



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HL 4QJK L



L HS



HARVARD LAW LIBRARY

GIFT OF

J. M. B. Churchill

Received

NOV 29 1933

L

Manner of citing the American and English Encyclopædia of Law, Second Edition :

A. & E. Encycl. of L., 2d Edition.

THE ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE,

Under the Codes and Practice Acts,
at Common Law, in Equity and in
Criminal Cases.

Compiled under the Editorial Supervision of

WILLIAM M. MCKINNEY.

A Companion Work of the
AMERICAN AND ENGLISH
ENCYCLOPÆDIA OF LAW.

IT covers the entire field of Pleading and
Practice, and is applicable to all the
States.

EDWARD THOMPSON CO., Publishers,
Northport, Long Island. N. Y.

THE
AMERICAN AND ENGLISH
ENCYCLOPÆDIA
OF
CHURCHILL & CHURCHILL,
412 Sears Building,
BOSTON,
LAW

EDITED BY
DAVID S. GARLAND AND LUCIUS P. McGEHEE
UNDER THE SUPERVISION OF
JAMES COCKCROFT

SECOND EDITION

VOLUME I

NORTHPORT, LONG ISLAND, N. Y.
EDWARD THOMPSON COMPANY
LONDON: C. D. CAZENOVE, 26 HENRIETTA STREET
1896

7
1236
21 Ed.

Copyright, 1896,
BY
EDWARD THOMPSON COMPANY.
All rights reserved.

NOV 23 1933

MADE AT NORTHPORT. L. I., N. Y.
ROBERT DRUMMOND,
Printer.

J. M. DUNN,
Binder.

PREFACE TO THE SECOND EDITION.

VOLUME 29 recently issued, and the Index-Digest to follow shortly, conclude the First Edition of the AMERICAN AND ENGLISH ENCYCLOPÆIA OF LAW. It is now ten years since the articles contained in Volume 1 were prepared. As the series was nearing completion it became a question as to how the work could best be kept abreast of the courts, and its value and usefulness preserved and, if possible, enhanced. There were but two methods worthy of consideration in which, by any possibility, this end could be attained: the first, by supplemental volumes, the ordinary but cumbrous and altogether unsatisfactory plan employed in continuing digests; the second, by a complete revision, issuing about three volumes annually. After mature deliberation, the latter method was resolved upon as being the more consistent with economy and convenience to the profession, and thoroughness and accuracy in the presentation of the law. It is a source of gratification to know that this course has the unqualified approval of eminent members of the bench and bar throughout the country.

In the work of revision, the plan of the original will be pursued. Each treatise will be accompanied by a logical and orderly synopsis, which will subserve the twofold purpose of indicating the scope of the title and facilitating the examination of any particular branch of the subject treated.

In connection with each treatise there will also be found a carefully prepared table of cross-references. The value and importance of this feature cannot be too highly estimated. By this means the reader is enabled to trace those parts of large and fruitful topics which, being worthy and susceptible of separate discussion, constitute independent titles; also to find other subjects more or less intimately related. It possesses the additional merit of lessening the likelihood of duplication of treatment.

The text will contain in clear and accurate form the principles of law involved, which, in the notes, will be supported by an exhaustive citation of authorities, and exemplified and fortified by concrete instances and apt quotations drawn from the cases. At the same time, theories and lengthy discussions will be studiously avoided.

In both text and notes black-letter headlines will be liberally used. The practical utility of this feature as a means of facilitating reference is patent.

The citations will be grouped by states in their alphabetical order, each list being preceded by the name of the state. This will be of great assistance

PREFACE TO THE SECOND EDITION.

to the lawyer in his search for the decisions of his own courts in the preparation of briefs. Not only are the cases of this country, both state and Federal, and of England, exhaustively collected and thus arranged, but also the adjudications of the Canadian and other Provincial courts.

It is believed that the scheme of verification in operation is the best yet devised. Every citation is copied on a card and twice compared with the original report by different corps of trained verifiers. This is a tedious and expensive process, but it is one which insures well-nigh absolute accuracy in the references.

The thoroughness which characterizes the revision in the matter of citations may best be shown by a comparison of the treatises of the new edition with the corresponding ones in the old. Thus, the article *ABSTRACT OF TITLE* in the new contains 269 citations as against 38 in the old; *ABDUCTION*, 609 as against 87; *ACCOUNTS*, 1244 as against 591; *ACKNOWLEDGMENTS*, 4070 as against 1425; *ADMISSIONS*, 3854 as against 1115. The comparison might be pursued still further with similar results. This is no reflection upon the first series, as every article therein far exceeded in citations any other treatise on the same subject. It shows, rather, that with ten years of experience new and improved methods of discovering authorities have been developed, and, also, that within that period a great body of case law has arisen.

Particular attention is invited to the exhaustive collection of words and phrases. This matter has never received treatment, at the hands of legal writers, commensurate with its importance. Until quite recently, no attempt had been made to index the definitions in the reports or gather them in the digests. The publishers have engaged a large force to search the reports of this country, England, and Canada, page by page, for every word and phrase that has been judicially defined. This search has been conducted under the supervision of Mr. Thomas Johnson Michie, of the Baltimore Bar, compiler of the *Index-Digest*, and formerly associate editor of the *Encyclopædia*, who for a number of years has devoted his attention to this branch of legal literature. With this wealth of material at command, it is confidently believed that he will present the most exhaustive collection of judicial definitions extant.

Since a complete revision of the work was determined upon, the whole range of the law has been examined with a view to a more scientific arrangement of the subjects, as well as the subdivision of others for the sake of a more comprehensive and clear presentation. Among the more prominent new titles that will appear in this volume may be mentioned the following: *ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE)*; *ABATEMENT OF LEGACIES*; *ABATEMENT OF NUISANCES*; *ACCOMMODATION PAPER*; *ADEPTION OF LEGACIES*; and *ADVICE OF COUNSEL*. Others of equal importance will appear in succeeding volumes.

Under the title *ABBREVIATIONS* will be found a complete list of the abbreviations commonly used to designate the American, British, and

PREFACE TO THE SECOND EDITION.

Canadian reports, together with those of the classic text-books. It is believed that this will be useful to all, and appreciated, especially, by those who have not reference manuals at hand.

The page of the new edition is much more spacious than that of the original, containing about forty per cent more matter. By this means it is practicable to present a fuller and more complete abstract of the law without increasing the number of volumes.

In a word, no effort has been or will be spared to present in convenient and accessible form a complete text-book on each topic, and, at the same time, a digest of all the law.

Mr. James Cockcroft, the founder of the *Encyclopædia*, and the presiding genius of its evolution and development, will continue his active supervision of the work.

Mr. Lucius P. McGehee, the author of a number of articles of exceptional merit, will occupy the position of associate editor. In this capacity his efforts will unquestionably be appreciated by the profession.

The reception of the original by the profession generally, and the frequent and favorable citation of the same by the courts of this and other countries, are the most flattering testimonial possible to its true worth. Now, as the result of an experience of ten years on the part of the publishers, and of the efforts of a thoroughly trained and equipped staff of writers, this volume is submitted to the profession, the first of the new edition, which, it is confidently believed, will be at once more useful in assisting them in their labors and more worthy of their commendation than its predecessor.

DAVID S. GARLAND.

▼

TABLES OF TITLES AND WORDS AND PHRASES.

I. TITLES.

Italics indicate cross-references.

- ABANDONMENT AND TOTAL LOSS (IN *Admeasurements of Dower*, 642.
MARINE INSURANCE), 4.
ABATEMENT OF LEGACIES, 42.
ABATEMENT OF NUISANCES, 63.
ABBREVIATIONS, 97.
ABDUCTION, 162.
Abode, 185.
ABORTION, 186.
ABSTRACT OF TITLE, 210.
ABUTTING OWNERS, 224.
ACCESSION, 247.
ACCESSORY, 257.
ACCIDENT (IN EQUITY), 277.
ACCIDENT INSURANCE, 284.
ACCOMMODATION PAPER, 334.
ACCOMPLICES, 389.
ACCORD AND SATISFACTION, 408.
Account Books, 432.
ACCOUNTS, 433.
ACCRETION, 467.
Accumulations, 481.
ACKNOWLEDGMENTS, 483.
Action on the Case, 583.
ACT OF GOD, 584.
Actus Dei, 608.
ADEMPTION OF LEGACIES, 610.
Adjacent Support, 634.
Adjudicata, 641.
ADMEASUREMENTS OF DOWER, 642.
ADMIRALTY JURISDICTION, 645.
ADMISSIONS, 670.
Admixture, 724.
ADOPTION OF CHILDREN, 726.
ADULTERATION, 738.
ADULTERY (AS A CRIME), 746.
ADVANCEMENTS, 760.
Adverse Claim, 786.
Adverse Enjoyment, 786.
Adverse Interest, 786.
Adverse Parties, 786.
ADVERSE POSSESSION, 787.
Adverse User, 892.
Adversus, 892.
ADVICE OF COUNSEL, 894.
Advocate, 908.
Affiliation, 911.
Affirmation, 914.
Affix, 914.
AFFRAY, 915.
Affreightment, 918.
African, 921.
After-acquired Property, 924.
After-acquired Title, 924.
After-born Children, 924.
AGE, 927.
AGENCY, 930.

II. WORDS AND PHRASES.

By THOMAS JOHNSON MICHIE.

- A, 1.
ABANDON, 1.
ABATEMENT, 41.
ABDICATE, 161.
ABET, 182.
ABEYANCE, 182.
ABIDE, 183.
ABIDING CONVICTION, 184.
ABILITY, 185.
ABJURE, 185.
ABLE, 185.
ABLE-BODIED, 185.
ABOUT, 196.
ABOVE, 200.
ABRIDGE, 201.
ABROAD, 201.
ABSCOND—ABSCONDING DEBTOR, 201.
ABSENT—ABSENCE, etc., 203.
ABSENTEE, 205.
ABSOLUTE, 205.
ABSOLUTELY, 208.
ABSORPTIVE SUBSTANCE, 209.
ABSTRACT, 209.
ABSURDITY, 221.
ABUSE AND MISUSE, 221.
ABUT—ABUTTER, 222.
ABUTMENT, 223.
ACADEMY, 244.
ACCEPT, 245.
ACCEPTANCE, 246.
ACCESS, 246.
ACCIDENT, 272.
ACCOMMODATING, 333.
ACCOMPANY, 388.
ACCORDING, 430.
ACCORDINGLY, 430.
ACCORDING TO LAW, 430.
ACCOUNT, 431.
ACCOUNTABLE, 431.
ACCOUNTABLE RECEIPT, 432.
ACCOUNTANT, 432.
ACCOUNTING OFFICER, 432.
ACCUE—ACCRUED—ACCRUING, 479.
ACCRUER, CLAUSE OF, 480.
ACCUMULATED SURPLUS (OF A CORPORATION), 481.
ACCUSED, 481.
ACCUSTOMED, 482.
ACID PHOSPHATE, 482.
ACKNOWLEDGE, 482.
ACQUAINTANCE—ACQUAINTED, 569.
ACQUETS AND CONQUETS, 570.
ACQUIESCENCE, 570.
ACQUIRED, 571.
ACQUITTAL, 572.
ACQUITTANCE, 572.
ACQUITTED, 573.
ACRE, 574.
ACROSS, 574.
ACT, 575.
ACTING, 577.
ACTION, 577.
ACTIO PERSONALIS MORITUR CUM PERSONA, 583.
ACTIVE TRUST, 583.
ACT OF INSOLVENCY, 600.
ACTUAL—ACTUALLY, 601.
ADD, 608.
ADDITION—ADDITIONAL, 608.
ADDRESS OF LETTERS, 609.
ADEQUACY, 632.
ADEQUATE, 632.
AD FILUM AQUÆ, 633.
ADHERING, 633.
ADIT, 633.
ADJACENT, 633.
ADJOINING, 635.
ADJOURN—ADJOURNMENT, 636.
ADJUDGED, 640.
ADJUDICATE—ADJUDICATION, 641.

TABLE OF WORDS AND PHRASES.

ADJUNCTS, 641.
ADJUST—ADJUSTMENT, 641.
ADMEASUREMENTS, 642.
ADMINISTER, 642.
ADMINISTRATION, 643.
ADMINISTRATIVE, 644.
ADMISSION, 669.
ADMIT, 724.
ADMONISH, 724.
ADMN., 724.
ADOPT, 724.
ADRIFT, 737.
ADS., 737.
ADULT, 737.
AD VALOREM, 757.
ADVANCE—ADVANCES, 757.
ADVANTAGE, 786.
ADVANTAGEOUSLY, 786.
ADVENTURE, 786.
ADVERTISE, 892.

ADVERTISEMENTS, 893.
ADVICE, 893.
ADVISE, 907.
ADVOWSON, 908.
AEROLITE, 908.
AFFAIRS, 908.
AFFECT—AFFECTING, 909.
AFFIDAVIT, 909.
AFFINITY, 911.
AFFIRM—AFFIRMATIVE, 913.
AFFIRMANCE, 913.
AFFIRMATIVE PREGNANT, 914.
AFORE, 918.
AFORESAID, 918.
AFORETHOUGHT, 920.
AFOUL, 920.
AFTER, 921.
AFTERNOON, 924.
AFTERWARD—AFTERWARDS, 924.
AGAINST, 925.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

A.—The article "A" is not necessarily a singular term; it is often used in the sense of "any," and is then applied to more than one individual object.¹

ABANDON. (See also the title ADVERSE POSSESSION.)—To desert, to forsake. Abandonment is the relinquishment or surrender of rights or property by one person to another;² it includes both the intention to abandon and the

1. *National Union Bank v. Copeland*, 141 Mass. 257. In this case, where a debtor executed an assignment for the benefit of such creditors as should execute the assignment within a given time from the date, or within such further time as the trustees should allow "in and by a writing" indorsed on the instrument, it was held that the term *a writing* did not limit the trustees to the allowance of only one extension of time.

Frequently *a* is the equivalent of *any*; and therefore, where by section 52, English Agricultural Holdings Act 1883 (46 & 47 Vict., c. 61), bailiffs for levying a distress on an agricultural holding are to be appointed in writing "by the judge of *a* county court," that does not mean "of *the* county court in the district of which the holding is," but means "of *any* county court;" so that a bailiff appointed by any county court judge may levy an agricultural distress anywhere. *In re Sanders*, 54 L. J. Q. B. 331.

Authority to issue *a bill* of exchange has been construed to authorize the issuance of several bills, the total amount not exceeding the sum specified. *Thompson v. Wesleyan Newspaper Assoc.*, 8 C. B. 849, 65 E. C. L. 849.

A statute abolishing entail provided that "estates shall not be entailed, and when a person dies intestate his or her estate shall be divided equally," etc. It was held that *a person* was a general term, equivalent to "any person," and therefore included equally persons who were sole tenants and persons who were cotenants. *Lowe v. Brooks*, 23 Ga. 327.

"**A** *Sea*."—After the sailing of a vessel, an agent for insurers inserted in the "live-cattle clause" of a policy issued to cover such vessel, among the dangers insured against, "any loss occasioned by *a sea*." It was held that this did not limit the insured to a loss occasioned by the force of a single wave, and that where cattle were carried between decks, and were injured by the tossing of the ship by heavy waves, it would render the insurers liable. *Snowden v. Guion*, 101 N. Y. 458.

"**A** *Distinguished from 'The'*—the *Definite and the Indefinite Article*.—In *Sharff v. Com.*, 2 Binn. (Pa.) 514, upon an indictment for libel, the jury's verdict was: "Guilty of writing and publishing *a bill* of scandal," etc. The judgment on the verdict was reversed, because the defendant was not found guilty of the offense charged in the indictment. Tilghman, C.J., in his opinion said: "If it had said, guilty of *the bill* of scandal with

which the defendant stands charged, or even guilty of *the bill* of scandal, without more, we should have been certain that the jury referred to the indictment; and then perhaps it might have been fairly construed 'guilty of the offense charged in the indictment.' But the words are 'guilty of *a bill* of scandal.' *A bill* is very different from *the bill*."

In *Graham v. Ewart*, 25 L. J. Exch. 47, a grant of *a right* of sporting on land was held to give only a concurrent right, while a grant of *the* right was held to give an exclusive right.

Whether Parol Evidence is Admissible to Show that "A" was Used in a Definite Sense.—A written contract to furnish "*a room* that is improved and suitable" for a certain purpose is fulfilled by furnishing such a room; and parol testimony is not admissible to show that some particular room was intended by the contracting parties. *Thompson v. Stewart*, 60 Iowa 223.

Used as an Equivalent of "The."—*A* is sometimes read as *the*; e.g., an act done "with *a view*" of giving a creditor a fraudulent preference (*English Bankruptcy Act* 1869, § 92; and now *Bankruptcy Act* 1883, 46 & 47 Vict., c. 52, § 48) means with the view—the real, effectual, substantial, dominant view of giving a preference. *Ex p. Bird*, 23 Ch. Div. 695; *Ex p. Taylor*, 18 Q. B. Div. 295. *Compare In re Mills*, 58 L. T. 871, 4 Times Rep. 284.

"**A**—**Abbreviation Equivalent to "At."**—A promissory note was worded, "value received, int. *a*. 6% p. a." It was held that the letter *a*, when thus used in a note, is known and recognized among commercial and business men as standing for the word *at*. *Atkinson v. Barber*, 145 Ill. 418.

"**A** *Year's Rent*.—See *Wades v. Figgatt*, 75 Va. 575.

"**A** *Railroad Leading to M.*—See *State v. Hastings*, 24 Minn. 78; *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291.

2. *Hickman v. Link*, 116 Mo. 123, *quoting with approval* 1 AM. AND ENG. ENCYC. LAW (1st ed.) 1; *Dodge v. Marden*, 7 Oregon 460; *State v. Seneca County Bank*, 5 Ohio St. 177.

"**Abandonment** is a word that has acquired a technical meaning. It is defined to be the relinquishment of a right—the giving up of something to which we are entitled." *Mallett v. Uncle Sam Gold Min. Co.*, 1 Nev. 204.

Property is said to be *abandoned* when it is thrown away, or its possession is voluntarily forsaken by the owner. *Eads v. Brazelton*, 22 Ark. 509.

external act by which the intention is carried into effect.¹

1. *Hickman v. Link*, 116 Mo. 123, *quoting with approval* 1 AM. AND ENG. ENCYC. LAW (1st ed.) 1; *Dodge v. Marden*, 78 Oregon 460; *Livermore v. White*, 74 Me. 452; *Clark v. Hammerle*, 36 Mo. 620; *Moon v. Rollins*, 36 Cal. 333; *Keane v. Connovan*, 21 Cal. 293; *Wilson v. Daniels*, 79 Iowa 132; *Duffey v. Willis*, 99 Mo. 132; *Rowe v. Minneapolis*, 49 Minn. 148; *Kuschke v. St. Paul*, 45 Minn. 225. See also ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE), Vol. I., p. 32; HOME-STEAD: LOST PROPERTY.

As where an article is thrown away. *M'Goon v. Ankeny*, 11 Ill. 558. It may be inferred from mere lapse of time. *Brentlinger v. Hutchinson*, 1 Watts (Pa.) 46. See *Smoot v. Wathen*, 8 Mo. 522.

Where the owner of a tannery sold it, but forgot to remove some hides which had been placed in the vats for tanning, and some years afterwards they were found, it was held that they were not *abandoned*. *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600.

To constitute an *abandonment* there must be the concurrence of the intention to abandon and the actual relinquishment of the property so that it may be appropriated by the next comer. *Judson v. Malloy*, 40 Cal. 299.

"To constitute an *abandonment* of a right secured, there must be a clear, unequivocal, and decisive act of the party—an act done which shows a determination in the individual not to have a benefit which is designed for him." *Breedlove v. Stump*, 3 Verg. (Tenn.) 257, *quoted with approval* in *Dawson v. Daniel*, 2 Flipp. (U. S.) 309.

Trademark. (See also the title TRADEMARKS.)—To constitute *abandonment* of a trademark, an intention to abandon must be shown; mere evidence of nonuser is insufficient. *Monson v. Boehm*, 26 Ch. Div. 398.

Intent—Questions of Law and Fact.—As intent is the essence of *abandonment*, the facts of each particular case are for the jury. 2 Washb. Real Prop. (4th ed.) 370, 40 Am. Dec. 464, note; *Dyer v. Sanford*, 9 Met. (Mass.) 395; *Clemmins v. Gottshall*, 4 Yeates (Pa.) 330; *Miller v. Cresson*, 5 W. & S. (Pa.) 284; *Heath v. Biddle*, 9 Pa. St. 273; *Wiggins v. McCleary*, 49 N. Y. 346; *Bell v. Smith*, 2 Johns. (N. Y.) 98; *Wilson v. Pearson*, 20 Ill. 81; *M'Goon v. Ankeny*, 11 Ill. 558; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Taylor v. Hampton*, 4 McCord (S. Car.) 96; *Parkins v. Dunham*, 3 Strobb. (S. Car.) 224; *Banks v. Banks*, 77 N. Car. 186; *Weill v. Lucerne Min. Co.*, 11 Nev. 200; *Myers v. Spooner*, 55 Cal. 257; *Marquart v. Bradford*, 43 Cal. 526; *Smith v. Cushing*, 41 Cal. 97; *Bell v. Bed Rock Tunnel, etc., Co.*, 36 Cal. 214; *Moon v. Rollins*, 36 Cal. 333; *Davis v. Perley*, 30 Cal. 630; *Roberts v. Unger*, 30 Cal. 676; *Masson v. Anderson*, 3 Baxt. (Tenn.) 290; *Landes v. Perkins*, 12 Mo. 238. See also *Sample v. Robb*, 16 Pa. St. 305; *Atchison v. McCulloch*, 5 Watts (Pa.) 13. See also QUESTIONS OF LAW AND FACT.

Abandonment Distinguished from Gift, or Barter, or Surrender.—In *Stephens v. Mansfield*, 11 Cal. 363, it was held that there could be no such thing as an *abandonment* of land in favor of a particular individual and for a consideration. The court said: "There can

be no such thing as *abandonment* in favor of a particular individual, or for a consideration. Such act would be a gift or sale. An *abandonment* is 'the relinquishment of a right, the giving up of something to which we are entitled' (Bouv.). '*Abandonment* must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing; and further, it must be made without any desire that any other person shall acquire the same; for if it were made for a consideration it would be a sale or *barter*, and if without consideration, but with an intention that some other person should become the possessor, it would be a *gift*.'" And see, to the same effect, *Richardson v. McNulty*, 24 Cal. 344.

In *Hagan v. Gaskill*, 42 N. J. Eq. 215, a lease provided that an *abandonment* of the property should annul the lease. It was held that a surrender to the lessor was not such an *abandonment* as would defeat the rights of creditors. The court said: "I think there is a great difference between *abandon* and *surrender*."

Abandonment of Children. (See also PARENT AND CHILD.)—*Abandon*, as used in the *Michigan* statute against the abandonment of children, is used in its ordinary sense; i. e., "to forsake, to leave without the intention to return to; to renounce all care or protection of." *Shannon v. People*, 5 Mich. 89.

To abandon or expose a child under two years of age, as used in 24 & 25 Vict., c. 100, § 27, "includes a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection." *Steph. Cr.* 196, *citing Reg. v. White*, L. R. 1 C. C. R. 311; *Reg. v. Falkingham*, L. R. 1 C. C. R. 222.

In *State v. Davis*, 70 Mo. 468, the court said: "The *abandonment* of a child is a statutory offense, and the language of the statute is sufficient, in an indictment, to charge the crime. *Abandonment* does not mean a mere temporary absence from home, or temporary neglect of parental duty. Bouvier defines *abandonment* thus: 'The act of a husband, or wife, who leaves his or her consort, wilfully and with an intention of causing perpetual separation.' Webster defines it as 'a total desertion; a state of being forsaken.' Additional words in the indictment would have been but definitions of the term *abandonment* in words which perhaps would equally require definitions."

Abandonment in the Sense of Desertion. (See also the title DIVORCE.)—"Abandonment may be defined to be the act of wilfully leaving the wife, with the intention of causing a palpable separation between the parties, and implies an actual desertion of the wife by the husband." *Stanbrough v. Stanbrough*, 60 Ind. 279.

Has abandoned means that the husband has voluntarily left the wife, with an intention to forsake her entirely and never to return to her, and never to resume his marital duties towards her, or to claim his marital rights. *Moore v. Stevenson*, 27 Conn. 25.

A wife alleged, in an action against her

ABANDON.

husband for support, that he had *abandoned* her. The statute under which the action was brought used the word *desertion*. The complaint was held sufficient, the court saying: "The word *deserted*, as used in the statute, and the word *abandoned*, as used in the pleading, convey the same idea; that is, the act of wilfully leaving the wife with the intention of causing a palpable separation—a cessation from cohabitation." *Carr v. Carr*, 6 Ind. App. 377.

In *Levering v. Levering*, 16 Md. 218, it is said that failure to support the wife, accompanied by intemperate habits and violence justifying her in leaving her husband, would amount to an *abandonment* by him.

Personal Property—Sunken Vessels. (See also LOST PROPERTY.)—Property sunk in a steamboat and unclaimed for twenty years was held to be *abandoned*. *Creedy v. Breedlove*, 12 La. Ann. 745. See *Eads v. Brazelton*, 22 Ark. 499; *Wyman v. Hurlburt*, 12 Ohio 82, 40 Am. Dec. 461.

Abandonment of property divests the owner of his title therein, and the finder who reduces the same to possession after such *abandonment* is not guilty of conversion. *Wyman v. Hurlburt*, 12 Ohio 81, 40 Am. Dec. 461.

Manure.—*Haslem v. Lockwood*, 37 Conn. 503, 9 Am. Rep. 350.

Abandonment of Invention. (See also the title INVENTIONS.)—"Abandonment is a dedication to the public—that is to say, the party has withdrawn himself from the claim of monopoly and exclusive use which he might have had for his invention, and notwithstanding whatever it may be worth, it thenceforth belongs to the public—it is *abandoned* to the public." *U. S. v. Hall*, 7 Mackey (D. C.) 19.

Abandon in the Sense of Leave.—In a bill of exceptions the term *abandon* was held by the court to have been used in the sense of *remove*. The court said: "What is meant by the expression in the bill of exceptions, that he *abandoned* his possession to it? The counsel for the plaintiff in error contends that it means that he gave up or yielded the title to all the lots. In our opinion, its fair interpretation is merely that he left it, as we find in the next sentence that the term *removed* is used as equivalent to the term *abandoned*, previously employed. The lots were separate and distinct from each other, and so considered by the grantor, as he refers to the plan of the city of Mobile for their boundaries. We cannot, therefore, understand the expression in the bill of exceptions 'that he *abandoned* it' (the house he had built and occupied) to mean that he relinquished or yielded up his right and title to all the lots." *O'Brien v. Doe*, 6 Ala. 792.

Abandonment of Land. (See also the titles ADVERSE POSSESSION; OCCUPANCY; REAL PROPERTY; PUBLIC LANDS.)—In *Dikes v. Miller*, 24 Tex. 424, it was held that land might be abandoned. The court said: "*Abandonment* is the relinquishment of a right; the giving up of something to which one is entitled. If the owner sees proper to abandon his property, and evidences his intention by an act legally sufficient to vest or divest the ownership,

why may he not do so in the case of land as well as of a chattel? It might go to the government, instead of the first occupant, upon the principle upon which land escheated, or become derelict, belongs to the state. But I do not perceive that that would affect the question of power in the owner to abandon the property." *Approved* in *Tiebout v. Millikan*, 61 Tex. 517.

To constitute *abandonment* there must be a concurrence of the act of leaving the premises vacant so that they may be appropriated by the next comer, and the intention of not returning. *Judson v. Malloy*, 40 Cal. 309.

An *abandonment* of realty will be presumed where the party leaves no property or improvement to indicate his intention to return and resume the occupancy of the land. *Burke v. Hammond*, 76 Pa. St. 172.

The payment of taxes by the grantee in a tax deed upon the property for a portion of the time he is in possession, claiming title under the deed, is not by itself, disconnected from other circumstances, evidence that the owner has *abandoned* the property. *Keane v. Cannovan*, 21 Cal. 291. See also *Davis v. Perley*, 30 Cal. 630; *Philadelphia v. Riddle*, 25 Pa. St. 259.

Abandonment of a Lease.—A provision in a lease provided that the failure to make payment within a certain time after such payment was due should be considered "an *abandonment* of this lease." The court, in construing the lease, said: "It seems to me that the words 'shall be considered an *abandonment*,' etc., as employed in the lease, must be considered, in a legal aspect, when applied to this lease, as amounting to no more than, and in fact as being equivalent to, the words 'shall be considered *forfeited*.'" *Bowyer v. Seymour*, 13 W. Va. 20.

Abandonment for Torts is the transfer of an animal or slave which has injured a person, in discharge of the owner's liability. *Brown Law Dict.*; *Bouvier Law Dict.*; *Hynson v. Meuillon*, 2 La. Ann. 798; *Arnoult v. Deschappelles*, 4 La. Ann. 41.

Abandonment of Canals. See CANALS.

Abandonment of Condemnation Proceedings. See EMINENT DOMAIN.

Abandonment of a Contract. See CONTRACTS.

Abandonment of a Fixture. See FIXTURES.

Abandonment of a Highway. See HIGHWAYS.

Abandonment of a Homestead. See HOMESTEAD.

Abandonment—Marine Insurance. See ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE).

Abandonment of a Mill. See MILLS.

Abandonment of a Mine. See MINES AND MINING CLAIMS.

Abandonment of an Office. See PUBLIC OFFICERS.

Abandonment of Personality. See LOST PROPERTY.

Abandonment of Right of Way. See RAILROADS.

Abandonment of Stations. See STATIONS.

Abandonment of Streets. See STREETS.

Abandonment—Animals. See ANIMALS.

Abandonment—Wife. See HUSBAND AND WIFE.

ABANDONMENT AND TOTAL LOSS.

(IN MARINE INSURANCE.)

By L. P. McGEHEE.

I. DEFINITION, 5.

II. REASON OF THE DOCTRINE, 5.

III. TOTAL LOSS, 6.

1. *Divisions of the Subject*, 6.
2. *Actual Total Loss*, 6.
 - a. *Definition*, 6.
 - b. *Destruction of Object Insured*, 6.
 - (1) *General Principles*, 6.
 - (2) *Vessel Missing*, 7.
 - c. *Total Loss to Insured*, 7.
 - (1) *General Principles*, 7.
 - (2) *Sale by Necessity*, 8.
 - (3) *Cost of Repairs Exceeding Value*, 8.
 - (4) *Particular Cases*, 9.
 - (a) *Memorandum Articles*, 9.
 - (b) *Perishable Articles*, 11.
 - (c) *Freight*, 11.
 - (d) *Total Loss Only*, 12.
 - d. *Total Loss with Benefit of Salvage*, 12.
3. *Constructive Total Loss*, 13.
 - a. *Definition*, 13.
 - b. *Criteria*, 13.
 - (1) *In General*, 13.
 - (2) *Quantum of Damage*, 13.
 - (a) *English Rule*, 13.
 - (b) *American Rule*, 13.
 - (3) *Imminence of Peril*, 14.
 - (4) *Loss of Adventure—Inability to Repair*, 16.
 - c. *Computation*, 16.
 - (1) *Value of Vessel*, 16.
 - (2) *Expense of Repairs and Transshipment*, 17.
 - (3) *One Third New for Old*, 17.
 - (4) *Salvage, General Average, and Jettison*, 18.
 - (5) *Under Valued Policies*, 18.

IV. RIGHT OF ABANDONMENT, 19.

1. *Election to Abandon*, 19.
2. *Limitations of the Right*, 19.
 - a. *Duty of Insured to Repair or Transship*, 19.
 - b. *Peril within Policy*, 20.
 - c. *Depends on State of Facts*, 21.
 - d. *Right of Insurer to Repair*, 21.
 - e. *Abandonment must be Entire*, 22.
3. *When Abandonment is Justified*, 22.
 - a. *General Principles*, 22.
 - b. *Particular Cases*, 23.
 - (1) *Capture, Embargo, and Blockade*, 23.
 - (a) *In General*, 23.
 - (b) *Apprehension of Loss*, 24.
 - (2) *Loss and Retardation of Voyage*, 25.

Definition.**ABANDONMENT AND TOTAL LOSS. Reason of the Doctrine.**

- (3) *Stranding and Submersion*, 26.
- (4) *Sale by Necessity*, 27.
- (5) *Freight*, 27.
- (6) *Profits*, 28.
- (7) *Outfits*, 29.
- (8) *Total Loss of Part of Cargo*
- 4. *Notice of Abandonment*, 30.
 - a. *Who may Give Notice*, 30.
 - b. *To Whom Given*, 30.
 - c. *Form and Sufficiency*, 31.
 - d. *Time of Notice*, 32.
 - e. *Waiver and Revocation*, 33.
- 5. *Acceptance*, 34.
 - a. *Effect*, 34.
 - b. *What Amounts to Acceptance*, 35.
 - c. *Who may Accept*, 36.
 - d. *Time of Taking Effect*, 36.
- 6. *Effect of Abandonment*, 36.
 - a. *General Principles*, 36.
 - b. *Apportionment of Freight*, 40.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *INSURANCE*, *ENCYCLOPEDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *ADMIRALTY*; *AVERAGE*; *BLOCKADE*; *EMBARGO*; *JETTISON*; *MARINE INSURANCE*; *MARITIME LIENS*; *MASTERS OF VESSELS*; *SALVAGE*; *SHIPS AND SHIPPING*; *SUBROGATION*; *USAGES AND CUSTOMS*.

I. DEFINITION.—Abandonment, in the law of marine insurance, is the act of cession, by which, in cases where the loss or destruction of the property, though not absolute, is highly imminent, or its recovery is too expensive to be worth the attempt, the assured, on condition of receiving at once the whole amount of insurance, relinquishes to the underwriters all his property and interest in the thing insured, as far as it is covered by the policy, with all the claims that may ensue from its ownership, and all profits that may arise from its recovery.¹ More briefly, it is the cession by the insured of all his interest in the subject insured to the insurer, in cases of constructive total loss, in order to recover the whole amount of the insurance.²

Applies in Insurance Only.—The doctrine of abandonment is confined to cases of insurance.³

II. REASON OF THE DOCTRINE.—The object of allowing the insured to abandon is to enable him to be promptly reinstated in his capital, and be thereby enabled to engage in some new mercantile adventure.⁴ But as the contract of marine insurance is a contract of indemnity, the insured must not retain any part of the subject-matter insured if he calls on the underwriter to settle with him for a total loss.⁵

1. 2 Arnould on Marine Insurance (6th ed.) 953.

2. 3 Kent Comm. (13th ed.) 318. See also *Merchants', etc., Ins. Co. v. Duffield*, 2 Handy (Ohio) 122; *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200, 67 Am. Dec. 339.

3. Where the steamer *F.* sunk the sloop *S.* by collision, and the owners of the *F.* raised and repaired the *S.* and tendered her to her owners, who refused to receive her, and insisted upon abandoning her to the steamer as a total loss, it was held that the doctrine of

abandonment did not apply and would carry no title; that the only claim was for actual damages. *Clarke v. Steamer Fashion*, 2 Wall. Jr. (C. C.) 339.

Bottomry Bonds.—The doctrine does not apply to bottomry bonds. *Broomfield v. Southern Ins. Co.*, L. R. 5 Exch. 192.

4. 3 Kent Comm. (13th ed.) 318.

5. *Smith Mercantile Law*, § 461 (Pomeroy's ed.).

See remarks of Lord Blackburn in *Rankin v. Potter*, L. R. 6 H. L. 118, and remarks of

III. TOTAL LOSS—1. Divisions of the Subject.—Before considering the principles of abandonment it is necessary to examine the doctrine of total loss. A total loss is a loss on account of which the assured is entitled to recover from the underwriters the total amount of his subscription.¹ It is either actual or constructive. Actual total loss entitles the assured to recover the total amount of his subscription without abandonment; constructive total loss entitles him to recover such total amount only upon condition of making abandonment.²

2. Actual Total Loss—*a.* DEFINITION.—Actual total loss is when the subject insured is wholly destroyed, or when there is a privation of it and its recovery is hopeless.³

***b.* DESTRUCTION OF OBJECT INSURED—(1) General Principles.**—Absolute annihilation is not essential;⁴ it is enough that the form and species of the thing is destroyed, although the materials of which it consisted still exist.⁵ This applies equally to ship⁶ and cargo.⁷

Brett, L. J., in *Kaltenbach v. Mackenzie*, 3 C. P. D. 470. Both these learned judges distinguish between abandonment—fundamental in every contract of indemnity—and the technical notice of abandonment in marine insurance; and Lord Blackburn says that the use of the ambiguous word “abandonment” often leads to confusion.

1. 2 Arnould on Marine Insurance (6th ed.) 951.

2. 2 Arnould on Marine Insurance (6th ed.) 951; *Smith Mercantile Law*, § 461 (Pomeroy's ed.); 3 Kent Comm. (13th ed.) 318; *Kaltenbach v. Mackenzie*, 3 C. P. Div. 471.

3. 2 Arnould on Marine Insurance (6th ed.) 951; 2 Parsons Marine Insurance 68; *McArthur on Insurance* 138; *Murray v. Great Western Ins. Co.*, 72 Hun (N. Y.) 287.

An actual total loss is a destruction of the property insured so that nothing valuable would remain upon abandonment. *Walker v. Protection Ins. Co.*, 29 Me. 317.

4. **Absolute Destruction.**—But it is of course sufficient. Where there is an absolute destruction of the subject-matter insured, an abandonment is unnecessary to entitle the insured to recover for a total loss. *Gordon v. Bowne*, 2 Johns. (N. Y.) 150.

5. **When Subject-matter Loses its Form and Species.**—*Cambridge v. Anderton*, 2 B. & C. 691, 9 E. C. L. 224; *Cossmann v. West*, L. R. 13 App. Cas. 160; *Walker v. Protection Ins. Co.*, 29 Me. 317; *Murray v. Hatch*, 6 Mass. 475; *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.*, 51 N. Y. Super. Ct. 444; *Burt v. Brewers'*, etc., Ins. Co., 9 Hun (N. Y.) 383, 78 N. Y. 400.

There is an actual total loss “when the subject-matter insured has, by a peril of the sea, lost its form and species—where a ship, for example, has become a wreck or a mere congeries of planks, and has been *bona fide* sold in that state for a sum of money.” *Lord Abinger, C.B.*, in *Roux v. Salvador*, 3 Bing. N. Cas. 266, 7 L. J. Exch. 328.

Where by a peril insured against the owner is disabled from recovering *in specie* the thing insured at the termination of the risk, there is an absolute total loss. *Roux v. Salvador*, 3 Bing. N. Cas. 266.

When a vessel is so far destroyed that it ceases to be of any value as a vessel, though some planks and material may remain, the loss is a total one, and no abandonment is

necessary. *Sherlock v. Globe Ins. Co.*, 1 Cin. Super. Ct. (Ohio) 193. But compare *Sherlock v. Globe Ins. Co.*, 25 Ohio St. 50.

6. **Ship.**—In *Murray v. Hatch*, 6 Mass. 475, Sewall, J., said: “In the technical sense of the words ‘total loss,’ and for every beneficial purpose in which a contract of insurance can be employed, a ship foundered and burnt at sea, or wrecked and broken upon the land, so as to be past relief or repair, is specifically, and as a vessel, totally destroyed; and such an event is a total loss, * * * notwithstanding salvage, and a very considerable salvage, remaining.”

If, by reason of the violence of the winds and waves, a vessel upon the high seas has become a wreck, incapable of being brought into port, she is an actual total loss. *Walker v. Protection Ins. Co.*, 29 Me. 317.

There may be a total loss of a vessel even though after sinking she is raised again, if, after being raised, she is no longer a vessel *in specie*. *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.*, 51 N. Y. Super. Ct. 444.

In order to constitute “actual,” as distinguished from “constructive,” total loss, the ship must have become a total wreck; it must have perished and ceased to exist as a ship, although fragments of the wreck may remain and may reach the home port. *Burt v. Brewers'*, etc., Ins. Co., 9 Hun (N. Y.) 383. In this case Talcott, J., said: “When the ship, in the course of her voyage, and by the agency of the perils insured against, becomes an absolute wreck; when she has been broken in pieces and dismembered, so that her planks and apparel are scattered on the sea, this is a case of absolute total loss on ship, though the whole or greater part of the fragments may reach the shore as wreck. In such a case it is quite clear that the ship, as a ship, is totally destroyed; the ship has perished, only the wreck remains. 2 Arnould on Insurance 1013.” *Affirmed* in 78 N. Y. 400.

7. **Cargo.**—Where a cargo of fruit became damaged by sea water so that it became rotten, and the underwriters forbade its being landed, and it was thrown overboard, it was a total loss. *Dyson v. Rowcroft*, 3 B. & P. 474; 7 Rev. Rep. 809. And see *infra*, this title, *Memorandum Articles*. As to freight, see *infra*, this title, *Freight*.

(2) *Vessel Missing*.—Where a vessel has been missing for a sufficient time, she is presumed to have been destroyed.¹

c. TOTAL LOSS TO INSURED—(1) *General Principles*.—Total loss of value to the insured is equivalent to a total physical loss, and takes place whenever the thing insured is totally gone from the power of the insured,² or there is

1. *Missing Ship—Presumption of Loss*.—There is no fixed rule of law as to what period of time will justify this assumption; this depends upon the circumstances of the particular case. *Houstman v. Thornton*, Holt 242; *Marshall v. Parker*, 2 Camp. 70; *Green v. Brown*, 2 Str. 1199; *Huggeford v. Ford*, 11 Pick. (Mass.) 223; *Gordon v. Bowne*, 2 Johns. (N. Y.), 150. See also *Brown v. Neilson*, 1 Cai. (N. Y.) 525, and *Ruan v. Gardner*, 1 Wash. (U. S.) 145, where a vessel was taken by a privateer and never again heard from. In such case it must be proved that when the vessel left the port of outfit she was bound on the voyage insured. *Cohen v. Hinckley*, 2 Camp. 51; *Koster v. Innes*, R. & M. 333, 21 E. C. L. 450. See also, as to what evidence should be produced, *Koster v. Reed*, 6 B. & C. 19, 13 E. C. L. 97; *Twemlow v. Oswin*, 2 Camp. 85.

If such ship turns up after the underwriters have paid for her as lost, she is considered as abandoned, and belongs to the underwriters. *Houstman v. Thornton*, Holt 242. As to when interest begins to run in such a case, see *Hallet v. Phoenix Ins. Co.*, 2 Wash. (U. S.) 279.

A vessel insured on a time policy and never heard of after a certain date is presumed to have perished immediately after such date. *Reck v. Phoenix Ins. Co.*, 3 Civ. Pro. Rep. (N. Y. Supreme Ct.) 376.

2. *Illustrations—Wreck*.—Where a vessel was wrecked, and the cargo, which was insured, perished in part, but was in part gotten on shore and was afterwards plundered and destroyed, and never reached the owner, it was a total loss. *Bondrett v. Hentigg*, 1 Holt 149, 3 E. C. L. 66.

Loss of Cargo.—In an action on a marine policy on goods, to establish actual total loss, the insured must prove the physical extinction of the property insured or the extinction of its value arising from the perils insured against. Total loss of value to the insured is equivalent to total physical loss. *Young v. Pacific Mut. Ins. Co.*, 34 N. Y. Super. Ct. 321.

To constitute a total loss it is not necessary that there should be an absolute extinction or destruction of the thing insured, so that nothing of it can be delivered at the point of destination. Where machinery was insured, to wit, the parts of a sugar-packing machine, and no part of the same could be delivered in a condition capable of use, it was held that this was a total loss though more than half the pieces in number and value could be delivered and would have some value as old iron. *Great Western Ins. Co. v. Fogarty*, 19 Wall. (U. S.) 640. Compare *Robertson v. Atlantic Mut. Ins. Co.*, 37 N. Y. Super. Ct. 443.

Loss of Ship.—The mere fact that a vessel

remains *in specie* does not necessarily prevent the insured from claiming a total loss without abandonment. *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 506.

Where a ship is sunk beyond hope of recovery there is a total loss. *Crosby v. New York Mut. Ins. Co.*, 5 Bosw. (N. Y.) 369. See *infra*, this title, *Stranding and Submersion*.

Seizure.—Where goods were seized by the Swedish government, unladen by a military force, and never restored, there was held to be an absolute total loss. *Mellish v. Andrews*, 15 East 13.

Capture.—If the property insured passes into the possession of captors or salvors, and the owners are thus in fact dispossessed, the loss becomes total, provided the owners cannot in either case recover the possession except by disproportionate exertions, expense, or hazard. *Monroe v. British, etc., Marine Ins. Co.*, 52 Fed. Rep. 777, 3 C. C. A. 280, 5 U. S. App. 179.

Where a cargo of saltpetre was seized by a British ship, condemned, and sold by order of a court of admiralty, it was held an absolute total loss. *Mullet v. Shedden*, 13 East 304. In this case Lord Ellenborough said: "If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument, that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away."

Where the insured had no notice of a loss until by a subsequent capture, he has nothing to abandon, and may recover without abandonment. *Abel v. Potts*, 3 Esp. 242, 6 Rev. Rep. 826.

Freight.—If the owner or charterer is wholly prevented from earning the freight insured upon, by the ship being wrecked, or other perils insured against, it is an absolute total loss. 2 Phillips on Insurance 352; *Dunning v. Merchants' Mut., etc., Ins. Co.*, 57 Me. 108 (116). See *infra*, this title, *Freight*.

Spes Recuperandi.—Whenever there is a *spes recuperandi* the insured must abandon in order to recover for a total loss. *Barney v. Maryland Ins. Co.*, 5 Har. & J. (Md.) 139. But it seems that where the *spes recuperandi* is very vague it does not render abandonment necessary. *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237.

The *spes recuperandi* in case of a total loss by capture without abandonment may be considered and valued by the jury in adjusting

nothing which on abandonment could pass to be of value to the underwriter.¹

(2) *Sale by Necessity*.—A sale by the master by reason of necessity constitutes a total loss, since the property having passed to another, there is nothing to abandon.²

(3) *Cost of Repairs Exceeding Value*.—In estimating an absolute total loss, the test has been laid down that, where the cost of repairs of a vessel exceeds the value when repaired, or, in cargo, when the cost of repairing the damaged condition exceeds the value of the cargo as repaired, or when the cost of transshipping exceeds the worth of the goods shipped, the loss is absolutely total.³

the loss. *Watson v. North America Ins. Co.*, 1 Binn. (Pa.) 47. *Contra, Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237.

1. *Rankin v. Potter*, L. R. 6 H. L. 83; *Babbitt v. Sun Mut. Ins. Co.*, 23 La. Ann. 315; *Gordon v. Bowne*, 2 Johns. (N. Y.) 150; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 124; *Kaltenbach v. Mackenzie*, 3 C. P. Div. 474. See especially the opinions delivered before the House of Lords in *Rankin v. Potter*, L. R. 6 H. L. 83.

2. *England*.—*Cossman v. West*, L. R. 13 App. Cas. 160; *Stringer v. English*, etc., *Marine Ins. Co.*, L. R. 5 Q. B. 599; *Idle v. Royal Exch. Assur. Co.*, 8 Taunt. 755; *Robertson v. Clarke*, 1 Bing. 445; *Cambridge v. Anderton*, 2 B. & C. 691; *Robertson v. Caruthers*, 2 Stark. 571; *Roux v. Salvador*, 3 Bing. N. Cas. 266; *Doyle v. Dallas*, 1 M. & R. 48; *Gardner v. Salvador*, 1 M. & R. 116; *Dyson v. Rowcroft*, 3 B. & P. 474; *Fleming v. Smith*, 1 H. L. Cas. 513.

Canada.—*Anchor Marine Ins. Co. v. Keith*, 9 Can. Supreme Ct. Rep. 483.

United States Courts.—*Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 510; *Hall v. Ocean Ins. Co.*, 37 Fed. Rep. 371.

Maine.—*Prince v. Ocean Ins. Co.*, 40 Me. 481, 63 Am. Dec. 676; *Stephenson v. Piscataqua F., etc., Ins. Co.*, 54 Me. 55; *Dunning v. Merchants' Mut. Ins. Co.*, 57 Me. 108.

Maryland.—*Mutual Safety Ins. Co. v. Cohen*, 3 Gill (Md.) 459, 43 Am. Dec. 341.

Massachusetts.—*Gordon v. Massachusetts F., etc., Ins. Co.*, 2 Pick. (Mass.) 249.

New York.—*American Ins. Co. v. Center*, 4 Wend. (N. Y.) 53; *Avery v. New York Mut. Ins. Co.*, 58 N. Y. Super. Ct. 226; *Snowden v. Guion*, 101 N. Y. 458.

Ohio.—*Portsmouth Ins. Co. v. Brazee*, 16 Ohio 81; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

Justifiable Sale—Per se Total Loss.—If, after encountering a sea peril, a ship is for that reason justifiably sold by the master, the insured may claim a total loss; accounting to the insurer for the proceeds of the sale as salvage received for his benefit. The title is, by such a sale, irrevocably gone from the owner, and cannot be transferred to the insurer by abandonment. *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 515. See also *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 5, 10.

In *Cossman v. West*, L. R. 13 App. Cas. 160, the effect of a sale by the master was much discussed. Sir Barnes Peacock in delivering the opinion in this case said: "It was admitted that no formal notice of abandonment was given, and it is unnecessary, in the view which their lordships take, to

determine whether what took place between the owner and the underwriters substantially amounted to such a notice. Their lordships are of opinion that after the sale under the decree of the court of admiralty there was an actual total loss. By that sale, the property in the vessel and cargo was transferred to the purchaser, and the vessel and cargo ceased to be the property of and were wholly lost to the original owners thereof. To constitute a total loss, within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed. It may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser; or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction, in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated."

In *Howland v. India Ins. Co.*, 131 Mass., 253, Gray, C. J., said: "Notwithstanding the dicta in *Smith v. Manufacturers' Ins. Co.*, 7 Met. (Mass.) 448, and in *Graves v. Washington Marine Ins. Co.*, 12 Allen (Mass.) 391, it appears to be settled by authority, in accordance with the plainest principles of justice, that, when a vessel has been so injured by perils insured against as to become a constructive total loss, and has been lawfully sold by the master, so as to leave nothing in the assured to abandon, no abandonment is needful to perfect his right to recover a total loss from the underwriters. But the difficulty in this case is, that there was no sufficient proof of such necessity as would justify a sale by the master without notice to the underwriters. * * * An abandonment was therefore necessary to enable the plaintiff to recover for a constructive total loss."

If the sale by the master was necessary, and warranted by the rules of law, it would, even without an abandonment, constitute a technical total loss. *Fuller v. Kennebec Mut. Ins. Co.*, 31 Me. 325.

As to when a sale is justified, see the titles MARINE INSURANCE; MASTERS OF VESSELS; SHIPS AND SHIPPING. As to master's sale as constructive total loss, see *infra*, this title, *Sale by Necessity*.

3. This is the *English* test for constructive total loss. See *infra*, this title, *English Rule*. This rule is supported by some *American* cases: *Smith v. Manufacturers' Ins. Co.*, 7

(4) *Particular Cases*—(a) *Memorandum Articles*.—Only an actual total loss entitles the insured to recover for the loss of memorandum articles.¹ The

Met. (Mass.) 448; *Graves v. Washington Ins. Co.*, 12 Allen (Mass.) 391; *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148; *Great Western Ins. Co. v. Fogarty*, 19 Wall. (U. S.) 640; *Kinsman v. China Mut. Ins. Co.*, 49 Fed. Rep. 876. Compare *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

Stagg v. United Ins. Co., 3 Johns. Cas. (N. Y.) 34, was a case where damage to ship could only be repaired at an expense exceeding her worth when repaired, but there was an abandonment.

In *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, it is laid down broadly that there can be no case of actual total loss if the vessel remains *in specie* and is susceptible of being repaired at any cost.

1. *England*.—*Cocking v. Fraser*, Park. 247, 4 Dougl. 295.

United States Courts.—*Morean v. U. S. Ins. Co.*, 1 Wheat. (U. S.) 219, 3 Wash. (U. S.) 256; *Hugg v. Augusta Ins., etc., Co.*, 7 How. (U. S.) 595; *Biays v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 415; *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch (U. S.) 39; *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. (U. S.) 220. *Kentucky*.—*Louisville Marine, etc., Ins. Co. v. Bland*, 9 Dana (Ky.) 147.

Louisiana.—*Gould v. Louisiana Mut. Ins. Co.*, 20 La. Ann. 259.

New York.—*Le Roy v. Gouverneur*, 1 Johns. Cas. (N. Y.) 226; *Magrath v. Church*, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173; *Neilson v. Columbian Ins. Co.*, 3 Cai. (N. Y.) 108; *Guerlain v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 527; *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138; *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Bryan v. New York Ins. Co.*, 25 Wend. (N. Y.) 617; *De Peyster v. Sun Mut. Ins. Co.*, 17 Barb. (N. Y.) 306.

Actual Total Loss Necessary.—In *Hugg v. Augusta Ins., etc., Co.*, 7 How. (U. S.) 595, Nelson, J., said: "In the case of memorandum articles the exception of particular average excludes a constructive total loss. * * * There must be an actual total loss of the goods. The object of the clause is to protect the underwriter from any partial loss on articles of a perishable nature which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against; and where it would be difficult, if not impossible, to distinguish between them. In case of a total loss consequent upon the happening of one of the perils, the whole damage is presumed to have arisen from that cause, and thus all dispute is avoided."

"The memorandum prevents the loss from being total, unless the article be burnt, sunk, captured, or otherwise completely destroyed." Per Kent, J., in *Magrath v. Church*, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173. But it is admitted that if the "voyage be lost" by reason of some cause not arising from the condition of the articles in the memorandum, there would be a total loss.

A loss of over one half is only partial in case of memorandum articles. *Wain v. Thompson*, 9 S. & R. (Pa.) 120, 11 Am. Dec. 675. But it has been held that the saving of a very small proportion of the articles in the memorandum clause will not prevent a total loss. *Bryan v. New York Ins. Co.*, 25 Wend. (N. Y.) 617.

Contra.—The principle that an absolute total loss is necessary in the case of memorandum articles has been denied, however. In *Delaware Ins. Co. v. Winter*, 38 Pa. St. 176, Thompson, J., said: "'In all cases, in fact,' says Arnould, 'except those of partial loss, the goods comprised in the memorandum stand on the same footing as other goods. If the question turn on a totality of the loss, there is no difference between them and other perishable articles. Whether the loss be total or partial in its nature must depend on general principles. The memorandum does not vary the rules upon which a loss is partial or total. It does no more than preclude indemnity for an ascertained partial loss.' *Poole v. Protection Ins. Co.*, 14 Conn. 47. In *Marean v. U. S. Ins. Co.*, 3 Wash. (U. S.) 256, the doctrine is stated thus: 'If the question turn on the totality of loss unconnected with the subject of loss by deterioration of the cargo in value or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in fact, or is such as the insured is permitted to treat as such, he is entitled to abandon and to recover as for a total loss, in the case of memorandum articles; but always with this exception, that he is not permitted to turn a partial into a total loss.' The rule, therefore, deducible from these and many other authorities, is that wherever the cargo may, on account of injuries from perils insured against, be abandoned as for a total loss, memorandum articles stand upon the same footing as others. There is much diversity on the subject of deterioration of this class of articles and the effect of a total change of their character, although they remain nominally *in specie* the same, as incurring liability on part of the insurers. But, as that question does not properly arise here, we express no opinion on the subject."

In *Poole v. Protection Ins. Co.*, 14 Conn. 47, there was an abandonment, and Storrs, J., declared that it was, therefore, unnecessary to determine whether the loss was absolutely or constructively total. It was determined, in this case, that to render the insurers liable for the loss of goods specified in the memorandum clause it was not necessary that there should be either an actual destruction of every part of the goods insured, so as no longer physically to exist *in specie*, nor that there should be a total extinction of their value; but that it was sufficient if, by reason of a peril insured against, the voyage was arrested and the goods neither came to the hands of the owners nor reached their port of destination nor were capable of being forwarded.

tests for determining whether a loss is actually total are, in general, the same as those already stated.¹ There is this limitation, however—in the case of memorandum articles there can never be a total loss provided the articles insured reach the port of destination *in specie*, however great the damage by a peril insured against may be.² It results that, no matter how extensive the damage at any intermediate port, it is the duty of the master to forward the goods, if this is possible, and by his failure to do so he cannot throw the loss upon the insurer.³ But where, though the goods still remain *in specie* at an intermediate port, the delivery of any portion of them at the port of destination becomes impossible by reason of a peril insured against, the loss becomes absolutely total and the obligation to forward ceases.⁴

Massachusetts.—In *Massachusetts* it seems to be unsettled whether there can be a constructive total loss of memorandum articles. In *Mayo v. India Mut. Ins. Co.*, 152 Mass. 172, W. Allen, J., said: "Whether, in this commonwealth, there can be a total loss of a memorandum article if any part of it arrives at the port of discharge *in specie*, or whether a special rule will apply to such articles, and there may be a constructive total loss and abandonment of them—if, as may have been the fact in the case at bar, the damage is such that the expense of landing and restoring the goods will equal or exceed their actual value, or whether the general rule in regard to other cargo will apply, and damage to the cargo of one half of the insured value with abandonment will constitute a total loss, we express no opinion."

New York.—It is well settled in *New York* that where goods are insured free of particular average, the insured may recover for a constructive total loss. *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. Rep. 664; *Chadsey v. Guion*, 97 N. Y. 333, *affirming* 46 N. Y. Super. Ct. 118. But it is to be noted that, in these cases, a constructive total loss is defined as a destruction of all value to the owner. It is perhaps doubtful whether the *English* decisions noticed by the court in *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. Rep. 664, show anything more than that the requirements for an actual total loss have received a more liberal construction with the advance of insurance law, and whether they have any bearing on the question of the sufficiency of a constructive total loss in the case before the court. Compare the definition of actual total loss in *Carr v. Security Ins. Co.*, 109 N. Y. 504.

Total Loss of Part.—As to a total loss of a part of memorandum articles, see *infra*, this title, *Total Loss of Part of Cargo*.

1. In *Roux v. Salvador*, 3 Bing. N. Cas. 266, 32 E. C. L. 110, Lord Abinger said: "The memorandum does not vary the rules upon which a loss shall be partial or total. * * * It has no application whatever to a total loss, or to the principle on which a total loss is to be ascertained." *Poole v. Protection Ins. Co.*, 14 Conn. 47; *Delaware Ins. Co. v. Winters*, 38 Pa. St. 176; *Marean v. U. S. Ins. Co.*, 3 Wash. (U. S.) 256.

Hides and skins, when so soaked with water as to have become putrid and to endanger the lives of the crew, will be deemed

a total loss. *De Peyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272, 75 Am. Dec. 331.

2. *Cocking v. Fraser, Park*, 247, 4 Dougl. 295; *Magrath v. Church*, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173; *Le Roy v. Gouverneur*, 1 Johns. Cas. (N. Y.) 226; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *De Peyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272, 75 Am. Dec. 331; *Chadsey v. Guion*, 97 N. Y. 333; *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455.

If a perishable article, or any part of it, shipped by sea, arrives *in specie* at its port of destination, or can, by the exercise of a reasonable care and diligence, be carried there in that condition, although when there it may be worthless, the insurers cannot be charged for a total loss. *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455.

3. See *infra*, this title, *Duty of Insured to Repair or Tranship*.

4. *Roux v. Salvador*, 3 Bing. N. Cas. 266; *Hugg v. Augusta Ins. Co.*, 7 How. (U. S.) 595; *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455; *De Peyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272, 75 Am. Dec. 331; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 115; *Tudor v. New England Mut. Marine Ins. Co.*, 12 Cush. (Mass.) 554.

The insurers are liable for a total loss on memorandum articles where the ship, from the perils insured against, becomes incapable of pursuing the voyage, and another vessel cannot be procured to forward the articles to their port of destination. *Wilson v. Royal Exch. Assur. Co.*, 2 Camp. 623, 12 Rev. Rep. 760; *Parry v. Aberdeen*, 9 B. & C. 411, 17 E. C. L. 408; *Fleming v. Smith*, 1 H. L. Cas. 513.

In *Roux v. Salvador*, 3 Bing. N. Cas. 266, 32 E. C. L. 110, Lord Abinger said: "If the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if, by any circumstance over which he has no control, they can never, or within no assignable period, be brought to their original destination—in any of these

(b) **Perishable Articles.**—The rules as to memorandum articles apply to other things of a perishable nature, though not enumerated in the memorandum.¹

(c) **Freight.**—An actual total loss of freight arises only where the circumstances are such as to render the ultimate earning of freight absolutely impossible or practically hopeless; as where the cargo is lost, or there are no means of forwarding it.² The loss of the vessel short of the port of destination does not of itself constitute a total loss of freight, but the question in such cases is, whether there was a chance of being able to earn the freight by forwarding the cargo;³ and it is always the duty of the insured to repair and complete the

cases the circumstance of their existing *in specie* at that forced termination of the risk is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle."

1. *Tudor v. New England Mut. Marine Ins. Co.*, 12 Cush. (Mass.) 554. But see *Kettell v. Alliance Ins. Co.*, 10 Gray (Mass.) 144.

2. *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 252.

When Actual Total Loss of Freight.—In *Rankin v. Potter*, L. R. 6 H. L. 99, Brett, L.J., said: "There may be an actual total loss of freight under a general policy on freight, if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight. An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured." He added that there would be an absolute total loss of freight when the ship was so damaged as to be a constructive total loss, were it insured, although there was no loss, or only an average loss of cargo, without means of sending it on; and under a policy on "chartered freight" absolute total loss might occur if the ship was actually or possibly constructively totally lost before any goods were shipped.

If the goods cannot be forwarded so as to retain some value, there is such a total loss of cargo as produces a total loss of freight. In *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109, Shaw, C.J., after citing *Roux v. Salvador*, 3 Bing. N. Cas. 266, said: "The case is a strong authority to this point, that if goods on board ship are damaged by one of the perils insured against, and upon being brought into a port other than that of their destination the damage is there found to be of such a nature and extent that, taking into consideration their actual condition, the distance of the port of destination and the time necessary for their transportation to such port, and the nature of the commodities, it can be shown that they must totally perish and cease to exist before they can arrive, then they are in effect totally destroyed by the first direct action of the sea peril; they cannot be carried

and delivered to the consignee, so as to enable the shipowner to earn his freight of the ship. They are as effectually and completely destroyed by such peril as if, instead of sea damage, they had been struck with lightning and consumed. And in this respect it seems to us immaterial whether the goods are memorandum articles, or goods perishable in their nature, or not; they are as effectually annihilated by the direct action of the peril insured against, and so totally destroyed by such peril, for all purposes of earning freight by their carriage, in the one case as in the other. In both cases the shipowner is entirely deprived of obtaining his freight by a peril insured against; the loss of that freight is a total loss to him without abandonment."

But where the goods could have arrived *in specie* at the port of destination, and there has been no total loss of ship, the insurers on freight are not liable for a total loss, though the ship has been compelled to put back to the port of departure, and the goods, damaged to the extent of half their value, have been sold. *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109.

Where a ship is obliged to put back, and the damage she has sustained is of such a nature that she cannot pursue her voyage, and no other ship can be procured to take the cargo, there is a total loss of freight. *Manning v. Newnham*, 2 Camp. 624, note, 12 Rev. Rep. 761.

Where out of a whole cargo of memorandum articles there are a few saved, at an expense exceeding their value, the loss is total. *Bryan v. New York Ins. Co.*, 25 Wend. (N. Y.) 617.

Passage-money.—When a ship after sailing on a voyage is never heard from, and the passage-money was insured, there is a total loss. *Ogden v. Mutual Ins. Co.*, 35 N. Y. 418.

3. *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 252.

When Loss of Vessel is Loss of Freight.—If no freight *pro rata* has been earned, or if the expense of reshipping in another vessel exceeds or is equal to the whole amount agreed upon by the charter party, there is an absolute total loss of freight. *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 53, 7 Cow. (N. Y.) 564; *Robertson v. Atlantic Mut. Ins. Co.*, 68 N. Y. 192; *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 252.

In *M'Gaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 410, Shaw, C.J., said: "In case of actual total loss of vessel the freight is, of course, lost." See also *Parsons v. Manufacturers' Ins. Co.*, 16 Gray (Mass.) 468. But,

voyage, or if this is impossible, to transship by another vessel.¹

(d) **Total Loss Only.**—A constructive total loss is sufficient under a policy against "total loss only."²

d. TOTAL LOSS WITH BENEFIT OF SALVAGE.—Salvage in marine insurance is the part, or remnant, of the thing insured which survives a total loss;³ and upon principles of indemnity it becomes the property of the underwriters without abandonment.⁴ Where the ship has become a wreck, or where goods have become a total loss, but something has survived, which, although it has lost its specific character, is yet of some value, this rule applies.⁵ Where there has been a sale of the thing insured, and the master has received the money, he must hold it to the use of the underwriters; and if it comes to the hands of the insured it may be deducted from the loss as so much paid.⁶

as pointed out by Rapallo, J., in *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 254, such expressions must refer to a constructive total loss of freight.

In *Willard v. Millers', etc., Ins. Co.*, 24 Mo. 561, there was an insurance on freight "against total loss only." The freight would have amounted to \$3000. Upon the voyage the ship was so damaged by disaster as to be rendered totally unable to transport the cargo, and it could not have been sent forward for any less rate of freight than that originally agreed on. Freight *pro rata* had been earned to the amount of \$467. It was held that there was an absolute total loss of freight, and that the freight received was only to be considered in adjusting the loss.

1. *Hugg v. Augusta Ins., etc., Co.* 7 How. (U. S.) 595; *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 246. And see *infra*, this title, *Duty of Insured to Repair or Transship*. For constructive total loss of freight, see *infra*, this title, *Freight*.

2. *Adams v. Mackenzie*, 13 C. B., N. S. 442; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *Greene v. Pacific Mut. Ins. Co.*, 9 Allen (Mass.), 217; *Mayo v. India Mut. Ins. Co.*, 152 Mass. 172; *O'Leary v. Stymest*, 6 Allen (New Bruns.) 289; *Morton v. Patillo*, 9 Nova Scotia 21. The same is true under a policy "free from partial loss," *Mayo v. India Mut. Ins. Co.*, 152 Mass. 172; *Kettell v. Alliance Ins. Co.*, 10 Gray (Mass.) 144. And see *Forwood v. North Wales Mut. Marine Ins. Co.*, 5 Q. B. Div. 57, where a policy against "absolute damage caused by the perils insured against" was held not to exclude constructive total loss.

Contra—New York—Missouri.—There are, however, decisions holding otherwise. Thus, in a case of insurance on freight "against total loss only," it has been held that there must be an actual total loss. *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 318; *Willard v. Millers', etc., Co.*, 24 Mo. 561.

Parol Evidence.—Parol evidence is inadmissible to show that the policy is for total loss only, where the instrument evidences a different agreement. *Gomila v. Hibernia Ins. Co.*, 40 La. Ann. 553.

Policy Expressed to be for "Absolute Total Loss."—Constructive total loss is of course insufficient under a policy restricting liability to "absolute total loss." *Gould v. Louisiana Mut. Ins. Co.*, 20 La. Ann. 259; *Munroe v. British, etc., Marine Ins. Co.* 2 Fed. Rep. 777.

3 C. C. A. 280, 5 U. S. App. 179; *Carr v. Providence Washington Ins. Co.*, 38 Hun (N. Y.) 86.

Declaration for "Total Loss."—Under a declaration for a total loss, a constructive total loss may be recovered. *Snow v. Union Mut. Marine Ins. Co.*, 119 Mass. 592, 20 Am. Rep. 349.

3. 3 Kent Comm. (13th ed.) 345, note; 2 Parsons Mar. Ins. 109.

4. *Gordon v. Massachusetts F., etc., Ins. Co.*, 2 Pick. (Mass.) 261; *Smith v. Manufacturers' Ins. Co.*, 7 Met. (Mass.) 448; *Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367. See the title SUBROGATION.

5. See instances put by Brett, L. J., in *Kaltenbach v. Mackenzie*, 3 C. P. Div. 467. The whole passage is instructive. The learned judge said: "I agree that there is a distinction between abandonment and notice of abandonment, and I concur in what has been said by Lord Blackburn, that abandonment is not peculiar to policies of marine insurance; abandonment is part of every contract of indemnity. Whenever, therefore, there is a contract of indemnity, and a claim under it for an absolute indemnity, there must be an abandonment, on the part of the person claiming indemnity, of all his right in respect of that for which he receives indemnity. The doctrine of abandonment in cases of marine insurance arises where the assured claims for a total loss. There are two kinds of total loss; one which is called an actual total loss, another which in legal language is called a constructive total loss. But in both the assured claims as for a total loss. Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there is anything to abandon, abandonment must take place; as, for instance, when the loss is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. Or where goods have been totally lost, as in the case of *Roux v. Salvador*, 3 Bing. N. Cas. 266, but something has been produced by the loss which would not be the goods themselves, if it were of any value at all, it must be abandoned. But that abandonment takes place at the time of the settlement of the claim; it need not take place before." See also *Stewart v. Greenock Marine Ins. Co.*, 2 H. L. Cas. 159.

6. **Salvage Passes without Abandonment.**—In *Gordon v. Massachusetts F., etc., Ins. Co.*, 2 Pick. (Mass.) 249, Parker, C. J., said:

3. Constructive Total Loss—*a. DEFINITION.*—A constructive total loss is when the damage, though not actually total, is of such a character that the insured is entitled, if he thinks fit, to treat it as total by an abandonment, i.e., by giving notice of an abandonment to the underwriters.¹

b. CRITERIA—(1) *In General.*—The character of a loss as constructively total depends upon the conduct of a prudent uninsured owner as measured, *first*, by the *quantum* of damage to the thing insured under the circumstances (English rule), or by an artificial one half loss standard (United States rule); *second*, by the imminence of actual peril; or *third*, by the loss of his adventure, or the lack of means to repair.

(2) *Quantum of Damage*—(a) *English Rule.*—If the outlay required to repair the damage be greater than the value of the thing when repaired, the loss is constructively total.²

(b) *American Rule.*—If the vessel or goods insured are damaged to more than half their value, or if more than half the freight is lost, the insured may abandon as for a total loss.³

"The money arising from the sale in such case must be held by the master to the use of the underwriters; it is their property without any abandonment; and if it comes to the hands of the insured, it may be deducted from the loss as so much paid, this being what is called a loss with benefit of salvage."

In the case of *Pringle v. Hartley*, 3 Atk. 195, the earliest reported case in England on abandonment, according to Chief Justice Tindal, there are *dicta* of Lord Hardwicke to the same effect; but in that case the ship had been sold under an order of court to pay salvage to recaptors, and the remnant had been paid into court for the benefit of those who might claim as owners.

In case of sale by necessity by the master, the salvage belongs to the insurer; and the insured is entitled to recover the full amount of his claim irrespective of the amount of salvage received by the insurer. *Stephenson v. Piscataqua F., etc., Ins. Co.*, 54 Me. 55. See also *Portsmouth Ins. Co. v. Brazee*, 16 Ohio 81.

In *Smith v. Manufacturers' Ins. Co.*, 7 Met. (Mass.) 453, Shaw, C. J., said: "If this were considered a total loss, with benefit of salvage, it is still, in effect, only a partial loss. The master being the agent of the assured, and they having made no abandonment, the money for the salvage, in his hands, is their money, and he being their agent, they were responsible for it, whether paid over or not. Then what is the loss? There is no difference between adjustment as a partial loss, and adjustment of a total loss with benefit of salvage. See *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. (Mass.) 261. If the vessel, being entire, were sunk and gone, the whole valuation is the measure of the indemnity to the assured. But if any boats or materials have been saved and sold, the money is that of the assured, and renders his loss so much less; so that it only remains to put down the valuation on one side, and deduct the money thus received, and the balance is the actual indemnity. The salvage, then, is not a set-off, not something belonging to the defendants, to be used to balance the plaintiff's total demand; but it is a sum belonging to the plaintiff, in his own

hands, which diminishes his demand *pro tanto*, and to the same extent diminishes the amount he is entitled to recover."

1. *Kaltenbach v. Mackenzie*, 3 C. P. Div. 479; *Murray v. Great Western Ins. Co.*, 72 Hun (N. Y.) 282.

A constructive total loss is where part of the property survives the peril, without a total destruction of the thing insured, or where rights or claims remain to the insured or owner. *Walker v. Protection Ins. Co.*, 29 Me. 317.

When a vessel is not destroyed, but its destruction is made highly probable, and its recovery, though not hopeless, is yet exceedingly doubtful, or too expensive, then it is a constructive total loss; and it is so in the *United States* when the cost to repair would exceed half the value of the vessel, and an abandonment is necessary. *Sherlock v. Globe Ins. Co.*, 1 Cinc. Super. Ct. Rep. (Ohio) 193; but compare *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

2. *Ship.*—In *Rankin v. Potter*, L. R. 6 H. L. 83, Martin, B., said that the definition of constructive total loss as to ships generally adopted is as follows: "Where the damage to the ship is so great from the perils insured against that the owner cannot put it in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship (when repaired), he is not bound to incur the expense, but he is at liberty to abandon and treat the loss as a total loss and recover the whole amount."

Cargo.—If the damage to cargo, though reparable, cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable from a business point of view, and the loss is constructively total. *Rosetto v. Gurney*, 11 C. B. 176, 73 E. C. L. 176. See also *Irving v. Manning*, 1 H. L. Cas. 289; *Young v. Turing*, 2 Scott N. K. 752, 2 M. & G. 593; *Allen v. Sugrue*, 3 M. & R. 9, 8 B. & C. 561; *Phillips v. Nairne*, 4 C. B. 343; *Domett v. Young, Car. & M.* 465; *Fleming v. Smith*, 1 H. L. Cas. 513; *Moss v. Smith*, 9 C. B. 94; *Troop v. Jones*, 5 R. & G. (Nova Scot.) 230.

3. *One Half Loss to Ship*—*United States Courts.*—*Patapsco Ins. Co. v. Southgate*, 5 Pet.

(3) *Imminence of Peril*.—If the subject of insurance is in such imminent peril that in all probability it cannot be delivered therefrom, or, so far as any reasonable calculations can be made, in the highest degree of probability the expenses for its delivery will exceed the *quantum* required for a constructive total loss¹—i.e., the value of the thing in *England*, the one half value

(U. S.) 604; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Magoun v. New England Marine Ins. Co.*, 1 Story (U. S.) 157; *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *Seton v. Delaware Ins. Co.*, 2 Wash. (U. S.) 175; *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. (U. S.) 220.

Illinois.—*Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235.

Kentucky.—*Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541.

Louisiana.—*Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. Ann. 305; *Hyde v. Louisiana State Ins. Co.*, 2 Martin, N. S. (La.) 410, 14 Am. Dec. 196; *Brooke v. Louisiana Ins. Co.*, 4 Martin, N. S. (La.) 640; *Riley v. Ocean Ins. Co.*, 11 Rob. (La.) 255; *Phillips v. St. Louis Ins. Co.*, 11 La. Ann. 459.

Maine.—*Dunning v. Merchants' Mut., etc., Ins. Co.*, 57 Me. 108.

Massachusetts.—*Wood v. Lincoln, etc., Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163; *Gordon v. Massachusetts F., etc., Ins. Co.*, 2 Pick. (Mass.) 261; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466; *Bryant v. Com. Ins. Co.*, 13 Pick. (Mass.) 543; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472; *Orron v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Kettell v. Alliance Ins. Co.*, 10 Gray (Mass.) 154; *Taber v. China Mut. Ins. Co.*, 131 Mass. 248; *Smith v. Manufacturers' Ins. Co.*, 7 Met. (Mass.) 448; *Greely v. Tremont Ins. Co.*, 9 Cush. (Mass.) 415.

Missouri.—*Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411; *Lockwood v. Sangamo Ins. Co.*, 46 Mo. 71.

New York.—*Abbott v. Broome*, 1 Cai. (N. Y.) 292, 2 Am. Dec. 187; *Smith v. Bell*, 2 Cai. Cas. (N. Y.) 153; *Saurez v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 482; *Goold v. Shaw*, 1 Johns. Cas. (N. Y.) 293; *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222; *S. C.*, 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; *Center v. American Ins. Co.*, 7 Cow. (N. Y.) 564, 4 Wend. (N. Y.) 45; *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer (N. Y.) 343; *Murray v. Great Western Ins. Co.*, 72 Hun (N. Y.) 282.

It is not sufficient that the loss is exactly fifty per cent; the loss must be more than one-half. *Fiedler v. New York Ins. Co.*, 6 Duer (N. Y.) 282.

Ohio.—*Peabody Ins. Co. v. Packet Co.*, 5 Am. L. Rec. (Ohio) 499; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

Pennsylvania.—*Peters v. Phoenix Ins. Co.*, 3 S. & R. (Pa.) 25.

South Carolina.—*Budd v. Union Ins. Co.*, 4 McCord (S. Car.) 1; *Cohen v. Charleston F., etc., Ins. Co.*, *Dudley* (S. Car.) 147, 31 Am. Dec. 549.

Cargo.—The rule as to one-half loss applies to cargo. *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141; *McConochie v. Sun Mut. Ins. Co.*, 26 N. Y. 477; *Center v. American Ins. Co.*, 7 Cow. (N. Y.) 564.

In *Pierce v. Columbian Ins. Co.*, 14 Allen (Mass.) 320, Gray, J., says: "By the American law, if goods other than memorandum articles are injured by perils of the sea to more than half their value, it is a constructive total loss."

Where a chariot was insured "free from average," and the box of it (valued at two thirds) was thrown overboard, it was held that the insured was entitled to abandon the remainder and recover for a total loss. *Judah v. Randal*, 2 Cai. Cas. (N. Y.) 324. This decision was put upon the ground that the chariot as a chariot was destroyed. *Quare*, whether under the rule laid down in later cases this would not be an absolute total loss.

Freight and Profits.—As to freight, see *infra* this title, *Freight and Profits*.

Cost of Repairs.—As to whether, when an abandonment has been made because the cost of reparation would in all probability exceed fifty per cent, the actual cost of repair when afterward made is conclusive, see notes *infra*, this title, *Imminence of Peril*.

1. **Test of the Prudent Owner**.—In *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378, Story, J., said: "In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one half the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proofs, to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. But it is not, and in many cases cannot be, decisive of the right to abandon. In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril, without an actual expenditure of one half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril are at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold

in the *United States*—so that a prudent owner uninsured upon the spot would decline any further expense in connection therewith, there is a constructive total loss.

any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good. It was to such a case that Lord Ellenborough alluded, in *Anderson v. Wallis*, 2 M. and S. 240, when he said: 'There is not any case, nor principle, which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of the abandonment.' Mr. Chancellor Kent, in his learned Commentaries (Vol. 3, 321), has laid down the true results of the doctrine of law on this subject. 'The right of abandonment,' says he, 'does not depend upon the certainty, but upon the high probability, of a total loss, either of the property, or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen that she was afterwards recovered at a less expense.' We have no difficulty, therefore, in acceding to the argument of the counsel for the plaintiffs in error on this point." See also *Fulton Ins. Co. v. Goodman*, 32 Ala. 127; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541.

In the great case of *Roux v. Salvador*, 3 Bing. N. Cas. 266, 32 E. C. L. 110, Lord Abinger states the law as follows: "If in the progress of the voyage it [the object of assurance] becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he [the underwriter] insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases—there may be a capture, which, though *prima facie* a total loss, may be followed by a recapture, which would revert the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. * * * In all these cases not only the thing assured, or part of it, is supposed to exist *in specie*, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected

by the measures that may be adopted for the recovery or preservation of it."

In *Kaltenbach v. Mackenzie*, 3 C. P. Div. 476, Brett, L. J., said: "It was argued before us that this was an actual total loss. I do not stop to enter into that; it is clear that the ship was not an actual total loss; but I think we are bound to take it that she was a constructive total loss—that is, she was in imminent danger of becoming a total loss to her owner. She may become a total loss to her owner either by perishing, although she has not yet perished, or she may become a total loss by reason of the cost of the repairs being greater than the value of the ship when repaired; in either case she becomes a total loss to her owner. I think we must take it that the circumstances were such that the owner had a right to consider that in all probability the cost of repairing that ship would be greater than her value when repaired, and that she would become a total loss. Therefore he was justified in assuming there was imminent danger of her becoming a total loss; and he would, according to the rule I have enunciated, the moment he received information which would lead any reasonable man to come to that conclusion, be bound to give notice of abandonment, unless he was excused."

In *Meagher v. Aetna Ins. Co.*, 20 U. C. Q. B. 607, Robinson, C. J., said: "The test [of a total loss] by the law of *England* clearly is whether a prudent man would think it worth his while to attempt to save and repair the vessel; and it is assumed that he would not do it unless he had the prospect of gaining something by the attempt; in other words, that he would not make the attempt unless it appeared probable that the vessel, when got off and restored to the state she was in before the accident, would be worth as much as the operation would cost him. The English authorities have, as we conceive, at last fully established that as the criterion of a total loss."

Result of Peril not Conclusive.—In *Hall v. Ocean Ins. Co.*, 37 Fed. Rep. 371, Carpenter, J., said: "The peril of the ship cannot be measured by the ultimate result of the efforts to save her. I am to look at the danger in which she was, rather than to the damage which she received." See also *Wallace v. Thames Ins. Co.*, 22 Fed. Rep. 66; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67; *Thompson v. Mississippi Marine, etc., Ins. Co.*, 2 La. 239, 22 Am. Dec. 129. Though the actual injury proves less than the half value this is not conclusive. *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235; *American Ins. Co. v. Ogden*, 15 Wend. (N. Y.) 532; 20 Wend. (N. Y.) 287; *Mordecai v. Fireman's Ins. Co.*, 12 Rich. (S. Car.) 512.

Contra—Ohio—Massachusetts.—The contrary

(4) *Loss of Adventure—Inability to Repair.*—When there is not a total loss by reason of the *quantum* of damage, or immediate imminence of total loss, yet, if the undertaking insured is broken up, or there is a lack of the means of repairing the injury sustained at the port of distress, an abandonment is justified.¹

c. COMPUTATION—(1) *Value of Vessel.*—The value of a vessel, within the rule as to one half loss, is the half of the general market value of the vessel at the time and place of the disaster, not its value for any particular voyage or purpose.²

doctrine has been laid down in *Ohio*. Notice by the assured, of abandonment because the cost will exceed fifty per cent, does not conclude the parties, but both are bound at last by the test of the actual cost of raising and repairing. *Peabody Ins. Co. v. Packet Co.*, 5 Am. L. Rec. (Ohio) 499. Compare also *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466, where it was held that imminent danger of a total loss is no ground for an abandonment. Thus, if a ship, being damaged, is abandoned on her way to a port of repair, the abandonment will be void if the vessel arrives and is repaired for less than one half value. See also *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Sewall v. U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191; *Marmaud v. Melledge*, 123 Mass. 173. This is, of course, the logical consequence of the doctrine of the insurer's right to repair. See *infra*, this title, *Right of Insurer to Repair*. As to what danger justifies abandonment in cases of stranding, see *infra*, this title, *Stranding and Submersion*, notes.

Limitations of Test of Prudent Owner.—The remarks of Chancellor Walworth, in *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287, are instructive as to the difference of the English and American rules, and the limitations of the test of the prudent owner in America. He said: "The rule of permitting the assured to abandon when the vessel has been injured to more than half the value does not exist in England. * * * As this principle of adopting an arbitrary rule of proportion between the value of the vessel and the expense of repairing her at the port of distress, for the purpose of ascertaining the right of the assured to abandon as for a total loss, was substituted for the more uncertain rule which exists in *England*, of leaving it to the jury to determine as a matter of fact, in all cases, whether the situation of the vessel was such as to make it a justifiable case of abandonment, or of a sale of the ship for the benefit of all parties, the courts of this country should be cautious how they depart from the established rule, or they will find the underwriters and the assured again involved in the ruinous litigation which the adoption of a fixed and certain rule was intended to obviate. I agree that there may be cases—where the vessel is stranded, with partial wreck, or is rendered otherwise unnavigable at a distance from any regular port, and where the means of repair or the necessary funds for that purpose could not have been procured, even if the master was furnished with the ordinary powers to

obtain them—in which, from the necessity of the case, there must be an abandonment or sale of the wreck of the ship. Pardessus admits that such cases may exist even under the present Commercial Code of France, the 390th article of which declares that an abandonment on the ground of incapacity to navigate cannot be made if the vessel stranded (*echoue*) may be gotten off, repaired, and put in a state to continue her course to her place of destination. (Pardessus Du Droit Com., part 3, tit. 5. c. 3, § 4, note 842. Tome 3, p. 370.) * * * The principle of submitting it to a jury in each case, to decide what a prudent owner would do, for the purpose of determining the right of the assured to abandon, would necessarily lead to ruinous litigation, and would deprive both the insurers and the assured of all the benefits intended to be secured to them by the adoption of the rule as to the extent of the repairs exceeding half the value of the vessel. It appears to me to be wholly inconsistent with reason and justice to permit both rules to stand together. The question as to what a prudent owner would do may be a very proper rule of decision in a case of stranding, and before it is known whether the vessel can be gotten off, or what injury she has sustained or may sustain in her then situation; and the other rule cannot be applied to such a case. But the adoption of such a principle in other cases, where the vessel is safely moored in a regular port, would probably have the effect here, as it has already had in *England*, of compelling underwriters to insert a stipulation in the policy that there shall be no abandonment except in case of capture, or detention, or where the vessel is stranded."

1. This test evidently shades into those already given, but is placed here for the sake of distinctness. See *infra*, this title, *Particular Cases*, and especially thereunder *Loss or Retardation of Voyage; Sale by Necessity*.

In *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27, Story, J., said: "If there be any general principle that pervades and governs [the cases on abandonment], it seems to be this, that the right to abandon exists whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage." See also *American Ins. Co. v. Ogden*, 15 Wend. (N. Y.) 532.

2. *Center v. American Ins. Co.*, 7 Cow.

(2) *Expense of Repairs and Transshipment.*—The expense of repairs is usually the main element in computing total loss.¹ Costs of repairs are to be estimated at the port of distress.² Where there is a total loss of cargo the expenses of transshipment and sale are to be deducted from the gross receipts of sale in computing a total loss.³ In computing a total loss on freight, no deduction is to be made for expenses of wages and provisions.⁴

(3) *One Third New for Old.*—Whether, in estimating the *quantum* of loss to determine total loss or not, the deduction of one third from the cost of repairs in favor of the insurer for the value of the new materials is to be made, as in cases of partial loss, is a question upon which the decisions are conflicting.⁵

(N. Y.) 564. See *infra*, this title, *Expense of Repairs and Transshipment*.

Vessels Built for Particular Trade.—As to peculiar vessels built with a view to a particular trade, it was suggested by Wood, V. C., in *African Steamship Co. v. Swanzy*, 2 Kay & J. 664, that the proper criterion would be the price given for the vessel and the subsequent deterioration. See also *Grainger v. Martin*, 31 L. J. Q. B. 186.

1. *Farnworth v. Hyde*, 18 C. B., N. S. 835; *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. (U. S.) 220; *Smith v. Manufacturers' Ins. Co.*, 7 Met. (Mass.) 448; *Greely v. Tremont Ins. Co.*, 9 Cush. (Mass.) 415; *Goold v. Shaw*, 1 Johns. Cas. (N. Y.) 293; *Budd v. Union Ins. Co.*, 4 McCord (S. Car.) 1; *Cohen v. Charleston F., etc., Ins. Co.*, Dudley (S. Car.) 147; and cases generally on the *American* rule of fifty per cent loss. See *infra*, this title, *Constructive Total Loss; American Rule*.

Previous Defects.—In calculating the value of repairs, those rendered necessary by defects existing previous to effecting the insurance are not to be included. *De Peyster v. Columbian Ins. Co.*, 2 Cai. (N. Y.) 85; *Depau v. Ocean Ins. Co.*, 5 Cow. (N. Y.) 63, 15 Am. Dec. 431.

Coppering.—The following cases construe a peculiar clause as to coppering, in *Massachusetts* policies: *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22; *Prince v. Equitable Safety Ins. Co.*, 12 Gray (Mass.) 527.

Submerged Vessel.—The expense of raising a submerged vessel and taking her into port is to be taken into account. *Sewell v. U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22; *Ellicott v. Alliance Ins. Co.*, 14 Gray (Mass.) 318.

Stranded Vessel.—When a vessel is stranded the rigging, etc., taken from her passes by abandonment to the insurer, and is not a fund in the insured's hands to defray expenses of getting her off. *King v. Hartford Ins. Co.*, 1 Conn. 333.

Straining and Weakening.—It seems that no sum for straining and weakening the ship can be added to the cost of repairs to make up a fifty per cent damage. *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Sage v. Middletown Ins. Co.*, 1 Conn. 239.

Must Place in Statu Quo.—In estimating the cost of repairs such sum must be taken as will place the vessel *in statu quo* with the same materials. *Center v. American Ins.*

Co., 7 Cow. (N. Y.) 564. See also *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22.

2. *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45; *Center v. American Ins. Co.*, 7 Cow. (N. Y.) 564; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *American Ins. Co. v. Francia*, 9 Pa. St. 390.

But *aliter*, if repairs could be made more cheaply and without danger at a neighboring port. *Peck v. Nashville Marine, etc., Ins. Co.*, 6 La. Ann. 148. And see *infra*, this title, *Duty of Insured to Repair or Transship*.

3. In *Portsmouth Ins. Co. v. Brazee*, 16 Ohio 82, there was a valued policy on cargo consisting of flour. The flour was sunk by a collision, and afterward raised and forwarded to New Orleans, the port of destination. In consequence of its damaged condition an immediate sale was necessary. It was held that the broker's charges of commission for making the sale and the expense of transshipment from the place of the disaster were properly estimated in favor of the insured in computing a total loss.

For expenses of forwarding cargo, see *Farnworth v. Hyde*, 18 C. B., N. S. 835.

4. *Stevens v. Columbian Ins. Co.*, 3 Cai. (N. Y.) 43, 2 Am. Dec. 247.

The wages and provisions of the officers and crew while a ship is being repaired are not to be included in constructive total loss; but a reasonable allowance should be made for the custody of the vessel, if necessary during such repairs, and for superintendence, which allowance should be charged to the account of labor, the usual deduction of one third new for old being made. *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472.

Premium for Further Insurance.—The premiums which would be required to insure against the risks of plunder and weather during transportation of goods insured from place of wreck to place of destination are not to be included in estimating fifty per cent loss. *Bryant v. Com. Ins. Co.*, 13 Pick. (Mass.) 543.

5. **Cases against One Third Deduction.**—*Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. (U. S.) 220; *Wallace v. Thames Ins. Co.*, 22 Fed. Rep. 66; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Phillips v. St. Louis Ins. Co.*, 11 La. Ann. 459; *Peabody Ins. Co. v. Packet Co.*, 5 Am. L. Rec. (Ohio) 499; *American Ins. Co. v. Francia*, 9 Pa. St. 390.

Cases in Favor of One Third Deduction.—*Dunning v. Merchants' Mut., etc., Ins. Co.*, 57 Me. 108; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *Smith v. Bell*, 2 Cai.

(4) *Salvage, General Average, and Jettison*.—The salvage contribution of the party claiming a total loss is to be taken into account in his favor, to determine whether his loss reaches the proportion required for a total loss.¹ It is proper to take into account goods jettisoned to make up a constructive total loss.² Items proper to be included in estimating general average are not so taken into account.³

(5) *Under Valued Policies*.—In computing a constructive total loss under a valued policy the rule in *England*, and that which obtains in some of the courts in the *United States*, is that the actual facts alone are to be considered, as in cases of partial loss. Thus a ship is a constructive total loss in the courts of the *United States* where this rule prevails, if it costs more than one half the actual value of the ship to repair.⁴

In some of the states, on the other hand, the valuation in the policy is conclusive—the damage must exceed one half the valuation therein stated.⁵

Cas. (N. Y.) 153; *Pezant v. National Ins. Co.*, 15 Wend. (N. Y.) 453; *Fiedler v. New York Ins. Co.*, 6 Duer (N. Y.) 282; *Gerow v. British American Assur. Co.*, 16 Can. Supreme Ct. Rep. 524; *Sherlock v. Globe Ins. Co.*, 1 Cinc. L. Bull. (Ohio) 26. But compare *Peabody Ins. Co. v. Packet Co.*, 5 Am. L. Rec. (Ohio) 499.

1. The vessel's proportion of salvage must be taken into account in determining the one half loss necessary for abandonment. *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378.

2. *Judah v. Randal*, 2 Cal. Cas. (N. Y.) 324; *Moses v. Columbian Ins. Co.*, 6 Johns. (N. Y.) 219; *Forbes v. Manufacturers' Ins. Co.*, 1 Gray (Mass.) 371; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 126. But see *Monroe v. British, etc., Marine Ins. Co.*, 52 Fed. Rep. 777, 3 C. C. A. 280, 5 U. S. App. 179.

3. *Greely v. Tremont Ins. Co.*, 9 Cush. (Mass.) 415; *Sewall v. U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 305, 28 Am. Dec. 245; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472; *Ellicott v. Alliance Ins. Co.*, 14 Gray (Mass.) 318; *Fiedler v. New York Ins. Co.*, 6 Duer (N. Y.) 282.

Surveyor's Fees.—Surveyor's fees are not to be included, *Fiedler v. New York Ins. Co.*, 6 Duer (N. Y.) 282; nor expenses incurred to ascertain the extent of loss, *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472.

General Average Charges Due to Insured.—Where a vessel is damaged, and vessel, cargo, and freight all belong to one person, the owner cannot recover for a total loss against the insurer, where the general average contributions due the vessel from freight and cargo would bring the loss below one half. *Pezant v. National Ins. Co.*, 15 Wend. (N. Y.) 453.

The reason given is that a contrary rule would lead to a multiplicity of suits, but this evil would not result where the owners of vessel, cargo, and freight were different persons, and the insured entitled to contribution need not diminish his loss by the general average due to him. *Pezant v. National Ins.*

Co., 15 Wend. (N. Y.) 453; *Maggrath v. Church*, 1 Cal. (N. Y.) 215, 2 Am. Dec. 173; *Forbes v. Manufacturers' Ins. Co.*, 1 Gray (Mass.) 371. See also *Dickenson v. Jardine*, L. R. 3 C. P. 639; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 126; *Potter v. Providence Washington Ins. Co.*, 4 Mason (U. S.) 298. But it has been held that in any case the insured must deduct the general average due to him in making up the fifty per cent loss. *Lapsley v. Pleasants*, 4 Binn. (Pa.) 502.

4. In *Irving v. Manning*, 6 C. B. 391, it was held that the question of loss, whether total or not, is to be determined as if there were no policy at all; that the nature of the loss being thus determined, the *quantum* of compensation is then to be fixed by the valuation in the policy. This case was erroneously cited to the opposite doctrine in *Murray v. Great Western Ins. Co.*, 72 Hun (N. Y.) 282. See also *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Peabody Ins. Co. v. Packet Co.*, 5 Am. L. Rec. (Ohio) 499.

Valued Policy on Freight.—The actual freight and not the valuation in the policy is decisive. *Boardman v. Boston Marine Ins. Co.*, 146 Mass. 442. See also *Dumas v. U. S. Ins. Co.*, 12 S. & R. (Pa.) 437.

5. *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.) 279; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472; *Allen v. Commercial Ins. Co.*, 1 Gray (Mass.) 154; *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 217, 4 Am. Rep. 664; *Murray v. Great Western Ins. Co.*, 72 Hun (N. Y.) 282; *Portsmouth Ins. Co. v. Brazee*, 16 Ohio, 82.

This rule, said Holmes, J., in *Boardman v. Boston Marine Ins. Co.*, 146 Mass. 442, should not be extended, in view of the state of decisions elsewhere, and is not to be applied to valued policies on freight.

The valuation of a ship in the policy prevails over the valuation made by order of a prize court in determining constructive total loss in case of capture. *Loving v. Mercantile Marine Ins. Co.*, 12 Pick. (Mass.) 348.

Under a valued policy on freight for successive voyages the valuation is distributive, and the earnings on one voyage are not to be offset against the loss happening on another, unless circumstances show that the valuation is applicable to the aggregate amount of successive freights.¹

IV. RIGHT OF ABANDONMENT—1. Election to Abandon.—The insured is never obliged to abandon; he may always elect to retain the property and recover for a partial loss.² But if he wishes to claim for a total loss, he must abandon if the loss is merely constructively total.³

2. Limitations of the Right—*a.* DUTY OF INSURED TO REPAIR OR TRANSSHIP.—The assured impliedly warrants that he will guard with reasonable diligence against the risks covered by the policy, so that a loss shall not happen through his own default or negligence.⁴ It is the duty of the insured to repair, if it be possible; or, if this is impossible, to transship by another vessel.⁵ It results that a partial loss cannot be made total by the neglect of the master to repair or transship, or by an unjustifiable sale on his part.⁶

The rule that the valuation is decisive may be fixed by the policy. *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148; *Copeland v. Phoenix Ins. Co.*, 1 Woolw. (U. S.) 278.

Premium.—Where the premium is made a part of the amount insured, the loss must exceed one half the whole valuation, including premium to authorize abandonment. *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 472.

1. Under a policy of insurance on freight from Boston to San Francisco, and thence to port or ports in the East Indies and to a port of discharge in the United States, with liberty to return with a cargo of guano from the Chincha Islands instead of the East Indies, freight earned on the outward voyage is not to be deducted from the valuation in the policy in computing a constructive total loss of freight on the passage from the Chincha Islands home. *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443.

2. *Pitman v. Universal Marine Ins. Co.*, 45 L. T., N. S. 46; *Murray v. Pennsylvania Ins. Co.*, 2 Wash. (U. S.) 186; *Marean v. U. S. Ins. Co.*, 3 Wash. (U. S.) 256; *Rugely v. Sun Ins. Co.*, 7 La. Ann. 279, 56 Am. Dec. 603; *Barney v. Maryland Ins. Co.*, 5 Har. & J. (Md.) 139; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; *Earl v. Shaw*, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; *Sale v. Sun Mut. Ins. Co.*, 3 Robt. (N. Y.) 602; *Suydam v. Marine Ins. Co.*, 2 Johns. (N. Y.) 138; *Watson v. North America Ins. Co.*, 4 Dall. (Pa.) 283.

Although, when the loss is constructively total, the insured elects to treat it as partial, yet he may recover for a total loss if a change of facts makes the loss absolutely total. *Stringer v. English, etc., Marine Ins. Co.*, L. R. 4 Q. B. 676, L. R. 5 Q. B. 599. Compare *Kaltenbach v. Mackenzie*, 3 C. P. Div. 467.

3. *Roux v. Salvador*, 3 Bing. N. Cas. 266, 32 E. C. L. 110; *Kaltenbach v. Mackenzie*, 3 C. P. Div. 467; *Martin v. Crockatt*, 14 East 446; *Fleming v. Smith*, 1 H. L. Cas. 513; *Bell v. Nixon*, Holt 423; *New Orleans Ins. Assoc. Co. v. Piaggio*, 16 Wall. (U. S.) 378; *Town-*

send v. Phillips, 2 Root (Conn.) 400; *Gomila v. Hibernia Ins. Co.*, 40 La. Ann. 553; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; *Taber v. China Mut. Ins. Co.*, 131 Mass. 239; *Thomas v. Rockland Ins. Co.*, 45 Me. 116; *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 246; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50; *American Ins. Co. v. Francia*, 9 Pa. St. 390; *Leslie v. Taylor*, 1 R. & C. (Nova Scot.) 352.

If the insured makes an abandonment, which is invalid, he may still recover for an actual total loss. *Fuller v. Kennebec Mut. Ins. Co.*, 31 Me. 325; *King v. Western Assur. Co.*, 7 U. C. C. P. 300.

On a policy of reinsurance no notice of abandonment is necessary. *Uzielli v. Boston Mar. Ins. Co.*, 15 Q. D. Div. 11.

Where the insurer makes a claim upon the underwriter for an absolute total loss, and the latter refuses to pay unconditionally, the right to an abandonment is waived. *Sherlock v. Globe Ins. Co.*, 1 Cinc. Super. Ct. Rep. (Ohio) 193.

In Whom the Right to Abandon is Vested.—As to who has the right to abandon, see *infra*, this title, *Who may Give Notice*.

4. *Smith Merc. Law* (Pomeroy), § 459. See the title MARINE INSURANCE.

5. *Benson v. Chapman*, 2 H. L. Cas. 696; *King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300; *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45; *Center v. American Ins. Co.*, 7 Cow. (N. Y.) 564; *Schieffelin v. New York Ins. Co.*, 9 Johns. (N. Y.) 21; *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270; *Kinsman v. New York Mut. Ins. Co.*, 5 Bosw. (N. Y.) 460; *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 246; *Clark v. Massachusetts F., etc., Ins. Co.*, 2 Pick. (Mass.) 104; *Bryant v. Commonwealth Ins. Co.*, 6 Pick. (Mass.) 131. See the titles MASTERS OF VESSELS; SHIPS AND SHIPPING; CARRIERS OF GOODS.

When the insured seeks to recover on the ground of loss of voyage, he must, in general, show that another vessel could not be procured. *Schieffelin v. New York Ins. Co.*, 9 Johns. (N. Y.) 21.

6. **Loss not Directly Due to Negligence.**—The insurer is not liable, in general, where the ground of abandonment, though real, was the

b. PERIL WITHIN POLICY.—When a total loss is claimed it must appear that it was caused directly by one of the perils within the policy.¹

result of the negligence of the insured. But such want of diligence does not discharge the insurer from any other risk or loss covered by the policy, and not caused or increased by the defect resulting from the negligence. *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287.

And under the rule *causa proxima non remota spectatur*, if the direct cause of loss is a risk covered by the policy, it does not bar recovery that the loss was occasioned remotely by the negligence of the insured's servants. *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 270; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67; *Richelieu v. Boston Marine Ins. Co.*, 136 U. S. 408; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Copeland v. New England Marine Ins. Co.*, 2 Met. (Mass.) 432; *Hagar v. New England Mut. Marine Ins. Co.*, 59 Me. 460; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Hume v. Providence Washington Ins. Co.*, 23 S. Car. 198.

Voluntary Surrender of Cargo, Free of Freight.

—Under a contract for the insurance of freight, the owners or master of the vessel cannot voluntarily surrender or abandon the cargo to the shipper or underwriter, free of freight, upon the occurrence of any injury short of a technical loss, or inability to deliver the goods *in specie* at the port of destination. If the owner demands the goods at the port of detention, the master should make payment of full freight a condition to the delivery. Having surrendered them without payment, he cannot hold the insurer liable. *Allen v. Mercantile Mut. Ins. Co.*, 44 N. Y. 437, 4 Am. Rep. 700. See also *Hughes v. Sun Mut. Ins. Co.*, 100 N. Y. 58.

Withholding Means of Repair.—An owner cannot convert a partial loss into a total loss by withholding the means of repair, where the cost would not exceed fifty per cent of the value. *Dunning v. Merchants' Mut., etc., Ins. Co.*, 57 Me. 108; *Greely v. Tremont Ins. Co.*, 9 Cush. (Mass.) 415; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Hall v. Ocean Ins. Co.*, 21 Pick. (Mass.) 482; *Hundhausen v. United States F., etc., Ins. Co. (Tenn.)*, 17 S. W. Rep. 152; *Leslie v. Taylor*, 1 R. & C. (Nova Scot.) 352.

If there are no reasonable means of repairing at the place where the vessel is injured, and she can be safely navigated to a port where repairs may be made for less than half her value, the master must proceed to such port. *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer (N. Y.) 343; *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45. But compare *Saurez v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 482; *Saltus v. Ocean Ins. Co.*, 12 Johns. (N. Y.) 107, 7 Am. Dec. 290.

Allowing Unnecessary Sale.—If the owners allow a sale to be made when it is in their power to prevent it, the loss is not total.

Thornely v. Hebson, 2 B. & A. 513; *Stringer v. English, etc., Marine Ins. Co.*, L. R. 5 Q. B. 607, L. R. 4 Q. B. 676; *Kemp v. Halliday*, 6 B. & S. 723; *Monroe v. British, etc., Marine Ins. Co.*, 52 Fed. Rep. 777, 3 C. C. A. 280, 5 U. S. App. 179.

Neglect to Tranship.—If the vessel is so damaged that the owner is entitled to abandon, he cannot be required to repair in order to carry on the cargo; but he can be required to ship by another vessel. *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45. See also *Dunning v. Merchants' Mut., etc., Ins. Co.*, 57 Me. 108.

Insurers are not liable for total loss on goods where the master might have transhipped for less than fifty per cent of their value, but instead of doing so sold them. *Bryant v. Com. Ins. Co.*, 13 Pick. (Mass.) 543.

Damage which might be repaired in twelve days, in a safe harbor, does not justify transshipment; and such transshipment discharges the insurers. *Salisbury v. Marine Ins. Co.*, 23 Mo. 553, 66 Am. Dec. 687.

River Craft.—But it has been held that the duty to repair before transshipment does not apply so strictly, in the case of river craft, as in that of vessels navigating the high seas, since river voyages are short; and shippers have the right to expect and require that in the case of detention from accident their goods shall not be detained to await lengthy repairs, but shall be forwarded promptly to their destination. *Roe v. Crescent Ins. Co.*, 11 La. Ann. 408. See also *Blanks v. Hibernia Ins. Co.*, 36 La. Ann. 599.

1. *Smith v. Universal Ins. Co.*, 6 Wheat. (U. S.) 176; *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408; *Roget v. Thurston*, 2 Johns. Cas. (N. Y.) 248; *Speyer v. New York Ins. Co.*, 3 Johns. (N. Y.) 88; *Western Assur. Co. v. Scanlan*, 13 Can. Supreme Ct. Rep. 207. See the title MARINE INSURANCE.

Illustrations.—Where loss by capture was excepted by the policy from the risks assumed, and the ship, by perils of the sea, was damaged to more than half its value, but before abandonment was captured and sold by a foreign government, it was held that the antecedent partial loss merged in the subsequent capture, by which the subject-matter was wholly lost, and that there could be no recovery. *Rice v. Homer*, 12 Mass. 230.

Where a vessel was arrested by a belligerent power, and the master illegally rescued it, and the ship was recaptured and condemned as prize, the loss happened from a cause not within the policy, and there could not be a recovery. *Robinson v. Jones*, 8 Mass. 536, 5 Am. Dec. 114. Compare *M'Lellan v. Maine F., etc., Ins. Co.*, 12 Mass. 246.

The insertion of the words "not liable for any repairs made in California," in a policy of insurance on a vessel, does not prevent the assured from making an abandonment and claiming a constructive total loss if the vessel is stranded in California and cannot be thoroughly repaired there at a cost less than

c. **DEPENDS ON STATE OF FACTS.**—The right to abandon depends on the facts as to the loss existing at the time of the abandonment, not on the information of the person abandoning.¹ In the *United States*, the right to abandon, once vested, can never divest by reason of a subsequent change of circumstances.² In *England* it is otherwise, and unless the facts justifying abandonment continue up to suit brought, the abandonment is futile.³

d. **RIGHT OF INSURER TO REPAIR.**—The right of the underwriter to repair, against the will of the owner, and thus defeat the right of the latter to abandon, is recognized in some of the states.⁴

three fourths of her value, if the expense of such temporary repairs there as will make her seaworthy to be navigated to *New York*, the nearest port at which full repairs can be made, with the expenses of such navigation, and of such full repairs there, will exceed three fourths of her value. *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22.

Successive Perils.—The loss is a valid cause of abandonment, though caused by a succession of perils and though there is no evidence that anyone peril caused a loss justifying abandonment. *Taber v. China Mut. Ins. Co.*, 131 Mass. 239; *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222; 3 Wend. (N. Y.) 658, 20 Am. Dec. 763. See also *infra*, this title, *When Abandonment Justified; General Principles*.

1. *Rhineland v. Pennsylvania Ins. Co.*, 4 Cranch (U. S.) 29; *Marshall v. Delaware Ins. Co.*, 4 Cranch (U. S.) 202, 2 Wash. (U. S.) 54; *Oliver v. Union Ins. Co.*, 3 Wheat. (U. S.) 183; *Church v. Marine Ins. Co.*, 1 Mason (U. S.) 341; *Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235; *Marks v. Nashville Marine Ins. Co.*, 6 La. Ann. 127; *Fuller v. Kennebec Mut. Ins. Co.*, 31 Me. 325; *Dorr v. Union Ins. Co.*, 8 Mass. 502; *Robinson v. Jones*, 8 Mass. 536, 5 Am. Dec. 114; *M'Lellan v. Maine F., etc., Ins. Co.*, 12 Mass. 246; *Snow v. Union Mut. Marine Ins. Co.*, 119 Mass. 592, 20 Am. Rep. 349; *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222; *Child v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 76; *Radcliff v. Coster, Hoffm. Ch.* (N. Y.) 98; *Adams v. Delaware Ins. Co.*, 3 Binn. (Pa.) 287; *Parker v. Towers*, 2 Browne App. (Pa.) 80. See the English cases cited in note 3 to this section, below.

Where the loss has ceased to be total at the time of abandonment, the abandonment is invalid. *Humphreys v. Union Ins. Co.*, 3 Mason (U. S.) 429; *Radcliff v. Coster, Hoffm. Ch.* (N. Y.) 99; *Murray v. Harmony F. & M. Ins. Co.*, 58 Barb. (N. Y.) 9; *Depau v. Ocean Ins. Co.*, 5 Cow. (N. Y.) 63, 15 Am. Dec. 431; *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222. See, for cases of recapture, restoration after capture, etc., *infra*, this title, *Capture, Embargo, and Blockade*.

The rule stated in the text was doubted or denied in some early American cases; and it was held that the information of the parties was controlling. *Dorr v. New England Marine Ins. Co.*, 4 Mass. 221; *Mumford v. Church*, 1 Johns. Cas. (N. Y.) 147; *Murray v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 263; *Slocum v. United Ins. Co.*, 1 Johns. Cas. (N. Y.) 151; *Livingston v. Hastie*, 3 Johns. Cas. (N. Y.) 293.

As to suspending the right of abandonment

by agreement, see *infra*, this title, *Time of Notice*.

2. *Wallace v. Thames Ins. Co.*, 22 Fed. Rep. 66; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Dutilh v. Gatloff*, 4 Dall. (U. S.) 446; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67. *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *Fuller v. Kennebec Mut. Ins. Co.*, 31 Me. 325; *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 230; *Munson v. N. E. Marine Ins. Co.*, 4 Mass. 88; *Lee v. Boardman*, 3 Mass. 238, 3 Am. Dec. 134; *Wood v. Lincoln, etc., Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163; *Coolidge v. Gloucester Marine Ins. Co.*, 15 Mass. 341; *Bordes v. Hallett*, 1 Cai. (N. Y.) 444; *Hallett v. Peyton*, 1 Cai. (N. Y.) 28; *Dicky v. American Ins. Co.*, 3 Wend. (N. Y.) 658; *Marshall v. Delaware Ins. Co.*, 3 Wend. (N. Y.) 202, 4 Cranch (U. S.) 202.

3. *Hamilton v. Mendes*, 2 Burr. 1198; *Bainbridge v. Neilson*, 10 East 329.

In *Hamilton v. Mendes*, 2 Burr. 1198, Lord Mansfield decided that abandonment was not effectual unless the facts constituting total loss existed at the time of abandonment; but he expressly left as an open question what would be the effect of recovery between the time of the abandonment and action brought. In *Bainbridge v. Neilson*, 10 East 329, the latter question was not necessarily involved, but the opinion of the judges shows that in their view the loss must continue total till action brought.

In *McCarthy v. Abel*, 5 East 388, 7 Rev. Rep. 711, it was held that an abandonment well made at the time may be divested by subsequent events. See also *Patterson v. Ritchie*, 4 M. & S. 393; *Wilson v. Forster*, 6 Taunt. 25; *Brotherston v. Barber*, 5 M. & S. 418; *Naylor v. Taylor*, 9 B. & C. 718; *Taylor v. Smith*, 1 Han. (New Bruns.) 120; *Providence Washington Ins. Co. v. Corbett*, 9 Can. Supreme Ct. Rep. 256; *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27. As to the Scotch rule see *Shepherd v. Henderson*, 7 App. Cas. 49. But see *Holdsworth v. Wise*, 7 B. & C. 794, 14 E. C. L. 129; *Parry v. Aberdeen*, 9 B. & C. 411, 17 E. C. L. 408. These cases hold that the subsequent recovery of the vessel did not convert that which had become a total loss, by reason of abandonment, into a partial loss.

4. **Right of Underwriter to Repair.**—*Hart v. Delaware Ins. Co.*, 2 Wash. (U. S.) 346; *Wood v. Lincoln, etc., Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Reynolds v. Ocean Ins. Co.*, 1 Met. (Mass.) 160; *Com. Ins. Co. v. Chase*, 20 Pick. (Mass.) 142; *Mar-*

c. ABANDONMENT MUST BE ENTIRE.—The abandonment must be of the whole interest of the insured in the property abandoned, so far as that interest is covered by the policy.¹

3. When Abandonment is Justified—*a.* GENERAL PRINCIPLES.—To entitle the

mand *v.* Melledge, 123 Mass. 173; Richelieu, etc., *Nav. Co. v. Thames, etc.*, Ins. Co., 72 Mich. 571; Copelin *v.* Phoenix Ins. Co., 46 Mo. 211, 2 Am. Rep. 504; Ritchie *v.* U. S. Ins. Co., 5 S. & R. (Pa.) 509.

Dicta to the same effect are to be found in King *v.* Middletown Ins. Co., 1 Conn. 201, and King *v.* Hartford Ins. Co., 1 Conn. 425.

In Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163, the ship stranded, and the owner offered to abandon; the underwriters refused the offer and undertook to recover the vessel, succeeded in the attempt, carried her to the termination of the voyage, repaired her, and offered her to the owner. As there was no proof as to what degree of injury was sustained by the stranding, it was held that there was only a partial loss. Parsons, C.J., said: "Where the stranding is under such circumstances that the attempt to recover and repair the ship in a reasonable time for the prosecution of the voyage may be hazardous, but not hopeless—if the underwriter will engage to pay all the expenses, whatever may be the event, the owner cannot abandon until he has used such reasonable endeavors to recover his ship, and has eventually failed. And *a fortiori*, if the underwriter will himself undertake, at his own expense, for the owner, the recovery of his ship, and shall succeed, and offer to restore her to him, so that he may seasonably prosecute his voyage, the owner cannot abandon, for neither the ship nor the voyage is lost."

In Peele *v.* Merchants' Ins. Co., 3 Mason (U. S.) 27, this right of the insurer to repair is learnedly and exhaustively discussed by Judge Story. After the ship insured had been cast on rocks and was in a desperate situation, the owners abandoned. There was no acceptance or refusal of the abandonment, but the underwriters took exclusive possession of the ship, and by extraordinary good fortune and good weather got her to Portsmouth, repaired her in three months, and offered to return her to the insured. The latter refused to accept her, and never authorized the repairs in any manner. It was held that the underwriters had no right to take possession of the ship, either to remove or repair her, without the owners' consent, and that their acts amounted in law to an acceptance of the abandonment. Judge Story commented upon and disapproved the broad doctrines of Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Hart *v.* Delaware Ins. Co., 2 Wash. (U. S.) 346; and Ritchie *v.* U. S. Ins. Co., 5 S. & R. (Pa.) 509. He said: "If the meaning [of Parsons, C.J., as quoted *supra*] be that in a doubtful case, where the expense of repairs must be great, though not with certainty one half; or where, by the stranding, and delay consequent thereon, the voyage may be, but not in all probability must be, lost; if the underwriters offer to bear

all the expenses of the experiment, the owner cannot abandon, there seems much reason for admitting such an offer as a material ingredient in considering whether the owner has a right to abandon. * * * But the offer itself has never been relied on to defeat an indisputably vested right of abandonment."

In Richelieu, etc., *Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, the Supreme Court of the *United States* touches on, but expresses no opinion as to, the insurer's right to repair; but if the insurer makes no offer to repair until after abandonment, that court has held that it has no effect on the abandonment. *Columbian Ins. Co. v. Ashby*, 4 Pet. (U. S.) 145. See also *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *Marine Dock, etc.*, Ins. Co. *v.* Goodman, 4 Am. L. Reg. 481; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108.

In *Younger v. Gloucester Marine Ins. Co.*, Sprague (U. S.) 236, Sprague, D.J., says: "This doctrine is peculiar to *Massachusetts*. I believe it is not to be found anywhere else, either in the decisions of the federal courts or in the courts of any other state, or in the law of *England*, or of the continent of *Europe*." The doctrine has met with a wider approval since this decision. For other cases throwing light on this question, see *infra*, this title, *Acceptance*.

The whole question depends largely upon the wording and construction of the "sue and labor" clause of the policy. *Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235; *Northwestern Transp. Co. v. Thames, etc., Ins. Co.*, 59 Mich. 214; *Schuyler v. Phoenix Ins. Co.*, 56 Hun (N. Y.) 493.

In *Massachusetts* the clause in question specifies the right. See cases cited, *supra*, in the notes to this paragraph.

The Restoration must be in a Reasonable Time.—*Copelin v. Phoenix Ins. Co.*, 46 Mo. 211, 2 Am. Rep. 504.

In *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286, it was held that, unless the insurer, after taking possession of the vessel to repair, do so, and restore her in a reasonable time, he forfeits his right to return her. In announcing the general principle in the case, Parker, C.J., said that the insurer might restore the vessel if he had repaired her at less than half her value. This seems to be the received form of the rule. *Marmand v. Melledge*, 123 Mass. 173.

Repairs must be Sufficient.—Unless the repairs are sufficient the owner need not accept the offer to return, *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Copelin v. Phoenix Ins. Co.*, 46 Mo. 211, 2 Am. Rep. 504; but he must object to the sufficiency of the repairs. *Marmand v. Melledge*, 123 Mass. 173.

¹ *Arnould Marine Ins.* (6th ed.) 954. See *infra*, this title, *Total Loss of Part of Cargo*; *Effect of Abandonment*; and *Notice of Abandonment*.

insured to abandon, there must be a total loss, either real or constructive, at some period of the voyage.¹ This loss must happen before the termination of the risk.² A loss merely partial cannot be made total by an offer of abandonment;³ but when a person insures only part of his interest he may abandon that part only.⁴ Abandonment is not favored.⁵

b. PARTICULAR CASES—(1) Capture, Embargo, and Blockade—(a) In General.—Capture, embargo, and blockade may operate as an actual or constructive total loss, according to the course of subsequent events.⁶ Each is for the time a

1 *Cazalet v. St. Barbe*, 1 T. R. 187; *Holds-worth v. Wise*, 7 B. & C. 794, 14 E. C. L. 129; *Wood v. Lincoln*, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; *Hanan v. Louisiana Mut. Ins. Co.*, 15 La. Ann. 201; *Copelin v. Phoenix Ins. Co.*, 46 Mo. 211, 2 Am. Rep. 504. See *supra*, this title, *Election to Abandon*.

Even when loss is actual, it is probable that abandonment is usual. *Callender v. North America Ins. Co.*, 5 Binn. (Pa.) 525.

2. Thus if the loss happens after the vessel has been twenty-four hours in port, where the policy is limited to the voyage and the ship's being moored twenty-four hours in safety, the insurer is not liable. *Lockyer v. Offley*, 1 T. R. 252. See also *Allen v. Commercial Ins. Co.*, 1 Gray (Mass.) 154; *Chadsey v. Guion*, 97 N. Y. 333; *Parage v. Dale*, 3 Johns. Cas. (N. Y.) 156; *Pezant v. National Ins. Co.*, 15 Wend. (N. Y.) 453; *Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. Ann. 305; *Ferguson v. Phoenix Ins. Co.*, 5 Binn. (Pa.) 544.

If, however, the ship receives her death-wound during the voyage, and, greatly damaged, and with only a part of her cargo, reaches the port of destination, the loss is total. *Stagg v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 34; *Ralston v. Union Ins. Co.*, 4 Binn. (Pa.) 386; *Peters v. Phoenix Ins. Co.*, 3 S. & R. (Pa.) 25; *Dorr v. New England Ins. Co.*, 11 Mass. 1; *Shawe v. Folton*, 2 East 109, 6 Rev. Rep. 394.

After any considerable portion of the goods, though less than one-half, has arrived at the port of destination and been landed in a perfect state, the assured cannot abandon and recover for the total loss. *Forbes v. Manufacturers' Ins. Co.*, 1 Gray (Mass.) 371.

Lien for Repairs.—But though damage to an amount exceeding fifty per cent has been sustained, if repairs are actually made, and the vessel completes her voyage and arrives in safety, the right to abandon is gone, and the lien upon the vessel for repairs does not continue the loss total. *Humphreys v. Union Ins. Co.*, 3 Mason (U. S.) 429.

But the lien is held, by *Savage, C. J.*, in *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 232, to continue the loss, so as to keep the right of abandonment in existence. The case was decided, however, upon a different question.

In *Allen v. Commercial Ins. Co.*, 1 Gray (Mass.) 154, it is doubted whether the insured could make a valid abandonment before discharging such a lien.

3. *Seton v. Delaware Ins. Co.*, 2 Wash. (U. S.) 175; *Hicks v. McGehee*, 39 Ark. 264.

4. *Coolidge v. Gloucester Marine Ins. Co.*, 25 Mass. 341.

5. *Lord Mansfield*, in *Goss v. Withers*, 2 Burr. 683; *Lord Ellenborough*, in *Bainbridge v. Neilson*, 10 East 329; *Merchants' S. S. Co. v. Commercial Mut. Ins. Co.*, 51 N. Y. Super. Ct. 444; *Sewall v. U. S. Ins. Co.*, 11 Pick. (Mass.) 95.

6. *Capture will Authorize the Assured to Abandon.*—*England.*—*Goss v. Withers*, 2 Burr. 683; *Tyson v. Gurney*, 3 T. R. 477; *Cologan v. London Assur. Co.*, 5 M. & S. 456.

United States Courts.—*Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357; *Rhineland v. Pennsylvania Ins. Co.*, 4 Cranch (U. S.) 29; *Russell v. Union Ins. Co.*, 4 Dall. (U. S.) 421; *Queen v. Union Ins. Co.*, 2 Wash. (U. S.) 331.

Maryland.—*Barney v. Maryland Ins. Co.*, 5 Har. & J. (Md.) 139. Here it was held that where there has been seizure and appropriation by a foreign government, without the sentence of a court of competent jurisdiction, there must be an abandonment to warrant a recovery for total loss.

Massachusetts.—*Oliver v. Newburyport Ins. Co.*, 3 Mass. 37; *Lee v. Boardman*, 3 Mass. 238, 3 Am. Dec. 134; *Dorr v. New England Marine Ins. Co.*, 4 Mass. 221; *Smith v. Touro*, 14 Mass. 112; *Lovering v. Mercantile Marine Ins. Co.*, 12 Pick. (Mass.) 348.

New York.—*Gouverneur v. United Ins. Co.*, 1 Cai. (N. Y.) 592; *Smith v. Steinbach*, 2 Cai. Cas. (N. Y.) 158; *Murray v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 263; *Post v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 77; *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514; *Duval v. Commercial Ins. Co.*, 10 Johns. (N. Y.) 278; *Gracie v. New York Ins. Co.*, 13 Johns. (N. Y.) 161; *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; *Watson v. Marine Ins. Co.*, 7 Johns. (N. Y.) 57; *Schieffelin v. New York Ins. Co.*, 9 Johns. (N. Y.) 21.

Pennsylvania.—*Parker v. Towers*, 2 Browne App. (Pa.) 80.

South Carolina.—*Mey v. Tunno*, 2 Bay (S. Car.) 307.

Seizure by Pirates.—See *Gilfert v. Hallet*, 2 Johns. Cas. (N. Y.) 296.

Capture by Belligerent.—When a vessel has been captured by a belligerent and condemned as a lawful prize, and the sentence of condemnation confirmed by the highest tribunal of the belligerent nation, the insured may recover without an abandonment. *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237.

Embargo.—*Delano v. Bedford Marine Ins. Co.*, 10 Mass. 347, 6 Am. Dec. 132; *M'Bride v. Marine Ins. Co.*, 5 Johns. (N. Y.) 299; *Walden v. Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310, 4 Am. Dec. 359; *Ogden v. New York F. Ins.*

total loss, and, as the duration is uncertain, justifies abandonment;¹ but if the detention ends by recapture, or the like, before the abandonment is made, the right to abandon is gone.²

(b) **Apprehension of Loss.**—Apprehension of peril is no ground for abandonment.³

Co., 10 Johns. (N. Y.) 177; *Odlin v. Pennsylvania Ins. Co.*, 2 Wash. (U. S.) 312; *Rotch v. Edie*, 6 T. R. 415.

Blockade.—Blockade is good ground for abandonment where a vessel attempting to come out is boarded and turned back, or if, in attempting to enter the blockaded port, she is turned back. In either case the force is directly applied. *Olivera v. U. S. Ins. Co.*, 3 Wheat. (U. S.) 183; *Craig v. United Ins. Co.*, 6 Johns. (N. Y.) 226, 5 Am. Dec. 222; *Symonds v. Union Ins. Co.*, 4 Dall. (U. S.) 417; *Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 382; *Thompson v. Read*, 12 S. & R. (Pa.) 440. But compare *Richardson v. Maine F., etc., Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92; *Tucker v. United Marine, etc., Ins. Co.*, 12 Mass. 288.

But warning and notification of a blockade do not justify abandonment. *King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300.

In *Schmidt v. United Ins. Co.*, 1 Johns. (N. Y.) 249, 3 Am. Dec. 319, a vessel was notified that the port of destination was blockaded, and thereupon proceeded to the port nearest thereto. It was held that an abandonment was justified. This case has been criticised as countenancing abandonment *quia timet*, because, *non constitit*, had the vessel proceeded she would have found the blockade raised. See *King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300.

1. *King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300; *Marshall v. Delaware Ins. Co.*, 4 Cranch (U. S.) 202. See *supra*, this title, *Right of Abandonment Depends on State of Facts*.

Special Provisions in Policy.—The right to abandon for capture may be suspended, by reason of the provision in the policy, until condemnation, or until the expiration of a certain time after the capture or detention, and due notice thereof to the underwriters. *Dorr v. Union Ins. Co.*, 8 Mass. 502; *Delano v. Bedford Marine Ins. Co.*, 10 Mass. 347, 6 Am. Dec. 132; *Law v. Goddard*, 12 Mass. 112.

2. The redelivery of a captured vessel upon bail, by order of the prize court, is no determination of the hostile detention. *Lovering v. Mercantile Marine Ins. Co.*, 12 Pick. (Mass.) 348; *Mey v. Tunno*, 2 Bay (S. Car.) 307. See also *M'Iver v. Henderson*, 4 M. & S. 576, 16 Rev. Rep. 550.

But if the abandonment is valid when made, a subsequent restoration does not defeat the abandonment. *Lovering v. Mercantile Marine Ins. Co.*, 12 Pick. (Mass.) 348; *Lee v. Boardman*, 3 Mass. 238, 3 Am. Dec. 134; *Munson v. New England Marine Ins. Co.*, 4 Mass. 88; *Smith v. Robertson*, 2 Dowl. 474. See also *Hudson v. Harrison*, 3 B. & B. 97.

Where a vessel is prevented from completing her voyage by a blockade, and the cargo is delivered by consent at another port near the port of discharge, there can be no abandonment, the whole purpose of the voyage having been answered by the previous

delivery of the cargo. *Shapley v. Tappan*, 9 Mass. 20.

Where, before abandonment for capture, the vessel is illegally rescued by the master, and is afterwards retaken and condemned for the rescue, the insured is not entitled to abandon. *Robinson v. Jones*, 8 Mass. 536, 5 Am. Dec. 114. But it is otherwise if the rescue is legal and the vessel is retaken and lost. *M'Lellan v. Maine F., etc., Ins. Co.*, 12 Mass. 246.

Restoration, after a capture, takes away the insured's right to abandon, though unknown to the insured. *Hallett v. Peyton*, 1 Cai. Cas. (N. Y.) 28; *Church v. Bedient*, 1 Cai. Cas. (N. Y.) 21; *Parage v. Dale*, 3 Johns. Cas. (N. Y.) 156; *DePeau v. Russel*, 1 Brev. (S. Car.) 441, 2 Am. Dec. 676. See also *Muir v. United Ins. Co.*, 1 Cai. (N. Y.) 49. The same is true in case of peace after blockade. *Livermore v. Newburyport Marine Ins. Co.*, 1 Mass. 264. Compare *Mumford v. Church*, 1 Johns. Cas. (N. Y.) 147; *Murray v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 263.

It has been held that the technical total loss from capture ceases with the decree of restitution, although the decree may not have been executed when the offer to abandon was made. *Marshall v. Delaware Ins. Co.*, 4 Cranch (U. S.) 202. *Contra*, *Dutilh v. Gatliff*, 4 Dall. (U. S.) 446.

If there is an illegal seizure, and the insured regains possession by purchase, the title is not changed, and he cannot recover for a total loss. *Wilson v. Forster*, 6 Taunt. 25, 1 Marsh. 425, 16 Rev. Rep. 560.

If recapture be made with a view to salvage, and the whole loss is not fifty per cent, and there is only a temporary interruption of the voyage, the insured cannot abandon. *Queen v. Union Ins. Co.*, 2 Wash. (U. S.) 331.

In cases of recapture the particular circumstances of the case determine whether the loss is partial or total. *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357.

Where the loss resulting from the capture is due to the master's own illegal act, there is no right to abandon. *Robinson v. Jones*, 8 Mass. 536, 5 Am. Dec. 114.

3. *Lubbock v. Rowcroft*, 5 Esp. 50; *King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300; *Smith v. Universal Ins. Co.*, 6 Wheat. (U. S.) 176; *Craig v. United Ins. Co.*, 6 Johns. (N. Y.) 226. See also note, 5 Am. Dec. 222; *Corp v. United Ins. Co.*, 8 Johns. (N. Y.) 277; *Lee v. Gray*, 7 Mass. 349; *Wheatland v. Gray*, 6 Mass. 124; *Cook v. Essex F., etc., Ins. Co.*, 6 Mass. 122; *Brewer v. Union Ins. Co.*, 12 Mass. 170, 7 Am. Dec. 53; *Richardson v. Maine F., etc., Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92; *Amory v. Jones*, 6 Mass. 318; *Tucker v. United M. & F. Ins. Co.*, 12 Mass. 288.

But a Just Fear, Amounting to Vis Major, as the fear of being made slave or prisoner, or of perishing in case of extremity, or when

(2) *Loss and Retardation of Voyage.*—If the insurance be on a ship for a voyage the undertaking is that the voyage shall not be destroyed by the fault of the ship, by reason of the happening to her of any of the perils insured against.¹ Consequently, the loss of the cargo for the voyage is not a cause for an abandonment;² and if the ship is damaged, the question under such a policy is her seaworthiness with respect to the voyage insured.³ Where there is an insurance on goods for a voyage, if, by reason of perils insured against, the cargo is permanently prevented from arriving at the port of destination, there is a total loss.⁴ And the loss of

defense becomes impossible, has been held sufficient ground for abandonment. *Mesonier v. Union Ins. Co.*, 1 Nott & M. (S. Car.) 155. And see *Savage v. Pleasants*, 5 Binn. (Pa.) 403, 6 Am. Dec. 424. So also where it appears with moral certainty that a law of the country to which the ship is bound applies to the vessel, and that under such law she will be confiscated if she should arrive. *Craig v. United States Ins. Co.*, 6 Johns. (N. Y.) 226, 5 Am. Dec. 222; *Corp. v. United Ins. Co.*, 8 Johns. (N. Y.) 277.

Investure of the Port where the insured vessel is, by an enemy, is a good cause for an abandonment; and such an abandonment is *quia timet*. *Saltus v. United Ins. Co.*, 15 Johns. (N. Y.) 523.

Massachusetts Rule.—The rule seems to be more strict in *Massachusetts*. *Richardson v. Maine F., etc., Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92; *Brewer v. Union Ins. Co.*, 12 Mass. 170, 7 Am. Dec. 53.

1. *Alexander v. Baltimore Ins. Co.*, 4 Cranch (U. S.) 370; *King v. Hartford Ins. Co.*, 1 Conn. 422.

2. *Alexander v. Baltimore Ins. Co.*, 4 Cranch (U. S.) 370; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *King v. Hartford Ins. Co.*, 1 Conn. 422.

It has been declared that the owner may abandon if the voyage is lost, defeated, or broken up. *Hamilton v. Mendez*, 2 Burr. 1198. And see *Cazalet v. St. Barbe*, 1 T. R. 187. In *Alexander v. Baltimore Ins. Co.*, 4 Cranch (U. S.) 370, Chief Justice Marshall examined these and other old English cases, and arrived at the doctrine stated in the text.

In *Snow v. Union Mut. Marine Ins. Co.*, 119 Mass. 592, 20 Am. Rep. 349, the "Helen Snow" was insured for a whaling voyage, and, being jammed fast in the ice of the Arctic Ocean, so that it was impossible to extricate her, she was deserted by her officers and crew. Afterward the ice became loosened, and the vessel was brought out by the master and crew of another vessel and held for salvage; but the master of the "Helen Snow," whose crew had become scattered, was unable to obtain a crew, or to regain possession of the vessel so as to pursue the voyage for which she was insured, and she was brought by the salvors to San Francisco, and before her arrival at that port was abandoned by the owners to the underwriters. It was held that there was a constructive total loss and that the abandonment was good. In delivering the opinion of the court, Gray, C. J., said: "It is true that a loss of the voyage is not necessarily a loss of the ship, within the meaning

of a policy of insurance upon her. But if the ship herself is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she was insured, the right to abandon and to recover for a constructive total loss still remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel."

3. *Abbott v. Broome*, 1 Cai. (N. Y.) 292, 2 Am. Dec. 187. In this case Radcliff, J., said: "The question in such cases is not whether the vessel is to be in a capacity, or in a situation to be repaired, so as to prosecute her voyage with a half or any other portion of her cargo, but whether she is capable of proceeding, or of being refitted to proceed, and carry the whole. A vessel is not seaworthy unless she be in a condition to carry a full cargo." It was held, further, that if the vessel could not carry her cargo, the fact that she could carry a more buoyant one was of no importance. See also the remarks of Swift, C. J., in *King v. Hartford Ins. Co.*, 1 Conn. 427.

Where the ship is so damaged that she has to put back to her starting-point and cannot pursue her voyage, there is a total loss, because the voyage in contemplation is lost. *Manning v. Newnham*, Camp. 624, 12 Rev. Rep. 761; *Fuller v. M'Call*, 1 Yeates (Pa.) 464, 2 Dall. (Pa.) 219, 1 Am. Dec. 312.

4. **Insurance on Cargo for Voyage.**—*Manning v. Newnham*, 2 Camp. 624, 12 Rev. Rep. 761; *Gilfert v. Hallet*, 2 Johns. Cas. (N. Y.) 296.

In a case of insurance on goods for voyage, it was held that if the voyage was broken up by an event over which the assured had no control (a capture) the assured might abandon. *Savage v. Pleasants*, 5 Binn. (Pa.) 403, 6 Am. Dec. 424.

In *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. (U. S.) 220, Story, J., said: "If the vessel during the voyage is injured by the perils of the seas to the extent of half her value, and no other vessel can be procured to carry on the cargo to the port of destination; or if the vessel, though repairable, cannot be repaired within a reasonable time, and before the cargo, being of a perishable nature will be irretrievably destroyed by the delay to repair; in such a case the insured is entitled to abandon, and recover for a total loss."

voyage by necessary sale at an intermediate port justifies an abandonment.¹

But mere retardation of a voyage by a peril insured against is no ground for abandonment.²

(3) *Stranding and Submersion*.—Stranding or submersion may or may not be a total loss, according to the circumstances of the case.³

1. *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383; *Akin v. Mississippi Marine, etc., Ins. Co.*, 4 Martin, N. S. (La.) 661. This may sometimes be an actual total loss. See *infra*, this title, *Sale by Necessity*.

2. *Mere Retardation no Ground for Abandonment*.—Thus, where a ship is not damaged to an extent which permanently disables her to perform the voyage, the mere retardation is no ground for abandonment. *Falkner v. Ritchie*, 2 M. & S. 290, 15 Rev. Rep. 253. And see *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer (N. Y.) 342.

In *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378, the authorities were examined by Story, J., who said: "The mere retardation of the voyage by any of the perils insured against, not amounting to or producing a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss which will authorize an abandonment. A retardation for the purpose of repairing damages from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine."

The Principle Applies also to Freight and Cargo.—The same principle (that retardation is not loss) applies to freight, *Everth v. Smith*, 2 M. & S. 278, 15 Rev. Rep. 246; *Mayo v. Maine F., etc., Ins. Co.*, 4 Mass. 374; *Murray v. Etna Ins. Co.*, 4 Biss. (U. S.) 417; *Jordan v. Warren Ins. Co.*, 1 Story (U. S.) 342; and to cargo, where the detention is caused by damage to the ship which is repairable, *Anderson v. Wallis*, 2 M. & S. 240, 14 Rev. Rep. 642; *Hunt v. Royal Exch. Assur. Co.*, 5 M. & S. 47.

Detention by Admiralty Proceedings.—Detention by admiralty proceedings is no more a cause of abandonment than detention from any other cause. *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378.

3. *Stranding is not Ipso Facto a Total Loss*.—*Church v. Marine Ins. Co.*, 1 Mason (U. S.) 341; *Howland v. Marine Ins. Co.*, 2 Cranch (U. S.) 474; *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *King v. Middletown Ins. Co.*, 1 Conn. 201; *King v. Hartford Ins. Co.*, 1 Conn. 422; *Wood v. Lincoln, etc., Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163; *Sewall U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22; *Ludlow v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 335; *Patrick v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 9; *Allen v. Mercantile Mut. Ins. Co.*, 46 Barb. (N. Y.) 642; *Phoenix Ins. Co. v. McGhee*, 18 Can. Supreme Ct. Rep. 61.

To justify an abandonment in case of stranding, the vessel must be in extreme hazard; that is, her situation must be such that there is imminent danger of her being lost, notwith-

standing all the means that can be applied to get her off, all the means within the power of the crew to use, and the assistance within the power of the master to obtain. *King v. Hartford Ins. Co.*, 1 Conn. 422.

In *Ludlow v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 335, it is held that to justify an abandonment on stranding, the goods must be deteriorated to half their value. But see *supra*, this title, *Imminence of Peril*.

Stranding Followed by Shipwreck.—Stranding may become an absolute total loss if it is followed by shipwreck. *Patrick v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 9.

When a Vessel is Sunk and there is no hope of recovery, the loss is total. *Shawe v. Felton*, 6 R. R. 394, 2 East 109; *Crosby v. New York Mut. Ins. Co.*, 5 Bosw. (N. Y.) 369.

Ship Recovered after Stranding.—If the ship is stranded and in such extreme peril as to justify abandonment, and abandonment is actually made, the fact that the ship was afterward gotten off is immaterial, and does not affect the abandonment, *King v. Middletown Ins. Co.*, 1 Conn. 201; unless where the right of the insurers to refuse the abandonment is recognized, and they do refuse, get the vessel off, and restore her to the insured, *People v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 264, 19 Am. Dec. 286. See *supra*, this title, *Right of Insurer to Repair*.

Submerged Vessel Raised.—In *Sewell v. U. S. Ins. Co.*, 11 Pick. (Mass.) 90, submersion where the vessel was raised after about six weeks, and repaired, was held not to create a total loss. *Shaw, C. J.*, said: "Some authorities say, we are aware, that a submersion *de facto* amounts to a total loss, but we think it would be difficult to maintain this position. For instance, a vessel might sink whilst repairing, and when her masts are out, so as to be wholly out of sight, and yet be under the control of the owner, so that when raised and pumped out she will be as valuable as before. It will be admitted that where a vessel is sunk in the sea it affords strong *prima facie* evidence of total loss, because it would in general preclude all hope of recovering her. We think, therefore, it comes to this, that submersion, like stranding or other serious disaster, is to be taken in connection with other circumstances in determining whether the loss is or is not total. * * * The ultimate question is, can she be raised and repaired at a reasonable expense of time and money; as, in case of stranding, the question is, can she be got off and repaired at a reasonable expense. And the question in either case must depend upon all the circumstances affecting it." See also *Kemp v. Halliday*, L. R. 1 Q. B. 520; *Anderson v. Royal Exch. Assur. Co.*, 7 East 38; *Doyle v. Dallas*, 1 M. & R. 48.

(4) *Sale by Necessity*.—A sale by the master at a port of distress justifies an abandonment;¹ but the sale must have been justifiable.² Where the sale is justified, not by the constructive total loss of the article insured, but by reason of the impossibility of obtaining means of repair at the port of distress, it appears that an abandonment is necessary.³

(5) *Freight*.—Where the ship is disabled, and the circumstances are such as to render the total loss of freight, though not inevitable, yet highly imminent, or when more than one half the freight must necessarily be lost, or there is an actual or constructive total loss of the vessel, the insured may (subject to the stipulations of his policy) claim as for a total loss by giving due notice of the abandonment of freight to the insurer.⁴

1. In *American Ins. Co. v. Francia*, 9 Pa. St. 390, Gibson, C. J., said: "It seems to be settled by a decisive weight of authority that in every case of insurance on the ship or cargo, though perhaps not on freight, when the master has sold the thing insured there must be an abandonment, to avoid the conclusion that the assured has elected to go for a partial loss." See also *Delaware Ins. Co. v. Winter*, 38 Pa. St. 176; *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383; *Akin v. Mississippi Marine, etc., Ins. Co.*, 4 Martin, N. S. (La.) 661.

A sale by the master from necessity justifies an abandonment. *Mordecai v. Fireman's Ins. Co.*, 12 Rich. (S. Car.) 512.

It is not necessary to introduce proof that the damage amounted to fifty per cent, if the vessel was surveyed, condemned as unseaworthy and not worth repairing, and sold. *Delaware Ins. Co. v. Winter*, 38 Pa. St. 176.

2. *Paddock v. Commercial Ins. Co.*, 2 Allen (Mass.) 93; *Greely v. Tremont Ins. Co.*, 9 Cush. (Mass.) 415; *Peck v. Nashville Marine, etc., Ins. Co.*, 6 La. Ann. 148; *Cort v. Delaware Ins. Co.*, 2 Wash. (U. S.) 375; *Currie v. Bombay Native Ins. Co.*, L. R. 3 C. P. 72; *Gallagher v. Taylor*, 5 Can. Supreme Ct. Rep. 368; *Providence Washington Ins. Co. v. Corbett*, 9 Can. Supreme Ct. Rep. 256; *Morton v. Patillo*, 9 Nova Scotia 17.

Sale not Warranted—Partial Loss.—But the insured, after an unjustifiable sale by the master, may still claim for a partial loss. *Rugely v. Sun Ins. Co.*, 7 La. Ann. 279, 56 Am. Dec. 603; *Cort v. Delaware Ins. Co.*, 2 Wash. (U. S.) 375.

Sale under Decree not in Consequence of Peril Insured.—Where the seizure and sale under a decree of an admiralty court are not the natural and necessary consequences of the peril insured against, there is no total loss. *De Mattos v. Saunders*, L. R. 7 C. P. 570. See also *Meyer v. Ralli*, 1 C. P. Div. 358.

The cases collected under the section *Sale by Necessity*, *supra*, this title, show that by the weight of authority an abandonment is in such case unnecessary. Of course an abandonment, even in case of actual total loss, does no harm, and the cases where an abandonment was actually made out of abundant care on the part of the insured, are not authorities to reduce sale by necessity to constructive total loss. Where no abandonment is made, the salvage, if any, goes to the insurer. See *supra*, this title, *Total Loss with Benefit of Salvage*.

3. In *Allen v. Commercial Ins. Co.*, 1 Gray (Mass.) 154, Thomas, J., said: "But the right to abandon and claim for a total loss existing in cases of injury to an amount greater than half the value of the ship, is not restricted to them. If this vessel had been in a port of necessity in the condition described in the report, and the master had found it impossible to obtain the requisite funds for her repair, by bottomry or otherwise, or to consult the owners, a sale might have been justified; and, upon abandonment, no lien or incumbrance having been created to deprive the underwriters of the rights which it is the object of an abandonment to secure, a total loss might have been claimed (upon sale under the circumstances by the master), though the cost of repair would have been less than fifty per cent." See also *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer (N. Y.) 342.

In *Moses v. Columbian Ins. Co.*, 6 Johns. (N. Y.) 219, there was an insurance on three hundred barrels of flour. In a storm one hundred and twenty-three barrels were jettisoned, and thirty others were so damaged that an immediate sale at the port of distress was necessary. The ship was repaired, and one hundred and forty-seven barrels arrived at the port of destination, and, crediting the sale of thirty barrels (estimating on the prime cost of the flour), the total loss was less than one half. It was held that the insured might abandon for a total loss. But compare *Anchor Marine Ins. Co. v. Keith*, 9 Can. Supreme Ct. Rep. 483.

4. *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 246.

Cost of Forwarding.—There is a total loss of freight, if it will cost as much to forward as the freight agreed on. *Driscoll v. Millville Marine Ins. Co.*, 23 New Bruns. 160. See also *Rankin v. Potter*, L. R. 6 H. L. 83; *Michael v. Gillespy*, 2 C. B. N. S. 627.

Fifty per Cent Rule.—American authorities apply the fifty per cent rule. *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455; *Whitney v. New York Firemen's Ins. Co.*, 18 Johns. (N. Y.) 208; *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45; 7 Cow. (N. Y.) 564; *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443; *Rogers v. Nashville Marine, etc., Ins. Co.*, 9 La. Ann. 537. See also *Callender v. North America Ins. Co.*, 5 Binn. (Pa.) 525. Some American cases seem to recognize the English rule. *Willard v. Millers', etc., Ins. Co.*, 30 Mo. 35.

Transshipment.—The effect of transshipment

(6) *Profits*.—When the insurance is on profits, the loss of cargo is a loss of

by the master as bearing on the insured's claim for total loss of freight, is lucidly examined in *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443, by Bigelow, J. He concludes that where transshipment will cost less than a moiety of the stipulated freight, the insured must forward, and cannot, by failing to do so, throw loss on the insurers. If, however, the cost of forwarding will be as great or greater than the stipulated freight, there is no duty to forward, since nothing can accrue to him or the underwriters by so doing; but if transshipment is made in such a case, it does not deprive the owner of his claim for a total loss of freight. The master, in making such transshipment, does not act for the benefit of the owner and does not bind him, unless perhaps the owner adopts and ratifies his act. In no case is the right of the owner to abandon his vessel for a constructive total loss, and thereby to lose the power of earning freight, taken away by the existence of policies on cargo and freight. See also *Dunning v. Merchants' Mut. Ins. Co.*, 57 Me. 108.

Constructive Total Loss of Ship.—There being separate insurance under valued policies on ship and freight, and the ship, by reason of damage to an amount over one half, having become a constructive total loss, the insured on both policies abandoned; the insurers accepted the ship and refused the freight, and, having repaired, completed the voyage, and complete freight was earned. It was held that there was a total loss of freight. *Coolidge v. Gloucester Marine Ins. Co.*, 15 Mass. 341. See also *Troop v. Merchants' Marine Ins. Co.*, 13 Can. Supreme Court Rep. 506; *Dunning v. Merchants' Mut., etc., Ins. Co.*, 57 Me. 108.

Vessel Disabled—Cargo Delivered.—If the vessel is disabled, but is not a constructive total loss, and the cargo is actually delivered, there is no loss of freight. *Fiedler v. New York Ins. Co.*, 6 Duer (N. Y.) 282.

Where Ship may be Repaired and Goods Delivered in Specie.—But if the vessel, though injured, can be repaired, and the goods, however badly damaged, may yet be delivered *in specie*, it is the duty of the insured to take the risk and try to earn his freight; and he cannot in such case abandon and claim for a total loss. *Murray v. Etna Ins. Co.*, 4 Biss. (U. S.) 417; *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138; *Griswold v. New York Ins. Co.*, 1 Johns. (N. Y.) 205, 3 Johns. (N. Y.) 321, 3 Am. Dec. 490; *Allen v. Mercantile Mut. Ins. Co.*, 44 N. Y. 437, 4 Am. Rep. 700; *Hughes v. Sun Mut. Ins. Co.*, 100 N. Y. 58; *Clark v. Massachusetts F., etc., Ins. Co.*, 2 Pick. (Mass.) 104; *Parsons v. Manufacturers' Ins. Co.*, 16 Gray (Mass.) 463; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109. See also *Moss v. Smith*, 9 C. B. 94; *Philpott v. Swann*, 11 C. B., N. S. 270; *Patch v. Pitman*, 19 Nova Scotia 298.

Ship Stranded and Abandoned, but Afterward Repaired.—Where there was an insurance on a vessel and freight, and the vessel was stranded and abandoned, but was gotten off by the underwriters, repaired at less than

half her value, and tendered to the owner, who refused to receive her, and wrote to the charterer that the vessel was a wreck and that he could not proceed as per charter party, it was held that, there being no total loss of the vessel, and the owner having voluntarily abandoned the charter party, he was not entitled to recover the insurance on freight. *Marmaud v. Melledge*, 123 Mass. 173.

Loss of Cargo.—Where, in case of insurance on freight, the cargo is destroyed *in specie* by a peril of the sea which causes the vessel to put into a port of distress, so that such cargo loses its original character at the port of distress, or where the damage to it is such that, if reshipped, a total destruction of it *in specie* will be inevitable before it can arrive at its port of destination, there is a total loss of freight, and the underwriters are liable. *Ridyard v. Phillips*, 4 Blatchf. (U. S.) 443. See also *Whitney v. New York Firemen's Ins. Co.*, 18 Johns. (N. Y.) 208; *Parsons v. Manufacturers' Ins. Co.*, 16 Gray (Mass.) 463; *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455.

Where there is a constructive total loss of cargo, by reason of a loss of more than half the cargo (coal) *in specie*, the assured on freight may abandon and recover for a total loss. *Boardman v. Boston Marine Ins. Co.*, 146 Mass. 442.

English Rule as to Abandonment in Case of Freight.—The English cases hold that in case of freight, abandonment is, in general, unnecessary. *Green v. Royal Exch. Assur. Co.*, 6 Taunt. 68; *Idle v. Royal Exch. Assur. Co.*, 8 Taunt. 755; *Mount v. Harrison*, 4 Bing. 388; *Rankin v. Potter*, L. R. 6 H. L. 83. In this last case the English authorities are discussed exhaustively. There was no notice of abandonment, and it was held that, there being nothing to abandon, it was not necessary. In reply to the suggestion in behalf of the insurers, that if the underwriters on freight had had timely notice they might have made such an arrangement with the underwriters on ship as would have saved a total loss accruing, Lord Hatherley said: "I apprehend, my lords, that that is much too remote a contingency to render it necessary for the insured to give the insurers notice of abandonment, upon the principle which I have before referred to, namely, of their being able to save something out of the wreck. It is not necessary to illustrate that, but it might be shown in a variety of ways how such a doctrine as that would carry the necessity of notice to the remotest extent in respect of bargains which might be made by persons who might or might not be interested at the moment in the ship, such as persons who might purchase the damaged vessel, or the wreck, or the like. Numerous arrangements might be made, of that kind, which would create, I apprehend, far too remote an interest to be considered upon a question as to the law requiring notice of abandonment to be given." In the same case, Brett, L.J., touching on the question whether there can be a constructive total

profits.¹ And abandonment by the insured is in some instances necessary.²

(7) *Outfits*.—The constructive total loss of a whaling vessel at a port where whaling outfits are obtainable, and where the outfits are in safety, is not a constructive total loss of the outfits, though there are no means of forwarding them within a reasonable time.³

(8) *Total Loss of Part of Cargo*.—The question has sometimes arisen in connection with articles free from average unless general, whether there could be a total loss of a portion of the cargo. Where the memorandum articles consist of distinct species, there may be a total loss of the whole of a particular species.⁴ But where the articles are of the same species, and, if in separate packages, are not expressed, by distinct valuation or otherwise, in the policy to be separately insured, there can be no loss of a portion.⁵

loss of freight, said: "If, for instance, the ship should be damaged as described, but cargo which was on board has been saved, under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the original cargo should be lost, and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight."

1. In *Mumford v. Hallett*, 1 Johns. (N. Y.) 439. Livingston, J., said: "It does not follow that a profit will be made if the cargo arrives, yet its loss would give a right to recover on such an insurance." See also *Barclay v. Cousins*, 2 East 544; *Hendricksen v. Margetson*, cited in 2 East 549; *Fosdick v. Norwich Marine Ins. Co.*, 3 Day (Conn.) 108; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139; *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222; *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397.

In *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139, Kent, J., suggested that the rule to ascertain whether there was a total or partial loss of the profits was to determine whether more or less than one half in value of the subject had been lost.

In *Hodgson v. Glover*, 6 East 316, it was intimated that the insured must show that there would have been an actual profit if the goods had reached a market. See also *Eyre v. Glover*, 16 East 218.

In *Loomis v. Shaw*, 2 Johns. Cas. (N. Y.) 36, there was an average loss of three eighths of the cargo, and the insured abandoned and sought to recover as for a total loss on the profits. It was held that they were entitled to average loss only.

In *Hendricksen v. Margetson*, cited in 2 East 549, the policy was held to be on profits by the ship in which the cargo was laden, and, therefore, when there was a technical total loss, and the goods were forwarded by different ships, there might still be a total loss of profits.

Where the profits are insured under a valued policy, free from average unless general, if part of the goods arrived in good condition and are sold at a profit, though part were destroyed, and there was a loss on the

whole adventure of more than fifty per cent., there is not a total loss. There must be actual total loss. *Waln v. Thompson*, 9 S. & R. (Pa.) 115, 11 Am. Dec. 675.

2. *When Abandonment Necessary*.—If profits only are insured, an abandonment is necessary when there has been no insurance on the cargo; and in such case it must be made early, that the insurer may elect either to pay only his loss, or to pay that and the price of the goods at first cost, and charges. *Tom v. Smith*, 3 Cai. (N. Y.) 245. But it has been held generally that in case of total loss of insurance on profits no abandonment is necessary. *Fosdick v. Norwich Marine Ins. Co.*, 3 Day (Conn.) 108.

It would seem, that, on the well-settled principle that where nothing of value can pass, no abandonment is necessary (see *supra*, this title, *Total Loss to Insured, General Principles*), there need never be an abandonment where the cargo on which the profits are to arise has been abandoned. See *infra*, this title, *Effect of Abandonment*.

Commissions.—Commissions stand upon the same footing as profits. 2 *Arnould on Marine Ins.* (6th ed.) 1023.

3. *Macy v. China Mut. Ins. Co.*, 135 Mass. 328. But see *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 510.

4. *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73. And see *Guerlain v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 527; *Vandenheuvel v. United Ins. Co.*, 1 Johns. (N. Y.) 406; *Moses v. Columbian Ins. Co.*, 6 Johns. (N. Y.) 219; *Sale v. Sun Mut. Ins. Co.*, 3 Robt. (N. Y.) 602; *Brooke v. Louisiana State Ins. Co.*, 4 Martin, N. S. (La.) 640.

If the different sorts of goods whereof the cargo is made up are specified and separately valued in the same policy, the insured may abandon any one sort of article, in case of loss, and retain the rest, in the same manner as if the different articles were insured by different policies. *Deidericks v. Commercial Ins. Co.*, 10 Johns. (N. Y.) 234.

Where a vessel during the voyage had been condemned for unseaworthiness, and her cargo properly transhipped in two other vessels, one of which was totally lost, the insured were held liable on the policy for the goods lost, though the other vessel arrived in safety. *Pierce v. Columbian Ins. Co.*, 14 Allen (Mass.) 320.

5. *Ralli v. Janson*, 6 El. & Bl. 422. See

4. Notice of Abandonment—*a*. WHO MAY GIVE NOTICE.—A valid abandonment can only be made by one who has power to make a legal transfer of the property abandoned.¹

***b*. TO WHOM GIVEN.**—Notice must be given to the insurer or to his agent.²

also *Entwisle v. Ellis*, 2 H. & N. 549; *Moore v. Provincial Ins. Co.*, 33 U. C. C. P. 383.

The case of *Davy v. Milford*, 15 East 559, decided in 1812, held that there might be a total loss of a part of a cargo. This case was never received with favor, *Thompson v. Royal Exch. Ins. Co.*, 16 East 214; *Hedberg v. Pearson*, 7 Taunt. 154; and was expressly overruled in *Ralli v. Janson*, 6 El. & Bl. 422. The U. S. Supreme Court declared, in *Biays v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 415, as early as 1813, the doctrine that there can be no total loss of a part of memorandum articles of one species; and Judge Story said, in *Humphreys v. Union Ins. Co.*, 3 Mason (U. S.) 429, that this case and that of *Morean v. U. S. Ins. Co.*, 1 Wheat. (U. S.) 219, settled the law of the Federal courts definitely against the doctrine of *Davy v. Milford*, 15 East 559. In *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33, the American cases were followed.

In *Duff v. Mackenzie*, 3 C. B., N. S. 16, it was held that there might be a total loss of part of "master's effects," valued in lump, free from all average. In *Wilkinson v. Hyde*, 3 C. B., N. S. 30, where goods were insured against total loss only, and valued at one entire sum, but were packed in separate packages and of different species, it was held that the insurer was liable for each separate package lost.

1. *Potter v. Rankin*, L. R. 5 C. P. 341. See also the remarks of Young, C. J., in *Morton v. Patillo*, 9 Nova Scotia 17.

Sale before Abandonment.—If, before abandonment, the master has made an invalid sale, the title is not changed, and the owner may abandon. *Fuller v. Kennebec Mut. Ins. Co.*, 31 Me. 325.

If a valid but unnecessary sale has been made before abandonment, the insured has nothing to abandon, and his right is gone. *Badger v. Ocean Ins. Co.*, 23 Pick. (Mass.) 347.

An absolute bill of sale made by the owner of a vessel insured, though intended as a security for debts, divests such owner of the right to abandon. *Gordon v. Massachusetts F., etc., Ins. Co.*, 2 Pick. (Mass.) 260.

Two Policies.—Where an abandonment under one policy has been made and accepted, the owner has no legal title left to transfer, and he cannot abandon under another policy. *Higginson v. Dall*, 13 Mass. 96. And see *Locke v. North American Ins. Co.*, 13 Mass. 61; *Rice v. Homer*, 12 Mass. 229.

Profits.—Where cargo and profits are separately insured, the abandonment to the insurer on cargo takes with it all right to profits, but the insured may subsequently abandon to the insurer on profits and recover as for a total loss as to profits insured. *Mumford v. Hallett*, 1 Johns. (N. Y.) 433.

By Master.—The master has no authority as such to bind the owner by an abandon-

ment, and the act must be ratified by the owner within a reasonable time. What is reasonable time for such ratification must be determined on the same principles as reasonable time for an original abandonment. *Younger v. Gloucester Marine Ins. Co.*, Sprague (U. S.) 236; *affirmed* in 2 Curt. (U. S.) 322.

By Agent.—The general agent of the insurer may make a valid abandonment, though the agency is created by parol. *Parker v. Towers*, 2 P. A. Browne App. (Pa.) 80.

It is presumed, nothing else appearing, that the agent who has authority to effect the insurance has authority to make a valid abandonment. *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.) 268; *Mellon v. Louisiana State Ins. Co.*, 5 Martin, N. S. (La.) 564; *Merchants' Marine Ins. Co. v. Barss*, 15 Can. Supreme Ct. Rep. 185.

Mortgaged Vessel.—Where the insured vessel is mortgaged and the insurance was procured by the owner, and made payable by indorsement to the mortgagee, the owners may make a valid abandonment upon which the mortgagee may recover. *Murray v. Great Western Ins. Co.*, 72 Hun (N. Y.) 282. And see *Fulton Ins. Co. v. Goodman*, 32 Ala. 108.

Legal and Equitable Owners.—In *Millidge v. Stymest*, 6 Allen (New Bruns.) 164, it was held that the abandonment must be by the legal, not the equitable, owner.

President of Corporation.—Where the vessel is owned by a corporation, the president may give notice of abandonment. *North Western Transp. Co. v. Thames, etc., Ins. Co.*, 59 Mich. 214.

Joint Owners.—One joint owner who effects the insurance may make a legal abandonment for all the joint owners. *Hunt v. Royal Exch. Assur. Co.*, 5 M. & S. 47. See also *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727.

But a part owner having sold the vessel cannot abandon for himself, nor after ratifying such sale can the other part owners abandon. *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 29 Am. Dec. 567.

Depository of Policy.—The deposit of a policy does not invest the depository with the authority to give notice of abandonment. *Jardine v. Leathley*, 3 B. & S. 700.

2. Notice to Agent.—Abandonment to the agent is an abandonment to the insurers. *Fosdick v. Norwich Marine Ins. Co.*, 3 Day (Conn.) 108.

Abandonment to a broker, who is agent for both parties, is sufficient. *Crousillat v. Ball*, 3 Yeates (Pa.) 375, 4 Dall. (Pa.) 294, 2 Am. Dec. 375.

Where the owner of a vessel gives due notice of its abandonment, to the president of the company insuring it, and also notifies him, as agent of another company which has insured "advances," that the "vessel insured under your policy" (stating the number of

c. **FORM AND SUFFICIENCY.**—No particular form of notice is essential; but it is sufficient if expressions are used which inform the underwriters that it is the intention of the insured to give up to them the property insured, upon the ground of its having been totally lost.¹ The notice, at least in the *United States*, must also specify the cause on account of which the loss is claimed, and the insured is restricted to the cause of loss stated in the notice.²

the policy), is abandoned, this is a sufficient abandonment as to the latter company. *Burnham v. Boston Marine Ins. Co.*, 139 Mass. 399.

1. **Form of Notice.**—In *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443, Bigelow, J., said: "No particular form is necessary to constitute a valid abandonment; nor need it be in writing. It is sufficient if the assured claims a total loss of the insureds under circumstances from which an intent to abandon may be fairly inferred. Nor is it requisite that the cause of the loss should be distinctly stated, if the assured, in making the abandonment, refers to the intelligence in his possession as the ground of his claim, puts it within the reach of the underwriter, and the latter omits to inquire into the circumstances or to ask for further information."

Must be Absolute and Explicit.—No particular form is necessary, but it must in substance be positive and absolute, and import an actual present relinquishment. *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 93, 29 Am. Dec. 567.

The notice must be explicit, and the abandonment must not be left as a matter in inference from equivocal facts. *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *Parmeter v. Todhunter*, 1 Camp. 541.

The notice must be unconditional. *Fuller v. McCall*, 1 Yeates (Pa.) 464; 2 Dall. (Pa.) 219, 1 Am. Dec. 312.

Parol.—Parol abandonment is sufficient. *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Parmeter v. Todhunter*, 1 Camp. 541. See also *Read v. Bonham*, 3 B. & B. 147.

Word "Abandon" not Necessary.—It is not necessary to use the technical word "abandon." Any equivalent expression which informs the underwriters that it is the intention of the insured to give up to them the property insured, upon the ground of its having been totally lost, is sufficient. *Currie v. Bombay Native Ins. Co.*, L. R. 3 C. P. 72.

Claim for Total Loss.—A claim for total loss is not *per se* an abandonment. *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 93, 29 Am. Dec. 567. Compare, however, *Mellon v. Louisiana State Ins. Co.*, 5 Martin, N. S. (La.) 564; *Babbitt v. Sun Mut. Ins. Co.*, 23 La. Ann. 315; yet, joined with other circumstances, it may be sufficient. *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73.

Master Consulting Insurer.—When the vessel is stranded the master's going to the insurers and consulting them as to getting her off is not an abandonment. *Firemen's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311.

Question for Jury.—In *Singleton v. Phenix Ins. Co.*, 132 N. Y. 298, the defendant's agent who issued the policy was notified of the loss the day after it happened. He examined the wreck, received a verified statement of the

circumstances of the loss, and mailed it to the defendant, together with a full statement of his own as to the condition of the wreck. These documents were retained by the defendant. Thereafter the defendant's adjuster wrote to the agent that he had examined the boat and would raise her. The plaintiffs verified formal proofs of loss and executed an assignment of all their interest to defendant, which was delivered to and retained by the agent. It was held that under the circumstances it was error for the court to hold as a matter of law that there had been no abandonment and acceptance, and that there was evidence sufficient to warrant the jury in finding that the boat had been abandoned as a total loss and accepted by the defendant. See also, as to the sufficiency of notice, *Thelusson v. Fletcher*, 1 Esp. 73; *King v. Walker*, 33 L. J. Exch. 325; *Thomas v. Rockland Ins. Co.*, 45 Me. 116; *Morton v. Patillo*, 9 Nova Scotia 17; *Baker v. Brown*, 9 Nova Scotia 100; *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222; *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.) 22; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *Perkins v. Augusta Ins.*, etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654; *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Savage v. Corn Exch. F.*, etc., Ins. Co., 4 Bosw. (N. Y.) 1; *Suydam v. Marine Ins. Co.*, 1 Johns. (N. Y.) 181, 3 Am. Dec. 307; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411; *Richelieu*, etc., Nav. Co. v. *Thames*, etc., Ins. Co., 58 Mich. 132, 72 Mich. 571; *Northwestern Trans. Co. v. Thames Ins. Co.*, 59 Mich. 214; *Bell v. Beveridge*, 4 Dall. (Pa.) 272.

2. **Notice must Specify Ground of Abandonment.**—*King v. Delaware Ins. Co.*, 2 Wash. (U. S.) 300; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. (U. S.) 221; *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 450; 22 Am. Dec. 337; *Suydam v. Marine Ins. Co.*, 1 Johns. (N. Y.) 181, 2 Johns. (N. Y.) 138, 3 Am. Dec. 307; *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222, 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; *McConochie v. Sun Mut. Ins. Co.*, 26 N. Y. 477; *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass. 83), 29 Am. Dec. 567; *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 354; *Northwestern Trans. Co. v. Thames*, etc., Ins. Co., 59 Mich. 214.

In *McConochie v. Sun Mut. Ins. Co.*, 26 N. Y. 480, Balcom, J., after examining the authorities, said: "The rule to be deduced from the above-mentioned authorities is that the notice of abandonment, to enable the assured to recover for a total loss where it is less, must truly state, not only the grounds for the abandonment, but with such particularity as

If the abandonment be invalid the insured may still recover for his partial loss.¹

d. TIME OF NOTICE.—Notice must be given within a reasonable time;² and what is a reasonable time depends upon the circumstances of the case.³ The insured is entitled to a sufficient interval, to determine fairly whether he is entitled to abandon.⁴ Particular provisions in the policy may con-

to enable the underwriter to determine whether he is bound to accept the offer or not; and if it does not further state in terms that the ship or goods insured are damaged to more than half the value, its language must be such as to render the inference therefrom clear that the damages exceed half the value of the ship or cargo. In other words, the grounds of abandonment set forth in the notice must be such, admitting them to be true, that the right of the assured to recover for a total loss is a necessary consequence. If the notice comes short of this it is insufficient."

If the assured in the notice of abandonment states a sufficient cause of abandonment he need not state additional causes, although known to him, if the underwriter refuses to accept. *Dederer v. Delaware Ins. Co.*, 2 Wash. (U. S.) 61.

1. *Suydam v. Marine Ins. Co.*, 2 Johns. (N. Y.) 138. And see *supra*, this title, *Election to Abandon*.

Proof of Loss.—As to the proof of loss which it is necessary to furnish on making an abandonment, see *Marine Insurance*.

3. Notice to be Given in Reasonable Time.—*Mitchell v. Edie*, 1 T. R. 608; *Kaltenbach v. MacKenzie*, 3 C. P. Div. 467; *Currie v. Bombay Native Ins. Co.*, L. R. 3 C. P. 72; *Abel v. Potts*, 3 Esp. 242, 6 Rev. Rep. 826; *Anderson v. Royal Exch. Assur. Co.*, 7 East 38; *Barker v. Blakes*, 9 East 283; *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.) 268; *Gardner v. Columbian Ins. Co.*, 2 Cranch (C. C.) 550; *Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235; *Mellon v. Louisiana Ins. Co.*, 5 Martin, N. S. (La.) 564; *Livermore v. Newburyport Marine Ins. Co.*, 1 Mass. 264; *Oliver v. Newburyport Marine Ins. Co.*, 3 Mass. 50; *Smith v. Newburyport Marine Ins. Co.*, 4 Mass. 668; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Fuller v. McCall*, 1 Yeates (Pa.) 464, 2 Dall. (Pa.) 219, 1 Am. Dec. 312; *Bell v. Beveridge*, 4 Dall. (Pa.) 272; *Savage v. Pleasants*, 5 Binn. (Pa.) 403, 6 Am. Dec. 424; *Krumbhaar v. Marine Ins. Co.*, 1 S. & R. (Pa.) 281; *Teasdale v. Charleston Ins. Co.*, 2 Brev. (S. Car.) 190, 3 Am. Dec. 705.

3. *Currie v. Bombay Native Ins. Co.*, L. R. 3 P. C. 72. See *Potter v. Campbell*, 16 W. R. 401.

When Question for Jury.—What is a reasonable time is a question of law and fact for the jury. *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.) 268; *Maryland Ins. Co. v. Ruden*, 6 Cranch (U. S.) 338; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 400; *Bell v. Beveridge*, 4 Dall. (U. S.) 272; *Mellon v. Louisiana State Ins. Co.*, 5 Martin, N. S. (La.) 564; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727.

When Question for Court.—When the facts are ascertained, reasonable time is a question of law. *Smith v. Newburyport Marine Ins. Co.*, 4 Mass. 668.

Harmless Delay.—A delay which does not prejudice the insurer does not affect the validity of the abandonment. *Young v. Union Ins. Co.*, 24 Fed. Rep. 279; *Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235. But *aliter*, after two months' delay. *Taber v. China Mut. Ins. Co.*, 131 Mass. 239. Delay caused by prevalence of a pestilence may be excusable. *McCalmont v. Murgatroyd*, 3 Yeates (Pa.) 27.

Loss Continuing Total.—If the loss continues total the abandonment is not too late. *Smith v. Steinbach*, 2 Cal. Cas. (N. Y.) 158, 2 Cal. (N. Y.) 129; *Livermore v. Newburyport Marine Ins. Co.*, 1 Mass. 281; *Earl v. Shaw*, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; *Roget v. Thurston*, 2 Johns. Cas. (N. Y.) 248; *Brown v. Phoenix Ins. Co.*, 4 Binn. (Pa.) 445; *Montgomery v. U. S. Ins. Co.*, 4 Binn. (Pa.) 469; *Bohlen v. Delaware Ins. Co.*, 4 Binn. (Pa.) 430.

Temporary Detention.—Abandonment for a temporary detention must be made while the detention continues. See *supra*, this title, *Capture, Embargo, and Blockade*.

Election after Capture.—Where the insured elect not to abandon upon hearing of a capture, they do not lose the right to abandon upon condemnation and sale following the capture. *Dorr v. New England Ins. Co.*, 11 Mass. 1; *Dorr v. Union Ins. Co.*, 8 Mass. 494; *Bohlen v. Delaware Ins. Co.*, 4 Binn. (Pa.) 430.

Further Authorities.—Other cases involving the question of what is reasonable time for making abandonment are *Grainger v. Martin*, 4 B. & S. 9; *Read v. Bonham*, 6 Moore 397, 3 B. & B. 147; *King v. Walker*, 3 H. & C. 209; *Kemp v. Halliday*, L. R. 1 Q. B. 520; *Hunt v. Royal Exch. Assur. Co.*, 5 M. & S. 47; *Barker v. Blakes*, 9 East 283; *Mellish v. Andrews*, 15 East 13; *Gardner v. Columbian Ins. Co.*, 2 Cranch (C. C.) 550; *Bell v. Beveridge*, 4 Dall. (U. S.) 272; *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.) 73; *Smith v. Newburyport Marine Ins. Co.*, 4 Mass. 668; *Livingston v. Hastie*, 3 Johns. Cas. (N. Y.) 293; *Murray v. Great Western Ins. Co.*, 72 Hun (N. Y.) 282.

4. *Kelly v. Walton*, 2 Camp. 155; *Currie v. Bombay Native Ins. Co.*, L. R. 3 P. C. 73; *Driscoll v. Millville Marine Ins. Co.*, 23 New Bruns. 160; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263; *Gernon v. Royal Exch. Ins. Co.*, 6 Taunt. 383, 16 Rev. Rep. 630; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 400. See also *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 450, 22 Am. Dec. 337.

But the insured cannot wait, after hearing of the loss, in order to take advantage of

trol; ¹ and by agreement of both parties the right may be kept in suspense.²

c. **WAIVER AND REVOCATION.**—Notice may be waived by acts of the assured inconsistent with an abandonment,³ or may be withdrawn by consent of both parties.⁴

Abandoned Vessel Bought by Master.—The decisions as to the effect of a purchase by the master or by the owner upon the sale of a vessel after abandonment are not easily reconciled.⁵ Where, after abandonment, the owner or master

later circumstances, to place the loss on the underwriters. *Hurtin v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 400; *Smith v. Newburyport Marine Ins. Co.*, 4 Mass. 668; *Anderson v. Royal Exch. Assur. Co.*, 7 East 38.

One need not give notice before he is entitled to abandon. *Cohen v. Charleston F. & Ins. Co.*, *Dudley (S. Car.)* 147; *Hedley v. Nashville Ins. Co.*, 6 Rich. (S. Car.) 130.

1. Thus the policy may provide that abandonment is not to be made for a certain time after notice of capture or detention. *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273; *Lovering v. Mercantile Marine Ins. Co.*, 12 Pick. (Mass.) 348; *Law v. Goddard*, 12 Mass. 112; *Dorr v. Union Ins. Co.*, 8 Mass. 502; *Delano v. Bedford Ins. Co.*, 10 Mass. 347. See also *Ritchie v. U. S. Ins. Co.*, 5 S. & R. (Pa.) 501.

2. *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.) 274.

3. **Waiver—Delivery on Bail.**—The delivery of a captured vessel on bail to an agent appointed by the master after capture is no waiver of abandonment, for if the abandonment was valid such agent was the agent of the underwriters. *Lovering v. Mercantile Marine Ins. Co.*, 12 Pick. (Mass.) 348.

Insured Retaining Control.—If, after giving notice of abandonment, the owner retains control of the vessel abandoned, repairs, claims, and uses it, the abandonment is waived. *Louisville Underwriters v. Pence (Ky.)*, 1892, 19 S. W. Rep. 10; *Sherlock v. Globe Ins. Co.*, 1 Cinc. L. Bull. (Ohio) 26.

Insured Receiving and Disposing of Vessel and Cargo.—Receiving and disposing of a vessel and the proceeds of the cargo by the insured or a person whom he has put in as ostensible owner, in order to claim in case of capture, will be a waiver of a previous abandonment. *Martin v. Salem Marine Ins. Co.*, 2 Mass. 420; *Smith v. Touro*, 14 Mass. 112.

Question for Court or Jury.—Whether an abandonment has been waived is a question for the jury, under the circumstances of the case. *Curcier v. Philadelphia Ins. Co.*, 5 S. & R. (Pa.) 113; *Columbian Ins. Co. v. Ashby*, 4 Pet. (U. S.) 139.

4. *Webb v. Protection Ins. Co.* 6 Ohio 456. See also *Driscoll v. Millville Marine Ins. Co.*, 23 New Bruns. 160.

5. **Right of Master or Owner to Purchase Considered.**—The law is thus explained by *Dorsey, J.*, for the court in *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 230: "If, after capture and abandonment, but before condemnation, a ship be ransomed by the captain, or retaken by the crew, or be recovered and delivered to the owners, who claim and use her as their own, they possess her under no new title or right of property;

their acts are the assertion of their original ownership, and therefore inconsistent with the abandonment, which, if sustained, casts the right of property on the insurers. Both cannot therefore stand together. The necessary inference is that the insured, by the resumption of their ownership, surrendered their rights under the abandonment. But where a condemnation has taken place, the assured, apart from all statutory regulation on the subject, is divested of all property in the ship, and in it, if purchased by themselves, or their agents, they acquire a new and independent title to which their subsequent acts of ownership are imputable, and not to their original proprietary rights. An intention to waive the abandonment is not the natural inference from their conduct. There is no inconsistency in their claiming for a total loss under the abandonment, and asserting the right of property under the newly acquired title. As against all the world, save the underwriters, the assured, as purchasers, have an incontrovertible title. And it is conclusive even against them, if they consented to its acquisition, or have waived the right to impeach it. We are aware that this question has been apparently otherwise decided in some of the *United States*, and especially in *New York*, where, in the honest zeal for the protection of insurers, it is respectfully suggested, they have stretched their doctrine upon this subject to an unjust invasion of the rights of the insured, and gone beyond what the policy or analogies of the law would sanction. The principle contended for in the argument as fairly deducible from the *New York* cases, is, that the acceptance by the insured for his own benefit, of a purchase of the thing insured, made by the captain for account of his owner, is *per se* a waiver of the abandonment, and converts the otherwise total into a partial loss. To this universal and unqualified proposition we cannot assent. Whilst we admit that the law has wisely erected around insurers an impenetrable barrier to fraud and injustice on the part of the insured, we insist that in doing so it has gone no further than the necessity of the occasion demanded, and that it has not been unmindful of providing a like protection for the insured against practices of a similar character emanating from the insurers; that whilst *uberrima fides* is exacted of the insured, a like course of conduct must be practised by insurers; that to neither party is it permitted to do acts, the natural tendency of which is injustice, and imposition on the other. We freely concede that neither the insured in person, nor through the instrumentality of others, either before or

sells the vessel *bona fide* for the benefit of all concerned, it is no waiver.¹

5. Acceptance—*a.* EFFECT.—Acceptance is in no case necessary;² but an

after the condemnation of the thing insured, possesses, where an abandonment has been made, an unqualified right to become its purchaser, for his own benefit. Such purchases, after condemnation, where a total loss is claimed, are ever subject to this qualification, that the insurers have the right or privilege, if they see fit, to exercise it within a reasonable time after a knowledge of the purchase, to elect to become themselves the purchasers; and if the insured refuse to surrender the bargain, the total is converted into a partial loss. * * * By an abandonment the rights of the underwriters relate back to the date of the disaster, not of the abandonment. All intermediate acts of the captain and agents of the insured inure to the benefit of the insurer. Any purchase, therefore, made by such captain or agents, no matter for whose account, if in due season adopted by the underwriters, becomes their own."

The subject was extensively considered in *King v. Middletown Ins. Co.*, 1 Conn. 184. There the ship was stranded while going through Hell Gate and abandoned, and afterward it was taken to New York and sold at public auction, and purchased by a brother of the insured, and transferred by him to the insured. It was held that whether or not the insured authorized the purchase, it was no waiver; that the abandonment transferred the property to the insurers, and made the master his agent; that the sale, being by the master, was the insurers' sale; and that, the property being so transferred, it could not be divested out of them by the act of the insured. Reeves, C.J., declared that if after abandonment the insured himself sells, he does so as trustee for the insurer, and cannot purchase at the sale or hold the property purchased against the will of the insurer, and if in such case the insurer does nothing to annul the sale it is a waiver of the abandonment by both parties. See also *Bourke v. Granberry*, Gilm. (Va.) 16, 9 Am. Dec. 589.

Waiver by Purchase.—*By Insured.*—The assured, when he abandons and claims a total loss, and is reduced to the necessity of a sale, cannot himself purchase without waiving the abandonment. *Ogden v. New York F. Ins. Co.*, 10 Johns. (N. Y.) 177, 12 Johns. (N. Y.) 25; *Robertson v. Western Marine, etc., Ins. Co.*, 19 La. 227, 36 Am. Dec. 673.

By Master; Ratified by Insured.—If the master sells without his knowledge, and he ratifies the act, adopts it, and avails himself thereof, it is a waiver. *Saidler v. Church* (N. Y. Supreme Ct., July, 1799), stated in 1 Cai. (N. Y.) 292 *et seq.*, and in 2 Cai. (N. Y.) 290; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139.

By Master; not Ratified.—Yet, if abandonment be refused, and the master purchases at a sale under decree for the benefit of all concerned, and the owner does nothing to ratify the purchase, but makes resale as trustee for

the insurer, it is no waiver. *Abbott v. Broome*, 1 Cai. (N. Y.) 292, 2 Am. Dec. 187. See also *Sawyer v. Maine F., etc., Ins. Co.*, 12 Mass. 291; *Walden v. Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310, 4 Am. Dec. 359.

But where the sale is at the instance of the master, and he purchases and restores the vessel to her former owners, and they receive her, they waive abandonment, and can only recover for a partial loss. *Oliver v. Newburyport Ins. Co.*, 3 Mass. 37.

Generally, after a valid abandonment, the master becomes agent for the insurer, and a sale made by him cannot affect the insured. *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; and see *infra*, this title, *Effect of Abandonment*. This doctrine will explain some of the older cases to which it was not applied.

Sale under Decree.—Where a sale was under a decree, and the vessel was bought by the master and delivered by him to her former owners, it was held that the property was changed, and there was a total loss. *Storer v. Gray*, 2 Mass. 565 (*explained* in *Oliver v. Ins. Co.*, 3 Mass. 53). See also *Welman v. Gray* (Mass., 1799), *cited* in 3 Mass. 37, and *apparently misreported* in 2 Dane Abr. 99.

Insured acting as Agent.—The insured may, however, act as agent for another at such sale, and his so acting cannot be regarded as such an interference or act of ownership as will be a waiver of abandonment. *Vaughan v. Western Marine, etc., Ins. Co.*, 19 La. 54; see also *Prince v. Ocean Ins. Co.*, 40 Me. 481, 63 Am. Dec. 676.

Purchase before Abandonment.—If the purchase is made before abandonment, the right to abandon, of course, ceases. *McMasters v. Shoolbred*, 1 Esp. 237 (5 Rev. Rep. 735); *Church v. Marine Ins. Co.*, 1 Mason (U. S.) 341.

1. If the insurer refuses to accept an abandonment, and afterward the goods arrive at the port of destination and are tendered to the abandonnee, and he refuses to accept them, a sale by the insured in good faith, as trustee of the abandonnee and for his benefit, is not a waiver. *Livingston v. Hastic*, 3 Johns. Cas. (N. Y.) 293. And see *Mowry v. Charleston Ins. Co.*, 6 Rich. (S. Car.) 146, 60 Am. Dec. 122; *Prince v. Ocean Ins. Co.*, 40 Me. 481, 63 Am. Dec. 676; *Fuller v. Kennebec Mut. Ins. Co.*, 31 Me. 325. See also *Martin v. Salem Marine Ins. Co.*, 2 Mass. 420; *Smith v. Touro*, 14 Mass. 112; *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192.

2. **Acceptance Unnecessary.**—Acceptance is in no case necessary if the abandonment was properly made. See remarks of Reeves, C.J., in *King v. Middletown Ins. Co.*, 1 Conn. 183 (203); *Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235; *Mellon v. Bucks, 5 Martin, etc., N. S. (La.)* 374; *Clamageran v. Banks*, 6 Martin, N. S. (La.) 553; *Hooper v. Whitney*, 19 La. 267; *Gould v. Citizens' Ins. Co.*, 13 Mo. 524. But the absence of acceptance leaves

acceptance of the abandonment on the part of the underwriter puts at rest every question as to the seasonableness or sufficiency of the notice.¹

b. WHAT AMOUNTS TO ACCEPTANCE.—The acceptance may be either an actual acceptance, or may be implied from the exercise, by the insurer, of acts of ownership,² or even from a failure, for a sufficient length of time, to refuse

the underwriters free to dispute the rightfulness of the abandonment. *Child v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 76; *McBride v. Marine Ins. Co.*, 7 Johns. (N. Y.) 431.

1. Consequence of Acceptance.—*Smith v. Robertson*, 2 Dow. 474; *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224; *Phoenix Ins. Co. v. Copelin*, 9 Wall. (U. S.) 461; *Fulton Ins. Co. v. Goodman*, 32 Ala. 108; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 199, 33 Am. Dec. 727; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411; *Buffalo City Bank v. North Western Ins. Co.*, 30 N. Y. 251; *Child v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 76; *Watson v. North America Ins. Co.*, 1 Binn. (Pa.) 47.

2. Question of Fact.—The question of acceptance is one of fact for the jury. *Shepherd v. Henderson*, 7 App. Cas. 49; *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 239; *Bell v. Smith*, 2 Johns. (N. Y.) 98; *Singleton v. Phenix Ins. Co.*, 132 N. Y. 298. But circumstances may justify the court in telling the jury that, if they believe that certain acts have been done by the insurers consistent only with the acceptance, they must find that the abandonment has been accepted. *Shepherd v. Henderson*, 7 App. Cas. 49; *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 239.

General Test.—The correct principle seems to be, that an act of the insurers in connection with the abandoned property, which can only be justified under a right derived from an abandonment, is decisive evidence of acceptance. *Shepherd v. Henderson*, 7 App. Cas. 63; *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408.

When Evidence Sufficient.—Where, on a claim being made for a total loss by capture, the insurers, with full knowledge of the facts, came to the conclusion that they were bound to pay as for a total loss, and made an adjustment accordingly, and some payments thereon, it was held that the jury might infer an abandonment, or a waiver of the right to it. *M'Lellan v. Maine F., etc., Ins. Co.*, 12 Mass. 246. See also *Houstman v. Thorton*, Holt N. P. 242.

Where there was evidence that the insurers, upon a request for assistance from the master of an injured vessel, sent a wrecking expedition to rescue it, which reached the vessel the day before the notice of abandonment was telegraphed to the insurer, and the vessel was towed by the wrecking party to a dock and repaired, but the evidence was conflicting as to who ordered such repairs, it was held that, under the provisions of the sue and labor clause of the policy, the question whether there was a constructive acceptance by the defendant of the abandonment was for the jury. *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408.

Intent Immaterial.—Provided the act of the insurer amounts to an acceptance, his intent is immaterial. *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Badger v. Ocean Ins. Co.*, 23 Pick. (Mass.) 355; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Copelin v. Phoenix Ins. Co.*, 46 Mo. 211, 2 Am. Rep. 504.

Repairing.—If the underwriter takes possession, repairs, and offers to return, it is an acceptance by operation of law. *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 27; *Younger v. Gloucester Marine Ins. Co.*, Sprague (U. S.) 236, 2 Curt. (U. S.) 322. *Norton v. Lexington F., etc., Ins. Co.*, 16 Ill. 235. But see *supra*, this title, *Right of Insurer to Repair*.

Repairing under an agreement with the insured is not an acceptance. *Webb v. Protection Ins. Co.*, 6 Ohio 456.

Purchase.—A purchase by the insurers from a third party, who has acquired a good title from the insured, is not an acceptance. *Badger v. Ocean Ins. Co.*, 23 Pick. (Mass.) 347.

Taking Possession.—Where an insurer, upon notification of an abandonment of a vessel, gets it off, brings it to port, repairs it at an expense of more than fifty per cent, and does not offer to return it, the abandonment is thereby accepted, and the company cannot depend on the ground that it is not liable, but must pay the full amount of the policy, as it should have investigated the cause of the loss before accepting the abandonment. *Richelieu, etc., Nav. Co. v. Thames, etc., Ins. Co.*, 72 Mich. 571.

If the insurers refuse an unjustifiable abandonment of a stranded vessel, but take possession of her under a clause in the policy to deliver her from peril, and allow her to be sold to satisfy the salvage expenses agreed on with a wrecking company employed by them to get her off, they are liable for a total loss. *Carr v. Security Ins. Co.*, 109 N. Y. 504.

Whether the right to repair is admitted or not, it was held in *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541, that insurers taking possession of a boat abandoned by the insured, without any designation as to the objects, will be presumed to have done so as insurers only, and their acts constitute an acceptance.

Superintending Sale, etc.—Where the insurers refused the abandonment of a ship, but assented to its conveyance to another port, paid the extra expense for carriage, and superintended the sale in the owner's interest, it was held that their action was an implied acceptance. *Wheaton v. China Mut. Ins. Co.*, 39 Fed. Rep. 879.

Raising Vessel.—Raising a stranded vessel after abandonment and tendering her back

the abandonment, but silence not amounting to estoppel is insufficient.¹

6. WHO MAY ACCEPT.—The acceptance must be by one who has power to bind the insurer.²

d. TIME OF TAKING EFFECT.—Acceptance when made relates to the time of the loss.³

6. Effect of Abandonment—*a. GENERAL PRINCIPLES.*—An abandonment divests the property of the thing abandoned out of the insured, and vests it in the insurer,⁴ together with all the rights of property and rights of

without repair, is an acceptance of the abandonment. *Northwestern Transp. Co. v. Continental Ins. Co.*, 24 Fed. Rep. 171.

Question of Construction.—The wording of the "sue and labor" clause may be decisive of the whole question. *Schuyler v. Phoenix Ins. Co.*, 56 Hun (N. Y.) 493. See also *North Western Transp. Co. v. Thames, etc.*, Ins. Co., 59 Mich. 214; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Com. Ins. Co. v. Chase*, 20 Pick. (Mass.) 142; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Copelin v. Phoenix Ins. Co.*, 9 Wall. (U. S.) 461; *Norton v. Lexington F., etc.*, Ins. Co., 16 Ill. 235; *McManus v. Aetna Ins. Co.*, 6 Allen (New Bruns.) 314; *Griswold v. New York Ins. Co.*, 1 Johns. (N. Y.) 205.

1. **Silence.**—The better doctrine seems to be that mere silence does not amount to an acceptance. *Provincial Ins. Co. v. Leduc*, L. R. 6 P. C. 224. The court in this case denied that *Hudson v. Harrison*, 3 B. & B. 97, was authority for such a proposition.

Estoppel.—The insurer may be estopped to deny an acceptance, where he has led the insured to believe in an acceptance, and their position has been thereby altered for the worse. *Shepherd v. Henderson*, 7 App. Cas. 62; *Hudson v. Harrison*, 3 Moore 288, 3 B. & B. 97. See *The Natchez*, 42 Fed. Rep. 169; *New Orleans, etc., Packet, etc.*, Co. v. *Louisville Underwriters*, 45 Fed. Rep. 370.

In *Fulton Ins. Co. v. Goodman*, 32 Ala. 131, Rice, C. J., said: "Mere silence may not amount to an acceptance; but the silence of a party whose duty it is to speak may amount to a waiver. When his silence, however innocent in its origin, would operate ultimately as a fraud, he will be estopped."

2. Where the act incorporating an insurance company provides that no losses shall be settled or paid without the approbation of at least four of the directors, with the president or assistants, or a plurality of them, the acceptance of an abandonment by the president and assistants alone will not be binding on the company. *Beatty v. Marine Ins. Co.*, 2 Johns. (N. Y.) 109, 3 Am. Dec. 401.

3. If the insurer refuses to accept the abandonment when made, yet if he does afterwards accept it, the acceptance relates back to the time of the loss to which the abandonment refers, and the rights of the parties are settled from that event. *The Brig Sarah Ann*, 2 Sumn. (U. S.) 206. See *infra*, this title, *Effect of Abandonment*.

4. *United States.*—*Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.) 268; *Comegys v. Vass*, 1 Pet. (U. S.) 193; *Columbian Ins. Co. v. Ashby*, 4 Pet. (U. S.) 139; *Dederer v.*

Delaware Ins. Co., 2 Wash. (U. S.) 61; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. (U. S.) 400; *Mutual Safety Ins. Co. v. Cargo, Olc. Adm.* 89; *Murphy v. Dunham*, 38 Fed. Rep. 503.

Illinois.—*Norton v. Lexington F., etc.*, Ins. Co., 16 Ill. 235.

Kentucky.—*Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 544.

Louisiana.—*Hooper v. Whitney*, 19 La. 267; *Phillips v. St. Louis Ins. Co.*, 11 La. Ann. 459; *Graham v. Ledda*, 17 La. Ann. 45; *Mellon v. Bucks*, 5 Martin, N. S. (La.) 374; *Clamageran v. Banks*, 6 Martin, N. S. (La.) 553.

Massachusetts.—*Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 29 Am. Dec. 567; *Smith v. Touro*, 14 Mass. 112; *Oliver v. Newburyport Ins. Co.*, 3 Mass. 37; *Badger v. Ocean Ins. Co.*, 23 Pick. (Mass.) 347.

Michigan.—*Northwestern Transp. Co. v. Thames, etc.*, Ins. Co., 59 Mich. 214.

Missouri.—*Gould v. Citizens' Ins. Co.*, 13 Mo. 524.

New York.—*Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285; *Gardner v. Smith*, 1 Johns. Cas. (N. Y.) 141; *Union Ins. Co. v. Burrell*, Anth. N. P. (N. Y.) 128; *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Atlantic Ins. Co. v. Storrow*, 1 Edw. Ch. (N. Y.) 621.

Ohio.—*Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200, 67 Am. Dec. 339; *Sherlock v. Globe Ins. Co.*, 4 Cinc. L. Bull. (Ohio) 26. See also *Subrogation*.

The Absence of a Formal Instrument of abandonment is not material. The law gives to the act of abandonment, when accepted, all the effects which the most accurately drawn assignment would accomplish. *Comegys v. Vass*, 1 Pet. (U. S.) 193, 213; *Northwestern Transp. Co. v. Thames Ins., etc.*, Co., 50 Mich. 214.

Upon Payment by the Underwriters in a policy of insurance upon goods on board of a ship, as for a total loss, they are entitled to be subrogated to all the rights of the insured. They are entitled to the property remaining and also to recover for the loss from any other source; and a release by the insured of any such right will exonerate the underwriters *pro tanto*. *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285; *Home Ins. Co. v. Western Transp. Co.*, 4 Robt. (N. Y.) 257.

But the Underwriters Cannot Demand an abandonment of more than is insured; and such demand does not affect the insured's rights to abandon to the extent of the sum insured and recover for a total loss. *Havelock v. Rockwood*, 8 T. R. 277.

Compromise.—Where the insurers reject the abandonment offered by the assured, refuse

action incident thereto,¹ and all the burdens and liabilities in respect

to pay for a total loss, and effect a compromise, they do not succeed to the rights of the assured. *New York Ins. Co. v. Roulet*, 24 Wend. (N. Y.) 505; *Brooks v. MacDonnell*, 1 Y. & C. 502.

Unauthorized Abandonment.—But an unauthorized and unaccepted abandonment has no effect. *Thompson v. Royal Exch. Assur. Co.*, 16 East 214; *Rugely v. Sun Ins. Co.*, 7 La. Ann. 279, 56 Am. Dec. 603; *Hanau v. Louisiana Mut. Ins. Co.*, 15 La. Ann. 201; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. (Mass.) 543, 6 Pick. (Mass.) 131; *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 29 Am. Dec. 567; *Robinson v. Jones*, 8 Mass. 536, 5 Am. Dec. 114; *Delaware Ins. Co. v. Winter*, 38 Pa. St. 176; *The Ship Packet*, 3 Mason (U. S.) 255; *Ward v. Peck*, 18 How. (U. S.) 267.

And where only a partial loss is claimed the insurer has no right to an abandonment. *Murray v. Pennsylvania Ins. Co.*, 2 Wash. (U. S.) 186.

1. Rights to which Insurer Succeeds—Proceeds and Profits.—If, after abandonment for capture and acceptance, agents of the assured purchase the thing insured, and resell, the insurer may affirm their purchase, and he is entitled to the proceeds thereof and to whatever has been purchased therewith, and may maintain trover therefor. *Robinson v. United Ins. Co.*, 1 Johns. (N. Y.) 592; *Union Ins. Co. v. Burrell*, Anth. N. P. (N. Y.) 128. The insurers are entitled also to the profits arising from the thing purchased with the proceeds of such sale. *Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 443.

Spes Recuperandi.—An abandonment rightfully made transfers as well the *spes recuperandi* as the interest to the insured in the vessel lost, although the loss has not been actually paid by the insurer. *Rogers v. Hosack*, 18 Wend. (N. Y.) 319.

Compensation from Foreign Government.—The insurer who has paid the loss is entitled, in cases of seizure of a vessel by a foreign government, to compensation obtained under letters of a marque and reprisal. *Randal v. Cockran*, 1 Ves. 98; *Blasuwpot v. De Costa*, 1 Eden 130; or under the award of commissioners appointed by treaty, *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319 (see *Mercantile Marine Ins. Co. v. Corcoran*, 1 Gray (Mass.) 75); but not to a sum granted by the legislature of such foreign country as a pure gift expressly to cover the part of the loss which the valuation of the policy did not cover, and which the insurers had not paid. *Burnand v. Rodocanachi*, 7 App. Cas. 335, affirming 6 Q. B. Div. 633, which reversed 5 C. P. Div. 424.

Compensation from Tort Feasor.—The insurer is entitled to any compensation recovered from one who is responsible for the injury for which the insurer has paid. *North of England Ins. Assoc. v. Armstrong*, L. R. 5 Q. B. 244; *Yates v. Whyte*, 4 Bing. N. Cas. 272, 33 E. C. L. 349; *Mercantile Marine Ins. Co. v. Clark*, 118 Mass. 288.

General Average Contribution.—*Sturgess v. Cary*, 2 Curt. (U. S.) 59; *Potter v. Providence Washington Ins. Co.*, 4 Mason (U. S.) 298.

Rights of Action.—Insurers succeed, upon abandonment, to all rights of action of the insured against third parties for injury to the property covered by the policy. *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285; *Home Ins. Co. v. Western Transp. Co.*, 4 Robt. (N. Y.) 257, 33 How. Pr. (N. Y.) 102, 51 N. Y. 93; *Clark v. Wilson*, 103 Mass. 219, 4 Am. Rep. 532; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 68; *Church v. Shelton*, 2 Curt. (U. S.) 271; *Garrison v. Memphis Ins. Co.*, 19 How. (U. S.) 312; *The Keokuk*, 1 Biss. (U. S.) 522; *The Planter*, 2 Woods (U. S.) 490; *Yates v. Whyte*, 4 Bing. N. Cas. 272. See also *Georgia Ins., etc., Co. v. Dawson*, 2 Gill (Md.) 365; *Williams v. Hays*, 64 Hun (N. Y.) 202. But the insurers succeed only to such claim for damages as the insured himself could have made. *Simpson v. Thompson*, L. R. 3 App. Cas. 279; *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 174; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312; *The Bristol*, 29 Fed. Rep. 867. See also *The Potomac*, 105 U. S. 630; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

Where the loss of the insured ship was caused by collision with another ship belonging to the insured, the underwriter, upon payment, has no cause of action against the ship which caused the injury, since the insured had no right of action against himself; and the underwriter succeeds to no greater rights. *Simpson v. Thompson*, L. R. 3 App. Cas. 279.

Where the carrier has limited his liability by agreement with the insured, the limitation is binding upon the abandonee, and the latter becomes subject to all agreements and equities between the insured and the carrier. *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 174; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312.

In *Phoenix Co. v. Erie, etc., Transp. Co.*, 117 U. S. 321, which is another case upon the same point, Gray, J., in delivering the opinion of the court, said: "From the very nature of the contract of insurance, as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received either from the remnants of the goods or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law it can only be asserted in his name, and even in a court of equity or of admiralty it can only be asserted in his right. In any form of remedy the insurer can take nothing by subrogation but the rights of the assured. * * * The right of action against another person, the equitable interest in which passes to the insurer, being only that which the as-

thereof,¹ from the moment of the casualty to which the abandonment refers.² But the abandonment operates as a transfer only to the extent of the insured's

sured has, it follows that if the assured has no such right of action none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions."

The underwriter may enforce his right in his own name in the *United States* courts. *Monticello v. Mollison*, 17 How. (U. S.) 153; *Commercial Ins. Co. v. The C. D., Jr.*, 1 Woods (U. S.) 72; *The Sydney*, 27 Fed. Rep. 119.

In *England* he must sue in the name of the insured. *Simpson v. Thompson*, 3 App. Cas. 279; *Wilson v. Raffalovich*, 7 Q. B. Div. 553.

1. **Insurers' Liabilities—Wages.**—The insurers on ship are liable for the wages of seamen earned subsequent to an abandonment. *Hammond v. Essex F., etc.*, Ins. Co., 4 Mason (U. S.) 196; *McBride v. Marine Ins. Co.*, 7 Johns. (N. Y.) 431. See *Frothingham v. Prince*, 3 Mass. 563. But the abandonee takes free from any lien for wages earned before the casualty. *Daniels v. Atlantic Mut. Ins. Co.*, 24 N. Y. 447; *Sharp v. Gladstone*, 7 East 24.

As between the shipowner and insurer on freight, it has been held that, in case of an abandonment, the wages are a charge on the ship and owner in exoneration of freight, and are not chargeable against the insurer. *Daniels v. Atlantic Ins. Co.*, 24 N. Y. 447. The same rule applies between the insured on cargo and the insurer. *Daniels v. Atlantic Ins. Co.*, 24 N. Y. 447; *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383.

Freight.—The insurer on goods is liable to the shipowner for freight, and the question arises, Does the abandonee take the salvage subject to the claim for freight? The U. S. Supreme Court has held that the claim against the abandonee could not be supported, and that the charge ought to fall on the insured. *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383.

Mr. Phillips and Mr. Arnould are of opinion that the loss ought to fall on the insurers, but that where such charges would exceed the salvage the insurer may decline taking the salvage and settle for a total loss. 2 Arnould on Marine Insurance (6th ed.) 977; 2 Phillips on Insurance, §§ 1718, 1726.

Expenses for Saving Property.—All the expenses and charges in saving the property abandoned after the abandonment are chargeable against the insurer. *Daniels v. Atlantic Mut. Ins. Co.*, 24 N. Y. 451; *Sharp v. Gladstone*, 7 East 24; *Barclay v. Stirling*, 5 M. & S. 6; *Barker v. Phoenix Ins. Co.*, 8 Johns (N. Y.) 307; 5 Am. Dec. 339; *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412, 5 Am. Dec. 283.

After capture and abandonment the insurer is liable for expenses incurred in prosecuting an appeal from the prize court. *Lawrence v. Van Horne*, 1 Cai. (N. Y.) 276.

But where the interests of others are ben-

efited, as well as those of the insurer, the principles of general average are to be considered. *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.), 412, 5 Am. Dec. 283.

Repairs.—Insurers are liable for the expenses of repairing the vessel subsequent to abandonment. *United Ins. Co. v. Scott*, 1 Johns. (N. Y.) 106.

Co-insurer's Liability.—The liability of separate underwriters, in case of an abandonment accepted by them, for repairs, etc., subsequent to the casualty occasioning the loss, is separate, and not as of partners, each being liable for a sum bearing the same ratio to the expenditure as the sum underwritten by him bears to the whole sum underwritten. *United Ins. Co. v. Scott*, 1 Johns. (N. Y.) 106.

Injuries Caused by Property Abandoned.—The abandonee of a vessel which has been sunk in a navigable river is bound to use proper care to prevent accidents to other vessels so long as he has the possession, control, and management of the vessel; that is, so long as by due care and exertion he can easily remove, or so far shift, its position as to prevent such injury; but by abandoning the wreck he may put an end to his liability. *White v. Crisp*, 26 Eng. L. & Eq. 532; *Taylor v. Atlantic Mut. Ins. Co.*, 37 N. Y. 275.

2. *Cammell v. Sewell*, 3 H. & N. 617; *The Brig Sarah Ann*, 2 Sumn. (U. S.) 206; *Dederer v. Delaware Ins. Co.*, 2 Wash. (U. S.) 61; *Kenedy v. Baltimore Ins. Co.*, 3 Har. & J. (Md.) 367, 6 Am. Dec. 499; *Lovering v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; *Sun Mut. Ins. Co. v. Hall*, 104 Mass. 507; *Mellon v. Bucks*, 5 Martin, N. S. (La.) 374; *Clamageran v. Banks*, 6 Martin, N. S. (La.) 553; *Hooper v. Whitney*, 19 La. 267; *Clarkson v. Phoenix Ins. Co.*, 9 Johns. (N. Y.) 1; *Saurez v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 482; *Marquette First Nat. Bank v. Stewart*, 26 Mich. 83; *Natchez Ins. Co. v. Buckner*, 4 How. (Miss.) 63.

A ratification of an abandonment dates back to the act ratified. *Graham v. Ledda*, 17 La. Ann. 47.

Insurer Takes Free from Pre-existing Charges.

—The insurer takes the thing abandoned, whether ship, freight, or cargo, free from all charges or incumbrances created by act of the master or owner before the casualty. *Daniels v. Atlantic Mut. Ins. Co.*, 24 N. Y. 447. See also *Barclay v. Stirling*, 5 M. & S. 6; *Sharp v. Gladstone*, 7 East 24.

Bottomry Bond.—If an insurer accepts the abandonment of a ship upon which a bottomry bond has been given, he takes it *cum onere*, and the holder of the bond has the first right to the salvage. *Delaware Mut. Safety Ins. Co. v. Gossler*, 96 U. S. 645. In delivering the opinion Clifford, J., said: "By an abandonment the insurer is placed in the situation of the insured whom he represents, and can have no greater right than the insured would have had. Unlike that, the lender on bottomry loses his remedy only when the ship or other property hypoth-

interest.¹ The master of the ship and agents of the insured thereupon become agents of the insurer, and the insured is not bound by their subsequent acts unless he adopts them.²

ecated is wholly lost; and, where parts are preserved, such parts are esteemed his proper goods, being presumed to be the product of his money; and he therefore takes preference of the owner or insurer." See *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 425, 5 Am. Dec. 283.

Mortgage.—Where A, who holds a mortgage on the whole of a vessel, insures her, and B holds a prior mortgage on one half the vessel; upon loss of the vessel, abandonment, and payment to A as for a total loss, the insurers take only one half the salvage, while the other half goes to A. *Rice v. Cobb*, 9 Cush. (Mass.) 302. In this case Bigelow, J., said: "So far as the rights of the parties to this case are concerned, at the time of the abandonment each was the owner of the half of the wreck of the brig; the plaintiff by virtue of his prior mortgage on one half, the defendant by virtue of the abandonment."

1. *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 622.

Thus, if only an aliquot part of the interest of the insured in the subject of the policy is covered thereby, an abandonment transfers only such insured part. *The Manitoba*, 30 Fed. Rep. 129. See also *Kirby v. Thames Ins. Co.*, 27 Fed. Rep. 221.

But this rule does not apply where the insurance reaches every part of the thing insured. *The Manitoba*, 30 Fed. Rep. 129.

Thus, where a vessel valued at \$13,500 is insured for \$11,000, an abandonment carries the whole vessel of the insured to the insurer, and not merely 11,000/13,500, i.e., 22/27 thereof. *The Mary E. Perew*, 15 Blatchf. (U. S.) 58. See also *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. (Ky.) 541; *Mutual Safety Ins. v. Cargo*, Oic. Adm. 89.

Contra.—*Merchants'*, etc., *Ins. Co. v. Duffield*, 2 Handy (Ohio) 122; *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200, 67 Am. Dec. 339; *Phillips v. St. Louis Ins. Co.*, 11 La. Ann. 459; *Natchez, etc., Packet, etc., Co. v. Louisville Underwriters*, 44 La. Ann. 714; *White v. Steam Tug Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523. In these cases it is held that where the owner of the entire property insures for less than its expressed value, an abandonment carries to the insurer only such proportionate part of the thing insured as is represented by the ratio between the actual insurance and the valuation in the policy.

Pennsylvania.—The question is an open one in *Pennsylvania*. But it is held there that, conceding the view that the insured retains his uninsured interest after abandonment, the underwriters are not bound to look after the interests of the insured, and, when they receive nothing from the wreck, are not liable for any part of its value. *Alleghany Ins. Co. v. Ransom*, 69 Pa. St. 496.

Salvage Received by Insured.—If the underwriters, in case of a total loss, wish to reduce the verdict by salvage received by the in-

sured, they must raise the issue by pleading that such salvage has been received by the insured. *Gulf of California Nav., etc., Co. v. State Invest., etc., Co.*, 70 Cal. 586. See *supra*, this title, *Total Loss with Benefit of Salvage*.

Freight Due from Insured.—In *Dumas v. U. S. Ins. Co.*, 12 S. & R. (Pa.) 437, there was an insurance on freight valued at \$7500. Two thirds of the goods shipped belonged to the shipowner and insured; one third belonged to other shippers. The vessel was captured, abandoned, and the insurers paid for a total loss, i.e., \$7500. Afterwards the vessel and part of the cargo was restored and the voyage completed. By the abandonment the insurer became entitled to the freight earned. They received that from the other shippers, and the question was whether, under the valuation in the policy, the freight to which the insurer was entitled from the owner and insured was the difference between the freight actually received from the other shippers and the valuation in the policy, or was to be taken as such a proportional part of the valuation in the policy as his own goods were of the entire cargo, i.e., two thirds of the valuation. It was held that the insured was accountable for only two thirds of the valuation.

2. *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; *Schmidt v. United Ins. Co.*, 1 Johns. (N. Y.) 249, 3 Am. Dec. 319; *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514; *Gardner v. Smith*, 1 Johns. Cas. (N. Y.) 141; *Miller v. De Peyster*, 2 Cai. (N. Y.) 302; *The Brig Sarah Ann*, 2 Sumn. (U. S.) 206. See also the cases cited in the first note to this section.

Supercargo.—Where the voyage is broken up before the arrival of the vessel at the port, and the cargo is abandoned, and the master delivers it to the supercargo, contrary to instructions, this makes the supercargo agent of the master, and so agent of the insurers after abandonment; and the insurers are responsible for his actions. *Catlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561.

A reasonable compromise made by a supercargo to free a vessel from detention after capture is binding on the insurer. *Welles v. Gray*, 10 Mass. 42.

Insured Agents for Beneficial Purposes.—The insured become agents for the underwriters for all beneficial purposes relative to the interest of the underwriters in the property. *Columbian Ins. Co. v. Ashby*, 4 Pet. (U. S.) 139; *Robertson v. Western Marine Ins. Co.*, 19 La. 227, 36 Am. Dec. 673.

After an abandonment which is not accepted by the insurer the assured remains the *quasi* agent or trustee of the insurer, and must do what he thinks most for the interest of the parties concerned; and if he acts with fidelity, and sells the vessel and property insured at public auction, in the usual manner, without a view to his own benefit, it is no waiver of

b. APPORTIONMENT OF FREIGHT.—In *England* this doctrine as to the effect of abandonment is construed, in the case of the abandonment of a ship, to carry, as an incident to the ship, the right to the whole freight pending at the time of the abandonment and subsequently earned, to the abandonee.¹ The

the abandonment, nor will it prejudice his claim against the insurer for a total loss. *Walden v. Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310, 4 Am. Dec. 359. See also *Curcier v. Philadelphia Ins. Co.*, 5 S. & R. (Pa.) 113.

But see *Mellon v. Bucks*, 5 Martin N. S. (La.) 371. The insured on goods in this case, after abandonment to the underwriters, brought suit against the owners and master of the ship by which he had shipped the goods, for the value thereof, alleging that the goods had been lost through their misconduct. The defendants were insured on ship and freight in the same insurance company, and the plaintiff attached the debt which might become due to the defendants from the company on the policies on ship and freight. The plaintiff claimed a right to bring the action as agent for the insurance company by reason of his abandonment. It was held that the agency created by abandonment extended only to beneficial purposes connected with the interest of the insurers in the property abandoned, and that his claim to act as agent, under the circumstances, was unfounded. See also *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 29 Am. Dec. 567.

Agency Relates to Time of Abandonment.—The master's service for the insurer relates to the time of the loss to which the abandonment refers. In *The Brig Sarah Ann*, 2 Sumn. (U. S.) 206, Judge Story said: "Then, it is said, that as the sale was made before the abandonment was accepted, it was a sale made by the master as agent of the owners, and that, by implication, the abandonment admits the necessity of the sale and adopts and justifies it. But here, again, I cannot admit the entire correctness of the argument. When a loss takes place for which an abandonment may be made, the master is not exclusively the agent of the original owners of the ship, but he is the agent of those who retroactively become owners of the ship in consequence of that event, if an abandonment is made and is justifiable. The common doctrine is that the master is the agent of all concerned in the voyage; and that he becomes, by relation, the agent of the underwriters, whenever an abandonment has been accepted, from the time of the loss to which that abandonment refers, although the abandonment may not have been offered or accepted until months after the event. So that in the present case, if the libellants have finally accepted the abandonment, and it was persisted in by the owners and never withdrawn by them, but was a continuing abandonment on their side, the act of the master in the sale is to be treated as his act, as agent of the libellants, and not of the original owners."

Where the master purchases the insured property at a sale after abandonment and the insurer confirms his acts, he takes the property *cum onere*, *Lawrence v. New Bedford Commercial Ins. Co.*, 2 Story (U. S.) 471;

Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; but the insurer may disclaim his acts and refuse to take the advantages of the purchase and settle with the insured for a total loss, *Jumel v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412, 5 Am. Dec. 283; or he may receive the property, reserving all rights and waiving no objections; and he is entitled to take the proceeds without any charges if the property does not yield a profit beyond the fair value of it when shipped. *Lawrence v. New Bedford Commercial Ins. Co.*, 2 Story (U. S.) 471. See also *Lawrence v. New Bedford Commercial Ins. Co.*, 2 Story (U. S.) 471; *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 29 Am. Dec. 567; *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514. But in *Dederer v. Delaware Ins. Co.*, 2 Wash. (U. S.) 61, it was held that upon abandonment, though the property vests in the insurer by relation from the time of the loss, the master continues the agent of the insured until abandonment.

Insured Retaining Interest.—Where the owner has only a part interest insured, he remains his own insurer as to the remainder; and, although he abandons, is still bound by the master's acts. *Natchez, etc., Packet, etc., Co. v. Louisville Underwriters*, 44 La. Ann. 714.

1. English Rule as to Freight.—Case *v. Davidson*, 5 M. & S. 79; *Davidson v. Case*, 8 Price 542; *M'Carthy v. Abel*, 5 East 388; *Stewart v. Greenock Marine Ins. Co.*, 2 H. L. Cas. 159; *Scottish Marine Ins. Co. v. Turner*, 1 Macq. Cas. 334; *Miller v. Woodfall*, 8 El. & Bl. 493, 92 E. C. L. 493; *Hickie v. Rodocanachi*, 4 H. & N. 455; *Barclay v. Stirling*, 5 M. & S. 6; *Thompson v. Rowcroft*, 4 East 34.

In *Miller v. Woodfall*, 8 El. & Bl. 493, the English rule and the contrasted American rule are thus stated by Lord Campbell: "The abandonees are considered as purchasers of the ship at the moment of the casualty to which the abandonment refers, and, although the contract of a shipowner does not run with the ship, it is well settled that, as incident to the ship, the right to the whole freight, pending at the time of the sale and subsequently earned, belongs to the purchaser of the ship. The American courts, presuming that ship and freight are always separately insured, and taking into consideration the respective right and equities of the different sets of underwriters, where the loss is finally adjusted among all parties, assured and assurers, make an apportionment of the freight earned partly before and partly after the casualty for which the abandonment on ship is made, so that the freight earned previous to the casualty may go for the benefit of the underwriters on freight to whom there has been an abandonment, and only the freight earned after the casualty vests in the abandonee on ship. (See the authorities collected, Arnould, §

rule in the *United States* as to freight is different, and the freight is apportioned; that earned previous to the abandonment going to the insured, and that afterward earned belonging to the abandonee.¹

ABATEMENT.—"Abatement" is a generic term derived from the French *abattre*, and signifies the quashing, beating down, removing, or destroying of a thing.²

404.) But (as in the present case), in adjusting the rights of assured and assurer on ship, we do not look beyond those parties; and the abandonee of the ship, like the purchaser, has a right to the whole of the freight pending at the casualty although he could not claim freight paid or completely earned in a prior part of the voyage. *Stewart v. Greenock Marine Ins. Co.*, 2 H. L. Cas. 159, 1 Macq. Cas. 382; *Scottish Marine Ins. Co. v. Turner*, 1 Macq. Cas. 334." In this case it was held that where the ship and goods belong to the same person, and there is consequently no contract of affreightment, the abandonee succeeds to no right to freight for the whole voyage, or anything in the nature thereof, with respect to the part of the voyage performed before abandonment; but he is entitled to compensation for the part of the voyage performed after the accident.

Hickie v. Rodocanichi, 4 H. & N. 455, goes far to bring the effect of the English law in accord with the American doctrine as to apportionment *pro rata itineris*. Here a ship having been chartered to carry troops to Calcutta was insured under a valued policy. After performing a part of the voyage she was injured by fire, and put into a port of distress, where, being found to be greatly damaged, she was abandoned to the underwriters as totally lost, and the abandonment was accepted, the captain having chartered another ship and forwarded the troops to Calcutta. The freight was received by the shipowner's agent. It was held that in forwarding the troops the captain acted as agent for the owner, and not for the underwriters, to whom the ship had been abandoned, and was not entitled to any benefit from the freight so received.

Where ship and freight were insured in separate companies, and both became a total loss by reason of a collision during the voyage, and the insured afterward recovered from the owner of the ship at fault for the loss of their own ship and her freight, it was held that the underwriters of the ship were not entitled to recovery from the insured of any part of the amount recovered by the said insured for the loss of freight. *Sea Ins. Co. v. Hadden*, 13 Q. B. Div. 706.

1. *United States Rule as to Freight.*—Ham-

mond *v. Essex F., etc., Ins. Co.*, 4 Mason (U. S.) 196; *Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 443; *Whitney v. New York Firemen's Ins. Co.*, 18 Johns. (N. Y.) 208; *Davy v. Hallett*, 3 Cai. (N. Y.) 16, 2 Am. Dec. 241; *United Ins. Co. v. Lenox*, 1 Johns. Cas. (N. Y.) 377, 2 Johns. Cas. (N. Y.) 443; *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 246; *Teasdale v. Charleston Ins. Co.*, 2 Brev. (S. Car.) 190, 3 Am. Dec. 705; *Coolidge v. Gloucester Marine Ins. Co.*, 15 Mass. 341.

The doctrine of apportionment of freight appears not to have been decisively established when the case of *Livingston v. Columbian Ins. Co.*, 3 Johns. (N. Y.) 49, was decided.

Profits.—It seems that where there is an insurance on goods, and an abandonment thereof is made, the profits follow incidentally the principal subject, and belong to the insurer of the goods, to the exclusion of the insurer on profits. *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397; *Tom v. Smith*, 3 Cai. (N. Y.) 245.

2. See *Case v. Humphrey*, 6 Conn. 140.

Abatement of Taxes. (See also the title *TAXATION*.)—In *Lowell v. Middlesex County*, 146 Mass. 411, the court distinguishes "abatement" from "revaluation."

Ouster by Abatement—Forcible Entry and Detainer.—In *Brown v. Burdick*, 25 Ohio St. 268, it was held, where a testator died seized of an estate in fee, and, before his devisee could enter, a stranger obtained possession, that the devisee might maintain forcible entry and detainer against the stranger. The court said: "The injury of which the plaintiff in detainer complained was what the common law denominates ouster by abatement, which is, where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger who has no right makes an entry and gets possession of the freehold. It is a figurative expression, to denote that the rightful possession of the freehold of the heir or devisee is overthrown by the rude intervention of a stranger, and is always consequent upon the descent or devise of an estate in fee-simple. 3 Bla. Com. 167-169."

Abatement of Actions; Writs; Pleas in Abatement. See the title *ABATEMENT*, 1 Encyc. Pl. & Pr. 1.

ABATEMENT OF LEGACIES.

By F. A. P. FISKE.

- I. DEFINITION, 42.
- II. RESIDUARY LEGACIES, 42.
- III. GENERAL LEGACIES, 45.
 - 1. *The General Rule*, 45.
 - 2. *Circumstances Influencing Application of Doctrine*, 46.
 - a. *Bounty*, 46.
 - b. *Consideration*, 48.
 - c. *Intent*, 51.
 - 3. *Annuities*, 54.
 - 4. *Legacy of Stock*, 56.
 - 5. *Gift of Legacy Duty*, 56.
- IV. SPECIFIC AND DEMONSTRATIVE LEGACIES, 56.
 - 1. *In General*, 56.
 - 2. *Specific Bequest of all the Testator's Personal Property*, 59.
 - 3. *Fund Given in Fractional Parts*, 59.
- V. LAPSED INTERESTS, 60.
- VI. STATUTORY PROVISIONS, 62.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *LEGACIES AND DEVISES*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *ADEMPMENT OF LEGACIES; ANNUITIES; DEBTS OF DECEDENTS; EXECUTORS AND ADMINISTRATORS; LEGACIES AND DEVISES; WILLS*.

I. DEFINITION.—Abatement is the reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies. When the estate of a testator is insufficient to pay both debts and legacies, it is the rule that the general legacies must abate proportionably to an amount sufficient to pay the debts. If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionably.¹

II. RESIDUARY LEGACIES—General Rule.—As a residuary legatee is entitled only to what remains after all debts and paramount claims upon the testator's estate are satisfied, he cannot call upon either the general or specific legatees to abate in his favor, even if the entire residue be exhausted.²

1. *Bouvier Law Dict.*, approved in *In re Neistrath*, 66 Cal. 331.

In *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148, an annuity to the widow of the testator was made chargeable upon all the realty. One of the devisees paid the annuity, and it was held that the various devisees must contribute, on a deficiency of

assets, in proportion to the value of their respective interests. The chancellor cited *Carter v. Barnardiston*, 1 P. Wms. 505; *Long v. Short*, 1 P. Wms. 403.

2. *No Abatement of General and Specific Legacies in Favor of Residuary Legacies.*—*Woerner Am. Law Adm.*, § 452; *Rop. Leg.* (2d Am. ed.) *411; *Purse v. Snaplin*, 1 Atk. 418; *Fonnereau*

Annuity Takes Precedence.—So where there is a gift of an annuity and a residuary gift, the annuity must be paid in full, however great or small the testator's property may be. In other words, the annuity takes precedence, and the whole loss falls upon the residuary legatee.¹

Annuity Paid from Income—Rule Otherwise.—If, however, the testator should provide in his will that the annuity should come only out of the income, and not out of the capital, the rule is otherwise.²

Subsequent Deficiency of Assets.—In cases where there is a residue at the time of the testator's death, but the assets in the hands of the executor subsequently become insufficient to pay all the other legatees, the residuary legatee is not entitled to call upon the other legatees to contribute towards the loss, but must himself bear the whole of it.³

v. Poyntz, 1 Bro. C. C. 478. See also *Harley v. Moon*, 1 Dr. & Sm. 623; *Baker v. Farmer*, L. R. 3 Ch. 537; *Thompson v. Thompson*, 3 Dem. (N. Y.) 409; *Langstroth v. Golding*, 41 N. J. Eq. 49, 53; *Warren v. Morris*, 4 Del. Ch. 289, 304; *Alsop v. Bowers*, 76 N. Car. 168.

Effect of Residuary Legacy.—"Nothing is given by a residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied." *Devens, J.*, in *Tomlinson v. Bury*, 145 Mass. 347.

A gift of the rest of a specific fund after payment of debts and funeral expenses, where legacies have been given as well, is a gift of the residue after payment of legacies as well as the debts and funeral expenses. *Foxen v. Foxen*, 3 N. R. 452, 13 W. R. 33.

A testatrix bequeathed her diamonds upon trust for sale, thereout to be paid two legacies of £600 and £700. The will contained a residuary bequest, but did not otherwise deal with the surplus (if any) of the proceeds of the sale. The diamonds realized only £900. The legacy of £700 failed. *Chitty, J.*, said: "The argument of the residuary legatee in this case appears to me to be an attempt to creep into the shoes of the legatee of the £700, as if that legacy had taken effect; but this legacy has failed, and the residuary legatee is entitled to claim, not the legacy of £700, but only so much of the proceeds of sale of the diamonds as is not required to satisfy the £600 legacy. In other words, the residuary legatee can take nothing until this specific charge of £600 has been satisfied." *In re Tunno*, 45 Ch. Div. 66.

1. Priority of Annuities.—"The general rule is that if there be a clear gift of a life interest and of a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee." *Lord Justice Turner* in *Croly v. Weed*, 3 De G., M. & G. 995.

Where a fund is set apart to pay annuities, and is directed, upon the death of the annuitants respectively, to fall into the residue, if the fund is insufficient to pay the annuities the residuary legatee is entitled to nothing till all the legacies and annuities have been paid in full. *Arnold v. Arnold*, 2 Myl. & K.

374; *Anderson v. Anderson*, 33 Beav. 223; *In re Tootal's Estate*, 2 Ch. Div. 628.

It would seem that a direction that in the event of insufficiency of assets all the beneficiaries are to abate, does not entitle the residuary legatee to a fund which is released by the death of a tenant for life. *In re Lyne's Estate*, L. R. 8 Eq. 482.

On the other hand, if annuities are directed to abate in favor of legatees, or *vice versa*, in the event of deficient assets the abatement is permanent, and a fund falling in is not applicable to increase gifts which have abated. *Farmer v. Mills*, 4 Russ. 86; *Hichens v. Hichens*, 25 W. R. 249; *Theobald on Wills* (2d ed.) 623.

2. *Williams on Executors* (9th ed.) *1212.

On the question whether an annuity is payable out of the income or capital, see *Wright v. Callender*, 2 De G., M. & G. 652; *Haynes v. Haynes*, 3 De G., M. & G. 590; *Bogue v. Dumegue*, 10 Hare 462; *Miner v. Baldwin*, 1 S., M. & G. 522; *Miller v. Huddleston*, 17 Sim. 71; *Hindle v. Taylor*, 20 Beav. 109; *Farmer v. Mills*, 4 Russ. 86; *Arnold v. Arnold*, 2 Myl. & K. 374.

3. Residue at Time of Testator's Death—Subsequent Deficiency.—*Willmot v. Jenkins*, 1 Beav. 401; *Baker v. Farmer*, L. R. 3 Ch. 537; *Humphreys v. Humphreys*, 2 Cox 186; *Page v. Leapingwell*, 18 Ves. Jr. 466; *Baker v. Farmer*, L. R. 3 Ch. 537.

In *Dyose v. Dyose*, 1 P. Wms. 305, a different opinion was expressed, but the decision has been severely criticised, and may now be considered as overruled.

The lord chancellor, in *Fonnereau v. Poyntz*, 1 Bro. C. C. 477, in speaking of the case of *Dyose v. Dyose*, 1 P. Wms. 305, said: "As to the case of *Dyose v. Dyose*, there was no ambiguity, either latent or patent. There was a legacy of £3000 apiece given to the younger sons, the residue to the eldest; and the question was whether the residuary legatee should have anything or nothing, which, if not mixed with the affair of the executrix having wasted the assets of the testator, is a simple question whether a testator giving a larger legacy than he is worth, and then the residue to another, there could be a residue. I cannot agree to the law in that case, for in such a case, if the testatrix did not leave a residue beyond the value of the legacies, the residuary legatee takes nothing, and the law of the court is that the

But a legatee otherwise entitled to a priority may have conducted himself in such a manner as to render it no more than just that the estate should be divided as if no loss had occurred.¹ Where a legacy is given in lieu of a share of residue, and the gift of the share of the residue is revoked, thereby becoming undisposed of, the legacy is payable, not out of the share thus undisposed of, but out of the general estate.²

Debts Charged on Particular Fund.—The testator may, if he desires, relieve the residuary legatee from primary liability by charging the debts upon a particular fund;³ and when he apprehends that there may be a deficiency of assets,

intention of the testatrix making a specific bequest or pecuniary legacy cannot be controlled by the statement of her fortune."

1. Conduct of Legatee as Affecting Question of Priority.—In *Ex parte Chadwin*, 3 Swanst. 387, the testator directed his trustees or executors, after the sale of his estate, to stand possessed of the money arising from the sale, upon trust, first, to invest four hundred pounds in trust for his wife for life, in bar of dower, and after her death for W. C.; and upon the further trust, out of the residue of the money, to invest £400 in trust for T. R. for life, and after his death for his children; and upon the further trust to pay other sums to persons named; and then bequeathed the residue of the estate to W. C. The executor made no investment of the trust money, but paid interest on the two sums of four hundred pounds to the respective legatees, and applied the assets to his own use, and then became insolvent. The lord chancellor in his opinion said: "In the events that have occurred, the executor, instead of applying himself to the due administration of the testator's estate, paying the legacies according to the priorities, if there were priorities, and making proper investments, paid interest to the testator's widow and to one of his brothers; and that sort of transaction introduces another question not touched by any prior decision, whether the legatees have not so dealt with this executor in regard to their respective legacies as to have made him their debtor for each respectively."

In *Willmott v. Jenkins*, 1 Beav. 404, an executor, who was also trustee, paid the adult legatee his share, but invested the share of the infant legatee in his own name, and then misappropriated the funds; but further assets unexpectedly came to the estate. Lord Langdale, M. R., said: "If an executor makes payments to a legatee in person, or to a trustee for a legatee, or makes such an appropriation as is equivalent to payment, the other persons entitled under the will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated. But if there be no payment, and no appropriation equivalent to payment, I do not see why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees."

This distinction will explain *Morris v. Livie*, 1 Y. & C. C. C. 380; *Baker v. Farmer*, L. R. 4 Eq. 382. Compare *Ex parte Chadwin*, 3 Swanst. 387.

2. Theobald on Wills (2d ed.) 618; *Sykes v.*

Sykes, L. R. 4 Eq. 200, L. R. 3 Ch. 301. See also *Cresswell v. Creslyn* (2d ed.) 125; 3 Bro. P. C. 246; 1 Swanst. 571 note.

The testator may of course direct the legacy to be paid out of the revoked share. *In re Woods' Will*, 29 Beav. 236; *Walsh v. Walsh*, 4 Ir. Rep. Eq. 428.

3. Relieving Residuary Legatee of Primary Liability.—2 Jarman on Wills (5th Am. ed.) *680; *Browne v. Groombridge*, 4 Madd. 495; *Choat v. Yeates*, 1 J. & W. 102; *Evans v. Evans*, 17 Sim. 86; *Phillips v. Eastwood*, 1 L. & G. 294; *Webb v. De Beauvoisin*, 31 Beav. 573; *Vernon v. Earl Manvers*, 31 Beav. 623.

"It should seem that where a specific portion of personal estate is appropriated to charges to which the general personalty is liable, such fund is not, as in the case of land, subsidiary only, but is primarily applicable." 2 Jarman on Wills (5th Am. ed.) *680. If, however, the residue is undisposed of, the latter is primarily liable. *Holford v. Wood*, 4 Ves. Jr. 78; *Hewett v. Snare*, 1 De G. & S. 333; *Newberger v. Bell*, 23 Beav. 386; *Corbet v. Corbet*, 8 Ir. Rep. Eq. 407.

This accords with the general principle that where there is no residuary gift, but there is in fact a residue of which no disposition has been attempted, such undisposed-of residue is in all cases the primary fund for payment of debts. *Howse v. Chapman*, 4 Ves. Jr. 542; *Taylor v. Mogg*, 27 L. J. Ch. 816.

Where one particular fund is appropriated for payment of debts, and the testator's other property is exempted, such other property still remains liable in its proper order for any deficiency, the exemption not having the effect of altering the liabilities of the several species of exempted property *inter se*. *Brooke v. Warwick*, 2 De G. & S. 425; affirmed in 1 H. & T. 142.

But where all the personalty is bequeathed in terms expressly exempting it from payment of the usual charges affecting it, this exemption throws those charges on all other property not expressly exempted, so that, for instance, in case of a deficiency in the produce of lands devised to answer such charges, they would fall upon other lands specifically devised. *Morrow v. Bush*, 1 Cox 185; *Young v. Young*, 26 Beav. 522; *Powell v. Riley*, L. R. 12 Eq. 175, 2 Jarman on Wills (5th Am. ed.) 682.

Mortgaged Property.—The testator may also relieve the residuary legatee from his primary liability on deficiency of assets, to exonerate mortgaged property by indicating the fund out of which the debt shall be paid,

and provides for it, his direction will govern, and the loss must be borne by those on whom he places it.¹

And this rule applies even if the burden is cast upon some of the specific legacies for the benefit of others of that class, or for the benefit of legatees whose bequests are founded upon a good consideration.²

III. GENERAL LEGACIES—1. **The General Rule.**—It may be stated as a general rule, that where the assets prove insufficient to pay the debts and specific legacies, but *not* the general legacies, and all the general legatees are volunteers, the general legacies must abate proportionately *inter se*, in the absence of an intent on the part of this testator to prefer one general legatee to another.³

or devising the same *cum onere*. See the titles DEBTS OF DECEDENTS; WILLS. See also 2 Jarman on Wills (5th Am. ed.) *634; Williams on Executors (7th Eng. ed.) *1694; Woerner's Am. Law Adm., § 494.

1. **Special Direction of Testator Controlling.**—*In re* Spencer, 16 R. I. 25. In this case the court, by Duffee, C.J., said: "We are of opinion that the clause in the codicil, viz., 'Should my estate diminish in value, then my legacies shall decrease in proportion,' means that if the estate diminishes in value between the making of the will and the payment of the legacies, the resulting loss shall not fall wholly upon the residuary legatees, but all the legacies shall decrease proportionately."

In *McLean v. Robertson*, 126 Mass. 537, Morton, J., said: "The general rule is, that where there is a deficiency of testamentary assets, after the payment of debts, expenses, and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. But if the chances of a deficiency are anticipated and provided for by the testator, his directions will govern, and the loss must be borne by those upon whom he places it." See also *Towle v. Swasey*, 106 Mass. 105; *Bancroft v. Bancroft*, 104 Mass. 226; *Hewes v. Dehon*, 3 Gray (Mass.) 205; *Hunt v. Hunt*, 4 Gray (Mass.) 190; *Emery v. Batchelder*, 78 Me. 233; *Swasey v. American Bible Soc.*, 57 Me. 524; *Titus v. Titus*, 26 N. J. Eq. 111.

2. "When the chances of deficiency are anticipated, and provided for by the express terms of the will, then the directions of the testator will of course govern, and the loss must be borne by those on whom he places it, even if the burden is cast upon some of the specific legacies for the benefit of others of that class, or for the benefit of legatees whose bequests are founded on a good consideration." *Colt, J.*, in *Richardson v. Hall*, 124 Mass. 233.

3. *Bartón v. Cooke*, 5 Ves. Jr. 461. See also *Wallace v. Wallace*, 23 N. H. 149; *Humes v. Wood*, 8 Pick. (Mass.) 478; *Colt, J.*, in *Towle v. Swasey*, 106 Mass. 104; *Richardson v. Hall*, 124 Mass. 233; *Mollan v. Griffith*, 3 Paige (N. Y.) 402; *Bevan v. Cooper*, 7 Hun (N. Y.) 117; *Pennsylvania University's Appeal*, 97 Pa. St. 187; *Knecht's Appeal*, 71 Pa. St. 333; *Cryder's Appeal*, 11 Pa. St. 72; *Gassman's Estate*, 14 Phila. (Pa.) 308; *Titus v. Titus*, 26 N. J. Eq. 111; *Bonham v. Bonham*, 33 N. J. Eq. 476;

Jett v. Bernard, 3 Call (Va.) 11; *Colbert v. Daniel*, 32 Ala. 314.

"In the administration of testamentary assets the general rule is, that where there is a deficiency after the payment of debts, expenses, and specific legacies, the loss shall be borne entirely by those pecuniary legacies which are in their natural general." *Colt, J.*, in *Towle v. Swasey*, 106 Mass. 104.

Illustrations.—An executor was directed under a will to invest such sum as would yield one thousand dollars per year, and from the sum so invested to pay the testator's widow one thousand dollars a year during widowhood; it was held a general legacy, and subject to abatement. *Haviland v. Cocks*, 6 Dem. (N. Y.) 4.

A legacy charged with the payment of debts is a general legacy and subject to abatement with other legacies. *In re Ingersoll's Estate*, 3 Pa. Dist. Rep. 399. Here *Ashman, J.*, said: "The only question which remains is as to the order of payment of the legacies bequeathed by the donee of the power. These were all pecuniary bequests, and they stand on the same footing. The gift to M. was charged with the debts of the donee and was in the nature of a trust, but this incident did not make it the less a general legacy and liable to abate *pari passu*." See also *In re McDowell's Estate*, 3 Pa. Dist. Rep. 271.

Testator gave all his property to his wife for life, and on her death made specific devises of real estate, and directed the payment of a number of pecuniary legacies, and that in case the assets at the death of his wife should not be sufficient to pay his debts and funeral expenses of his wife and the legacies in full, the legacies should be reduced *pro rata*. He gave his brother by codicil "the sum of twenty-five dollars per month for and during the term of his natural life, such payments to begin immediately after my decease, to and for his own use forever." At the time the codicil was made the testator's brother was sixty-eight years of age. The wife died before the testator. The executor contended that the monthly payments to the brother should abate *pro rata*, while he insisted that they should be paid in full. It was held by the court that it was clear, from the provisions of the will and codicil, that the testator intended the payment to be made in full; and it was therefore decreed that these monthly sums should take priority over the payment of the

2. Circumstances Influencing Application of Doctrine.—Whether one general legatee has a right to claim a preference in payment of his legacy, so as to be exempt from abatement, depends upon several considerations.

a. BOUNTY.—If the bequest is a mere bounty it must abate upon deficiency of assets, unless the contrary intent be manifest in the will.¹ But the fact of near relationship, or dependence, or of the meritorious character of the objects to which the legacy is to be applied, is not enough to exempt it from abatement.²

Bequests to Wife, Kindred, Servants, Charities, etc.—So bequests to a wife,³ child,⁴

other legacies. *Richardson v. Bowen* (R. I., 1893), 25 Atl. Rep. 908.

A testator devised certain sums to various persons, and later on, by a codicil, increased the amount of the bequest to one of the legatees. It was held that the bequest in the codicil took the place of the bequest in the will, and should therefore abate and be paid on the same footing with the other legacies. *Pond v. Allen*, 15 R. I. 171.

A testatrix provided for the payment of certain legacies, and by codicil gave five thousand dollars to endow a bed in a hospital without directing the order of its payment. It was held to be a general legacy and subject to abatement, though given for a special purpose, and though that purpose would be entirely defeated by an abatement. *Wetmore v. New York Blind Inst.*, 56 Hun (N. Y.) 313.

Where the Reference as to Certain Legacies Extends only to the time of payment, such legacies abate with others. *Matter of Connell's Estate*, 3 Redf. (N. Y.) 514.

Where it is Apparent from the Will that it was the intent of the testator to make the real estate aid in discharging the legacies, and that he intended the legacies to stand, they will not abate as in the absence of such intentions. *Taylor v. Dodd*, 58 N. Y. 335.

In Case of a Deficiency of Assets to Pay Debts, general legacies must be exhausted before the specific legacies can be resorted to for contribution; and this rule prevails though the general legatee be the widow of the testator, where the provisions made for her by the will exceed her common-law rights, at least so far as the excess is concerned. *Mayo v. Bland*, 4 Md. Ch. 484.

1. Where Bequest a Mere Bounty.—*Wallace v. Wallace*, 23 N. H. 149; *Humes v. Wood*, 8 Pick. (Mass.) 478; *Towle v. Swasey*, 106 Mass. 100; *Mollan v. Griffith*, 3 Paige (N. Y.) 402; *Pennsylvania University's Appeal*, 97 Pa. St. 187; *Knecht's Appeal*, 71 Pa. St. 333; *Cryder's Appeal*, 11 Pa. St. 72; *Titus v. Titus*, 26 N. J. Eq. 111; *Jett v. Bernard*, 3 Call (Va.) 11; *Colbert v. Daniel*, 32 Ala. 314.

2. Effect of Near Relationship, Dependence, etc.—*Farnum v. Bascom*, 122 Mass. 282; *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Towle v. Swasey*, 106 Mass. 100; *Shepherd v. Guernsey*, 9 Paige (N. Y.) 360; *Titus v. Titus*, 26 N. J. Eq. 111. See *Emery v. Batchelder*, 78 Me. 238; *Jett v. Bernard*, 3 Call (Va.) 11; *Miller v. Huddleston*, 3 M. & G. 513; *Lewin v. Lewin*, 2 Ves. 415; *Creed v. Creed*, 11 Cl. & F. 491.

"The fact of near relationship, or depend-

ence, or of the meritorious character of the legatee, is not enough, when the will furnishes no proof of an intention to prefer. It cannot be left to our mere conjecture that other legacies would not have been made by the testator except upon the expectation that his estate would be sufficient to meet them." *Colt, J.*, in *Richardson v. Hall*, 124 Mass. 228.

It was held in *In re Chauncey*, 119 N. Y. 77, that a legacy for the support of the testator's wife and child did not abate with general legacies. See also *Bliven v. Seymour*, 88 N. Y. 469.

How far, between persons of the same relation to the testator—e.g., between his only son, bearing the testator's name, and his daughters who are married—circumstances will have the effect to suggest a preference, e.g., of son, *quære*. See *King v. Girdiey*, 46 Conn. 555, where such fact was deemed of significance in determining the destination of the testator's homestead, not clearly disposed of by the will.

3. Bequest to Wife.—*Blower v. Morret*, 2 Ves. 422, by Lord Hardwicke; *Lord Truro*, in *Miller v. Huddleston*, 3 M. & G. 523; *Pennsylvania University's Appeal*, 97 Pa. St. 187; *Titus v. Titus*, 26 N. J. Eq. 111; *Jett v. Bernard*, 3 Call (Va.) 11.

In *Wells v. Barwick*, 50 L. J. Ch. 241, a legacy to testator's wife, to be paid immediately after his decease, was held to have priority. This is equivalent to holding that words in themselves insufficient to give priority to a legacy to a stranger, will be sufficient to have that effect when referred to a bequest to testator's wife, and is contrary to the opinion of Lord Hardwicke in *Blower v. Morret*, 2 Ves. 422. See also *Roper v. Roper*, 3 Ch. Div. 714.

In *Duncan v. Alt*, 3 P. & W. (Pa.) 382, *Gibson, C.J.*, said: "A pecuniary legacy may undoubtedly be exempt from abatement, as in the case of a wife or child destitute of other provision, or of a legacy given in lieu of a dower, or of a preference manifestly intended. But these cases are few in number, dependent on peculiar circumstances, and attended with strong expressions of intention. They are, in fact, exceptions to the general rule that equality is the highest equity, which a chancellor is eager to enforce, whenever it is not controlled by countervailing equities or by an intent too manifest to be disregarded." See *McGlaughlin v. McGlaughlin*, 24 Pa. St. 22.

4. Bequests to Children.—Lord Hardwicke in *Blower v. Morret*, 2 Ves. 420; Lord Truro

in *Miller v. Huddleston*, 3 M. & G. 529. A testator, by the first five articles of his will, made specific bequests and devises to his two minor children, including the homestead estate, which was an expensive establishment. By the sixth article he created a trust for the maintenance and education of his daughter, and by the seventh article a similar trust for his son; by the eighth article he gave a large sum of money in trust for the additional benefit of the children, the trust to terminate at a probably distant period, and the interest of the son to be inalienable, for the declared purpose of protecting him and his family from want; by the ninth, tenth, eleventh, and twelfth articles he gave numerous large pecuniary legacies, the largest being to his brother, his sister, and her children, who were dependent upon him for support either wholly or mainly; to other near relations, and a few friends, including one gift which the testator hoped to have applied to purposes not disclosed; by the thirteenth article he made bequests "out of any property which may then remain;" and by the fourteenth article he gave in trust "all which then remains of the property and estate." There was a deficiency of assets. It was held that there was nothing to warrant a presumption that the testator intended to prefer his children, and that the legacies in the sixth to the twelfth articles of the will, inclusive, all abated in equal proportions. *Babbidge v. Vittum*, 156 Mass. 38.

In *Towle v. Swasey*, 106 Mass. 100, a testator bequeathed to an adopted son, besides some small specific legacies, "the income arising from the sum of \$10,000, to be expended by his guardian for his support and education during his minority, and the principal sum of \$10,000" at majority. It was held that the bequest of the income of \$10,000 to the son was to be preferred next to a bequest to testator's wife in lieu of dower; but that the bequest of the principal of \$10,000 must abate with other general legacies. The court said: "The meritorious character of the legatee is not to be considered as affecting it [the construction] when there is nothing in the language of the will, or the character and declared purpose of the gift, to indicate an intention to prefer. The will is to be interpreted by what the testator has written, rather than by what he ought to have written. The circumstances of near relationship and dependence, though not of themselves sufficient, may, however, be regarded as constituting, in the language of the lord chancellor in *Miller v. Huddleston*, 3 M. & G. 528, 'an auxiliary reason for allowing such priority where the words used in the will favor the notion of a priority to a sufficient degree.' This is the doctrine of the leading case of *Lewin v. Lewin*, 2 Ves. 415. The executor was, in that case, directed to pay an annuity to the wife for the maintenance of a child, and Lord Hardwicke declared that it was a strong case to show that the annuity was intended to be preferred, especially in view of the fact that it was a provision for a child otherwise unprovided for. In *Miller v. Huddleston*, 3 M. & G. 513, where the law is fully discussed,

life annuities to a daughter, and to other relatives, were held not entitled to priority over other legacies, on the ground that the language of the will furnished no proof of such intention. In the case at bar, the will makes special provision for the discharge of a natural obligation resting upon the father towards his son. The annuity is given expressly for his education and support during minority. It is in the form of a yearly allowance which in amount is not more than sufficient for the purpose to which it is devoted—a purpose which would be defeated if it is now liable to abatement. It terminates when he reaches twenty-one years of age, and the principal then becomes his. There is no other provision for his support and education, for it cannot be supposed that the testator contemplated that a son adopted by him before marriage would be supported by his widow out of the provision made for her. And we are of opinion that the intention is manifest, that this part of the gift to the son, namely, the income devoted to his support and education, should not be impaired in common with those general legacies which are mere bounties, by deficiency of assets, and is to be allowed from the death of the testator. The principal sum to be paid to the son when he reaches majority stands upon a different ground. There is nothing in the will which gives that part of the legacy any preference. It is distinguishable in this respect from the gift of the income, and must be classed with the general legacies subject to abatement." See *Richardson v. Hall*, 124 Mass. 233. Compare *Willson v. Tyson*, 61 Md. 575; *Moore v. Beckwith*, 14 Ohio St. 129; *Hoyt v. Hoyt*, 85 N. Y. 148.

New York.—In *Stewart v. Chambers*, 2 Sandf. Ch. (N. Y.) 393, it was laid down that legacies for support and maintenance of wife and children otherwise unprovided for do not abate with general legacies. This appears to be based upon a misunderstanding of Lord Hardwicke's ruling in *Lewin v. Lewin*, 2 Ves. 417. That case was based upon the intent to confer priority manifested by the creation of two residues, and not upon the relationship of the parties. *Blower v. Morret*, 2 Ves. 422.

In *Scofield v. Adams*, 12 Hun (N. Y.) 366, the principle was extended to the analogous case of a bequest by a wife for the support of her husband. In neither of these cases was *Blower v. Morret*, 2 Ves. 422, cited. How far they will be sustained in view of the apparent approval in that case in *Bliven v. Seymour*, 88 N. Y. 475, may well be questioned.

The principle has further been extended to bequests for the maintenance or education of minors (not necessarily children) who are near relatives of the testator, and who would be otherwise unprovided for; and this extension appears to have met the unqualified approval of the Court of Appeals. *Bliven v. Seymour*, 88 N. Y. 475. See *Scofield v. Adams*, 12 Hun (N. Y.) 366; *Petrie v. Petrie*, 7 Lans. (N. Y.) 93. But see *Waters v. Collins*, 3 Dem. (N. Y.) 376.

A legacy to A for support and a legacy to B for education abate ratably *inter se*; but a

sister,¹ old servant,² or to charities,³ abate. The same is true of bequests given for the purchase of mourning rings,⁴ or for the erection of a monument to the memory of a relative.⁵

b. CONSIDERATION.—But if the legacy be given in consideration of the legatee relinquishing some subsisting right or interest, as to a creditor in satisfaction of his debt,⁶ or to a wife in lieu of dower,⁷ it will be entitled to

bequest to erect headstones has priority over both. *Wood v. Vandenburg*, 6 Paige (N. Y.), 285.

California.—Civ. Code, § 1361, changes the rule laid down in the text by providing that legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator.

Under Civ. Code, § 1362, abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

Under Civ. Code, § 1359, property which is not specifically devised or bequeathed is to be applied to the payment of debts before other property. Hence it would seem that a general legacy to husband, widow, or kindred would have priority over other general legacies, but not over specific. See, however, *Apple's Estate*, 5 West Coast Rep. 522, and 1 Code Civ. Pro. § 1563, § 1564.

1. *Bequest to Sister.*—*Towle v. Swasey*, 106 Mass. 108.

2. *Bequest to Servant.*—*Atty.-Gen. v. Robins*, 2 P. Wms. 25.

3. *Bequest to Charities.*—*Atty.-Gen. v. Robins*, 2 P. Wms. 25; *Tate v. Austin*, 1 P. Wms. 265; *Masters v. Masters*, 1 P. Wms. 423; *Atty. Gen. v. Hudson*, 1 P. Wms. 675; *Bishop of Peterborough v. Mortlock*, 1 Bro. C. C. 566; *Philanthropic Soc. v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Beav. 462; *Pennsylvania University's Appeal*, 97 Pa. St. 187.

4. *Bequests for Purchase of Mourning Rings.*—*Williams on Executors* (7th Eng. ed.) 1366.

Such a legacy is not specific. *Apreece v. Apreece*, 1 Ves. & B. 364.

5. *Bequests for Erection of Monuments.*—*Roper on Legacies* (2d Am. ed.) *422; *Williams on Executors* (7th Eng. ed.) 1366, note (a).

In *Masters v. Masters*, 1 P. Wms. 423, the chancellor gave a bequest to erect a monument to the testatrix's mother preference over other general legacies, on the ground that it was a debt of piety. This position has been severely criticised by Mr. Roper (*Roper Leg.* (2d Am. ed.) *423), and seems untenable if the decision in *Blackshaw v. Rogers*, cited in *Simmons v. Vallance*, 4 Bro. C. C. 349, that a bequest to keep a monument in repair abates with other general legacies, is to be sustained.

Masters v. Masters, 1 P. Wms. 423, was followed in *Wood v. Vandenburg*, 6 Paige (N. Y.) 278. See also *Ward's Law of Leg.* *375; *Woerner's Am. Law of Adm.*, § 452, maintaining the priority of such a bequest on the authority of *Masters v. Masters*, 1 P. Wms. 423, and *Wood v. Vandenburg*, 6 Paige (N. Y.) 278. See also the title DEBTS OF DECEDENTS.

Notwithstanding the decision of Lord Parker, C., in *Masters v. Masters*, 1 P. Wms.

423, "upon the whole, it is presumed that a general legacy to erect a monument for a parent, child, or friend would not now be excepted out of the general rule of abatement." *Roper on Legacies* (2d ed.), § 422.

"It may therefore be concluded that general and voluntary bequests for the maintenance or further advancement in the world of the legatees, or for any other purposes of bounty, must abate with other general legacies." *Roper on Legacies* (2d ed.), § 421.

6. *To Creditor in Satisfaction of Debt.*—*Burridge v. Bradyl*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. 420; *Davenport v. Fletcher*, Ambl. 244; *Norcott v. Gordon*, 14 Sim. 258; *Roper on Legacies* (2d Am. ed.) *431; *Williams on Executors* (7th Eng. ed.) *1364; *Lord Lyndhurst in Davies v. Bush*, 1 Younge 343; *Wood v. Vandenburg*, 6 Paige (N. Y.) 278; *McLean v. Robertson*, 126 Mass. 537; *Richardson v. Hall*, 124 Mass. 233; *Pennsylvania University's Appeal*, 97 Pa. St. 200; *Duncan v. Franklin Tp.*, 43 N. J. Eq. 143.

The principle applies to a bequest to A on condition that he conveys a particular estate to B, and on making the conveyance A's position is of a purchaser for value, and his bequest entitled to priority over other legacies. See *Blower v. Morret*, 2 Ves. 422.

7. *To Wife in Lieu of Dower—England.*—*Blower v. Morret*, 2 Ves. 422; *Burridge v. Bradyl*, 1 P. Wms. 127; *Heath v. Dendy*, 1 Russ. 543; *Norcott v. Gordon*, 14 Sim. 258; *Stahlschmidt v. Lett*, 1 Sm. & G. 421; *Bell v. Bell*, 6 Ir. Eq. Rep. 239.

Alabama.—*Steele v. Steele*, 64 Ala. 438.

Connecticut.—*Lord v. Lord*, 23 Conn. 327; *Security Co. v. Bryant*, 52 Conn. 311.

Delaware.—*Warren v. Morris*, 4 Del. Ch. 289.

Georgia.—*Clayton v. Akin*, 38 Ga. 331.

Maine.—*Moore v. Alden*, 80 Me. 301; *Additon v. Smith*, 83 Me. 551.

Maryland.—*Addison v. Addison*, 44 Md. 182.

Massachusetts.—*Hubbard v. Hubbard*, 6 Met. (Mass.) 50; *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Towle v. Swasey*, 106 Mass. 100; *Borden v. Jenks*, 140 Mass. 562.

Minnesota.—*In re Gotzian's Estate*, 34 Minn. 167.

Missouri.—*Brant v. Brant*, 40 Mo. 266.

New Jersey.—*Howard v. Francis*, 30 N. J. Eq. 448; *Justice v. Justice* (N. J., 1889), 18 Atl. Rep. 674; *Duncan v. Franklin Tp.*, 43 N. J. Eq. 143.

New York.—*Wood v. Vandenburg*, 6 Paige (N. Y.) 277; *Williamson v. Williamson*, 6 Paige (N. Y.) 298; *Matter of Dolan*, 4 Redf. (N. Y.) 511; *Isenhardt v. Brown*, 1 Edw. Ch. (N. Y.) 411; *Matter of McKay's Estate* (Surrogate Ct.), 25 N. Y. Supp. 725; *Betts v. Betts*, 4 Abb. (N. Cas.) N. Y. 317; *Matter of Vreeland* (Surrogate Ct.), 25 N. Y. Supp. 725.

priority over general legacies which are mere bounties, although the bequest

Pennsylvania.—*Reed v. Reed*, 9 Watts (Pa.) 263; *McGlaughlin v. McGlaughlin*, 24 Pa. St. 22; *Pennsylvania University's Appeal*, 97 Pa. St. 187; *Harper's Appeal*, 111 Pa. St. 243.

Rhode Island.—*Potter v. Brown*, 11 R. I. 235.

South Carolina.—*Loock v. Clarkson*, 1 Desaus. (S. Car.) 471; *Stuart v. Carson*, 1 Desaus. (S. Car.) 500.

Virginia.—*Brown v. Brown*, 79 Va. 648. Compare *Lee v. Smith*, 84 Va. 289.

The principle obviously extends to cases where the will is made before the marriage, in contemplation of marrying the legatee. *Towle v. Swasey*, 106 Mass. 100; *Farnum v. Bascom*, 122 Mass. 289.

The words "in lieu of dower" need not be used; any words sufficient to put the widow to her election are ample. *Warren v. Morris*, 4 Del. Ch. 300. Compare *Hinson v. Ennis*, 81 Ky. 363. *In re Gotzian's Estate*, 34 Minn. 159.

In most of the states of the Union statutes provide that every testamentary provision in favor of the testator's wife shall be construed to be in lieu of dower, unless it appears from the will that he intended the provision in addition thereto. Under these statutes it seems that if the widow accept the provision she will be entitled to priority over general legacies, although the provision is not expressed to be in lieu of dower. *Towle v. Swasey*, 106 Mass. 105, by Colt, J. *Borden v. Jenks*, 140 Mass. 562; *Reed v. Reed*, 9 Watts (Pa.) 263; *Kline's Appeal*, 117 Pa. St. 148; *Brown v. Brown*, 79 Va. 652. *Contra*, *Jett v. Bernard*, 3 Call (Va.) 11; *Hinson v. Ennis*, 81 Ky. 363. Compare *Lord v. Lord*, 23 Conn. 334; *Matter of Dolan*, 4 Redf. (N. Y.) 511. As to *Minnesota*, see *In re Gotzian's Estate*, 34 Minn. 159.

The rule that a legacy to the widow in lieu of dower is preferred to general legacies to volunteers holds good though the gift, being an annuity for life, is made payable out of the income of the estate, unless it also appears that the testator intended that the gift should be strictly limited to such income or its payment. *Moore v. Alden*, 80 Me. 301.

Whether a Bequest in Lieu of Dower has Priority over Specific Legacies and Devises.—In *Massachusetts* it has been held that a pecuniary legacy to the testator's widow, accepted by her, must be paid, not only in preference to general legacies, but, if the abatement of those proves insufficient, in preference, first, to specific bequests, and, second, to specific devises. *Borden v. Jenks*, 140 Mass. 562, 54 Am. Rep. 507. See *Addison v. Addison*, 44 Md. 201. But this seems not to apply in other states. *Sanford v. Sanford*, 4 Hun (N. Y.) 757; *Boykin v. Boykin*, 21 S. Car. 534. See further, upon this point, *Lord v. Lord*, 23 Conn. 327; *Reed v. Reed*, 9 Watts. (Pa.) 263; *Stuart v. Carson*, 1 Desaus. (S. Car.) 500; *Clayton v. Akin*, 38 Ga. 320; *Warren v. Morris*, 4 Del. Ch. 300; *Hinson v. Ennis*, 81 Ky. 363.

Where the Widow Elects to take against the

will, legacies abate in her favor. *Capron v. Capron*, 6 Mackey (D. C.) 340.

Lien on Realty.—A legacy in lieu of dower has no lien on the realty. *Sanford v. Sanford*, 4 Hun (N. Y.) 757. See *McCorn v. McCorn*, 100 N. Y. 511; *Boykin v. Boykin*, 21 S. Car. 514. *Contra*, *Addison v. Addison*, 44 Md. 201. As to *California*, see Civ. Code, §§ 1359, 1361, 1362; Code Civ. Pro., § 1564; *Apple's Estate*, 66 Cal. 437.

Express Direction.—A legacy in lieu of dower has no priority over the express direction of the testator; the widow, by electing to take under the will, purchases only such rights as are therein conferred upon her, and is bound by its provisions. *Tickel v. Quinn*, 1 Dem. (N. Y.) 428; *Orton v. Orton*, 3 Abb. App. Dec. (N. Y.) 415; *Kline's Appeal*, 117 Pa. St. 148. See *Security Co. v. Bryant*, 52 Conn. 311, 52 Am. Rep. 599; *Barnett's Appeal*, 104 Pa. St. 342.

Bequest to Wife of Interest in General Estate.—By item one, testator left to his wife "one third of all my personal estate, excepting the proceeds or price of my farm, which I lately sold, of which I bequeath one third of the interest that may accrue on the same, to be paid to her during her natural lifetime, said bequests to her to be in lieu of dower." By items two and three he bequeathed certain general legacies, and by item four left "all the residue and remainder of my estate, after paying my funeral expenses, just debts, bequests hereby made, etc.," to A, B, C and D. It was held that the widow was only entitled to one third of what was left after deducting the debts and expenses of administration. "There is no merit in the widow's claim to have the testator's debts, expenses of administration, and costs of audit deducted from the residuary fund. * * * The reason assigned for her claim is that the bequests in her favor are in lieu of dower; hence she is a purchaser, and as to her there can be no abatement. It is not a question of abatement. The gift of one third of the personal estate is a gift of one third of what may be left after the payment of debts and expenses. As this is all her husband left her, there is no abatement." *Barnett's Appeal*, 104 Pa. St. 349. See *Morris v. Morris*, 4 Houst. (Del.) 443, reversing *Warren v. Morris*, 4 Del. Ch. 302.

Pretermitted Children.—In states in which the afterbirth of a child unprovided for does not revoke the will, a legacy to wife in lieu of dower is held subject to the rights of posthumous pretermitted children, and must contribute with other legacies and devises as provided by statute. This arises from the paramount right of such children over any disposition made by the will. The part of the estate taken by such child is treated as intestate property and subject to the widow's dower, notwithstanding she may not have renounced the benefit of the provisions of the will. *Ward v. Ward*, 120 Ill. 116; *Shelby v. Shelby*, 1 B. Mon. (Ky.) 268; *Mitchell v. Blain*, 5 Paige (N. Y.) 588; *Warren v. Morris*, 4 Del. Ch. 308, on appeal, 4 Houst. (Del.)

greatly exceeds the value of the right relinquished.¹

Bequests to Executors.—A bequest to an executor for his trouble is not sustained by a valuable consideration;² nor do the words "for care and pains"³ of themselves confer priority.

Bequests to Creditors when Debt Already Liquidated.—Likewise, and for the same reason, a bequest to a creditor whose debt has already been liquidated by composition is entitled to no preference.⁴

414. See *Coates v. Hughes*, 3 Binn. (Pa.) 508.

Creditors.—A widow who accepts a legacy in lieu of dower cannot claim in preference to her husband's creditors. Hence if she would compel payment of an amount equal to her dower interest, she must cite in creditors. *Beekman v. Vanderveer*, 3 Dem. (N. Y.) 221.

The obligation of a husband to pay to his wife a sum which by an antenuptial contract he agreed she should receive in lieu of dower, in case she should survive him, is a debt within the meaning of the usual clause of a will directing the payment of debts. *Warner v. Warner*, 18 Abb. N. Cas. (N. Y.) 151.

Bequests to Husband.—Since the husband of a testatrix cannot be deprived of his statutory interest in her personal estate, under the statute of distributions, without his own consent, and by accepting a provision under her will relinquishes his rights under the statute, he occupies the same position as a widow who has accepted a devise in lieu of dower, and as a purchaser he is entitled to have the legacies and devises to pure beneficiaries, although specific in their character, first applied to the payment of the debts. It is not important whether that which he is to receive is or is not an exact equivalent in value to the right which he relinquished; it is sufficient that the testatrix deemed it proper to treat it as such. *Farnum v. Bascom*, 122 Mass. 289; *Borden v. Jenks*, 140 Mass. 567. See also *Scofield v. Adams*, 12 Hun (N. Y.) 366.

So, too, a legacy given to a Testator's Widow, to be paid to her before the proceeds of his property are invested, will not abate in favor of legacies not payable till two years after the death of the widow. *Dey v. Dey*, 19 N. J. Eq. 137.

1. *Davenport v. Fletcher*, Amb. 244; *Heath v. Dendy*, 1 Russ. 543; *Farnum v. Bascom*, 122 Mass. 289; *Borden v. Jenks*, 140 Mass. 562; *Matter of Dolan*, 4 Redf. (N. Y.) 512; *Orton v. Orton*, 3 Abb. App. Dec. (N. Y.) 415; *Matter of Vreeland* (Surrogate Ct.), 25 N. Y. Supp. 725; *Reed v. Reed*, 9 Watts (Pa.) 265; *Harper's Appeal*, 111 Pa. St. 251; *Howard v. Francis*, 30 N. J. Eq. 448; *Warren v. Morris*, 4 Del. Ch. 289; *Brown v. Brown*, 79 Va. 648.

It is immaterial whether the legacy is or is not the whole of the consideration for the release of dower; if it is only part, the widow is nevertheless a purchaser. *Heath v. Dendy*, 1 Russ. 564.

In *Matter of Brook's Estate* (Surrogate Ct.), 10 N. Y. Supp. 20, a testator gave his wife a legacy of twenty-five hundred dollars in lieu of dower. The estate proved insufficient to pay the legacies in full. The surrogate said: "The estate is insufficient to pay the legacies

in full. The legacy to the widow is conceded to be in value many times the actual value of the dower right released, and it is claimed that the excess in value should ratably abate with the other legacies. The principle is well established that legacies given in lieu of dower do not abate; and while I do not find any case in which it is stated that it makes no difference whether the legacy exceeds in amount the value of the dower right relinquished, I do find several cases in which it was stated that such was the fact, and no significance apparently was attached to it. *Orton v. Orton*, 3 Abb. Dec. 411."

2. **Bequest to Executor for His Trouble.**—*Duncan v. Watts*, 16 Beav. 204. See *Fretwell v. Stacy*, 2 Vern. 434; *Atty.-Gen. v. Robins*, 2 P. Wms. 25; *Hurron v. Burt*, 2 Atk. 171. Compare *Clapp v. Meserole*, 1 Abb. App. Dec. (N. Y.) 362; *Clayton v. Akin*, 38 Ga. 330.

The acceptance of a legacy under the will does not prevent him from claiming commissions, unless put to his election by the instrument. See the title EXECUTORS AND ADMINISTRATORS.

Election by Executor.—On the other hand, it would seem clear, upon principle, that where an executor is put to his election, and elects to take the legacy, he stands in regard to other general legatees as a purchaser and entitled to the same priority as any other creditor who has a legacy in satisfaction of his debt. See *Harper's Appeal*, 111 Pa. St. 247; *Waters v. Collins*, 3 Dem. (N. Y.) 374; *Matter of Mason*, 98 N. Y. 533. But see *Clayton v. Akin*, 38 Ga. 330. As to the status of an executor's claim for commissions see the titles EXECUTORS AND ADMINISTRATORS; LEGACIES AND DEVISES.

3. **Bequest to Executor "for Care and Pains."**—*Heron v. Heron*, 2 Atk. 171; *Clayton v. Akin*, 38 Ga. 330; *Morris v. Kent*, 2 Edw. Ch. (N. Y.) 175. In the first case cited Lord Hardwicke said: "I am very unwilling to distinguish legacies given to executors for their care and pains from common legacies, because whether the care and pains be expressed in the will or not is a circumstance depending entirely upon the whim of the drawer. The legacies are still bequests, and not more so than others, so that there ought not to be any distinction among them upon so slight a ground."

An executor cannot give himself a preference in regard to his own legacy, as he could at common law in the case of his own debt. *Toller Exrs.* 347.

4. **A Release under a Deed of Composition** destroys the original obligation, and the creditor stands in no better position as to the

Bequest to Pay Debt of a Friend.—The same is true in case of a bequest to pay the debt of a friend, there never having been any obligation on the part of the testator to pay the debt.¹

Rights must Subsist at Time of Testator's Death.—As it is the surrender of existing rights which constitutes the consideration and authorizes the preference, these rights should be subsisting at the time of the testator's death.² Hence it has been held that legacies of unpaid balances to creditors whose debts have been previously liquidated by composition for less than their face value,³ or to a wife in lieu of dower, of which she had already been barred;⁴ or where the testator left no land of which his widow was dowable,⁵ must abate with other legacies.

c. INTENT—Intent to Create Priority must be Clear.—The testator may, of course, give one legacy a preference over others in case the assets are insufficient, but his intent to do so must be clearly manifest upon a fair construction of the instrument.⁶

balance due than a volunteer. *Coppin v. Coppin*, 2 P. Wms. 296.

On the other hand, it seems that the bar of the statute of limitations merely creates new matter of defense without destroying obligation, and the defense being waived by the bequest, the original obligation remains intact. See *Williamson v. Naylor*, 3 Y. & C. 208; *Phillips v. Phillips*, 3 Hare 281. As to proceedings in bankruptcy, see *In re Sowerby*, 2 Kay & J. 630; *Turner v. Martin*, 7 De G., M. & G. 429. But see *Duncan v. Franklin Tp.*, 43 N. J. Eq. 145.

1. *Shirt v. Westby*, 16 Ves. Jr. 396.

2. *Lord Hardwicke*, in *Blower v. Morret*, 2 Ves. 422; *Acey v. Simpson*, 5 Beav. 35. *Roper v. Roper*, 3 Ch. Div. 719; *Lord Lyndhurst* in *Davies v. Bush*, *Younge* 343.

Legacies Given under a Sense of Moral Obligation.—That the legacy was given because of a sense of moral obligation, or as compensation for services or other favors rendered as a mere voluntary courtesy, will not, if no legal obligation to pay exist at the death of the testator, constitute such a valuable consideration as to entitle the legacy to priority in payment. The expression in the will, "for his services in assisting me at different times," referring to the legatee, does not, standing alone, import indebtedness for which payment may be exacted by process of law. For aught that appears to the contrary, the services may have been rendered gratuitously, and the legacy given in grateful recognition. *Duncan v. Franklin Tp.*, 43 N. J. Eq. 145.

So the fact that legatee had supported testator's mother, and that he had declared that she should be compensated as he had provided for her in his will, is not enough. *Towle v. Swasey*, 106 Mass. 100.

Nevertheless, the fact that the testator, in making the bequest, seems to have acted under a sense of moral obligation, is a material circumstance to be considered in construing the will, and, taken in connection with other circumstances, may confer priority on the legacy, on the ground of implied intention, irrespective of the doctrine of consideration. Thus, where a testatrix by her will directed her house to be sold and two hundred dollars out of the proceeds to be paid to R., a former partner of her husband, pro-

vided "it can be proved that it was loaned to my said husband to be put into the first money paid for this house, my executor to decide whether it is or is not proved that the money was so given," and all the other bequests were preceded by words of *donation* and followed by a provision that "all these specific bequests of money, in the event of there not being enough to pay them all in full, each one is to be paid in proportion to the sum left him," it was held, on the executor's deciding that the money had been so lent by R., that his bequest of two hundred dollars had priority. *McLean v. Robertson*, 126 Mass. 537; *Borden v. Jenks*, 140 Mass. 567.

Consideration Arising after Testator's Death.

—A consideration arising after testator's death by reason of services to be performed, as where the legacy is on the express condition that legatee "shall continue to live as housekeeper" with the husband of testatrix, *Gassman's Estate*, 10 W. N. C. (Pa.) 276; or "take care of the premises and the goods left thereon," is sufficient. *Weckerly's Estate*, 15 Phila. (Pa.) 527.

So where the legacy was given to "A for his services as trustee to" B, and the question of priority arises exclusively between A and B, the legacy to A is preferred. *Harper's Appeal*, 111 Pa. St. 245.

3. *Coppin v. Coppin*, 2 P. Wms. 296. See *Turner v. Martin*, 7 De G., M. & G. 429.

4. *Blower v. Morret*, 2 Ves. 422.

5. *Acey v. Simpson*, 5 Beav. 35; *Roper v. Roper*, 3 Ch. Div. 714.

6. *Williams on Executors* (7th Eng. ed.) 1368. See *Lewin v. Lewin*, 2 Ves. 415; *Johnson v. Johnson*, 14 Sim. 313; *Legh v. Legh*, 15 Sim. 135; *Murdoch's Appeal*, 31 Pa. St. 47; *Swasey v. American Bible Soc.*, 57 Me. 523; *Emery v. Batchelder*, 78 Me. 233, 1369, 1370; *Coore v. Todd*, 7 De G., M. & G. 520; *Miller v. Huddleston*, 3 M. & G. 513; *Creed v. Creed*, 11 Cl. & F. 491; *Titus v. Titus*, 26 N. J. Eq. 111; *Farnum v. Bascom*, 122 Mass. 282; *Towle v. Swasey*, 106 Mass. 100; *McLean v. Robertson*, 126 Mass. 537; *Hewes v. Dehon*, 3 Gray (Mass.) 205. See *Boston Safe Deposit, etc., Co. v. Plummer*, 142 Mass. 263; *Barry's Estate*, 13 Phila. (Pa.) 310. See also *Brown v. Brown*, 1 Keen 275; *Pepper v. Bloomfield*, 3 Dr. & W. 506; *Haynes v. Haynes*, 3 De G., M. & G. 590; *Gyett v. William*, 2 J. & H. 429;

Burden of Proof.—But the burden lies upon the party seeking priority to establish it, and to show that such was the intention of the testator.¹

Use of Certain Terms.—But the words "imprimis," "in the first place," "in the second place," or "afterwards" create no priority, either *inter se*² or over other general legatees.³

Direction to Executor.—Nor is a direction to an executor to pay a legatee im-

Trunkey, J., in Pennsylvania University's Appeal, 97 Pa. St. 199.

Presumption of Intended Equality.—But the presumption of intended equality prevails between general legatees as a class and between specific legatees as a class where such legatees are mere beneficiaries, and that equality in respect to the share to be borne in all deficiencies of assets will not be disturbed without clear evidence in the will of a different intention. *Richardson v. Hall*, 124 Mass. 228.

"In the common case of a direction, in the will of a testator, to pay several pecuniary legacies out of his estate, if it happens that the fund provided for the payment of such legacies is not sufficient to satisfy all, each legacy must abate ratably. And the executor is not at liberty to pay the first legatee named in the will in full, although the payment of that legacy was first directed by the testator. The presumption in such cases is that the testator intended that all the legatees should be paid equally. Such presumption of intended equality will not be repelled by any ambiguous expressions in the will, but must be allowed to prevail, unless the will contains unequivocal evidence of the testator's intention to give some of the legatees a preference in case the fund should be found to be insufficient to pay all." Chancellor Walworth in *Shepherd v. Guernsey*, 9 Paige Ch. (N. Y.) 357.

1. **Burden of Proof upon Party Seeking Preference.**—*Duncan v. Franklin Tp.*, 43 N. J. Eq. 143; *Shepherd v. Guernsey*, 9 Paige Ch. (N. Y.) 357.

In *Emery v. Batchelder*, 78 Me. 233, the court by Foster, J., said: "Therefore if, by express words or by a fair construction, the intent of the testator is clearly manifest that one general legatee should have priority over the others, that intention must be carried out; but the burden lies upon the party seeking priority to establish it and show that such was the intention of the testator, for the reason that, in the absence of proof of such priority, the testator is presumed to have considered his estate sufficient to pay all legacies, and therefore not to have thought it necessary to provide for a deficiency by giving preference to any of those upon whom he has bestowed his bounty (*Miller v. Huddleston*, 3 M. & G. 513), consequently no priority will be allowed where the expressions are ambiguous and do not mark with certainty the testator's intention."

2. **Use of the Word "Imprimis" and the Like.**—*Matter of Vreeland's Estate* (Surrogate Ct.), 25 N. Y. Supp. 725; *Johnson v. Child*, 4 Hare 87; *Thwaites v. Foreman*, 1 Colly. 409; *Beeston v. Booth*, 4 Madd. 161; *Whitehouse v. Insole*, 7 L. T., N. S. 400; *In re Hardy*, 50 L. J. Ch. 241; *Everett v. Carr*, 59 Me. 330;

Gray's Estate, 13 Phila. (Pa.) 246; *Brown v. Brown*, 1 Keen 275.

For if the testator says "imprimis," or "in the first place, I give such a legacy," that amounts only to the order in which he expresses his gifts in the will; to nothing more. *Lewin v. Lewin*, 2 Ves. 417.

3. **Illustrations.**—A learned text-writer uses the following language: "If a testator expressed himself in the following manner: 'imprimis,' or 'in the first place,' I give such a legacy to A, and 'in the next place,' or 'afterwards,' I give such a sum of money to B; these words, or variety of expression (considering the inattention and incorrectness with which wills are frequently drawn, as also the little regard paid to nicety of expression), will neither give A a preference to B, nor either of them a priority to other general legatees, so as to exempt them from the obligation of abating with such other legatees. The reason is that the words merely point out the order in which the bequests are made in succession, and do not impart with certainty an intention to prefer one to another. The expressions before noticed are not necessarily inconsistent with the application of the general rule of abatement, which is founded on equality; but they may be satisfied with a construction compatible with the admission of that rule. The possible intent of the testator to give a preference by the language he adopted is judicially insufficient to accomplish a purpose so obscurely or doubtfully intimated." *Roper on Legacies* (2d Am. ed.) *427, citing *Brown v. Allen*, 1 Vern. 31; *Lewin v. Lewin*, 2 Ves. 417; *Blower v. Morret*, 2 Ves. 421; *Brown v. Brown*, 1 Keen 275; *Everett v. Carr*, 59 Me. 330.

For the same reason, if a legacy be given to A, payable one month after the testator's death, a second to B, payable six months after the testator's death, and a third legacy to C, payable twelve months after the testator's death, the difference in times of payment will not impart to any of the legatees such a preference as to exempt them from abating upon a deficiency of assets. Such direction may have been intended to affect only the time of payment, and is consistent with the presumption that the testator intended all his dispositions to be wholly satisfied, upon which presumption the rule of abatement is founded. *Blower v. Morret*, 2 Ves. 421. See also *Beeston v. Booth*, 4 Madd. 168.

But a legacy of one thousand pounds, to be raised by executors "within two calendar months next after my decease, out of my said three per cent reduced annuities, before any other charges thereon," is to be paid before any other person named either in the will or codicils is entitled to take any portion of that fund. *Johnson v. Johnson*, 14 Sim. 325.

mediately after the testator's death,¹ or one month after his decease, sufficient to create a priority.²

Testator Supposing there will be Sufficiency.—On the other hand, a legacy given upon the supposition that there will still be a residue after the payment of prior legacies abates first.³ So where the testator constitutes two residues and computes the first after taking out of it one or more legacies, and computes the second after deducting other legacies, the first set of legatees are preferred to the second.⁴

1. *Blower v. Morret*, 2 Ves. 422; *Roche v. Harding*, 7 Ir. Ch. 332.

2. *Beeston v. Booth*, 4 Madd. 168.

3. *Beeston v. Booth*, 4 Madd. 170; *Theobald on Wills* (2d ed.) 622; *Atty.-Gen. v. Robins*, 2 P. Wms. 23; *Stammers v. Halliley*, 12 Sim. 42; *Brown v. Brown*, 1 Keen 275. Thus, where the testator, after giving several legacies, mentioned, towards the conclusion of his will, that he apprehended there would be a considerable surplus of his personal estate beyond what he had before disposed of in legacies, for which reason he gave several others, and afterwards bequeathed further legacies by codicil, to be paid, on deficiency of assets, out of £200 given by the will to charitable purposes, the master of the rolls held that the legacies given on the supposition that there would be a surplus were postponed to those previously bequeathed, and that the same supposition of surplus affected the legacies by codicil, which must be lost also, except in so far as the special fund bequeathed to charities sufficed for payment. *Atty.-Gen. v. Robins*, 2 P. Wms. 24.

4. **Where Testator Constitutes Two Residues.**—*Roper on Legacies* (2d Am. ed.) *427, citing *Lewin v. Lewin*, 2 Ves. 415, a case which was expressly placed upon this ground by Lord Hardwicke in *Blower v. Morret*, 2 Ves. 241, and which, unless so explained, cannot be reconciled with the principle that a legacy or annuity to a wife or child, *ipso facto*, has no priority. In that case A, having a wife and two children, bequeathed to her for life an annuity of one hundred and twenty pounds, subject to limitations over if he had a son, etc., and afterwards directed the executors to buy, if they could, the annuity in government securities of ninety-nine years or some other long term; but, if they were unable to do so, then to purchase lands of the annual value of two hundred pounds, to be so settled that the annuity should be to his wife free from taxes with remainder over. A also directed that, if he left any child, his executors should, out of the profits of his residuary estate, pay to the wife thirty pounds a year for the maintenance of the child. He then gave legacies to some collateral relations and friends, and ordered all the residue of his real and personal estates to be placed out for the benefit of his child or children, to be paid to him or them at their respective ages of twenty-one, or marriage. On deficiency of assets, it was held that the wife's annuity of one hundred and twenty pounds was preferred to the other general legacies.

And where the testator gave legacies to his two sons and his daughter, with proviso that, if the assets should fall short, the daughter should be paid in full and the abatement borne proportionally by the legacies to the sons only, it was held that a deficiency caused by the executor's waste must be borne by the sons only. *Marsh v. Evans*, 1 P. Wms. 668. It seems that a deficiency caused by losses from fire or defective securities would be equally within the proviso. *Roper on Legacies* (2d Am. ed.) *425.

A testator directed, if his estate should be too small to pay all legacies in full, "then pay one and all *pro rata*; or if otherwise, the same *pro rata*." It was held, there being no other residuary clause, that "if otherwise, *pro rata*" meant, if there should be a surplus the surplus should be divided *pro rata*. *Bartlett v. Houdlette*, 147 Mass. 25.

After disposing of his whole estate by the first four clauses of his will, a testator in the fifth provided: "Independent of all the provisions heretofore made by me, I give * * * eight hundred dollars out of money due my estate, to be applied to the education of my youngest daughter, F. L." It was held that the bequest to F. L. was to be paid prior to all other legacies and devises, and the legatee could recover it from the estate after attaining majority. *Lee v. Smith*, 84 Va. 289.

Where a testator directs a legacy to be paid in preference to and before every and all other legacies, said legacy is entitled to priority in the distribution of a fund produced by the sale of real estate converted by peremptory direction of the testator for the benefit of certain designated beneficiaries. *Bright's Appeal*, 100 Pa. St. 602.

By the different clauses of a will, gifts of railroad stock by testator were made to his children and to other persons and societies. By the twenty-fourth clause he directed that, should there be a deficiency of assets to pay all the bequests, the bequests to his children in the first four clauses should first be fully paid. It was held that the gifts of railroad stock were not severally specific legacies required to be paid in full, regardless of the question whether there were assets to pay the pecuniary legacies provided in the first four clauses. *Shethar v. Sherman*, 65 How. Pr. (N. Y. Supreme Ct.) 9.

Abatement Inter Se.—On deficiency of assets legacies equally preferred by the testator abate *pro rata*, while the unpreferred general legacies are lost entirely. *Bancroft v. Bancroft*, 104 Mass. 226; *Wood v. Vandenberg*, 6 Paige (N. Y.) 285. Compare *Waters v. Collins*, 3 Dem. (N. Y.) 376.

Special Direction as to Legacies for Life.—So a direction that particular legacies given for life are to become applicable on the death of the legatee to the payment of other legacies, will give the legatee for life priority.¹

When there is but One General Legacy.—The priority of general over residuary bequests is not affected by the fact that there is but one general legacy, and the residue is then distributed in certain sums; but in such case the general legacy has priority over all others.²

3. Annuities—Annuity Charged on Personality.—An annuity charged on personal estate is a general legacy, so that between annuitants and legatees there is no priority where there is a deficient estate, but both must abate proportionally.³

1. *Brown v. Brown*, 1 Keen 275; *Haynes v. Haynes*, 3 De G., M. & G. 590.

But legacies payable at the death of a tenant for life, or at some future period, do not abate before other legacies. *Miller v. Huddleston*, 3 M. & G. 513; *Street v. Street*, 2 N. R. 56; *Nickisson v. Cockill*, 3 De G., J. & S. 622.

Legacies for life, with remainder over, where the estate is insufficient to pay them in full, should abate, as between the life tenants and remaindermen, proportionally. *Wood v. Hammond* (R. I., 1889), 17 Atl. Rep. 324.

Where the payment of the general legacies was postponed till the death of the life tenant, who was entitled by the will to consume the principal of the entire estate if necessary for her support, it was held that if the assets at that time proved insufficient to pay them in full, they should abate ratably.

2. *Gyett v. Williams*, 2 J. & H. 440; *In re Hardy*, 50 L. J. Ch. 241. In the first case just cited the court said: "Where a man directs two thousand pounds to be laid out in purchasing an estate, and then, after disposing of that estate, directs that the residue of his estate is to be invested and portioned out in a particular way, what is it that he gives by this last disposition? Clearly nothing except the residue so to be invested after payment of the two thousand pounds. The substance of the gift is such that the language cannot be regarded as pertaining to the mere order of enumeration, but must be read as giving priority. The onus, no doubt, is on those who claim priority; but in this case I think it is satisfied."

3. Annuity Charged on Personality a General Legacy.—*Hume v. Edwards*, 3 Atk. 693; *Innes v. Mitchell*, 1 Ph. 346; *Creed v. Creed*, 11 Cl. & F. 508; *Miller v. Huddleston*, 3 M. & G. 513; *Emery v. Batchelder*, 78 Me. 233; *Pennsylvania University's Appeal*, 97 Pa. St. 187; *Heatherington v. Lewenberg*, 61 Miss. 372. Compare *Smith v. Fellows*, 131 Mass. 20; *Richardson v. Bowen* (R. I., 1893), 25 Atl. Rep. 908.

In *Emery v. Batchelder*, 78 Me. 233, the court said: "The principal controversy is whether this annuitant should suffer *pro rata* with the other general legatees in the will, or is entitled to priority over them and to payment of the annuity in full. * * * And here we may say that the language used is such that there can be no question but that this legacy is general, and not specific. It is for a certain amount to be paid from the general fund of the estate. It is not specific, because not

of any particular thing or from any particular money of the testator's estate. Therefore the general rule is, that in the administration of testamentary assets, when there is a deficiency of such assets after the payment of debts, expenses, and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. And it is the settled doctrine that annuities stand upon the same footing as legacies, and as between annuitants and legatees there is no priority merely because one is an annuitant and the other a legatee, where the estate is deficient, but both must abate in the same proportion."

The principle applies whether the annuity is to commence immediately on the testator's death or at a future period. *Innes v. Mitchell*, 2 Ph. 346.

As to Mode of Valuation, see the cases of *Wroughton v. Colquhoun*, 1 De G. & S. 36; *Wright v. Callender*, 2 De G., M. & G. 652; *Potts v. Smith*, L. R. 8 Eq. 683; *Gratrix v. Chambers*, 2 Giff. 321.

See *Todd v. Billby*, 27 Beav. 353, as to the proper mode of ascertaining value in a case where several annuities are given and the fund proves deficient, and some of the annuitants are dead and some living.

When Value to be Taken.—As to the period at which the value must be taken, see *Fielding v. Preston*, 1 De G. & J. 438.

Legacies and Annuities Charged on Land Devised.—It would seem to be the better opinion that a devise of land and a rent charge, legacy, or annuity charged thereon would abate ratably, since the devise is specific and the charge either demonstrative or specific; and the testator must have equally intended the devisee to have the land and the legatee to have the legacy or annuity. It was so held in the case of a rent charge or annuity in *Long v. Short*, 1 P. Wms. 403. See *Jackson v. Hamilton*, 9 Ir. Eq. Rep. 434; *Gaw v. Huffman*, 12 Gratt. (Va.) 628; *McCampbell v. McCampbell*, 5 Litt. (Ky.) 92.

On the other hand, it has been said that where property of any kind is devised to one person and a sum certain bequeathed out of it to another, the intention of the testator manifestly is that the devisee shall only have what remains after paying the legacy; and if the property becomes less valuable, or part of it is required for the payment of debts, the loss will be his and not that of the person who is to receive the moiety. *Raikes v. Boneton*, 29 Beav. 41; *Hoover v. Hoover*, 5 Pa. St. 351. In *re Barklay's Estate*, 10 Pa.

The same is true with a bequest of a sum of money to purchase an annuity,¹ or to be used in the purchase of real estate,² or to be invested in government securities for the benefit of annuitants.³ In all these cases, if there is a deficiency of assets, these sums abate.

Annuities abate not only with reference to other legacies, but between themselves as well.⁴ But if annuities are given as specific gifts out of real estate, they do not abate with legacies charged generally upon the real estate, when the real estate is insufficient to pay both annuities and legacies.⁵

St. 387. *Compare* Hallowell's Estate, 23 Pa. St. 223; *Cryder's Appeal*, 11 Pa. St. 72.

Where legacies and annuities are charged on real estate, powers of distress and entry conferred upon the annuitants do not give the annuities priority over the legacies. *Roper v. Roper*, 3 Ch. D. 714.

In *Curran v. Green* (R. I., 1893), 27 Atl. Rep. 596, where the testator created a trust fund out of which he directed certain annuities to be paid, giving the residue of the fund to his daughter, and the income of the fund proved insufficient to pay the annuities in full and the taxes, the court said: "We are also of the opinion that the annuities provided for are to be paid without abatement, and are not to abate because the income of the trust fund may be insufficient for their payment in full and the payment of taxes; the gift over * * * being not of the fund in its entirety, but only of the residue."

And where also a testator bequeathed an annuity of fifteen thousand dollars per annum to his widow in lieu of her share in his personal estate under the statute, and the personal estate was not sufficient to pay the annuity and other bequests, it was held that the annuity was not subject to abatement along with such other bequests. *McDaniels' Estate*, 9 Pa. Co. Ct. Rep. 232.

1. *Hinton v. Pinke*, 1 P. Wms. 539.

2. *Lawson v. Stitch*, 1 Atk. 507.

3. *Gibbons v. Hills*, Dick. 324.

"Such being the rule when an annuity is given directly out of the personal estate, because it amounts to no more than a general bequest of so much money out of that fund as will yearly produce the annuity, it follows that, if the bequest be of a sum of money to purchase an annuity, or to lay out in buying land, or invest upon government securities for the benefit of the legatee, either in paying to him the rents and interest, or otherwise to dispose of the benefits according to his appointment, or to transfer them to him at a particular time, in each of those cases, if there be a failure of assets, those severally must abate, since they are no more than voluntary dispositions, and fall within the class of general legacies." *Roper on Legacies* (2d Am. ed.), § 420.

4. *Annuities Abating Inter Se*.—*Innes v. Mitchell*, 2 Ph. 346. Or, in reference to general legacies, they abate ratably. *Wms. Ex'rs* (7th Eng. ed.) 1367; *Wroughton v. Colquhoun*, 1 De G. & S. 36; *Carr v. Ingleby*, 1 De G. & S. 362; *Long v. Hughes*, 1 De G. & S. 364.

In *Innes v. Mitchell*, 2 Ph. 346, the tes-

tator had bequeathed an annuity of three hundred pounds to his three daughters and the survivors and survivor, with a gift over, to the last survivor, of the sums set apart to answer the annuity. After the death of one of the daughters the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two; but after their deaths a sum of money—forming part of the residue—became available. It was held that the annuity must be supposed to have continued until put an end to by the principal money falling in, and that such money must be apportioned ratably between the arrears which on that supposition would be due to the daughters respectively, and the sum originally set apart and which belonged to the last survivor.

5. *Theobald Wills* (2d Am. ed.) 622, citing *Portarlington v. Damer*, 4 De G., J. & S. 161; *Coore v. Todd*, 7 De G., M. & G. 520; *Creed v. Creed*, 11 Cl. & F. 491. See also *Conron v. Conron*, 7 H. L. Cas. 168; *Miller v. Huddleston*, 3 M. & G. 513; *Maskell v. Farrington*, 3 De G., J. & S. 338; *Towle v. Swasey*, 106 Mass. 100.

In *Creed v. Creed*, 11 Cl. & F. 491, a testator gave his wife his freehold estate of B. and certain specific chattels, and also an annuity for life charged upon all his real estate except B., with power of distress for the same. He then charged his debts upon his real estate in aid of his personal estate. He next gave several pecuniary legacies to be paid, in case of a deficiency of personal estate, out of his real estate except B., and he charged his real estate with the same. The personal estate was insufficient to pay the debts and legacies; the real estate was insufficient to pay the annuities and legacies. It was held that as to the real estate, the annuities were entitled to priority over the legacies.

A testator, after bequeathing certain legacies, devised his freehold estate called R. to his brother in tail male, but subject to and charged with the payment of two annuities; and he directed that the residue of his estate thereafter devised should be considered and made the primary fund for the payment of his debts and the several legacies given by his will, and that the R. estate, "hereinbefore devised, subject as aforesaid" to his brother in tail male, should not be subject or liable to the payment of said legacies, unless the residue of his estates thereafter specifically bequeathed for those purposes should prove of insufficient value. That event having happened, it was held that the subject-matter

4. Legacy of Stock.—Where stock is bequeathed as a general legacy, and the legatee is called upon to abate with other general legatees, the abatement will be regulated by the value of the stock at the end of one year next after the death of the testator.¹

5. Gift of Legacy Duty.—A gift of a legacy duty on a specific or a pecuniary legacy is a general legacy for the benefit of the specific legatee in the one case and of the pecuniary legatee in the other, and abates with other general legacies.²

IV. SPECIFIC AND DEMONSTRATIVE LEGACIES—1. **In General.**—After all the personal estate not specifically bequeathed has been exhausted,³ specific

which was charged with the legacies was only the R. estate, burdened with the annuities, which consequently had priority thereon over the legacies. *Portarlington v. Damer*, 4 De G., J. & S. 161.

1. An instance of this sort occurred in *Blackshaw v. Rogers*, cited in *Simmons v. Vallance*, 4 Bro. C. C. 349, in which a testator gave £200 consols to B, to keep a monument in repair, and by a codicil he gave the interest of £300 to C for life. The assets being deficient, Lord Thurlow decreed that B and C should abate in proportion; and he directed the master to inquire into the value of the stock at the end of a year after the death of the testator. See also *Shadwell & C., in Anther v. Anther*, 13 Sim. 440; *Keyling's Case*, 1 Eq. Cas. Abr. 239, pl. 25; *Osborne v. McAlpine*, 4 Redf. (N. Y.) 1.

2. Gift of Legacy Duty—When General Legacy.—*Farrer v. St. Catherine's College*, L. R. 16 Eq. 19, 25. See *Wilson v. O'Leary*, L. R. 17 Eq. 419.

It appeared in *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19, 25, that the general personal estate of the testator was insufficient for the payment of the pecuniary legacies in full; and the question was raised as to whether any legacy duty was payable out of that estate or their specific legacies. Lord Selbourne, L.C., said: "A gift of legacy duty on a specific or pecuniary legacy is a common pecuniary legacy for the benefit of the specific legatee in the one case, and of the pecuniary legatee in the other; and in the event of the general estate being insufficient, the gifts of legacy duty must abate along with other pecuniary legacies. The value of the specific legacies must, therefore, be ascertained and the amounts of legacy duty payable thereon calculated, and such amounts must be treated as pecuniary legacies, and abate accordingly."

3. Roper on Legacies (2d Am. ed.) *356; *Wms. Exrs.* (7th Eng. ed.) 1359. See *Legacies and Devises*, Vol. 13, p. 134.

General Legacies Abate before Specific legacies or devises can be called upon at all. "The principle is the presumed intention of the testator [presumed from his severing specific parts of his personal estate from the rest and bequeathing them specifically] to give a preference to those legatees." *Roper on Legacies* (2d Am. ed.) *355. See also *Williams on Executors* 1359; *Hayes v. Seaver*, 7 Me. 237; *Wallace v. Wallace*, 23 N. H. 149; *Perkins v. Mathes*, 49 N. H. 107; *Humes v. Wood*, 8 Pick. (Mass.) 478; *White-*

head v. Gibbons, 10 N. J. Eq. 230; *Nash v. Smallwood*, 6 Md. 394; *White v. Beattie*, 1 Dev. Eq. (N. Car.) 87.

In *Wallace v. Wallace*, 23 N. H. 149, the court said: "As between specific and general legacies, where the personal property is not sufficient to pay the debts and the specific legacy, the general legatees must lose their legacies."

Where there is a deficiency of assets to answer the legacies, the question whether the specific shall abate with the general legacies must be decided according to the intention of the testator. *Moore v. Moore* (N. J., 1892), 25 Atl. Rep. 403. See also *Norris v. Thomson*, 16 N. J. Eq. 542.

A devise of a house and ten acres of land adjacent thereto, to be allotted by the executors, is specific, and does not abate upon the insufficiency of the estate to pay all the bequests. *Wood v. Hammond*, 16 R. I. 98.

Intent of Testator.—A testator devised his residence in trust for his wife for life, the trustees at her death to convey it to the Home for Aged Men; and, disclaiming any intention to "impose any restriction upon the absolute title to be conveyed," suggested its use for a "home." After a specific bequest to his wife absolutely, and a gift to her for life of the income of a trust fund of twenty-five thousand dollars to be created out of personal property not specifically bequeathed, the testator stated that he preferred the provisions for his wife, "to all other devises and bequests of this will;" and directed the specific bequest to be paid to her, and the trust fund to "be formed before payment of any other legacies, and to be free from abatement" in case the estate should prove insufficient to carry out the will. Another fund was then to be formed for the testator's sons, and preferred "next after" the devises and bequests already made. At the wife's death ten thousand dollars was to be paid out of the twenty-five thousand dollar fund to the Washingtonian Home, and the balance was to be held for the benefit of the son and a granddaughter. A power to sell real estate, conferred upon the executors and the trustees, expressly excepted the testator's residence. The wife died before the testator, and the personal estate after the payment of debts was less than ten thousand dollars in value. It was held that the twenty-five thousand dollar fund was not preferred over the specific devise of the residence. *Johnson v. Home for Aged Men*, 152 Mass. 89.

legacies and devises abate *pro rata*,¹ and demonstrative legacies, so far

1. Roper on Legacies (2d Am. ed.) *357, *358; Williams on Executors (7th Eng. ed.) 1359, 1372, 1695, 1696, 1719; 2 Jarman on Wills (5th Am. ed.) 623; Theobald on Wills (2d ed.) 624; Slesch v. Thorington, 2 Ves. 561, 564; Clifton v. Burt, 1 P. Wms. 678; Devon v. Atkins, 2 P. Wms. 383; Fielding v. Preston, 1 De G. & J. 438; Long v. Short, 1 P. Wms. 403; Gervis v. Gervis, 14 Sim. 654; Armstrong's Appeal, 63 Pa. St. 316; Cryder's Appeal, 11 Pa. St. 72; Dugan v. Hollins, 11 Md. 41; Everitt v. Lane, 2 Ired. Eq. (N. Car.) 548; Brant v. Brant, 40 Mo. 280; Woodworth's Estate, 31 Cal. 616.

In What Instances Question of Abatement may Arise.—The question of abatement may arise, first, between specific legatees; second, between specific devisees; third, between specific devisees and legatees. The application of the principle in the first two instances is simple, and seems never to have been seriously questioned.

Specific Devisees and Legatees.—But whether the contention has arisen between specific devisees and legatees, the authorities are by no means uniform. Before Stat. 3 & 4 Wm. IV., c. 104, by which the land of a decedent was made subject to simple contract debts, it was held that devisees of freehold and leasehold were liable to contribute *pro rata* to debts by specialty, since both freeholds and leaseholds were liable to those demands. Long v. Short, 1 P. Wms. 403; Tombs v. Roch, 2 Colly. 490; Gervis v. Gervis, 14 Sim. 654, *overruling* Cornewall v. Cornewall, 12 Sim. 298; Williams on Executors (7th Eng. ed.) 1696, 1717, 1719.

Since the passage of Stat. 3 & 4 Wm. IV., c. 104, in *England*, and similar statutes in most of the *United States*, by which the real estate of a decedent is rendered liable for his simple contract debts, there would seem to be no reason why specific legatees whose legacies have been sold to pay principal contract debts cannot call on the specific devisees for like contribution. Roper on Legacies (2d Am. ed.) *359. See Williams on Executors (7th Eng. ed.) 1717; Jackson v. Pease, L. R. 19 Eq. 96; Lancefield v. Iggulden, L. R. 10 Ch. 136; Armstrong's Appeal, 63 Pa. St. 316; Cryder's Appeal, 11 Ga. St. 72; Brant v. Brant, 40 Mo. 280; Woodworth's Estate, 31 Cal. 616; Grim's Appeal, 89 Pa. St. 333; Loomis's Appeal, 10 Pa. St. 387; Kelly v. Richardson, 100 Ala. 584; Mabury v. Grady, 67 Ala. 147.

In Armstrong's Appeals, 63 Pa. St. 312, Sharswood, J., said: "In this state, where lands have always been assets for the payment of debts by simple contract as well as by specialty, the rule is general—that wherever there is a deficiency of assets to pay both debts and legacies, specific devisees and specific legatees shall contribute proportionably. What is termed a demonstrative legacy partakes, in this respect, of the privilege of a specific legacy."

In Hubbell v. Hubbell, 9 Pick. (Mass.) 561, it was held that lands specifically devised could not be sold to pay specific legacies; whether or not the specific legatees could com-

pel contribution, was left undecided. See also Humes v. Wood, 8 Pick. (Mass.) 478; Hayes v. Seaver, 7 Me. 237; Kitchell v. Young, 46 N. J. 501.

In some instances, following cases decided upon the authority of Cornewall v. Cornewall, 12 Sim. 298, *overruled* in Gervis v. Gervis, 14 Sim. 654, it has been held that specific legacies abate before specific devisees, and the devisees cannot be called upon for contribution unless the testator has manifested his intention to place both on the same level by charging the land, or it is subject to a lien. Rogers v. Rogers, 1 Paige (N. Y.) 190; Shreve v. Shreve, 10 N. J. Eq. 391; Elliott v. Carter, 9 Gratt. (Va.) 549; Warley v. Warley, Bailey Eq. (S. Car.) 409; Farmer v. Spell, 11 Rich. Eq. (S. Car.) 549; M'Campbell v. M'Campbell, 5 Litt. (Ky.) 92, 15 Am. Dec. 59.

In M'Fadden v. Hefley, 28 S. Car. 317, item 1 of a will was as follows: "I give, devise, and bequeath to my wife, Rebecca Hefley, during her life or widowhood the plantation where I now reside; and at her death, or in the event of her marrying again, I give and devise the same to my son, William Henry, to be held by him in trust for his own use and benefit and for the use and benefit of all my other children by my said wife, Rebecca, equally; the said plantation to be the common homestead of all my said children so long as they may choose to occupy it as such; and in the event of any of them removing therefrom, then the ones so removing are to be entitled to receive from the net proceeds of said plantation such amount as will equal that of those who remain thereon. My said son, William Henry, is to have the control and management of the said plantation." McIver, J., said: "Item 1 is clearly a specific devise of real estate, and cannot therefore be abated until, first, the general legacies and then the specific legacies are exhausted. Warley v. Warley, Bailey Eq. (S. Car.) 397. It was argued on behalf of appellants, that there is no priority as between specific devisees and specific legacies, but that when abatement becomes necessary they must abate *pro rata*. While, under the view which we take, this may not become a question of any interest to the appellants, yet, to avoid misconception, we desire to say that we do not concur in that proposition. The rule is otherwise." See also Hull v. Hull, 3 Rich. Eq. (S. Car.) 65.

Of course, where the land is not liable for simple contract debts, specific legatees whose legacies have been taken to discharge such obligations cannot call for contribution from the devisees. Chase v. Lockerman, 11 Gill & J. (Md.) 204; Dugan v. Hollins, 11 Md. 41.

In states in which a legacy to widow in lieu of dower has priority over both specific legacies and devises, specific legatees and devisees must contribute *pro rata*. Addison v. Addison, 44 Md. 202. See also the title LEGACIES AND DEVISES.

Devise to Heir.—The heir to whom an estate

as the fund upon which they are charged will extend for their payment, abate ratably with specific legacies;¹ but in so far as it may be necessary to resort

is devised, though taking as heir, is entitled to contribution as between himself and other devisees. *Roper on Legacies* (2d Am. ed.) *361; *Biederman v. Seymour*, 3 Beav. 368.

By Stat. 3 & 4 Wm. IV., c. 106, § 3, the heir to whom an estate is devised takes as devisee for all purposes. *Strickland v. Strickland*, 10 Sim. 374.

Devise in Lieu of Dower.—When a widow relinquishes her right of dower in consideration of a devise she is regarded as a purchaser, and as such she has the right to ask that lands devised to others, not standing in the same position with herself, shall first be sold for the payment of debt before proceeding against those given to her. *Kirk's Estate*, 13 Phila. (Pa.) 276, citing *Heath v. Dendy*, 1 Russ. 543; *Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. 420; *Earp's Will*, 1 Pars. Eq. Cas. (Pa.) 453; *Walter v. Dunshee*, 38 Pa. St. 430; *Steffy & Shimp's Appeal*, Leg. Int. 1874 (Pa.), 252.

English Rule Modified.—In *Grim's Appeal*, 89 Pa. St. 333, the court, by *Mercur, J.*, said: "It may be conceded, under the English authorities, that demonstrative legacies, or specific bequests of personalty, payable out of a particular fund, set apart for that purpose, will abate only as against each other in case of a deficiency of assets for the payment of simple contract debts, and also that some of the earlier decisions of this court appear to have assumed that to be the correct rule. In later cases, however, this court has given a reason for modifying the rule which prevails in England, resting, in my opinion, on substantial ground. There lands are not, as here, regarded as general assets for the payment of debts. Hence it was reasonably inferred that an intention existed there, as against simple contract debts, to prefer specific devisees over specific legacies. In this state, however, lands have always been assets for the payment of debts whether by simple contract or otherwise. Hence, now, specific or demonstrative legacies shall not alone be liable to abate, but, on a deficiency of personal assets to pay debts, devisees are equally liable to abate." See, further, *Loomis's Appeal*, 10 Pa. St. 387; *Tea's Appeal*, 23 Pa. St. 223; *Armstrong's Appeal*, 63 Pa. St. 312; *Knecht's Appeal*, 71 Pa. St. 333; *Snyder's Appeal*, 75 Pa. St. 171.

In *Brant v. Brant*, 40 Mo. 266, the court said: "The rule that specific devisees were considered as intended to be preferred over specific legacies was derived from England, where, as is well known, land is not regarded as general assets for the payment of debts. But this rule never applied to specialty debts, because land was liable for them, and therefore as to them devisees and specific legacies ratably contributed. With us land is assets for all sorts of debts, no distinction being made between simple contract debts and debts by specialty; and although the personal estate is the primary fund for their payment, yet, as between the devisees and legatees, the same

reason does not exist for preferring devisees over legacies."

In *Hoover v. Hoover*, 5 Pa. St. 351, the court said: "But the case is very different where the burden of paying the legacies is specifically imposed on the devised land. The devisee then takes it so subject, and, in *Pennsylvania*, on failure of the prior funds, also operated with the debts. The testator says he shall pay the legacies, and the law says he shall pay the debts. It is, in this respect, like a devise of mortgaged lands, charged by the testator with the payment of a sum certain, partly applicable to the discharge of legacies given to other children of the testator."

1. *Pomeroy's Eq. Jur.*, § 1138; *Roper on Legacies* (2d Am. ed. 364) *410; *Williams on Executors* (7th Eng. ed.), 1371; *Roberts v. Pocock*, 4 Ves. Jr. 150; *Lambert v. Lambert*, 11 Ves. Jr. 607; *Acton v. Acton*, 1 Meriv. 178; *Lord Cottenham in Creed v. Creed*, 11 Cl. & F. 509; 3 M. & G. 744, per Lord Truro; *Florence v. Sands*, 4 Redf. (N. Y.) 206; *Armstrong's Appeal*, 63 Pa. St. 312; *Cryder's Appeal*, 11 Pa. St. 72; *Dugan v. Hollins*, 11 Md. 41; *Gelbach v. Shively*, 67 Md. 501; *Gaw v. Huffman*, 12 Gratt. (Va.) 628; *Alsop v. Bowers*, 76 N. Car. 168; *McCampbell v. McCampbell*, 5 Litt. (Ky.) 92.

A testator provided that certain of his real and personal estate should be sold for the payment of his debts, and made a bequest of seven hundred dollars to one of his seven children, "which should be his entire portion." To another son, who was also executor, he devised the homestead, to be cultivated by him so long as the testator's wife should remain a widow, one-quarter of the proceeds thus arising to be paid to the widow and the balance to be divided among the six heirs. At the death or marriage of the widow the executor was given the privilege of taking the homestead at so much per acre, or of selling it at auction and dividing the proceeds equally among the six heirs. At the death of the widow he sold the homestead at auction. The proceeds derived from the sale of land and personalty proved insufficient to pay the debts and the seven hundred dollar legacy, and it became a question as to whether or not the proceeds of the sale of the homestead should be resorted to for this purpose. It was held that inasmuch as the seven hundred dollar legacy was a general legacy, and the devise to the six heirs was a demonstrative legacy, the former, and not the latter, should abate. *Myers v. Myers*, 88 Va. 131. In this case *Hinton, J.*, said: "Such being the relative characters of these two different legacies, and the rule being that a demonstrative legacy is preferred to a general legacy, in the case at bar, inasmuch as the assets of the testator are insufficient to pay his debts and his legacies too, the general legacy of seven hundred dollars to the appellant has to abate to pay the debts before the demonstrative

to the general estate, by reason of the total or partial failure of the fund, they are to be regarded as general legacies, in which event they contribute *pro rata* with other general legacies.¹

2. Specific Bequest of all the Testator's Personal Property.—Although, in general, specific legacies are not compelled to abate in favor of general legacies, there are exceptions to the rule. When, for example, all of the testator's personal property is specifically bequeathed, and at the same time a general legacy is directed to be paid "out of his personal estate," the specific legatees will have to abate proportionally in favor of the general legacies; the usual presumption of preference in favor of specific legatees being, in instances of this sort, repelled.²

3. Fund given in Fractional Parts.—So also if stock or the proceeds of an estate directed to be sold be specifically given in fractional parts, and the person to whom the last fractional part is given be appointed to take it as the residue or remainder of the specific fund, whatever may be its amount, then, on insufficiency of assets, he, as residuary legatee, will only be entitled to the surplus of the fund after full satisfaction of the other aliquot parts specifically bequeathed.³

legacy to the remaining six children can be touched."

Rule of Intention.—The rule that demonstrative legacies, or those payable out of a specific fund, are preferred in case of deficiency, is a rule of intention merely. Legacies charged on land specifically may abate equally with general legacies, if it is apparent from the will that the testator so intended. *Rambo v. Rumer*, 4 Del. Ch. 9.

For a case where, upon the construction of a will, certain legacies of bank stock, bills obligatory, and chattels were deemed equally specific and abatable *pro rata*, see *Sparks v. Weedon*, 21 Md. 156.

Certain legacies of specific amounts "in government bonds" were held to be neither specific nor demonstrative, but general, and subject to abatement *pro rata* with other general legacies. *Matter of Newman's Estate*, 4 Dem. (N. Y.) 65.

Where a will gave to one legatee a sum of money absolutely, it was held that this legacy did not abate with the general legacies. *Matter of Morris's Estate*, 6 Dem. (N. Y.) 304.

1. *Mullins v. Smith*, 1 Dr. & Sm. 210; *Florence v. Sands*, 4 Redf. (N. Y.) 210; *Gelbach v. Shively*, 67 Md. 501.

Demonstrative legacies, so far as the fund to which they are referred will suffice for payment, are preferred to general legacies, because it is to be inferred that by referring to specific parts of the estate for their payment the testator intended them to be preferred to other legacies which he had not so secured. *Williams on Executors* (7th Eng. ed.) 1371. Hence the lien which they have on the designated fund places them upon the same plane as specific legacies and devises; but when the legacy becomes general by the failure of the fund, the reason for the preference has ceased to exist. *Mullins v. Smith*, 1 Dr. & Sm. 210.

A specific legacy is not liable to abatement for the payment of debts; but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the

insufficiency or extinction of the fund out of which it is payable. *Mullins v. Smith*, 1 Dr. & Sm. 210.

In *Florence v. Sands*, 4 Redf. (N. Y.) 210, where a demonstrative legacy was given to F., and the fund upon which it was chargeable proved insufficient to pay it in full, it was held that the demonstrative legatee was, as to the unpaid balance of his legacy, a general legatee, and that his legacy was subject to abatement with the other general legacies.

2. *Barry v. Harding*, 1 J. & L. 475. See also *Roper on Legacies* (2d Am. ed.) *363; *Williams on Executors* (7th Eng. ed.) 1360; *Fonblanque Eq.*, bk. 4, pt. 1, c. 2, § 5; *Pierrepont v. Edwards*, 25 N. Y. 128; *Gallego v. Atty.-Gen.*, 3 Leigh (Va.) 450; *Biddle v. Carraway*, 6 Jones Eq. (N. Car.) 95; *White v. Green*, 1 Ired. Eq. (N. Car.) 45; *White v. Beattie*, 1 Dev. Eq. (N. Car.) 87.

Thus where a testator, possessed of personal estate at W and X, after devising all his personal estate at W to one, and all his personal estate at X to another, devises a legacy of three hundred pounds "out of his personal estate," and dies having no other personal estate than in the two places before mentioned, the three hundred pound legacy must come out of the personal estate in W and X. See remarks of the lord chancellor in *Sayer v. Sayer*, *Prec. Ch.* 393.

3. *Danvers v. Manning*, 2 Bro. C. C. 22, 1 Cox 203; 1 P. Wms. 404.

But although the last aliquot share of the fund be given by the word remainder or residue, yet if, from the context of the will, it appears to have been the testator's intention that all the specific legatees should have certain defined parts or proportions of the subject, by whatever words they were bequeathed, then the last-named legatee, although in terms a residuary legatee, will be entitled to call upon the other legatees of parts of the fund to abate equally with him upon their respective shares. *Roper on Legacies* (2d Am. ed.) *357; *Sleech v. Thorington*, 2 Ves. 561; *Page v. Leapingwell*, 18 Ves. 463;

In *England*, and in those states of the Union which hold that a residuary devise is specific, such devise, notwithstanding the existence of statutes providing that after-acquired realty shall pass by the will,¹ abates with other specific devises.²

But in states in which the effect of such legislation has been to abolish all distinctions between real and personal property in the administration of decedent's estates, it would seem that such devise would be liable immediately after residuary personality, in exoneration of both general and specific legacies and specific devises.³

V. LAPSED INTERESTS.—Real estate, specifically devised, which descends to the heirs by reason of lapse, is liable with other lands descended in exoneration of specific devises which take effect;⁴ but in states in which a lapsed devise, instead of descending to the heir, falls into the residuary⁵ devise, and a residuary

Farmer v. Mills, 4 Russ. 86; *Scott v. Salmond*, 1 Myl. & K. 363. See *Wright v. Weston*, 26 Beav. 429; *Duncan v. Duncan*, 27 Beav. 392; *Haslewood v. Green*, 28 Beav. 1; *Elwes v. Causton*, 30 Beav. 554. *In re Jeffrey's Trust*, L. R. 2 Eq. 68; *Walpole v. Apthorpe*, L. R. 4 Eq. 37; *Miller v. Huddlestone*, L. R. 6 Eq. 65; *Van Nest v. Van Nest*, 43 N. J. Eq. 126. See the title LEGACIES AND DEVISES.

It should also be observed that the residue of a particular fund severed and distinguished from the bulk of the estate, whether specific or residuary in respect to bequests of other parts of that fund, will always, as regards the general estate, be specific, and cannot be applied until the general estate is exhausted. See the title LEGACIES AND DEVISES.

1. See the title LEGACIES AND DEVISES.

2. *Hensman v. Fryer*, L. R. 3 Ch. 420; *Lancefield v. Iggulden*, L. R. 10 Ch. 136; *Jackson v. Pease*, L. R. 19 Eq. 96; *Clark v. Clark*, 34 L. J. Ch. 477; *Emuss v. Smith*, 2 De G. & S. 722; *Eddels v. Johnson*, 1 Giff. 22; *Pearman v. Twiss*, 2 Giff. 130; *Edwards v. Pugh*, 2 Giff. 135, note; *Gibbons v. Eyden*, L. R. 7 Eq. 371; *Collins v. Lewis*, L. R. 8 Eq. 708.

Earlier decisions held that by virtue of the Wills Act a residuary devise had ceased to be specific, and was to be applied in exoneration of general and specific legacies and specific devises. *Dady v. Hartridge*, 1 Dr. & Sm. 236; *Barnwell v. Ironmonger*, 1 Dr. & Sm. 255; *Rotheram v. Rotheram*, 26 Beav. 465; *Bethell v. Green*, 34 Beav. 302; *Roadhouse v. Morto*, 35 L. J. Ch. 67; *Hensman v. Fryer*, L. R. 2 Eq. 627.

In *Shreve v. Shreve*, 10 N. J. Eq. 385, the effect of the corresponding statute in that state was left undecided.

Effect of General Charge of Legacies.—Since a general charge of legacies did not, even before the passage of the Wills Act, affect land specifically devised, such charge falls necessarily, without regard to the construction placed upon such act, upon the residuary realty. *Spong v. Spong*, 3 Bligh, N. S. 8. See *Mirehouse v. Scaife*, 2 Myl. & C. 704; *Young v. Hassard*, 1 J. & L. 471.

Contribution in Favor of General Legatees.—In *Hensman v. Fryer*, L. R. 3 Ch. 420, Lord Chelmsford held that although a residuary devise is specific, notwithstanding the passage of the Wills Act (1 Vict., c. 26), and hence a

general legatee had no right to marshal the assets as against a residuary devisee, yet the latter was bound to contribute ratably with the general legatees to pay such debts as the general personal estate was insufficient to satisfy. This decision is evidently based upon the idea that the language of *Knight Bruce, V.C.*, in *Tombs v. Roch*, 2 Colly. 502, referred to the rights of general legatees, whereas that case merely decided that specific legatees and devisees must contribute ratably to specialty debts, on deficiency of the general personal estate. Such a right on the part of general legatees is manifestly inconsistent with the doctrine that a residuary devise is specific. *Hensman v. Fryer*, while never expressly overruled by the House of Lords, has not been considered binding by the lower branches of the Court of Chancery, on the ground that it was "clearly erroneous." See *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 235; *Tomkins v. Colthurst*, 1 Ch. Div. 626; *Farquharson v. Floyer*, 3 Ch. Div. 109.

3. See judgment of *Kindersley, V.C.*, in *Hensman v. Fryer*, L. R. 2 Eq. 627, holding that a general legatee had the right to marshal the assets against a residuary devisee.

Under *California Code Civ. Pro.*, §§ 1359, 1360, "property which is devised or bequeathed to a residuary legatee" is to be applied to the payment of debts before "property specifically devised or bequeathed."

4. *Williams v. Chitty*, 3 Ves. Jr. 548; *Dady v. Hartridge*, 1 Dr. & Sm. 241.

"The order in which descended estates are liable is not generally varied in favor of the heir by their being included with the devised estates in the charge of debts, nor by the circumstance that they come to the heir by lapse, and not as simply undisposed of, nor by both of these circumstances together." 2 *Jarman on Wills* (5th Am. ed.) *624, citing *Williams v. Chitty*, 3 Ves. Jr. 545; *Dady v. Hartridge*, 1 Dr. & Sm. 241.

5. In *Theobald on Wills* (2d ed.) 624, it is said that real estate devised, not charged with debts, but descending to the heir by reason of lapse, is applicable in the same order as specific and residuary devises, citing *Blann v. Bell*, 47 L. J. Ch. 120, 7 Ch. Div. 382; *Luckcraft v. Pridham*, 48 L. J. Ch. 636. This is true in *England* if there is a residuary devise, since the only instance in which a lapsed

devise is, nevertheless, considered specific, it would seem that the land comprised in the lapsed devise is to be regarded as specifically devised to the residuary devisee, and only liable to contribute *pari passu* with other specific devises.¹ A lapsed share of a general or residuary devise to several as tenants in common, as between the heir at law and residuary devisees, only contributes ratably with the shares well devised.² In regard to personalty, a lapsed share of residue,³ or a lapsed specific legacy falling with the residue, only contributes its ratable proportion with the other residue.⁴ Where there is no residuary bequest, and all the legacies are subject to a charge of debts, a lapsed pecuniary legacy only contributes ratably with those which take effect;⁵ where there is no charge of debts, it would seem to be the better opinion that the lapsed legacy is to be applied in exoneration of the others.⁶

devise can descend to the heir is in the case of a lapsed share of a general or residuary devise to several as tenants in common. But if there is no residuary devise, it would seem that a lapsed specific devise descending to the heir would be applied before other devises, as under the old law. See *Williams v. Chitty*, 3 Ves. Jr. 548.

In both *Blann v. Bell*, 7 Ch. Div. 382, and *Luckcraft v. Pridham*, 6 Ch. Div. 205, the devise was a share of a blended residue.

1. Such at least was the opinion of *Kindersley, V.C.*, upon the effect of the corresponding English statute. *Dady v. Hartridge*, 1 Dr. & Sm. 241.

In states in which a residuary devise is held not to be specific, or in which all distinction between real and personal property has been abolished, it would seem that a specific devise falling into the residue would contribute with the other residuary realty.

2. *Peacock v. Peacock*, 34 L. J. Ch. 316; *Ryves v. Ryves*, L. R. 11 Eq. 541; *Fisher v. Fisher*, 2 Keen 610; *Wood v. Ordish*, 3 Sm. & G. 125. See *Blann v. Bell*, 47 L. J. Ch. 120, 7 Ch. Div. 382; *Luckcraft v. Pridham*, 48 L. J. Ch. 636. Compare *Maddison v. Pye*, 32 Beav. 658; *Bagot v. Legge*, 2 Dr. & Sm. 259; *Jackson v. Pease*, L. R. 19 Eq. 96.

Costs of Administration Suit.—But in *Scott v. Cumberland*, L. R. 18 Eq. 586 (*per Malins, V.C.*), it was held that the costs of an administration suit were to be charged upon a lapsed share of residuary realty which had descended to the heir in execution of the shares well devised. Mr. Theobald thinks this case not now of authority. *Theobald on Wills* (2d ed.) 624. See, however, *Astley v. Micklethwait*, 15 Ch. Div. 66; *Row v. Row*, L. R. 7 Eq. 414; *Trethery v. Helyar*, 4 Ch. Div. 53; *Fenton v. Wills*, 7 Ch. Div. 33; *Blann v. Bell*, 7 Ch. Div. 382.

3. *Theobald on Wills* (2d ed.) 619; *Trethery v. Helyar*, 4 Ch. Div. 53; *Fenton v. Wills*, 7 Ch. Div. 33; *Blann v. Bell*, 7 Ch. Div. 382.

It is well settled that if there is a general charge of debts a lapsed share of residue only contributes ratably with a share well disposed of. *Eyre v. Marsden*, 4 Myl. & C. 231; *Burt v. Sturt*, 10 Hare 415; *Oddie v. Brown*, 4 De G. & J. 179. See *Elborne v. Goode*, 14 Sim. 165; *Ralph v. Carrick*, 5 Ch. Div. 984.

It was at one time supposed that *Malins, V.C.*, had decided in *Gowan v. Broughton*,

L. R. 19 Eq. 77, that a lapsed share, in the absence of a general charge of debts, was to be applied in exoneration of a share well disposed of; whereas what he intended to decide was that where the residuary personalty is given to a person who dies in the life of the testator, such personalty is no less the primary fund than it would have been if the legatee had survived. *Jones v. Caless*, 10 Ch. Div. 40.

A bequest of "all testator's personal estate, after payment of debts, funeral and testamentary expenses," is liable to the costs of administration in exoneration of a lapsed devise of realty. *Jones v. Caless*, 10 Ch. Div. 40.

Bequests to Charities.—Under the principle in the text, if a mixed residue of pure and impure personalty is given to a charity, so that the gift fails as regards the impure personalty, the latter will not be the primary fund as against the other portion, the gift of which takes effect, but debts will be payable ratably out of both. *Theobald on Wills* (2d ed.) 619, citing *Atty.-Gen. v. Winchelsea*, 3 Bro. C. C. 373; *Atty.-Gen. v. Hurst*, 2 Cox 365; *Blann v. Bell*, 7 Ch. Div. 382. See also *Stuart, V.C.*, in *Scott v. Forristall*, 10 W. R. 37.

A Testator Made a Specific Bequest of Jewels, and directed that they be sold, and out of the proceeds of the sale two legacies of fixed amounts be paid. He then made a residuary bequest, but no other gift of any surplus sale-money. The proceeds of the sale failed to be sufficient to pay both of the legacies. But one of the legacies lapsed. It was held that the other legacy was not liable to abate in favor of the residuary legatee, as it would have been obliged to do in favor of his fellow-legatee had that legacy not lapsed. *In re Tunno*, 45 Ch. Div. 66.

4. *Scott v. Forristall*, 10 W. R. 37; *Morley v. Tunstall*, L. R. 7 Eq. 416, note (1).

5. *Howse v. Chapman*, 4 Ves. Jr. 551.

6. *Theobald on Wills* (2d ed.) 620; *Harris's Trust*, 2 Sim., N. S. 106.

This view seems to be sustained by the principle of the decisions in *Gowan v. Broughton*, L. R. 19 Eq. 77, and *Scott v. Cumberland*, L. R. 18 Eq. 578, without being justly subject to Sir George Jessel's criticisms in *Trethery v. Helyar*, 4 Ch. Div. 53, which referred to the application of the principle to a lapsed share of residue.

VI. STATUTORY PROVISIONS.—In many of the states the question of contribution between legatees and devisees, and also questions of abatement and priority, are regulated by statute.¹

A testatrix devised her real and personal estate to trustees upon trust to sell, and from the proceeds to pay debts, legacies, and annuities, to be created by subsequent writing or codicil, the surplus to be applied as she should appoint. By subsequent memoranda, proved with the will, she created certain charitable bequests which turned out to be void; upon which Lord Eldon held that the proportion of the fund produced by the real estate which would have been applied to payment of the charitable bequests, had they been valid, did not go to the heir, but must be raised to supply a deficiency of assets for the other legacies. *Currie v. Pye*, 17 Ves. Jr. 462. He said: "If a man devises his real estate in trust to pay several persons £1000 each, and any of those persons die in his life, in case of a deficiency the others must abate; but if the devise is in trust to pay his debts and legacies, and he gives several legacies, and one of the legatees dies, the fund is a trust for the benefit of all the other legatees, if necessary."

But in *Harker v. Reilly*, 4 Del. Ch. 95, it was held that a legacy charged on land, which reverted to the heir by reason of lapse, must abate with other general legacies.

A testator devised his freehold estates to seven children, and empowered his executor, notwithstanding the preceding devises, to sell so much of the freehold estates as was necessary to pay debts, and directed that the money so raised should be applied in payment of such debts, and that the surplus money should go according to the preceding devise of the freehold estates. The testator then gave his leaseholds to his seven children and his personal estate to his daughter E., free from debts, and charged his freehold as the primary fund and the leaseholds as the secondary fund for the payment of his debts. One share of the leasehold and personal property lapsed by the death of one of the children. It was held that the testator had appropriated, first, his freeholds, and, second, his leaseholds, as a special fund for the payment of debts; that the interest which the deceased child would have taken if he had lived was a share of so much only as remained after deducting debts; that therefore his share of so much only lapsed. In other words, the lapsed

share was liable *pari passu* with shares well devised. *Fisher v. Fisher*, 2 Keen 610.

In *Wood v. Ordish*, 3 S. & G. 125, the testator devised, in 1832, all his real and personal estate, subject to payment of debts, to one for life, with remainder to three persons as tenants in common, and afterwards purchased other lands, which, of course, were unaffected by the will. One of these shares in remainder lapsed; and it was held that the simply descended lands must first be exhausted, and that the lapsed share of the devised estate was then applicable for payment of debts *pari passu* with the other shares.

The two cases above were treated by Sir W. P. Wood, in *Peacock v. Peacock*, 34 L. J. Ch. 316, as laying down the principle that, as between the heir at law, the next of kin, and the residuary devisees and legatees, a lapsed share of real and personal estate ought to be applied in the same order as if the legatee had survived.

1. See the various local statutes.

As to the construction of the *California* statute and the condition of the law in that state, see *Neistrath's Estate*, 66 Cal. 330. It was held in this case that the statute of that state did not authorize the payment of general legacies from property specifically devised or bequeathed. See also *Apple's Estate*, 66 Cal. 432. See, as bearing upon the *Rhode Island* and *Massachusetts* statutes, *In re Spencer*, 16 R. I. 25.

It has been held in *Michigan* that the statutory provision that an heir, legatee, devisee, or distributee, who pays more than his share of a debt, shall have contribution from others liable in the same order, is declaratory of the common law, *Eberstein v. Camp*, 37 Mich. 176; and that such contribution, if enforced in the probate court, must be by execution. *Atwood v. Frost*, 59 Mich. 409.

It has been held, in construing the *Colorado* statute providing that where the widow renounces the will, and "legacies and bequests" are thus increased or diminished, the court, in settling the estate, shall place the legatees on the same relative footing which they had under the will; that the words "legacies and bequests" embrace devises. *Logan v. Logan*, 11 Colo. 44.

ABATEMENT OF NUISANCES.

By A. S. H. BRISTOW.

I. DEFINITION, 63.

II. ABATEMENT BY PROCESS OF LAW, 63.

1. *Civil Proceedings*, 63.
 - a. *Action at Law*, 63.
 - b. *Suit in Equity*, 64.
 - (1) *When Equity will Interfere*, 64.
 - (2) *Who may Maintain a Bill*, 71.
 - (3) *Delay and Acquiescence*, 74.
 - (4) *Decree must not be Too Broad*, 76.
2. *Criminal Proceedings*, 76.
 - a. *Generally*, 76.
 - b. *Extent of Abatement*, 78.
 - c. *To Whom Order is Given*, 78.

III. ABATEMENT WITHOUT PROCESS OF LAW, 79.

1. *By Private Individuals*, 79.
 - a. *Origin of the Right*, 79.
 - b. *Who may Abate*, 79.
 - c. *Limitations upon Right of Abatement*, 82.
 - d. *Notice*, 86.
2. *By Municipal Corporations*, 87.
 - a. *Source of Power*, 87.
 - b. *Extent of Power*, 88.
 - c. *Method of Abatement*, 93.
 - d. *Liability of Municipality*, 95.

CROSS-REFERENCES.

For matters of PROCEDURE see the title NUISANCES, ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject see the following titles in this work: BOARDS OF HEALTH; HEALTH; MUNICIPAL CORPORATIONS; NUISANCES; ORDINANCES; POLICE POWER.

I. DEFINITION.—The abatement of a nuisance is the taking away or removal of the same.¹

II. ABATEMENT BY PROCESS OF LAW—1. *Civil Proceedings*—a. **ACTION AT LAW.**—The ancient common-law remedies for the abatement of nuisances were *quod permittat prosternere* and assize of nuisance.² The former of these was a writ of right, commanding the defendant to abate the nuisance complained of, or to show cause why he would not.³ An assize of nuisance was a writ issued at the instance of the tenant of the freehold, complaining of some act done *ad nocumentum liberi tenementi sui*, and commanding the sheriff to

1. **Definition.**—The Century Dict.

In 3 Cooley's Black. Com. (3d ed.) 5, it is said that a nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, provided that he commits no riot in doing it.

In *Maloney v. Traverse*, 87 Iowa 309, the court says: "The definition of 'abate' is to put an end to, as to abate a nuisance."

2. **Ancient Common-law Remedies.**—Kendrick v. Bartland, 2 Mod. 253; Baten's Case, 9 Coke 54.

See also *Call v. Buttrick*, 4 Cush. (Mass.) 345.

3. *Wood Law of Nuisances* (2d ed.), § 843; 3 Cooley's Black. Com. (3d ed.) 221; 1 Comyns Dig. 307.

summon a jury to view the premises; and, if they found for the plaintiff, he was entitled to a judgment abating the nuisance, and for damages.¹ Both of these remedies are now obsolete, and have been superseded by an action on the case.²

Power of Court to Order Abatement.—At common law, the court, after verdict in an action on the case, is without power to order an abatement;³ but in most of the states this authority has been conferred by statute.⁴

b. SUIT IN EQUITY—(1) *When Equity will Interfere.*—The aid of a court of equity may be invoked for the abatement of nuisances, both public⁵ and

1. 3 Cooley's Black. Com. (3d ed.) 221.

2. Wood Law of Nuisances (2d ed.), § 843;

3 Cooley's Black. Com. (3d ed.) 221; Kintz v. McNeal, 1 Den. (N. Y.) 436.

Both these remedies are abolished by Stat. 3 & 4 Wm. IV., c. 27.

A Writ of Nuisance is an ancient proceeding and should not be encouraged, and the court will not in such a proceeding relax the strictness of the ancient practice. Kintz v. McNeal, 1 Den. (N. Y.) 436.

But in *Barnet v. Ihrie*, 17 S. & R. (Pa.) 174, it was held that assize of nuisance was an existing remedy in *Pennsylvania*, not altered in essential points, though it ought to be adapted to modern practice. For cases in which a writ of nuisance has been recognized in this country see: *Tate v. Parrish*, 7 T. B. Mon. (Ky.) 325; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Livezey v. Gorgas*, 1 Binn. (Pa.) 251; *Maris v. Parsy*, 3 Rawle (Pa.) 413. But see *Ellsworth v. Putnam*, 16 Barb. (N. Y.) 565, and *Hutchins v. Smith*, 63 Barb. (N. Y.) 252, where it was held that the writ of nuisance had been abolished by statute in *New York*.

3. **Power of Court to Order Abatement.**—*Kendrick v. Bartland*, 2 Mod. 253; *Gleason v. Gary*, 4 Conn. 418; *Call v. Buttrick*, 4 Cush. (Mass.) 345.

In an action on the case, as no abatement of the nuisance is claimed, nor can be asked for, the fact that the plaintiff has himself removed the nuisance does not defeat the remedy. *Gleason v. Gary*, 4 Conn. 418; *Call v. Buttrick*, 4 Cush. (Mass.) 345.

In *Kendrick v. Bartland*, 2 Mod. 253, the court said: "The end of a *quod permittat* or assize was to abate the nuisance, but the end of an action on the case was to recover damages."

4. *California*.—*Weimer v. Lowery*, 11 Cal. 105; *Stiles v. Laird*, 5 Cal. 121, 63 Am. Dec. 110; *DeCosta v. Massachusetts Flat Water*, etc., Co., 17 Cal. 613; *Gardner v. Stroeve*, 89 Cal. 26; *Bear River*, etc., Water, etc., Co. v. Boles, 24 Cal. 359; *Yolo County v. Sacramento*, 36 Cal. 196.

Georgia.—*Wetter v. Campbell*, 60 Ga. 266; *Broomhead v. Grant*, 83 Ga. 451; *Ruff v. Phillips*, 50 Ga. 130; *Salter v. Taylor*, 55 Ga. 310; *Holmes v. Jones*, 80 Ga. 659.

Indiana.—*Williamson v. Yingling*, 93 Ind. 42; *Cromwell v. Lowe*, 14 Ind. 234.

Iowa.—*Applegate v. Winebrenner*, 66 Iowa 67; *Ottumwa v. Chinn*, 75 Iowa 405; *Gribben v. Hansen*, 69 Iowa 255; *Bushnell v. Robeson*, 62 Iowa 540; *Platt v. Chicago*, etc., R. Co., 74 Iowa 127.

Massachusetts.—*Codman v. Evans*, 7 Allen (Mass.) 431; *Rice v. Moorehouse*, 150 Mass. 482; *Bemis v. Clark*, 11 Pick. (Mass.) 452.

Michigan.—*Wilmarth v. Woodcock*, 58 Mich. 482.

Minnesota.—*Colstrum v. Minneapolis*, etc., R. Co., 33 Minn. 516.

New York.—*People v. Metropolitan Telephone, etc., Co.*, 64 How. Pr. (N. Y. Supreme Ct.) 120; *Hutchins v. Smith*, 63 Barb. (N. Y.) 252.

Oregon.—*Ankeny v. Fair View Milling Co.*, 10 Oregon 390; *Kothenberthal v. Salem Co.*, 13 Oregon 604.

Tennessee.—*Lassater v. Garrett*, 63 Tenn. 368.

A declaration alleging that the plaintiff was lawfully possessed of a certain close, and that the defendant, "well knowing the premises, wrongfully and injuriously kept and continued a building projecting, and overhanging the plaintiff's said close, and before then wrongfully erected and built, projecting as aforesaid for a long space of time," was a declaration in tort for a nuisance; and if the plaintiff had prevailed therein, no exception would lie to an order of the court entering judgment that the nuisance be abated. *Codman v. Evans*, 7 Allen (Mass.) 431.

While a ditch, by which the waters of a stream have been appropriated, is out of repair and not in condition to carry off water, an action will not lie to abate, as a nuisance, a reservoir built across the bed of the stream above the head of the ditch, by which the water of the stream is collected and detained, and caused to overflow unequally. The reservoir does not become a nuisance until the ditch has been repaired and put in a condition to carry off the water. *Bear River, etc., Water, etc., Co. v. Boles*, 24 Cal. 359.

In an action, under Laws of *Massachusetts* (1887), c. 348, for maintaining unnecessarily a fence over six feet high, for the purpose of annoying the plaintiff, a reduction, after suit instituted and before trial, of the fence from sixteen to seven and a half feet, does not remove the power given the court by chapter 180, § 1, to order the nuisance abated. *Rice v. Moorehouse*, 150 Mass. 482.

Proceedings before Justices of the Peace.—The impeding or stopping a private way is a private nuisance. Such a nuisance may be abated by proceedings before two justices of the peace and a jury. *Salter v. Taylor*, 55 Ga. 310; *Holmes v. Jones*, 80 Ga. 659.

5. **Equitable Relief.**—*United States*.—*Irwin v. Dixon*, 9 How. (U. S.) 10; *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

private.¹ Formerly this power was exercised only after the right of the plain-

Arkansas.—*Wellborn v. Davies*, 40 Ark. 83.

California.—*San Jose Ranch Co. v. Brooks*, 74 Cal. 463; *Hargro v. Hodgdon*, 89 Cal. 623; *Blanc v. Klumpke*, 29 Cal. 156; *Schulte v. Northern Pac. Transp. Co.*, 50 Cal. 592; *Bigley v. Nunan*, 53 Cal. 404; *Hogan v. Central Pac. R. Co.*, 71 Cal. 84.

Illinois.—*Chicago v. Union Building Assoc.*, 102 Ill. 379; *Green v. Oakes*, 17 Ill. 249; *Richeson v. Richeson*, 8 Ill. App. 204.

Indiana.—*McCowan v. Whitesides*, 31 Ind. 236; *Pettis v. Johnson*, 56 Ind. 139.

Iowa.—*Bushnell v. Robeson*, 62 Iowa 540.

Kansas.—*School Dist. No. 1 v. Neil*, 36 Kan. 617, 59 Am. Rep. 575.

Kentucky.—*Corley v. Lancaster*, 81 Ky. 171.

Louisiana.—*Bell v. Edwards*, 37 La. Ann. 475.

Maryland.—*Fort v. Groves*, 29 Md. 188.

Massachusetts.—*Hartshorn v. South Reading*, 3 Allen (Mass.) 501.

Michigan.—*Robinson v. Baugh*, 31 Mich. 290.

Minnesota.—*Dawson v. St. Paul F., etc., Ins. Co.*, 15 Minn. 136, 2 Am. Rep. 109.

Mississippi.—*Green v. Lake*, 54 Miss. 540.

New Jersey.—*Pavonia Land Assoc. v. Feenfer* (N. J., 1887), 5 Cent. Rep. 640; *Morris, etc., Co. v. Prudden*, 20 N. J. Eq. 530; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Zabriskie v. Jersey City, etc., R. Co.*, 13 N. J. Eq. 314.

New York.—*Crooke v. Anderson*, 23 Hun (N. Y.) 266; *Adams v. Popham*, 76 N. Y. 410; *DeLaney v. Blizzard*, 7 Hun (N. Y.) 7; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Knox v. New York*, 55 Barb. (N. Y.) 406; *Corning v. Lowerre*, 6 Johns. Ch. (N. Y.) 440; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Atty.-Genl. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *People v. New York*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 123.

Pennsylvania.—*Pennsylvania R. Co. v. Mish* (Pa., 1886), 4 Cent. Rep. 276.

Virginia.—*Beveridge v. Lacey*, 3 Rand. (Va.) 63.

West Virginia.—*Keystone Bridge Co. v. Summers*, 13 W. Va. 484.

Mr. Bishop, in his work on Non-Contract Law, § 429, says: "In the flexible proceedings in equity, an abatement of the nuisance or its equivalent—the injunction is in substance, though not in form, an abatement—may be ordered." But see *Ruff v. Phillips*, 50 Ga., 132, where it was said that neither an action for damages nor an injunction can abate a nuisance.

Acquittal on Indictment not a Bar.—An acquittal on an indictment for the particular nuisance will not bar the remedy in equity. The fact that the statute gives the remedy by indictment does not deprive the court of its equitable jurisdiction. *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63.

Where a bill charged that the defendant's milldam injured the health of the relators, an injunction was perpetuated, notwithstanding the defendant had been indicted for the

same offense, on which there had been a mistrial, and although an indictment was still pending. *Atty.-Genl. v. Hunter*, 1 Dev. Eq. (N. Car.) 12.

Statutory Remedy at Law and Remedy in Equity Concurrent.—It has been held in *Iowa* that the fact that the court is authorized by statute, after verdict, to order the abatement of a nuisance does not take away the remedy by equity. *Bushnell v. Robeson*, 62 Iowa 540; *Gribben v. Hansen*, 69 Iowa 255; *Miller v. Keokuk, etc., R. Co.*, 63 Iowa 680.

There has been a similar decision in *Tennessee*. *Lassater v. Garrett*, 4 Baxt. (Tenn.) 368. And it was similarly held in *Michigan*. *Wilmarth v. Woodcock*, 58 Mich. 482.

But in *Georgia* it has been held that parties who wish to abate a nuisance, either public or private, must resort to the remedy provided by statute, unless special facts are alleged showing that the remedy is insufficient or inadequate. *Broomhead v. Grant*, 83 Ga. 452.

1. Private Nuisances.—*United States*.—*Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

Arkansas.—*Wellborn v. Davies*, 40 Ark. 83.

Kansas.—*Palmer v. Waddell*, 22 Kan. 352.

Maryland.—*Lamborn v. Covington Co.*, 2 Md. Ch. 412.

Massachusetts.—*Davis v. Sawyer*, 133 Mass. 289.

Michigan.—*Wilmarth v. Woodcock*, 58 Mich. 482.

New Jersey.—*Perrine v. Taylor*, 43 N. J. Eq. 128; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335; *Broome v. New York, etc., Telephone Co.*, 42 N. J. Eq. 141.

New York.—*Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 287; *Hutchins v. Smith*, 63 Barb. (N. Y.) 252; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395; *Corning v. Troy Iron, etc., Factory*, 8 How. Pr. (N. Y. Supreme Ct.) 89; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

Feed Lots.—Where feed lots were found to be a nuisance, and the trouble arose largely from the wet and miry condition of the soil, and there was no reason to suppose that any mode of use could be adopted which would obviate the trouble, it was held that it was proper to enjoin the use of the lots for that purpose absolutely. *Baker v. Bohannon*, 69 Iowa 60.

Vibration of Machinery.—The complainants and defendant occupied adjoining buildings, the walls of which touched in places. The force of the defendant's machinery caused the building of the complainants to vibrate to such an extent as to seriously interfere with their business. It was held that the defendant was guilty of a nuisance which it was the duty of the court to abate. *Demarest v. Hardham*, 34 N. J. Eq. 469.

Noise.—Where a tinsmith erected his shop, a very thin, loose building of boards, some eight feet from the back building and sleeping-rooms of the complainant, and there carried on his work, generally beginning in the morning, before or by daylight, and resuming it in the evening at or about eight

tiff and the fact of a nuisance had been first established in a court of law.¹ But at present, where the plaintiff's right is clear and the existence of a nuisance is manifest, a court of equity will interfere to give relief, and it is only when the plaintiff's right, or the question of nuisance, is doubtful, that a previous settlement at law is necessary.²

o'clock, and keeping it up until eleven o'clock at night, having generally other employment through the day; and the noise from the hammering was so great that the complainant and his family could scarcely hear each other converse, and had been obliged to abandon their chambers next the shop, and were every morning deprived of their rest, it was held that equity would interfere to restrain it as a nuisance. *Dennis v. Eckhardt*, 3 Grant's Cas. (Pa.) 390.

Cornice Projecting over Boundary.—A bill in equity will lie against the complainant's neighbor for building and maintaining a cornice which projects over the complainant's boundary lines, to the permanent injury of his property. *Wilmarth v. Woodcock*, 58 Mich. 482.

Sewerage.—The plaintiff purchased from the state certain lands formerly used for canal purposes, through which ran a ditch or culvert used to carry off the surplus waters from a portion of the Chemung canal. Thereafter the legislature authorized the defendant to use that portion of the canal which was adjacent to the plaintiff's premises, with power to fill and improve the same and adopt it as a public street, and lay a sewer therein. In pursuance of this authority the defendant occupied the said portion of the canal as a street, and constructed a sewer therein connecting with the culvert running under the premises of the plaintiff, which sewer the defendant used, and permitted others to use, for the purpose of draining and conducting off from their premises slops, refuse, and other foul matter, which accumulated under the plaintiff's premises, occasioning a foul, unhealthful, and offensive smell therein, to such an extent as to render the buildings thereon unsuitable for occupancy. It was held that the plaintiff was not obliged to bring an action at law to abate the nuisance, and for damages, but was entitled to an injunction restraining the defendant from discharging, or allowing to be discharged, on his premises, through the said sewer, any noxious or offensive matter, or any matter whatever other than surface-water, if any, from the said canal. *Beach v. Elmira*, 22 Hun (N. Y.) 158.

Poisonous Gas.—The defendant was the owner of a brick-yard, upon which he burned brick by the use of mineral coal as a fuel; in this process, sulphurous acid gas, which is poisonous to vegetation, was generated in quantities. When the south wind blew while the kilns were burning, this gas was carried upon the plaintiffs' improved land, which they had been engaged for several years in beautifying, and by its repeated attacks many of the ornamental trees were destroyed. It was held that the plaintiffs were entitled to an injunction to restrain the defendant from using mineral coal in his process of burning brick. *Campbell v. Seaman*, 2 Thomp. & C. (N. Y.) 231.

Smoke, Steam, Cinders, etc.—The plaintiff, the lessee for a term of three years of a residence, brought an action to restrain the defendant from so conducting the business of manufacturing blinds, sashes, and boxes, in the adjoining premises, as to allow the smoke, steam, cinders, and partly burned shavings, issuing therefrom, to come upon and into the plaintiff's premises, to her damage and annoyance. It appeared that the plaintiff's house was at times enveloped in smoke, and that dust and soot, proceeding from the defendant's works, were deposited on the windows in the rooms of the plaintiff's house, and upon clothing when hung in the yard to dry. It was held that the plaintiff was entitled to the injunction demanded in the complaint. *Beir v. Cooke*, 37 Hun (N. Y.) 38.

Dam.—Where a nuisance, by overflowing the plaintiff's mining claim by means of a dam erected by the defendants, was found, the decree should have directed such a reduction of the dam as would have prevented any overflow, from that cause, of the ground of the plaintiff; or, if necessary, an entire removal. *Ramsay v. Chandler*, 3 Cal. 90.

Obstructing Natural Channel.—If the surface of the ground is such as to collect water at different seasons of the year, to an extent which requires an outlet to some given reservoir, and if such is always the case in times of heavy rain and melting of snow; and if, so far as the memory of man runs, that flow of water created a natural channel through the lands of different persons, where such accumulated surplus water has always been accustomed to run, a court of equity will protect such channel from obstruction, to the injury of any one through whose land it runs. *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395.

Ringling Bell.—The ringing, at an early hour in the morning, for the purpose of awaking the keepers of boarding-houses where operatives in a mill live, or for the purpose of awaking the operatives themselves, of a bell weighing two thousand pounds and set in an open tower forty feet from the ground, and so situated with respect to the residences of persons, owned and occupied by them before the erection of the bell, that they receive the full force of the sound, such persons being thereby robbed of sleep during the hours usually devoted to repose, and personally disturbed and annoyed, and the quiet and comfort of their homes impaired, is a private nuisance to them, which may be restrained by injunction. *Davis v. Sawyer*, 133 Mass. 289.

1. *Weller v. Smeaton*, 1 Cox C. C. 102; *Atty.-Genl. v. Blount*, 4 Hawks (N. Car.) 384; *Cooper v. Carlisle*, 21 N. J. Eq. 576; *Sprague v. Rhodes*, 4 R. I. 304.

2. **Establishment of Right at Law**—*United States*.—*Sellers v. Parvis*, 30 Fed. Rep. 164; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Parker*

Must be Substantial Injury.—However, it may be stated that, ordinarily, a court of equity will not grant relief unless it appears that a substantial right of prop-

v. Winnipiseogee Lake Cotton, etc., Co., 2 Black (U. S.) 545.

Alabama.—*Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14.

Illinois.—*Richeson v. Richeson*, 8 Ill. App. 204.

Indiana.—*Smith v. Fitzgerald*, 24 Ind. 316.

Kentucky.—*Louisville Coffin Co. v. Warren*, 78 Ky. 400.

Maine.—*Porter v. Witham*, 17 Me. 292.

Massachusetts.—*Dana v. Valentine*, 5 Met.

(Mass.) 8; *Ingraham v. Dunnell*, 5 Met. (Mass.) 118.

Michigan.—*Ronayne v. Loranger*, 66 Mich. 373.

Mississippi.—*Learned v. Hunt*, 63 Miss. 373; *Green v. Lake*, 54 Miss. 540.

Missouri.—*Hayden v. Tucker*, 37 Mo. 215. *New Hampshire.*—*Coe v. Winnipiseogee Lake Cotton, etc., Mfg. Co.*, 37 N. H. 263.

New Jersey.—*Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 376; *Shields v. Arndt*, 4 N. J. Eq. 235; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Atty.-Genl. v. Heishon*, 18 N. J. Eq. 412.

New York.—*Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 287; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395.

North Carolina.—*Atty.-Genl. v. Hunter*, 1 Dev. Eq. (N. Car.) 12.

Pennsylvania.—*New Castle v. Raney*, 130 Pa. St. 546; *Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412; *Rhea v. Forsyth*, 37 Pa. St. 503; *Heake's Appeal*, 101 Pa. St. 245.

Rhode Island.—*Sprague v. Rhodes*, 4 R. I. 301.

Tennessee.—*Wall v. Cloud*, 3 Humph. (Tenn.) 181; *Lassater v. Garrett*, 4 Baxt. (Tenn.) 368; *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209.

Virginia.—*Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

The Modern Doctrine of Courts of Equity in regard to the necessity of the person establishing his right at law before seeking the aid of equity to protect him by injunction in the enjoyment of it is much more liberal than the ancient, and the rule requiring the right to be first established at law prevails only in cases where the right itself is in dispute, or is doubtful. *White v. Forbes*, Walk. (Mich.) 112. Some courts more than others have hesitated or refused to grant the injunction until the existence of a nuisance has been established at law. *Daniels v. Keokuk Water Works*, 61 Iowa 553.

Must be Clear Case of Nuisance.—On the petition of a land-owner complaining that certain steam power and machinery operated by another on adjoining land is a nuisance, an injunction should not be granted unless a clear case of nuisance and irreparable injury be made out. When a party who complains that a business lawful *per se* is a nuisance and affects his property injuriously by reason of the manner in which it is carried on, has an adequate remedy in an action for damages, he must establish his right to relief at law before equity will interfere by injunc-

tion. *Goodall v. Crofton*, 33 Ohio St. 271, 31 Am. Rep. 535.

When a complainant in equity seeks to enjoin the continuance of a milldam on the ground that his dwelling-house has been thereby rendered unhealthful, the evidence must establish clearly the injury complained of, in order that the court may justly interfere to restrain the defendant from the lawful use of his property in conducting a legitimate business. The court in such case should be permitted to interfere where it is plainly shown that the injury is real and not purely imaginary. But where the evidence leaves the matter doubtful, the court should decline to interpose. *Thomas v. Calhoun*, 58 Miss. 81.

Where there is a gradual fall of water, extending over lands owned by different persons, merely sufficient to allow of one milldam, and where the different owners, recently and about the same time, proceeded to erect separate dams upon their own land, and the lower dam renders the upper one useless, the court, acting as a court of equity, will not interfere to abate the lower dam before the rights of the parties are determined at law. *Porter v. Witham*, 17 Me. 292.

Where a bill in equity was brought praying that the defendants be compelled to remove and abate a dam, erected by them for the purpose of running a mill and other machinery, upon the ground that it was a nuisance producing sickness, and rendering permanently unhealthful the neighborhood near by, it was held that, from the evidence in the case, it was not clear that the destruction of the dam would remove the nuisance, and hence equity would not interfere. *Lassater v. Garrett*, 4 Baxt. (Tenn.) 368.

A milldam which, if a nuisance at all, has become so by the gradual growth of the city around it, will not be abated in equity as a nuisance where the fact that it is a nuisance has not been established at law. *New Castle v. Raney*, 130 Pa. St. 546.

The operation of a manufactory by day and night, in a city, which necessarily causes some vibration and noise in neighboring private residences, will not be restrained by injunction where the evidence is not such as to satisfy a chancellor that the noise and vibration constitute a substantial and unjustifiable nuisance to the complainant. *McCaffrey's Appeal*, 105 Pa. St. 253.

A machine-shop in a city, although its operation may render the adjacent places less valuable and less desirable as residences for families but not intrinsically less valuable as property, is not for that reason a nuisance, and will not be restrained by injunction. *League v. Journeay*, 25 Tex. 172. And see *Hudson v. Thorne*, 7 Paige (N. Y.) 261.

Locality of Nuisance.—The locality is proper to be considered in determining the question of nuisance. Thus, where a street in a city has ceased to be used or occupied, and is

erty has been affected, and that the plaintiff has suffered an injury which will entitle him to damages in a court of law.¹ But equity will not grant relief

changed into a place of business, persons who may for any reason desire to continue a residence therein will not be allowed to restrain a blacksmith from pursuing his trade in such street merely because they are subjected to annoyance or even loss thereby. It would be better that they should go elsewhere than that the public should be inconvenienced by arresting a necessary and useful business, and the trade of an artisan be broken up. *Gilbert v. Shomeran*, 23 Mich. 448. See also *Huckenstine's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669.

But the fact that a locality has been partially given up to noxious trade will not deprive a party of his remedy in equity. *McKeon v. Lee*, 4 Robt. (N. Y.) 449; *Mulligan v. Elias*, 12 Abb. Pr. N. S. (Brooklyn City Ct.) 259. Also where a noxious trade is carried on in a neighborhood for the most part given up to residences, the locality should be considered. For example, where the proofs showed that the business of forging was carried on by the defendant on a large scale, in an inexpensive wooden building situated in close proximity to a neighborhood substantially used and adapted to dwellings and built up with valuable residences; and that the complainants, who were occupants of such residences, were seriously injured, both in person and property, by means of the smoke and soot from the large quantity of bituminous coal used, settling in clouds upon their premises and sifting and blowing into their dwellings, and by means of the noise and jarring of the steam hammers used, disturbing the peace and annoying all those who were well, and injuring the sick, and in case of the nearest dwellings seriously damaging their foundations and walls, a clear case for relief by injunction against a nuisance was made out. *Robinson v. Baugh*, 31 Mich. 290.

The fact that when the defendant erected his works no dwellings were near, but that the plaintiff has come to his works, will not operate to protect him, for he should have purchased enough of the surrounding property, when he built his works, to prevent the possibility of a nuisance. *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

Denial of Right by Answer.—Where a complainant seeks protection in the enjoyment of a natural watercourse upon his land, the right can ordinarily be regarded as clear; and the mere fact that the defendant denies the right by answer, or sets up title in himself by adverse user, will not entitle him to an issue before the granting of the injunction. *Carlisle v. Cooper*, 21 N. J. Eq. 576. See also *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335; *Shields v. Arndt*, 4 N. J. Eq. 235.

Generally, an Injunction will not be Granted until the complainant's legal right has been established at law; yet in a case where his right appears to be clear, though it has not been established at law and the defendant

denies it, and the complainant has for a long time been in the enjoyment of the right, and the acts of the defendant in violation of it are recent, equity may properly take jurisdiction of the question of legal right and decide that as well as the other question involved in the litigation. *Stanford v. Lyon*, 37 N. J. Eq. 94.

Issue Made to a Jury.—An issue may be made to a jury by either party when the right is doubtful, or the court may direct it of its own motion. *Wood Law of Nuisances* (2d ed.), § 785; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Ingraham v. Dunnell*, 5 Met. (Mass.) 118; *Robinson v. Baugh*, 31 Mich. 290.

In *Shields v. Arndt*, 4 N. J. Eq. 235, it was held that the court will exercise its discretion whether or not to order a trial at law before ordering an injunction, always inclining, if there be reasonable doubt, to put the case to the jury.

Where the complainant's right to the relief sought by the bill is admitted by the answer, and also established in a suit at law, and the only question of controversy in fact is whether the defendant has effected an abatement of the admitted nuisance by lowering his dam to the required level, the court of equity is an appropriate tribunal to decide the question. There is nothing in the subject-matter of such investigation that would entitle the defendant to an issue as of course. *Carlisle v. Cooper*, 21 N. J. Eq. 576. In delivering the opinion of the court in this case, *Dupie, J.*, said that the power of courts of equity to order the trial of an issue of fact which the court is itself competent to try ought to be sparingly exercised, and the practice of sending ordinary matter to the decision of a jury ought not to be established. Where the truth of the facts can be satisfactorily ascertained by the court without the aid of a jury, it is its duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law. But in cases where the evidence is so contradictory as to leave the decision of a question of fact in serious doubt, and superior advantages of testing the credit of witnesses by *viva voce* examination in open court, and of applying the facts and circumstances proved in the cause to the decision of disputed points, may be obtained by means of trial before a jury, it is proper that an issue should be awarded.

Where the Nature of the Injury is such that it never could be determined whether the injunction had been violated or not, an injunction will not be granted even after a verdict at law. *Wason v. Sanborn*, 45 N. H. 169.

1. Must be Substantial Injury.—*Richeson v. Richeson*, 8 Ill. App. 205; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401. See also *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Hargro v. Hodgdon*, 89 Cal. 623; *Hacke's Appeal*, 101 Pa. St. 245.

A Mere Temporary Obstruction to the flow of water, such as does not cause actual injury to the prior appropriator below, will not be

in every case where an action at law might be sustained.¹

Injunction—When Granted.—It is a matter of common learning that an injunction is not, like damages, a remedy *ex debito justitiæ*. Whether it shall be granted or not, in a given case, is in the judicial discretion of the court, now guided by principles which have become well settled.² To warrant the interposition of a court of chancery, it must be shown that no adequate remedy can be had in a court of law.³ Thus, where the grievance is permanent, continuous, or

actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong. *Phoenix Water Co. v. Fletcher*, 23 Cal. 481.

1. *Parker v. Winnepiseogee Lake Cotton, etc.*, Co., 2 Black (U. S.) 545.

2. *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Richard's Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202. See also *Robinson v. Baugh*, 31 Mich. 290; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

3. **Legal Remedy must be Inadequate**—*United States*.—*Sellers v. Parvis*, 30 Fed. Rep. 164; *Parker v. Winnepiseogee Lake Cotton, etc.*, Co., 2 Black (U. S.) 545; *Irwin v. Dixon*, 9 How. (U. S.) 10.

Alabama.—*Rosser v. Randolph*, 7 Port. (Ala.) 238; *State v. Mobile*, 5 Port. (Ala.) 280.

Illinois.—*Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63.

Iowa.—*Daniels v. Keokuk Water Works*, 69 Iowa 549.

Kentucky.—*Louisville Coffin Co. v. Warren*, 78 Ky. 400.

Maine.—*Porter v. Witham*, 17 Me. 294.

Maryland.—*Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Fort v. Groves*, 29 Md. 188.

Massachusetts.—*Ingraham v. Dunnell*, 5 Met. (Mass.) 118; *Dana v. Valentine*, 5 Met. (Mass.) 8.

Michigan.—*Robinson v. Baugh*, 31 Mich. 290; *Detroit Base Ball Club v. Deppert*, 61 Mich. 63.

Mississippi.—*Green v. Lake*, 54 Miss. 540.

Missouri.—*Welton v. Martin*, 7 Mo. 307; *Hayden v. Tucker*, 37 Mo. 215.

New Hampshire.—*Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Coe v. Winnepiseogee Cotton, etc.*, Mfg. Co., 37 N. H. 254.

New Jersey.—*Atty.-Genl. v. Heishon*, 18 N. J. Eq. 412; *Zabriski v. Jersey City R. Co.*, 13 N. J. Eq. 314; *Jersey City v. Hudson*, 13 N. J. Eq. 420; *Morris, etc.*, R. Co. v. *Prudden*, 20 N. J. Eq. 530; *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 23; *Tichenor v. Wilson*, 8 N. J. Eq. 197.

New York.—*Ninth Ave. R. Co. v. New York El. R. Co.*, 7 Daly (N. Y.) 174; *Campbell v. Seaman*, 2 Thomp. & C. (N. Y.) 271; *Doellner v. Tynan*, 38 How. Pr. (N. Y. Super. Ct.) 176; *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357; *Knox v. New York*, 55 Barb. (N. Y.) 406.

North Carolina.—*Brown v. Carolina Cent. R. Co.*, 83 N. Car. 128.

Ohio.—*Goodall v. Crofton*, 33 Ohio St. 271, 31 Am. Rep. 535.

Pennsylvania.—*Sparhawk v. Union Pass.*

R. Co., 54 Pa. St. 401; *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 116, 32 Am. Rep. 534; *Grey v. Ohio, etc.*, R. Co., 1 Grant's Cas. (Pa.) 412.

Tennessee.—*Clack v. White*, 2 Swan (Tenn.) 540; *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209; *Lassater v. Garrett*, 4 Baxt. (Tenn.) 368.

Virginia.—*Crenshaw v. State River Co.*, 6 Rand. (Va.) 245.

West Virginia.—*Talbott v. King*, 32 W. Va. 6; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

A Mere Diminution of the Value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Zabriskie v. Jersey City, etc.*, R. Co., 13 N. J. Eq. 314.

An owner of vacant land which is intended for house lots is not entitled to an injunction to restrain the exercise of an offensive trade in the vicinity thereof, whereby its value is diminished. Such owner has an adequate remedy at law. *Dana v. Valentine*, 5 Met. (Mass.) 8.

Lands Rendered Worthless.—Where the complainant's lands are rendered comparatively worthless by backwater from a dam, and a nuisance is thereby created dangerous to health, and the enjoyment of the premises is thereby impaired, an action of law furnishes no adequate redress, and the complainant is entitled to the protection of a court of equity by the abatement of the nuisance. *Carlisle v. Cooper*, 21 N. J. Eq. 576. In giving the opinion of the court in this case, *Depue, J.*, said that the jurisdiction of courts of equity over the subject-matter of nuisances is not an original jurisdiction. It does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from an injury for which no adequate redress can be obtained by an action at law, or its interference is necessary to suppress interminable litigation for the recovery of damages for an actionable wrong.

The Location of a Railroad through a public street, in a line not warranted by law, will not be enjoined at the instance of the owner of an unimproved building lot suffering no detriment. *Zabriskie v. Jersey City, etc.*, R. Co., 13 N. J. Eq. 314.

Equity will not Enjoin the Continuance of a milldam as a private nuisance, in damaging by flowage the land of the party complaining, where it appears that the injury is not irreparable, or incapable of being removed by the building of levees to confine the water, but is trifling, and can be adequately compensated by an action at law, and that the business for which the dam is erect-

often recurring, equity will interfere to prevent irreparable injury, interminable litigation, and a multiplicity of suits.¹ While a substantial right must be violated, and the remedy at law must be inadequate, to entitle the plaintiff to equitable relief, the damage sustained need not be great. Such relief may be granted, though only nominal damages are given in a court of law.² In determining upon the propriety of injunctive relief against nuisances, the court will sometimes be influenced against ordering an abatement, by the fact that the damage to the plaintiff is small in comparison with the injury which the issuance of an injunction would work to the defendant and the public at large.³

ed is lawful and carried on wholly on the land of the party against whom the complaint is made. *Thomas v. Calhoun*, 58 Miss. 80.

Digging Deep Holes and planting therein large stone pillars or abutments, digging and carrying away large banks of valuable clay, and constructing an aqueduct by ditches and embankments through the complainant's land, are acts which, if done without authority of law, would present a case of irreparable damage authorizing the interposition of a court of equity by injunction. *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550.

Where it appeared that the water from the defendant's milldam was thrown upon a small part of several pieces of swamp land of the plaintiff, which had never been productive or brought into use, an injunction was refused, upon the ground that the injury was not irreparable in its nature, although the plaintiff's title had been established at law. *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426.

An Injunction is the Only Effectual Remedy, when the injury is caused by so many who contributed to the nuisance that it would be difficult to apportion the damage, or say how far any one may have contributed to the result, and so damages would likely be but nominal, and repeated actions, without any substantial benefit, might be the result. *Woodyear v. Schaefer*, 57 Md. 2, 40 Am. Rep. 419.

1. *United States*.—*Sellers v. Parvis*, 30 Fed. Rep. 164; *Parker v. Winnepiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

Alabama.—*State v. Mobile*, 5 Port. (Ala.) 280.

Maryland.—*Woodyear v. Schaefer*, 57 Md. 1.

Missouri.—*Hayden v. Tucker*, 37 Mo. 215.

New Jersey.—Atty.-Genl. *v. Heishon*, 18 N. J. Eq. 412; *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 24; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1.

New Hampshire.—*Coe v. Winnepiseogee Lake Cotton, etc., Mfg. Co.*, 37 N. H. 263.

New York.—*Knox v. New York*, 55 Barb. (N. Y.) 406.

North Carolina.—*Brown v. Carolina Cent. R. Co.*, 83 N. Car. 128.

Tennessee.—*Clack v. White*, 2 Swan (Tenn.) 540.

Instances of Irreparable Injury.—Where the plaintiff owns valuable machinery which gives employment to a large number of hands, and which is worked by the water power of a certain stream, the court of equity will restrain by injunction a repeated diversion of the water by the upper proprietors, by means of

a ditch on their own lands; and this on the principle of preventing irreparable injury and multiplicity of suits. *Wright v. Moore*, 38 Ala. 594, 82 Am. Dec. 731. See also *Tuolumne Water Co. v. Chapman*, 8 Cal. 393.

The unauthorized use of the premises of another, in putting filth, trash, and garbage upon the same in such a manner as to interfere constantly with the reasonable and unimpeded use of such premises by the owner, and to occasion him damage, hurt, and annoyance, is, in addition to being a nuisance, a continuing trespass which may be irreparable in damages; and whether the wrongdoer is insolent or not, these repeated acts may give rise to a multiplicity of suits. To avoid these consequences, a court of equity may interpose by injunction. *Lowe v. Holbrook*, 71 Ga. 563.

In an action to abate a dam as a nuisance, it is proper to prove damages caused by it after the commencement of the action, as this shows the continuance of a nuisance. *Hayden v. Albee*, 20 Minn. 159.

2. **Quantum of Damage**.—*Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Wellborn v. Davies*, 40 Ark. 83; *Hargro v. Hodgdon*, 89 Cal. 623; *Wilmarth v. Woodcock*, 58 Mich. 482; *Knox v. New York*, 55 Barb. (N. Y.) 404; *DeLaney v. Blizzard*, 7 Hun (N. Y.) 7.

If a Substantial Right has been invaded, especially if the wrong be in the nature of a continuing trespass, of such character that its continuance will create a right against the plaintiff's estate, or operate to deprive the plaintiff of a substantial right incident to property, the nuisance will be abated, although the damage is merely nominal. *Hargro v. Hodgdon*, 89 Cal. 623.

Leasehold Interest.—An equitable action may be maintained by one having only a leasehold interest in the premises injuriously affected. *DeLaney v. Blizzard*, 7 Hun (N. Y.) 7.

Benefit Resulting from Act.—In *Dickenson v. Grand Junction Canal Co.*, 19 Eng. Law & Eq. 287, an injunction was granted to prevent the defendants from injuring the plaintiffs' rights when it appeared that there was no damage, but an actual benefit, ensuing to the plaintiffs from the defendants' act.

3. **Balancing Conveniences**.—Wood Law of Nuisances (2d ed.), § 801; *Corning v. Troy Iron, etc., Factory*, 34 Barb. (N. Y.) 486; *Lassater v. Garrett*, 4 Baxt. (Tenn.) 368.

The plaintiffs owned certain premises and were riparian proprietors of a certain stream. The defendants, having a long lease of these premises, had diverted the water of the stream from its natural channel, for the

But the court will not stop to balance conveniences if the plaintiff's right is clear, and he has no adequate redress at law.¹

(2) *Who may Maintain a Bill.*—Any person injured by a nuisance, who could bring an action at law therefor, may maintain a bill for an injunction.² Thus, to abate a private nuisance, suit must be brought by the party injured.³ Although the nuisance is public, the bill may be maintained by an individual who has suffered some private, direct, and material damage beyond that suffered by the public at large.⁴ But where the nuisance is purely public, proceedings in equity

use of their machinery. It was held that since the act complained of might ripen into a right, neither the trivial amount of damage already sustained, nor the heavy expenditures to which the defendants would be subjected if enjoined from the further use of the diverted waters and compelled to restore them to their natural and accustomed channel, furnished sufficient reason why an injunction should be denied. *Corning v. Troy, etc., Factory*, 34 Barb. (N. Y.) 486.

1. *Sellers v. Parvis*, 30 Fed. Rep. 164; *Brown v. Carolina Cent. R. Co.*, 83 N. Car. 128; *Demarest v. Hardham*, 34 N. J. Eq. 471; *Morris, etc., Co. v. Prudden*, 20 N. J. Eq. 530; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412; *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

Where a city was dependent upon the defendant's water-works for its supply of water to extinguish fires, and for other public and domestic purposes, and smoke and gases escaping from the defendant's smokestack—a necessary part of the works—were accustomed to be carried by the wind over, upon, and into the grounds and houses of the plaintiffs, thereby causing damage, inconvenience, and annoyance, but no injury to health, destruction of property, or other irreparable injury, it was held that equity could not interfere to abate the works complained of, and that the decree of the court restraining the defendant from using its smokestack without using a proper smoke-consumer to prevent smoke, soot, etc., escaping therefrom, was as favorable a judgment as the plaintiffs were entitled to. *Daniels v. Keokuk Water Works*, 61 Iowa 550.

2. *Wood Law of Nuisances* (2d ed.), § 791.

3. *Private Nuisance.*—*Wellborn v. Davies*, 40 Ark. 83. See also *Parker v. Winnipisogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Palmer v. Waddell*, 22 Kan. 352; *Wilmarth v. Woodcock*, 58 Mich. 482; *Lamborn v. Covington Co.*, 2 Md. Ch. 412; *Davis v. Sawyer*, 133 Mass. 289; *Perrine v. Taylor*, 43 N. J. Eq. 128; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335; *Broome v. New York, etc., Telephone Co.*, 42 N. J. Eq. 141; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 287; *Hutchins v. Smith*, 63 Barb. (N. Y.) 252; *Fisk v. Wilber*, 7 Barb. (N. Y.) 395; *Corning v. Troy Iron, etc., Factory*, 6 How. Pr. (N. Y. Supreme Ct.) 89; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

4. *Public Nuisance—United States.*—*Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. Rep. 753; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485.

Arkansas.—*Wellborn v. Davies*, 40 Ark. 83.

California.—*San Jose Ranch Co. v. Brooks*, 74 Cal. 463; *Hargro v. Hodgdon*, 89 Cal. 623; *Blanc v. Klumpke*, 29 Cal. 156; *Schulte v. Northern Pac. Transp. Co.*, 50 Cal. 592; *Bigley v. Nunan*, 53 Cal. 404; *Hogan v. Central Pac. R. Co.*, 71 Cal. 84.

Illinois.—*Chicago v. Union Building Assoc.*, 102 Ill. 379; *Green v. Oakes*, 17 Ill. 249; *Richeson v. Richeson*, 8 Ill. App. 204.

Indiana.—*McCowan v. Whitesides*, 31 Ind. 236; *Pettis v. Johnson*, 56 Ind. 139.

Iowa.—*Bushnell v. Robeson*, 62 Iowa 540.

Kansas.—*School Dist. No. 1 v. Neil*, 36 Kan. 617, 59 Am. Rep. 575.

Kentucky.—*Corley v. Lancaster*, 81 Ky. 171.

Louisiana.—*Bell v. Edwards*, 37 La. Ann. 475.

Maryland.—*Fort v. Groves*, 29 Md. 188.

Massachusetts.—*Bemis v. Upham*, 13 Pick. (Mass.) 169; *Hartshorn v. South Reading*, 3 Allen (Mass.) 501.

Michigan.—*Robinson v. Baugh*, 31 Mich. 290.

Minnesota.—*Dawson v. St. Paul F., etc., Ins. Co.*, 15 Minn. 136, 2 Am. Rep. 109.

Mississippi.—*Green v. Lake*, 54 Miss. 540.

New Jersey.—*Pavonia Land Assoc. v. Feenfer* (N. J., 1887), 5 Cent. Rep. 640; *Morris, etc., Co. v. Prudden*, 20 N. J. Eq. 530; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Zabriskie v. Jersey City, etc., R. Co.*, 13 N. J. Eq. 314.

New York.—*Crooke v. Anderson*, 23 Hun (N. Y.) 266; *Adams v. Popham*, 76 N. Y. 410; *Delaney v. Blizzard*, 7 Hun (N. Y.) 110; *McKeon v. See*, 51 N. Y. 306, 10 Am. Rep. 659; *Knox v. New York*, 55 Barb. (N. Y.) 406; *Corning v. Lowerre*, 6 Johns. Ch. (N. Y.) 440; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Atty.-Genl. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *People v. New York*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 123.

Pennsylvania.—*Pennsylvania R. Co. v. Mish* (Pa., 1886), 4 Cent. Rep. 276.

Virginia.—*Beveridge v. Lacey*, 3 Rand. (Va.) 63.

West Virginia.—*Keystone Bridge Co. v. Summers*, 13 W. Va. 484.

Soap Factory.—In *Howard v. Lee*, 3 Sandf. (N. Y.) 281, it was held that a soap factory, in a compact part of the city where it had been carried on for a long time, was a nuisance, and that it might be restrained by injunction at the suit of the proprietor of a large hotel situated within two hundred feet of the said factory, where it appeared that the factory was very offensive to the plaintiff's guests, and many left his house in consequence of it.

Loud Noises—Offensive Odors.—An adjacent house-owner who, with his family, is seriously annoyed by loud noises and offensive odors from hucksters selling their produce from wagons on the public space surrounding the city park, including the sidewalks in front of and near his house, the sleep, comfort, and conversation of the family being disturbed thereby, may enjoin the city from using or authorizing the use of the streets in question as a market-place for the sale of goods, although the nuisance may also be a public one. *McDonald v. Newark*, 42 N. J. Eq. 136.

Erection of Dam.—Where a party by erecting a dam raises a stream of water above its natural level so as materially to injure the mills above on the same stream, the court of equity will decree that the dam be lowered. *Hammond v. Fuller*, 1 Paige (N. Y.) 197.

Where a Pond which is maintained by the defendant for manufacturing purposes upon lands belonging to the plaintiff, and which adjoins other lands belonging to him, is a common nuisance and is especially injurious to the plaintiff, he may bring an action to have the pond removed, even though, by the terms of the deed by which the lands were conveyed to the defendant by a former owner of the lands of both the plaintiff and defendant, the right to maintain and use the pond is expressly reserved to the defendant. *Leonard v. Spencer*, 34 Hun (N. Y.) 341.

Noxious Gases from Brewery.—The complaint averred that the defendant maintained a brewery on lands adjoining the plaintiff's residence, and so operated it as to foul the water in certain streams running along and through his premises, and cause the whole neighborhood and a certain highway therein, and the atmosphere over and around the same, to be tainted and polluted with noxious gases and smells which disturbed the comfort and endangered the health of all persons residing in the neighborhood. Special matters of damage to the plaintiff were alleged, and in a separate count it was averred that by the fouling of the air around the plaintiff's residence the comfort of himself and family was annoyed and their health endangered. It was held that this was not an action to abate a private nuisance, but a private action to abate a public nuisance. *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364.

New York Rapid Transit Act.—Where the commissioners appointed under the *New York Rapid Transit Act* (1875) authorized the defendant to build a station, provided that the "stairs and all parts of the stations except the platform, doors, windows, and inside sheathings, and except the tread of the stairs, shall be of iron"—it was held that, in erecting a station of wood, the defendant was guilty of maintaining a public nuisance, which equity would remove at the instance of an aggrieved property-owner. *Porth v. Manhattan R. Co.* (Super. Ct.), 11 N. Y. Supp. 633.

Obstructions on Highways.—An unauthorized continuous obstruction of a public street is a public nuisance, for the reason that the public are entitled to an unobstructed passage upon the streets and sidewalks of the city; and where the defendants placed skids

across the sidewalk in front of the plaintiff's premises, whereby the plaintiff's employees and patrons were prevented from passing and repassing along the sidewalk to the plaintiff's great injury and detriment, it was held that such obstruction was a special injury to the plaintiff, who might have an injunction to restrain it as a nuisance. *Callanan v. Gilman*, 67 How. Pr. (N. Y. Super. Ct.) 464.

Where the evidence in an action showed that the upper portion of a building, in which the plaintiff had leased offices previously, had been so far injured by a bridge which the defendants had thrown across a public street in front of such building, and by the obstruction to the approaches to it, caused by pedestrians passing along the walks, that they had been abandoned by the tenants, and he was unable to procure others to occupy them; and that persons who passed along the street at that point, on account of the diminished capacity of the sidewalk, by the erection of a stairway to the bridge, blockaded the front of his store, rendering it inconvenient for goods to be taken to and removed from it, and for his customers to pass in and out, and frequently forcing persons collected upon the sidewalk to go through his store for the purpose of passing and repassing from one street to another—it was held that these facts showed such a clear case of special injury to the plaintiff as would enable him to maintain an equitable action for the abatement of the structure as a public nuisance. *Knox v. New York*, 55 Barb. (N. Y.) 404.

Where the defendants, having become somewhat famous as museum attractions under the name of the "Seven Sutherland Sisters," used the front window of their store upon a busy and bustling business street in New York City for arranging their extraordinarily long hair in full view of the passers-by, in order to promote the sale of their hair restorative, causing crowds to collect which blocked up the street and seriously interfered with the entrance to and egress from the plaintiff's store in the basement underneath the defendant's premises, it was held that such use of their premises was unreasonable and resulted in a public nuisance, with special damage to the plaintiff, and should be enjoined *pendente lite*. *Elias v. Seven Sutherland Sisters*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 126.

Where the defendants permanently located their floating dock in a basin opposite to the upland in the street, and opposite to the side of the plaintiffs' pier, by which act the plaintiffs were deprived of wharfage and of gains arising from large boats for active shipping lying in the basin, it was held that the plaintiffs' rights were peculiar to them, and their loss by the obstruction of the defendant constituted a special injury to the plaintiffs. *Penniman v. New York Balance Co.*, 13 How. Pr. (N. Y. Supreme Ct.) 40. See *Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423.

A railroad switch laid without municipal authority on part of a public street is a nuisance, and the owner of the property in front of which the same is used may have it

can be instituted only by the state, or the attorney-general acting for the state.¹

abated as inflicting injury peculiar to himself; but he may not champion the rights of others in front of whose property the switch is laid with municipal authority, and who do not complain. *Bell v. Edwards*, 37 La. Ann. 475.

Where the owner of a lot fronting upon a street in a city erects a stoop and fence in front thereof, so as to reduce the space left for public travel upon the sidewalk from nineteen to eight feet, an owner of a lot fronting on the same street, and distant about one hundred feet from the obstruction so erected, may bring an action to have the same removed as a nuisance. *Crooke v. Anderson*, 23 Hun (N. Y.) 266. See also *Pettis v. Johnson*, 56 Ind. 139.

If in front of a lot in a city there is a public street in a condition to be used as such, and an obstruction is put on the street by which its use as a highway is impeded, which prevents the owner of a lot from having free access to the street therefrom, he may maintain an action to abate the nuisance. *Hargro v. Hodgdon*, 89 Cal. 623. See also *Schulte v. Northern Pac. Transp. Co.*, 50 Cal. 592.

The owner of a slaughter-house, who slaughters a large number of animals daily, and has no other place for slaughtering, is specially injured by an obstruction in the highway which wholly cuts him off from access to the slaughter-house, and he may abate the nuisance by a mandatory injunction. *Gardner v. Stroeveer*, 89 Cal. 26.

But the owner of a lot in a city is not entitled, as a matter of right, to enjoin a party from obstructing a sidewalk or street in such city, where the owner's lot or land does not abut upon, and is not opposite or contiguous to, the obstruction, since the injury or nuisance complained of is not different in kind from that sustained by the public. *Billard v. Erhart*, 35 Kan. 611; *Hartshorn v. South Reading*, 3 Allen (Mass.) 501. See also *Hogan v. Central Pac. R. Co.*, 71 Cal. 83; *Blanc v. Klumpke*, 29 Cal. 156.

In *San Jose Ranch Co. v. Brooks*, 74 Cal. 463, it was held that to obstruct a public highway so as to completely prevent travel will not constitute special injury to an individual such as will enable him to maintain a private action to abate the nuisance, even where such highway constitutes the only means by which the individual can reach his property. *O'Brien v. Norwich, etc., R. Co.*, 17 Conn. 371; *McCowan v. Whitesides*, 31 Ind. 236.

Iowa Code, § 3331, giving the right to "any person injured thereby" to maintain an action to abate a nuisance, does not change the ordinary rules that a private individual will not be allowed to maintain an action to restrain or abate a public nuisance unless he can show some peculiar or special damage or injury to himself. A person who, after the erection of a bridge over a lake, has purchased boats and engaged in the business of running them, has no rights, in respect to the navigation of the lake, differing from those enjoyed by other persons, or sufficient to enable him to maintain an action to abate the bridge as a

nuisance on the ground that it obstructs the navigation of the lake. *Innis v. Cedar Rapids, etc., R. Co.*, 2 L. R. A. 282.

Suit by Two or More Parties.—Two or more persons having distinct and separate tracts of land which are injured or rendered less valuable by the overflow of water at certain seasons of the year, from a natural water-course obstructed by dams and ditches, where such overflow is a common injury to the lands of both, may join in a suit as plaintiffs to restrain such nuisance, since such parties have a common interest in the subject-matter thereof. *Palmer v. Waddell*, 22 Kan. 352. See *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

Suit against Two or More Parties.—An injunction was prayed by the owner of a flour-mill on a stream, against the owner of a slaughter-house above on the same stream, to restrain the latter from letting flow down the stream into the milldam, and thence into the millrace, blood and other matter from the slaughtered animals, on the ground that such acts created a nuisance by rendering the water offensive and depriving the air of its purity, thereby injuring the health of the mill operatives, diminishing the value of the mill property, and depriving the complainant of its comfortable and reasonable enjoyment. It appeared that the defendant was one of many who contributed to create the alleged nuisance, there being other slaughter-houses, breweries, soap and other factories, and cattle-scales, from which flowed filth and refuse, with the occasional addition of dead animals and other offensive matter from other sources, blood being the principal contribution from the defendant's slaughter-house; and that the mill had been in use for more than twenty years before the slaughter-house was erected, and that the pollution of the water had been gradually growing worse for some eight years before suit was brought. It was held that complainant was entitled to relief, and that he would be entitled to the same relief against all those contributing to the nuisance; and if it should not cease upon the granting of the injunction in this case, he would be entitled to join in one case all who continued the injury. *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419.

1. Nuisances Purely Public.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *State v. Mobile*, 24 Ala. 701; *Hoole v. Atty.-Genl.*, 22 Ala. 190; *Yolo County v. Sacramento*, 36 Cal. 194; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *People v. Dreher* (Cal., 1894), 35 Pac. Rep. 867; *Denver v. Mullen*, 7 Colo. 346; *Green v. Oakes*, 17 Ill. 249; *Atty.-Genl. v. Tarr*, 148 Mass. 309; *Carleton v. Rugg*, 149 Mass. 550; *Atty.-Genl. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 1; *Higbee v. Camden, etc., R. Co.*, 19 N. J. Eq. 276; *State v. Chosen Freeholders*, 46 N. J. Eq. 173; *Atty.-Genl. v. Hunter*, 1 Dev. Eq. (N. Car.) 12; *Atty.-Genl. v. Blount*, 4 Hawks (N. Car.) 334; *People v. Metropolitan Telephone, etc., Co.*, 64 How. Pr. (N. Y. Supreme Ct.) 120.

(3) *Delay and Acquiescence.*—Mere delay in applying to the court of equity to abate a nuisance may be a ground for denying relief until the plaintiff's right has been established in a court of law.¹ But where the right is clear, or has

Suits by the State.—The state of *Pennsylvania* having constructed lines of canal and railroad and other means of transportation, which would be injured in their revenues by the obstruction of the Ohio river created by a bridge at Wheeling, has a sufficiently specific interest to sustain an application to the Supreme Court of the *United States*, in the exercise of its original jurisdiction, for an injunction to remove the obstruction. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518.

Title to the bed of the ocean below low-water mark, along the shore, is in the state, and if obstructions are placed in it which interfere with navigation and fishery, they may be abated as public nuisances at the suit of the state. *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634.

If an action is brought to remove an erection in navigable waters, on the ground that it is an injury to the *jus publicum* and to the common right of navigation, it must appear that an actual nuisance exists, even though the erection is an encroachment. *Atty.-Genl. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 1.

The relators in a bill filed by the state under the Act of March 31, 1887, §§ 28, 29, to abate a nuisance as dangerous to the public health, must show that the situation or practice complained of amounts of itself, and without the aid of other similar practices or situations (for which the defendants are not responsible) to a public as distinguished from a private nuisance, and one which would be indictable as such. A mere tendency to injure is not sufficient to constitute such a nuisance. There must be something actually appreciable, which arrests the attention, and rests not merely in theory, but strikes the common sense of the ordinary citizen. *State v. Chosen Freeholders*, 46 N. J. Eq. 173.

In an action by the people on the relation of an individual to remove an obstruction in a public street, where it appears that the street was never dedicated or accepted, the plaintiff cannot invoke an estoppel on the ground that the relator, an abutting property owner, acted on an agreement with the defendant to open the street, since the action by the people is not to vindicate the relator's private rights. *People v. Dreher*, (Cal., 1894), 35 Pac. Rep. 867.

Suit Brought by Municipal Corporation.—A municipal corporation, in the exercise of its power, granted by the state, to abate nuisances under proper circumstances, may call a court of equity to its assistance. *Denver v. Muller*, 7 Colo. 345, 4 Am. & Eng. Corp. Cas. 304; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 507; *Fresno v. Fresno Canal, etc., Co.*, 98 Cal. 179; *Waterloo v. Union Mill Co.*, 72 Iowa 437; *New Orleans v. Lambert*, 14 La. Ann. 244; *Pine City v. Munch* (Minn., 1890), 44 N. W. Rep. 197; *Board of Health v. Copcutt*, 71 Hun (N. Y.) 149; *Hudson v. Thorne*, 7 Paige (N. Y.) 261.

In *Pine City v. Munch* (Minn., 1890), 44

N. W. Rep. 197, it was held that a municipality may maintain in its own name a suit in equity to abate a nuisance. Compare *Ottumwa v. Chinn*, 75 Iowa 405, 23 Am. & Eng. Corp. Cas. 55.

New Jersey Pub. Laws 1888, p. 80 (a statute authorizing boards of health to abate nuisances hazardous to public health), makes provision in section 28 that any local board of health, instead of proceeding in a summary manner to remove a nuisance hazardous to the public health, may file a bill in chancery in the name of the state, on the relation of such board of health, for an injunction to prohibit the continuance of such nuisance; and such action shall proceed according to the rules and practices in such cases on the relation of individuals. *State v. Neidt* (N. J., 1890), 19 Atl. Rep. 318.

An ordinance of a city council ordering a blacksmith shop to be closed as a nuisance is authorized by law, and may be carried into effect by an injunction restraining the owner from continuing it. *New Orleans v. Lambert*, 14 La. Ann. 244; *Herbert v. Benson*, 2 La. Ann. 770.

The board of health of the city of Yonkers may maintain an action in the Supreme Court to compel the defendant to destroy a dam maintained by him. *Board of Health v. Copcutt*, 71 Hun (N. Y.) 149.

The Court of Chancery will not interfere by injunction to enforce the by-laws of a corporation unless the act to be restrained is in itself a nuisance. *Hudson v. Thorne*, 7 Paige (N. Y.) 261. See also *Marshalltown v. Foreney*, 61 Iowa 578.

A court of equity will not limit the abatement of a nuisance to any particular officer of a municipality unless exclusive power to act in the matter is conferred plainly on one department. *U. S. Illuminating Co. v. Grant* (Supreme Ct.), 7 N. Y. Supp. 788.

1. *Delay—How Far a Bar.*—*Parker v. Winnepiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 647; *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 19; *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Meigs v. Lister*, 23 N. J. Eq. 199; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Hieskell v. Gross*, 7 Phila. (Pa.) 317; *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209.

A delay of three years or more has been frequently held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law. *Parker v. Winnepiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 545.

An injunction to stop chemical works, applied for after the works had been in operation three and a half years, by an individual who owned and resided on adjoining lands during that time, was denied. *Tichenor v. Wilson*, 8 N. J. Eq. 197.

Where a trifling trespass or interference with an ancient right has been submitted

been settled at law, relief will not be refused the plaintiff on account of delay, unless he has done some act amounting to acquiescence in the nuisance.¹ Where, however, the delay is coupled with an acquiescence,² especially if, by reason of such delay, the defendant is allowed to go ahead and make expensive erections,³ the plaintiff will be deprived of all equitable relief. An assent to

without protest for six years, equity will not exercise its jurisdiction, but will leave the plaintiff to remedies at law. *Gaunt v. Fynney*, L. R. 8 Ch. 8, 42 L. J. Ch. 122.

Where a factory, alleged to emit cinders from its smokestack, had been operated in the same manner for seven years without complaint, a very clear and positive showing of the nuisance is necessary to warrant an injunction. *Louisville Coffin Co. v. Warren*, 78 Ky. 400.

1. *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Mueller v. Fruen*, 36 Minn. 273; *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Meigs v. Lister*, 23 N. J. Eq. 199; *Corning v. Troy Iron, etc., Factory*, 34 Barb. (N. Y.) 485.

The owners of glass-works which were erected in 1845, erected in 1847, and subsequent years down to 1863, seven new furnaces, by reason of which the quantity of smoke and vapor emitted from the works was greatly increased. The plaintiff owned property adjoining the works, which he and his predecessors in title had enjoyed long before the erection of the works, and he had at considerable expense fitted up a portion of the property for building purposes; but, on account of the offensive smoke, etc., from the glass-works, he had been prevented from carrying out this plan. In 1870 he filed a bill to restrain the emission of smoke and vapor from the new kilns. It was held that he was not barred by delay, and that he was entitled to an injunction as to the whole of the new works. *Saville v. Kilner*, 26 L. T., N. S. 277.

2. *Delay Accompanied with Acquiescence—Alabama*.—*Clifton Iron Co. v. Dye*, 87 Ala. 468. *California*.—*Fresno v. Fresno Canal, etc., Co.*, 98 Cal. 179.

New Hampshire.—*Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426.

New Jersey.—*Southard v. Morris Canal, etc., Co.*, 1 N. J. Eq. 518; *Atty.-Genl. v. New York, etc., R. Co.*, 24 N. J. Eq. 49; *Hulme v. Shreve*, 4 N. J. Eq. 116.

New York.—*Adams v. Popham*, 76 N. Y. 410; *Ninth Ave. R. Co. v. New York El. R. Co.*, 7 Daly (N. Y.) 174.

Ohio.—*Burkam v. Ohio, etc., R. Co.*, 122 Ind. 344; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169.

Pennsylvania.—*Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412.

Rhode Island.—*Sprague v. Steere*, 1 R. I. 247. See also *Broome v. New York, etc., Telephone Co.*, 42 N. J. Eq. 141.

An adjoining owner who expressly consents to the occupancy of a street may not ask a court afterwards to enjoin the use of the street or to give him damages. *Burkam v. Ohio, etc., R. Co.*, 122 Ind. 344.

If waste-gates be erected by the defendants, and used by them through a course of years with the assent of the complainants, the com-

plainants cannot have relief by injunction so long as the use of the gates is confined to their original purpose. *Hulme v. Shreve*, 4 N. J. Eq. 116.

The acquiescence of the plaintiff's grantor in an action by the defendant is no defense. *Learned v. Castle*, 78 Cal. 454.

Where a contract between a person and a municipal corporation, whereby the latter permitted the former to erect a stairway occupying a portion of a public alley, was entered into privately, and not under a public ordinance of the city, the fact that the defendant's grantors, in carrying out the terms of such contract, had expended large sums of money, of which expenditure the agent of the plaintiff had knowledge, and to the construction of which stairway he did not object, does not work an estoppel against the plaintiff. *Pettis v. Johnson*, 56 Ind. 139.

3. *Expensive Erections*.—*Fresno v. Fresno Canal, etc., Co.*, 98 Cal. 179; *Ninth Ave. R. Co. v. New York El. R. Co.*, 7 Daly (N. Y.) 174; *Southard v. Morris Canal, etc., Co.*, 1 N. J. Eq. 518; *Atty.-Genl. v. New York, etc., R. Co.*, 24 N. J. Eq. 49; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169; *Sprague v. Steere*, 1 R. I. 247.

Where it appeared that a canal was constructed at great expense, more than five years before the incorporation of the city of Fresno (the party complaining) and eleven years before the suit was instituted, and had ever since been used by the canal company, adversely to all the world; that the proprietors of the land where the city was situated induced such company to run its canal through the town, and located the latter on the assurance that the company would do so; that the supervisors were consulted at the time and offered no objections; that taxes on the canal were paid to the city, and its trustees by ordinances and official acts recognized its existence; and that a mill of the company was built at an expense of nearly one hundred thousand dollars—it was held that a decree ordering the canal to be abated as a nuisance by filling it up was erroneous. *Fresno v. Fresno Canal, etc., Co.*, 98 Cal. 179.

Where the plaintiff, having granted a mill site and water privilege, with power to close his land within certain limits, permitted a dam to be raised so high as to flow the water beyond those limits, and afterwards allowed the dam to be repaired at the same height and a mill and machinery to be adjusted to that height, an injunction to compel the defendant to lower his dam and restrict the flowage to the limits expressed in the grant was denied by the court. *Sprague v. Steere*, 1 R. I. 247.

Where the plaintiff and his grantors had acquiesced for six years in the defendant's maintaining a dam, under a claim of right to

the erection of a nuisance will be no estoppel where the party, at the time of giving assent, had no reason to suppose that a nuisance would be the result.¹

(4) *Decree must not be Too Broad.*—The decree must limit the abatement to that in which the nuisance consists, and no unnecessary damage should be done.²

2. Criminal Proceedings—*a.* GENERALLY.—Where a person has been indicted for maintaining a public nuisance, the judgment on conviction may embrace, in addition to the punishment, an order for the abatement of the nuisance.³

flow certain lands, during which time the defendants made expensive erections of mills and machinery, to be operated by the power so gained, it was held that there was good reason for refusing an injunction. *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426.

A person may so encourage another in the erection of a nuisance as not only to be deprived of the right of equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance. *William v. Jersey*, 1 C. & P. 91; *Carlisle v. Cooper*, 21 N. J. Eq. 591.

1. Assent—How Far a Bar.—*Bankart v. Houghton*, 27 Beav. 430; *Corley v. Lancaster*, 81 Ky. 171; *Mueller v. Fruen*, 36 Minn. 273; *Adams v. Popham*, 76 N. Y. 410; *Snow v. Williams*, 16 Hun (N. Y.) 471; *Leonard v. Spencer*, 108 N. Y. 338.

In order that an injunction may issue, a business must be in its very nature a nuisance. If it is only a business which may or may not become a nuisance, acquiescence is no estoppel. *Bankart v. Houghton*, 27 Beav. 430.

In *Adams v. Popham*, 76 N. Y. 410, it was held that the fact that the plaintiff, by consent of the defendant, took ice from the pond one or two winters, did not constitute such an acquiescence in the continuance of the dam as to estop her from claiming that it was a nuisance, especially when thereafter its effects were more clearly discovered; nor did the fact that the plaintiff and her husband had made efforts by suggesting improvements, and otherwise, to have the pond rendered harmless, preclude her from resorting to an action for the abatement of the nuisance.

In *Snow v. Williams*, 16 Hun (N. Y.) 468, it was held that the owner of a farm through which a stream flowed was not precluded from maintaining an action to enjoin the operation of a cheese-factory on the stream above in such manner as to pollute the water with whey, by the fact that at the time the same was built he was acquainted with the custom of such factories to thus dispose of surplus whey, and that he had patronized it for two years before the defendant purchased it.

The plaintiff's mere failure to protest against the construction of a mill and the use of a millpond—in the absence of evidence that the defendant by his silence caused the plaintiff to do anything he would not otherwise have done—and his reasonable delay in suing, in order to be sure that the pond was a nuisance, will not estop the plaintiff from maintaining an action to abate it. *Leonard v. Spencer*, 108 N. Y. 338.

2. Decree—and Action Thereunder.—*Richards v. Holt*, 61 Iowa 529; *Trulock v. Merte*, 72 Iowa 510; *Green v. Lake*, 54 Miss. 540; *Shepard v. People*, 40 Mich. 487; *Williams v. Osborn*, 40 N. J. Eq. 235.

Where a factory situated at B. was complained of by one who lived at G., and an injunction was thereupon allowed, restraining the defendants from causing the nuisance at B. by their factory, it was held that, as no one at B. had complained, the injunction must be modified so as to restrain the defendants from causing a nuisance at G. only. *Williams v. Osborn*, 40 N. J. Eq. 235.

Where the defendants were so keeping a building on their premises as to be a nuisance to the plaintiff in several respects, but, after the plaintiff's action to enjoin the nuisance had been begun, the defendants so kept the building that it was no longer a nuisance, except in one particular, and there was nothing in the evidence to indicate that they would again keep it as they did when the action was begun, it was held that the injunction should have been limited to the offense existing at the time of the hearing. *Trulock v. Merte*, 72 Iowa 510.

A court of equity will not make perpetual an injunction against the lawful use of a flour and corn mill in a city, upon the allegations of noise by the machinery, danger of fire from the engine, and of disease from the accumulation of filth and unwholesome odors, if the grievances can be remedied by scientific and skilful appliances, but it will require such appliances to be used. *Green v. Lake*, 54 Miss. 540.

Where it was determined that a certain hog-lot was so kept and used as to create a nuisance, but not that it was a nuisance *per se*, the court was not authorized in wholly restraining the use of the lot for the purpose of feeding hogs. It should have restrained only such use of the lot as would amount to a nuisance. *Richards v. Holt*, 61 Iowa 529.

Destruction of Property.—The court is not obliged to order the destruction of property which it has decreed to be a nuisance. Property cannot be destroyed for the abatement of a nuisance until its destruction is lawfully ascertained to be necessary therefor, and then only so far as is determined to be necessary. *Shepard v. People*, 40 Mich. 487.

3. Judgment—What may Embrace—England.—*Reg. v. Chichester*, 2 Den. C. C. 458, 17 Q. B. 504, note; *Rex v. Wilcox*, 2 Salk. 458; *Rex v. Yorkshire*, 7 T. R. 463; *Rex v. Incledon*, 13 East 164; *Rex v. Commerell*, 4 M. & S. 203; *Rex v. Stead*, 8 T. R. 142; *Reg. v. Bateman*, 8 El. & Bl. 584, 4 Jur., N. S. 301; *Rex v. Pappi-*

Such order, however, is not an essential part of the judgment.¹ The abatement may or may not be ordered, according as it is or is not justified by the facts in the case.² For instance, to warrant the order, it must be shown that the nuisance is continuing.³ The abatement, strictly speaking, forms no part

neau, 1 Stra. 686; Hall's Case, Vent. 169; Hawk. P. C. 75.

United States.—*Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 95.

Alabama.—*State v. Mobile*, 24 Ala. 701; *Campbell v. State*, 16 Ala. 144.

Illinois.—*Earp v. Lee*, 71 Ill. 193.

Indiana.—*Wertz v. State*, 42 Ind. 161; *Maxwell v. Boyne*, 36 Ind. 120; *Howard v. State*, 6 Ind. 446; *McLaughlin v. State*, 45 Ind. 338; *Droneberger v. State*, 112 Ind. 105.

Maine.—*State v. Hull*, 21 Me. 84; *State v. Haines*, 30 Me. 65; *State v. Sturdivant*, 21 Me. 9.

Maryland.—*Wroe v. State*, 8 Md. 416.

Michigan.—*Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Crippen v. People*, 8 Mich. 117; *Shepard v. People*, 40 Mich. 487.

New Hampshire.—*State v. Noyes*, 30 N. H. 279.

New Jersey.—*Atty.-Genl. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136; *State v. Morris, etc.*, R. Co., 23 N. J. L. 360.

New York.—*Syracuse, etc., Plank Road Co. v. People*, 66 Barb. (N. Y.) 25; *Willis v. Warren*, 1 Hilt. (N. Y.) 590; *People v. Branchport, etc., Plank Road Co.*, 5 Park. Cr. Rep. (N. Y.) 604; *Munson v. People*, 5 Park. Cr. Rep. (N. Y.) 16.

Ohio.—*Smith v. State*, 22 Ohio St. 539; *Miller v. State*, 3 Ohio St. 477; *Matthews v. State*, 25 Ohio St. 536.

Pennsylvania.—*Taggart v. Com.*, 21 Pa. St. 527; *Barclay v. Com.*, 25 Pa. St. 503, 64 Am. Dec. 715; *Delaware, etc., Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570.

Rhode Island.—*State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497.

Washington.—*State v. Paggett*, 8 Wash. 579; *Coffey v. Territory*, 1 Wash. 325.

It is not a cruel or unusual punishment to adjudge the abatement of a nuisance. *McLaughlin v. State*, 45 Ind. 341.

Municipal Corporations.—The ordinary method by which a municipal corporation abates a public nuisance is by criminal proceedings. *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 95; *Ottumwa v. Chinn*, 75 Iowa 405, 23 Am. & Eng. Corp. Cas. 55; *Welch v. Stowell*, 2 Dougl. (Mich.) 332. See also *Shepard v. People*, 40 Mich. 487.

The power conferred by *Iowa Code*, § 456, upon cities and towns organized under the general laws of the state to abate a nuisance, is to be exercised through the medium of an ordinance and criminal proceedings rather than a suit in equity. *Ottumwa v. Chinn*, 75 Iowa 405, 23 Am. & Eng. Corp. Cas. 55.

1. Order of Removal.—*Howard v. State*, 6 Ind. 446; *Maxwell v. Boyne*, 36 Ind. 125; *Crippen v. People*, 8 Mich. 124; *Shepard v. People*, 40 Mich. 487. See also *Campbell v. State*, 16 Ala. 146; *State v. Haines*, 30 Me. 65; *State v. Noyes*, 30 N. H. 279.

Although the removal of a nuisance is not a necessary part of the judgment, and the

power may or may not be exercised by the court, yet when it is exercised it must be at the time of imposing the fine or imprisonment, and the order for removal must form a part of the same judgment. *Crippen v. People*, 8 Mich. 124.

2. Abatement—When Ordered.—*Maxwell v. Boyne*, 36 Ind. 120.

In *Rex v. Pappineau*, 2 Stra. 688, *Rhenolds, J.*, said that "every judgment should be adapted to the nature of the case."

There seems to be some diversity among the decisions as to whether or not the matter of abatement is left entirely to the discretion of the court. Thus, in *Crippen v. People*, 8 Mich. 124, the court said that the removal of a nuisance is left discretionary with the court. It is a power that may or may not be exercised. See also *Shepard v. People*, 40 Mich. 487. And in *Howard v. State*, 6 Ind. 446, it was said, "The court may order the removal or not, at its discretion." See also *Cromwell v. Lowe*, 14 Ind. 234. But in *Maxwell v. Boyne*, 36 Ind. 120, the court, in commenting upon the above-mentioned *Indiana* cases, said that although an order for the abatement of a nuisance does not necessarily follow a conviction in a criminal case, or a verdict and judgment for the plaintiff in an action for damages, yet it is not a matter entirely in the discretion of the court. It is the court's duty to make such an order whenever the interest and comfort of the community or of individuals require the nuisance to be abated in whole or in part.

3. Nuisance must be Continuing.—*Campbell v. State*, 16 Ala. 144; *People v. Branchport, etc., Plank Road Co.*, 5 Park. Cr. Rep. (N. Y.) 604; *State v. Noyes*, 30 N. H. 298; *Miller v. State*, 3 Ohio St. 477; *Smith v. State*, 22 Ohio St. 539; *Matthews v. State*, 25 Ohio St. 536.

An indictment for nuisance against a plank road company contained the allegation that the defendants' road was, and had been, and at and until the finding of the indictment still was out of repair, to the damage and common nuisance of the citizens of the state, so that they could not go and pass over the same without great trouble and inconvenience. It was held, that to warrant a conviction, it was necessary to show not only that the road had been out of repair, but that it continued so to be down to the time of the finding of the indictment. *People v. Branchport, etc., Plank Road Co.*, 5 Park. Cr. Rep. (N. Y.) 604.

The sentence and judgment required by the statute, upon conviction for maintaining a nuisance, under the *Ohio Act* of April 15, 1857, cannot be dispensed with upon a showing that the nuisance does not exist at the time such judgment is about to be rendered. In such case, however, an order to abate the nuisance will not be issued to the sheriff as a matter of course; and, on the hearing of a motion for such order, either party will be

of the punishment.¹ Hence, where the offense is pardoned, the abatement of the nuisance is not thereby prevented.²

b. EXTENT OF ABATEMENT.—The judgment may require the destruction of property, if it is necessary for the abatement of a nuisance;³ but only so much of the thing as causes the nuisance ought to be removed.⁴

c. TO WHOM ORDER IS GIVEN.—The court usually orders that the defendant abate the nuisance at his own cost.⁵ And if he disobey, obedience may be enforced by attachment for contempt of court,⁶ or by an order, contained in the sentence, that he stand committed until the nuisance is abated.⁷ It is competent for the court, also, in case the defendant refuses to comply with the sentence, to require by law the sheriff or some other officer to execute the order.⁸

heard upon testimony, and if it then appear that such nuisance has ceased to exist, the order should not issue. *Smith v. State*, 22 Ohio St. 539; *Matthews v. State*, 25 Ohio St. 541.

1. 1 Bishop Crim. L. (8th ed.), § 1079, 1; *Rex v. Wilcox*, 2 Salk. 458; *Matthews v. State*, 25 Ohio St. 541; *People v. Branchport*, etc., *Plank Road Co.*, 5 Park. Cr. Rep. (N. Y.) 604. Compare *Willis v. Warren*, 1 Hilt. (N. Y.) 590; *Delaware, etc., Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570.

The abatement of a nuisance is not a punishment for the offense, but the removal of a thing injurious to the public. *Matthews v. State*, 25 Ohio St. 541.

But in *Willis v. Warren*, 1 Hilt. (N. Y.) 590, it was said that where obscene pictures were destroyed, the loss thus occasioned to the owner was a part of the punishment inflicted for the offense of publicly keeping or exposing them.

2. *Rex v. Wilcox*, 2 Salk. 458.

3. *Willis v. Warren*, 1 Hilt. (N. Y.) 590. In this case it was held that the exhibition of obscene pictures is an offense indictable at common law, and that such pictures might be destroyed as a public nuisance when the fact of publication is established.

4. *Extent of Abatement.*—*Rex v. Pappineau*, 1 Stra. 686; *Campbell v. State*, 16 Ala. 144; *Shepard v. People*, 40 Mich. 487; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711.

Where the nuisance consists in the illegal use of a building, and not in the building itself, the court will not be justified in ordering the destruction of the building. It is only the unlawful use that can be abated. *State v. Kaster*, 35 Iowa 222; *Earp v. Lee*, 71 Ill. 193; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Barclay v. Com.*, 25 Pa. St. 503, 64 Am. Dec. 715; *State v. Paul*, 5 R. I. 185.

Where Strangers are Affected.—In *State v. Haines*, 30 Me. 65, it was held that upon conviction an abatement of the nuisance will not be ordered by the court when strangers to the proceeding might be improperly affected.

In *Delaware, etc., Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570, it was held that a sentence against a corporation to abate a nuisance created by it is proper, although the nuisance is on the land of another.

5. *Nature of Order.*—*Rex v. Bateman*, 8 El. & Bl. 584; *Rex v. Pappineau*, 1 Stra. 686; *Rex v. Yorkshire*, 7 T. R. 467; *Rex v. Sterd*, 8 T.

R. 142; *Campbell v. State*, 16 Ala. 144; *Ashbrook v. Com.*, 1 Bush (Ky.) 144, 89 Am. Dec. 616; *Wroe v. State*, 8 Md. 416; *Munson v. People*, 5 Park. Cr. Rep. (N. Y.) 16; *Delaware, etc., Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570; *Barclay v. Com.*, 25 Pa. St. 503, 64 Am. Dec. 715; *Taggart v. Com.*, 21 Pa. St. 527.

Upon the prosecution of an employee of a powder company for maintaining a public nuisance, judgment upon his conviction, ordering that the nuisance be removed, is erroneous. The judge, in giving the opinion of the court in this case, said: "The law contemplates that property, either in business or in a building, shall not be destroyed unless the person who is financially interested therein is before the court. An employee has no interest in either, and, while he may be culpable in continuing to maintain an obnoxious trade or business, he has no such control over it as that an order that he abate the entire business could be otherwise than oppressive, if not in its nature necessarily ineffectual." *State v. Paggett*, 8 Wash. 579.

6. *Miller v. State*, 3 Ohio St. 477.

It seems to be the better opinion that the Court of King's Bench may, by a mandatory writ, prohibit a nuisance and order that the same shall be abated; and that if the party disobeys the writ he subjects himself to an attachment. But upon such attachment, for proceeding after the writ of prohibition, there ought to be a declaration setting forth the nature of the offense, and that the same is a nuisance, and that, notwithstanding the writ of prohibition, the defendant proceeded in or continued it; to which, if the defendant can in pleading set forth a sufficient justification, his proceeding *post prohibitionem regiam* will be good in law, and he himself discharged of all contempt. 7 Bac. Abr. 234.

7. *Taggart v. Com.*, 21 Pa. St. 527.

8. *Requiring Officer to Execute Order.*—*Ashbrook v. Com.*, 1 Bush (Ky.) 144, 89 Am. Dec. 616; *Barclay v. Com.*, 25 Pa. St. 503, 64 Am. Dec. 715. See also *Howard v. State*, 6 Ind. 444; *State v. Sturdivant*, 21 Me. 9; *Matthews v. State*, 25 Ohio St. 536; *Smith v. State*, 22 Ohio St. 539. Compare *Campbell v. State*, 16 Ala. 144; *Miller v. State*, 3 Ohio St. 477.

Order not to be Given to Sheriff in First Instance.—The prevailing opinion among the authorities seems to be that the court cannot order the sheriff to abate a nuisance, where no previous order has been given to the defendant.

III. ABATEMENT WITHOUT PROCESS OF LAW—1. By Private Individuals—

a. ORIGIN OF THE RIGHT.—Abatement of nuisances by private individuals has its origin in the common law,¹ which allows this private and summary method of doing one's self justice, because injuries which obstruct or annoy one in the enjoyment of such things as are of daily convenience and use, require an immediate remedy and cannot await the slow progress of the ordinary forms of justice.²

b. WHO MAY ABATE.—A Private Nuisance may be abated only by the party aggrieved,³ who may always resort to this summary method of redress whenever he has been injured to such an extent as to give him a right of action.⁴

In *Barclay v. Com.*, 25 Pa. St. 503, 64 Am. Dec. 715, it was held that, on a conviction for nuisance, it is error in the court to command the nuisance to be abated by the sheriff in the first instance, that being part of the sentence given against the defendants; but if they refuse to comply with the sentence, the court may order the sheriff to abate it at their cost.

In *Campbell v. State*, 16 Ala. 144, it was held that a judgment, upon an indictment for a nuisance, "that the nuisance be abated forthwith, at the cost of the defendant; and the sheriff is charged with the execution of the order," is virtually an order to the sheriff to abate the nuisance, and to that extent erroneous, but that it will be amended in the appellate court so as to command the defendant to abate the same, if this has not been already done. Compare *Crippen v. People*, 8 Mich. 117; *Copper v. Territory*, 1 Wash. 325.

In *Miller v. State*, 3 Ohio St. 477, it was held that an order to abate should not be directed to any officer. It is not an order to be executed by an officer. But it has been held that in Ohio now, by Act of April 15, 1857, the court is authorized to issue an order to the sheriff to abate a nuisance at the cost of the defendant, unless such nuisance shall be abated or removed before said order shall be issued to the sheriff. *Matthews v. State*, 25 Ohio St. 537; *Smith v. State*, 22 Ohio St. 539.

1. *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 253; *Wetmore v. Tracy*, 14 Wend. (N. Y.) 256, 28 Am. Dec. 525; *Coe v. Schultz*, 47 Barb. (N. Y.) 67. See also *James v. Hayward*, Cro. Car. 184; *Stiles v. Laird*, 5 Cal. 123, 63 Am. Dec. 112.

2. 3 Black. Com. 5. See also *Thompson v. Allen*, 7 Lans. (N. Y.) 459; *Moffett v. Brewer*, 1 Greene (Iowa) 355; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Fields v. Stokley*, 99 Pa. St. 309, 44 Am. Rep. 109; *Rung v. Shoneberger*, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

3. Private Nuisance Abatable by Person Aggrieved.—*Gates v. Blincoe*, 2 Dana (Ky.) 158, 26 Am. Dec. 440; *Hart v. Albany*, 9 Wend. (N. Y.) 571.

In the trial of an action of trespass on the case, brought by the owner of the middle one of three dams on the same stream against the owner of the lowest, subsequently erected, for damages caused by flowing the wheels of the former, it is not competent for the defendant, except so far as it might affect the question of abandonment, to prove that the plaintiff's dam caused the water to flow back and injure the oldest and uppermost dam and the

mills thereon, and that the owner of the last-mentioned dam abated the plaintiff's dam as a nuisance at the time the defendant erected his dam. The judge, in giving the opinion of the court, said: "One cannot answer proof that he has done an injury to the property of his neighbor, by allegation and proof that the property is in itself injurious to some third person whose rights he does not represent. The right of abatement for private nuisances cannot be thus extended." *Lincoln v. Chadbourne*, 56 Me. 197.

4. 1 Bishop on Crim. Law 829; *Cooley on Torts* (2d ed.) 46; 1 *Hilliard on Torts* 605; *Wood Law of Nuisances* (2d ed.) 844.

England.—*Rex v. Rosewell*, 2 Salk. 459; *Lonsdale v. Nelson*, 2 B. & C. 302; *Roberts v. Rose*, L. R. 1 Exch. 82; *Baten's Case*, 9 Coke 55; *Norrice v. Baker*, 3 Bulst. 197; *Perry v. Fitzhowe*, 8 Ad. & El., N. S. 757; *Penruddock's Case*, 5 Coke 101, notes a, b.

Alabama.—*Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

Connecticut.—*Hubbard v. Deming*, 21 Conn. 356.

Illinois.—*Calef v. Thomas*, 81 Ill. 478.

Indiana.—*Mayhew v. Burns*, 103 Ind. 328.

Iowa.—*Moffett v. Brewer*, 1 Greene (Iowa) 348; *Morrison v. Marquardt*, 24 Iowa 35, 92 Am. Dec. 444.

Kentucky.—*Gates v. Blincoe*, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

Maine.—*Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

Michigan.—*Hickey v. Michigan Cent. R. Co.*, 96 Mich. 498.

New Hampshire.—*Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Great Falls Co. v. Worster*, 15 N. H. 412.

New York.—*Thompson v. Allen*, 7 Lans. (N. Y.) 459; *Griffith v. McCullum*, 46 Barb. (N. Y.) 561.

Pennsylvania.—*Lancaster Turnpike Co. v. Rogers*, 2 Pa. St. 114, 44 Am. Dec. 179; *Crosland v. Pottsville*, 126 Pa. St. 511.

Vermont.—*Adams v. Barney*, 25 Vt. 225.

Wisconsin.—*State v. Smith*, 52 Wis. 134.

See also *Colchester v. Brooke*, 7 Q. B. 339; *Stiles v. Laird*, 5 Cal. 123, 63 Am. Dec. 112; *Brown v. Perkins*, 12 Gray (Mass.) 101; *Miller v. Forman*, 37 N. J. L. 57; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301.

Instances of Exercise of Right.—"If H. builds a house so near mine that he stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down." *Rex v. Rosewell*, 2 Salk. 459.

It is equally well established that one who sustains a special injury from a public nuisance may abate it, for, as to him, it is a private nuisance.¹

Public Nuisance.—But the question of the right of an individual to abate a public nuisance from which he sustains no special injury beyond that common to the public at large, has given rise to considerable discussion and conflict of authority.² The ancient authorities, in the broad and general language used, appear to support the view that anybody may abate a public nuisance;³ but there is a tendency among the modern decisions to limit the right of an individual to abate a public nuisance, to cases where an action could be maintained by him. The true rule would seem to be this, that, speaking generally,

Where the commissioners of highways changed the course of a sluiceway crossing and draining the highway, and turned the water upon the defendant's land, and the defendant obstructed the drain and was sued for a penalty, it was held that if the effect of the change was to destroy his cultivated field, the defendant committed no error in peaceably abating the drain, in that manner, as a nuisance. *Thompson v. Allen*, 7 Lans. (N. Y.) 459.

Every proprietor of land adjoining a highway has a right to reasonable access to its traveled part; and any fence or other obstruction which so encumbers it as essentially to interfere with this right, is a nuisance, and may be abated by such proprietor. Therefore, where the traveled part of the highway had been so constructed in front of the land of B as to render direct access to it therefrom inconvenient without considerable expense, and C, owning land adjoining B's, inclosed with his own premises a part of the highway by a fence, whereupon B, finding it necessary to pass through that portion of the highway so inclosed in order to get access to the traveled part, removed the fence as an incumbrance on the highway—in an action of trespass by C, it was held that B was justified in so doing. *Hubbard v. Deming*, 21 Conn. 356. In the above case the public generally was not affected by the obstruction, and hence it was not a public nuisance, though it was erected on a public highway. The defendant's rights as an adjoining proprietor were the only matters in dispute.

1. Public Nuisance from which One Sustains Special Injury—*England*.—*Bateman v. Black*, 18 Q. B. 870; *Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Petley*, 15 Q. B. 276.

Alabama.—*Owens v. State*, 52 Ala. 400.

Illinois.—*Earp v. Lee*, 71 Ill. 193.

Indiana.—*Bidinger v. Bishop*, 76 Ind. 244.

Maryland.—*Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361.

Massachusetts.—*Brown v. Perkins*, 12 Gray (Mass.) 101.

Michigan.—*Clark v. Lake St. Clair, etc., Ice Co.*, 24 Mich. 508.

New Hampshire.—*Hopkins v. Crombie*, 4 N. H. 520.

New Jersey.—*Miller v. Forman*, 37 N. J. L. 57; *Brown v. DeGroff*, 50 N. J. L. 409, 7 Am. St. Rep. 794.

New York.—*Goldsmith v. Jones*, 43 How. Pr. (N. Y. C. Pl.) 415; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Griffith v. McCullum*, 46 Barb. (N. Y.) 561; *Lansing v. Smith*, 8 Cow. (N. Y.) 146.

Pennsylvania.—*Rung v. Shoneberger*, 2 Watts (Pa.) 23, 26 Am. Dec. 95; *Dyer v. Depui*, 5 Whart. (Pa.) 584; *Fields v. Stokley*, 99 Pa. St. 309, 44 Am. Rep. 109; *Philiber v. Matson*, 14 Pa. St. 306.

Rhode Island.—*State v. Keeran*, 5 R. I. 497.

Washington.—*Johnson v. Maxwell*, 2 Wash. 482.

See, also *Finley v. Hershey*, 41 Iowa 389; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191.

One owning an ancient mill has the right to go upon the land of another and remove an obstruction erected across the stream for the purpose of irrigating the land, by which the mill is prevented from working. *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160.

Where the natural course of surface water is, and has been for a long period of time, through a culvert in a public highway, and thence upon the lands of A, the latter has no right to fill up the culvert, thereby making the highway impassable at times of high water, and, by the construction of a ditch, to collect the water in a channel and discharge it in a body upon the lands of B, to his injury. B may abate such nuisance by restoring the culvert. *Reed v. Cheney*, 111 Ind. 387.

In *Turner v. Holtzman*, 54 Md. 157, 39 Am. Rep. 361, *Dobbins, J.*, delivering the opinion of the court, said: "Without stopping to inquire whether any one whose rights are not injured or interfered with by a public nuisance, may abate it, about which there is some conflict in the decisions, there can be no doubt whatever that any person whose rights are injured or interfered with may abate it, provided its abatement does not involve a breach of the peace."

2. Right of Individual to Abate Public Nuisance.—There is a diversity of opinion among text-writers on this question, Mr. Hilliard and Mr. Bishop holding that any one may abate a nuisance. 1 Hilliard on Torts 605; 1 Bishop New Criminal Law (8th ed.), § 828. For opposite view see Wood Law of Nuisances (2d ed.), § 732 *et seq.*; Cooley on Torts (2d ed.) 46.

3. Older Authorities.—3 Black. Com. 5. And see *Baten's Case*, 9 Coke 53; *Penruddock's Case*, 5 Coke 101; *Rex v. Wilcox*, 2 Salk. 458; *Comyns's Dig.*, "Action upon the Case for a Nuisance;" *Hall's Case*, 1 Mod. 76; *Rex v. Rosewell*, 2 Salk. 459; *Cooper v. Marshall*, 1 Burr. 263; *Davies v. Williams*, 16 Q. B. 546.

an individual has not the right to abate a public nuisance from which he sustains no special injury, but that circumstances may arise to secure a judicial recognition of such right. The cases bearing upon this question are cited below, those purporting or tending to afford support for the affirmative view being somewhat carefully collated.¹

1. The Following are cases supporting the doctrine that any one may abate a public nuisance:

Canada.—*Rex v. Patton*, 13 Low. Can. 311.

Alabama.—*Oliver v. Loftin*, 4 Ala. 240.

California.—*Gunter v. Geary*, 1 Cal. 462.

Connecticut.—*Burnham v. Hotchkiss*, 14 Conn. 310.

Maine.—*Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100.

Maryland.—*Day v. Day*, 4 Md. 262.

Massachusetts.—*Arundel v. McCulloch*, 10 Mass. 70.

New Jersey.—*Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 253.

New York.—*Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397; *Adams v. Beach*, 6 Hill (N. Y.) 271; *Wetmore v. Tracy*, 14 Wend. (N. Y.) 252, 28 Am. Dec. 525; *U. S. Illuminating Co. v. Grant* (Supreme Ct.), 7 N. Y. Supp. 788; *Coe v. Schultz*, 47 Barb. (N. Y.) 67.

North Carolina.—*State v. Dibble*, 4 Jones (N. Car.) 107.

Pennsylvania.—*Lancaster Turppike Co. v. Rogers*, 2 Pa. St. 114, 44 Am. Dec. 179.

South Carolina.—*King v. Sanders*, 2 Brev. (S. Car.) 11.

Tennessee.—*Stump v. McNairy*, 5 Humph. (Tenn.) 363, 42 Am. Dec. 437.

See also *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39; *Griffin v. New York*, 9 N. Y. 462; *Strickland v. Woolworth*, 3 Thomp. & C. (N. Y.) 286.

Authorities Analyzed.—A leading American case on this side of the question is *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397, where, during the cholera epidemic of 1832, an Albany tenement house, containing fifty or more persons, and being a public nuisance, was torn down. In an action of trespass it appeared that the defendant was a citizen of the ward and an alderman. He had a verdict, and a new trial was refused. Mr. Wood, in commenting upon this case (*Wood on Nuisances* (2d ed.) § 735 *et seq.*), lays stress upon what he deems to have been the defendant's personal interest in the abatement of the nuisance, and upon the extraordinary exigency of the situation. We incline to believe, however, that the defendant's personal interest played but a small part in the case, and that the exigency of the situation afforded the ground of the decision.

Renwick v. Morris, 7 Hill (N. Y.), 575, was an action of trespass for cutting away a part of a dam. Here the defendant justified on the ground that the dam was a public nuisance. It appeared that he was interested in the navigation of the river. Whether his action would have been justified had he been a stranger, cannot be said.

In *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525, the court said: "Any person may abate a public nuisance," and cited

2 Burn's Justice 563, and *Hawkins* 408; but neither of these authorities supports the statement of the learned judge, nor does the case of *Hart v. Albany*, 9 Wend. (N. Y.) 589, 24 Am. Dec. 165, also cited, the decision there having been put upon the ground that the defendant was an aggrieved party.

In *Arundel v. McCulloch*, 10 Mass. 70, the court said: "It is clear that, when any public way is unlawfully obstructed, any individual who wants to use it in a lawful way may remove the obstruction." The case went no farther than this. In *Burnham v. Hotchkiss*, 14 Conn. 310, the court said: "We consider it to be well settled that a common nuisance may be abated by any person." But the authorities here cited hardly support so broad a statement, the authorities being Lord Hale, who said, "Any man may justify the removal of a common nuisance either by land or water, because every man is concerned in it;" *James v. Haywood*, Cro. Car. 184, a case of a gate across a highway; *Lodie v. Arnold*, 2 Salk. 458, a case of a house across a highway; and 1 Hawk. P. C., § 61, where an obstruction to a highway was spoken of.

In *Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100, the court said, in passing, that a public nuisance was abatable by any one; but this was clearly a *dictum*. *Adams v. Beach*, 6 Hill (N. Y.) 271, at most only assumed the truth of the doctrine.

In *Jones v. Williams*, 11 M. & W. 176, Lord Abinger, C.B., says it may be necessary in some cases, where there is such immediate danger to life or health as to render it unsafe to wait, to remove without notice.

In *Perry v. Fitzhowe*, 8 Q. B. 757, where a building was a nuisance, the court said, "While the plaintiff might have pulled down the house, yet he could not do it while any one was in it, for it is well settled that no one may abate a nuisance in such a way as to disturb the peace." And see *Burling v. Read*, 11 Q. B. 904; *Davies v. Williams*, 16 Q. B. 546.

In *Harvey v. DeWoody*, 18 Ark. 252, the court said, "It seems that any person may abate a common nuisance." Here this language was not essential to the decision of the case. Nor does *Dewey v. White*, M. & M. 56, which was an action of trespass against a fireman for pulling down a stack of chimneys in the vicinity of a fire, go further than to hold that the defendants were justified because the condition of the chimneys was such as to endanger the safety of those who pulled them down as well as of those at work.

In *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 251, an injunction was refused by the vice-chancellor; and what was said in relation to the right of a citizen to abate a common-law nuisance was not essential to the decision.

c. LIMITATIONS UPON RIGHT OF ABATEMENT.—The person who abates a nuisance, either public or private, acts at his own peril. He takes upon him-

In *Stiles v. Laird*, 5 Cal. 120, 63 Am. Dec. 110, there was an invasion of a private as well as of a public right.

Killing Dogs.—In the following cases it was held that any person is justified in killing a ferocious and dangerous dog which is permitted to run at large by its owner, when the owner has notice of its vicious disposition. *Parker v. Mise*, 27 Ala. 483, 62 Am. Dec. 776; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Putnam v. Payne*, 13 Johns. (N. Y.) 312; *Dunlap v. Snyder*, 17 Barb. (N. Y.) 566; *Hinckley v. Emerson*, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383; *Dodson v. Mock*, 4 Dev. & B. (N. Car.) 146; *Bowers v. Fitzrandolph*, Add. (Pa.) 215; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603.

In *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175, it was held that any person may kill a mad dog, or one which is justly suspected of being mad, or which is known to have been bitten by a dog which was mad.

In *Maxwell v. Palmerton*, 21 Wend. (N. Y.) 407, the court said: "If the dog be in fact ferocious, at large, and a terror to the neighborhood, the public should be justified in dispatching him at once."

In *King v. Kline*, 6 Pa. St. 318, there is a dictum to the effect that a dog may be so ferocious as to become a public nuisance; and in such case, if his owner permits him to run at large any person may kill him.

In *Bowers v. Fitzrandolph*, Add. (Pa.) 215, it is said that a dog having bitten the defendant was a nuisance, and that anybody might abate the nuisance; and in *Dunlap v. Snyder*, 17 Barb. (N. Y.) 561: "If a dog is so ferocious that of his own disposition he will bite men in the street, and is at large, he is a nuisance and may be killed by any one."

Below are the cases supporting the opposite view:

England.—*Colchester v. Brooke*, 7 Q. B. 339; *Rex v. Pappineau*, 2 Stra. 688; *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Black*, 18 Q. B. 870.

Alabama.—*Owens v. State*, 52 Ala. 400.

Illinois.—*Earp v. Lee*, 71 Ill. 193.

Indiana.—*Reed v. Cheney*, 111 Ind. 387; *Bidinger v. Bishop*, 76 Ind. 244.

Massachusetts.—*Brown v. Perkins*, 12 Gray (Mass.) 89.

Michigan.—*Clark v. Lake St. Clair, etc.*, Ice Co., 24 Mich. 508.

New Hampshire.—*Hopkins v. Crombie*, 4 N. H. 520.

New Jersey.—*Brown v. De Groff*, 50 N. J. L. 409, 7 Am. St. Rep. 794.

New York.—*Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Griffith v. McCullum*, 46 Barb. (N. Y.) 561; *Goldsmith v. Jones*, 43 How. Pr. (N. Y. C. Pl.) 416.

Pennsylvania.—*Fields v. Stokley*, 99 Pa. St. 309, 44 Am. Rep. 109; *Philiber v. Matson*,

14 Pa. St. 306; *Rung v. Shoneberger*, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

Rhode Island.—*State v. Paul*, 5 R. I. 185; *Bowden v. Lewis*, 13 R. I. 189, 43 Am. Rep. 21; *State v. Keeran*, 5 R. I. 497.

Wisconsin.—*Godsell v. Fleming*, 59 Wis. 52.

Among the *contra* cases are those of *Griffith v. McCullum*, 46 Barb. (N. Y.) 561, where the court, by Marvin, J., said, on the proposition that any one might abate a public nuisance: "I so conceded in *Peckham v. Henderson*, 27 Barb. (N. Y.) 207, without examining the question. Indeed, in the view taken in that case, the question was of no importance;" and then concurred with *Harrower v. Ritson*, 37 Barb. (N. Y.) 301, and concluded that "that which is exclusively a common or public nuisance cannot lawfully be abated by the private acts of individuals," citing the language quoted in that case from *Blackstone*, and deeming it not to afford authority for the contrary doctrine.

In *Brown v. Perkins*, 12 Gray (Mass.) 89, *Shaw, C. J.*, said: "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right; and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law." This was an action of tort against persons taking part in the abatement of a liquor nuisance and the destruction of the liquor.

In *Colchester v. Brooke*, 7 Q. B. 339, the defendant negligently ran his vessel into and destroyed an oyster bed unlawfully planted by the plaintiff in the channel of a navigable river. Being sued for the damage, he claimed that as the oyster bed was a public nuisance, no action would lie for an injury to it; but the court held otherwise. *Denman, C. J.*, said: "However wrongful the act of the plaintiffs, yet, as the defendant sustained no special inconvenience thereby, he certainly could not have been justified in wilfully impinging upon or destroying the oysters, even for the purpose of abating the nuisance. It is very important, for the sake of the public peace and to prevent oppression, even on wrongdoers, not to confound common with private nui-

self by his act the risk of being able to show, on a proper action by the party whose interests are affected by the abatement, that the thing abated was a nuisance.¹ It must be a nuisance actually existing at the time, and not one

sances in this respect. In the case of the latter, the individual aggrieved may abate (3 Black. Com. 5), so as he commits no riot in doing it; and a public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway which prevents a traveler from passing, and which he may therefore throw down; but the ordinary remedy for a public nuisance is itself public—that of indictment; and each individual who is only injured as one of the public can no more proceed to abate than he can bring an action."

In *Dimes v. Petley*, 15 Q. B. 276, Campbell, C.J., says: "It is fully established by the recent cases, that if there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it does him a special injury; and he can only interfere with it as far as is necessary to exercise his right of passing along the highway. * * * W: clearly think he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience."

In *Brown v. De Groff*, 50 N. J. L. 409, 7 Am. St. Rep. 794, the defendant, in fishing for clams, injured the plaintiff's oysters, and, when sued, sought to justify on the ground that the plaintiff's maintenance of the oyster bed was a public nuisance; but the court held that, conceding this to be so, it was no defense.

The decayed and worthless condition of a street erected by authority of law, or the peril attending its crossings, will not authorize its destruction or injury by one not suffering particular annoyance or injury. *Owens v. State*, 52 Ala. 400.

There is a class of cases in which it is held that the party who had occasion to use a highway might abate an obstruction therein. Thus, in *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44, the court said: "A distinction must be made between the right of a person navigating the stream and one not navigating it, to abate the nuisance therein." See also *Com. v. Tolman*, 149 Mass. 235, 14 Am. St. Rep. 414 (which distinguishes *Arundel v. McCulloch*, 10 Mass. 70); *Williams v. Fink*, 18 Wis. 265; *Godsell v. Fleming*, 59 Wis. 54.

In *State v. Parrott*, 71 N. Car. 311, 17 Am. Rep. 5, it was held that the proprietors of a steamboat on a navigable river might tear away a sufficient portion of the bridge to enable them to take their boat through, where the bridge had been constructed without a draw, and the proprietors, after notice, had failed to remove the bridge or to put in a draw. This case, however, cites with approval the case of *State v. Dibble*, 4 Jones (N. Car.) 107, which was a similar case, and in which it was held that the nuisance was abatable by any one.

In *Larson v. Furlong*, 63 Wis. 323, it was held that one may remove a wharf built in navigable water in front of his land, disconnected with said land, and preventing access to it.

To a declaration charging the defendant with breaking and entering upon a certain dummy or landing-stage of the plaintiffs, the same being a barge of the plaintiffs moored in the river Orwell, and embarking and disembarking from the same passengers and others on, to, and from divers ships and vessels, and mooring ships and vessels against the same, the defendant pleaded that the river Orwell was a public and common navigable stream; that he had a right to land and was desirous of landing passengers from his steam vessel at the wharf; that the plaintiffs' dummy or landing-stage at the time was permanently moored and fixed alongside the wharf so that his passengers could not embark or disembark there without his vessel being moored thereto and his passengers passing over the same. This was held on demurrer a sufficient answer to the declaration; the dummy appearing to be a permanent obstruction of the defendant's right to use the river as a highway, which right he could exercise only by removing or passing over the said dummy. *Eastern Counties R. Co. v. Doling*, 5 C. B., N. S. 821.

Where the defendant, owning a vessel and a wharf upon a navigable stream, and finding a raft of lumber belonging to the plaintiff fastened in the stream so as to obstruct the approach of his vessel to his wharf, untied the raft, doing no unnecessary damage, and the raft, not being in charge of any person, floated away, it was held that he was not liable for the loss of the lumber. *Harrington v. Edwards*, 17 Wis. 586, 84 Am. Dec. 768.

The case of *Bowden v. Lewis*, 13 R. I. 189, 43 Am. Rep. 21, presents some peculiar complications. A villa fronted upon a bay, on the shore of which an oyster house was erected which obstructed the view of the bay from the villa and interfered with the approach to it up the bay. The oyster house was erected without authority in the navigable portion of the bay. The owner of the villa tore it down. It appeared that the market value of the villa had been considerably depreciated by the erection of the oyster house. The court held the owner liable, though admitting that he had suffered a special injury; and held that the injury which he suffered, to entitle him to abate, must be an injury to him in his right as one of the public to navigate the bay.

1. *Denver v. Mullen*, 7 Colo. 345; *McGregor v. Boyle*, 34 Iowa 268; *Coe v. Schultz*, 47 Barb. (N. Y.) 67; *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525; *Fields v. Stokley*, 99 Pa. St. 309, 44 Am. Rep. 109; *Crosland v. Pottsville*, 126 Pa. St. 511. See

that has been discontinued or that is apprehended merely.¹ The right to abate is limited to the removal of that in which the nuisance consists; and for

also *Graves v. Shattuck*, 35 N. H. 269, 69 Am. Dec. 536; *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 253; *Smart v. Com.*, 27 Gratt. (Va.) 950.

Encroachments.—The cases distinguish between a mere encroachment not interfering with the freedom of passage, and an obstruction hindering or materially interfering with the passage, the former being held not to be a nuisance. *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Godsell v. Fleming*, 59 Wis. 52; *Williams v. Fink*, 18 Wis. 265; *Howard v. Robbins*, 1 Lans. (N. Y.) 63. See also *Clark v. Lake St. Clair, etc., Ice Co.*, 24 Mich. 508; *Peckham v. Henderson*, 27 Barb. (N. Y.) 207.

Where A's fence encroached upon the road, but did not render the use of the highway entirely inconvenient or impossible, and B, while himself obstructing the highway by keeping a threshing-machine thereon, took down A's fence opposite the machine and caused a team to be driven across the field inclosed thereby, it was held, in an action of trespass to the close, that B could not defend on the ground that the fence encroached upon the highway. *Williams v. Fink*, 18 Wis. 265.

Where the trustees of the village of Watkins, proceeding in a manner directed by their charter, declared an encroachment on one of the village streets to be a nuisance, and the defendants, being thereupon deputed by them so to do, removed it, and in an action by the owner to recover damages for such removal the evidence did not establish a nuisance in fact, it was held that the defendants were not protected by the determination and direction of the trustees. *Howard v. Robbins*, 1 Lans. (N. Y.) 63.

If a party assumes that a building which is being moved through a public highway is a nuisance, and undertakes to abate it as such, he does so at the risk of being deemed a trespasser if he fails to establish the existence of the nuisance. *Graves v. Shattuck*, 35 N. H. 258, 69 Am. Dec. 536.

A company which undertakes, under a contract with a municipal corporation, to work a public improvement, such as laying a fire-alarm telegraph, has no right to invade the premises of an abutting proprietor and to cut off limbs of trees overhanging the sidewalk when such limbs do not obstruct the use of the sidewalk, or when the posts and wires could have been, with less inconvenience or with none, located elsewhere. *Tissot v. Great Southern Telephone, etc., Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248.

Dangerous Animals.—In *Perry v. Phipps*, 10 Ired. (N. Car.) 259, 51 Am. Dec. 387, it was held that a person cannot kill a dog in the owner's house or yard, upon the pretense that he is a nuisance, because he has at a former period chased or bitten some one else. Also in *Uhlein v. Cromack*, 109 Mass. 273, it was held that a person has no right to kill a dog simply because it is ferocious, so long as

it does not attack him or endanger his safety, being confined on the owner's premises.

The fact that a dog has a habitual disposition to drive off stock trespassing on its owner's land will not justify a person whose stock is so being driven off by it in killing the dog. In order to warrant him in doing this, the dog must be shown to be a nuisance. *Spray v. Ammerman*, 66 Ill. 309.

In *Franz v. Hilterbrand*, 45 Mo. 121, the plaintiff was the owner of two horses, sick with a contagious disease, which he kept upon his own premises. The defendants, thinking to prevent the spread of the disease, entered the plaintiff's premises and killed the horses, claiming that they had become a nuisance. It was held that their action was not justifiable. See further, in relation to the right to kill dangerous animals, *Marshall v. Blackshire*, 44 Iowa 475; *Clark v. Keliher*, 107 Mass. 406; *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339; *Bost v. Minguets*, 64 N. Car. 44; *Ladue v. Branch*, 42 Vt. 574.

1. Abatement must be of Existing Nuisance.—*Moffett v. Brewer*, 1 Greene (Iowa) 350; *Gates v. Blincoc*, 2 Dana (Ky.) 158, 26 Am. Dec. 440; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

The nuisance must exist at the time it is sought to be abated. If the thing was a nuisance ten years or five years since, and it has ceased to be such, it cannot be abated as a nuisance. *Peckham v. Henderson*, 27 Barb. (N. Y.) 210.

The fact that a dam has been a nuisance, and is likely to become so again, will not justify an abatement of the dam. *Gates v. Blincoc*, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

A nuisance cannot be abated, with or without legal process, if it has been discontinued and has not been renewed when proceedings are begun against it. *State v. Saunders* (N. H., 1889), 25 Atl. Rep. 588.

A nuisance must be actually subsisting, to the injury of the public or some individual, before any person should be suffered to resort to a remedy so critical, perilous, and extraordinary as that of his own will and power, which necessity alone indulges in cases of extremity or great emergency, and in which no ordinary remedy will be altogether effectual. The public peace should not be jeopardized by permitting individuals to redress their own wrongs when they might obtain adequate security and indemnity by a resort to any of the ordinary remedies in courts of justice. *Gates v. Blincoc*, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

If a person, having an intent to build a wall, lay the foundation, this may not be pulled down. *Norris v. Baker*, 1 Rolle 394. And again, in the same case: "Although boughs which hang over another's land may be cut, yet they cannot be cut merely for fear they will hereafter grow over." And again in *Rolle Abr.*, tit. "Nuisance": "A man cannot remove scaffolds, etc., for making buildings which will be a nuisance when finished."

any excess of abatement the party abating will be liable to an action.¹ Where

1. **Abatement must not be Excessive**—*England*.—*Cooper v. Marshall*, 1 Burr. 259; *Perry v. Fitzhowe*, 8 Q. B. 757, 55 E. C. L. 757; *Rex v. Pappineau*, 2 Stra. 688.

Alabama.—*Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

California.—*Grandona v. Lovdal*, 70 Cal. 163.

Colorado.—*Denver v. Mullen*, 7 Colo. 345.

Connecticut.—*Beardslee v. French*, 7 Conn. 125.

Illinois.—*Calef v. Thomas*, 81 Ill. 478.

Indiana.—*Reed v. Cheney*, 111 Ind. 387; *Indianapolis v. Miller*, 27 Ind. 394.

Iowa.—*Finley v. Hershey*, 41 Iowa 389; *Moffett v. Brewer*, 1 Greene (Iowa) 348.

Kentucky.—*Gates v. Blincoc*, 2 Dana (Ky.) 158, 26 Am. Dec. 440; *Gray v. Ayres*, 7 Dana (Ky.) 376, 32 Am. Dec. 107.

Maine.—*Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

Massachusetts.—*Com. v. Tolman*, 149 Mass. 235, 14 Am. St. Rep. 414.

Michigan.—*Shepard v. People*, 40 Mich. 487; *Welch v. Stowell*, 2 Dougl. (Mich.) 332.

New Hampshire.—*Graves v. Shattuck*, 35 N. H. 258, 69 Am. Dec. 536.

New Jersey.—*Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 251.

New York.—*Northrup v. Burrows*, 10 Abb. Pr. (N. Y. Supreme Ct.) 365; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Moody v. Niagara County*, 46 Barb. (N. Y.) 659; *Ely v. Niagara County*, 36 N. Y. 297; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397; *Howard v. Robbins*, 1 Lans. (N. Y.) 63.

North Carolina.—*State v. Parrott*, 71 N. Car. 311, 17 Am. Rep. 5.

Pennsylvania.—*Philiber v. Matson*, 14 Pa. St. 306; *Dyer v. Depui*, 5 Whart. (Pa.) 584; *Crosland v. Pottsville*, 126 Pa. St. 511.

Wisconsin.—*Williams v. Fink*, 18 Wis. 265.

In abating a nuisance no more injury must be done to the property than is absolutely necessary to effect the object. *Roberts v. Rose*, L. R. 1 Exch. 82; *State v. Moffett*, 1 Greene (Iowa) 247.

Instances.—An owner of land in abating a private nuisance, as shocks of corn left encumbering the ground by a tenant, is bound to use reasonable care to avoid unnecessary injury. He has no right to destroy the corn unless there is no other reasonable way of enjoying the land. *Calef v. Thomas*, 81 Ill. 478.

In *Howard v. Robbins*, 1 Lans. (N. Y.) 63, it was held that where an encroachment in a highway constitutes a nuisance, it may be abated to that degree only which will enable the public to enjoy the right of way.

A party exercising the right to abate a nuisance can remove or take away only so much as constitutes the nuisance. Thus if a person entitled to raise water to a certain height by means of a dam, raises it higher than he is entitled to, the person injured may reduce the dam to the proper height, but has

not the right to demolish it. *Dyer v. Depui*, 5 Whart. (Pa.) 584.

M. was authorized by the county court to erect a tollgate on a turnpike road in the county, and take toll thereon at a fixed rate, he being bound to keep the road in order. R. and B. came with their teams to the gate, which they found shut and fastened. They demanded that the gate should be opened, and the gatekeeper demanded the usual tolls before opening the gate. R. and B. refused to pay the tolls, and the gatekeeper refused to open the gate. Thereupon R. and B. broke down and destroyed the gate, and passed through without paying toll. It was held that if the tollgate was such an obstruction on the highway as could be regarded a nuisance, R. and B. could be justified only in removing it peaceably, not in destroying it. *Smart v. Com.*, 27 Gratt. (Va.) 950.

In *Cooper v. Marshall*, 1 Burr. 259, it was decided that a commoner cannot destroy the lord's conies and their burrows because they are in excess. See also *Rex v. Pappineau*, 2 Stra. 688.

When the nuisance consists in the wrongful use of a building harmless in itself, the remedy is to stop the use and not to destroy the building. Thus, where the defendants tore down a building in which a business, offensive from its smells, was carried on, this method of abatement was held unjustifiable. *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711.

Where a house was kept as a place of public prostitution, it was held that the remedy was to stop such use, and not to demolish the building. *Moody v. Niagara County*, 46 Barb. (N. Y.) 660; *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Gray v. Ayres*, 7 Dana (Ky.) 376, 32 Am. Dec. 107. See also *Colchester v. Brooke*, 7 Q. B. 339; *Brown v. Perkins*, 12 Gray (Mass.) 89; *Earp v. Lee*, 71 Ill. 193; *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497. Compare *Van Wormer v. Albany*, 15 Wend. (N. Y.) 262; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397, where it was held that the defendants were justified in destroying the building, on the ground that it was impossible otherwise to remove the cause of disease.

To abate a nuisance occasioned by a pond of water, the injured parties have not the right to fill up the bed of water, but may remove the cause rendering the water impure. *Finley v. Hershey*, 41 Iowa 389.

Where a person who is entitled to a limited right exercises it in excess, so as to produce a nuisance, this may be abated to the extent of the excess. *Crosland v. Pottsville*, 126 Pa. St. 511; *Taggart v. Com.*, 21 Pa. St. 527.

But if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be stopped entirely until means have been taken to reduce it within its proper limits. Thus, where a person, a lot-owner in a borough, gave to the owner of a lot across the street a license to

there are more ways than one of abating a nuisance, he must choose that which is the least mischievous to the wrongdoer;¹ but where a particular method would work an injury to some innocent third person, or to the public, such method cannot be justified, and it may be necessary to abate the nuisance in a manner more onerous to the wrongdoer.² The right must always be so exercised as not to disturb the public peace.³

d. NOTICE.—The party having the right to abate must give reasonable notice of his intention to do so, unless in the case of an emergency requiring immediate action, or, perhaps, in the case of positive wrong or gross negligence on the part of the person maintaining the nuisance.⁴

carry off surface water by a covered drain-pipe passing under the street and through his lot to a stream, and the licensee turned into the drain foul matter from his cesspool, it was held that the person granting the license was justified in disconnecting the drain and in stopping it at his curb line. *Crosland v. Pottsville*, 126 Pa. St. 511.

In *Beard v. Murphy*, 37 Vt. 101, 86 Am. Dec. 693, it was held that where an upper owner mingled slops and filthy water with the surface water that flowed from his premises to those of a lower owner, the owner of the servient estate was justified in building an embankment that altogether prevented the surface water from coming upon his land.

In *Pilcher v. Hart*, 1 Humph. (Tenn.) 524, it was held that while a man may not willfully destroy the property of another even though it be a nuisance, yet he should not be held to so strict an accountability for the unintentional destruction of such property as for a like destruction of property in the lawful use and possession of its owner.

1. Choice of Modes of Abatement.—*Roberts v. Rose*, L. R. 1 Exch. 82.

Where the water is thrown back upon the land of a riparian owner by a dam erected below him, the proper mode of abating it is by lowering the level of the dam, if there be a prescriptive right for it, to the height authorized by such prescription, or, in the absence of any prescription, to such a height as will stop the reflux of the water at his boundary line; but he cannot divert the water from the stream, to the injury of the proprietor below him, by cutting a ditch on his own land. *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731.

2. Roberts v. Rose, L. R. 1 Exch. 82; *Amick v. Tharp*, 13 Gratt. (Va.) 564, 67 Am. Dec. 787.

The plaintiffs, by parol license from G. and from the defendant, constructed a watercourse, and thereby discharged water from their own mines across the land of G., thence across the defendant's land. The defendant revoked his license, and upon the refusal of the plaintiffs to discontinue using the watercourse, he entered upon G.'s land at a spot near the boundary between it and the land of the plaintiffs, and obstructed the watercourse. Had the defendant stopped the watercourse on his own land, he would have done less damage to the plaintiffs than was actually done, but more damage to G., and possibly some damage to the public. It was held that the

watercourse was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after revocation of the license were wrongdoers, was subordinate to the convenience of innocent third persons and the public. *Roberts v. Rose*, L. R. 1 Exch. 82.

Where the city authorities changed the channel of a drain so as to throw the water flowing along it upon the lot of G. lying below, he could not obstruct the channel so as to cause the water to flow back upon and injure the lot of M. lying above his. *Amick v. Tharp*, 13 Gratt. (Va.) 564, 67 Am. Dec. 787.

3. Public Peace must not be Disturbed.—*Rex v. Rosewell*, 2 Salk. 459; *Perry v. Fitzhowe*, 8 Q. B. 757, 55 E. C. L. 757; *Colchester v. Brooke*, 7 Q. B. 339; *Stiles v. Laird*, 5 Cal. 123, 63 Am. Dec. 112; *Calef v. Thomas*, 81 Ill. 478; *Earp v. Lee*, 71 Ill. 193; *Baldwin v. Smith*, 82 Ill. 162; *Day v. Day*, 4 Md. 262; *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Rung v. Shoneberger*, 2 Watts (Pa.) 23, 26 Am. Dec. 95; *Field v. Stokley*, 99 Pa. St. 309, 44 Am. Rep. 109; *Crosland v. Pottsville*, 126 Pa. St. 511; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242; *Mohr v. Gault*, 10 Wis. 513, 78 Am. Dec. 687.

In *Perry v. Fitzhowe*, 8 Q. B. 757, 55 E. C. L. 757, it was held that if a house is occupied, even though it has itself become a nuisance, the nuisance cannot be abated, for the reason that an abatement cannot, under such circumstances, be made without involving a breach of the peace. Compare *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397.

In *Burling v. Read*, 11 Q. B. 904, this doctrine was held to be true in cases where no notice or request to remove existed; but it was further held that where reasonable notice had been given, and the person occupying the house had neglected to remove, the house might be torn down while he was actually in it. See also *Davies v. Williams*, 16 Q. B. 546; *Jones v. Jones*, 1 H. & C. 1.

4. Reasonable Notice—When Required.—*Penruddock's Case*, 5 Coke 101; *Perry v. Fitzhowe*, 8 Q. B. 757, 55 E. C. L. 757; *Burling v. Read*, 11 Q. B. 904; *Davies v. Williams*, 16 Q. B. 546; *Jones v. Williams*, 11 M. & W. 181; *Harvey v. DeWoody*, 18 Ark. 252; *Swett v. Sprague*, 55 Me. 190; *State v. Parrott*, 71 N. Car. 311, 17 Am. Rep. 5; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397; *Crosland v. Pottsville*, 126 Pa. St. 511. Compare *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 251.

2. By Municipal Corporations.—*a. SOURCE OF POWER.*—A municipal corporation derives its control over nuisances from the legislature creating it.¹ This power is usually conferred specifically in the act of incorporation;² but in the absence of such specific authority, it will be implied from the general power to secure and promote the public health, safety, and convenience.³

The alienee of property upon which a nuisance exists at the time of his purchase has a right to a reasonable notice, on the ground that he merely permits the nuisance. *Penruddock's Case*, 5 Coke 101; *Jones v. Williams*, 11 M. & W. 176.

Parke, B., commenting on this question in *Jones v. Williams*, 11 M. & W. 176, says that it may be necessary in some cases, where there is such immediate danger to life or health as to render it unsafe to wait, to remove without notice.

When Notice is Necessary, notice of the identical nuisance must be given. Thus, where the use of a lot sheltered by a fence constituted a nuisance, it was held to be insufficient to give notice of nuisance and an order to remove the fence. *Verder v. Ellsworth*, 59 Vt. 354.

Nuisances from Omission.—In *Lonsdale v. Nelson*, 2 B. & C. 302, *Best, J.*, said: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice."

Where Branches of a Tree Overhang a right of way, constituting a nuisance, a railroad company may remove the overhanging parts without giving notice, when the adjoining owner is aware that the company claims they are a nuisance, and desires their removal, which he refuses. The fact that the company offered him money to remove them gives him no right of further notice. *Hickey v. Michigan Cent. R. Co.*, 96 Mich. 498.

1. Source of Municipal Power over Nuisances.—*State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *St. Paul v. Gilfillan*, 36 Minn. 298; *Clark v. Syracuse*, 13 Barb. (N. Y.) 33; *People v. Albany*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; *Breninger v. Belvidere*, 44 N. J. L. 350; *State v. Williams*, 11 S. Car. 288; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242; *Pye v. Peterson*, 45 Tex. 312.

"All power a municipal corporation created by special or general laws may exercise emanates from the state creating it." *Scott, J.*, in *Harmon v. Chicago*, 110 Ill. 408, 51 Am. Rep. 698.

There are cases which are in seeming conflict with the proposition as declared in the text. Thus, in *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 850, it was said by the court: "It is settled, without dissent, that without a special grant of authority public corporations may, as a common-law power, cause the abatement of nuisances." See also *Ronayne v. Loranger*, 66 Mich. 373.

But *Mr. Wood*, in his work on Nuisances, § 743, explains this apparent conflict by saying, that when the city authorities, with no authority except the common law, proceed to abate a nuisance, they are justified, not because they are officials of the city, but because they are citizens injured by the thing abated. See *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397; *Van Wormer v. Albany*, 15 Wend. (N. Y.) 262; *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 255.

2. How Conferred.—*Dillon Mun. Corp.* (4th ed.), § 379.

One of the powers most commonly conferred upon municipal corporations is that to declare and to abate nuisances. The general authority is commonly given to the common council or other legislative body; but so far as the nuisances are supposed to be injurious to the public health, jurisdiction in respect to them is likely to be conferred upon boards of health. Where nuisances are spoken of in statutes delegating this authority, public nuisances must be understood as intended. *Cooley Const. Lim.* (6th ed.) p. 741, note.

3. When Implied.—*Dillon Mun. Corp.* (4th ed.), § 379; *Ferguson v. Selma*, 43 Ala. 400; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; *Hellen v. Noe*, 3 Ired. (N. Car.) 493; *State v. Williams*, 11 S. Car. 288. See also *Louisville City R. Co. v. Louisville*, 71 Ky. 416; *Milne v. Davidson*, 5 Martin, N. S. (La.) 409, 16 Am. Dec. 190; *Kennedy v. Phelps*, 10 La. Ann. 227; *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388; *Childress v. Nashville*, 3 Sneed (Tenn.) 347.

Under the authority to regulate the police of the city or village, and pass and enforce all necessary police ordinances, it was held that the village of Chebanse had the power to prohibit the keeping open of places of business on Sundays. *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857.

In delivering the opinion of the court in *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421, *Wilde, J.*, said: "The mayor and aldermen are fully empowered to adopt measures of police for the purpose of preserving the health and promoting the com-

b. EXTENT OF POWER.—The extent of the control of a municipal corporation over nuisances is measured by the powers conferred by its charter and the general laws.¹ It has been claimed that the right of a municipality to abate nuisances is absolute; that since many things not nuisances *per se* may become so, under certain circumstances, a declaration by the proper authority that such is the fact should be conclusive.² But this doctrine has

fort, convenience, and general welfare of the inhabitants within the city. Among these powers no one is more important than that for the preservation of the public health. It is not only the right, but the imperative duty, of the city government to watch over the health of the citizens, and to remove every nuisance, so far as they may be able, which may endanger it."

1. *Extent of Municipal Control.*—*Nevada v. Hutchins*, 59 Iowa 506; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; *Weil v. Ricord*, 24 N. J. Eq. 169; *Breninger v. Belvidere*, 44 N. J. L. 350; *People v. Albany*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; *Collins v. Hatch*, 18 Ohio 525; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.

The power to declare and provide for the removal of nuisances does not prevent the doing of an act which is of itself a nuisance. It is confined to stationary nuisances such as can be removed. *State v. Jersey City*, 29 N. J. L. 170.

Within the power granted, the degree of necessity or propriety of the exercise of the power of abatement rests exclusively with the proper corporate authorities; but in all cases the power exercised, or attempted to be exercised, must depend upon the nature and extent of the power granted; and whenever the question of the existence or limit of the power is raised, it becomes the plain duty of the court to see that the corporate authorities do not transcend the authority delegated to them. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 205.

All the authority of a municipal corporation being derived from its charter, it is evident that its power cannot be enlarged, diminished, or varied by the ordinances or police of the corporation. *Breninger v. Belvidere*, 44 N. J. L. 350.

In *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242, the defendant purchased a livery stable belonging to and on the premises of the plaintiff, under a sale by authority of an ordinance of the town council of Bastrop declaring it a nuisance and ordering its sale and removal. The defendant purchased the building and destroyed it, and removed the materials. In an action of trespass therefor the defendant was justified under the ordinance, but Caldwell, J., in giving the opinion of the court, said: "The question is well settled that a corporation can exercise no power not clearly delegated in the act of incorporation, or arising by necessary implication out of some delegated power. An ordinance, therefore, not warranted by the charter, is void, and can furnish no justification to persons acting under its authority."

The corporation of the city of Albany has no right under its corporate powers granted by charter, or by special acts of the legislature, to remove the bulkhead at the foot of the basin connecting the Erie canal with the Hudson river; and where a Court of General Sessions instructed a jury that the corporation was bound to abate the nuisance arising from the basin being foul, even if in doing so it should be necessary to cut down or remove the bulkhead, and a verdict was found accordingly, the judgment entered upon such judgment was reversed by the Supreme Court upon a writ of error. *People v. Albany*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

The charter of the city of St. Paul confers no power upon the city council to declare what acts or omissions shall constitute a public nuisance. Hence an ordinance passed, declaring the emission of dense smoke from smokestacks and chimneys a public nuisance, is unauthorized and void. *St. Paul v. Gilfillan*, 36 Minn. 298.

In *State v. Hammond*, 40 Minn. 43, it was held that part of an ordinance of the city of Minneapolis, which imposes a penalty upon any person who commits any act of lewdness or indecency within the limits of the city, is void, because it is in excess of the power vested in the city council by the city charter.

2. *Effect of City's Determination.*—*Green v. Savannah*, 6 Ga. 1; *Kennedy v. Board of Health*, 2 Pa. St. 366; *Wistar v. Addicks*, 9 Phila. (Pa.) 145. See also *Dingley v. Boston*, 100 Mass. 546; *St. Louis v. Stern*, 3 Mo. App. 48.

In *Kennedy v. Board of Health*, 2 Pa. St. 366, it was shown that the board of health was by legislative enactment authorized to cause all offensive or putrid substances, and all nuisances which in their opinion might have a tendency to endanger the health of the citizens, to be removed, etc. Under this authority they declared that a certain lot was a nuisance because filled with stagnant water, and proceeded to remove the nuisance by causing the lot to be filled in. The proprietor, upon being proceeded against for the expense incurred by the filling, offered to prove the cause of the alleged nuisance. The refusal of the trial court to hear this evidence was assigned as error in the appellate court. The court, in delivering the opinion on this point, said: "It is not easy to perceive the relevancy of such evidence, unless it was intended to show by it that there was in reality no nuisance to be removed. But this latter could not be proved, for the Act of Assembly on the subject, as recited above, makes the order of the board conclusive that the nuisance did exist, and expressly enacts that the fact of the nuisance shall not be inquired

been repudiated, and it is well settled that municipal authorities cannot declare a thing a nuisance arbitrarily, or destroy valuable property which was lawfully erected or created, until this fact has been ascertained lawfully; and further, that where the power to declare what shall be a nuisance has been conferred expressly, such power is inoperative and void unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance and in defiance of it; and except in cases of emergency, or where the use is purely a nuisance, that fact should be established first by judicial adjudication.¹ It is

into. The board decided that the nuisance existed on the lot of the defendant, and the fact being so determined, it made no difference from what cause it arose. It was necessary and proper that it should be removed. The evidence was therefore properly rejected."

In *Green v. Savannah*, 6 Ga. 1, the corporate authorities were empowered by their charter to pass such laws and ordinances as they might consider fit and proper to remove nuisances or causes of disease which might affect the citizens of Savannah or in any wise injure their health. An ordinance was passed under this authority prohibiting the cultivation of rice within the corporate limits. It was held that this was in effect a conclusive adjudication that rice growing, within the corporate jurisdiction, was in fact injurious to the public health.

In *St. Louis v. Stern*, 3 Mc App. 48, the above cases were cited, apparently with approval.

In *Alabama* it has been held that the action of a city in declaring a certain thing a nuisance is *prima facie* evidence of the fact. *Montgomery v. Hutchinson*, 13 Ala. 573.

The board of health of the town of Kirkwood, acting within the scope of its powers, duly adjudged a drain or sewer pipe which discharged sewage from the premises of the defendant into a public street of that town to be a nuisance, and thereon, pursuant to the ordinances of the town, a proceeding was instituted before the recorder of the town, against the defendant, for a failure to abate the nuisance within a specified time. It was held that in such a proceeding before the recorder, the adjudication of the board of health was *prima facie* evidence of the existence of a nuisance. *Kirkwood v. Cairns*, 44 Mo. App. 89.

1. *England*.—*Wanstead Local Board v. Hill*, 13 C. B., N. S. 479, 106 E. C. L. 477; *Everett v. Grapes*, 3 L. T., N. S. 669.

United States.—*Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *Hennessy v. St. Paul*, 37 Fed. Rep. 565; *In re Sam Kee*, 31 Fed. Rep. 680.

Arkansas.—*McKibbin v. Fort Smith*, 35 Ark. 352; *Ward v. Little Rock*, 41 Ark. 526, 48 Am. Rep. 46; *Arkadelphia v. Clark* (Ark., 1889), 27 Am. & Eng. Corp. Cas. 586.

Colorado.—*Denver v. Mullen*, 7 Colo. 345, 4 Am. & Eng. Corp. Cas. 304.

Florida.—*Orlando v. Pragg* (Fla., 1893), 12 So. Rep. 368.

Georgia.—*Americus v. Mitchell* (Ga., 1888), 5 S. E. Rep. 201.

Illinois.—*Chicago, etc., R. Co. v. Joliet*, 79 Ill. 25; *Lake View v. Letz*, 44 Ill. 81; *Des*

Plaines v. Poyer, 123 Ill. 348, 44 Am. Rep. 788; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301.

Indiana.—*Evansville v. Martin*, 41 Ind. 145.

Iowa.—*Everett v. Council Bluffs*, 46 Iowa 66; *Cole v. Kegler*, 64 Iowa 59, 5 Am. & Eng. Corp. Cas. 361.

Kentucky.—*Joyce v. Woods*, 78 Ky. 386.

Louisiana.—*Monroe v. Gerspach*, 33 La. Ann. 1011.

Maryland.—*Vogt v. Baltimore* (Md., 1884), 4 Am. & Eng. Corp. Cas. 329; *Glenn v. Baltimore*, 5 Gill & J. (Md.) 429; *State v. Mott*, 61 Md. 297, 4 Am. & Eng. Corp. Cas. 334, 48 Am. Rep. 105.

Massachusetts.—*Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650.

Michigan.—*Everett v. Marquette*, 53 Mich. 450; *Wreford v. People*, 14 Mich. 41; *Jackson v. People*, 9 Mich. 112, 77 Am. Dec. 491.

Minnesota.—*St. Paul v. Gilfillan*, 36 Minn. 298.

Missouri.—*River Rendering Co. v. Behr*, 77 Mo. 91; *Allison v. Richmond*, 51 Mo. App. 133.

Mississippi.—*Pieri v. Shieldsboro*, 42 Miss. 493; *Lake v. Aberdeen*, 57 Miss. 260; *Ex p. O'Leary*, 65 Miss. 80.

New Jersey.—*Weil v. Ricord*, 24 N. J. Eq. 169; *Hutton v. Camden*, 39 N. J. L. 132; *State v. Jersey City*, 29 N. J. L. 170.

New York.—*Howard v. Robbins*, 1 Lans. (N. Y.) 63; *Underwood v. Green*, 42 N. Y. 140; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Boom v. Utica*, 2 Barb. (N. Y.) 104; *Lawton v. Steele*, 119 N. Y. 227, 16 Am. St. Rep. 813; *People v. Board of Health*, 140 N. Y. 1.

Ohio.—*Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

South Carolina.—*Crosby v. Warren*, 1 Rich. (S. Car.) 385.

Tennessee.—*McCrowell v. Bristol*, 5 Lea (Tenn.) 685.

Texas.—*Pye v. Peterson*, 45 Tex. 312; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.

West Virginia.—*Teass v. St. Albans*, 38 W. Va. 1.

See also *Bell v. Rochester* (Supreme Ct.), 11 N. Y. Supp. 305.

In *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, Miller, J., said: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the

said also, however,—and the statement is not irreconcilable with the previous proposition,—that where a municipal corporation is authorized by its charter

uncontrolled will of the temporary local authorities."

The legislature can neither declare nor authorize a municipality to declare a building a nuisance because it obstructs a view of the sea or intercepts the breezes therefrom. *Quintine v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 16 Am. & Eng. Corp. Cas. 50.

A City Cannot Declare the Keeping of Bees to be a nuisance without determining whether it is so or not. *Arkadelphia v. Clark* (Ark., 1889), 27 Am. & Eng. Corp. Cas. 586.

In *St. Louis v. Shnuckelberg*, 7 Mo. App. 536, where a dairy had been declared a nuisance by the board of health of the city of St. Louis and ordered to be abated, under power to declare and abate nuisances granted by the city charter, the person violating the order of the board to abate may show that the thing declared to be a nuisance is not so in fact, the action of the board of health in such cases not being conclusive. In this case Hayden, J., delivering the opinion of the court, says: "The question here is merely whether, when the thing condemned as a nuisance is not such by any law or ordinance, the decision of the board, when brought before a court, prevents all inquiry into the fact of a nuisance. In such cases we hold that their decision is not conclusive."

A clause in a charter giving the city power to declare what shall be a nuisance, and to remove the same, does not mean that a city council, by mere resolution or motion, may declare any particular thing a nuisance which has not theretofore been pronounced to be such by law or so adjudged by judicial determination. Only nuisances *per se* may be removed or abated summarily by the acts of individuals or by the public. *Denver v. Mullen*, 7 Colo. 345, 4 Am. & Eng. Corp. Cas. 304.

Arkansas Stats. March 9, 1875, §§ 12, 42, do not authorize a city council to condemn as a nuisance any act or thing which in its nature, situation, or use does not come within the legal notion of a nuisance. *Ward v. Little Rock*, 41 Ark. 526, 8 Am. & Eng. Corp. Cas. 397, 48 Am. Rep. 46.

Limekilns.—Under a power to remove nuisances and regulate the places where offensive trades are carried on, the city may not prohibit the operation of limekilns. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105.

Laundries.—The city ordinance which makes it an offense to keep a laundry, wherein clothes are cleansed for hire, within the limits of the largest part of the city, without regard to the character of the structure or the appliances used for the purpose, or the way in which the business is carried on, is unconstitutional and void. *In re Sam Kee*, 31 Fed. Rep. 680.

Dead Animals.—The seizure of dead hogs by a city inspector, under an ordinance directing that all dead animals be forthwith removed beyond the city limits, so as most effectually to secure the public health, is not warranted

by the mere proof that they died by suffocation, and that animals so dying were sometimes taken to market and sold for food; but it must appear that they were, or would become, a nuisance. *Underwood v. Green*, 42 N. Y. 140. See *River Rendering Co. v. Behr*, 77 Mo. 91. Compare *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Louisville v. Wible*, 84 Ky. 290.

Person Sick of Infectious Disease.—Under the provision, in the charter of the city of Utica, authorizing the common council to make and publish ordinances, by-laws, etc., for the purpose of abating and removing nuisances, they have no power to direct the removal of a person sick of an infectious or contagious disease from one place to another without his consent. A person sick of an infectious disease in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. *Boom v. Utica*, 2 Barb. (N. Y.) 104.

Use Authorized by Common Law or Statute.—Nothing is to be understood to be a nuisance which is authorized either by the common law or by statute. *Pittsburgh, etc., R. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73; *Chicago, etc., R. Co. v. Joliet*, 79 Ill. 25; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32. Thus, where a city declared the occupation by a railroad company of certain grounds, where it had been lawfully located, to be a nuisance, it was held that the declaration was a mere nullity, because in conflict with the superior law. *Chicago, etc., R. Co. v. Joliet*, 79 Ill. 25.

The Use of Steam Engines to Draw Trains of cars over the street railroad laid down by the Augusta and Somerville Railroad Company through Washington street, in the city of Augusta, is expressly authorized by acts of the legislature of Georgia and by the contracts and ordinances of the city of Augusta, and, being so authorized, the running of the said trains cannot be abated as a public nuisance, under the Revised Code of that state, even though such use tend to the immediate annoyance of the citizens in general. *Vason v. South Carolina R. Co.*, 42 Ga. 631.

A City cannot Arbitrarily, by Ordinance, declare property a nuisance and destroy it, unless it is in fact a nuisance. When it is in fact not a nuisance, no authority to remove it is derived from the ordinance declaring it to be such. *Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *Denver v. Mullen*, 7 Colo. 345, 4 Am. & Eng. Corp. Cas. 304; *Cole v. Kegler*, 64 Iowa 59; *Chicago v. Laffin*, 49 Ill. 172; *New Orleans v. St. Louis Church*, 11 La. Ann. 244; *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Wreford v. People*, 14 Mich. 41; *Pieri v. Shieldsboro*, 42 Miss. 493; *Allison v. Richmond*, 51 Mo. App. 133; *State v. Jersey City*, 29 N. J. L. 170; *Babcock v. Buffalo*, 56 N. Y. 268; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32.

Public Picnics and Public Dances are not in their nature nuisances. They are not in the list of common-law nuisances enumerated in

to remove nuisances, generally speaking, the only restriction upon that right is, that what is done shall be for the public health, safety, and conven-

the text-books. That the manner of conducting them may be productive of annoyance and injury to the public, will only authorize an ordinance directed against such manner of conduct. The fact that a privilege may be abused is no reason why it should be denied. *Desplaines v. Boyer*, 123 Ill. 348.

Slaughter-houses.—An ordinance of the city of New Orleans described the place where slaughter-houses must be located. Relying upon this designation of such place, the complainants secured land within its limits and proceeded thereon to erect houses and make other improvements for slaughtering purposes; the city afterwards amended the ordinances by making it unlawful to maintain slaughter-houses in the prescribed place, except permission be granted by the council of the city of New Orleans, and proceeded to prevent the complainants, who had no such permission, from carrying on their slaughtering business. It was held that the amendment was unconstitutional, because it would, in effect, deny the complainants the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. *Barthel v. New Orleans*, 24 Fed. Rep. 563, 9 Am. & Eng. Corp. Cas. 509.

Nuisance Created by Municipality.—Under a city charter authorizing the city council, whenever the health of the city required it, to order any lot to be filled by the owner thereof, or, on default by him, to fill it itself and charge the expense to him, it was held that the city could not require the filling of a lot because of a nuisance created by itself. *Hannibal v. Richards*, 82 Mo. 330. And see *Chicago v. Laffin*, 49 Ill. 172; *Weeks v. Milwaukee*, 10 Wis. 270.

Creating New Class of Offenses.—The following cases support the doctrine that it is competent for the legislature to confer upon a municipality the authority to supersede the general law in respect to those matters which are found to be injurious in their locality, and to create, as to them, a new class of public offenses:

Georgia.—*Green v. Savannah*, 6 Ga. 1.

Illinois.—*Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857; *Harbaugh v. Monmouth*, 74 Ill. 367; *Kettering v. Jacksonville*, 50 Ill. 39; *Goddard v. Jacksonville*, 15 Ill. 589; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Harmison v. Lewiston*, 46 Ill. App. 164.

Louisiana.—*Milne v. Davidson*, 5 Martin, N. S. (La.) 409, 16 Am. Dec. 189; *Kennedy v. Phelps*, 10 La. Ann. 227.

New York.—Metropolitan Board of Health v. *Heister*, 37 N. Y. 661.

North Carolina.—*Hellen v. Noe*, 3 Ired. (N. Car.) 493; *Whitfield v. Longest*, 6 Ired. (N. Car.) 271.

Pennsylvania.—*Kennedy v. Board of Health*, 2 Pa. St. 366. See also *Tourne v. Lee*, 8 Martin, N. S. (La.) 548, 20 Am. Dec. 260.

Under its charter power to prevent and re-

move all nuisances, it was held that a city had power to declare to be nuisances all steam grist-mills, saw-mills, or other machinery contained in buildings wholly or in part of wood, which arrangements, by reason of the defect or dilapidation of the building, the defective construction of the machinery, the worn-out condition of the boiler, or any other causes which are, or shall hereafter become, dangerous to persons or property. *Green v. Lake*, 60 Miss. 451.

Steam as Motive-power.—In *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788, it was held that, under the authority of a charter giving the power to define and declare what shall be deemed a nuisance and to abate the same, a municipal corporation might pass an ordinance declaring the use of steam as a motive-power to propel any street-car or other vehicle upon or along any street, etc., in the town, to be a nuisance, in the absence of any legislative grant authorizing it. In delivering the opinion of the court in this case, Miller, J., said: "Town authorities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. The adoption of such an ordinance would not be a legitimate exercise of the power granted, but, on the contrary, would be an abuse of it. But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question." The doctrine in this case was followed in *Harmison v. Lewiston*, 46 Ill. App. 164.

Dense Smoke.—In *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698, it was held that where a city was authorized to declare what should be a nuisance, and to abate the same, an ordinance declaring dense smoke emitted from the smokestack of any boat or locomotive or from any chimney of any building within the corporate limits, to be a nuisance, was valid and enforceable.

In *St. Paul v. Gilfillan*, 36 Minn. 298, where the charter of the city of St. Paul conferred no power to declare what should be nuisances, it was held that an ordinance declaring the emission of dense smoke from smokestacks and chimneys a public nuisance was unauthorized and void.

Hogs Running at Large.—Under the power to make ordinances for the removal of public nuisances, and also such necessary rules as may tend to the advantage, improvement, and good government of the town not inconsistent with the laws and constitution of the state, it was held that a municipal corporation may pass an ordinance declaring the running at large of hogs in the streets of the town a nuisance which may be abated. *Hellen v. Noe*, 3 Ired. (N. Car.) 493; *Whit-*

ience.¹ But where the objectionable thing or property is clearly a nuisance *per se*, the power of the municipality to abate it is unquestioned.² An injunc-

field *v. Longest*, 6 Ired. (N. Car.) 271. See also *Tourne v. Lee*, 8 Martin, N. S. (La.) 548, 20 Am. Dec. 260.

Where an incorporated town was authorized by the legislature to declare what should be nuisances, it was held that under this power an ordinance declaring that swine running at large were a nuisance, and providing for the abatement thereof, was valid. *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201.

Keeping Places of Business Open on Sunday.—Under the power to regulate the police of the city or village, and pass and enforce all necessary police regulations, a municipal corporation may pass an ordinance prohibiting persons from keeping their places of business open on Sunday. *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857.

Private Hospital.—Under the authority to make and pass such by-laws as shall be deemed necessary to maintain the cleanliness and salubrity of the city, it was held that a municipal corporation had the power to pass an ordinance prohibiting the erection of a private hospital. *Milne v. Davidson*, 5 Martin, N. S. (La.) 409, 16 Am. Dec. 189. Porter, J., in delivering the opinion in this case, said: "The authority of the city council to make the regulation complained of cannot be tested by the principles of the common law in relation to nuisances. No such guide is given to them by the charter. No such limit can be inferred from the motives which we must suppose induced such a grant of power, nor from the language by which it is conferred. The police of cities requires many regulations which grow out of their situation, their climates, and their population; and many things which would not amount to a nuisance at common law might be hurtful here."

Spirituuous Liquors.—Under proper legislation a municipal corporation may make the sale of spirituuous liquors within its jurisdiction a nuisance. *Goddard v. Jacksonville*, 15 Ill. 589; *Kettering v. Jacksonville*, 50 Ill. 39; *Harbaugh v. Monmouth*, 74 Ill. 367.

Smoking in Street-cars.—In *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, it was held that the city of New Orleans had the power to adopt an ordinance prohibiting smoking in street-cars as a nuisance.

Wooden Buildings within Certain Limits.—A wooden building is not in itself a nuisance, but it may become so when it injures surrounding property; and a municipal corporation may pass an ordinance providing for the summary removal of such building. *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830. See *Miller v. Sergeant* (Ind. App., 1894), 37 N. E. Rep. 418. Compare *Pye v. Peterson*, 45 Tex. 312.

Building Erected in Defiance of Ordinance.—Where an ordinance was passed establishing fire limits and determining the kinds of buildings which might be erected therein, and afterward, and in defiance of such ordinance,

a wooden building was erected within the limits, it was held that such building was a nuisance *per se* under the circumstances, and that it might be summarily abated. *Miller v. Sergeant* (Ind. App., 1894), 37 N. E. Rep. 418. See *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830.

Cases of Necessity.—Under the exercise of the police power, it may be conceded that municipalities can declare and abate nuisances in case of necessity, without citation and without adjudication as to whether there is in fact a nuisance. *Joyce v. Woods*, 78 Ky. 386.

1. *Alabama.*—*Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441.

Connecticut.—*Peck v. Lockwood*, 5 Day (Conn.) 22.

Georgia.—*Williams v. Augusta*, 4 Ga. 509.

Illinois.—*Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *McPherson v. Chebanse*, 114 Ill. 51, 55 Am. Rep. 857; *Lake View v. Letz*, 44 Ill. 81.

Louisiana.—*State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388.

Maryland.—*Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239.

Massachusetts.—*Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Dingley v. Boston*, 100 Mass. 545.

Minnesota.—*St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278.

Pennsylvania.—*Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

Tennessee.—*Whyte v. Nashville*, 2 Swan (Tenn.) 364.

Compare with the above *Lake v. Aberdeen*, 57 Miss. 260; *People v. Albany*, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

2. **Nuisances Per Se.**—In *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788, the court said: "There are many things which courts, without proof, will declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house or other obstruction, in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject, declaring such obstructions nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show that the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance."

Bowling Alley.—In *Tanner v. Albion*, 5 Hill (N. Y.) 121, it was held that a bowling alley kept for gain or hire is a public nuisance at common law, and that, therefore, under a village charter authorizing the trustees to pass by-laws relating to nuisances, they have the power to make a by-law prohibiting the keeping of bowling alleys for hire.

In *Updike v. Campbell*, 4 E. D. Smith (N. Y.) 570, the above case was referred to as settling the doctrine, so far as that court was concerned, that a bowling alley kept for gain is

tion will lie restraining a city from interference with the use of property which has not been lawfully ascertained and declared to be a nuisance.¹

c. **METHOD OF ABATEMENT.**—The legislature has power to invest municipal corporations with authority to abate public nuisances without resorting to legal proceedings.² The municipality may take whatever means are necessary to abate a nuisance, even though such means involve the destruction of the property.³ But a city has no power to appropriate private property without

a nuisance; but some doubt was expressed as to the correctness of the decision. *Compare* State v. Hall, 32 N. J. L. 158; People v. Judges, 8 Cow. (N. Y.) 129.

Hogpen in City.—In *St. Louis v. Stern*, 3 Mo. App. 48, the court held that where a nuisance in a city is a nuisance *per se*—in that particular case a hogpen in the city of St. Louis—the action of the board of health of the city, within the scope of its granted powers in condemning it as a nuisance, is conclusive.

Slaughter-house in City.—It has been held that a slaughter-house in a city is a nuisance *per se*, and may be abated by municipal corporations without judicial determination. *Harrison v. Lewiston*, 46 Ill. App. 164. See also *Metropolitan Board of Health v. Heister*, 37 N. Y. 661.

Floating Storehouse on Public Rivers.—Where an individual constructed, without grant, a floating storehouse, or vessel for receiving and delivering goods and merchandise, in a public river, it was held that he was guilty of maintaining a public nuisance which a corporation might abate summarily. *Hart v. Albany*, 9 Wend. (N. Y.) 571. See *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351.

Houses of Ill Fame are nuisances which municipal corporations have the authority, usually expressly conferred, to suppress by all proper means, even to forbidding the use of property for this purpose. *Rogers v. People*, 9 Colo. 450, 59 Am. Rep. 146; *State v. Williams*, 11 S. Car. 288; *State v. De Bar*, 58 Mo. 395; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Childress v. Nashville*, 3 Sneed (Tenn.) 347; *McAllister v. Clark*, 33 Conn. 91; *Ogden v. McLaughlin*, 5 Utah 387; *Shreveport v. Roos*, 35 La. Ann. 1010; *Ely v. Niagara County*, 36 N. Y. 297; *Ex p. Wilson*, 14 Tex. App. 592; *People v. Miller*, 38 Hun (N. Y.) 82.

Under its police power a city may, by ordinance, suppress bawdy houses and prescribe a punishment for the violation of the ordinance, even though the offense is made punishable by the general statutes. *Wong v. Astoria*, 13 Oregon 538; *People v. Hanrahan*, 75 Mich. 611, 27 Am. & Eng. Corp. Cas. 605; although it may not have exclusive jurisdiction in such proceedings. *State v. Wister*, 62 Mo. 592.

Exhibition of Stud Horse.—The exhibition of a stud horse on a street is a nuisance *per se*, and may be prohibited by ordinance. *Nolin v. Franklin*, 4 Verg. (Tenn.) 163.

Offensive Odors and Gases.—Where it appears that the odors and gases from a "fat-rendering establishment" produce headache, nausea, and vomiting, and that citizens are therefore compelled to close their doors and

windows both by night and by day, and interfered with in the enjoyment of their meals and sleep, such establishment is a nuisance *per se*, and it is the duty of the board of health in such cases to take the proper measures for its abatement. *Board of Health v. Lederer* (N. J., 1894), 29 Atl. Rep. 444.

When gas furnished by a gas company becomes a dangerous and offensive nuisance by reason of defective pipes, a municipality has power to prohibit its continuance, and an injunction restraining its officers from abating the nuisance should be dissolved. *Butler's Appeal* (Pa., 1885), 1 Cent. Rep. 594.

1. **Enjoining Municipality.**—*Ferguson v. Selma*, 43 Ala. 398; *Denver v. Mullen*, 7 Colo. 345, 4 Am. & Eng. Corp. Cas. 304; *Barthet v. New Orleans*, 24 Fed. Rep. 563, 9 Am. & Eng. Corp. Cas. 509; *Kennedy v. Phelps*, 10 La. Ann. 227; *Milne v. Davidson*, 5 Martin, N. S. (La.) 409, 16 Am. Dec. 189; *Everett v. Marquette*, 53 Mich. 450; *Baltimore v. Radecke*, 49 Md. 218; *People v. Board of Health*, 140 N. Y. 1; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Babcock v. Buffalo*, 56 N. Y. 268.

2. **Summary Abatement.**—*Baumgartner v. Hasty*, 100 Ind. 575, 8 Am. & Eng. Corp. Cas. 353, 50 Am. Rep. 830; *Miller v. Sergeant* (Ind. App., 1894), 37 N. E. Rep. 418; *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *U. S. Illuminating Co. v. Grant* (Supreme Ct.), 7 N. Y. Supp. 797; *Americus v. Mitchell* (Ga., 1888), 5 S. E. Rep. 601; *Board of Health v. Copcutt*, 71 Hun (N. Y.) 149.

3. *Harvey v. DeWoody*, 18 Ark. 252; *Baumgartner v. Hasty*, 100 Ind. 575, 8 Am. & Eng. Corp. Cas. 353, 50 Am. Rep. 830; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *St. Louis v. Stern*, 3 Mo. App. 48; *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 255; *Hart v. Albany*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; *Wistar v. Addicks*, 9 Phila. (Pa.) 145; *Hubbell v. Goodrich*, 37 Wis. 84.

Wells in Streets.—In *Ferrenbach v. Turner*, 86 Mo. 416, it was held that the city of St. Louis had a right to abolish wells situated within the limits of the public streets.

Obstruction in Highway.—The town's supervisors have power, and it is their duty, to cause a summary removal of any public nuisance found in any highway under their jurisdiction, or any encroachment upon the highway which unnecessarily incommodes or impedes the lawful use thereof by the public; and to this end they may compel the overseer of the proper district to abate such obstruction or other public nuisance. *Hubbell v. Goodrich*, 37 Wis. 84.

Fencing a Lot.—The board of health have power to fence a lot for the purpose of re-

the owner's consent, for the purpose of abating a nuisance existing on adjoining land.¹

Notice.—It is usual to give notice of the nuisance to the wrongdoer, so as to give him an opportunity to appear and be heard before the authorities proceed to abate; but in cases of emergency or gross negligence, notice is not necessary.²

moving the cause of a nuisance. *Wistar v. Addicks*, 9 Phila. (Pa.) 145.

Destruction of Buildings.—In certain cases buildings may be in such a state as to be common nuisances; where this is so they may be lawfully removed in pursuance of an ordinance to that effect. *Ferguson v. Selma*, 43 Ala. 398; *Harvey v. DeWoody*, 18 Ark. 252; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Miller v. Sergeant* (Ind. App., 1894), 37 N. E. Rep. 418; *Green v. Lake*, 60 Miss. 451; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397; *Van Wormer v. Albany*, 15 Wend. (N. Y.) 263; *Fields v. Stokley*, 99 Pa. St. 306, 44 Am. Rep. 109.

Tenements consisting of two old, intrinsically valueless houses, on a lot in an improving and flourishing part of the city, which are filthy, and crowded with filthy tenants, and which have been occupied by patients affected with the smallpox, and which have also been condemned as a nuisance by the board of health of the city, under the provisions of its charter, may be removed by the city authorities. *Ferguson v. Selma*, 43 Ala. 398.

An act of the legislature which empowers taxing districts to condemn and abate as nuisances all houses which shall be found unhealthful is not in violation of the provision of the statute which provides that no man's particular service shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor. This inhibition has no application as a limitation of the exercise of those police powers which are necessary to the safety and tranquillity of every well-ordered community. *Theilan v. Porter*, 14 Lea (Tenn.) 622, 9 Am. & Eng. Corp. Cas. 486, 52 Am. Rep. 173.

The mayor, councilman, and constable of the town of Des Arc, being sued individually in an action of trespass for tearing down the plaintiff's house, justified under an ordinance of the town declaring the house a nuisance in that it was unoccupied by the plaintiff or tenants, but was used by others in such way as to imperil the town by fire, and also in such a manner as to make it offensive to the citizens of the town and to endanger their lives, and providing that if the plaintiff did not, within a specified time after notice, abate the nuisance, the constable should proceed to do so; the justification was held sufficient on demurrer. *Harvey v. DeWoody*, 18 Ark. 252.

Where certain parties were engaged in manufacturing fertilizers, and it was ascertained that their building contained putrid and decaying animal matter and offensive substances emitting noxious and unwholesome smells, in violation of an ordinance of the city; and the street commissioner, for the

purpose of abating the nuisance, took off the eccentric rods of the machinery for grinding baked blood, removed the belting and other parts of the machinery, and committed other damage, it was held that such abatement was justifiable. *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 251.

Removal of Drains.—It is said by the Supreme Court of *Rhode Island*, in the case of *State v. McCulla*, 16 R. I. 196, that Pub. Laws R. I. 1865, c. 580, empowering the board of aldermen of the city of Providence to provide for the summary removal of drains, etc., prejudicial to the public health, and to impose penalties for the violation of the regulation made by them, in pursuance of the authority given, to be recovered upon complaint and warrant before the police court, is repealed by Pub. Laws R. I. 1885, c. 495, which authorizes town councils to order such removal, and imposes a penalty for noncompliance with such order.

1. **Appropriating Private Property.**—*Cavanagh v. Boston*, 139 Mass. 426, 9 Am. & Eng. Corp. Cas. 311, 52 Am. Rep. 716, holds that, in the absence of statutory authority, neither the board of health nor the city council can erect a dam on a person's land, without his consent, for the purpose of abating a nuisance on adjacent land. Such acts being beyond the power and authority of the common council of a city, the city cannot be held responsible in damages. But it seems that the liability, if any, rests upon the individuals who perform the acts.

Practically the same conclusion as that reached in the foregoing case was arrived at in *New York*. A statute was passed in 1871 authorizing the draining of private lots in the city of New York by the department of public works, on the certificate of the board of health that the same was necessary, etc., and providing for collecting the expense by an assessment on the property benefited. It was, however, held unconstitutional in making no provision for compensation to the landowners. *Matter of Cheesbrough*, 17 Hun (N. Y.) 561. And see *Read v. Cambridge*, 126 Mass. 427; *Cambridge v. Munroe*, 126 Mass. 496; *Bancroft v. Cambridge*, 126 Mass. 438; *Welch v. Boston*, 126 Mass. 442; *Farnsworth v. Boston*, 126 Mass. 1; *Nickerson v. Boston*, 131 Mass. 306.

2. **Notice.**—*Hopkins v. Smethwick Local Board*, 24 Q. B. 712; *Bush v. Dubuque*, 69 Iowa 233; *People v. Board of Health*, 58 Hun (N. Y.) 595; *Schoepflin v. Calkins* (Supreme Ct.), 25 N. Y. Supp. 666; *People v. Board of Health* (Supreme Ct.), 12 N. Y. Supp. 561; *Weil v. Ricord*, 24 N. J. Eq. 176; *Teass v. St. Albans*, 38 W. Va. 1; *Orlando v. Pragg* (Fla., 1893), 12 So. Rep. 368. *Compare Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Belcher v. Farrar*, 8 Allen (Mass.) 328.

Ordinarily the municipal authorities will serve an order for the removal of a nuisance, upon the occupant or owner of the property upon which it is found, and in case of his disobedience they will proceed to abate of their own motion.¹ But this summary method is not exclusive. Municipal corporations may invoke the aid of the courts.

d. LIABILITY OF MUNICIPALITY.—It is not only the right, but the duty, of a municipal corporation to exercise control over nuisances, and it will be held accountable for any neglect in this respect.² On the other hand, if property is destroyed in order to abate an alleged nuisance, in pursuance of an ordinance, the municipality will be held subject to the same liabilities as an individual if, as a matter of fact, the thing abated is not a nuisance.³ Where the

Cases of Necessity.—*Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Miller v. Sergeant* (Ind. App., 1894), 37 N. E. Rep. 418; *Joyce v. Woods*, 78 Ky. 386; *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Weil v. Ricord*, 24 N. J. Eq. 176.

In *Miller v. Sergeant* (Ind. App., 1894), 37 N. E. Rep. 418, *Lotz, J.*, said, "When a public nuisance creates an imminent danger, a necessity for immediate action arises. If the public authorities were compelled to give notice and await the action of courts or other bodies, the delay might result in public calamity. The right of self-preservation is one of the first laws of nature, and applies to organized societies as well as individuals."

Gross Negligence.—Where electric wires had become uninsulated and in need of repairs, and were dangerous to human life, it was held that the commissioner of public works might abate them as a nuisance without notice to the owners of the electric plant, since it was the duty of the owners to maintain a proper inspection of such of their apparatus as might become dangerous, and a neglect so to do was gross negligence on their part. *U. S. Illuminating Co. v. Grant* (Supreme Ct.), 7 N. Y. Supp. 788.

1. Order for Removal.—*Orlando v. Pragg* (Fla., 1893), 12 So. Rep. 568; *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *People v. Board of Health*, 58 Hun (N. Y.) 595; *Lydecker v. Eells* (Supreme Ct.), 3 N. Y. Supp. 323; *Philadelphia v. Dungan*, 124 Pa. St. 52; *Eddy v. Board of Health*, 10 Phila. (Pa.) 94. Compare *New Rochelle Board of Health v. Valentine* (Supreme Ct.), 11 N. Y. Supp. 112.

An order of a board of health, under the Mass. Gen. S. at., c. 26, § 3, for removing a nuisance, need not prescribe a mode for the removal; and if it does prescribe a mode, the occupant or owner of the property on which the nuisance is found is not restricted thereto. If an order of a board of health prescribes a mode for removal, and the occupant or owner of the property upon which the nuisance is found fails to remove it, the board in proceeding to remove it under section 10 is not restricted to that mode, but may adopt any which is suitable, even if, in so doing, it is necessary to subvert soil adjoining that on which the nuisance exists. *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650.

Upon Whom Order Served.—It was held in *Philadelphia v. Laughlin*, 10 Pa. Co. Ct. 49,

that notice to abate a nuisance must be given to the registered owner, if there is one. And see *Philadelphia v. Dungan*, 124 Pa. St. 52.

Under the N. Y. Laws 1885, c. 207, §§ 3, 4, requiring the order of the board of health for the removal of a special nuisance to be served on the owner and any occupant of the premises where the nuisance exists, and, in case of disobedience, authorizing the abatement of the nuisance and charging the expenses to the occupant, an order for abatement directed to one having an interest in the premises whereon the nuisance exists, and served on his agent who is the occupant of the premises, does not require the agent to abate the nuisance. *Lydecker v. Eells* (Supreme Ct.), 3 N. Y. Supp. 324.

It is not essential to the validity of the service of a special order made by a municipality, requiring the abatement of a nuisance, that it be served on the occupant of the premises whereon the nuisance exists within the territorial jurisdiction of the board; a service outside of the jurisdiction of the board is sufficient. *Gould v. Rochester*, 105 N. Y. 46, 19 Am. & Eng. Corp. Cas. 542.

2. Neglect in Matter of Nuisances.—*Parker v. Macon*, 39 Ga. 725; *Riley v. Kansas City*, 69 Mo. 102, 33 Am. Rep. 491. See also *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446.

A two-story brick wall of a house that has been burned down for some months, standing at the edge of the sidewalk, and so decayed or dilapidated as to endanger the lives of persons passing along the street, is a nuisance which the mayor and council are bound to abate, although it be private property; and if they neglect to have it removed, and injury results to any person in consequence thereof, the city is liable for damages sustained. *Parker v. Macon*, 39 Ga. 725.

3. Yates v. Milwaukee, 10 Wall. (U. S.) 497; *Americus v. Mitchell* (Ga., 1888), 5 S. E. Rep. 201; *Orlando v. Pragg* (Fla., 1893), 12 So. Rep. 368; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Underwood v. Green*, 42 N. Y. 140; *People v. Board of Health*, 140 N. Y. 1.

In *Cole v. Kegler*, 64 Iowa 59, 5 Am. & Eng. Corp. Cas. 361, it was held that if the authorities of a town abate a supposed nuisance under the authority of an ordinance, they are subject to the same liability therefor as an individual, unless it be established that the property destroyed constituted a nuisance. The owner of the property destroyed has a right to have recourse to either of the

nuisance exists, the abatement must be made without inflicting unnecessary injury.¹

legal remedies—to test the validity of the action of the town council by certiorari, or to sue the authorities for damages sustained.

Destruction of Buildings.—The following cases hold that buildings which are not nuisances cannot be destroyed: *Colchester v. Brooke*, 7 Q. B. 339; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Allison v. Richmond*, 51 Mo. App. 136; *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.

Encroachment on Highways.—Where the trustees of a village, empowered by charter to declare and abate nuisances, declared an encroachment on one of the village streets to be a nuisance, and the defendants, being thereupon deputed by them so to do, removed it, and, in an action by the owner to recover damages for such removal, the evidence in the case did not establish a nuisance in fact, it was held that the defendants were not protected by the determination and direction of the trustees. *Howard v. Robbins*, 1 Lans. (N. Y.) 63.

Removing Dams.—Where the board of health of a city determined that certain dams in the city were nuisances, and ordered them removed, and in doing so acted on its own inspection and knowledge of such nuisances, it was held that the remedy was by an action at law for damages against the members of the board, if such nuisances did not exist. *People v. Board of Health*, 140 N. Y. 1.

1. **Power to be Reasonably Exercised.**—*Colchester v. Brooke*, 7 Q. B. 339; *Allison v. Richmond*, 51 Mo. App. 136; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *People v. Board of Health*, 140 N. Y. 1; *Babcock v. Buffalo*, 56 N. Y. 268; *Moody v. Niagara County*, 46 Barb. (N. Y.) 660; *Weil v. Ricord*, 24 N. J. Eq. 169; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242. See also *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421.

Where the Fact of a Nuisance is Evident, the city is then under the obligation to exercise the power of abatement in a reasonable manner, so as to do least harm to private rights; and if it exercises that power in a careless, negligent, or unreasonable manner, so as to produce unnecessary damage, it will be liable for the damage caused by such negligence. *Orlando v. Pragg* (Fla., 1893), 12 So. Rep. 368. See also *U. S. Illuminating Co. v. Grant* (Supreme Ct.), 7 N. Y. Supp. 794.

A city has no right, without the owner's consent, to raise the grade of a lot higher than is necessary for the abatement of the nuisance caused by water stagnating there. *Bush v. Dubuque*, 69 Iowa 233.

The power of the board of health does not extend to the removal of tenants in houses and closing up the latter, unless justified by the existence of a pestilential disease; and such action will be restrained by injunction. *Eddy v. Board of Health*, 10 Phila. (Pa.) 94.

When power is given to the authorities of a city, by its charter, to direct the digging down, draining, filling up, or fencing of lots or parcels of ground, in all cases where such digging down, draining, or filling up or fencing is necessary to abate a nuisance, it is the duty of the court to see that the power conferred is reasonably exercised, and in such mode as to do the least injury to private rights. *State v. Newark*, 34 N. J. L. 264.

Suppression of Use.—If the use to which a building is being put is so hazardous as to be a nuisance, this would authorize only the suppression of the use, not the destruction of the building; and the city, in undertaking to exercise such power, invades and trespasses upon complainant's rights, and must answer for the consequences. *Brightman v. Bristol*, 65 Me. 436, 20 Am. Rep. 711.

Thus, where a building was old, and there were stored therein a variety of articles such as coal, kindling-wood, old papers, shavings, boxes, etc., it was held that the city council was not justified in tearing it down on the ground that it was in a dangerous situation and annoying to the public, and that the city was liable to damages. *Allison v. Richmond*, 51 Mo. App. 137.

Livery Stable.—Where a building which has been used formerly as a livery stable had become old and dilapidated, and was resorted to as a "sink," it was held that it could not be demolished by the authority of the corporation, although the corporation was empowered by charter to remove nuisances. *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.

Houses of Ill Fame.—The statute empowering the common council of the city of Detroit "to make all such by-laws and ordinances as may be deemed expedient for the purpose of suppressing houses of ill fame within the limits of the city," does not authorize the common council, by ordinance and resolution, to require the city marshal to demolish a house occupied as a house of ill fame and adjudged by such council to be a common nuisance. The power to abate a nuisance is limited to the removal of that in which the nuisance consists. *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Moody v. Niagara County*, 46 Barb. (N. Y.) 660.

ABBREVIATIONS.

- I. DEFINITION, 97.
- II. IN GENERAL, 97.
- III. JUDICIAL NOTICE, 98.
- IV. PAROL EVIDENCE, 99.
- V. DEEDS, TAX PROCEEDINGS, AND DESCRIPTIONS OF LAND, 100.
- VI. ABBREVIATIONS OF THE REPORTS, TEXT-BOOKS, AND COMMON LEGAL TERMS, 101.

CROSS-REFERENCES.

For abbreviations in pleadings, affidavits, etc., see 1 ENCYCLOPEDIA OF PLEADING AND PRACTICE, pp. 42 and 309, and also the following titles in the same work: PROCESS; VARIANCE; WARRANTS.

For abbreviations in other connections, see the following titles in this work: ACKNOWLEDGMENTS; AMBIGUITY; ELECTIONS; NAME. And for common abbreviations see specific titles, such as C. O. D.; F. O. B.; I. O. U., and the like.

I. DEFINITION.—An abbreviation is the shortened form of a word, obtained by the omission of one or more syllables or letters from the middle or end of the word.¹

II. IN GENERAL.—Abbreviations in common use in legal instruments, or those capable of explanation by parol evidence or usage, do not, as a general rule, vitiate a writing.²

1. Bouv. Law Dict.

2. *Frowd v. Stillard*, 4 C. & P. 51, 19 E. C. L. 268; *State v. Reed*, 35 Me. 489, 58 Am. Dec. 727; *Com. v. Hagarman*, 10 Allen (Mass.) 401; *Com. v. Kingman*, 14 Gray (Mass.) 85; *Kelly v. State*, 3 Smed. & M. (Miss.) 518; *Brown v. State*, 16 Tex. App. 247; *U. S. Express Co. v. Keeper*, 59 Ind. 263; *Smith v. Butler*, 25 N. H. 521; *Berry v. Osborn*, 28 N. H. 279; *Silberman v. Clark*, 96 N. Y. 522. See also 1 Encyc. Pl. & Pr.

"&" for "and."—*Brown v. State*, 16 Tex. App. 245; *Com. v. Clark*, 4 Cush. (Mass.) 596; *Malton v. State*, 29 Tex. App. 527.

"L. S." for Seal.—*Smith v. Butler*, 25 N. H. 521; *Holbrook v. Nichol*, 36 Ill. 161; *Buckley v. Hasterlik* (Ill., 1895), 40 N. E. Rep. 561.

"Ads." for Ad Sectam.—*Bowen v. Wilcox, etc., Sewing Mach. Co.*, 86 Ill. 11.

Attorney's Fee Bill.—An attorney in rendering his bill may use such abbreviations as are commonly used in the English language, under the statutes of 2 Geo. II., c. 23, and 12 Geo. II., c. 13, § 5. A bill containing the following abbreviations: "Drawg. declar. ffs. 15, Instruns. for case, attg. you in long confce., preparing aftt.," was held to be clearly intelligible, and therefore good. *Frowd v. Stillard*, 4 C. & P. 51, 19 E. C. L. 268.

Where the defendant is defaulted, and the cause is heard before the court without a jury, a fee bill will not be rejected as unintelligible if the abbreviations therein can be understood by the court. *Myers v. Shoneman*, 90 Ill. 80.

"O. F. B. A."—Where a writ was indorsed "Dr. Peter Brudgeman, O. F. B. A.," it was held to be clear, from the remainder of the writ, that "Odd Fellows Building Association" was meant. *Odd Fellows Bldg. Assoc. v. Hogan*, 28 Ark. 261.

"—Double Comma."—In *Steinmetz v. Versailles, etc., Turnpike Co.*, 57 Ind. 457, it was held that the use of a "—" following the name of a subscriber to articles of association under the name of a town, city, or county, sufficiently designated the subscriber's residence.

Vs.—Versus.—*Smith v. Butler*, 25 N. H. 521.

Cash. for Cashier.—*Nave v. Hadley*, 74 Ind. 157.

Suff. for Sufficient.—The words "Mr. officer, attach. suff." on the back of a writ, sufficiently indicate to the officer the wish of the plaintiff that an attachment should be made; and the officer would be responsible for omitting to attach, if in his power, when so directed. *Kimball v. Davis*, 19 Me. 310.

Notes.—Cits.—Br.—Bk.—In *Locke v. Mer-*

III. JUDICIAL NOTICE.—Courts will determine the meaning of customary abbreviations of common words,³ names of places,⁴ and Christian names, without proof.⁵ A judge also takes judicial notice of abbreviations customarily

chants' Nat. Bank, 66 Ind. 353, it was held that where a note was made payable at "Citz. Bank of Noblesville, Indiana," the jury might infer that the note was payable at "Citizens Bank," etc. The court said: "One other question is made, which, as it will arise upon another trial, we deem it proper to decide, and that is this: Is the note set forth in the complaint a commercial note; that is, does it appear to be payable at a certain existing bank? It seems to us that the abbreviation 'Citz.' plainly means Citizens, and that the note appeared to be payable at the existing Citizens Bank of Noblesville, Indiana. If the jury might so have found upon it, then it seems to us it was admissible in evidence. In *Miller v. Powers*, 16 Ind. 410, it was decided that the court, sitting as a jury, might infer from the face of a note payable 'at the Br. at Fort Wayne of the Bk. of the State of Indiana,' that it was intended to be made payable 'at the Branch at Fort Wayne of the Bank of the State of Indiana.' See *Parkinson v. Finch*, 45 Ind. 122."

Abbreviation of Amount of Note.—It is not error to admit in evidence the note sued on because the amount thereof is written "four hund. and two and $\frac{10}{100}$ dollars." *Glenn v. Porter*, 72 Ind. 525.

Int. a 6% p. a.—The form "int.," inserted after the words "value received," in a promissory note, is an abbreviation of the word interest, and should be construed the same as if the entire word was written out. The letter "a." when used in a note as above, stands for the word "at," and "6%," when used as here, stands for six per cent, and the letters "p." and "a." when used in the connection here used, mean per annum. *Belford v. Beatty*, 145 Ill. 414.

"Com." and "Co." are well-understood abbreviations of the word Company, when used as a part of the name of a commercial firm. *Keith v. Sturges*, 51 Ill. 142.

Dolls. for Dollars.—In *Salisbury v. Shirley*, 66 Cal. 223, it was held that the use of the abbreviation "dolls." for dollars, in an assessment, was sufficient.

3. Malton v. State, 29 Tex. App. 527, citing 1 AM. & ENG. ENCYC. LAW (1st ed.) p. 20; *Brown v. State*, 16 Tex. App. 245; *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Jordan Ditching, etc., Assoc. v. Wagoner*, 33 Ind. 50; *Frazer v. State*, 106 Ind. 471.

Supt.—The court knows judicially that the abbreviation "supt." stands for the word superintendent, and that a superintendent is a managing officer. *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.

Adm'r.—The appellate court will take judicial notice of the fact that the word "adm'r.," following the plaintiff's name in the complaint, is an abbreviation for the word administrator. *Moseley v. Mastin*, 37 Ala. 216.

C., B. & Q. R. R. Co.—Courts will not take judicial notice that "C., B. & Q. R. R. Co." stands for Chicago, Burlington & Quincy Railroad Co. *Accola v. Chicago, etc., R. Co.*, 70 Iowa 185. Compare *Ripley v. Case*, 78 Mich. 126, 18 Am. St. Rep. 428.

"Ex. A" for Exhibit A.—*Dugan v. Trisler*, 69 Ind. 555.

Danger of Trusting Courts to Take Judicial Notice of Abbreviations.—In a note to 2 Abb. N. Cas. (N. Y.) 231, Mr. Austin Abbott points out the danger of relying upon the courts taking judicial notice of matters of fact. And in Abbott's Trial Brief, p. 2, he refers to this note and illustrates it by the case of *Hulbert v. Carver*, 37 Barb. (N. Y.) 62, where the court said: "We can easily guess what was intended by the letters 'Ills. cy.,' but that is not the mode which the law adopts to ascertain the meaning of doubtful terms. It was the duty of the party relying on these terms, as affecting the contract of deposit, to show by parol what was intended."

4. "Ind." for Indiana.—In *Burroughs v. Wilson*, 59 Ind. 536, it was held that a note payable at a certain bank of a certain place in "Ind.," was payable at a bank in the state of Indiana.

Contra—"La." for Louisiana.—In *Russell v. Martin*, 15 Tex. 238, the court said: "The only point in this case is, Can the court judicially know that a note payable in New Orleans, La., is payable in the state of Louisiana? The question was directly decided in the negative in the case of *Ellis v. Park*, 8 Tex. 205." *Ellis v. Park*, 8 Tex. 205, was a case in which the court refused to recognize "Mo." for Missouri. See also *Willard v. Conduit*, 10 Tex. 213; and see *Miller v. Miller* (S. Car., 1895), 21 S. E. Rep. 254, set out in the next note.

Bail Bond.—In stating the place where the accused is bound to appear, a bail bond is sufficient if it specifies the name of the court or magistrate, and of the county. The bond in this case was conditioned that the accused "shall be and appear before the honorable District Court on the first day of the next term thereof, to be begun and holden at the court-house in Carrizo Springs, in said county, on," etc. The bond nowhere recited the name of a county, but recited that the accused had been arrested by virtue of a warrant issued by "J. R. Sweeten, J.P., Pr. No. 1 D. C." It was held that the court was not authorized to presume that the initials "D. C." signified "Dimmit county," nor that "Carrizo Springs" was in Dimmit county; in this respect the bond failed to state the name of the county before the District Court of which the accused was bound to appear, and for that reason the motion to set aside the judgment nisi should have prevailed. *Vivian v. State*, 16 Tex. App. 262.

5. See the title NAME. See also 1 Encyc. Pl. & Pr., p. 43.

used to designate the official character of court officers and other public officials.¹

Time.—Courts take judicial notice of abbreviations ordinarily used to designate time, such as those for month, forenoon, afternoon, etc.²

IV. PAROL EVIDENCE.—Parol evidence is admissible to explain the meaning of abbreviations in written instruments, and to show the words for which they stand.³ Although parol evidence is admissible to show the sense in which

1. "J. P." for *Justice of the Peace*.—Shattuck v. People, 5 Ill. 477; Livingston v. Kettelle, 6 Ill. 116, 41 Am. Dec. 166; Scudder v. Scudder, 10 N. J. L. 340; Hawkins v. State, 136 Ind. 630; Com. v. Melling, 14 Gray (Mass.) 388.

A certificate of marriage was certified by one Michael Naughton, with the letters "J.P., C. Co., Ga.," written after his name. This was held insufficient to prove the official character of the alleged justice, in the absence of any explanatory evidence. The court said: "It seems that the plaintiff endeavored to prove a fact of marriage and not a marriage in fact. Of course, it being true that the alleged marriage ceremony was observed in the state of Georgia, it became necessary to the establishment of its validity to show what the law of that state is on this subject, and a strict compliance with every requisite in that law to establish a valid marriage. The certificate of Michael Naughton, with the letters 'J.P., C. Co., Ga.,' written after his name, that he had performed the ceremony, was introduced. No explanation was in evidence as to the meaning to be attached to these letters 'J.P., C. Co., Ga.' Of course this was fatal, in the absence of explanation." Miller v. Miller (S. Car., 1895), 21 S. E. Rep. 254.

"N. P." for *Notary Public*.—Rowley v. Berrian, 12 Ill. 199.

C. P. C. C.—In Buell v. State, 72 Ind. 523, it was held that, as courts take judicial knowledge of the signatures of their officers, where the signature affixed to the *jurat* in an affidavit on which an information was based was "Rufus P. Wells, C. P. C. C.," the Supreme Court would presume that the court in which such information was filed knew such signature to be that of its clerk.

2. Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768.

"Dec." for *December*.—Perdue v. Fraley, 92 Ga. 780.

"Octb." for *October*.—Kearns v. State, 3 Blackf. (Ind.) 336.

"Feby." for *February*.—Cutting v. Conklin, 28 Ill. 506.

"A. M." and "P. M." for forenoon and afternoon respectively. Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768.

"A. D." for *Anno Domini*.—Brown v. State, 16 Tex. App. 245; State v. Hodgeden, 3 Vt. 481; Com. v. Clark, 4 Cush. (Mass.) 596.

"Ms." for *Months*.—Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

Printer's Marks.—The court cannot know officially the meaning of the printer's marks "Oct. 3, 4t," at the foot of an advertisement, nor can it give interpretation to them without evidence as to their

meaning. Johnson v. Robertson, 31 Md. 489. Here the court said: "At the bottom of the printed slip are the following letters and figures, 'Oct. 4, 4t,' which the counsel for the appellee has contended supplies the defect of the certificate, and proves that the publication was made according to the court's order. In support of this argument it has been said that these marks mean 'October 3d, four times,' showing the date of the first insertion to be the 3d of October; and we are asked so to interpret them, and to infer that the publication was made during the four successive weeks next after the 3d of October, 1861. But we are not at liberty to make any such inference, in the absence of further proof on the subject. This court cannot know officially the meaning of the printer's marks at the foot of the advertisement. They most probably indicate merely the directions placed upon the advertisement in the printing office when it went into the compositor's hands, to indicate when and how often it was intended to be published, and cannot show that it was in fact so published. The certificate in plain terms states that the publication was made prior to the first day of March, 1862; this language is susceptible of but one interpretation, and cannot be construed to mean that it was made before the 10th day of November, 1861, as required by the court's order."

3. **Admissibility of Parol Evidence.**—Barry v. Coombe, 1 Pet. (U. S.) 653; U. S. v. Hardyman, 13 Pet. (U. S.) 176; Shattuck v. People, 5 Ill. 477; Rowley v. Berrian, 12 Ill. 200; Olcott v. State, 10 Ill. 481; Atkins v. Hinman, 7 Ill. 444; Blakeley v. Bestor, 13 Ill. 714; Jackson v. Cummings, 15 Ill. 449; Dukes v. Rowley, 24 Ill. 210; Baily v. Doolittle, 24 Ill. 577; Avery v. Babcock, 35 Ill. 175; American Express Co. v. Lesem, 39 Ill. 333; Sheldon v. Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; Collender v. Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Taylor v. Beavers, 4 E. D. Smith (N. Y.) 215; DeLavallette v. Wendt, 75 N. Y. 579, 31 Am. Rep. 494; Comstock v. Savage, 27 Conn. 190; Barton v. Anderson, 104 Ind. 578; Jaqua v. Witham, etc., Co., 106 Ind. 546; Hite v. State, 9 Yerg. (Tenn.) 357.

Abstract of Title.—In Converse v. Wead, 142 Ill. 132, the court admitted a witness, who was familiar with the system of entries and making of abstracts by abstract makers, to explain certain abbreviations used in an abstract of title; *citing with approval* 1 AM. & ENG. ENCYC. LAW (1st ed.) 15. See, generally, the title **ABSTRACT OF TITLE**.

Stock Brokers.—In Storey v. Salomon, 6 Daly (N. Y.) 531, 71 N. Y. 420, it was held that

the parties were in the habit of using particular abbreviations or characters, and their conventional meaning, it is inadmissible to show the intention of a party in making use of them.⁹ It has been said that in order to introduce parol evidence to explain the sense in which characters or letters which have not acquired a legal signification were used in a contract, it is necessary to aver in the pleading the meaning the party desires to attribute to them.¹

Usage.—Parol evidence of usage and custom may be given to explain abbreviations.²

V. DEEDS, TAX PROCEEDINGS, AND DESCRIPTIONS OF LAND.—In general the principles governing the effect of abbreviations in conveyances, tax assessments, and descriptions of land generally, do not differ from those applicable to the use of abbreviations in other instruments. Reference, therefore, should be made to the preceding sections. As, however, there have been a large number of decisions upon the effect of abbreviated descriptions of land, it has been thought more useful to the practitioner to gather them in one subdivision of this article. Well-known abbreviations may be used in conveyances, and are sufficient; but vague, uncertain, and arbitrary abbreviations are not permissible. In tax proceedings perhaps more strictness is required in description than in an ordinary conveyance.³

the evidence of stock brokers was admissible to explain abbreviated expressions used in a writing of the kind known among stock brokers as a "stock privilege" and of the special nature known as a "straddle."

Contract—Statute of Frauds.—Where a memorandum in writing was to the effect that W. was to deliver to C. and R. a certain number of "C. L. R. P. oats," it was held not error to admit parol evidence to show that the same number of carloads of Texas rust-proof oats was meant. Although, under the statute of frauds, an agreement of this character, where the value of the goods is over fifty dollars, must be in writing to bind the promisor, yet an ambiguity, such as appears in this case, in the writing, may be explained by parol. *Wilson v. Coleman*, 81 Ga. 297.

Well-known Mercantile Abbreviations which have a fixed meaning known to dealers and understood by the parties using them, may be explained by oral testimony, and may be effectual as a memorial of what was originally agreed. *Heideman v. Wolfstein*, 12 Mo. App. 366; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446.

Wills.—Where a testator bequeathed to his children the sum of i. x. x. and o. x. x., parol evidence was received to the effect that the testator in his business as a jeweler had used the ciphers in dispute to indicate respectively £100 and £200. *Kell v. Charmer*, 23 Beav. 195.

The word "mod." occurred in the codicil of the will of a sculptor. Opinions of experts differed as to whether "models" was meant, and Lord Brougham decided that a formal bequest of the models in the will could not be revoked by such an abbreviation in the codicil. *Goblet v. Beechey*, 3 Sim. 24, 2 R. & M. 624.

A testator devised his real estate under the description:

"Sixty acres Se 25, toon 7, } Jasper County,
"Forty acres Se 24, toon 6, } State of Iowa."
It was held that "Se" meant "section,"

and that it was competent to prove by parol in what township and range the testator owned the above land, and no other. *Chambers v. Watson*, 60 Iowa 339, 46 Am. Rep. 70.

A Docket Entry of Justice's Judgment—Parol Inadmissible.—In *Rood v. School Dist. No. 7*, 1 Dougl. (Mich.) 502, it was held that parol evidence was inadmissible to show that the letters "P." and "D." in the docket entry of the judgment, meant "plaintiff" and "defendant." The court says: "It requires no argument or authority to show that an ambiguity apparent on the face of a transcript of judgment cannot be explained by parol evidence. The evidence received for the purpose of explaining the meaning of the letters 'P.' and 'D.' was clearly inadmissible."

Jaqua v. Witham, etc., Co., 106 Ind. 545. In this case the court said: "The defendant offered himself as a witness to prove what his intention was in the use of the abbreviations and characters contained in his order for brackets, set out in the second paragraph of the complaint, and which had been previously read in evidence; but the court refused to permit the proposed proof to be made, allowing the defendant only to testify as to his understanding as to the conventional meaning of the abbreviations and characters in question."

1. *American Express Co. v. Lesem*, 39 Ill. 333; *U. S. v. Hardyman*, 13 Pet. (U. S.) 179. See also *Barry v. Coombe*, 1 Pet. (U. S.) 653.

2. *Barton v. Anderson*, 104 Ind. 578; *Jaqua v. Witham, etc., Co.*, 106 Ind. 545; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224. See the title **USAGES AND CUSTOMS**.

Contracts.—Where a written contract called for the delivery of "one hundred and fifty casks, 'of one ton each,' best EXFF madder, 12 1-4, 6 ms.;" it was held that the plaintiff might prove by parol the meaning, in commercial usage, of the letters and abbreviations employed. *Dana v. Fiedler*, 1 E. D. Smith (N. Y.) 464.

3. **Sufficient Descriptions.**—A deed described

VI. ABBREVIATIONS OF THE REPORTS, TEXT-BOOKS, AND COMMON LEGAL TERMS.
—In the notes is given a complete list of the abbreviations commonly used to

the lands conveyed, as follows: "The following tracts or parcels of land, all of which lying and being in the military tract in the state of Illinois, that is to say, the northwest $\frac{1}{4}$ section 27, 11 S. 2 W." following with the numbers of several other tracts, describing them thus: "N. E. $\frac{1}{4}$ 17, 15 N. 6 E." without the use of the word "section" preceding the quarters. It was held that the description of the tracts succeeding the first one was sufficient, and that the word "section" would be understood, as though it were expressed, before the numerals representing all the other quarters. *Bowen v. Prout*, 52 Ill. 354.

"Pt." for part, "frm." for from, are allowable in tax proceedings. *Blakeley v. Bestor*, 13 Ill. 715. Here the court said: "Some objection was taken on the argument to the abbreviations, such as 'pt.' for part, 'frm.' for from, and 'ft.' for feet, used in describing the premises in the various tax-title proceedings, but the objection was not much relied upon, and is scarcely worthy of serious consideration. Such abbreviations are well understood, and no one is misled by them."

While such letters or characters are used, under the statutes for the collection of taxes, as clearly convey their meaning, either as to description of land or amount of money, they will be sustained. As "\$" for dollar; "tx" for tax, etc. *Jackson v. Cummings*, 15 Ill. 449.

A description of land, in a tax receipt or deed, as the "north side S. W. $\frac{1}{4}$ of block 2," etc., is not void for indefiniteness and uncertainty. Those words mean the north half of the southwest quarter of the lot. Mathematical accuracy is not indispensable, and descriptions are not to be rejected because they are awkwardly and inaptly expressed. If, taking the language in the connection in which it is used, the meaning is reasonably clear to the ordinary apprehension, it is sufficient. *Winslow v. Cooper*, 104 Ill. 236.

Where a debtor owns ten acres, on the west side of a forty-acre tract which is a quarter of a quarter-section, a levy upon the same, described as the "west side of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 23," etc., is not void for uncertainty, it meaning the west half of the tract, which includes the ten acres off the west side thereof. *Hill v. Blackwelder*, 113 Ill. 284.

The courts will take notice, without proof, of the meaning of initials commonly used in the description of land in tax receipts, such as "W. $\frac{1}{2}$ " for "west half," "N. W." for "northwest quarter," "T. 37 N." for "township thirty-seven north," etc. *Paris v. Lewis*, 85 Ill. 597. See *Olcott v. State*, 10 Ill. 481; *Jackson v. Cummings*, 15 Ill. 449; *Blakeley v. Bestor*, 13 Ill. 714.

In *People v. Miller*, 80 Ill. 268, the following description of land in an assessment: "S. $\frac{1}{2}$ ex. W. 12 rods of E. 40 rods of N. $\frac{1}{4}$ of N. $\frac{1}{4}$, and N. 10 rods, S. 13 rods of E. 28 rods of

N. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 23, etc., 74 $\frac{1}{100}$ acres," was held sufficient, as the property could be located by a competent surveyor, without extrinsic aid.

A description of land for the purposes of taxation, "W. side N. $\frac{1}{4}$, S. E. N. W. 10 acres, sec. 8, T. 23, R. 10," is sufficiently certain. The "W. side" means the west side. *Taylor v. Wright*, 121 Ill. 455.

A description of land in an assessment roll as "Spanish Claim, Sec. 13, T. 4, R. 1 E., 640 acres," is good, and sufficiently certain to support a sale of the land for taxes. *Havard v. Day*, 62 Miss. 748.

A description of land, in the assessor's book and the tax-list, by the common abbreviations used to designate government subdivisions of land, sufficiently identifies it. *Jenkins v. McTigue*, 22 Fed. Rep. 148.

In relation to the abbreviations on a tax duplicate, the treasurer and a deputy auditor were both permitted to testify that "ft." meant "feet," that "Washt. St." meant "Washington Street," that "S. W. cor." meant "southwest corner," and that "out. 66" stood for "out-lot 66." *Barton v. Anderson*, 104 Ind. 582.

In *Jordan Ditching, etc., Assoc. v. Waggoner*, 33 Ind. 50, it was held that a description of defendant's land in a local assessment by abbreviations and figures, as follows: "Matthias Waggoner S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Sec. 18, T. 21, N. R. 7 E., 40 acres," was sufficient.

A deed is not invalid because of the description of the lands being in figures and well-understood abbreviations. *Harrington v. Fish*, 10 Mich. 415.

The description of lands assessed or sold for taxes, by the use of initial letters, abbreviations, and figures, is a valid description. *Sibley v. Smith*, 2 Mich. 487.

Eminent Domain.—Where the commissioners in their report use only numerals to express the valuation of the land taken and the damages to that not taken, and it is evident from the report that the commissioners intended that such numerals should represent dollars and cents, the report is not void because the commissioners omitted to use either the dollar mark or the words "dollars" and "cents," or some abbreviation of the same. *Hunt v. Smith*, 9 Kan. 95.

Insufficient Descriptions.—In *Power v. Bowdle*, 3 N. Dak. 107, it was held, following *Power v. Larabee*, 2 N. Dak. 141, and *Keith v. Hayden*, 26 Minn. 212, that the description of parts of sections of land in a tax assessor's book, as "NW 4; NE 4; NE SW; W 2 SW, etc.," was invalid and insufficient.

In a tax judgment a description of the land against which the judgment purports to be rendered, as S. 2 N. E. 4 and N. W. 4 S. E. 4 of a designated section, township, and range, is fatally defective, and the judgment is, upon its face, of no effect. *Keith v. Hayden*, 26 Minn. 212.

The judgment must show definitely the

designate the American, British, and Canadian reports, together with those of the classic text-books. It has not been thought necessary to go further than this, as a complete list of the ephemeral text-books would be of no value, and would only serve to encumber the really useful abbreviations. To this list of reports and text-books have been added the more common abbreviations of legal terminology; such as have received judicial construction will be found in their alphabetical order in the body of this Encyclopædia.¹

amount of tax for which it was rendered; figures without some mark indicating for what they stand, in a column, at the head of which are the words Tax, Coll., Clerk, Pri., are not sufficient. *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 401.

Under Wagner's Statutes (*Missouri*), p. 1212, § 240, authorizing certain abbreviations in describing land in tax deeds and proceedings relating to the same, abbreviations can be used only as provided in said section; and when used they will be insufficient, under said section, unless the land intended to be designated by their use is so designated thereby that it may be identified or located. Abbreviations used in the description of land in the tax deed and anterior proceedings in this case were held to be insufficient. *Lowe v. Ekey*, 82 Mo. 286.

Mere abstracts of title which are unintelligible without the aid of some proof to explain the meaning of abbreviations and initial letters used in them, introduced in evidence under a stipulation which does not determine what effect shall be given to them, are insufficient of themselves to establish title to lands. *Weeks v. Downing*, 30 Mich. 4.

1. The following is the list referred to above:

A. Queen Anne; Anonymous; Alabama; Arkansas; Louisiana Annual Reports.

A, a, B, b. "A" front, "B" back of a leaf.

A. B. Anonymous reports at end of Benloe's Reports, commonly called New Benloe.

A. B. R. J. N. S. W. A'Beckett's Reserved (Equity) Judgments, New South Wales.

A. B. R. J. P. P. A'Beckett's Reserved Judgments, Port Philip.

A. C. (1891). Appeal Cases (1891), English.

A. C. (1892). Appeal Cases (1892), English.

A. C. (1893). Appeal Cases (1893), English.

A. C. (1894). Appeal Cases (1894), English.

(1891) A. C. Law Reports, vol. —, English.

(1892) A. C. Law Reports, Appeal Cases, vol. —, English.

(1893) A. C. Law Reports, Appeal Cases, vol. —, English.

A. C. Appeal Court; Law Report, Appeal Cases, English.

A. C. C. American Corporation Cases (Withrow's).

A. D. Anno Domini; in the year of our Lord; American Decisions (Select Cases), San Francisco.

A. G. Attorney General (in names of cases).

A. Ins. R. American Insolvency Reports.

A. J. American Jurist.

A. K. Marsh. (Ky.). A. K. Marshall's Kentucky Reports.

A. M. & O. Armstrong, Macartney, & Ogle's Nisi Prius Reports, Irish.

A. Moo. A. Moore's Reports, in 1 Bosanquet & Puller.

A. P. B. Ashurst's Paper Books; manuscript paper books of Ashurst, J., and other judges, in Lincoln's Inn Library.

A. R. Anno Regni; in the year of the reign.

A. & E. Adolphus and Ellis, 1834-1841.

A. & E., N. S. Adolphus and Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*

A. & H. Arnold and Hodges' Queen's Bench Reports, English.

A. & N. Alcock and Napier's King's Bench Reports, Irish.

Ab. or Abr. Abridgment.

Abb. (N. Y.). Abbott's New York Practice Reports.

Abb. (U. S.). Abbott's United States Circuit and District Court Reports.

Abb. Ad. (U. S.). Abbott's United States Admiralty Reports.

Abb. App. (N. Y.). Abbott's New York Court of Appeals Decisions.

Abb. Ct. App. (N. Y.). Abbott's New York Court of Appeals Decisions.

Abb. Dec. (N. Y.). Abbott's New York Appeal Decisions.

Abb. Dig. (N. Y.). Abbott's New York Digest.

Abb. Dig. Corp. Abbott's Digest of the Law of Corporations.

Abb. Ind. Dig. Abbott's Indiana Digest.

Abb. Leg. Rem. Abbott's Legal Remembrancer.

Abb. Month. Ind. Abbott's Monthly Index.

Abb. N. Cas. (N. Y.). Abbott's New York New Cases.

Abb. Nat. Dig. Abbott's National Digest.

Abb. Pr. (N. Y.). Abbott's New York Practice Reports. Vols. 1-19.

Abb. Pr., N. S. (N. Y.). Abbott's Practice, New Series, New York, various courts.

Abr. Abridgment; Abridged.

Abr. Ca. Eq. Abridged Cases in Equity, Eng.

Abr. Cas. Crawford & Dix's Abridged Cases, Ireland.

Abr. Cas. Eq. or Abr. Eq. Cas. Equity Cases Abridged, English Chancery.

Acc. Accordant. Used in the reports to denote the accordance or agreement between one adjudged case and another, in establishing or confirming the same doctrine, in the same way as the disagreement or opposition of cases is denoted by *contra*.

Act. Acton's Reports, Prize Causes, English Privy Council.

Ad. Cas. Sales. Adams' Cases on the Law of Sales.

- Ad. Cont.** Addison on Contracts.
Ad. Eq. Adams's Equity.
Ad. Torts. Addison on Torts.
Ad. & E. Adolphus & Ellis's Reports, English King's Bench.
Ad. & El. Adolphus & Ellis's Reports, English.
Ad. & El., N. S. Adolphus & Ellis's Reports, New Series.
Adams (Me.). Adams's Reports, Maine Supreme Court (41, 42 Maine).
Adams (N. H.). Adams's Reports, New Hampshire Supreme Court (1 New Hampshire).
Add. Addams's Ecclesiastical Reports, English.
Add. (Pa.). Addison's Reports, Pennsylvania.
Add. Con. Addison on Contracts.
Add. Ecc. Addams's Ecclesiastical Reports, English.
Add. Torts. Addison on Torts.
Addams. Addams's Ecclesiastical Reports, English.
Addis. (Pa.). Addison's Pennsylvania Reports.
Adj. Adjudged; Adjourned.
Adm. Admiralty.
Adm. & Ecc. English Law Reports, Admiralty and Ecclesiastical.
Admr. Administrator.
Admx. Administratrix.
Adolph. & E. Adolphus & Ellis's Reports, English King's Bench.
Adolph. & E., N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
Ads. or Ats. At the suit of.
Agna. St. of F. Agnew on the Statute of Frauds.
Agra H. C. Agra High Court Reports, India.
Aik. (Vt.). Aiken's Vermont Reports.
Aiken (Vt.). Aiken's Vermont Reports.
Al. Aleyn's English King's Bench Reports.
Al. Tel. Cas. Allen's Telegraph Cases, American and English.
Al. & Nap. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ala. Alabama Reports; Minor's Alabama Reports.
Ala. L. J. Alabama Law Journal.
Ala., N. S. Alabama Reports, New Series (Alabama Reports, proper).
Ala. Sel. Cas. Alabama Select Cases, State Reports.
Ala. St. Bar Asso. Alabama State Bar Association Reports.
Alabama. Alabama Reports.
Alb. Arb. Cas. Albert's Arbitration Cases, English.
Alb. L. J. Albany Law Journal, New York.
Alb. L. Sch. J. Albany Law School Journal.
Alc. Alcock's Registry Cases, Irish.
Alc. Reg. Alcock's Registry Cases, Irish.
Alc. & Nap. Alcock & Napier's King's Bench Reports, Irish.
Alcock. Alcock's Registry Cases, Irish.
Alcock & N. Alcock & Napier's King's Bench Reports, Irish.
Ald. (Pa.). Alden's Condensed Reports, Pennsylvania.
Ald. Cas. Cont. Aldred's Cases on Contracts.
Ald. Ind. Alden's Index of U. S. Reports.
Alden (Pa.). Alden's Condensed Reports, Pennsylvania.
Alex. Dig. Alexander's Texas Digest.
Aleyn. Aleyn's Select Cases, English King's Bench.
All. (Mass.). Allen's Massachusetts Reports (83-96 Massachusetts).
All. (N. B.) or Allen (N. B.). Allen's Reports, New Brunswick Supreme Court.
All. Ser. Allahabad Series, Indian Law Reports.
All. Tel. Cas. Allen's Telegraph Cases.
Allen (Mass.). Allen's Massachusetts Reports.
Allen (N. B.). Allen's New Brunswick Reports.
Allen (Wash.). Allen's Washington Territory Reports.
Allen Tel. Cas. Allen's Telegraph Cases.
Am. American; Amended; Amendment.
Am. Banker. American Banker, New York City.
Am. Bar Asso. American Bar Association Reports.
Am. Ch. Dig. American Chancery Digest.
Am. Civ. L. J. American Civil Law Journal.
Am. Corp. Cas. Withrow's American Corporation Cases.
Am. Crim. Rep. American Criminal Reports by Howley.
Am. Dec. American Decisions (Select Cases), San Francisco.
Am. Dig. American Digest.
Am. Eng. Ency. Law. American and English Encyclopædia of Law.
Am. Insol. Rep. American Insolvency Reports.
Am. J. Soc. Sci. American Journal Social Science.
Am. Jur. American Jurist, Boston.
Am. L. Cas. or Am. Lead. Cas. American Leading Cases (Hare & Wallace's).
Am. L. J. (Hall's). American Law Journal (Hall's).
Am. L. J. (N. S.). American Law Journal, New Series.
Am. L. J. (O.). American Law Journal, Ohio.
Am. L. Mag. American Law Magazine.
Am. L. Rec. American Law Record, Cincinnati.
Am. L. Reg. American Law Register, Philadelphia.
Am. L. Rep. American Law Reports.
Am. L. Rep., N. S. American Law Reports, New Series.
Am. L. Reporter. American Law Reporter.
Am. L. Rev. or Am. Law Rev. American Law Review, Boston.
Am. L. T. American Law Times, Washington and New York.
Am. L. T. Bankr. American Law Times Bankruptcy Reports.
Am. L. T., N. S. American Law Times, New Series.

Am. L. T. Rep. American Law Times Reports.
Am. L. T. Rep., N. S. American Law Times Reports, New Series.
Am. Law Jour. American Law Journal (Hall's).
Am. Law Mag. American Law Magazine.
Am. Law Reg. American Law Register.
Am. Law Reg., N. S. American Law Register, New Series.
Am. Law Reg. & Rev. American Law Register and Review, Philadelphia.
Am. Law Rev. American Law Review, St. Louis.
Am. Lawy. American Lawyer, New York City.
Am. Lead. Cas. Hare & Wallace's American Leading Cases.
Am. Prob. American Probate Reports.
Am. R. Cas. American Railway Cases.
Am. R. Rep. American Railway Reports.
Am. R. & Corp. R. American Railroad and Corporation Reports, Chicago.
Am. Reg. American Register.
Am. Rep. American Reports (Selected Cases), Albany.
Am. Ry. Cas. American Railway Cases.
Am. Ry. Rep. American Railway Reports.
Am. St. Rep. American State Reports, San Francisco.
Am. Them. American Themis, New York.
Am. Tr. Cas. Cox's American Trademark Cases.
Am. & Eng. Corp. Cas. American and English Corporation Cases. Edward Thompson Co., Northport, L. I.
Am. & Eng. Encyc. Law. American and English Encyclopædia of Law.
Am. & Eng. Pat. Cas. American and English Patent Cases.
Am. & Eng. R. Cas. American and English Railroad Cases. Edward Thompson Co., Northport, L. I.
Ambl. Ambler's English Chancery Reports.
Amer. American. (See Am.)
Ames (Minn.). Ames's Minnesota Reports.
Ames (R. I.). Ames's Reports, Rhode Island Supreme Court (4-7 Rhode Island).
Ames Cas., B. & N. Ames's Cases on Bills and Notes.
Ames Cas. Part. Ames's Cases on Partnership.
Ames Cas. Pl. Ames's Cases on Pleading.
Ames Cas. Trusts. Ames's Cases on Trusts.
Ames, K. & B. (R. I.). Ames, Knowles & Bradley's Rhode Island Reports (8 Rhode Island).
Ames & Sm. Cas. Torts. Ames & Smith Cases on Torts.
And. Andrews's King's Bench Reports, English; Anderson's Common Pleas Reports, English.
And. Dig. Anderson's Digest of Opinions of Attorney-General.
Anderson. Anderson's Common Pleas Reports, English.
Andr. Andrews's King's Bench Reports, English.
Andrews. Andrews's King's Bench Reports, English.
Ang. (R. I.) Angell's Reports, Rhode Island Supreme Court (1 Rhode Island).

Angell & Dur. (R. I.). Angell & Durfee's Rhode Island Reports.
Ann. Queen Anne; as, 1 Ann. c. 7.
Ann. Annaly, ed. Lee's Cas. *temp.* Hardw., English.
Ann. Annual.
Ann. Reg. Annual Register, London.
Ann. Reg. N. S. Annual Register, New Series, London.
Annaly. Annaly's Reports, Eng. Commonly cited Cas. *temp.* Hardw., but sometimes as Ridgeway's Reports.
Anon. Anonymous.
Ans. Cont. Anson on Contracts.
Anstr. Anstruther's English Exchequer Reports.
Anth. (N. Y.). Anthon's New York Nisi Prius Reports.
Anth. Ill. Dig. Anthony's Illinois Digest.
Anth. N. P. (N. Y.). Anthon's New York Nisi Prius Reports.
Anth. Shop. Anthon's edition of Sheppard's Touchstone.
Anthon (N. Y.). Anthon's New York Nisi Prius Reports.
Ap. Bre. Appendix to Breese's Reports.
Ap. Justin. *Apud Justinianum*; in Justinian's Institutes.
App. Appeal.
App. (Me.). Appleton's Maine Reports (19, 20, Maine).
App. Cas. English Law Reports, Appeal Cases.
App. Cas. (D. C.). Appeal Cases, District of Columbia, vol. 1.
App. Cas. Beng. Sevestre & Marshall's Bengal Reports, India.
App. Ct. Rep. Bradwell's Illinois Appeal Court Reports.
App. N. Z. Appeal Reports, New Zealand.
App. Rep. Ont. Appeal Reports, Ontario.
Appleton (Me.). Appleton's Maine Reports.
Apud. At, by, with, among, in, quoted in.
Arbuth. (Madras). Arbuthnot's Criminal Cases, India.
Arch. Arb. Archbold on Arbitration and Award.
Arch. Cr. L. Archbold's Criminal Law.
Arch. Cr. Pl. Archbold's Criminal Pleading, Procedure, and Evidence.
Arch. Cr. Prac. Archbold's Criminal Pleading, Procedure, and Evidence.
Arch. F. Archbold's Forms.
Arch. F. I. Archbold's Forms of Indictment.
Arch. L. & T. Archbold's Landlord and Tenant.
Arch. P. C. Archbold's Pleas of the Crown.
Arch. P. L. Cas. Archbold's Abridgement of Poor Law Cases.
Arch. Part. Archbold's Law of Partnership.
Arch. Prac. Archbold's Practice.
Archer (Fla.). Archer's Florida Reports (2 Florida).
Archer & Hogue (Fla.). Archer and Hogue's Reports (2 Florida).
Arg. *Arguendo*, in arguing, in the course of reasoning.

Arg. Rep. Reports printed in the Melbourne Argus, Australia.
Aris. Arizona Reports.
Ark. Arkansas Reports; Arkley's Scotch Justiciary Reports.
Ark. L. J. Arkansas Law Journal, Fort Smith.
Arkl. Arkley's Reports, Scotch Justiciary Court.
Arm. Con. El. Armstrong's Contested Elections.
Arm. Mac. & O. Armstrong, MacCartney and Ogle's Irish Nisi Prius Reports.
Arn. Arnold's Common Pleas Reports, English; Arnot's Criminal Trials, Ireland.
Arn. El. Cas. Arnold's Election Cases, English.
Arn. Ins. Arnould on Insurance.
Arn. & H. Arnold and Hodges' Reports, English Queen's Bench.
Arn. & H. B. C. Arnold and Hodges' Reports, English Bail Court.
Arn. & H. Pr. Cas. Arnold and Hodges' Practice Cases, English.
Arnold. Arnold's Common Pleas Reports, English.
Arnot. Arnot's Scotch Criminal Cases.
Ash. Ashe's Abridgment of Plowden's Reports; Ashe's Tables to Coke's Reports, to Dyer's Reports, and to the Year Books.
Ashl. Cas. Cont. Ashley's Cases on Contracts.
Ashm. (Pa.). Ashmead's Pennsylvania Reports.
Ashton. Ashton's Opinions of the United States Attorneys-General.
Asp. Aspinall's Admiralty Reports, English.
Asp. Cas. (or Rep.). English Maritime Law Cases, New Series, by Aspinall.
Asp. M. C. Aspinall's Maritime Cases.
Aspinall. Aspinall's Admiralty Reports, English.
Ass. Book of Assizes (part 5 of the Year Books).
Atch. Atcherson's Reports, Navigation and Trade, English.
Atk. Atkyns's English Chancery Reports.
Atk. P. T. Atkyns's Parliamentary Tracts.
Atl. Rep. Atlantic Reporter.
Ats. At suit of.
Atty. Attorney.
Atty.-Gen. Attorney-General.
Atty.-Gen. Op., U. S. Attorney-General's Opinions.
Atty.-Gen. Op., N. Y. Attorney-General's Opinions, New York.
Atw. (Minn.). Atwater's Reports, Minnesota Reports, vol. 1.
Auch. Auchinleck's Manuscript Cases, Scotch Court of Session.
Auct. Reg. & L. Chron. Auction Register and Law Chronicle.
Aust. Austin's County Courts Cases, English.
Aust. Jur. Austin's Lectures on Jurisprudence; Australian Jurist.
Aust. Jur. Abr. Austin's Lectures on Jurisprudence, abridged.

Aust. Jur. Rep. Australian Jurist Reports.
Aust. Juris. Austin's Province of Jurisprudence.
Aust. L. T. Australian Law Times, Melbourne, Australia.
Austin. Austin's Jurisprudence.
Austin C. C. Austin's County Court Reports, English.
Austra. Jur. Australian Jurist.
Austra. L. T. Australian Law Times.
Auth. *Authentica*, in the authentic; that is, the summary of some of the Novels in the civil law, inserted in the Code under such a title.
Ayl. Pan. Ayliffe's Pandects.
B. Bar. Bench and Bar, Chicago.
B. C. Bail Court; Bankruptcy Cases.
B. C. C. Lowndes and Maxwell's Bail Court Cases, English; Brown's Chancery Cases, English.
B. C. B. Saunders and Cole's Bail Court Reports, English.
B. Ch. (N. Y.). Barbour's Chancery Reports, New York.
B. D. & O. Blackham, Dundas, & Osborne's Nisi Prius Reports, Ireland.
B. L. B. Bengal Law Reports.
B. L. T. Baltimore Law Transcript, Baltimore, Md.
B. M. Burrow's Reports *temp.* Mansfield.
B. M. or B. Moore. Moore's Reports, English.
B. Mon. (Ky.). B. Monroe, Kentucky Court of Appeals.
B. N. C. Bingham's New Cases, English Common Pleas; Brooke's New Cases, English King's Bench; Busbee's North Carolina Law Reports.
B. N. P. Buller's Nisi Prius.
B. P. B. Buller's Paper Book, Lincoln's Inn Library.
B. P. C. Brown's Parliamentary Cases.
B. P. N. B. Bosanquet & Puller's New Reports, English Common Pleas.
B. B. Bancus Regis, or King's Bench; Bankruptcy Reports; Bankruptcy Register, New York.
B. B. H. Cases *temp.* Hardwicke, English King's Bench.
B. Reg. Bankruptcy Register, New York.
B. S. Bancus Superior, or Upper Bench.
B. & A. Barnewall and Adolphus's English King's Bench Reports; Barron and Arnold's English Election Cases; Barron and Austin's English Election Cases; Banning and Arden's Patent Reports.
B. & A. or B. & Ald. Barnewall and Alderson's Reports, English King's Bench.
B. & Ad. Barnewall and Adolphus.
B. & Adol. Barnewall and Adolphus English King's Bench Reports.
B. & Ald. Barnewall and Alderson's English King's Bench Reports.
B. & Arn. Barron and Arnold's English Election Cases.
B. & Aust. Barron and Austin's Election Cases, English.
B. & B. Broderip and Bingham's English Common Pleas Reports; Ball and Beatty's Irish Chancery Reports.

- B. & Bar.** The Bench and Bar, Chicago.
B. & C. Barnewall and Cresswell, English King's Bench Reports.
B. & D. Benloe and Dalison, English Common Pleas Reports.
B. & F. Broderick and Fremantle's English Ecclesiastical Reports.
B. & H. (U. S.). Blatchford and Howland, U. S. District Court Reports.
B. & H. Dig. Bennett and Heard's Massachusetts Digest.
B. & H. Lead. Cas. Bennett and Heard's Leading Cases on Criminal Law.
B. & I. Bankruptcy and Insolvency Cases.
B. & L. Browning and Lushington's Reports, English Admiralty.
B. & Macn. Browne and Macnamara.
B. & P. Bosanquet and Puller's English Common Pleas Reports.
B. & P. N. E. Bosanquet and Puller, New Reports.
B. & S. Best & Smith's Reports, English Queen's Bench.
Ba. & Be. Ball and Beatty's Irish Chancery Reports.
Bac. Abr. Bacon's Abridgement of the Law.
Bac. Ca. Bacon's Case of Treason, 1641.
Bac. Dig. (Ga.). Bacon's Georgia Digest.
Bagl. (Cal.). Bagley's California Reports.
Bagl. or Bagl. & H. Bagley and Harman's Reports, California Supreme Court (16-19 California).
Bail. (S. Car.). Bailey's South Carolina Reports.
Bail. Dig. (N. Car.). Bailey's North Carolina Digest.
Bail. Eq. (S. Car.). Bailey's Equity Reports, South Carolina.
Bail Ct. Cas. Lowndes and Maxwell's Bail Court Cases, English Bail Court.
Bail Ct. R. Bail Ct. Rep., Saunders and Cole.
Ball & B. Ball and Beatty, Irish Chancery.
Bailey (S. Car.). Bailey's South Carolina Reports.
Bailey Dig. (N. Car.). Bailey's North Carolina Digest.
Bailey Eq. (S. Car.). Bailey's Chancery Reports.
Baill. Dig. Baillie's Digest of Mohammedan Law.
Bald. (U. S.). Baldwin's Reports, U. S. 3d Circuit.
Bald. App. 11 Pet. Baldwin's Appendix to 11 Peters.
Baldw. (U. S.). Baldwin's U. S. Circuit Court Reports, vol. 1.
Baldw. Conn. Dig. Baldwin's Connecticut Digest.
Ball Cas. Torts. Ball's Cases on Torts.
Ball & Beatt. Ball & Beatty's Irish Chancery Reports.
Balt. L. Trans. Baltimore Law Transcript.
Banc. Sup. Bancus Superior, or Upper Bench.
Bank. Bankruptcy; Bankruptcy Court.
Bank Ct. Rep. American Law Times Bankruptcy Reports.
Bank Ct. Rep. Bankrupt Court Reporter, New York.
Bank. Gaz. Gazette of Bankruptcy.
Bank. L. J. Banking Law Journal.
Bank. Reg. Bankruptcy Register, New York.
Bank. Reg. Dig. Bankruptcy Register Digest.
Bank. & Ins. Bankruptcy and Insolvency Reports, English.
Bank. & T. Banker and Tradesman.
Banker's Mag. (Lon.). Banker's Magazine, London.
Banking L. J. Banking Law Journal, New York City.
Banks (Kan.). Banks, Kansas Reports; (1-5 Kansas).
Bann. Bannister's Reports, English Common Pleas.
Bann. Br. Bannister's edition of O. Bridgman's English Common Pleas Reports.
Bann. & A. Pat. Cas. Banning and Arden's Patent Cases.
Bar. Barnardiston's English King's Bench Reports; Bar Reports in all the Courts, English; Barbour (see Barb.).
Bar. Chy. Barnardiston's English Chancery Reports.
Bar. Ex. Jour. Bar Examination Journal, London.
Bar. N. Barnes's Notes, English Common Pleas Reports.
Bar. & Ad. Barnewall & Adolphus's English King's Bench Reports.
Bar. & Al. Barnewall & Alderson's English King's Bench Reports.
Bar. & Arn. Barron & Arnold's English Election Cases.
Bar. & Aust. Barron & Austin's English Election Cases.
Bar. & Cr. Barnewall & Cresswell's English King's Bench Reports.
Barb. (Ark.). Barber's Reports, Arkansas (14-24 Arkansas).
Barb. (N. Y.). Barbour's New York Supreme Court Reports, vols. 3-67.
Barb. Abs. Barbour's Abstracts of Chancellor's Decisions, New York (or the Saratoga Chancery Sentinel).
Barb. App. Dig. (N. Y.). Barbour's Digest New York Court of Appeals.
Barb. Ch. (N. Y.). Barbour's New York Chancery Reports.
Barb. Dig. (Ky.). Barbour's Digest of Kentucky Reports.
Barb. Eq. Dig. Barbour's Equity Digest.
Barb. Sup. Dig. (N. Y.). Barbour's Digest, New York Supreme Court.
Baro. Mo. Dig. Barclay's Missouri Digest.
Barn. Barnardiston's English King's Bench Reports; Barnes's English Common Pleas Reports.
Barn. Ch. Barnardiston's Chancery Reports, English.
Barn. K. B. Barnardiston's King's Bench Reports, English.
Barn. No. Barnes' Notes of Cases, English Common Pleas.
Barn. & A. or Barn. & Ald. Barnewall and Alderson's Reports, English King's Bench.
Barn. & Ad. Barnewall & Adolphus's Reports, English King's Bench.
Barn. & Adol. Barnewall & Adolphus's English King's Bench Reports.

Barn. & Ald. Barnewall and Alderson, English King's Bench Reports.

Barn. & Cress. Barnewall and Cresswell, English King's Bench Reports.

Barnes N. C. Barnes's Notes of Cases, English.

Barnet. Barnet's English Central Criminal Courts Reports.

Barnw. Dig. Barnwall's Digest of the Year Books.

Barr. (Pa.) Barr's Pennsylvania Reports (1-10 Pennsylvania).

Barr. & Arn. Barron & Arnold's Election Cases, English.

Barr. & Aus. Barron & Austin's Election Cases, English.

Barrister. The Barrister, Toronto, Canada.

Barron Mir. Barron's Mirror of Parliament.

Bart. Elect. Cas. Bartlett's Congressional Election Cases.

Bat. Dig. (N. Car.). Battle's North Carolina Digest.

Bates (Del.). Bates's Delaware Chancery Reports.

Batt. Batty's King's Bench Reports, Irish.

Batt. & Dev. (N. Car.). Battle and Devereux' North Carolina Reports.

Batty. Batty's King's Bench Reports, Irish.

Baxt. (Tenn.). Baxter's Tennessee Supreme Court Reports, vols. 1-9.

Bay (Mo.). Bay's Reports, Missouri Supreme Court (1-3, 5-8 Missouri).

Bay (S. Car.). Bay's South Carolina Reports.

Bay St. Mo. Bay State Monthly.

Bea. Beavan, English.

Beale Cas. Crim. L. Beale's Cases on Criminal Law.

Beas. (N. J.). Beasley's New Jersey Chancery Reports.

Beat. Beatty's Irish Chancery Reports.

Beav. Beavan's English Rolls Court Reports.

Beav Ry. & Can. Cas. Beavan's Railway and Canal Cases.

Bee Adm. Bee's United States District Court Admiralty Reports.

Bee (U. S.). Bee's United States District Court Reports.

Bee C. C. E. Bee's Crown Cases Reserved, English.

Bel. Bellewe's Reports, English King's Bench, *temp.* Richard II.

Bel. (Bombay). Bellasis' Bombay Reports.

Bel. Ca. t. H. VIII. Bellewe's Cases, Henry VIII. (Brooke's New Cases).

Beling (Ceylon). Beling, Ceylon Reports.

Beling & Van. (Ceylon). Beling & Vanderstraaten's Ceylon Reports.

Bell. Bell's Scotch Session Cases; Bellewe's English King's Bench Reports; Brooke's New Cases, by Bellewe; Bellinger's Reports (4-8 Oregon); Bellasis' Bombay Reports.

Bell. (Ind.). Bell's Reports, India.

Bell. (Or.). Bellinger's Reports, Oregon Reports, vol. 4-8.

Bell. Ap. Cas. Bell's House of Lords Cases, Scotch Appeals.

Bell C. C. Bellasis' Civil Cases, Bombay; Bellasis' Criminal Cases, Bombay.

Bell C. H. C. Bell's Reports, Calcutta High Court.

Bell. Cas. Bell's Cases, Scotch Court of Sessions.

Bell. Cas. t. H. VIII. Brooke's New Cases (collected by Bellewe).

Bell. Cas. t. E. II. Bellewe's English King's Bench Reports (time of Richard II.).

Bell Cr. C. Bell's English Crown Cases.

Bell. Cr. Cas. Beller's Criminal Cases, Bombay.

Bell fol. Bell's folio Reports, Scotch Court of Session.

Bell H. C. (In.). Bell's Reports, High Court of Calcutta.

Bell H. L. Bell's House of Lords Cases, Scotch Appeal.

Bell oct. (or 8vo). Bell's octavo Reports, Scotch Court of Session.

Bell P. C. Bell's Cases in Parliament, Scotch Appeals.

Bell Put. Mar. Bell's Putative Marriage Case, Scotland.

Bell So. App. Cas. Bell's Scotch Appeal Cases.

Bell Scot. Dig. Bell's Scottish Digest.

Bell Sess. Cas. Bell's Cases in the Court of Sessions.

Bellasis (Bombay). Bellasis' Criminal Cases, Bombay.

Bellewe. Bellewe's Reports, English King's Bench, *temp.* Richard II.

Bellewe Cas. Bellewe's Cases, *temp.* Henry VIII.; Brooke's New Cases; Petit Brooke.

Bellewe t. H. VIII. Brooke's New Cases (collected by Bellewe).

Bell's App. Cas. Bell's Appeal Cases, H. L., Scotland.

Bell's Cr. Cas. Bell's Crown Cases, England.

Belt Bro. Belt's Edition of Brown's Chancery Reports.

Belt Sup. Ves. Belt's Supplement of Vesey's Reports.

Belt Ves. Sen. Belt's Edition of Vesey Senior's Reports.

Ben. (U. S.). Benedict's United States District Court Reports, Southern District of New York.

Ben. F. I. Cas. Bennett's Fire Insurance Cases.

Ben. Ins. Cas. Bennett's Insurance Cases.

Ben. Monr. (Ky.). B. Monroe's Reports, Kentucky Court of Appeals.

Ben. & D. Benloe and Dalison, English Common Pleas Reports.

Ben. & H. Dig. Bennett and Heard's Massachusetts Digest.

Ben. & H. L. Cas. Bennett and Heard's Leading Criminal Cases.

Ben. & Sl. Dig. (La.). Benjamin and Slidell's Louisiana Digest.

Bench & Bar. The Bench and Bar, Chicago.

Bendl. Bendloe's (or New Benloe's) Reports, English Common Pleas, ed. of 1661.

Bendl. in Ashe. Bendloe in Ashe, Eng.

Bendl. in Keil. Bendloe in Keilway, Eng.

Bendl. N. New Bendloe, or Bendloe, English King's Bench.

Bendl. Old. Old Bendloe, Eng. Common Pleas.

Benedict (U. S.). Benedict's United States District Court Reports.

Beng. L. R. Bengal Law Reports, India.

Beng. S. D. Bengal Sudder Dewany Reports, India.

Benj. on Sales. Benjamin on Sales of Personal Property.

Benl. C. P. Benloe's Common Pleas Reports, English.

Benl. K. B. Benloe's King's Bench Reports, English.

Benl. in Ashe. Benloe's Reports, at the end of Ashe's Tables.

Benl. in Keil. Benloe's Reports, at the end of Keilway's Reports.

Benl. New. Benloe's Reports, English Common Pleas.

Benl. Old. Benloe's Reports, English Common Pleas of Benloe and Dalison.

Benl. & D. Benloe and Dalison's Reports, English Common Pleas.

Benn. (Cal.). Bennett's Reports, California Supreme Court (1 California).

Benn. (Dak.). Bennett's Dakota Reports.

Benn. (Mo.). Bennett's Reports, Missouri Supreme Court (16-21 Missouri).

Benn. Fire Ins. Cas. Bennett's Fire Insurance Cases.

Benn. & H. Cr. Cas. Bennett and Heard's Leading Criminal Cases.

Benn. & H. Dig. Bennett and Heard's Massachusetts Digest.

Bennett. Bennett's Reports (1 California; 1 Dakota; 16-21 Missouri).

Bent. Bentley's Reports, Irish Chancery.

Bentl. Atty.-Gen. Bentley's U. S. Attorney-General's Opinions.

Ber. (Mo.). Berry's Missouri Appeals Reports.

Ber. (N. B.). Berton's New Brunswick Reports.

Bert. (N. B.). Berton's New Brunswick Reports.

Best Ev. Best on Evidence.

Best & S. Best and Smith's Reports, English Queen's Bench.

Betts Dec. Blatchford and Howland's U. S. District Court Reports.

Bev. Pat. Bevell Patent Cases, English.

Bevon (Ceylon). Beven's Ceylon Reports.

Bibb (Ky.). Bibb's Kentucky Reports.

Bick. (India). Bicknell's Reports, India.

Bick. (Nev.). Bicknell's Nevada Reports (10 Nevada).

Bicknell & H. (Nev.). Bicknell and Hawley's Nevada Reports.

Big. (India). Bignell's Reports, India.

Big. Cas. Bigelow's Cases, William I. to Richard I.

Big. Cas. B. & N. Bigelow's Cases on Bills and Notes.

Big. Cas. Torts. Bigelow's Leading Cases in Torts.

Big. Ins. Cas. or Big. L. & A. Ins. Cas. Bigelow's Life and Accident Insurance Cases.

Big. Lead. Cas. Bigelow's Leading Cases on Bills and Notes; Leading Cases in Torts; Leading Cases in Wills.

Bigo. O. Cas., or Big. Over. Cas. Bigelow's Overruled Cases.

Big. Plac. Norm. Bigelow's Placita Normannicum, English.

Big. Torts. Bigelow's Leading Cases in Torts.

Bigo. Cas. Bigelow's Cases, William I. to Richard I.

Bign. (India). Bignell's Reports, India.

Bin. (Pa.). Binney's Pennsylvania Reports.
Bin. Dig. (Mich.). Binmore's Digest, Michigan.

Bing. Bingham's English Common Pleas Reports.

Bing. N. C. Bingham's English Common Pleas Reports, New Cases.

Binm. Ind. Binmore's Index-Digest of Michigan Reports.

Binn. (Pa.). Binney's Pennsylvania Reports.

Biss. (U. S.). Bissell, United States Circuit Court.

Bitt. Pr. Cas. Bittleston's English Practice Cases.

Bitt. W. & P. Bittleston, Wise, and Parnell's Reports (2-3 New Practice Cases).

Bk. Bankruptcy; Black's U. S. Supreme Court Reports.

Bk. Judg. Book of Judgments by Townsend.

Bkg. L. J. Banking Law Journal.

Bl. Black's U. S. Supreme Court Reports; Blatchford's U. S. Circuit Court Reports; Blackford's Indiana Reports; Henry Blackstone's English Common Pleas Reports; W. Blackstone's English King's Bench Reports; Blackstone's Commentaries.

Bl. C. C. (U. S.). Blatchford's Reports, U. S. Circuit Court

Bl. Com. Blackstone's Commentaries.

Bl. D. & O. Blackham, Dundas, and Osborne's Reports, Irish Nisi Prius Cases.

Bl. H. Blackstone, Henry, English Common Pleas.

Bl. Law Tr. Blackstone's Law Tracts.

Bl. Pr. Cas. (U. S.). Blatchford's Prize Cases, U. S. District of New York.

Bl. B. William Blackstone's Reports, English Common Law Courts.

Bl. W. Blackstone, William, English Reports.

Bl. & How. (U. S.). Blatchford and Howland's Admiralty Reports, U. S. District Court, Southern District of New York.

Bla. Ch. (Md.). Bland's Maryland Chancery Reports.

Bla. Com., or Comm. Blackstone's Commentaries.

Bla. H. Henry Blackstone's English Common Pleas Reports.

Bla. W. Sir William Blackstone's Reports, English King's Bench.

Black. (Ind.). Blackford's Indiana Reports.

Black (Ind.). Black's Indiana Reports (30-53 Indiana).

Black (U. S.). Black's U. S. Supreme Court Reports.

Black Acc. Cas. Black on Pleading in Accident Cases.

Black. Comm. Blackstone's Commentaries.
Black. Cond. Rep. (Ill.). Blackwell's Condensed Illinois Reports.

Black. Dun. & Os. Blackham, Dundas, and Osborne, Irish Nisi Prius.

Black. H. Henry Blackstone's English Common Pleas Reports.

Black. Jus. Blackerby's Justices' Cases.

Black. S. Blackburn on Sales.

Black Ship. Cas. Black's Decisions in Shipping Cases.

Abbreviations of the Reports, ABBREVIATIONS. Text-books, and Common Legal Terms.

- Black. Wm.** William Blackstone's English King's Bench Reports.
Blackb. Blackburn on Sales.
Blackf. (Ind.). Blackford's Indiana Supreme Court.
Blacks. Comm. Blackstone's Commentaries.
Blacks. R. William Blackstone's Reports.
English Common Law Courts.
Blackst. Comm. Blackstone's Commentaries.
Blackst. R. William Blackstone's Reports, English.
Blackw. (Ill.). Blackwell's Illinois Reports.
Blackw. Cond. Blackwell's Condensed Reports, Illinois.
Blake (Mont.). Blake's Montana Reports.
Blake & H. Blake and Hedges' Montana Reports.
Blanch. & W. Blanchard and Weeks's Leading Cases on Mines and Minerals.
Bland Ch. (Md.). Bland's Maryland Chancery Reports.
Blatch. & H. (U. S.). Blatchford and Howland's Admiralty Reports, U. S. District Court, Southern District of New York.
Blatchf. (U. S.). Blatchford's U. S. Circuit Court.
Blatchf. P. C. (U. S.). Blatchford's Prize Cases, U. S. District Court.
Bleek. (Ga.). Bleckley's Reports, Georgia Supreme Court (34-35 Georgia).
Bl. Bligh's House of Lords Reports, English.
Bl. N. S. Bligh's House of Lords Reports, English, New Series.
Bligh. Bligh's Reports, House of Lords.
Bligh, N. S. Bligh, New Series, 1827-1837.
Bliss N. Y. Co. Bliss's New York Code.
Bloom. Man. Cas. (N. J.). Bloomfield's Manumission Cases, New Jersey.
Bomb. H. Ct. Rep. Bombay High Court Reports.
Bomb. Sel. Cas. Bombay Select Cases.
Bomb. Ser. Bombay Series, Indian Law Reports.
Bond (U. S.). Bond's U. S. Circuit and District Court Reports.
Book Judg. Book of Judgments, English.
Boor. (Cal.). Booraem's Reports, California Supreme Court (6-8 California).
Borr. Borradaile's Reports, Bombay.
Bos. (N. Y.). Bosworth's New York Superior Court Reports.
Bos. & P. Bosanquet and Puller's English Common Pleas Reports.
Bos. & P. N. R. Bosanquet and Puller's New Reports, English Common Pleas.
Bost. L. Rep. Boston Law Reporter.
Bost. Pol. Rep. Boston Police Court Reports.
Bosw. (N. Y.). Bosworth's State Reports, 14-23 N. Y. Superior Court.
Bott P. L. Bott's Poor Law Cases.
Bott P. L. Const. Const's edition of Bott's Poor Law Cases.
Bott Set. Cas. Bott's Poor Law (Settlement) Cases.
Boulnois. Boulnois's Reports, Bengal.
Bourke. Bourke's Reports, India.
Bouvier's Dic. Bouvier's Law Dictionary.
Bov. Pat. Cas. Bovill's Patent Cases.
Br. Bracton de Legibus et Consuetudinibus Angliæ.
Br. Abr. Brooke's Abridgment.
Br. C. C. British (or English) Crown Cases (American reprint).
Br. Ch. C. Brown's Chancery Cases, English.
Br. Cr. Cas. British Crown Cases.
Br. Fed. Dig. Brightly's Digest of Federal Decisions.
Br. Leg. Max. Broom's Legal Maxims.
Br. N. C. Brooke's New Cases, English King's Bench Reports.
Br. P. C. Brown's Parliamentary Cases, English House of Lords.
Br. Syn. Brown's Synopsis of Decisions, Scotch Court of Session.
Br. & F. Eco. Broderick and Fremantle's Ecclesiastical Cases.
Br. & Gold. Brownlow and Goldesborough's English Common Pleas Reports.
Br. & L. Browning and Lushington's English Admiralty Reports.
Bra. Bracton de Legibus, etc., Angliæ.
Braet. Bracton de Legibus et Consuetudinibus Angliæ.
Brad. Bradford's Iowa Reports; Bradwell's Illinois Reports.
Brad. (N. Y.), or Bradf. Surr. (N. Y.). Bradford's Surrogate Court Reports, N. Y.
Bradf. (Iowa). Bradford's Iowa Reports.
Bradf. (N. Y.). Bradford's New York Surrogate Court Reports.
Bradl. (R. I.). Bradley's Rhode Island Reports.
Bradw. (Ill.). Bradwell's Illinois Appellate Reports.
Brady Ind. Brady's Index to Arkansas Reports.
Branch (Fla.). Branch's Florida Reports.
Brans. Dig. Branson's Digest of Bombay Reports.
Brayt. (Vt.). Brayton's Vermont Reports.
Breese (Ill.). Breese's Illinois Reports.
Brett Cas. Eq. Brett's Cases in Modern Equity.
Brev. (S. Car.). Brevard's South Carolina Reports.
Brev. Dig. Brevard's Digest.
Brew. (Md.). Brewer's Reports, Maryland Supreme Court (19-26 Maryland).
Brew. (Pa.). Brewster's Reports.
Brews. (Pa.). Brewster's Pennsylvania Reports.
Brewst. (Pa.). Brewster's Pennsylvania Reports.
Brewst. Pa. Dig. Brewster's Pennsylvania Digest.
Brick. Dig. (Ala.). Brickell's Digest Alabama Reports.
Bridg., or Bridg. J. J. Bridgman's Reports, English Common Pleas.
Bridg. Dig. Ind. Bridgman's Digested Index.
Bridg. Eq. Ind. Bridgman's Index to Equity Cases.
Bridg. O. Sir Orlando Bridgman's English Common Pleas Reports.
Brief. The Brief, London, England.
Bright. (Pa.). Brightly's Nisi Prius Reports at Philadelphia, and Pennsylvania Supreme Court.
Bright. Dig. (N. Y.). Brightly's Digest New York Reports.

Bright. Dig. (Pa.). Brightly's Digest Pennsylvania Reports.

Bright. Dig. (U. S.). Brightly's Digest Federal Reports.

Bright. El. Cas. Brightly's Election Cases.

Bright N. P. (Pa.). Bright's Pennsylvania Nisi Prius Reports.

Bright. Purd. Brightly's edition of Purdon's Digest of Laws of Pennsylvania.

Brisb. (Minn.) Brisbin's Minnesota Reports.

Brit., or Britt. Britton's Ancient Pleas of the Crown.

Brit. & For. Rev. British and Foreign Review.

Brit. Col. S. C. British Columbia Supreme Court Reports.

Brit. Cr. Cas. British (or English) Crown Cases.

Brit. Q. British Quarterly Review.

British Col. British Columbia Reports.

Britt. Britton's Pleas of the Crown.

Bro. Browne's Pennsylvania Reports; Brown's Michigan Nisi Prius Reports; Brown's English Chancery Reports; Brown's Parliamentary Cases.

Bro. A. & B. Browne's Admiralty and Revenue Cases, U. S. Dist. Court, Michigan.

Bro. Adm. Brown's United States Admiralty Reports.

Bro. C. C. Brown's Chancery Cases, English.

Bro. Ecc. Brooke's Ecclesiastical Reports, English.

Bro. Leg. Max., or Bro. Max. Broom's Legal Maxims.

Bro. N. B. Cas. Browne's National Bank Cases.

Bro. N. C. Brooke's New Cases, English King's Bench.

Bro. N. P. Brown's Nisi Prius Cases, English King's Bench.

Bro. N. P. (Mich.). Brown's Nisi Prius Cases, Michigan.

Bro. Nat. B. Cas. Brown's National Bank Cases.

Bro. P. C. Brown's Parliamentary Cases, English House of Lords.

Bro. (Pa.). Brown's Reports, Pennsylvania.

Bro. Parl. C. Brown's Parliamentary Cases, English.

Bro. Syn. Brown's Synopsis of the Decisions of the Scotch Court of Session.

Bro. & F. Broderick and Fremantle's Ecclesiastical Cases.

Bro. & G. Brownlow and Goldesborough's English Common Pleas Reports.

Bro. & Lush. Browning and Lushington's English Admiralty Reports.

Brook. (U. S.). Marshall's United Circuit Court Decisions by Brockenbrough.

Brook. Cas. (Va.). Brockenbrough's Cases, Virginia Cases.

Brook. & H. (Va.). Brockenbrough and Holmes's Reports, Virginia Cases.

Brod. Stair. Brodie's Notes and Supplement to Stair's Institutes of the Laws of Scotland.

Brod. & Bingham. Broderip and Bingham's English Common Pleas Reports.

Brod. & Frem. Broderick and Fremantle's English Ecclesiastical Reports.

Brooke. Brooke's New Cases, English King's Bench.

Brooke (Petit). Brooke's New Cases.

Brooke Ecc. Brooke's Ecclesiastical Reports, English.

Brooke N. C. Brooke's New Cases, English King's Bench (Bellewe's Cases *temp.* Henry VIII.).

Brooke Six Judg. Six Ecclesiastical Judgments of the English Privy Council by Brooke.

Brookl. Rec. Brooklyn Daily Record, Brooklyn, N. Y.

Broom Max. Broom on Legal Maxims.

Broun, or Broun Just. Broun's Reports, Scotch Justiciary Court.

Brown Ch. C. Brown's Chancery Cases, English Chancery.

Brown (Mich.). Brown's Michigan Reports.

Brown (Nebr.). Brown's Nebraska Reports.

Brown (U. S.). Brown's United States Admiralty Reports.

Brown, or Brown (Mich.) N. P. Brown's Michigan Nisi Prius Reports.

Brown A. & B. Brown's Admiralty and Revenue Cases, U. S. Dist. Courts, Michigan.

Brown Adm. Brown's United States District Court Admiralty Reports.

Brown Ch. Brown's Chancery, England.

Brown Ecc. Brown's Ecclesiastical Reports, English.

Brown N. P. Cas. Brown's Nisi Prius Cases, English.

Brown N. P. Cas. (Mich.). Brown's Nisi Prius Reports, Michigan.

Brown P. C. Brown's Parliamentary Cases, English House of Lords.

Brown Rep. Brown's Scotch Reports.

Brown Supp. Brown's Supplement, Scotch Sessions.

Brown Syn. Brown's Synopsis of Decisions of the Scotch Court of Session.

Brown & G. Brownlow and Goldesborough's English Common Pleas Reports.

Brown & H. (Miss.). Brown and Hemingway's Mississippi Reports.

Brown. & Lush. Browning and Lushington, English Admiralty.

Browne (Mass.). Browne's Reports, Massachusetts Supreme Court (97-109 Massachusetts).

Browne (Pa.). Browne, Pennsylvania Court of Common Pleas, First Judicial District.

Browne Bank Cas., or Browne Nat. B. C. Browne's National Bank Cases.

Browne & G. (Mass.). Browne and Gray's Reports, Massachusetts Supreme Court (110-114 Massachusetts).

Browning & L. Browning and Lushington's Reports, English Admiralty.

Brownl. & Goldes. Brownlow and Goldesborough's Reports.

Brown E. Brown's Scotch Reports.

Bru. (or Bruce). Bruce's Scotch Court of Session Reports.

Brun. Col. Cas. Brunner's U. S. Circuit Court Collective Cases.

Brunk. Ir. Dig. Brunker's Irish Common Law Digest.

Abbreviations of the Reports, ABBREVIATIONS. Text-books, and Common Legal Terms.

- Bt. (U. S.).** Benedict's Reports, U. S. District of New York.
- Bu. Ct. App. Cape G. H.** Buchanan, Court of Appeals, Cape of Good Hope.
- Bu. E. D. Cape G. H.** Buchanan, Eastern Districts, Cape of Good Hope.
- Buch.** Buchanan's (Eben J. or James) Reports, Cape of Good Hope.
- Buch. Cas.** Buchanan's Criminal Cases, Scotland.
- Buch. Rep.** Buchanan's Reports, Cape of Good Hope.
- Buch. Sc. Cr. C.** Buchanan's Scotch Criminal Cases.
- Buck. Cas.** Buck's English Bankruptcy Cases.
- Buck. Dec.** Buckner's Decisions (in Freeman's Mississippi Chancery Reports).
- Buff. Super. Ct. (N. Y.).** Buffalo Superior Court Reports.
- Bull. & C. Dig.** Bullard and Curry's Louisiana Digest.
- Buller Mas.** J. Buller's Paper Books.
- Bulst.** Bulstrode's English King's Bench Reports.
- Bump No. Const.** Bump's Notes of Constitutional Decisions.
- Bunb.** Bunbury's English Exchequer Reports.
- Bur.** Burrows' English King's Bench Reports; Burnett's Wisconsin Reports.
- Bur. M.** Burrows' Reports *temp.* Mansfield.
- Burd. Cas. Torts.** Burdick's Cases on Torts.
- Burg. Dig. (Md.).** Burgwyn's Digest of Maryland Reports.
- Burke Tr.** Burke's Celebrated Trials.
- Burm. L. R.** Burmah Law Reports.
- Burn. (Wis.).** Burnett, Wisconsin Territory Supreme Court.
- Burnett.** Burnett's Wisconsin Reports.
- Burnet.** Burnet's Manuscript Decisions, Scotch Court of Session.
- Burr.** Burrow, English King's Bench.
- Burr. S. C.** Burrows' English Settlement Cases.
- Burr's Tr.** Burr's Trial, U. S. Circuit.
- Burt. Cas.** Burton's Collection of Cases and Opinions.
- Burt. Sc. Tr.** Burton's Scotch Trials.
- Busb. (N. Car.).** Busbee's North Carolina Supreme Court.
- Busb. Ch. (N. Car.).** Busbee's North Carolina Equity Reports.
- Busb. Cr. Dig. (N. Car.).** Busbee's Criminal Digest, North Carolina.
- Bush (Ky.).** Bush's Kentucky State Reports.
- Butt Sh.** Butt's edition of Shower's English King's Bench Reports.
- Byles B. & N.** Byles on Bills and Notes.
- C. A.** Court of Appeal; Court of Arches; Chancery Appeals.
- C. B.** Chief Baron of the Exchequer; Common Bench; English Common Bench Reports.
- C. B., N. S.** English Common Bench Reports, New Series.
- C. C.** Circuit Court; Crown Cases; Chancery Cases; County Court; City Court; Civil Code; Coleman's Cases (New York); Cases in Chancery; Civil Code.
- C. C. A.** U. S. Circuit Court of Appeals Reports; County Court Appeals, English.
- C. C. Chr.** Chancery Cases Chronicle, Ontario.
- C. C. E.** Caines's Cases in Error, N. Y.; Cases of Contested Elections.
- C. C. R.** Crown Cases Reserved; City Courts Reports, New York; County Court Reports; Circuit Court Reports.
- C. E. Gr. (N. J.).** C. E. Greene's Chancery Reports, New Jersey (2-4 New Jersey Chancery Reports).
- C. E. Greene (N. J.).** C. E. Greene's New Jersey Chancery Reports.
- C. H. Rec.** City Hall Recorder (Rogers), New York City.
- C. H. Rep.** City Hall Reporter (Lomas), New York City.
- C. H. & A.** Carrow, Hamerton, and Allen's New Session Cases, English.
- C. J. C.** Cowper's Justiciary Cases, Scotch Justiciary Court.
- C. J. Can.** Corpus Juris Canonici.
- C. J. Civ.** Corpus Juris Civilis.
- C. L.** Common Law; Civil Law.
- C. L. J.** Central Law Journal, St. Louis; Chicago Law Journal; Canada Law Journal, Toronto.
- C. L. J., N. S.** Canada Law Journal, New Series, Toronto.
- C. L. N.** Chicago Legal News.
- C. M. & R.** Compton, Meeson, and Roscoe's English Exchequer Reports.
- C. N. P. C.** Campbell's Nisi Prius Cases, English.
- C. of C. E.** Cases of Contested Elections, United States.
- C. P.** Common Pleas, English.
- C. P. C.** Cooper's Practice Cases, English.
- C. P. C. t. Br.** C. P. Cooper's English Chancery Reports *temp.* Brougham.
- C. P. C. t. Cott.** C. P. Cooper's English Chancery Reports *temp.* Cottenham.
- C. P. D.** Law Reports Common Pleas Division.
- C. P. Rept.** Common Pleas Reporter, Scranton, Pa.
- C. P. U. C.** Common Pleas Reports, Upper Canada.
- C. R.** Chancery Reports; Code Reporter, New York.
- C. R., N. S.** Code Reports, New Series, New York.
- C. S. C. R.** Cincinnati Superior Court Reporter.
- C. sa.** Capias ad satisfaciendum.
- C. t. K.** Cases *temp.* King (Macnaghten's Select Chancery Cases, English).
- C. t. N.** Cases *temp.* Northington.
- C. t. T.** Cases *temp.* Talbot, English Chancery.
- C. t. Talb.** Cases *temp.* Talbot.
- C. W. Dud. Eq. (S. Car.).** C. W. Dudley's Equity Reports, South Carolina.
- C. W. Dud. L. (S. Car.).** C. W. Dudley's Law Reports, South Carolina.
- C. & A.** Cooke and Alcock's Reports, Irish King's Bench and Exchequer.
- C. & C.** Coleman and Caines's Cases, New York.
- C. & D.** Corbett and Daniell's English Election Cases; Crawford and Dix's Irish Circuit Cases.

Abbreviations of the Reports, *ABBREVIATIONS.* Text-books, and Common Legal Terms:

- C. & D. A. C. Crawford and Dix's Abridged Cases, Irish.
 C. & D. C. C. Crawford and Dix's Criminal Cases, Irish; Crawford and Dix's Circuit Cases, Irish.
 C. & F. Clark and Fennelly's English House of Lords Cases.
 C. & F. N. S. Clark and Fennelly's English House of Lords Cases, New Series.
 C. & H. Dig. Coventry and Hughes's Digest.
 C. & J. Crompton and Jervis's Reports, English Exchequer.
 C. & K. Carrington and Kirwan's English Nisi Prius Reports.
 C. & L. Connor and Lawson's Irish Chancery Reports.
 C. & L. Dig. Cohen and Lee's Maryland Digest.
 C. & M. Carrington and Marshman, or Crompton and Meeson, English Reports.
 C. & Marsh. Carrington and Marshman's English Nisi Prius Reports.
 C. & N. Cameron and Norwood's North Carolina Conference Reports.
 C. & O. R. & C. Cas. Carrow and Oliver Railway and Canal Cases.
 C. & P. Carrington and Payne's Nisi Prius Reports; Craig and Phillips's Chancery Reports.
 C. & R. Cockburn and Rowe's Reports, English Election Cases.
 C. & S. Dig. Conner and Simonton's South Carolina Equity Digest.
 Ca. resp. Capias ad respondendum.
 Ca. t. Hard. Cases temp. Hardwicke.
 Ca. sa. Capias ad satisfaciendum.
 Ca. t. K. Cases temp. King; Cases temp. King, Chancery.
 Ca. t. Talb. Cases in Equity, temp. Talbot, 1733-1737.
 Ca. t. Talb. Cases temp. Talbot, Chancery.
 Ca. temp. F. Cases temp. Finch.
 Ca. temp. H. Cases temp. Hardwicke, King's Bench.
 Ca. temp. Holt. Cases temp. Holt, King's Bench.
 Cab. & El. Cababé and Ellis, English.
 Cadw. Dig. Cadwalader's Digest of Attorney-General's Opinions.
 Cal. (N. Y.). Caines's Reports, New York Supreme Court.
 Cal. Cas. (N. Y.). Caines's Cases, New York Court of Error.
 Caines (N. Y.). Caines's Reports, New York Supreme Court.
 Caines Cas. (N. Y.). Caines's Cases, New York Court of Error.
 Cairns Dec. Cairns's Decisions, Reilly, English.
 Cal. California Reports.
 Cal. Calthrop's English King's Bench Reports; Caldecott's English Settlement Cases.
 Cal. L. J. California Law Journal, San Francisco.
 Cal. L. Rec. California Legal Record.
 Cal. Leg. Adv. Calcutta Legal Adviser, India.
 Cal. Leg. Obs. Calcutta Legal Observer.
 Cal. S. D. A. Calcutta Sudder Dewanny Adawlut Reports.
 Cal. Ser. Calcutta Series Indian Law Reports.
 Cal. W. R. Calcutta Weekly Reporter, India.
 Calc. L. O. Calcutta Legal Observer.
 Cald. Caldecott's Reports, English Justice of the Peace Cases.
 Cald. Caldecott, England, King's Bench.
 Cald. Sett. Cas. Caldecott's Settlement Cases.
 Call (Va.). Call's Virginia Reports.
 Calth. Calthrop's English King's Bench Reports.
 Cam. Cameron's Reports, Upper Canada Queen's Bench.
 Cam. & N. (N. Car.). Cameron and Norwood's North Carolina Conference Reports.
 Camp. Campbell's English Nisi Prius.
 Camp. Dec., or Campb. Dec. Campbell's Reports of Taney's Decisions, U. S. Circuit Court.
 Campb. N. P. Campbell's English Nisi Prius Reports.
 Can. Exch. Canada Exchequer Reports.
 Can. L. J. (L. C.). Lower Canada Law Journal, Montreal.
 Can. L. J., N. S. Canada Law Journal, New Series.
 Can. L. T. Canadian Law Times, Toronto, Canada.
 Can. Mun. J. Canadian Municipal Journal.
 Can. Sup. Ct. Canada Supreme Court Reports.
 Canad. Mo. Canadian Monthly.
 Cane & L. Cane and Leigh's Crown Cases Reserved.
 Cape Law J. Cape Law Journal, Grahams-town, Cape of Good Hope.
 Car. Carolus. (as 13 Car. II. c. 1).
 Car., H. & A. Carrow, Hamerton and Allen's Reports, Magistrates' Cases, English Courts.
 Car. L. J. Carolina Law Journal, Charleston, S. C.
 Car. Law Rep. Carolina Law Repository.
 Car. O. & B. Carrow, Oliver and Beavan's Railway and Canal Cases.
 Car. & Kir. Carrington and Kirwan's English Nisi Prius Reports.
 Car. & Marsh. Carrington and Marshman's English Nisi Prius Reports.
 Car. & O. Carrow and Oliver's Railway and Canal Cases.
 Car. & P. Carrington and Payne's English Nisi Prius Reports.
 Carp. (Cal.). Carpenter's California Reports (53 California).
 Carp. Carpmael's Patent Cases.
 Carr. Cas. Carrow's Summary Cases, India.
 Cart. Carter's English Common Pleas Reports.
 Cart. (Ind.). Carter's Reports, Indiana Supreme Court (1-2 Indiana).
 Carth. Carthew's English King's Bench Reports.
 Cartm. Trade-M. Cas. Cartmell's Trade-mark Cases.
 Cartw. Const. Cas. Cartwright's Constitutional Cases.
 Cary. Cary's English Chancery Reports.
 Cas. (Pa.). Casey's Pennsylvania Reports (25-36 Pennsylvania State).

- Cas. App.** Cases of Appeal to the House of Lords.
Cas. B. R. Cases Banco Regis *temp.* William III. (12 Modern Reports).
Cas. B. R. Holt. Cases and Resolutions in the Court of King's Bench, not Holt's King's Bench.
Cas. C. L. Cases in Crown Law.
Cas. Ch. Cases in Chancery, English; Select Cases in Chancery; Cases in Chancery (9 Modern Reports).
Cas. Eq. Cases in Equity, Gilbert's Reports, English.
Cas. Eq. Abr. Cases in Equity Abridged, English.
Cas. H. L. Cases in the House of Lords.
Cas. in C. Cases in Chancery; Select Cases in Chancery.
Cas. in P. or Cas. Parl. Cases in Parliament.
Cas. K. B. Cases in King's Bench (8 Modern Reports).
Cas. K. B. t. H. Cases *temp.* Hardwicke (W. Kelynge's English King's Bench Reports).
Cas. L. & Eq. Cases in Law and Equity (10 Modern Reports); (Gilbert's) Cases in Law and Equity, English.
Cas. of Self-Def. Horrigan and Thompson's Cases on the Law of Self-Defence.
Cas. Pr. Cases of Practice in the Court of King's Bench from Elizabeth to 14 George III.
Cas. Pr. (Cooke). Cooke's Practice Cases, English Common Pleas.
Cas. Pr. C. P. Cases of Practice, English Common Pleas; Cooke's Practice Cases.
Cas. Pr. K. B. Cases of Practice, English King's Bench.
Cas. S. C. (Cape G. H.). Cases in the Supreme Court, Cape of Good Hope.
Cas. Set. Cases of Settlement, English King's Bench.
Cas. Six Circ. Cases on the Six Circuits, Irish King's Bench.
Cas. t. Ch. II. Cases *temp.* Charles II., in vol. 3 of Reports in Chancery.
Cas. t. F. Cases *temp.* Finch, English Chancery; Reports *temp.* Finch.
Cas. t. Geo. I. Cases *temp.* George I., English Chancery (8-9 Modern Reports).
Cas. t. Hardw. Cases in time of Hardwicke, England, K. B.
Cas. t. Holt. Cases *temp.* Holt, English King's Bench, Holt's Reports.
Cas. t. K. Select Cases *temp.* King, English Chancery (edited by Macnaghten); Moseley's Chancery Reports, *temp.* King.
Cas. t. Lee. (Phillimore's) Cases *temp.* Lee, English Ecclesiastical.
Cas. t. Maco. Cases *temp.* Macclesfield, English Law and Equity Cases (10 Modern Reports).
Cas. t. Nap. Cases *temp.* Napier, by Drury, Irish Chancery.
Cas. t. North. Cases *temp.* Northington (Eden's English Chancery Reports).
Cas. t. Plunk. Cases *temp.* Plunkett, by Lloyd and Gould, Irish Chancery.
Cas. t. Q. A. Cases *temp.* Queen Anne (11 Modern Reports).
Cas. t. Sugd. Cases *temp.* Sugden, Irish Chancery.
Cas. t. Talb. Cases *temp.* Talbot, English Chancery.
Cas. t. Will. III. Cases *temp.* William III. (12 Modern Reports).
Cas. Wm. I. Bigelow's Cases, William I. to Richard I.
Cas. & Op. Cases with Opinions of Eminent Counsel.
Casey (Pa.). Casey's Pennsylvania Reports (25-36 Pennsylvania State).
Cent. Crim. Ct. Central Criminal Court Sessions Papers.
Cent. L. J. Central Law Journal, St. Louis.
Cent. L. Month. Central Law Monthly.
Cent. Rep. Central Reporter.
Cent. Cr. C. Rep. Central Criminal Courts Reports, English.
Ceyl. Leg. Misc. Ceylon Legal Miscellany.
Ch. Law Reports, Chancery Appeals.
(1891) Ch. Chancery Division (1891).
(1892) Ch. Law Reports, Chancery Division.
(1894) Ch. Chancery Division (1894).
Ch. App. Cas. Chancery Appeal Cases, English Law Reports.
Ch. Ca. Cases in Chancery.
Ch. Cas. Chancery Cases, England.
Ch. Cham. (Ont.). Chancery Chambers Reports, Ontario.
Ch. Cr. L. Chitty's Criminal Law.
Ch. D. Law Reports, Chancery Division.
Ch. J. Chief Justice; Chief Judge.
Ch. Pl. Chitty on Pleading.
Ch. Pro. Precedents in Chancery.
Ch. R. M. (Ga.). R. M. Charlton's Georgia Reports.
Ch. Rep. Reports in Chancery.
Ch. Rep. (Ir.). Irish Chancery Reports.
Ch. T. U. P. (Ga.). T. U. P. Charlton's Georgia Reports.
Ch. & Cl. Cas. Cripps's Church and Clergy Cases.
Ch. Dig. Mich. Chaney's Michigan Digest.
Chal. Op. Chalmers's Colonial Opinions.
Chamb. (U. C.). Chancery Chamber Upper Canada Reports.
Chamb. Dig. Pub. H. Cas. Chambers' Digest of Public Health Cases.
Chan. (Mich.). Chaney's Michigan Reports (37-44 Michigan).
Chan. Chamb. (U. C.). Upper Canada Chancery Chambers Reports.
Chan. Sent. (N. Y.). Chancery Sentinel.
Chand. (N. H.). Chandler's Reports, New Hampshire Supreme Court (20, 38-44 New Hampshire).
Chand. (Wis.). Chandler's Reports, Wisconsin Supreme Court.
Chand. Cr. Chandler's Criminal Trials.
Chaney (Mich.). Chaney's Michigan Reports.
Chapl. Cas. Crim. L. Chaplin's Cases on Criminal Law.
Charl. Pr. Cas. Charley's English Practice Cases.
Charlt. R. M. (Ga.). R. M. Charlton's Georgia Reports.

Charlt. T. U. P. (Ga.). T. U. P. Charlton's Georgia Reports.
Chase (U. S.). Chase's United States Circuit Court Reports.
Chase Cas. Torts. Chase's Cases on Torts.
Chase Cas. Wills. Chase's Cases on Wills.
Chest. Co. Rep. Chester County Reporter.
Chev. (S. Car.). Cheves's Law Reports, South Carolina.
Chev. Ch. or Chev. Eq. (S. Car.). Cheves's Chancery Reports, South Carolina.
Cheves (S. Car.). Cheves South Carolina Law Reports.
Cheves Ch. (S. Car.). Cheves South Carolina Equity Reports.
Chi. Black. Chitty's Blackstone.
Chi. Law J. Chicago Law Journal, Chicago.
Chi. Leg. N. Chicago Legal News, Chicago.
Chic. L. B. Chicago Law Bulletin, Illinois.
Chic. L. Rec. Chicago Law Record.
Chic. L. T. Chicago Law Times.
Chip. D. (Vt.). D. Chipman's Vermont Reports.
Chip. (N. B.). Chipman's New Brunswick Reports.
Chip. MS. Reports printed from Chipman's Manuscript, New Brunswick.
Chip. N. (Vt.). N. Chipman's Vermont Reports.
Chit. B. C. Chitty's Bail Court Reports; English Bail Court.
Chit. B. & N. Chitty on Bills and Notes.
Chit. Bl. Com. Chitty's Blackstone's Commentaries.
Chit. Con. Chitty on Contracts.
Chit. Cr. L. Chitty on Criminal Law.
Chit. Eq. Dig. Chitty's English Equity Digest.
Chit. F. Chitty's Forms.
Chit. Pl. Chitty's Pleading.
Chit. Pr. Chitty on General Practice.
Chit. Pre. Chitty's Precedents in Pleading.
Choyce Cas. Ch. Choyce's Cases in Chancery, England.
Chr. Rep. Chamber Reports, Upper Canada.
Chr. Rob. Christopher Robinson's English Admiralty Reports.
Cin. L. Bull. Cincinnati Law Bulletin.
Cin. Mun. Dec. Cincinnati Municipal Decisions.
Cin. Rep. Cincinnati Superior Court Reports, Ohio.
Cin. Sup. Ct. Rep. Cincinnati Superior Court Reporter.
City Ct. (N. Y.). City Court Reports, New York.
City H. Rec. (N. Y.). Rogers, City Hall Recorder, New York, various courts.
City H. Rep. (N. Y.). City Hall Reporter.
Civ. Pro. (N. Y.). Civil Procedure Reports, New York.
Cl. App. Clark's Appeal Cases, English House of Lords.
Cl. Ch. Clarke's Chancery Reports, N. Y.
Cl. Home. Clerk Home's Scotch Session Cases.
Cl. & Fin. Clark and Finnelly's English House of Lords Cases.

Cl. & Fin. N. S. Clark and Finnelly's English House of Lords Cases, New Series.
Cl. & H. Clarke and Hall's Contested Elections in Congress.
Clapp's Ind. (R. I.). Clapp's Index to Rhode Island Reports.
Clark. Clark's Appeal Cases, English House of Lords.
Clark (Ala.). Clark's Alabama Reports (58 Alabama).
Clark (Pa.). Clark's Pennsylvania Law Journal Reports.
Clark Dig. H. L. Clark's Digest of House of Lords Reports.
Clark H. L. Ind. Clark's Index to Reports in the House of Lords.
Clarke. Clarke's Notes of Cases, Bengal.
Clarke (Iowa). Clarke's Reports, Iowa Supreme Court (1-8 Iowa).
Clarke (Mich.). Clarke's Reports, Michigan Supreme Court (19-22 Michigan).
Clarke (N. Y.). Clarke's New York Chancery Reports.
Clarke Not., or B. & O. Clarke's Notes of Cases, in his Rules and Orders, Bengal.
Clarke & H. Elec. Cas. Clarke and Hall's Cases of Contested Elections in Congress.
Clayt. Clayton's English Nisi Prius Cases.
Clerk Home. Clerk Home's Decisions, Scotch Court of Session.
Clerke Dig. (N. Y.). Clerke's Digest, New York.
Clev. L. Rec. Cleveland (Ohio) Law Record.
Clev. L. Rep'r. Cleveland Law Reporter.
Clif. & B. Clifford and Rickard's English Locus Standi Reports.
Clif. & S. Clifford and Stephens' English Locus Standi Reports.
Cliff. Clifford's Election Cases.
Cliff. (U. S.). Clifford's United States Circuit Court Reports.
Clin. Dig. (N. Y.). Clinton's Digest, New York Reports.
Clin. & Sp. Dig. Clinton and Spencer's Digest.
Clk. Mag. The Clerk's Magazine, London; the Rhode Island Clerk's Magazine.
Co. Coke's English King's Bench Reports.
Co. Ct. Cas. County Court Cases, English.
Co. Ct. Ch. County Court Chronicle, English.
Co. Ct. Rep. (N. S.). County Court Reports, New Series, English.
Co. G. Reports and Cases of Practice in Common Pleas *temp.* Anne, George I., and George II., by Sir G. Cooke. (Same as Cooke's Practice Reports.)
Co. Inst. Coke's Institutes.
Co. Litt. The First Part of the Institutes of the Laws of England, or a Commentary on Littleton, by Sir Edward Coke.
Co. P. C. Coke's Reports, English King's Bench.
Co. Pl. Coke's Pleadings (sometimes published separately).
Co. R. (N. Y.). Code Reporter, New York.

- Co. B. N. S. (N. Y.). Code Reports, New Series.
- Co. Rep. Coke's Reports, English King's Bench.
- Cobb (Ga.). Cobb's Reports, Georgia Supreme Court (6-20 Georgia).
- Cobb Cas. Int. L. Cobbett's Cases on International Law.
- Coch. (N. So.). Cochrane's Nova Scotia Reports.
- Cock. & R. Cockburn and Rowe's Election Cases.
- Cooke (Ala.). Cooke's Reports, Alabama Supreme Court (16-18 Alabama).
- Cooke (Fla.). Cooke's Reports (14-16 Florida).
- Cod. Codex Justiniani.
- Cod. Jur. Civ. Codex Juris Civilis; Justinian's Code.
- Code Civ. Pro. Code of Civil Procedure.
- Code Cr. Pro. Code of Criminal Procedure.
- Code La. Civil Code of Louisiana.
- Code N., or Nap. Code Napoléon or Code Civil.
- Code Pro. Code of Procedure.
- Code R. (N. Y.) Code Reporter, New York.
- Code R. N. S. (N. Y.) Code Reports, New Series.
- Cof. Dig. Cofer's Kentucky Digest.
- Cohen Dig. (Md.). Cohen's Maryland Digest.
- Coke. Coke's Reports, English King's Bench.
- Coke Inst. Coke's Institutes.
- Coke Lit. Coke on Littleton.
- Col. Colorado Supreme Court Reports.
- Col. C. C. Collyer's Chancery Cases, English.
- Col. Cas. (N. Y.). Coleman's Cases, New York Supreme Court.
- Col. L. J. Colonial Law Journal, New Zealand.
- Col. L. Rep. Colorado Law Reporter.
- Col. & Cal. Cas. (N. Y.). Coleman and Caines' Cases, New York.
- Coldw. (Tenn.). Coldwell's Tennessee Reports.
- Cole (Iowa). Cole's Iowa Reports.
- Cole. Cas. (N. Y.). Coleman's Cases, New York.
- Cole. Pr. (N. Y.). Coleman's New York Practice Reports.
- Cole. & C. Cas. (N. Y.). Coleman and Caines' Cases, New York.
- Coll. Collyer's English V. C. Reports.
- Coll. Parl. Cas. Colles' Parliamentary Cases.
- Collector. The Collector and Commercial Lawyer, Detroit, Mich.
- Colles. Colles' English Parliamentary Cases.
- Colly. Collyer's Vice-Chancellor's Reports, English.
- Colo. Colorado Reports.
- Colo. L. Rep. Colorado Law Reporter.
- Colo. St. Bar Asso. Colorado State Bar Association Reports.
- Colon. L. J. Colonial Law Journal.
- Colq. Colquit's Reports (1 Modern Reports).
- Colt. Reg. Cas. Coltman, Registration Cases.
- Colum. Jur. Columbian Jurist.
- Colum. L. T. Columbia Law Times.
- Com. Comyns's Reports, English King's Bench and Common Pleas.
- Com. B. English Common Bench Reports, by Manning, Granger, and Scott.
- Com. B. N. S. English Common Bench Reports, New Series, by Manning, Granger, and Scott.
- Com. Dig. Comyns's Digest.
- Com. Jour. Journals of the House of Commons.
- Com. L. B. English Common Law Reports (American reprint).
- Com. P. Common Pleas Reports.
- Com. P. Div. Common Pleas Division.
- Com. P. Rep. (Pa.). Common Pleas Reporter, Pennsylvania.
- Com. & Leg. Rep. Commercial and Legal Reporter, Nashville, Tenn.
- Comb. Comberbach's English King's Bench Reports.
- Comm. Blackstone's Commentaries.
- Coms. (N. Y.). Comstock's Reports, New York Court of Appeals (1-4 New York).
- Comst. (N. Y.). Comstock's New York Reports.
- Comyns. Comyns' Reports, English King's Bench and Common Pleas.
- Comyns's Dig. A Digest of the Laws of England, by Sir John Comyns.
- Con. (Wis.). Conover's Reports, Wisconsin Supreme Court (16-41 Wisconsin).
- Con. & L. Connor and Lawson's Irish Chancery Reports.
- Con. & Sim. Connor and Simonton's South Carolina Equity Digest.
- Cond. Ch. B. Condensed Chancery Reports.
- Cond. Ecol. Condensed Ecclesiastical Reports (American reprint).
- Cond. Ex. B. Condensed Exchequer Reports.
- Cond. Rep. (U. S.). Peters's Condensed United States Reports.
- Conf. (N. Car.). Cameron and Norwood's Conference Reports, North Carolina Court of Reference.
- Cong. Elec. Cas. Congressional Election Cases.
- Cong. Globe. Congressional Globe, Washington.
- Conn. Connecticut Reports.
- Conn. Dig. Conner's Digest South Carolina Law Reports.
- Conr. Conroy's Custodiam Reports, Irish.
- Consist. Haggard's Consistory Reports, English Consistory Court.
- Const. (S. Car.). Treadway's Constitutional Reports, South Carolina.
- Const. N. S. (S. Car.). Mill's Constitutional Reports, New Series, South Carolina.
- Cont. *Contra*; opposed; to the contrary.
- Conv. Index. Converse's Indexes to Virginia and West Virginia Reports.
- Coo. & Al. Cooke and Alcock's Irish King's Bench Reports.
- Cooke. Cooke's Cases of Practice, English Common Pleas.
- Cooke, George. Sir George Cooke's English Common Pleas Reports.
- Cooke (Tenn.). Cooke's Reports, Tennessee Supreme Court.
- Cooke Pr. Cas. Cooke's Practice Reports, English Common Pleas.

Cooke Pr. Reg. Cooke's Practical Register, Common Pleas.

Cooke & A. Cooke and Alcock's Irish King's Bench and Exchequer Chamber Reports.

Cool. (Mich.). Cooley's Michigan Reports.

Cool. Bl. Cooley's Blackstone.

Cool. Con. L. Cooley's Constitutional Limitations.

Cool. Con. Law. Cooley's Constitutional Law.

Cool. Mich. Dig. Cooley's Michigan Digest.

Cool. Tax. Cooley on Taxation.

Cool. Torts. Cooley on Torts.

Cooley (Mich.). Cooley's Reports, Michigan Supreme Court (5-12 Michigan).

Coop. Cooper's English Chancery Reports *temp.* Eldon; Cooper's English Chancery Reports *temp.* Brougham; Cooper's English Practice Cases, Chancery.

Coop. (G.). George Cooper's Chancery Pleading.

Coop. (Tenn.). Cooper's Tennessee Reports.

Coop. C. C., or Cas. Cooper's Chancery Cases *temp.* Cottenham.

Coop. (C. P.). Charles P. Cooper's English Chancery Reports.

Coop. C. & Pr. (U. C.). Cooper's Chambers and Chancery Reports, Upper Canada.

Coop. Eq. Dig. Cooper's Equity Digest.

Coop. Op. (U. S.). Cooper's United States Circuit Court Reports.

Coop. Pr. Cas. Cooper's Practice Cases, English Chancery.

Coop. Sel. Cas. Cooper's Select Cases *temp.* Eldon, English Chancery.

Coop. t. Br. Cooper's English Chancery Cases *temp.* Brougham.

Coop. t. Brough. Cooper's English Chancery Reports *temp.* Brougham.

Coop. t. Cot. Cooper's English Chancery Reports *temp.* Cottenham.

Coop. t. Eld. Cooper's English Chancery Cases *temp.* Eldon.

Cooper. Cooper's English Chancery Reports *temp.* Eldon.

Cooper (Geo.). George Cooper's English Chancery Reports.

Copp. Copp's Mining Decisions.

Copp Land Off. Bull. Copp's Land Office Bulletin.

Cor. Coryton's Bengal Reports.

Corb. & D. Corbett and Daniell's English Election Cases.

Corn. Dig. Cornwell's Digest.

Corp. Dig. Corporation Digest.

Corp. Jur. Can. Corpus Juris Canonici.

Corp. Jur. Civ. Corpus Juris Civilis.

Cory. (Calcutta). Coryton's Reports, Bengal.

Cou. Couper's Justiciary Reports, Scotland.

Counsellor. The Counsellor, New York City.

County Ct. Rep. County Court Reports, English.

County Ct. Rep. N. S. County Court Reports, New Series, English.

County Cts. Ch. County Courts Chronicles, London.

County Cts. Rep. County Courts Reports, English.

County Cts. Rep. N. S. County Courts Reports, New Series, English.

County Cts. & Bankr. Cas. County Courts and Bankruptcy Cases.

Coup. Couper's Justiciary Reports, Scotland.

Court Cl. U. S. Court of Claims Reports.

Court J. & Dist. Ct. Rec. Court Journal and District Court Record.

Court Sess. Cas. Court of Session Cases, Scotland.

Court. & Macl. Courteney and Maclean's Scotch Appeals (6-7 Wilson and Shaw).

Cov. & H. Dig. Coventry and Hughes' Digest of the Common Law Reports.

Cow. Cowper's English K. B. Reports.

Cow. (N. Y.). Cowen's New York Supreme Court Reports.

Cow. Cr. (N. Y.). Cowen's Criminal Reports.

Cow. Cr. Dig. Cowen's Criminal Digest.

Cow. Dig. Cowell's (East) Indian Digest.

Cow. & W. Cowell and Woodman's Digest of India Reports.

Cowp. Cowper's English King's Bench Reports.

Cowp. Cas. Cowper's Cases, in vol. 3 of Reports in Chancery.

Cox. Cox's English Criminal Cases.

Cox (Ark.). Cox's Reports, Arkansas Supreme Court (25-27 Arkansas).

Cox, or Cox Ch. Cox's Reports, English Chancery.

Cox Am. T. M. Cas. Cox's American Trade-mark Cases.

Cox C. C. Cox's English and Irish Criminal Cases.

Cox Ch. Cox's English Chancery Cases.

Cox Cr. Dig. Cox's Criminal Law Digest.

Cox J. S. Cas. Cox's Joint Stock Cases.

Cox M. & H. Cox, Macrae, and Hertslet's English County Court Reports.

Cox Mag. Cas. Cox's English Magistrates' Cases.

Cox. Man. Tr. M. Cox's Manual of Trade-mark Cases.

Cox. & Atk. Cox and Atkinson, English Registration Appeal Reports.

Coxe (N. J.). Coxe's Reports, New Jersey Supreme Court and Court of Errors (1 New Jersey Law Reports).

Cr. (U. S.). Cranch's United States Supreme Court Reports.

Cr. C. C. (U. S.). Cranch's United States Circuit Court Reports.

Cr. Cas. Crown Cases, English.

Cr. Cas. Res. Crown Cases Reserved, English Law Reports.

Cr. & Dix. Crawford and Dix's Irish Circuit Court Cases.

Cr. & Dix. Ab. Cas. Crawford and Dix's (Irish) Abridged Cases.

Cr. L. Mag. Criminal Law Magazine.

Cr. L. Rec. Criminal Law Recorder.

Cr., M. & R. Crompton, Meeson, and Roscoe, English Exchequer Reports.

Cr. Pat. Cas. Cranch's Patent Cases.

Cr. S. & P., or Cr. St. Craigie, Stuart, and Paton's Scotch Appeal Cases.

Cr. & J. Crompton and Jervis.

Cr. & M. Crompton and Meeson, English Exchequer.

Gr. & Ph. Craig and Phillips's English Chancery Reports.

Crabb Dig. Crabb's Digest of Statutes from Magna Charta to 9 and 10 Victoria.

Crabbe (U. S.). Crabbe's United States District Court Reports.

Craig & P. Craig and Phillips's Reports, English Chancery.

Craig, & S., or Craig., S. & P. Craigie, Stuart, and Paton's Reports, Scotch Appeals, English House of Lords.

Craik. Craik's English Causes Célèbres.

Cranch (U. S.). Cranch's United States Supreme Court Reports.

Cranch C. C. (U. S.). Cranch's United States Circuit Court Reports.

Cranch Pat. Cas. Cranch's Patent Cases.

Craw. & D. Crawford and Dix, Irish Nisi Prius.

Crawf. & D. Crawford and Dix's Abridged Cases, Irish.

Creasy (Ceylon). Creasy's Ceylon Reports.

Cress. Cresswell's English Insolvency Cases.

Crim. L. Mag. Criminal Law Magazine, American.

Crim. L. Rep. Criminal Law Reporter.

Crim. Rec. Criminal Recorder, Philadelphia.

Crim. Rec. (Eng.). Criminal Recorder, London.

Cripps Cas. Cripps's English Church and Clergy Cases.

Critch. (O.). Critchfield's Ohio State Reports.

Cro. Croke's Reports, English King's Bench and Common Pleas, the separate volumes of which are usually cited Cro. Eliz., Cro. Jac., and Cro. Car. (sometimes Cro. refers to Keilway's Reports, published by Serjeant Croke).

Cro. Car. Croke's English King's Bench Reports *temp.* Charles I. (3 Cro.).

Cro. El. Croke's Reports *temp.* Elizabeth (1 Cro.).

Cro. Jac. Croke's Reports *temp.* James I. (2 Cro.).

Crockford. English Maritime Law Reports, published by Crockford.

Croke. Croke's English King's Bench Reports. See Cro.

Crompt. Star Chamber Cases, by Crompton.

Crompt. Ex. Rep. Crompton's Exchequer Reports, English.

Crompt. M. & E. Crompton, Meeson, and Roscoe's Reports, English Exchequer.

Crompt. & J. Crompton and Jervis's Reports, English Exchequer.

Crompt. & M. Crompton and Meeson's Reports, English Exchequer.

Crow. Pat. Cas. Crowell's Patent Cases.

Crounse (Neb.). Crounse's Nebraska Reports.

Crowth. (Ceylon). Crowther's Ceylon Reports.

Cruise Dig. Cruise's Digest of the Law of Real Property.

Cruise R. P. Cruise's Real Property.

Ct. Court; Circuit.

Ct. App. Court of Appeals.

Ct. Cl. Court of Claims, United States.

Ct. Cl. Dig. Court of Claims Digest.

Ct. Cl. Rep. Court of Claims Reports.

Ct. Gen. Sess. Court of General Sessions.

Ct. Sess. Cas. Scotch Court of Session Cases.

Cum. Cas. Priv. Corp. Cumming's Cases on Private Corporations.

Cum. & Dun. Rem. Tr. Cummins and Dunphy's Remarkable Trials.

Cumm. (Idaho). Cummins's Idaho Reports.

Cunn. Cunningham's English King's Bench Reports.

Cunn. Ohio Dec. Ev. Cunningham's Ohio Decisions on Evidence.

Cur. (U. S.). Curtis's United States Circuit Court Reports.

Cur. Ov. Cas. Curwen's Overruled Cases, Ohio.

Cur. Com. Current Comment and Legal Miscellany.

Curry (La.). Curry's Reports, Louisiana Supreme Court (6-19 Louisiana).

Curt. Curteis's English Ecclesiastical Reports.

Curt. (U. S.) C. C. Curtis's U. S. Circuit Court Reports.

Curt. Adm. Dig. Curtis's Admiralty Digest.

Curt. Cond. (U. S.). Curtis's United States Condensed Reports.

Curt. Dig. Curtis's Digest of United States Decisions.

Curt. Ecc. Curties's Ecclesiastical Reports, English.

Curtis C. C. (U. S.). Curtis's United States Circuit Court Reports.

Cush. (Mass.). Cushing's Massachusetts Reports (1-12 Massachusetts).

Cush. Cont. Elect. Cas. (Mass.). Cushing's Contested Election Cases.

Cush. Man. Cushing's Manual of Parliamentary Law.

Cushing (Mass.). Cushing's Massachusetts Reports.

Cushman. (Miss.). Cushman's Reports, Mississippi High Court of Errors and Appeals (23-29 Mississippi).

Cust. Rep. Custer's Ecclesiastical Reports.

D'An. D'Anvers' Abridgments.

D. B. Domesday Book.

D. & B. Dearsley and Bell's English Crown Cases.

D. C. District of Columbia Reports.

D. Chip. (Vt.). D. Chipman's Reports, Vermont Supreme Court.

D. Dec. Dix's School Law Decisions, New York.

D. F. & J. De Gex, Fisher, and Jones's Reports, English Chancery.

D. F. & J. B. De Gex, Fisher, and Jones' English Bankruptcy Reports.

D. G. M. & G. De Gex, Macnaghten, and Gordon, English.

D. G. De Gex English Bankruptcy.

D. G. & J. De Gex and Jones, English.

D. G. & S. De Gex and Smale, English.

D. G. F. & J. De Gex, Fisher, and Jones, English.

D. G. J. & S. De Gex, Jones, and Smith, English.

D. M. & G. De Gex, Macnaghten, and Gordon's Reports, English Chancery.

D. M. & G. B. De Gex, Macnaghten, and Gordon's English Bankruptcy Reports.

D., N. S. Dowling's Reports, New Series, English Bail Court; Dow, New Series (Dow and Clark, English House of Lords Cases).

- D. P. B.** Dampier Paper Book (see A. P. B.).
- D. P. C.** Dowling's Practice Cases, Old Series.
- D. & C.** Dow and Clark's English House of Lords (Parliamentary Cases).
- D. & Chitt.** Deacon and Chitty's Reports, English Bankruptcy Cases.
- D. & E.** Durnford and East, English King's Bench Term Reports.
- D. & J.** De Gex and Jones's Reports, English Chancery.
- D. & J. B.** De Gex and Jones' English Bankruptcy Reports.
- D. & L.** Dowling and Lowndes' Reports, English Practice Cases.
- D. & M.** Davison and Merivale's English King's Bench Reports.
- D. & P.** Denison and Pearce's Crown Cases.
- D. & R.** Dowling and Ryland's English King's Bench Reports.
- D. & R. Mag. Cas.** Dowling and Ryland's English Magistrates' Cases.
- D. & R. N. P.** Dowling and Ryland's English Nisi Prius Reports.
- D. & S.** Doctor and Student.
- D. & Sm.** Drew and Smale's English V. C. Reports.
- D. & Sw.** Deane and Swabey's English Ecclesiastical Reports.
- D. & War.** Drury and Warren's Reports, Irish Chancery.
- Da.** Dakota Territory Reports.
- Daily L. Rec.** Daily Law Record.
- Daily Rec.** Daily Record.
- Daily Reg. (N. Y.).** Daily Register, New York.
- Dak.** Dakota Reports.
- Dak. T.** Dakota Territory Reports.
- Dakota.** Dakota Reports.
- Dal.** Dallas's United States Reports; Dalison's English Common Pleas Reports (bound with Benloe); Dalrymple's Session Cases.
- Dal. in Keil.** Dalison in Keilway.
- Dale Eco.** Dale's Ecclesiastical Reports, English.
- Dalis.** Dalison, English Common Pleas Reports.
- Dall. (Pa.) or (U. S.).** Dallas Reports, U. S. Courts, and Courts of Pennsylvania.
- Dall. (Tex.).** Dallam's Texas Reports.
- Dall. Tex. Dig.** Dallam's Texas Digest.
- Dalr.** Dalrymple's Cases, Scotch Court of Session.
- Dalrymple.** (Sir Henry) Dalrymple's Scotch Session Cases; (Sir David Dalrymple of Hailes) Hailes's Scotch Session Cases.
- Daly (N. Y.).** Daly's New York Common Pleas Reports.
- Dampier MSS.** Dampier's Paper Books.
- Dan.** Daniell's Reports, English Exchequer Equity.
- Dan. Ch. Pr.** Daniell's Chancery Practice.
- Dan. Com. Cas.** Daniels' Commission Cases.
- Dan. Neg.** Daniel on Negotiable Instruments.
- Dan. & Ll.** Danson and Lloyd's Mercantile Cases.
- Dana (Ky.).** Dana's Kentucky Reports.
- Dane Abr.** Dane's Abridgment and Digest of American Law.
- Daniell's Ch. Pr.** Daniell's Chancery Practice.
- Dann. (Ala.).** Danner's Alabama Reports.
- Dann (Cal.).** Dann's California Reports.
- Dans. & Ll.** Danson and Lloyd's Mercantile Cases.
- Dart. Col. Cas.** Report of Dartmouth College Case.
- Das.** Dasent's Bankruptcy and Insolvency Reports; also Common Law Reports, vol. 3.
- Dass. Dig. Kan.** Dassler's Digest Kansas Reports.
- Dav.** Davis's Reports, abridgment of Sir Ed. Coke's Reports.
- Dav. (U. S.).** Davies's Reports, U. S. District of Maine (2 Ware).
- Dav. or Davies.** Davies's Reports, Irish King's Bench.
- Dav. & Mer.** Davison and Merivale's English King's Bench Reports.
- Dav. (Hawaii).** Davis's Hawaiian Reports.
- Dav. Pat. Cas.** Davis's Patent Cases, English Courts.
- Davies.** Davies (or Davis's or Davys's) Irish King's Bench Reports.
- Davies Pat. Cas.** Davies's English Patent Cases.
- Davies (U. S.).** Davies's United States District Court Reports.
- Davis (Hawaiian).** Davis's Hawaiian Reports.
- Davis Dig. Ind.** Davis's Digest Indiana Reports.
- Davys.** Davys's Irish Reports.
- Day (Conn.).** Day's Connecticut Reports.
- Day Elect. Cas.** Day's Election Cases.
- Dea. (U. S.).** Deady's United States District Court Reports.
- Dea. & C.** Deacon and Chitty English Bankruptcy Reports.
- Dea. & Sw.** Deane and Swabey's Reports, English Probate and Divorce Courts.
- Deac.** Deacon's English Bankruptcy Reports.
- Deac. & Ch.** Deacon and Chitty, Bankrupt Reports, English.
- Deac. Dig.** Deacon's Digest of the Criminal Law.
- Deacon.** Deacon's English Bankruptcy Reports.
- Deady (U. S.).** Deady's United States Circuit and District Court Reports.
- Deane (Vt.).** Deane's Reports, Vermont Supreme Court (24-26 Vermont).
- Deane, or Deane Eco.** Deane and Swabey's English Probate and Divorce Reports.
- Deane & Swab.** Deane and Swabey's English Ecclesiastical Reports.
- Dears.** Dearsley, Crown Cases, English.
- Dears. & B.** Dearsley and Bell's English Crown Cases.
- Deas & And.** Deas and Anderson's Scotch Court of Session Cases.
- Dec. Com. Pat.** Decisions of the Commissioner of Patents.
- Dec. t. H. & M.** Decisions in Admiralty *temp.* Hay and Marriott.
- Def.** Defendant.
- De Gex.** De Gex's English Bankruptcy Reports.
- De Gex, F. & J.** De Gex, Fisher, and Jones' Eng. Chancery.

Abbreviations of the Reports, ABBREVIATIONS. Text-books, and Common Legal Terms.

- De Gex, F. & J.** De Gex, Fisher, and Jones' English Bankruptcy Reports.
De Gex, F. & J. Bankr. De Gex, Fisher, and Jones' English Bankruptcy Reports.
De Gex & F. De Gex and Fisher's English Chancery Reports.
De Gex & J. De Gex and Jones' English Chancery Reports.
De Gex & J. Bankr. De Gex and Jones' English Bankruptcy Reports.
De Gex & M. De Gex and Macnaghten's English Chancery Reports.
De Gex & Sm. De Gex and Smale's English Vice-Chancellors' Reports.
De Gex, J. & S. De Gex, Jones, and Smith's English Bankruptcy Reports.
De Gex, M. & G. De Gex, Macnaghten, and Gordon's English Bankruptcy Reports.
Del. Delaware Reports; Delane's English Revision Cases.
Del. Ch. Delaware Chancery Reports.
Del. Cr. Houston's Delaware Criminal Reports.
Del. El. Cas. Delane's English Election (Revision) Cases.
Den. Denison's English Crown Cases.
Den. (N. Y.). Denio's New York Supreme Court Reports.
Den. C. C. Denison's Crown Cases Reserved, English courts.
Den. & P. Denison and Pearce's English Crown Cases (2 Denison).
Denio (N. Y.). Denio's New York Reports.
Dens. (Mich.). Denslow's Michigan Reports.
Denv. L. J. Denver Law Journal.
Denv. Leg. N. Denver Legal News.
Des. (S. Car.). Desaussure's South Carolina Equity Reports.
Dest. Cal. Dig. Desty's California Digest.
Dev. (N. Car.). Devereux's North Carolina Law Reports.
Dev. (U. S.). Devereux's U. S. Court of Claims Reports.
Dev. Ch. (N. Car.). Devereux's North Carolina Equity Reports.
Dev. Ct. of Cl. Devereux's Court of Claims Reports.
Dev. L. (N. Car.). Devereux's North Carolina Law Reports.
Dev. & B. Ch. (N. Car.). Devereux's and Battle's North Carolina Equity Reports.
Dev. & B. L. (N. Car.). Devereux and Battle's North Carolina Law Reports.
De Witt (O.). De Witt's Reports, Ohio Supreme Court (24-27 Ohio State).
Di. or Dy. Dyer's Reports, English King's Bench.
Dic. Part. Dicey on Parties to Action.
Dice (Ind.). Dice's Indiana Reports.
Dicey Dom. Dicey on Domicil.
Dick. Dickens's English Chancery Reports.
Dick. Eq. Prec. Dickinson's Equity Precedents.
Dig. or Digest. Digest (or Pandects) of Justinian.
Dill. (U. S.). Dillon's United States Circuit Court.
Dirle. Nisbet's (of Dirleton) Scotch Court of Session Cases.
Disn. (O.). Disney's Cincinnati Superior Court Reports.
Div. & Matr. C. Divorce and Matrimonial Causes.
Dix. Decisions of the Superintendent of Public Schools of the state of New York.
Doct. & S. Doctor and Student.
Dods. Dodson's Reports, English Admiralty Courts.
Dom. Boo. Domesday Book.
Domat. Domat's Civil Law.
Donn. Donnelly's Reports, English Chancery; Donnell's Irish Land Cases.
Donn. Ch. Donnelly's Chancery Reports, English.
Donn. Irish Land Cts. Donnell's Irish Land Courts Reports.
Dor. (Quebec). Dorion's Quebec Queen's Bench Reports.
Doug. Douglas, English King's Bench Reports.
Doug. El. Cas. Douglas's English Election Cases.
Dougl. (Mich.). Douglass's Michigan Supreme Court.
Dow. Dow's English House of Lords Cases.
Dow & Cl., or Dow N. S. Dow and Clark's House of Lords Cases.
Dow. & L. Dowling and Lowndes's English Bail Court Reports.
Dow. & E. M. C. Dowling and Ryland's English Magistrates' Cases.
Dowl. Dowling's Bail Court Reports, English Bail Court.
Dowl., N. S. Dowling's Practice Cases (Bail Court), New Series.
Dowl. Pr. Cas. Dowling's English Practice Cases.
Dowl. Pr., N. S. Dowling's Practice Cases (Bail Court), New Series.
Dowl. & Lownd. Dowling and Lowndes's English Practice Cases.
Dowl. & E. Dowling and Ryland's English King's Bench Reports.
Dowl. & E. Mag. Cas. Dowling and Ryland's English Magistrates' Cases.
Dowl. & E. N. P. Dowling and Ryland's English Nisi Prius Reports.
Down. & Lud. Downton and Luder's English Election Cases.
Dow P. C. Dow's Parliamentary Cases.
Dr. Drewry's English Vice-Chancellors' Reports; Drury's Irish Chancery Reports *temp.* Sugden; Drury's Irish Chancery Reports *temp.* Napier.
Dr. & S. Doctor and Student.
Dr. & Sm. Drewry and Smale's English Chancery Reports.
Dr. & Wal. Drury and Walsh's Irish Chancery Reports.
Dr. & War. Drury and Warren Irish Chancery Reports.
Drap. K. B. (U. C.). Draper's King's Bench Reports, Upper Canada.
Drew. Drewry's English Chancery Reports.
Drew (Fla.). Drew's Reports, Florida Supreme Court (13 Florida).
Drew. & S. Drewry and Smale's English Vice-Chancellors' Reports.
Drinkw. Drinkwater's English Common Pleas Reports.
Dru. Drury's Reports *temp.* Sugden, Irish.
Dru. t. Nap. Drury's Irish Chancery Reports *temp.* Napier.
Dru. & Wal. Drury and Walsh's Irish Chancery Reports.

Dru. & War. Drury and Warren's Irish Chancery Reports.

Drury. Drury's Irish Chancery Reports.

Drury t. Nap. Drury's Irish Chancery Reports *temp.* Napier.

Drury t. Sug. Drury's Irish Chancery Reports *temp.* Sugden.

Drury & Wal. Drury and Walsh's Irish Chancery Reports.

Drury & War. Drury and Warren's Irish Chancery Reports.

Dub. *Dubitatur*, it is doubted, it is doubtful.

Dud. (Ga.). Dudley's Georgia Reports.

Dud. Ch. or Eq. (S. Car.). Dudley's South Carolina Equity Reports.

Dud. L. (S. Car.). Dudley's South Carolina Law Reports.

Dudley (Ga.). Dudley's Georgia State Reports.

Dudley Ch. or Eq. (S. Car.). Dudley's South Carolina Equity Reports.

Dudley L. (S. Car.). Dudley's South Carolina Law Reports.

Duer (N. Y.). Duer's New York Superior Court Reports.

Dun. & Cum. Dunphy and Cummins's Remarkable Trials.

Dunc. Ent. Cas. Duncan's Scotch Entail Cases.

Dunl. Dunlap's English Chancery Reports.

Dunl. B. & M. Dunlop, Bell, and Murray's Reports, Scotch Court of Session.

Dunlop, or Dunl. B. & M. Dunlop, Bell, and Murray's Reports, Second Series, Scotch Session Cases.

Durf. (R. I.). Durfee's Reports, Rhode Island Supreme Court (2 Rhode Island).

Durie So. Sess. Durie's Scotch Court of Session Cases.

Durnf. & E. Durnford and East's Reports English King's Bench (Term Reports).

Dutch. (N. J.). Dutcher's New Jersey Law Reports.

Duv. (Can.). Duvall's Canada Supreme Court Reports.

Duv. (Ky.). Duvall's Kentucky Reports.

Dwar. Dwaris on Statutes.

Dwight. Dwight's Charity Cases, English.

Dy., or Dyer. Dyer's Reports, English King's Bench.

E. East's Reports, English King's Bench.
E. B. & E. Ellis, Blackburn, and Ellis's English King's Bench Reports.

E. B. & S. Best and Smith's Reports (sometimes so cited).

E. C. L. English Common Law Reports (American reprint).

E. D. Smith (N. Y.). E. D. Smith's New York Common Pleas Reports.

E. E. English Exchequer Reports (American reprint).

E. E. Rep. English Ecclesiastical Reports.

E. g. *Exempli gratia*, for example.

E. L. & Eq. English Law and Equity Reports (American reprint).

E. P. C. East's Pleas of the Crown.

E. R. East's King's Bench Reports; Election Reports.

E. & A. R. Error and Appeal Reports, Ontario.

E. & B. Ellis and Blackburn's English King's Bench Reports.

E. & E. Ellis and Ellis's English King's Bench Reports.

E. & Y. Eagle and Youngs's Tithe Cases.

Ea. East's Reports, English King's Bench.
Eag. & Y. Eagle and Younge, Tithe Cases, English.

East. East's English King's Bench Reports.

East. N. of C. East's Notes of Cases in Morley's East Indian Digest.

East Pl. Cr. East's Pleas of the Crown.

East. Rep. Eastern Reporter.

Ec. & Ad. Spink's Ecclesiastical and Admiralty Reports.

Ecol. R. English Ecclesiastical Reports (American reprint).

Eden. Eden's English Chancery Reports.

Edgar So. Sess. Edgar's Scotch Court of Session Reports.

Edict or Edicta. Edicts of Justinian.

Edin. L. J. Edinburgh Law Journal.

Edm. Sel. Cas. (N. Y.). Edmonds's New York Select Cases.

Edw. King Edward (thus, 1 Edw. I. signifies the first year of the reign of King Edward I.).

Edw. (Mo.). Edwards's Reports, Missouri Supreme Court (2-3 Missouri Reports).

Edw. (Tho.). Edwards's English Admiralty Reports.

Edw. Abr. Edwards's Abridgment of Cases in Privy Council.

Edw. Adm. Edwards's Admiralty Reports, English Admiralty.

Edw. Ch. (N. Y.). Edwards's New York Chancery Reports.

Edw. Lead. Dec. Edwards's Leading Decisions in Admiralty; Edwards's Admiralty Reports.

Edw. Pr. Cas. Edwards's Prize Cases (English Admiralty Reports).

Edw. Pr. Ct. Cas. Edwards's Abridgment of Prerogative Court Cases.

Edwards. Edwards's English Admiralty Reports.

El. Elchies's Decisions, Scotch Court of Session.

El. B. & S. Ellis, Best, and Smith's Reports, English Queen's Bench.

El. Bl. & El. Ellis, Blackburn, and Ellis's English King's Bench Reports.

El. Dict. Elchies's Dictionary of Decisions, Court of Session, Scotland.

El. & Bl. Ellis and Blackburn's English King's Bench Reports.

El. & El. Ellis and Ellis's English King's Bench Reports.

Elchies. Elchies's Dictionary of Decisions, Scotch Court of Session.

Elect. Cas. (N. Y.). New York Election Cases (Armstrong's).

Eliz. Queen Elizabeth.

Ell. Dig. Minn. Eller's Digest, Minnesota Reports.

Elm. Dig. (N. J.). Elmer's New Jersey Digest.

Elph. Elphinstone, Norton, and Clark on the Interpretation of Deeds.

Elis. W. Bl. Elsley's edition of Wm. Blackstone's English King's Bench Reports.

Encyc. Pl. & Pr. Encyclopædia of Pleading and Practice. Edward Thompson Co., Northport, L. I.

Eng. English Reports (American reprint, edited by Moak).

Eng. (Ark.). English's Arkansas Reports.

Eng. Adm. R. English Admiralty Reports.

- Eng. C. C., or Cr. Cas.** English Crown Cases (American reprint).
Eng. C. L. English Common Law Reports (American reprint).
Eng. Ch. English Chancery Reports (American reprint).
Eng. Ecol. English Ecclesiastical Reports (American reprint).
Eng. Exch. English Exchequer Reports (American reprint).
Eng. Ir. App. English Law Reports, English and Irish Appeal Cases.
Eng. Jud. Cases in the Court of Session by English judges.
Eng. L. & Eq. English Law and Equity Reports (American reprint).
Eng. Rep. Moak's English Reports (American reprint).
Eng. Ry. & Can. Cas. English Railway and Canal Cases.
Eng. Sc. Ecol. English and Scotch Ecclesiastical Reports.
English (Ark.). English's Arkansas Reports.
Eq. Equity.
Eq. Cas. Ab. Equity Cases Abridged.
Eq. Cas. Equity Cases (9 Modern Reports).
Eq. Rep. Equity Reports; Gilbert's Equity Reports; Harper's South Carolina Equity Reports; The Equity Reports, published by Spottiswoode.
Er. & Ap. Error and Appeals Reports, Upper Canada.
Ersk. Dec. (U. S.). Erskine's U. S. Circuit Court, etc., Decisions (35 Georgia).
Esp. Espinasse's English Nisi Prius Reports.
Esprit des Loix. Montesquieu's Spirit of Laws.
Et al. Et alii, and others.
Ev. Evidence.
Ev. & H. Dig. (Minn.). Ewell and Hamilton's Digest of Minnesota Reports.
Ewell Cas. Dom. Rel. Ewell's Cases on Domestic Relations.
Ewell Cas. Inf., or L. C. Ewell's Leading Cases on Infancy, etc.
Ex. Exchequer Reports, English.
Ex. D. English Law Reports, Exchequer Division.
Exam. The Examiner.
Exch. Exchequer; Exchequer Reports (Welsby, Hurlstone, and Gordon); English Law Reports, Exchequer.
Exch. (Can.). Canada Exchequer Reports.
Exch. Cas. Exchequer Cases (Legacy Duties, etc.), Scotland.
Exch. Chamb. Exchequer Chamber.
Exch. D. Exchequer Division, English Law Reports.
Exch. Rep. Exchequer Reports (Welsby, Hurlstone, and Gordon); English Exchequer Reports (American reprint).
Exr. Executor.
Eyre. Eyre's Reports, English King's Bench, *temp.* William III.
F. Faculty Collection of Court of Session Decisions.
F. Abr. Fitzherbert's Abridgment.
F. B. C. Fonblanque's Bankruptcy Cases.
F. B. B. Full Bench Rulings, Bengal.
F. B. B. N. W. P. Full Bench Rulings, Northwest Provinces, India.
F. C. Faculty Collection of Decisions, Scotch Court of Session.
F. C. B. Fearne on Contingent Remainders.
F. Dict. Kames and Woodhouselee's (folio) Dictionary, Scotch Court of Session Cases.
F. N. B. Fitzherbert's *Natura Brevium*.
F. & F. Foster and Finlason's English Nisi Prius Reports.
F. & Fitz. Falconer and Fitzherbert's English Election Cases.
F. & S. Fox and Smith's Irish King's Bench Reports.
Fac. Col. Faculty of Advocates Collection, Scotch Court of Session Cases.
Fair. (Me.). Fairfield's Maine Reports.
Falc. Falconer's Reports, Scotch Court of Session.
Falc. & F. Falconer and Fitzherbert's English Election Cases.
Fam. Cas. Cir. Ev. Famous Cases of Circumstantial Evidence, by Phillips.
Far. Farresley's Reports, English King's Bench (7 Modern Reports).
Farq. Farquharson's Court of Chancery.
Farr. Farresley's Reports, English King's Bench (7 Modern Reports).
Fearne Cont. Rem. Fearne on Contingent Remainders.
Fed. The Federalist. Essays on United States Constitution.
Fed. Cas. Federal Cases.
Fed. Rep. Federal Reporter.
Federalist. The Federalist. Essays on the United States Constitution.
Fent. (New Zealand). Fenton's New Zealand Reports.
Ferg. Ferguson's Scotch Consistorial Court Reports.
Ferg. Ry. Cas. Ferguson's Five Years' Railway Cases.
Fergusson. (Fergusson of) Kilkerran's Scotch Session Cases.
Ff. Pandects of Justinian (a corruption of the Greek letter π).
Fin. Finch's English Chancery Reports; Finlason (see Finl.).
Fin. or Finch. Finch's Reports, English Chancery (Reports *temp.* Finch).
Finch Cas. Cont. Finch's Cases on Contract.
Finl. Dig. Finlay's Irish Digest (with original cases).
Finl. L. C. Finlason's Leading Cases on Pleading, etc.
Finl. Rep. Finlason's Report of the Guernsey Case.
First pt. Edward III. Part II. of the Year Books.
First pt. Henry VI. Part VII. of the Year Books.
Fish. C. L. Dig. Fisher's Digest of English Common Law Reports.
Fish. Cr. Dig. Fisher's English Criminal Law Digest.
Fish. Pat. Cas. (U. S.). Fisher's Patent Cases, United States Courts.
Fish. Pat. Dig. Fisher's Digest of Patent Law.
Fish. Pr. Cas. (U. S.). Fisher's Prize Cases, United States District Court.
Fisher Cas. (U. S.). Fisher's United States District Court Cases.
Fitz. Abr. Fitzherbert's Abridgment.

Fits. N. B. The Natura Brevium of Judge Anthony Fitzherbert.

Fitzg. Fitzgibbon's English King's Bench Reports.

Fitzh. Fitzherbert's Le Graunde Abridgment; Fitzhardinge's New South Wales Reports.

Fitzh. Abr. Fitzherbert's Abridgment, English.

Fitzh. N. B. Fitzherbert's New Natura Brevium.

Fl. Fleta, Commentarius Juris Anglicani.

Fl. & K. Flanagan and Kelly's Irish Rolls Court Reports.

Fla. Florida Reports.

Flan. & K. Flanagan and Kelly's Irish Rolls Court Reports.

Fleta. Fleta, seu Commentarius Juris Anglici.

Flipp. (U. S.). Flippin's United States Circuit and District Court Reports.

Flor. Florida Reports.

Fogg (N. H.). Fogg's Reports, New Hampshire Supreme Court (32-37 New Hampshire Reports).

Fol. Foley's Poor Laws and Decisions, English.

Fol. Dict. Kames and Woodhouselee's folio Dictionary Scotch Court of Session.

Fon. B. C. Fonblanque, English Bankruptcy Cases.

Fonb. N. B. Fonblanque's New Reports, English Bankruptcy.

Fonbl. Fonblanque's English Bankruptcy Reports.

For. Forrest's Exchequer Reports; Forrester's Chancery Reports (Cases *temp.* Talbot); Fortescue de Laudibus Legum Angliæ.

For. Cas. & Op. Forsyth's Cases and Opinions on Constitutional Law.

For. de Laud. Fortescue de Laudibus Legum Angliæ.

Forbes. Forbes's Scotch Court of Session Cases.

Form. (Ill.). Forman's Illinois Reports.

Forr. Forrester's English Chancery Cases (commonly cited Cases *temp.* Talbot).

Forrest. Forrest's Reports, English Exchequer.

Fors. Cas. & Op. Forsyth's Cases and Opinions on Constitutional Law.

Fort. Fortescue de Laudibus Legum Angliæ.

Fort. Fortescue's English King's Bench Reports.

Fortesc. de L. L. Angl. Fortescue de Laudibus Legum Angliæ.

Fortescue. Fortescue de Laudibus Legum Angliæ.

Forum. The Forum (periodical), Baltimore and New York.

Fost. Foster's Legal Chronicle Reports, Pennsylvania.

Fost. (N. H.). Foster, New Hampshire Reports (21-31 New Hampshire).

Fost. Cr. Cas. Foster's English Crown Cases.

Fost. Doct. Com. Foster on Doctors' Commons.

Fost. & F. Foster and Finlason's English Nisi Prius Reports.

Foster. Foster's English Crown Law; Legal Chronicle; Reports (Pa.) edited by Foster.

Foster (N. H.). Foster's New Hampshire Reports.

Fount. Fountainhall's Scotch Court of Session Cases.

Fowl. L. Cas. Fowler's Leading Cases on Collieries.

Fox. Fox's Reports, English.

Fox Reg. Cas. Fox's Registration Cases.

Fox & S. Fox and Smith's Reports, Irish King's Bench and Court of Error.

Fr. Fragment; Law, in titles of Pandects of Justinian.

Fr. Ch. Freeman's English Chancery Reports; Freeman's Mississippi Chancery Reports.

Fr. E. C. Fraser's Election Cases.

Frano. Francillon's Judgments, County Courts.

France. (Col.). France's Colorado Reports.

Fraser. El. Cas. Fraser's Election Cases, English.

Fraser. Fraser's English Election Cases.

Fraser. Adm. Frazer's Scottish Admiralty Reports.

Free. Freeman's English King's Bench Reports (1 Freeman).

Free. (Ill.). Freeman's Illinois Reports.

Free. (Miss.). Freeman's Mississippi Chancery Reports.

Free. Ch. Freeman's English Chancery Reports.

Freem. Freeman's Reports, English King's Bench and Chancery.

Freem. (Ill.). Freeman's Reports, Illinois Supreme Court (31-80 Illinois).

Freem. (Miss.). Freeman's Reports, Mississippi Superior Court of Chancery.

Freem. Ch. Freeman's Reports (2 English Chancery).

Freem. Ch. (Miss.). Freeman's Chancery State Reports.

Freem. K. B. Freeman's Reports, English King's Bench (1 Freeman).

French (N. H.). French's New Hampshire Reports.

Full B. B. Full Bench Rulings, Bengal (or Northwest Provinces).

Fult. Fulton's Reports, Bengal.

G. King George (thus, 1 G. I. signifies the first year of the reign of King George I.); Gale's English Exchequer.

G. Gr. (Iowa). George Greene's Reports, Iowa.

G. M. Dudl. (Ga.). G. M. Dudley's Georgia Reports.

G. & D. Gale and Davison, English King's Bench.

G. & J. (Md.). Gill and Johnson's Maryland Reports.

Ga. Georgia Reports.

Ga. Bar. Asso. Georgia Bar Association Reports.

Ga. Dec. Georgia Decisions, Georgia Superior Courts.

Ga. L. J. Georgia Law Journal.

Ga. L. Rep. Georgia Law Reporter.

Ga. Sup. Supplement to 33 Georgia Reports.

- Gal. (Fla.).** Galbraith's Florida Reports.
Gal. Index (Fla.). Galbraith's Index to Florida Reports.
Galb. & M. (Fla.). Galbraith and Meek's Reports, Florida Supreme Court (12 Florida).
Gale. Gale's Reports, English Exchequer.
Gale & D. Gale and Davidson's English King's Bench Reports.
Gall. (U. S.). Gallison's United States Circuit Court Reports.
Gall. Cr. Cas. Gallick's Reports of French Criminal Cases.
Gam. & B. Ir. Eq. Dig. Gamble and Barlow's Irish Equity Digest.
Gantt Dig. (Ark.). Gantt's Digest Arkansas Statutes.
Gard. (Mo.). Gardenhire's Missouri Reports.
Gard. N. Y. Rept. Gardenier's New York Reporter.
Gardenh. (Mo.). Gardenhire's Reports, Missouri Supreme Court (14-15 Missouri).
Gardn. P. Cas. Report of the Gardner Peerage Case.
Gaspar. Gaspar's Small Cause Court Reports, Bengal.
Gay. (La.). Gayarré's Louisiana Reports.
Gas. B. Gazette of Bankruptcy, London.
Gas. Dig. Bank. Gazzam's Digest of Bankruptcy Decisions.
Gas. & Bank. Ct. Rep. Gazette and Bankrupt Court Reporter, New York.
Gold. & M. Geldart and Maddock's Reports.
Geld. & O. (Nova Scotia). Geldert and Oxley's Decisions, Nova Scotia.
Genl. Dig. General Digest.
Geo. Georgia; Georgia Reports.
Geo. Coop. George Cooper's English Chancery Cases, *temp.* Eldon.
Geo. Dec. Georgia Decisions.
Geo. Dig. George's Mississippi Digest.
George (Miss.). George's Mississippi Reports (30-37 Mississippi).
George Dig. (Miss.). George's Digest Mississippi Reports.
Gib. Dec. Gibson's Scottish Decisions.
Gibbs (Mich.). Gibbs's Michigan Reports (2-4 Michigan).
Gibbs Jud. Chr. Gibbs's Judicial Chronicle.
Gibs. Gibson's Decisions, Scotland.
Giff. Giffard's English Vice-Chancellors' Reports.
Giff. & H. Giffard and Hemming's Reports, English Chancery.
Gil. (Minn.). Gilfillan's Minnesota Reports.
Gil. Gilman's Reports (6-10 Illinois); Gilbert's English Chancery Reports.
Gil. & Fal. Gilmour and Falconer's Scotch Session Cases.
Gilb. Gilbert's Cases in Law and Equity, English King's Bench.
Gilb. Gilbert's English Common Pleas Reports.
Gilb. Cas. Gilbert's Cases in Law and Equity, English Chancery and Exchequer.
Gilb. Ch. Gilbert's English Chancery Reports.
Gilb. Eq. Gilbert's English Equity or Chancery Reports.
Gilb. K. B. Gilbert's King's Bench Reports, English.
Gilb. Rep. Gilbert's Reports, English Chancery.
Gild. (N. M.). Gildersleeve's New Mexico Reports.
Gilfillan. Gilfillan's edition of Minnesota Reports.
Gill (Md.). Gill's Maryland Reports.
Gill & J. (Md.). Gill and Johnson's Maryland Reports.
Gilm. Gilmour's Reports, Scotch Court of Session.
Gilm. (Ill.), or Gilman. Gilman's Reports, Illinois Supreme Court (6-10 Illinois).
Gilm. (Va.). Gilmer's Virginia Reports.
Gilm. Dig. Gilman's Digest of Decisions, Illinois and Indiana.
Gilm. & F. Gilmour and Falconer's Scotch Court of Session Cases.
Gilmer (Va.). Gilmer's Virginia Reports.
Gilmour. Gilmour's Reports, Scotch Court of Session.
Gilp. Gilpin's Opinions of the Attorneys-General of the United States.
Gilp. (U. S.). Gilpin's United States District Court Reports, Eastern District of Pennsylvania.
Gl. & J. Glyn and Jameson's English Bankruptcy Reports.
Glan. El. Cas. Glanville's English Election Cases.
Glanv. or Glanville. Glanville's De Legibus et Consuetudinibus Regni Angliæ.
Glasc. Glascock's Reports, Irish Courts.
Glenn (La.). Glenn's Louisiana Reports (16-18 Louisiana Annual).
Glyn (T. J.). Glyn and Jameson's English Bankruptcy Reports.
Godb. Godbolt's English King's Bench Reports.
Goeb. Prob. Ct. Cas. Goebel's Probate Court Cases.
Gold. Goldesborough's English King's Bench Reports.
Good. & Wood. Full Bench Rulings, Bengal, edited by Goodeve and Woodman.
Gord. Dig. Gordon's Digest of the Laws of the United States.
Gord. Tr. Gordon's Treason Trials.
Gosf. Gosford's Manuscript Reports, Scotch Court of Session.
Gould. Gouldsborough's English King's Bench Reports.
Gould. Sten. Rep. Gould's Stenographic Reporter.
Gouldsb. Gouldsborough's Reports, English Courts.
Gour. Wash. Dig. Gourick's Washington Digest.
Gow. Gow's English Reports.
Gr. H. W. Greene's New Jersey Equity Reports; Greenleaf's Maine Reports.
Gr. Cas. Grant's Cases, Pennsylvania.
Gr. Ev. Greenleaf on Evidence.
Gra. & Wat. N. T. Graham and Waterman on New Trials.
Grang. (O.). Granger's Reports, Ohio Supreme Court (22-23 Ohio State).

Grant. (Grant of) Elchies's Scotch Session Cases.
Grant. Grant's Chancery Reports, Ontario.
Grant (Jamaica). Grant's Jamaica Reports.
Grant (Pa.). Grant's Pennsylvania Reports.
Grant (U. C.). Grant's Error and Appeal Reports, Upper Canada.
Grant Cas. Grant's Cases, Pennsylvania Supreme Court.
Grant Ch. (U. C.). Grant's Chancery Reports, Upper Canada.
Grant Ch. Ch. (U. C.). Grant's Chancery Chambers Reports, Upper Canada.
Grant E. & A. Grant's Error and Appeal Reports, Ontario.
Grant Cas. (Pa.). Grant's Pennsylvania Cases.
Grant Ch. (Ont.). Grant's Chancery.
Grant's Ch. (U. C.) Grant's Canada Chancery Reports.
Gratt. (Va.). Grattan's Virginia Reports.
Gray (Mass.). Gray's Massachusetts Reports.
Gray Cas. Prop. Gray's Cases on Property.
Gray's Inn J. Gray's Inn Journal.
Green (Iowa). Green's Iowa Reports.
Green (Mass.). Green's Massachusetts Reports.
Green. (Me.). Greenleaf's Maine Reports.
Green (R. I.). Green's Rhode Island Reports.
Green Bag. The Green Bag, Boston, Mass.
Green Cr. Cas. Green's Scottish Criminal Cases.
Green Cr. L. Rep. Green's Criminal Law Reports, United States.
Green. Cruise. Greenleaf's edition of Cruise's Digest of Real Property.
Green Eq. (N. J.). Green's Reports, New Jersey Chancery (2-4 New Jersey Equity).
Green. Ev. Greenleaf's Law of Evidence.
Green L., or N. J. Green's Reports, New Jersey Supreme Court and Court of Errors and Appeals (13-15 New Jersey Law).
Green. Ov. Cas. Greenleaf's Overruled Cases.
Green So. Cr. Cas. Green's Criminal Cases, Scotland.
Green So. Tr. Green's Scottish Trials for Treason.
Greene (Iowa). Greene's Iowa Reports.
Greene, C. E. (N. J.). C. E. Greene's Reports, New Jersey Chancery Court and Court of Errors and Appeals (16-28 New Jersey Equity).
Greenl. (Me.). Greenleaf's Reports, Maine Supreme Court (1-9 Maine).
Greenl. Cru. Greenleaf's Cruise's Real Property.
Greenl. Ev., or Evid. Greenleaf on Evidence.
Greenl. O. Cas. Greenleaf's Overruled Cases.
Greenlf. (Me.). Greenleaf's Maine Reports.
Greenlf. Ev. Greenleaf on Evidence.
Greln. Dig. Greiner's Louisiana Digest.
Grn. (Ceylon). Grenier's Ceylon Reports.
Grif. L. Reg. Griffith's Law Register, Burlington, N. J.
Grif. P. R. Cas. Griffith's English Poor Rate Cases.
Griff. L. Reg. Griffith's Law Register.

Griff. P. L. Cas. Griffith's English Poor Law Cases.
Griffin Pat. Cas. Griffin's Abstract of Patent Cases.
Grisw. (O.). Griswold's Ohio Reports.
Gro. Grotius' De Jure Belli et Pacis.
Gro. Dr. Grotius, Le Droit de la Guerre.
Grotius. Grotius' De Jure Belli et Pacis.
Guide. The Guide, Kalamazoo, Mich.
Gundry. Gundry Manuscripts in Lincoln's Inn Library.
Guth. Sher. Cas. Guthrie's Scottish Sheriff Court Cases.
Gwill., or Gwm. Gwillim's Tithe Cases, English.
H. King Henry (thus **H. I.** signifies the first year of the reign of King Henry I.); Hilary Term; Hare's English Chancery Reports.
H. Bl. Henry Blackstone's Reports, English Common Pleas and Exchequer Chamber.
H. C. B. High Court Reports, India.
H. Ct. R. N. W. P. High Court Reports, Northwest Provinces, India.
H. H. C. L. Hale's History of the Common Law.
H. L., or H. L. Cas. House of Lords Cases.
H. L. Rep. Cas. Clark and Finnelly's House of Lords Reports, New Series.
H. P. C. Hale's Pleas of the Crown; Hawkins's Pleas of the Crown.
H. W. Gr. H. W. Green's New Jersey Equity Reports.
H. & B. Hudson and Brooke's Reports, Irish King's Bench.
H. & C. Hurlstone and Coltman's English Exchequer Reports.
H. & D. Lalor's Supplement to Hill and Denio's Reports, New York.
H. & G. Hurlstone and Gordon's Exchequer Reports.
H. & G. (Md.). Harris and Gill's Maryland Reports.
H. & H. Horn and Hurlstone's English Exchequer Reports; Harrison and Hodgkin's Municipal Reports, Upper Canada.
H. & J. (Md.). Harris and Johnson's Maryland Reports.
H. & J. Ir. Hayes and Jones's Reports, Irish Exchequer.
H. & M. Hemming and Miller, English Chancery Reports.
H. & M. (Va.). Hening and Munford's Virginia Reports.
H. & M. Ch. Hemming and Miller's Chancery Reports, English.
H. & McH. (Md.). Harris and McHenry's Maryland Reports.
H. & N. Hurlstone and Norman's English Exchequer Reports.
H. & P. Hopwood and Philbrick's English Election Cases.
H. & R. Harrison and Rutherford's English Common Pleas Reports.
H. & S. Harris and Simrall's Mississippi Reports.
H. & T. Self-Def. Horrigan and Thompson's Cases on Law of Self-Defense.
H. & Tw. Hall and Twells's English Chancery Reports.

- H. & W.** Harrison and Wollaston's English King's Bench Reports; Hurlstone and Walmsley's English Exchequer Reports.
- Ha.** Hare's Chancery Reports.
- Ha. & Tw.** Hall and Twells's Reports, English Chancery.
- Hab. corp.** Habeas corpus.
- Hab. fa. poss.** Habere facias possessionem.
- Hab. fa. seis.** Habere facias seisinam.
- Had. (N. H.).** Hadley's New Hampshire Reports.
- Hadd.** Haddington's Manuscript Decisions, Scotch Court of Session.
- Hadl. (N. H.).** Hadley's Reports, New Hampshire Supreme Court (45-48 New Hampshire).
- Hag. (Utah).** Hagans's Utah Reports.
- Hag. (W. Va.).** Hagans's West Virginia Reports.
- Hag. Adm.** Haggard's Admiralty Reports, English.
- Hag. Con.** Haggard's Consistory Reports, English.
- Hag. Ec.** Haggard's Ecclesiastical Reports, English.
- Hagg. Ad.** Haggard's Admiralty Reports, English.
- Hagg. Con.** Haggard's Consistorial Cases, English.
- Hagg. Eco.** Haggard's Ecclesiastical Reports, English.
- Hagg. Eng. Con.** Haggard's Consistory Reports, English.
- Hagn. & M. (Md.).** Hagner and Miller's Maryland Reports.
- Hailes.** Hailes's Scotch Court of Session Reports.
- Haines Am. L. Man.** Haines' American Law Manual.
- Halc. Cas.** Halcomb's Mining Cases, London.
- Hale (Cal.).** Hale's California Reports (33-37 California).
- Hale C. L.** Hale's History of the Common Law.
- Hale Eco.** Hale's English Ecclesiastical Reports.
- Hale P. C., or Pl. Cr.** Hale's Pleas of the Crown.
- Hale Prec.** Hale's Precedents in (Ecclesiastical) Criminal Cases.
- Halk. Comp.** Halkerston's Compendium of Scotch Faculty Decisions.
- Hall. (Col.).** Hallett's Colorado Reports.
- Hall (N. H.).** Hall's New Hampshire Reports.
- Hall (N. Y.).** Hall's State Reports (1-2 New York Superior Court Reports).
- Hall Jour.** Hall's Journal of Jurisprudence.
- Hall & T.** Hall and Twells's English Chancery Reports.
- Hallett (Col.).** Hallett's Reports (1-2 Colorado).
- Halst. (N. J.).** Halsted's New Jersey Law Reports.
- Halst. Ch. (N. J.).** Halsted's Reports, New Jersey Court of Chancery, and Court of Error and Appeals.
- Halst. Dig.** Halsted's Digest.
- Ham.** Hamilton's Reports, Scotch Court of Session.
- Ham. (O.).** Hammond's Ohio Reports (1-9, Ohio).
- Ham. A. & O.** Hamerton, Allen, and Otter's Magistrates' Cases, English Courts (3 New Sessions Cases).
- Ham. Fed.** The Federalist.
- Hamilton.** (Hamilton of) Haddington's Manuscript Cases, Scotch Court of Session.
- Hamm. (Ga.).** Hammond's Reports, Georgia Supreme Court (36-44 Georgia).
- Hamm. (O.).** Hammond's Reports, Ohio Supreme Court (1-9 Ohio).
- Hamm. & J. (Ga.).** Hammond and Jackson's Reports, Georgia Supreme Court (45 Georgia).
- Han.** Hannay's Reports, New Brunswick.
- Hand (N. Y.).** Hand's New York Court of Appeals Reports.
- Handy.** Handy's Cincinnati Superior Court.
- Hanes.** Hanes's English Chancery Reports.
- Hanes Dig. Cr. Cas. (U. S.).** Hanes's Digest United States Criminal Cases.
- Hann.** Hanmer's Lord Kenyon's Notes, English King's Bench.
- Hannay (N. B.).** Hannay's New Brunswick Reports.
- Har. (Del.).** Harrington's Delaware Reports.
- Har. (Mich.).** Harrington's Chancery Reports, Michigan.
- Har. (N. J.).** Harrison's New Jersey Law Reports.
- Har. Dig.** Harrison's English Common Law Digest; Harris's Georgia Digest.
- Har. St. Tr.** Hargrave's State Trials.
- Har. & G. (Md.).** Harris and Gill's Maryland State Reports.
- Har. & J. (Md.).** Harris and Johnson's Maryland Court of Appeals.
- Har. & McH. (Md.).** Harris and McHenry's Maryland Provincial Court and Court of Appeals.
- Har. & Ruth.** Harrison and Rutherford's English Common Pleas Reports.
- Har. & W.** Harrison and Wollaston's Reports, English King's Bench.
- Harc.** Harcarse's Decisions, Scotch Court of Session.
- Hard.** Hardres's English Exchequer Reports.
- Hard., or Hardin (Ky.).** Hardin's Reports, Kentucky Court of Appeals.
- Hardres.** Hardres's English Exchequer Reports.
- Hardw.** Cases temp. Hardwicke, English King's Bench.
- Hare.** Hare's English Vice-Chancellors' Reports.
- Hare & Wal. Lead. Cas.** Hare and Wallace's American Leading Cases.
- Harg. (N. Car.).** Hargrove's North Carolina Reports.
- Harg St. Tr.** Hargrave's State Trials.
- Hargr. L. Tr.** Hargrave's Law Tracts.
- Hargr. St. Trials.** Hargrave's State Trials.
- Hargrove, or Harg. (N. Car.).** Hargrove's

Reports, North Carolina Supreme Court (68-76 North Carolina).

Harm. (Cal.). Harmon's Reports, California Supreme Court (13-15 California).

Harm. (U. C.). Harman's Common Pleas Reports, Upper Canada.

Harp. (S. Car.). Harper's Reports, South Carolina Constitutional Court.

Harp. Ch. (S. Car.). Harper's Chancery Reports, South Carolina.

Harp. L. (S. Car.). Harper's Law Reports, South Carolina.

Harr. (Del.). Harrington's Delaware Reports.

Harr. (Ind.). Harrison's Reports, Indiana Supreme Court (15-17, 23-29 Indiana).

Harr. (Mich.). Harrington's Michigan Chancery Reports.

Harr. (N. J.). Harrison's Reports, New Jersey Supreme Court (16-19 New Jersey Law).

Harr. (Pa.). Harris's Reports, Pennsylvania Supreme Court (13-24 Pennsylvania State).

Harr. Con. (La.). Harrison's Condensed Louisiana Reports.

Harr. Dig. Eng. Harrison's Digest of English Reports.

Harr. & G. (Md.). Harris and Gill's Maryland Reports.

Harr. & Hod. (U. C.). Harrison and Hodg-in's Municipal Reports, Upper Canada.

Harr. & J. (Md.). Harris and Johnson's Maryland Reports.

Harr. & McH. (Md.). Harris and McHenry's Maryland Provincial Court and Court of Appeals Reports.

Harr. & R. Harrison and Rutherford's English Common Pleas Reports.

Harr. & S. (Miss.). Harris and Simrall's Reports, Mississippi Supreme Court (49-51 Mississippi).

Harr. & Woll. Harrison and Wollaston's English King's Bench Reports.

Harring. Harrington's Delaware Reports; Harrington's Michigan Chancery Reports, 1842.

Harris (Pa.). Harris's Pennsylvania State Reports.

Harris Dig. (Ga.). Harris's Digest, etc., Georgia Reports.

Harris & Gill (Md.). Harris and Gill's Maryland Reports.

Harris & Johnson (Md.). Harris and Johnson's Maryland Reports.

Harris & McH. (Md.). Harris and McHenry's Maryland Reports.

Harris & S. (Miss.). Harris and Simrall's Mississippi Reports.

Harrison (Ind.). Harrison's Indiana Reports (15-17, 23-29 Indiana).

Hart. (Tex.). Hartley's Texas Reports.

Hart. Dig. Hartley's Digest of Laws, Texas.

Harv. Law Rev. Harvard Law Review, Cambridge, Mass.

Hast. (Me.). Hastings's Maine Reports.

Hav. (Pr. Edw. Is.). Haviland's Prince Edward Island Reports.

Haw. Hawkins; Hawaiian Reports.

Haw. Am. Cr. Rep. Hawley's American Criminal Reports.

Hawaii. Hawaii (Sandwich Islands) Reports.

Hawk. (La.). Hawkins's Reports, Louisiana Supreme Court (19-25 Louisiana Annual).

Hawk. Co. Litt. Hawkins's Coke upon Littleton.

Hawk. Pl. Cr. Hawkins's Pleas of the Crown.

Hawkins (La.). Hawkins's Louisiana Reports (19-24 Louisiana Annual).

Hawkins P. C. A Treatise of the Pleas of the Crown, by William Hawkins.

Hawks (N. Car.). Hawks's North Carolina Reports.

Hawl. (Nev.). Hawley's Nevada Reports and Digest.

Hawl. Cr. Rep. Hawley's American Criminal Reports.

Hay (Cal.). Hay's Reports, Calcutta.

Hay. Haywood's North Carolina Reports; Haywood's Tennessee Reports.

Hay Acc. Cas. Hay's Cases of Accident or Negligence.

Hay Dec. Hay's Scotch Decisions.

Hay. Exch. Hayes's Reports, Irish Exchequer.

Hay P. L. Dec. Hay's Poor Law Decisions of Scotland.

Hay. & J., or Hayes & Jones. Hayes and Jones's Reports, Irish Exchequer.

Hay & M. Hay and Marriott's Admiralty Decisions.

Hayes. Hayes's Irish Exchequer Reports.

Hayes & J. Hayes and Jones's Irish Exchequer Reports.

Haynes Lead. Cas. Haynes's Students' Leading Cases.

Hayw. (N. Car.). Haywood's Reports, North Carolina Superior Courts of Law and Equity.

Hayw. (Tenn.). Haywood's Reports, Tennessee Supreme Court of Errors and Appeals.

Hayw. L. Reg. Hayward's Law Register, American.

Hayw. & H. (D. C.). Hayward and Hazleton Circuit Court Reports.

Has. Pa. Reg. Hazard's Pennsylvania Register.

Has. Reg. (U. S.). Hazard's United States Register.

Head (Tenn.). Head's Tennessee Supreme Court Reports.

Heath (Me.). Heath's Reports, Maine Supreme Court (36-40 Maine).

Heck. Cas. Hecker's Leading Cases in Warranty.

Heisk. (Tenn.). Heiskell's Tennessee Supreme Court Reports.

Helm (Nev.). Helm's Nevada Reports (3-9 Nevada).

Hem. & M. Hemming and Miller's English Chancery Reports.

Heming. (Miss.). Hemingway's Mississippi Reports.

Hemm. & M. Hemming and Miller's Reports, English Chancery.

Hempst. (U. S.). Hempstead's United States Circuit Court and District Court Reports.

Hen. King Henry (thus *i* Henry I. signifies the first year of the reign of King Henry I.).

Hen. Bl. Henry Blackstone's Reports, English Common Pleas and Exchequer Chamber.

Hen. La. Dig. Hennen's Louisiana Digest.

Hen. Man. Cas. Henry's Manumission Cases.

Hen. Quiz Cas. Pl. Henning's Quiz Cases on Pleading.

Hen. & Mun. (Va.). Hening and Munford's Virginia Reports.

Hennen Dig. (La.). Hennen's Digest Louisiana Reports.

Hepb. (Cal.). Hepburn's California Reports (2-4 California).

Hepb. (Pa.). Hepburn's Pennsylvania State Reports.

Hetl. Hetley's English Common Pleas Reports.

Heyw. (Ga.). Heyward's Table of Cases, Georgia Reports.

Hig. Dig. Pat. Cas. Higgins's Digest of Patent Cases.

High Ct. B. High Court Reports, Northwest Provinces, India.

Hill (N. Y.). Hill's New York Supreme Court Reports.

Hill (S. Car.). Hill's South Carolina Law Reports.

Hill Ch., or Hill Eq. (S. Car.). Hill's Chancery Reports, South Carolina.

Hill Dig. (Ill.). Hill's Digest Illinois Reports.

Hill & D. (N. Y.). Hill and Denio's New York Reports.

Hill & D. Supp. (N. Y.). Lalor's Supplement to Hill and Denio.

Hilly. (Cal.). Hillyer's California Reports (20-22 California).

Hilt. (N. Y.). [Hilton's New York Common Pleas Reports.

Ho. Lord Cas. House of Lords Cases (Clark's).

Hob. Hobart's English King's Bench Reports.

Hod. Hodges's Reports, English Common Pleas.

Hodg. El. Cas. (Ont.). Hodgkin's Election Cases.

Hodges. Hodges' English Common Pleas Reports.

Hoff. (U. S.). Hoffman's Land Cases, United States District Court.

Hoff. Ch. (N. Y.). Hoffman's New York Chancery Reports.

Hoff. L. Cas. (U. S.). Hoffman's Land Cases, United States District Court.

Hoff. Lead. Cas. Hoffman's Leading Cases, Commercial Law.

Hoff. Pub. P. Hoffman's Public Papers, New York.

Hoffm. Ch. (N. Y.). Hoffman's Chancery Reports, New York.

Hoffm. L. C. (U. S.). Hoffman's Land Cases, United States District Court.

Hog. Hogan's Irish Rolls Court Reports; (Hog. of) Harcarse's Reports, Scotch Court of Session.

Hog. (Pa.), or Hog. St. Tr. Hogan's Pennsylvania State Trials.

Hogan. Hogan's Irish Rolls Court Reports.

Hogan (Pa.) St. Tr. Hogan's Pennsylvania State Trials.

Hogue (Fla.). Hogue's Reports, Florida Supreme Court (3-4 Florida).

Holo. Lead. Cas. Holcombe's Leading Cases on Commercial Law.

Holl. (Minn.). Hollinshead's Minnesota Reports.

Holm., or Holmes (U. S.). Holmes's Reports, United States Circuit Court, 1st Circuit.

Holt. Holt's English King's Bench Reports.

Holt Ad. Holt's English Admiralty Reports.

Holt Ch. Holt's English Vice-Chancellors' Reports.

Holt N. P. Holt's English Nisi Prius Reports.

Home. Home's Scotch Court of Session Reports.

Hook. (Conn.). Hooker's Connecticut Reports (23-45 Connecticut).

Hoonahan. Hoonahan's Sind Reports, India.

Hop. & Colt. Hopwood and Coltman, English Registration Cases.

Hop. & Ph. Hopwood and Philbrick's English Registration Cases.

Hope. Thomas Hope (of Kerse) Manuscript Decisions, Scotch Court of Session.

Hopk. (U. S.). Hopkinson's United States District Court Admiralty Decisions.

Hopk. (N. Y.). Hopkins's New York Reports.

Hopk. Ad. (Pa.). Hopkinson's Pennsylvania Admiralty Reports.

Hopk. Ch. (N. Y.). Hopkins's New York Chancery Reports.

Hopw. & C. Hopwood and Coltman's English Reports, Registration Appeal Cases.

Hopw. & Phil. Hopwood and Philbrick's English Registration Appeal Cases.

Hor. & Th. Cas. Horrigan and Thompson's Cases on the Law of Self-Defense.

Horn & Hurlst. Horn and Hurlstone's English Exchequer Reports.

Horr. & T. Self-Def. Horrigan and Thompson's Self-Defense Cases.

Horw. Y. B. (Horwood's) Year-Books of Edward I.

House of L. House of Lords Cases.

Houst. (Del.). Houston's Delaware Reports.

Houst. Cr. Cas. (Del.). Houston's Criminal Cases, Delaware.

Hov. Supp. Hovenden's Supplement to Vesey, Jr.

How. (Miss.). Howard's Reports, Mississippi Supreme Court and Court of Errors.

How. (U. S.). Howard's United States Supreme Court Reports.

How. App. Cas. (N. Y.). Howard's New York Appeal Cases.

How. Cr. Tr. Howison's Criminal Trials, Virginia.

How. Pop. Cas. Howard's Popery Cases, Irish.

How. Pr. (N. Y.). Howard's New York Practice Reports.
How. St. Tr. Howell's State Trials.
Hub. (Me.). Hubbard's Maine Reports.
Hub. Leg. Dir. Hubbell's Legal Directory.
Hubb. (Me.). Hubbard's Reports, Maine Supreme Court (45-51 Maine).
Hud. & B. Hudson and Brooke's Irish King's Bench Reports.
Hud. & Will. Dig. (U. S.). Hudson and Williams's United States Digest.
Huds. & B. Hudson and Brooke's Reports, Irish King's Bench.
Hugh. (Ky.). Hughes's Reports, Kentucky.
Hugh. (U. S.). Hughes's Reports, United States Circuit Court, 4th Circuit.
Hughes (Ky.). Hughes's Kentucky State Reports.
Hughes (U. S.). Hughes's United States Circuit Court and District Court Reports.
Hum. (Tenn.). Humphrey's Tennessee Reports.
Hume. Hume's Scotch Court of Session Cases.
Humph. (Tenn.). Humphrey's Tennessee Supreme Court Reports.
Hun (N. Y.). Hun's New York Supreme Court Reports.
Hunt, or Hunt Ann. Cas. Hunt's Collection of Annuity Cases.
Hunt Mer. Mag. Hunt's Merchant's Magazine, New York.
Hurl. & Colt. Hurlstone and Coltman's English Exchequer Reports.
Hurl. & Gord. Hurlstone and Gordon's Reports (10-11 Exchequer, English).
Hurl. & Nor. Hurlstone and Norman's English Exchequer Reports.
Hurl. & Walms. Hurlstone and Walmsley's English Exchequer Reports.
Hurlst. & Gor. Hurlstone and Gordon's Exchequer Reports.
Hurlst. & Norm. Hurlstone and Norman's English Exchequer Reports.
Hurlst. & Walms. Hurlstone and Walmsley's English Exchequer Reports.
Hut., Hutt., or Hutton. Hutton's Reports, English Common Pleas.
Hyde. Hyde's Reports, India.
I. C. C. Interstate Commerce Commission Reports.
I. C. L. B. Irish Common Law Reports.
I. C. B. Irish Chancery Reports; Irish Circuit Reports.
I. E. B. Irish Equity Reports.
I. J. Irish Jurist, Dublin.
I. J. C. Irvine's Justiciary Cases, Scotch.
I. J., N. S. Irish Jurist, New Series.
I. Jur. Irish Jurist, Dublin.
I. Jur., N. S. Irish Jurist, New Series.
I. L. T. Irish Law Times, Dublin.
I. B. C. L. Irish Reports, Common Law Series.
I. B. Eq. Irish Reports, Equity Series.
I. B. E. Internal Revenue Record, New York.
I. T. B. Irish Term Reports, by Ridgway, Lapp, and Schoales.
Ia. Iowa Reports.
Ib. *Ibidem*, the very same.

Id. *Idem*, the same; Idaho Reports.
Idaho. Idaho Reports.
Ill. Illinois Reports.
Ill. App. Illinois Appellate Court Reports.
Ill. App., or Bradw. (Ill.). Bradwell's Appellate Court Reports.
Ill. St. Bar. Asso. Illinois State Bar Association Reports.
Ills. Illinois.
In f. In fine (at end of a paragraph or title).
Ind. Indiana Reports.
Ind. App. Indiana Appellate Court Reports; English Law Reports, Indian Appeals.
Ind. Jur. Indian Jurist, Calcutta; Indian Jurist, Madras.
Ind. L. C. Com. Law. Indermaur's Epitome of Leading Common Law Cases.
Ind. L. C. Eq. Indermaur's Leading Cases in Conveyancing and Equity.
Ind. L. Mag. Indiana Law Magazine.
Ind. L. E. (East) Indian Law Reports.
Ind. L. E. All. Allahabad Series of Indian Law Reports.
Ind. L. Reg. Indiana Law Register.
Ind. L. Rep. Indiana Law Reporter.
Ind. Leg. Reg. Indiana Legal Register.
Ind. Rep. Indiana Reports.
Ind. Super. Indiana Superior Court Reports (Wilson's).
Ind. T. Indian Territory.
Indes. L. C. Com. L. Indermaur's Leading Common Law Cases.
Indes. L. C. Eq. Indermaur's Leading Equity Cases.
Index Rep. Index Reporter.
Inf. *Infra*, beneath or below; inferior.
Ins. Insurance; insolvency.
Ins. L. J. Insurance Law Journal, New York and St. Louis.
Ins. L. M. Insurance Law Monitor.
Ins. L. Rep. Insurance Law Reporter.
Ins. Y. B. Insurance Year Book.
Inst. Institutes. When preceded by a number denoting a volume (thus, 1 Inst.), the reference is to Coke's Institutes; when followed by several numbers (thus, Inst. 4, 2, 1), the reference is to the Institutes of Justinian.
Inst. Com. Com. Interstate Commerce Commission Reports.
Int. Cas. Rowe's Interesting Cases, English and Irish.
Int. Com. Rep. Interstate Commerce Reports.
Int. Jour. Eth. International Journal of Ethics, Philadelphia.
Int. Rev. Rec. Internal Revenue Record and Customs Journal.
Inters. Intercollegiate Law Journal.
Inters. Com. Rep. Interstate Commerce Reports.
Iow., or Iowa. Iowa Reports.
Iowa Univ. Law Bul. Iowa University Law Bulletin.
Ir. Irish; Iredell's North Carolina Law or Equity Reports.
Ir. C. L. Irish Common Law Reports.
Ir. Ch. Irish Chancery Reports.
Ir. Cir. Irish Circuit Reports.

- Ir. Ecol.** Irish Ecclesiastical Reports, by Milward.
Ir. Eq. Irish Equity Reports.
Ir. Jur. Irish Jurist, Dublin.
Ir. L. Irish Law Reports.
Ir. L., N. S. Irish Common Law Reports.
Ir. L. E. Irish Law Reports.
Ir. L. E. Irish Law Reports; The Law Reports, Ireland.
Ir. L. Rec. Irish Law Recorder.
Ir. L. Rec., N. S. Irish Law Recorder, New Series.
Ir. L. Rep. Irish Law Reports.
Ir. L. T. Irish Law Times and Solicitor's Journal, Dublin.
Ir. L. T. Rep. Irish Law Times Reports.
Ir. Law Rec. Irish Law Recorder.
Ir. Law Rep. Irish Law Reports.
Ir. Law Rep., N. S. Irish Common Law Reports.
Ir. Law & Ch. Irish Law and Equity Reports, New Series.
 (1894) 1 & 2 **Ir. E.** Irish Reports.
Ir. E. C. L. Irish Reports, Common Law Series.
Ir. E. Eq. Irish Reports, Equity Series.
Ir. E. Reg. App. Irish Reports, Registration Appeals.
Ir. Reg. & Land Cas. Irish Registry and Land Cases.
Ir. Rep. Irish Reports.
Ir. Rep. C. L. Irish Reports, Common Law.
Ir. Rep. Eq. Irish Reports, Equity.
Ir. Rep. Reg. App. Irish Reports, Registry and Land Cases.
Ir. St. Tr. Irish State Trials (Ridgeway's).
Ir. T. R. Irish Term Reports (Ridgeway, Lapp, and Schoales).
Ired. Ch. (N. Car.). Iredell's Equity Reports.
Ired. Dig. Iredell's North Carolina Digest.
Ired. L. (N. Car.). Iredell's Law Reports.
Irv. Irvine's Justiciary Cases, Scotch.
J. Adv. Gen. Judge Advocate General.
JJ. Justices.
J. J. Marsh. (Ky.). J. J. Marshall's Kentucky Reports.
J. Kel. Sir J. Kelyng's Reports, English King's Bench.
J. P. Justice of the Peace, London.
J. P. Sm. J. P. Smith's English King's Bench Reports.
J. S. Gr. (N. J.). J. S. Green's New Jersey Reports.
J. & Hem. Johnson and Hemming's English Vice-Chancellors' Reports.
J. & La T. Jones and La Touche's Irish Chancery Reports.
J. & S. (N. Y.). Jones and Spencer's Superior Court Reports.
J. & W. Jacob and Walker's English Chancery Reports.
Jac. King James (thus 1 Jac. I. signifies the first year of the reign of King James I.); Jacob's Reports, English Chancery.
Jac. Fish. Dig. Jacob's American edition of Fisher's English Digest.
Jac. & Walk. Jacob and Walker's English Chancery Reports.
Jack. (Ga.). Jackson's Georgia Reports (46-60 Georgia).
Jack. Geo. Ind. Jackson's Index to Georgia Reports.
Jack. Tex. App. Jackson's Texas Court of Appeals Reports.
Jackson & Lumpkin (Ga.). Jackson and Lumpkin's Georgia Reports.
Jacob. Jacob's English Chancery Reports.
Jacob L. Dict. Jacob's Law Dictionary.
James. James's Nova Scotia Reports; King James.
James Op. James's Opinions, Charges, etc.
James Sel. Cas. James's Select Cases, Nova Scotia.
James & Mont. Jameson and Montagu's English Bankruptcy Reports (in 2 Glyn and Jameson).
Jar. Wills. Jarman on Wills.
Jebb. Jebb's Irish Crown Cases.
Jebb & Bourke. Jebb and Bourke's Irish King's Bench Reports.
Jebb & Sy. Jebb and Symes's Irish King's Bench Reports.
Jeff. (Va.). Jefferson's Virginia General Court Reports.
Jeff. Man. P. L. Jefferson's Manual of Parliamentary Law.
Jenk., or Jenk. Cent. Jenkins's Reports, English Exchequer.
Jenn. (Mich.). Jennison's Michigan Reports (14-18 Michigan).
Jo. Jur. Journal of Jurisprudence.
Jo. La T. Jones and La Touche's Irish Chancery Reports.
Jo. T. Sir T. Jones's English Reports.
Jo. & La T. Jones and La Touche's Reports, Irish Chancery.
John. or Johns. Johnson's New York Reports; Johnson's Chancery Reports, Maryland; Johnson's English Vice-Chancellors' Reports.
John. Cas. (N. Y.). Johnson's New York Cases.
John. & H. Johnson and Hemming's Reports, English Chancery.
Johns. Johnson's English Vice-Chancellors' Reports.
Johns. (Md.). Johnson's Maryland Reports.
Johns. (N. Y.). Johnson's New York Supreme Court Reports.
Johns. (New Zealand). Johnson's New Zealand Reports.
Johns. Cas. (N. Y.). Johnson's Cases, New York Supreme Court, etc.
Johns. Ch. (Md.). Johnson's Maryland Chancery Reports.
Johns. Ch. (N. Y.). Johnson's New York Chancery Reports.
Johns. Ct. Err. Johnson's Reports, New York Court of Errors.
Johns. Dec. Johnson's Maryland Chancery Decisions.
Johns. Eng. Ch. Johnson's English Chancery Reports.
Johns. Tr. Johnson's Impeachment Trial.
Johns. (U. S.). Johnson's Reports, United States 4th Circuit, Chase's Decisions.
Johns. V. C. Johnson's English Vice-Chancellors' Reports.

Johns. & Hem. Johnson and Hemming's English Vice-Chancellors' Reports.

Johnst. (New Zealand). Johnston's Reports, New Zealand.

Johnst. Dig. (S. Car.). Johnstone's Digest South Carolina Equity Reports.

1 Jon. Sir William Jones's Reports, English King's Bench and Common Pleas.

2 Jon. Sir Thomas Jones's Reports, English King's Bench and Common Pleas.

Jon. (Ala.). Jones's Reports (43-49, 52-57, 61, 62 Alabama Reports, N. S.).

Jon. (Mo.). Jones's Reports (22-30 Missouri).

Jon. (N. Car.). Jones's Law Reports, North Carolina.

Jon. (Pa.). Jones's Reports (11, 12 Pennsylvania State).

Jon. (U. C.). Jones's Reports, Upper Canada.

Jon., B. & W. Jones, Barclay, and Whittelsey's Reports (31 Missouri).

Jon. Eq. (N. Car.). Jones's Equity Reports, North Carolina.

Jon. Exch., or Jon. Ir. Exch. Jones's Reports, Irish Exchequer.

Jon. T. Sir Thomas Jones's Reports, English King's Bench and Common Pleas (sometimes cited as 2 Jones).

Jon. W. Sir William Jones's Reports, English King's Bench and Common Pleas (sometimes cited as 1 Jones).

Jon. & C. Jones and Cary's Reports, Irish Exchequer.

Jon. & La T. Jones and La Touche's Reports, Irish Chancery.

Jon. & S. (N. Y.). Jones and Spencer's Reports (33-46 New York Superior Court).

Jones (Ala.). Jones's Reports, Alabama Supreme Court (43-48 Alabama).

Jones (Ir.). Jones's Irish Exchequer.

Jones (Mo.). Jones's Reports, Missouri Supreme Court (22-30 Missouri).

Jones (N. Car.). Jones's North Carolina Law Reports.

Jones (Pa.). Jones's Pennsylvania State Reports.

Jones (T.). Sir Thomas Jones's English King's Bench Reports.

Jones (U. C.). Jones's Reports, Upper Canada Common Pleas.

Jones (Wm.). Sir William Jones's English King's Bench Reports.

Jones 1. Sir William Jones's English King's Bench Reports.

Jones 2. Sir Thomas Jones's English King's Bench Reports.

Jones, B. & W. (Mo.). Jones, Barclay, and Whittelsey's Reports, Missouri Supreme Court (31 Missouri).

Jones Ch. (N. Car.). Jones's North Carolina Equity Reports.

Jones Ir. Jones's Irish Exchequer Reports.

Jones L. (N. Car.). Jones's North Carolina Law Reports.

Jones T. Sir Thomas Jones's English King's Bench Reports.

Jones W. Jones, W., English King's Bench Reports.

Jones & La T. Jones and La Touche's Reports, Irish Chancery.

Jones & McMurtrie (Pa.). Jones and McMurtrie's Pennsylvania Reports.

Jones & Spenc. Jones and Spencer's New York Superior Court Reports.

Jour. Bank. L. Journal of Banking Law.

Jour. Jur. Journal of Jurisprudence and Scottish Law Magazine.

Jour. Jur. (Hall's). Hall's Journal of Jurisprudence.

Jour. Jur. (So.). Journal of Jurisprudence and Scottish Law Magazine, Edinburgh.

Jour. L. Journal of Law, Philadelphia.

Jour. L. Sch. Needh. Journal of the Law School at Needham.

Journ. Jur. Journal of Jurisprudence.

Journ. L. Journal of Law.

Journ. P. M. & M. J. Journal of Psychological Medicine and Medical Jurisprudence.

Jud. Repos. Judicial Repository, New York.

Jud. & Sw. (Jamaica). Judah and Swan's Reports, Jamaica.

Jur. The Jurist, English.

Jur. (N. Y.). The Jurist, or Law and Equity Reporter, New York.

Jur. (Wash., D. C.). The Jurist, Washington, D. C.

Jur. N. S. Jurist, New Series, English.

Jur. Ros. Roscoe's Jurist, London.

Jur. Sc. Scottish Jurist, Scotch Court of Session.

Jur. Soc. P., or Jurid. Soc. Pap. Juridical Society Papers, London.

Jur. & L. Eq. Rep. Jurist and Law and Equity Reporter.

Jurid. Rev. Juridical Review, Edinburgh.

Jurisp. The Jurisprudent, Boston.

Jurist. Jurist, or Quarterly Journal.

Jus. Inst. Institutes of Justinian.

Just. P. The Justice of the Peace, London (periodical).

Justinian. See editions by Abdy and Walker, Cooper, Harris, Holland, Hunter, Lyons, Ortolan, Sanders, Shadwell.

Juta (Cape of Good Hope). Jutta's Cape of Good Hope Reports.

K. Keyes's New York Court of Appeals Reports; Kenyon's English King's Bench Reports.

K. B. King's Bench Reports, English.

K. B. (U. C.). King's Bench Reports, Upper Canada.

K. C. B. Reports temp. King, English Chancery.

K. & B. Dig. Kerford's and Box's Victorian Digest.

K. & G. B. C. Keane and Grant's English Registration Cases.

K. & J. Kay and Johnson, English Chancery Reports.

K. & O. Knapp and Ombler's Election Cases, English.

Kam. Rem. Dec. Kames's Remarkable Decisions, Scotch Court of Session.

Kam. Sel. Dec. Kames's Select Decisions, Scotch Court of Session.

Kames. Kames's Decisions, Scotch Court of Session.

Kames Rem. Dec. Kames's Remarkable Decisions, Scotch Court of Session.
Kames Sel. Dec. Kames's Select Decisions, Scotch Court of Session.
Kan. Kansas Supreme Court.
Kan. C. L. Rep. Kansas City Law Reporter.
Kan. L. J. Kansas Law Journal.
Kan. Univ. Lawy. Kansas University Law-
 yer, Lawrence.
Kans. City Bar. Assn. Kansas City Bar
 Association Reports.
Kas. Kansas Reports.
Kay. Kay's English Vice-Chancellors' Re-
 ports.
Kay & John. Kay and Johnson's English
 Vice-Chancellors' Reports.
Ke. Keen's English Rolls Court Re-
 ports.
Keane & G. B. C. Keane and Grant's Regis-
 tration Appeal Cases.
Keb. or Kehle. Keble's English King's
 Bench Reports.
Keen. Keen's English Rolls Court Re-
 ports.
Keen. Cas. Qua. Cont. Keener's Cases on
 Quasi Contracts.
Keilw. Keilway's English King's Bench
 Reports.
Kel. Kelyng's English Crown Case.
Kel. (Ga.). Kelly's Georgia Reports (1-3
 Georgia).
Kel. 1. Sir John Kelyng's English Crown
 Cases.
Kel. 2. William Kelynge's English Chan-
 cery Reports.
Kel. J., or 1 Kel. J. Kelyng's Reports,
 English King's Bench.
Kel. W., or 2 Kel. W. Kelynge's Reports,
 English Chancery and King's Bench.
Kel. & Cobb (Ga.). Kelly and Cobb's Georgia
 Reports.
Kelly (Ga.). Kelly's Georgia Reports.
Kelyng, J. Kelyng, J., English Crim.
Kelynge, W. William Kelynge's English
 Chancery Reports.
Ken. Kentucky (see Ky.).
Ken. (N. Car.). Kenan's North Carolina
 Reports.
Ken. Ch., or Ken. K. B. Kenyon's Eng-
 lish Chancery and King's Bench Re-
 ports.
Ken. L. Rep. Kentucky Law Reporter.
Kenan (N. Car.). Kenan's North Carolina
 Reports (76-85 North Carolina).
Kent Comm. Kent's Commentaries on
 American Law.
Keny. Kenyon's Notes, English King's
 Bench.
Keny. C. H., or 3 Keny. Chancery Reports
 at the end of 2 Kenyon.
Kenyon. Kenyon, English King's Bench
 Reports.
Ker. or Kernan (N. Y.). Kernan's New
 York Court of Appeals Reports.
Korr (Ind.). Kerr's Reports, Indiana Su-
 preme Court (18-22 Indiana).
Korr (N. B.). Kerr's Reports, New Bruns-
 wick Supreme Court.
Kerse. Kerse's Manuscript Decisions,
 Scotch Court of Session.
Keyes (N. Y.). Keyes's New York Court of
 Appeals Reports.

Keyl. Keilway's (or Keylway's) English
 King's Bench Reports.
Kilk. Sc. Sess. Kilkerran's Scotch Court of
 Session Cases.
King (La.). King's Louisiana Reports
 (5-6 Louisiana Annals).
King Cas. Cases in King's Colorado Civil
 Practice.
King, Cas. temp. Select Cases *temp.* King,
 English Chancery.
King Dig. (Tenn.). King's Digest Tennessee
 Reports.
Kinn. Dig. Sc. App. Kinnear's Digest Scotch
 Appeal Cases.
Kirby (Conn.) Kirby's Connecticut Re-
 ports.
Kn. or Knapp. Knapp's Reports, English
 Privy Council.
Kn. N. S. W. Knox's New South Wales
 Reports.
Kn. & Moo. Knapp and Moore's Reports (3
 Knapp's Privy Council Reports).
Knapp & Om. Knapp and Ombler's English
 Election Cases.
Knowles (B. I.). Knowles's Rhode Island
 Reports (3 Rhode Island Supreme Court).
Knox. Knox's New South Wales Re-
 ports.
Knox & Fits. Knox and Fitzhardinge's New
 South Wales Reports.
Kulp. Luzerne Legal Register.
Ky. Kentucky Reports.
Ky. Bar Asso. Kentucky Bar Association
 Reports.
Ky. Dec. Sneed's Kentucky Decisions, Ken-
 tucky Court of Appeals.
Ky. L. J. Kentucky Law Journal.
Ky. L. Rep. Kentucky Law Reporter.
L. C. Lord Chancellor; Lower Canada;
 Leading Cases.
L. C. Eq. White and Tudor's Leading Cases
 in Equity.
L. C. G. Local Courts Gazette, Toronto.
L. C. J. Lord Chief Justice.
L. C. J. B. Lower Canada Jurist Reports.
L. C. Jur. Lower Canada Jurist.
L. C. L. Jour. Lower Canada Law Journal.
L. C. Rep. Lower Canada Reports.
L. Chr., or J. Jur. Law Chronicle or Jour-
 nal of Jurisprudence.
L. H. C. Lord High Chancellor.
L. I. Legal Intelligencer, Philadelphia.
L. Int. Law Intelligencer.
L. J. Law Journal, English, reports in all
 the courts.
L. J. (M. & W.). Law Journal (Morgan and
 Williams).
L. J. Adm. Law Journal, New Series, Eng-
 lish Admiralty.
L. J. App. Law Journal, New Series, Eng-
 lish Appeals.
L. J. Bank. Law Journal, New Series,
 English Bankruptcy.
L. J. C. C. B. Law Journal, New Series,
 Crown Cases Reserved.
L. J. C. P. Law Journal, New Series, Com-
 mon Pleas.
L. J. Can. Law Journal, Canada.
L. J. Ch. Law Journal, New Series, Eng-
 lish Chancery.
L. J. D. & M. Law Journal, New Series,
 English Divorce and Matrimonial.

Abbreviations of the Reports, ABBREVIATIONS. Text-books, and Common Legal Terms.

- L. J. Ecc.** Law Journal, New Series, English Ecclesiastical.
L. J. Ex. Law Journal, New Series, English Exchequer.
L. J. H. L. Law Journal, New Series, English House of Lords.
L. J. K. B., or Q. B. Law Journal, New Series, King's or Queen's Bench.
L. J. L. C. Law Journal, Lower Canada.
L. J. L. Tracts. Law Journal Law Tracts.
L. J. M. & W. Morgan and Williams's Law Journal, London.
L. J. M. C. Law Journal, New Series, English Magistrates' Cases.
L. J. Mat. Cas. Law Journal, New Series, English Divorce and Matrimonial Causes.
L. J. N. C. Law Journal, Notes of Cases.
L. J. N. S. The Law Journal, New Series, London.
L. J. O. S. The Law Journal, Old Series, London.
L. J. O. S. C. P. Law Journal, Old Series, English Common Pleas.
L. J. O. S. Ch. Law Journal, Old Series, English Chancery.
L. J. O. S. K. B. Law Journal, Old Series, English King's Bench.
L. J. O. S. M. C. Law Journal, Old Series, English Magistrates' Cases.
L. J. P. & M. Law Journal, New Series, English Probate and Matrimonial.
L. J. P. C. Law Journal, New Series, English Privy Council.
L. J. P. D. & A. Law Journal, New Series, English Probate, Divorce, and Admiralty.
L. J. P. M. & A. Law Journal, New Series, English Probate, Matrimonial, and Admiralty.
L. J. Rep. Law Journal Reports.
L. J. Rep. N. S. Law Journal Reports, New Series.
L. J. Sm. Smith's Law Journal, London.
L. J. U. C. Law Journal, Upper Canada.
L. M., or Mag. & L. R. Law Magazine and Law Review, London.
L. M. & P. Lowndes, Maxwell, and Pollock, English Bail Court.
L. Mag. Law Magazine or Quarterly Review.
L. Mag. N. S. Law Magazine or Quarterly Review, New Series.
L. N. Law News.
L. O. Legal Observer, London.
L. P. B. Paper Book of Laurence, J., in Lincoln's Inn Library.
L. P. R. Lilly's Practical Register.
L. Quar. Rev. Law Quarterly Review.
L. R. Law Recorder, Reports in all the Irish Courts; Law Reporter; Law Reports; Law Review; Law Times Reports.
L. R. A. Lawyers' Reports Annotated.
L. R. A. & E. English Law Reports, Admiralty and Ecclesiastical.
L. R. App. Cas. English Law Reports, Appeal Cases.
L. R. Burm. Law Reports, British Burmah.
L. R. C. C. Law Reports, English Crown Cases Reserved.
L. R. C. P. English Law Reports, Common Pleas.
L. R. C. P. D. Law Reports, Common Pleas Division English Supreme Court of Judicature.
L. R. Ch. App. English Law Reports, Chancery Appeals.
L. R. Ch. D. Law Reports, Chancery Division English Supreme Court of Judicature.
L. R. E. & I. App. Law Reports, English and Irish Appeals.
L. R. Eq. Law Reports, English Equity Cases.
L. R. Ex. English Law Reports, Exchequer.
L. R. Ex. D. Law Reports, Exchequer Division English Supreme Court of Judicature.
L. R. H. L. Law Reports, English and Irish Appeal Cases, House of Lords.
L. R. H. L. Sc. Law Reports, Scotch and Divorce Appeal Cases, House of Lords.
L. R. Ind. App. English Law Reports, Indian Appeals.
L. R. Ir. Law Reports, Irish.
L. R. Misc. D. Law Reports, Miscellaneous Division, English Supreme Court of Judicature.
L. R. N. S. Irish Law Recorder, New Series.
L. R. N. S. W. Law Reports, New South Wales.
L. R. P. & D. Law Reports, English Probate and Divorce Cases.
L. R. P. C. Law Reports, English Privy Council Appeal Cases.
L. R. P. D. English Law Reports, Probate Division.
L. R. Q. B. English Law Reports, Queen's Bench.
L. R. Q. B. Div. Law Reports, Queen's Bench Division English Supreme Court.
L. R. S. A. Law Reports, South Australia.
L. R. Sc. Div. App. Cas. Scotch and Divorce Appeal Cases, Law Reports.
L. R. Sess. Cas. English Law Reports, Session Cases.
L. R. Stat. English Law Reports, Statutes.
L. Rec. Law Recorder.
L. Rec. N. S. Law Recorder, New Series.
L. Rep. Law Reporter.
L. Rep. (Mont.). Law Reporter (Montreal).
L. Repos. Law Repository.
L. Rev. & Quart. J. Law Review and Quarterly Journal.
L. Stu. Mag. N. S. Law Student's Magazine, New Series.
L. T. Law Times, New Series, English.
L. T. B. American Law Times Bankruptcy Reports.
L. T. J. Law Times Journal.
L. T. N. S. Law Times Reports, New Series.
L. T. O. S. Law Times, Old Series.
L. & B. Ins. Dig. Littleton and Blatchley's Insurance Digest.
L. & C. Leigh and Cave English Crown Cases.
L. & E. English Law and Equity Reports, Boston edition.
L. & E. Rep. Law and Equity Reporter, New York.

- L. & G. t. Plunk.** Lloyd and Goold *temp.* Plunkett, Irish.
- L. & G. t. Sug.** Lloyd and Goold *temp.* Sugden, Irish.
- L. & M.** Lowndes and Maxwell's English Practice Cases.
- L. & T.** Longfield and Townsend's Reports, Irish Exchequer.
- L. & W.** Lloyd and Welsby's English Mercantile Cases.
- L. & Welsb., or L. & Welsb. Mer. Cas.** Lloyd and Welsby's Mercantile Cases, English Courts.
- La.** Lane's Reports, English Exchequer; Louisiana Reports, Supreme Court.
- La. Ann.** Louisiana Annual; Louisiana Supreme Court.
- La. Law J.** Louisiana Law Journal.
- La. T. B. Martin's Louisiana Term Reports (2-12 Louisiana).**
- La. Thé.** La Thémis, Lower Canada.
- Lab. (Cal.).** Labatt's California Reports.
- Lac. Dig. Ry. Dec.** Lacey's Digest of Railway Decisions.
- Lacey Iowa Dig.** Lacey's Iowa Digest.
- Lack. Bar.** Lackawanna Bar.
- Lack. Jur.** Lackawanna Jurist.
- Lack. Leg. R.** Lackawanna Legal Record, Scranton, Pa.
- Lal. Supp. (N. Y.).** Lalor's New York Supreme Court and Court of Errors Reports. Supplement to Hill and Denio.
- Lanc. Bar.** The Lancaster Bar (periodical).
- Lanc. L. Rev.** Lancaster Law Review.
- Land. Est. C.** Landed Estates Courts.
- Lane.** Lane's English Exchequer Reports.
- Lang. Lead. Cas. C.** Langdell's Leading Cases on Contracts.
- Lang. Lead. Cas. Sales.** Langdell's Leading Cases on Sales.
- Lans. (N. Y.).** Lansing's New York Supreme Court Reports.
- Lans. Ch. (N. Y.).** Lansing's New York Chancery Reports.
- Laper. Dec.** Laperriere's Speaker's Decisions, Canada.
- Latch.** Latch's English King's Bench Reports.
- Lath. (Mass.).** Lathrop's Massachusetts Reports (115-131 Massachusetts).
- Lauder.** (Lauder of) Fountainhall's Scotch Session Cases.
- Law.** The Law, London (periodical).
- Law. (O.).** Lawrence's Ohio Reports.
- Law. Alm.** Law Almanack, New York.
- Law Amend. J.** Law Amendment Journal.
- Law Book N.** Law Book News.
- Law Bull.** Law Bulletin, San Francisco.
- Law Cen.** Law Central (periodical).
- Law Chr.** Law Chronicle, Edinburgh or London.
- Law Chr. & Jour. Jur.** Law Chronicle and Journal of Jurisprudence.
- Law Chr. & Prof. Adv.** Law Chronicle and Professional Advertiser.
- Law Dig.** Law Digest, London (periodical.)
- Law Dig. Pat.** Law's Digest of Patent Cases.
- Law Ex. J.** Law Examination Journal, London.
- Law Int.** Law Intelligencer, American.
- Law Jour.** Law Journal, reports in all the English courts.
- Law Jour. (M. & W.).** Morgan and Williams's Law Journal, London.
- Law Jour. (Smith's).** J. P. Smith's Law Journal, London.
- Law Jour. Adm.** Law Journal, New Series, English Admiralty.
- Law Jour. Bankr.** Law Journal, New Series, English Bankruptcy.
- Law Jour. C. P.** Law Journal, New Series, English Common Pleas.
- Law Jour. Ch.** Law Journal, Chancery, English.
- Law Jour. Ecc.** Law Journal, Ecclesiastical, English.
- Law Jour. Ex.** English Law Journal, Exchequer Reports.
- Law Jour. H. L.** Law Journal, New Series, English House of Lords.
- Law Jour. L. Tracts.** English Law Journal, Law Tracts.
- Law Jour. M. C.** English Law Journal, Magistrates' Cases.
- Law Jour. Mat. Cas.** Law Journal, New Series, English Divorce and Matrimonial Cases.
- Law Jour. N. S.** Law Journal, New Series, English.
- Law Jour. No. Cas.** Law Journal, Notes of Cases, English.
- Law Jour. Priv. Coun.** English Law Journal, Privy Council.
- Law Jour. Prob.** Law Journal, Probate Reports, English.
- Law Jour. Q. B.** Law Journal, New Series, English Queen's Bench.
- Law Jour. Rep.** Law Journal Reports, English.
- Law Jour. Rep. N. S.** Law Journal Reports, New Series, English.
- Law. Lead. Cas.** Lawson's Leading Cases Simplified.
- Law Mag.** Law Magazine, London.
- Law Mag. & L. Rev.** Law Magazine and Law Review.
- Law N.** Law News, St. Louis.
- Law Notes.** Law Notes, London, England.
- Law Pat. Dig.** Law's Digest of Patent, Copyright, and Trade-mark Cases.
- Law Quart. Rev.** Law Quarterly Review, London.
- Law R. Adm. & Ecc.** Law Reports, Admiralty and Ecclesiastical, England.
- Law R. Ch.** Law Reports, Chancery Appeal Cases, English.
- Law R. Com. P.** Law Reports, Common Pleas, English.
- Law R. Cr. Cas.** Law Reports, Crown Cases Reserved, English.
- Law R. Eq.** Law Reports, Equity, English.
- Law R. Ex.** Law Reports, Exchequer, English.
- Law R. H. L. Sc.** Law Reports, House of Lords, Scotch and Divorce Appeals, England.
- Law R. Ind. App.** Law Reports, Indian Appeals, Privy Council, English.
- Law R. Ind. App. Supp.** Law Reports, Indian Appeals, Supplements.
- Law R. Ir.** Law Reports, Irish.
- Law R. P. C.** Law Reports, Privy Council, English.

- Law R. Pro. & D.** Law Reports, Probate and Divorce, English.
- Law R. Q. B.** Law Reports, Queen's Bench, English.
- Law Rec.** Law Recorder, reports in all the Irish courts.
- Law Rec'r N. S.** Law Recorder, New Series, Irish.
- Law Reg.** American Law Register, Philadelphia.
- Law Rep. (Tor.).** Law Reporter, Toronto.
- Law Rep. A. & E.** Law Reports, English Admiralty and Ecclesiastical.
- Law Rep. App. Cas.** Law Reports, English Appeal Cases.
- Law Rep. C. C.** Law Reports, English Crown Cases.
- Law Rep. C. P.** Law Reports, English Common Pleas.
- Law Rep. C. P. D.** Law Reports, Common Pleas Division, English Supreme Court of Judicature.
- Law Rep. Ch.** Law Reports, English Chancery Appeal Cases.
- Law Rep. Ch. D.** Law Reports, Chancery Division, English Supreme Court of Judicature.
- Law Rep. Eq.** Law Reports, English Equity Cases.
- Law Rep. Ex.** Law Reports, English Exchequer.
- Law Rep. Ex. D.** Law Reports, Exchequer Division, English Supreme Court of Judicature.
- Law Rep. H. L.** Law Reports, English and Irish Appeal Cases, House of Lords.
- Law Rep. H. L. Sc.** Law Reports, Scotch and Divorce Appeal Cases, House of Lords.
- Law Rep. Misc. D.** Law Reports, Miscellaneous Division, English Supreme Court of Judicature.
- Law Rep. N. S.** Monthly Law Reporter, Boston.
- Law Rep. P. C.** Law Reports, English Privy Council Appeal Cases.
- Law Rep. P. & D.** Law Reports, English Probate and Divorce Cases.
- Law Rep. Q. B.** Law Reports, English Queen's Bench.
- Law Rep. Q. B. D.** Law Reports, Queen's Bench Division, English Supreme Court of Judicature.
- Law Repos. (N. Car.).** Carolina Law Repository, North Carolina Supreme Court.
- Law Rev.** Law Review, London; American Law Review, Boston.
- Law Rev. & Qu. J.** Law Review and Quarterly Journal, London.
- Law Stud. Mag.** Law Students' Magazine.
- Law Students' Helper.** Law Students' Helper, Detroit, Mich.
- Law Students' J.** Law Students' Journal, John Indemaur, Chancery Lane, London, England.
- Law T.** Law Times, London; Law Times, Scranton, Pa.
- Law T. Rep.** Law Times Reports, England.
- Law T. Rep. N. S.** Law Times Reports, New Series.
- Law Times (Pa.).** Law Times, Scranton, Pa.
- Law Times N. S., or Law Times Rep. N. S.** Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
- Law Tr.** Law Tracts.
- Law Weekly.** Law Weekly, New York.
- Law & Eq. Rep.** Law and Equity Reporter, New York.
- Law. & Mag. Mag.** Lawyers' and Magistrates' Magazine, London.
- Lawr. (O.).** Lawrence's Ohio Reports (20 Ohio).
- Lawrence MSS.** Lawrence's Paper Book.
- Lawson Cas. Crim. L.** Lawson's Leading Cases in Criminal Law.
- Lawson Cas. Eq.** Lawson's Leading Cases in Equity.
- Lawson Lead. Cas. Simp.** Lawson's Leading Cases Simplified.
- Lawy.** Lawyer, or Jurisprudential Record.
- Lawy. Mag.** Lawyers' Magazine.
- Lawy. Rep. Ann.** Law Republican Annotated Lawyers' Co-operative Publishing Co., Rochester, N. Y.
- Lay.** Lay's Reports, English Chancery.
- Ld. Ken.** Lord Kenyon's English King's Bench Reports.
- Ld. Raym.** Lord Raymond's English King's Bench Reports.
- Lea (Tenn.).** Lea's Tennessee Supreme Court Reports.
- Leach C. C.** Leach's Crown Cases.
- Leach Club Cas.** Leach's Club Cases.
- Lead. Cas.** Leading Cases Done into English.
- Lead. Cas. Am.** American Leading Cases, by Hare and Wallace.
- Lead. Cas. Eq.** White and Tudor's Leading Cases in Equity.
- Lee.** Lee's English King's Bench Reports *temp.* Hardwicke.
- Lee (Cal.).** Lee's California Reports (9-12 California).
- Lee Ab.** Lee on Abstracts of Title.
- Lee Cas. t. H.** Lee's Cases *temp.* Hardwicke, English King's Bench.
- Lee Ecc.** Lee's English Ecclesiastical Reports.
- Lee G.** Sir George Lee's English Ecclesiastical Reports.
- Lee t. Hardwicke.** Lee's English King's Bench Reports *temp.* Hardwicke.
- Lef. Dec.** Lefevre's Parliamentary Decisions, reported by Bourke.
- Lefroy.** Lefroy's English Railroad and Canal Cases.
- Leg. Adv.** Legal Adviser, Chicago, Ill.
- Leg. Chr.** Legal Chronicle, Pennsylvania.
- Leg. Ex. Am.** Legal Examiner, American.
- Leg. Ex. Eng.** Legal Examiner, English.
- Leg. Ex. & Week. Rep.** Legal Examiner and Weekly Reporter.
- Leg. Exam. & Chr.** Legal Examiner and Law Chronicle.
- Leg. Exam. & Med.** Legal Examiner and Medical Jurist, London.
- Leg. Exch.** Legal Exchange, Des Moines, Iowa.
- Leg. G.** Legal Guide, London.
- Leg. Gaz.** Legal Gazette, Philadelphia.
- Leg. Gaz. Rep. (Pa.).** Legal Gazette Reports, Pennsylvania Courts.
- Leg. Inq.** Legal Inquirer, London.

- Leg. Int.** Legal Intelligencer, Philadelphia, Pa.
Leg. N. Legal News (periodical).
Leg. N. L. C. Legal News, Lower Canada.
Leg. Ob. Legal Observer, English.
Leg. Op. Legal Opinions, Harrisburg, Pa.
Leg. Pract. & Sol. J. Legal Practitioner and Solicitors' Journal.
Leg. Rec. Rep. Legal Record Reports.
Leg. Rem. Legal Remembrancer, Calcutta High Courts.
Leg. Rep. (Ir.). Legal Reporter, Irish Courts.
Leg. Rev. Legal Review, London.
Leg. Y. B. Legal Year Book, London.
Leg. & Fin. Reg. Legal and Financial Register.
Leg. & Ins. Rep. Legal and Insurance Reporter, Philadelphia.
Legal Chron. (Pa.). Legal Chronicle Reports.
Legal Gaz. (Pa.). Legal Gazette Reports.
Legg. Leggett's Reports, Sind, India.
Lehigh Val. L. Rep. Lehigh Valley Law Reporter.
Leigh (Va.). Leigh's Virginia Appeal and General Court Reports.
Leigh & C. Leigh and Cave's English Crown Cases.
Leon. Leonard's English King's Bench Reports.
Leon. La. Dig. Leonard's Louisiana Digest of United States Cases.
Leonard. Leonard's English King's Bench Reports.
Lest. (Ga.). Lester's Georgia Reports (31-33 Georgia).
Lest. P. L. Lester's Decisions in Public Land Cases.
Lester Supp., or Lester & B. Lester and Butler's Supplement to 33 Georgia Reports.
Lev. or Levinz. Levinz' English King's Bench Reports.
Lew. Lewin's English Crown Cases Reserved.
Lew. (Nev.). Lewis's Reports, Nevada Supreme Court (1 Nevada).
Lew. L. Cas. Lewis's Leading Cases on Public Land Law.
Lew. T. & T. Lewin on Trusts and Trustees.
Lewin C. C. Lewin's English Crown Cases.
Ley. Ley's English King's Bench Reports.
Life & Acc. Ins. B. Life and Accident Insurance Reports (Bigelow's).
Lig. Dig. Ligon's Digest (Alabama).
Lil. Lilly's Reports or Entries, English Court of Assize.
Lind. Part. Lindley on Partnership.
Linn. Ind. Linn's Index of Pennsylvania Reports.
Lit. Littleton's Reports, English Common Pleas and Exchequer.
Lit. & Bl. Dig. Littleton and Blatchley's Insurance Digest.
Litt. Littleton's English Common Pleas Reports.
Litt. (Ky.). Littell's Kentucky Reports.
Litt. Sel. Cas. (Ky.). Littell's Select Cases, Kentucky.
Litt. Ten. Littleton's Tenures.
Litt. & B. Littleton and Blatchley's Digest of Insurance Decisions.
Liv. (N. Y.). Livingston's Mayor's Court Reports, New York.
Liv. Jud. Op. Livingston's Judicial Opinions, New York City Mayor's Court.
Liv. Law Mag. Livingston's Law Magazine, American.
Liz. Sc. Exch. Lizars' Scotch Exchequer Cases.
Ll. *Leges*, Laws.
LL.D. Doctor of Laws.
Ll. & G. t. P. Lloyd and Goold's Reports *temp.* Plunkett, Irish Chancery.
Ll. & G. t. S. Lloyd and Goold's Reports *temp.* Sugden, Irish Chancery.
Lloyd & W. Eng. Mer. Cas. Lloyd and Welsby's English Mercantile Cases.
Loc. Cts. Gaz. Local Courts and Municipal Gazette, Canada.
Lock. Rev. Cas. (N. Y.). Lockwood's Reversed Cases.
Locus Standi. Locus Standi Reports, English.
Lofft. Lofft's English King's Bench Reports.
Lofft Max. Maxims appended to Lofft's Reports.
Lom. C. H. Rep. (N. Y.). Lomas' City Hall Reports, New York.
Lom. Dig. Lomax's Digest of the Laws of Real Property.
Lond. Jur. London Jurist, reports in all the courts.
Lond. Jur. N. S. London Jurist, New Series.
Lond. L. M. London Law Magazine.
Lond. Magazine. London Magazine.
Lond. Q. London Quarterly Review.
Long Quinto. Year Book, part 10.
Longf. & T. Longfield and Townsend's Reports, Irish Exchequer.
Lords Jour. Journal of the House of Lords.
Lorenz (Ceylon). Lorenz' Ceylon Reports.
Loss Lead. Cas. Loss's Leading Cases in Commercial Law.
Lou. An. Louisiana Annual.
Lou. L. J. Louisiana Law Journal.
Low. (U. S.). Lowell's United States Circuit and District Court Reports.
Low. C. Lower Canada Reports.
Low. C. Jur. Lower Canada Jurist.
Low. C. Seign. Lower Canada Seigniorial Reports.
Low. Can. L. J. Lower Canada Law Journal.
Lowell (U. S.). Lowell's United States District Decisions.
Lownd. M. & P. Lowndes, Maxwell, and Pollock's Bail Court Reports, English.
Lownd. & M. Lowndes and Maxwell's Bail Court Reports, English.
Luc. Lucas's Cases in Law and Equity, English Courts (10 Modern Reports).
Lud. El. Cas. Luder's English Election Cases.
Ludd. (Me.). Ludden's Maine Reports.
Luder. Luder's English Election Cases.
Lum. Cas. Lumley's Poor Law Cases.
Lush. Lushington's English Admiralty.
Lut. or Lutw. Lutwyche's English Common Pleas Reports.
Lut. Elec. Cas. Lutwyche's Election Cases, English.
Lutw. E. Edward Lutwyche's English Common Pleas Reports.

- Luz. L. J.** Luzerne Law Journal.
Luz. L. T. Luzerne Law Times.
Luz. Leg. Ob. Luzerne Legal Observer, Carbondale, Pa.
Luz. Leg. Reg. Luzerne Legal Register, Wilkesbarre, Pa.
Lynd. (Wal.). Lyne's Irish Chancery Cases, from Wallis's Notes.
M. Queen Mary (thus, 1 M. signifies the first year of the reign of Queen Mary); Michaelmas Term; Morison's Dictionary of Decisions, Scotch Court of Session.
M. C. C. Moody's English Crown Cases, Reserved.
M. Cas. Magistrates' Cases.
M. D. & D. Montague, Deacon, and De Gex's Reports, English Bankruptcy.
M. G. & S. Manning, Granger, and Scott's Reports, English Common Pleas; Common Bench Reports.
M. L. J. Memphis Law Journal, Tennessee.
M. L. Mag. Monthly Law Magazine.
M. L. B. Maryland Law Record, Baltimore.
M. M. B. Mitchell's Maritime Register, London.
M. P. C. Moore's Privy Council Cases, English.
M. R. Master of the Rolls.
M. & Ayr. Montagu and Ayrton's Reports, English Bankruptcy Court.
M. & B. Montagu and Bligh's Reports, English Bankruptcy.
M. & C. Mylne and Craig's English Chancery Reports; Montagu and Chitty's English Bankruptcy Reports.
M. & C. Bankr. Montagu and Chitty's Bankruptcy Reports, English.
M. & G. Manning and Granger's English Common Pleas.
M. & Gel. Maddock and Geldhart's English Chancery Reports (6 Maddock).
M. & Gord. Macnaghten and Gordon's Reports, English Common Pleas.
M. & H. Murphy and Hurlstone's Exchequer Reports.
M. & K. Mylne and Keen's Reports, English Chancery.
M. & M. N. P. Moody and Malkin's English Nisi Prius Reports.
M. & MacA. Moody and MacArthur's Reports, English Bankruptcy.
M. & P. Moore and Payne's Reports, English Common Pleas and Exchequer.
M. & R. Manning and Ryland's English King's Bench Reports.
M. & R. N. P. Moody and Robinson's English Nisi Prius Reports.
M. & S. Manning and Scott's English Common Pleas Reports; Maule and Selwin's English King's Bench Reports.
M. & W. Meeson and Welsby's English Exchequer Reports.
M. & Y. (Tenn.). Martin and Yerger's Reports, Tennessee.
Mac. N. Z. Macassey's New Zealand Reports.
Mac. P. C. Macrory's Patent Cases.
Mac. & G. Macnaghten and Gordon's English Chancery Reports.
Mac. & H. Eng. Ins. Cas. Macrae and Hertslet's English Insolvency Cases.
Mac. & R. Sc. App. Cas. Maclean and Robinson's Scotch Appeal Cases.
Mac. & Rob. Maclean and Robinson's English Appeal Cases.
Macal. (U. S.). McAllister's United States Circuit Court Reports.
MacArth. (D. C.). MacArthur's District of Columbia Reports.
MacArthur & M. (D. C.). MacArthur and Mackey's District of Columbia Reports.
Macas. (N. Z.). Macassey's Reports, New Zealand.
Maco. Cas. Maccala's Breach of Promise Cases.
Maccl. Cases in Law and Equity *temp.* Macclesfield (10 Modern Reports).
Macd. (Jamaica). Macdougall's Jamaica Reports.
Macf. Macfarlane's Reports, Scotch Jury Courts.
Macf. Dig. Min. Macfarland's Digest of Mining Cases.
Macf. Sc. J. Ct. Rep. Macfarlane's Scotch Jury Court Reports.
Mackey (D. C.). Mackey's District of Columbia Reports.
Macl. McLean's United States Circuit Court Reports; MacLaurin's Scotch Criminal Decisions.
Macl. & B., or M'L. & B. Maclean and Robinson's Reports, English House of Lords, Appeals from Scotland.
Maon. Macnaghten's Select Cases in Chancery *temp.* King.
Maon. (Bengal). Macnaghten's Bengal Reports.
Maon. F. F. Macnaghten's Reports, Indian Courts.
Maon. N. A. (Beng.). Macnaghten's Nizamut Adawlut Reports, Bengal.
Maon. S. D. A. (Beng.). (W. H.) Macnaghten's Sudder Dewanny Adawlut Reports, Bengal.
Maon. Sel. Cas. Select Cases in Chancery *temp.* King, edited by Macnaghten.
Maon. & G. Macnaghten's and Gordon's English Chancery Reports.
Maoph. Macpherson's Cases, Court of Sessions Cases, 3d Series.
Macq. Macqueen's Scotch House of Lords Cases.
Macq. H. L. Macqueen's Scotch Appeals.
Macr. Pat. Cas. Macrory's English Patent Cases.
Maor. & H. Macrae and Hertslet's Insolvency Cases.
Mad. Maddock's English Chancery Cases.
Mad. H. Ct. E. Madras High Court Reports.
Mad. Jur. Madras Jurist, India.
Mad. L. J. Madras Law Journal.
Mad. S. D. E. Madras Sudder Dewanny Reports.
Mad. Sel. D. Madras Select Decrees.
Mad. Ser. Madras Series (East) Indian Law Reports.
Mad. & Geld. Maddock and Geldart's Reports, English Chancery.
Madd. Maddock's English Vice-Chancellors' Reports.

- Madd. & G.** Maddock and Geldart's Reports, English Chancery.
Madras Jur. Madras Jurist.
Madras Law J. Madras Law Journal.
Mag. The Magistrate, London.
Mag. (Md.). Magruder's Reports, Maryland Supreme Court (1-2 Maryland).
Mag. Cas. Magistrates' Cases (especially the series edited by Bittleston, Wise, and Parnell).
Mag. Char. Magna Charta.
Mag. Dig. (S. Car.). Magrath's Digest, South Carolina Law Reports.
Mag. & Mun. & P. Lawy. Magistrate and Municipal and Parochial Lawyer.
Magr. (Md.). Magruder's Maryland Reports.
Mai. Maine Reports.
Mai. Anc. L. Maine's Ancient Law.
Maine. Maine Reports, Supreme Court.
Maine Anc. Law. Maine's Ancient Law.
Maitland. Maitland's Scotch Court of Session Cases.
Man. Manitoba Bench Reports; Manning's Reports, English.
Man. (La.). Manning's Louisiana Unreported Cases.
Man. (Mich.). Manning's Michigan Reports.
Man. t. Wood. Manitoba Reports *temp.* Wood.
Man. Cas. Manumission Cases in New Jersey, by Bloomfield.
Man. El. Cas. Manning's English Election Cases, Court of Revision.
Man. G. & S. Manning, Granger, and Scott's Reports, English Common Pleas (1-8 Common Bench Reports).
Man. L. J. Manitoba Law Journal.
Man. & G. Manning and Granger's English Common Pleas Reports.
Man. & R. Manning and Ryland's English King's Bench Reports.
Man. & Ry. Mag. Cas. Manning and Ryland's English Magistrates' Cases.
Man. & S. Manning and Scott's English Common Pleas Reports.
Manitoba L. Rep. Manitoba Law Reports.
Mann. Manning's English Court of Revision Reports.
Mann. (Mich.). Manning's Michigan Reports (1 Michigan).
Mann. Elec. Cas. Manning's Election Cases, English.
Manson. Manson's English Reports.
Manum. Cas. Manumission Cases, New Jersey.
Mar. Maritime; March's English King's Bench Reports; Marshall's United States Circuit Court Reports; Marshall's Kentucky Reports; Martin's Louisiana Reports; Martin's North Carolina Reports; Marshall's Reports, Bengal.
Mar. (La.). Martin's Louisiana Reports.
Mar. (N. Car.). Martin's North Carolina Reports.
Mar. L. C. English Maritime Law Cases (Crockford).
Mar. L. C. N. S. English Maritime Law Cases, New Series (Aspinwall).
Mar. L. Cas. Maritime Law Cases, English and American.
Mar. N. S. (La.). Martin's Louisiana Reports, New Series.
Mar. Notes & Q. Maritime Notes and Queries.
Mar. B. English Maritime Law Reports.
March N. C. March's New Cases, English King's Bench.
Marine Ct. R. (N. Y.). Marine Court Reporter (McAdam's), New York.
Marr., or Marr. Adm. Marriott's Reports, English Admiralty.
Marrack. Marrack's European Assurance Arbitration.
Marsh. Marshall's English Common Pleas.
Marsh. (Ceylon). Marshall's Ceylon Reports.
Marsh. (U. S.). Marshall's United States Circuit Court Reports.
Marsh. A. K. (Ky.). A. K. Marshall's Kentucky Reports.
Marsh. Calc. Marshall's Reports, Calcutta.
Marsh. Dec. Brockenbrough's Reports of Marshall's Decisions, United States Circuit Court.
Marsh. J. J. (Ky.). J. J. Marshall's Kentucky Reports.
Mart. (Ga.). Martin's Reports, Georgia Supreme Court (21-29 Georgia).
Mart. (Ind.). Martin's Indiana Reports.
Mart. (La.). Martin's Reports, Louisiana Supreme Court.
Mart. (N. Car.). Martin's North Carolina Reports.
Mart. Cond. (La.). Martin's Condensed Louisiana Reports.
Mart. Dec. (U. S.). Martin's United States District Court Decisions.
Mart. (La.). N. S. Martin's Reports, New Series, Louisiana Supreme Court.
Mart. & Y. (Tenn.). Martin and Yerger's Tennessee Reports.
Martin (La.). Martin's Louisiana State Reports.
Martin N. S. (La.). Martin's Louisiana State Reports, New Series.
Martin Ind. Martin's Index, Virginia Reports.
Mas. or Mason (U. S.). Mason's United States Circuit Court Reports.
Mass. Massachusetts Reports, Massachusetts Supreme Court.
Mass. El. Cas. Massachusetts Election Cases.
Mass. L. R. Massachusetts Law Reporter, Boston.
Mats. (Conn.). Matson's Connecticut Reports (22-24 Connecticut).
Matth. (W. Va.). Matthews' West Virginia Reports (6 West Virginia).
Maule & Selw. Maule and Selwyn's English King's Bench Reports.
Max. Maxim.
Max. Int. Stat. Maxwell on the Interpretation of Statutes.
Maxw. Dig. Neb. Maxwell's Digest of Nebraska Reports.
Maxw. Int. Stat. Maxwell on the Interpretation of Statutes.
May Const. Hist. May's Constitutional History of England.

May. Dam. Mayne on the Law of Damages.

May Fr. Conv. May on Fraudulent Conveyances.

Mayn. Maynard's Reports, Edward II. (Year Books, Part I.).

McA. & M. (D.C.). McArthur and Mackey, District Columbia.

McAll. (U. S.). McAllister's United States Circuit Court Reports.

McArth. or McArthur (D. C.). McArthur's Reports, District of Columbia Courts.

McArthur (U. S.). McArthur's United States District Court Reports.

McB. (Mo.). McBride's Missouri Reports.

McC. or McCahon (Kan.). McCahon's Reports, Supreme Court of Kansas, and United States Dist. of Kansas.

McCahon (U. S.). McCahon's United States District Court Reports.

McCar. Ch. (N. J.). McCarter's New Jersey Chancery Reports.

McCl. McClelland's English Exchequer Reports.

McCl. Dig. McClellan's Florida Digest.

McCl. & Y. McClelland and Young's English Exchequer Reports.

McClain Cas. Car. McClain's Cases on Carriers.

McCle. McClelland's English Exchequer Reports.

M'Cle. & Y. M'Clelland and Young's English Exchequer.

McCl. Dig. (Fla.). McClellan's Digest Florida Laws.

M'Clel. & Y. M'Clelland and Young's English Exchequer Reports.

McCook (O.). McCook's Reports, Ohio Supreme Court (1 Ohio State).

M'Cord Ch. (S. Car.). M'Cord's South Carolina Equity Reports.

M'Cord L. (S. Car.). M'Cord's South Carolina Law Reports.

McCork. (N. Car.). McCorkle's North Carolina Reports (65 North Carolina).

McCr. or McCrary (U. S.). McCrary's United States Circuit Court Reports.

McFar. McFarlane's Reports, Scotch Jury Court.

McGill Sc. Sess. McGill's Manuscript Decisions, Scotch Court of Session.

McGl. or McGloin (La.). McGloin's Louisiana Reports.

McK. Fel. Serv. McKinney on Fellow-Servants.

McL. (U. S.). McLean's United States Circuit Court Reports.

McL. & R. McLean and Robinson's Scotch Appeal Cases.

McKean (U. S.). McLean's United States Circuit Court Reports.

McMast. Dig. McMaster's Digest of the Law of Railways.

McMull. (S. Car.). McMullan's Law Reports, South Carolina Court of Appeals.

McMull. Eq. (S. Car.). McMullan's Equity Reports, South Carolina Court of Appeals.

McPherson. McPherson, Lee, and Bell's (3d series) Scotch Session Cases.

McQ. McQueen's Scotch Appeal (House of Lords) Cases.

McV. Dig. (O.). McVey's Digest of Ohio Reports.

Md. Maryland Reports.

Md. Ch. Maryland Chancery Decisions.

Md. Conv. Reg. Maryland Convention Register.

Md. L. J. Maryland Law Journal.

Md. L. Rec. Maryland Law Record, Baltimore.

Md. L. Rep. Maryland Law Reporter, Baltimore.

Md. L. Rev. Maryland Law Review.

Me. Maine Reports.

Means (Kan.). Means's Kansas Reports.

Mech. Cas. Agen. Mecham's Cases on Agency.

Med. Crit. & Psy. J. Medical Critic and Psychological Journal.

Med. Leg. J. Medico-Legal Journal, New York City.

Med. Leg. Rep. Medico-Legal Papers.

Medd. (Mich.). Meddaugh's Michigan Reports (13 Michigan).

Mee. & Wels. Meeson and Welsby's English Exchequer Reports.

Mees. & Ros. Meeson and Roscoe's English Exchequer Reports.

Meigs (Tenn.). Meigs's Tennessee Supreme Court Reports.

Meigs Dig. (Tenn.). Meigs's Digest Tennessee Reports.

Memp. L. J. Memphis Law Journal.

Mens. Cape Good Hope. Menzies' Cape of Good Hope Reports.

Mer. Merivale's English Chancery Reports.

Mero. Cas. Mercantile Cases.

Mero. L. J. Mercantile Law Journal.

Meriv. Merivale's English Chancery Reports.

Met. (Ky.). Metcalfe's Kentucky Reports.

Met. (Mass.). Metcalf's Massachusetts Reports.

Met. or Metc. Metcalf's Mass. Reports; Metcalf's Kentucky Reports.

Meto. (Ky.). Metcalf's Kentucky Court of Appeals Reports.

Meto. (Mass.). Metcalf's Massachusetts Supreme Court Reports.

Meto. (B. I.). Metcalf's Rhode Island Reports.

Meth. Ch. Cas. Report of the Methodist Church Property Case.

Mich. Michigan Reports.

Mich. (N. P.). Michigan Nisi Prius Cases.

Mich. Cir. Ct. Rep. Michigan Circuit Court Reporter.

Mich. L. Michigan Lawyer, Detroit, Mich.

Mich. L. J. Michigan Law Journal, Detroit, Mich.

Mich. Leg. News. Michigan Legal News.

Mich. N. P. Michigan Nisi Prius Reports.

Midd. Sitt. Middlesex Sittings at Nisi Prius.

Miles (Pa.). Miles's Philadelphia District Court Reports.

Mill. (La.). Miller's Reports, Louisiana Supreme Court (1-5 Louisiana).

- Mill. (Md.).** Miller's Reports, Maryland Court of Appeals (3-18 Maryland).
Mill (S. Car.). Mill's Reports (Constitution).
Mill. (U. S.). Miller's United States Circuit Court Decisions.
Mill Const. Mill's Constitutional Reports, South Carolina.
Mill. Dec. Miller's Decisions, by Woolworth, United States Circuit Court, Court Reports, Eighth Circuit.
Mills Const., or Mill (S. C.). Mill's Reports, South Carolina Constitutional Court.
Milw. Milward's Irish Prerogative Court Reports.
Min. (Ala.). Minor's Reports, Alabama.
Min. Dig. Minot's Digest, Massachusetts.
Min. Inst. Minor's Institutes of Common and Statute Law.
Minn. Minnesota Reports.
Minn. Ct. Rep. Minnesota Court Reporter.
Minn Law J. Minnesota Law Journal, St. Paul, Minn.
Minn. St. Bar Asso. Minnesota State Bar Association Reports.
Minor (Ala.). Minor's Alabama State Reports.
Mir., or Mir. Just. Horne's Mirror of Justices.
Mir. Parl. Mirror of Parliament, London.
Mir. Pat. Off. Mirror of the Patent Office, Washington, D. C.
Mirr. Mirror of Justices.
Misc. (N. Y.). Miscellaneous Reports, New York.
Miss. Mississippi Reports.
Miss. St. Cas. Mississippi State Cases.
Mit. Ch. Pl. Mitford's Equity Pleading.
Mitch. M. R. Mitchell's Maritime Register, London.
Mitf. Mitford on Chancery Pleading.
MM. Manuscripts.
M'Mul. Ch. (S. Car.). M'Mullan's South Carolina Equity Reports.
M'Mul. L. (S. Car.). M'Mullan's South Carolina Law Reports.
Mo. Moore's Reports, English Courts; Missouri Reports, Supreme Court.
Mo. F. Sir Francis Moore's English King's Bench Reports.
Mo. (J. B.). J. B. Moore's English Common Pleas Reports.
Mo. App. Missouri Appeal Reports.
Mo. Bar. Missouri Bar, Jefferson City.
Mo. Bar Asso. Missouri Bar Association Reports.
Mo. I. A. Moore's Indian Appeals.
Mo. Jur. Monthly Jurist, Bloomington, Ill.
Mo. L. Mag. Monthly Law Magazine, London.
Mo. Law Rep. Monthly Law Reporter, Boston.
Mo. Leg. News. Missouri Legal News.
Mo. P. C. Moore's English Privy Council Reports.
Mo. West. Jur. Monthly Western Jurist.
Mo. & P. Moore and Payne's English Common Pleas Reports.
Mo. & R. Moody and Robinson's English Nisi Prius Reports.
Mo. & S. Moore and Scott's English Common Pleas Reports.
Moak. Moak's English Reports.
Mod. Modern Reports, English Courts.
Mod. Cas. L. & Eq. Modern Cases in Law and Equity.
Mod. Cas. Modern Reports, vols. 2, 6, 8, 9.
Mod. Cas. per Far., or t. Holt. Modern Cases *temp.* Holt, by Farresby (7 Modern Reports).
Mod. Rep. The Modern Reports; English King's Bench, etc., Modern Reports, by Style (Style's King's Bench Reports).
Moll. Molloy, Irish Chancery.
Moly. Molyneaux' Reports, English Courts, *temp.* Car. I.
Mon. Montana Reports.
Mon. B. (Ky.). B. Monroe's Kentucky Reports.
Mon. Law Mag. Monthly Law Magazine.
Mon. T. Montana Territory; Montana Territorial Reports.
Mon. T. B. (Ky.). T. B. Monroe's Kentucky Reports.
Monr. B. (Ky.). B. Monroe's Kentucky Reports.
Monr. Bank Cas. Monroe's Bank Cases, American.
Mon. T. B. (Ky.). T. B. Monroe's Kentucky Reports.
Mont. Montana Reports.
Mont. B. Rep. Montagu's English Bankruptcy Reports.
Mont. Cond. Rep. Montreal Condensed Reports.
Mont. D. & De G. Montagu, Deacon, and De Gex's English Bankruptcy Reports.
Mont. Dig. Eq. Pl. Montagu's Digest of Pleadings in Equity.
Mont. L. R. Q. B. Montreal Law Reports, Queen's Bench.
Mont. L. R. Super. Ct. Montreal Law Reports, Superior Court.
Mont. L. Rep. Montreal Law Reporter.
Mont. Leg. N. Montreal Legal News, Montreal, Canada.
Mont. Sp. L. Montesquieu's Spirit of Laws.
Mont. Supr. Montreal Superior Court Report.
Mont. & A. Montagu and Ayrton's English Bankruptcy Reports.
Mont. & B. Montagu and Bligh's English Bankruptcy Reports.
Mont. & C. Montagu and Chitty's English Bankruptcy Reports.
Mont. & McA. Montagu and MacArthur's English Bankruptcy Reports.
Montesq. S. L. Montesquieu's Spirit of Laws.
Montg. Co. L. Rep. Montgomery County Law Reporter.
Month. Ind. Monthly Index to the Reporters.
Month. J. L. Monthly Journal of Law, Washington.
Month. Jour. L. Monthly Journal of Law.
Month. Jur. Monthly Jurist, American.
Month. L. Dig. and Rep. Monthly Law Digest and Reporter.
Month. L. M. Monthly Law Magazine, London.
Month. Law Rep. Law Reporter, Boston.

Month. Leg. Ex. Legal Examiner, New York.

Month. West. Jur. Monthly Western Jurist, American.

Montr. Montriou's Reports, Bengal; Montriou's Supplement to Morton's Reports.

Montr. L. R. Montreal Law Reports.

Moo. Francis Moore's Reports, English (when a volume is given, the reference is to J. B. Moore's Reports, English Common Pleas).

Moo. A. Moore's Reports, English (1st Bosanquet and Puller's Reports after page 470).

Moo. C. C. Moody's English Crown Cases Reserved.

Moo. C. P. Moore's English Common Pleas Reports.

Moo. I. A. Moore's Indian Appeals.

Moo. J. B. J. B. Moore's Reports, English Common Pleas.

Moo. K. B. Moore's English King's Bench Reports.

Moo. P. C. Moore's Privy Council Reports.

Moo. P. C. N. S. Moore's Privy Council Cases, New Series, English.

Moo. Tr. Moore's Trials, Divorce Cases.

Moo. & M. Moody and Malkin's English Nisi Prius Reports.

Moo. & P. Moore and Payne's English Common Pleas Reports.

Moo. & R. Moody and Robinson, English Nisi Prius Reports.

Moo. & S. Moore and Scott's English Common Pleas Reports.

Moody. Moody's English Crown Cases.

Moody & M. N. P. Moody and Malkin's English Nisi Prius Reports.

Moody & R. N. P. Moody and Robinson's English Nisi Prius Reports.

Moore. Moore (Francis), or J. B. Moore, English Reports.

Moore (Ark.). Moore's Arkansas Reports (28-33 Arkansas).

Moore (Tex.). Moore's Texas Reports.

Moore C. P. Moore's English Common Pleas Reports.

Moore E. I. Moore's East Indian Appeals.

Moore G. C. Moore's Gorham Case (English Privy Council).

Moore (J. B.). Moore, J. B., English Common Pleas Reports.

Moore K. B. Moore's English King's Bench Reports.

Moore P. C. Moore's Privy Council Reports.

Moore P. C. N. S. Moore's Privy Council Appeals, New Series.

Moore & P. Moore and Payne's English Common Pleas Reports.

Moore & Scott. English Common Pleas Reports.

Moore & W. (Tex.). Moore and Walker's Reports, Texas Supreme Court (22-24 Texas).

Mor. (Ia.). Morris's Iowa Reports.

Mor. or Morr. Morison's Dictionary of Decisions, Scotch Court of Session.

Mor. Bankr. Cas. Morrell's Bankruptcy Cases.

Mor. Dig. Morley's Digest of the Indian Reports; Morrison's New Hampshire Digest.

Mor. Min. Rep. Morrison's Mining Reports.

Mor. St. Cas. Morris's Mississippi State Cases.

Mor. Supp. Supplement to Morison's Dictionary Scotch Court of Session.

Mor. Syn. Morison's Synopsis of Scotch Session Cases.

Mor. Tran. Morrison's Transcript, American.

Mor. Wills. Morrell on the Law of Wills.

Morg. & W. L. J. Morgan and Williams's Law Journal, London.

Morl. Dig. Morley's (East) Indian Digest.

Morr. Morrell, English.

Morr. (Bomb.). Morris's Reports, Bombay.

Morr. (Cal.). Morris's Reports, California Supreme Court (5 California).

Morr. (Iowa). Morris's Iowa Reports.

Morr. (Jamaica). Morris's Jamaica Reports.

Morr. (Miss.). Morris's Reports, Mississippi High Court of Errors and Appeals (43-48 Mississippi).

Morr. Dict., or M. Dict. Morison's Dictionary of Decisions, Scotch Court of Session.

Morr. Dig. Morrison's New Hampshire Digest.

Morr. Dig. Min. Morrison's Digest of Mining Decisions.

Morr. Dig. N. H. Morris's Digest of New Hampshire Reports.

Morr. St. Cas. (Miss.). Morris's State Cases, Mississippi Reports.

Morr. Supp. Supplement to Morison's Dictionary, Scotch Court of Session.

Morr. Trans. App. Morrison's Transcript Reports, United States Supreme Court.

Morris (Bombay). Morris's Bombay Reports.

Morris (Cal.). Morris's California Reports.

Morris (Iowa). Morris's Iowa Reports.

Morris (Jamaica). Morris's Jamaica Reports.

Morris (Miss.). Morris's Mississippi Reports.

Morris St. Cas. (Miss.). Morris's Mississippi State Cases.

Morris & Har. Morris and Harrington's Sudder Dewanny Adawlut Reports, Bombay.

Morse Exch. Rep. Morse's Exchequer Reports.

Morse Fam. Tr. Morse's Famous Trials.

Morton (Bengal). Morton's Reports Bengal.

Mos. or Mosely Ch. Mosely's English Chancery Reports.

Moult. Ch. (N. Y.). Moulton's New York Chancery Practice.

MS. Manuscript; Manuscript Reports.

MSS. Manuscripts.

Mumf. (Jamaica). Mumford's Jamaica Reports.

Munf. (Va.). Munford's Virginia Reports.

Munic. & P. L. Municipal and Parish Law Cases, English.

Mur. & H. Murphy and Hurlstone's Reports, English Exchequer.

Murph. (N. Car.). Murphey's North Carolina Reports.

Murr. Murray's Scotch Jury Court Reports.

Murr. Over. Cas. Murray's Overruled Cases.

Murray (Ceylon). Murray's Ceylon Reports.

Abbreviations of the Reports, ABBREVIATIONS. Text-books, and Common Legal Terms.

- Murray** (New South Wales). Murray's New South Wales Reports.
Murray Sc. Ju. Ct. Rep. Murray's Scotch Jury Court Reports.
Mut. (Ceylon). Mutukisna's Ceylon Reports.
My. & C. Mylne and Craig's English Chancery.
My. & K. Mylne and Keen's English Chancery.
Myers Dig. (Tex.). Myers's Digest Texas Reports.
Myers Fed. Dec. Myers's Federal Decisions.
Myers Ind. Ill. Myers's Index to Illinois Reports.
Myers Ind. U. S. Myers's Index to United States Supreme Court Reports.
Myl. & C. Mylne and Craig's Reports, English Chancery.
Myl. & K. Mylne and Keen's Reports, English Chancery.
Myr. Prob. (Cal.). Myrick's Probate Court Reports, California.
N. Novella. The Novels or New Constitution.
N. B. New Brunswick Reports; *Nota bene*.
N. B. B. National Bankruptcy Register, New York.
N. Benl. New Benloe (anonymous reports at the end of Benloe's Reports).
N. Bruns. New Brunswick Reports.
N. C. Notes of Cases, English Ecclesiastical and Maritime Courts; North Carolina Reports.
N. C. C. New Chancery Cases (Younge and Collyer).
N. C. Conf. North Carolina Conference Reports.
N. C. Eco. Notes of Cases in the Ecclesiastical and Maritime Courts.
N. C. Repos. North Carolina Law Repository.
N. C. Str. Notes of Cases, by Strange, Madras.
N. C. Term B. North Carolina Term Reports.
N. Car. North Carolina Reports.
N. Chip. (Vt.). N. Chipman's Reports, Vermont.
N. Dak. North Dakota Reports.
N. E. Rep. Northeastern Reporter.
N. Eng. Rep. New England Reporter.
N. F. Newfoundland Reports.
N. H. New Hampshire Reports.
N. H. & C. English Railway and Canal Cases, by Nichol, Hare, Carrow, etc.
N. Hop. Nott and Hopkins's Reports, United States Court of Claims Reports.
N. J. New Jersey Reports.
N. J. Eq. New Jersey Equity Reports.
N. J. Eq., or Beas. (N. J.). Beasley's New Jersey Reports.
N. J. Eq., or C. E. Greene (N. J.). C. E. Greene's New Jersey Reports.
N. J. Eq., or Green (N. J.). Green's New Jersey Chancery Reports.
N. J. Eq., or Hals. (N. J.). Halstead's New Jersey Chancery Reports.
N. J. Eq., or McCart. (N. J.). McCarter's New Jersey Reports.
N. J. Eq., or Sax. (N. J.). Saxton's New Jersey Reports.
N. J. Eq., or Stew. (N. J.). Stewart's New Jersey Reports.
N. J. Eq., or Stock. (N. J.). Stockton's New Jersey Reports.
N. J. L. New Jersey Law Reports.
N. J. L., or Coxe (N. J.). Coxe's New Jersey Reports.
N. J. L., or Dutch. (N. J.). Dutcher's New Jersey Reports.
N. J. L., or Green (N. J.). Green's New Jersey Reports.
N. J. L., or Hals. (N. J.). Halstead's New Jersey Law Reports.
N. J. L., or Harr. (N. J.). Harrison's New Jersey Reports.
N. J. L., or Pen. (N. J.). Pennington's New Jersey Reports.
N. J. L., or South. (N. J.). Southard's New Jersey Reports.
N. J. L., or Spen. (N. J.). Spencer's New Jersey Reports.
N. J. L., or Vroom (N. J.). Vroom's New Jersey Reports.
N. J. L., or Zab. (N. J.). Zabriskie's New Jersey Reports.
N. J. L. J. New Jersey Law Journal, Somerville, N. J.
N. J. L. J. New Jersey Law Journal, Plainfield, N. J.
N. L. Nelson's Lutwyche's Reports, English Common Pleas; Lutwyche's Reports.
N. M. New Mexico Reports.
N. Mag. Cas. New Magistrates' Cases, English.
N. Mex. New Mexico Reports.
N. of Cas. Notes of Cases, English Ecclesiastical and Maritime Courts.
N. of Cas. Madras. Notes of Cases at Madras.
N. P. Nisi Prius; Notary Public.
N. P. Cas. Nisi Prius Cases.
N. P. Rep. Nisi Prius Reports, English.
N. Pr. Cas. New Practice Cases, English.
N. R. New Reports, English Common Pleas.
N. R. B. P. New Reports of Bosanquet and Puller.
N. S. Nova Scotia Reports.
N. S. Dec. Nova Scotia Decisions.
N. S. L. B. Nova Scotia Law Reports.
N. S. W. L. B. New South Wales Law Reports.
N. Sc. Dec. Nova Scotia Decisions.
N. Sess. Cas. New Session Cases, English.
N. W. Law Rev. Northwestern Law Review, Chicago, Ill.
N. W. P. Northwest Provinces Reports, India.
N. W. P. H. C. Northwest Provinces, High Court Reports, India.
N. W. Rep. Northwestern Reporter.
N. W. Rep. (Victoria). Northwestern Reports, Victoria.
N. W. Rep. Ills. Sup. Northwestern Reporter, Illinois Supplement.
N. W. Rep. Ind. Sup. Northwestern Reporter, Indiana Supplement.
N. Y. New York Court of Appeals Reports.
N. Y. Cas. Err. New York Cases in Error (Caines's Cases).

N. Y. Ch. Sent. New York Chancery Sentinel.
N. Y. City Bar Asso. New York City Bar Association Reports.
N. Y. City H. Rec. New York City Hall Recorder.
N. Y. Civ. Proc. Rep. New York Civil Procedure Reports.
N. Y. Co. New York Codes.
N. Y. Code Rep. New York Code Reporter, New York City.
N. Y. Code Rep. N. S. New York Code Reports, New Series.
N. Y. Con. Rep. New York Condensed Reports.
N. Y. Cr. R. New York Criminal Reports, S. S. Peloubet, New York City.
N. Y. Daily L. Gaz. New York Daily Law Gazette.
N. Y. El. Cas. New York Contested Election Cases.
N. Y. Jud. Rep. New York Judicial Repository, New York (Bacon's).
N. Y. Jur. New York Jurist.
N. Y. L. Gaz. New York Law Gazette.
N. Y. L. J. New York Law Journal, New York City.
N. Y. Law Bull. New York Law Bulletin.
N. Y. Law Gaz. New York Law Gazette, New York City.
N. Y. Law Rev. New York Law Review, Ithaca, N. Y.
N. Y. Leg. N. New York Legal News.
N. Y. Leg. Ob. New York Legal Observer.
N. Y. Leg. Reg. New York Legal Register, New York City.
N. Y. Mo. Law Bul. New York Monthly Law Bulletin.
N. Y. Mun. Gaz. New York Municipal Gazette, New York City.
N. Y. Off. Ser. Dig. New York Official Series Digest.
N. Y. Op. Att. Gen. Sickels's Opinions of the Attorneys-General of New York.
N. Y. Pr. Rep. New York Practice Reports.
N. Y. Rec. New York Record.
N. Y. Reg. New York Daily Register, New York City.
N. Y. S. R. New York State Reporter.
N. Y. St. Bar. Asso. New York State Bar Association Reports.
N. Y. St. Rep. New York State Reporter.
N. Y. Sup. Ct. Rep. New York Supreme Court Reports.
N. Y. Super. Ct. Rep. New York Superior Court Reports.
N. Y. Supp. New York Supplement.
N. Y. Term Rep. New York Term Reports, by Caines.
N. Y. Them. New York Themis.
N. Y. Trans. New York Transcript, New York City.
N. Y. Trans. N. S. New York Transcript, New Series, New York City.
N. Y. Week. Dig. New York Weekly Digest, New York City.
N. Z. New Zealand Reports.
N. Z. App. Rep. New Zealand Appeal Reports.

N. Z. Col. L. J. New Zealand Colonial Law Journal.
N. Z. Jur. New Zealand Jurist, Dunedin, N. Z.
N. Z. Jur. N. S. New Zealand Jurist, New Series.
N. Z. Rep. New Zealand Reports, Court of Appeals.
N. Z. Sup. Ct. New Zealand Supreme Court.
N. & H. Nott and Huntington's Reports (1-7 United States Court of Claims).
N. & Hop. Nott and Hopkins's Reports (8-15 United States Court of Claims).
N. & M. Neville and Manning's English King's Bench Reports.
N. & M. Mag. Cas. Neville and Manning's English Magistrates' Cases.
N. & Mc. (S. Car.). Nott and McCord's South Carolina Reports.
N. & P. Neville and Perry, English King's Bench.
Nagl. & H. (Cal.). Nagley and Harmen's California Reports (17-19 California).
Napt. (Mo.). Napton's Missouri Reports.
Narr. Mod. Narrationes Modernæ, or Style's King's Bench Reports.
Nat. Bank. Reg. National Bankruptcy Register.
Nat. Bk. Cas. National Bank Cases, American.
Nat. Brev. Natura Brevium.
Nat. Corp. Rep. National Corporation Reporter, Chicago.
Nat. L. Rec. National Law Record.
Nat. L. Rep. National Law Reporter.
Nat. L. Rev. National Law Review.
Nat. Reg. National Register, edited by Mead.
Nd. Newfoundland Reports.
Neb. Nebraska Reports.
Neb. L. J. Nebraska Law Journal.
Needh. L. Sch. J. Needham Law School Journal.
Neg. Cas. Bloomfield's Manumission (or Negro) Cases, New Jersey.
Nel., Nels., or Nels. Svo. Nelson's English Chancery Reports.
Nell (Ceylon). Nell's Ceylon Reports.
Nels. Fol. Rep. Finch's Chancery Reports, edited by Nelson.
Nev. Nevada Reports.
Nev. & M. Neville and Manning's Reports, English King's Bench.
Nev. & M. M. Cas. Neville and Manning's Magistrates' Cases, English.
Nev. & Mac. Ry. & Can. Cas. Neville and Macnamara's English Railroad and Canal Cases.
Nev. & Man. Neville and Manning's English King's Bench Reports.
Nev. & Man. Mag. Cas. Neville and Manning's English Magistrates' Cases.
Nev. & McN. Neville and McNamara's Railway and Canal Cases.
Nev. & P. Neville and Perry's English King's Bench Reports.
Nev. & P. Mag. Cas. Neville and Perry's English Magistrates' Cases.
New Ann. Reg. New Annual Register, London.
New Benl. New Benloe's Reports, English King's Bench.

New Brun. New Brunswick Supreme Court Reports.

New Cas. Eq. New Cases in Equity (8-9 Modern Reports).

New Eng. New Englander (periodical).

New Eng. Rep. New England Reporter.

New Eng. & N. Y. L. Reg. New England and New York Law Register.

New Mag. Cas. New Magistrates' Cases (Bittleston, Wise, and Parnell).

New Pr. Cas. New Practice Cases, English Courts.

New Rep. New Reports, English Common Pleas; Bosanquet and Puller's Reports; New Reports in all the English courts.

New Sess. Cas. New Sessions Cases, English Courts (Carrow, Hamerton, and Allen's Reports).

New South Wales. New South Wales Reports.

New Term Rep. New Term Reports; Dowling and Ryland's King's Bench Reports.

New Zea. App. New Zealand Appeal Reports.

New Zea. Col. L. J. New Zealand Colonial Law Journal.

New Zea. Jur. New Zealand Jurist.

New Zea. Jur. N. S. New Zealand Jurist, New Series.

New Zea. Sup. Ct. New Zealand Supreme Court Reports.

New Zealand. New Zealand Reports.

New Zealand Jur. New Zealand Jurist.

Newb. Adm. (U. S.). Newberry's Admiralty Reports, United States District Court.

Newbyth. Newbyth's Manuscript Decisions, Scotch Court of Session.

Newf. Newfoundland Reports.

Newf. Sel. Cas. Newfoundland Select Cases.

Nich. H. & C. Nicholl, Hare, and Carrow's Railway Cases, English Courts.

Nicholson. Nicholson's Manuscript Decisions, Scotch Court of Session.

Nisbet. (Nisbet of) Dirleton's Scotch Session Cases.

No. Cas. Notes of Cases, English Ecclesiastical and Maritime Courts.

Nol., or Nol. Set. Nolan's Settlement Cases.

Nol. Mag. Cas. Nolan's English Magistrates' Cases.

Nor. L. C. Inh. Norton's Leading Cases on Inheritance, India.

Norr. (Pa.). Norris's Reports, Pennsylvania Reports.

Norris (Pa.). Norris's Pennsylvania State Reports.

Norris B. & B. Dig. (Md.). Norris, Brown, and Brune's Digest, Maryland Reports.

Nort. L. C. Norton's Leading Cases on Inheritance, India.

North. Reports *temp.* Northington (Eden's English Chancery Reports).

North. Co. Rep. Northampton County Reporter.

North W. L. J. Northwestern Law Journal.

Not. Cas. Ecc. & M. Notes of Cases in the English Ecclesiastical and Maritime Courts.

Not. Cas. Madras. Notes of Cases at Madras.

Not. Dec. Notes of Decisions (Martin's North Carolina Reports).

Not. J. Notaries' Journal.

Not. Op. Wilmot's Notes of Opinions and Judgments.

Notes of Cas. Notes of Cases, English.

Notes of Cas. Adm. & E. Notes of Cases, Adm. and Ecc., English.

Nott & H. (U. S.). Nott and Huntington's United States Court of Claims Reports.

Nott & Hop. (U. S.). Nott and Hopkins's Court of Claims Reports.

Nott & Hop. Ct. Cl. Nott and Hopkins's United States Court of Claims Reports.

Nott & Hop. Dig. Ct. Cl. Nott and Hopkins's Digest United States Court of Claims Reports.

Nott & Hunt. Ct. Cl. Nott and Huntington's United States Court of Claims Reports.

Nott & M. Nott and McCord, South Carolina Constitutional Court.

Nott & McCord (S. Car.). Nott and McCord's South Carolina Reports.

Nov. Sc. Nova Scotia Supreme Court Reports.

Nov. Sc. Dec. Nova Scotia Decisions.

Nova Scotia L. Rep. Nova Scotia Law Reports.

Noy. Noy's English Reports; Noy's Maxims.

O. Ohio Reports; Oregon Reports; Otto's United States Supreme Court Reports.

O. B. Old Benloe; Orlando Bridgman's English Reports.

O. B. S. Old Bailey Session Papers.

O. Benl. Old Benloe's Reports, English Courts.

O. Bridg. Orlando Bridgman's Reports, English Common Pleas; Carter's Reports *temp.* Bridgman, English Common Pleas.

O'D. & Br. Eq. Dig. O'Donnell and Brady's Irish Equity Digest.

O. G. Official Gazette, United States Patent Office, Washington, D. C.

O. L. J. Ohio Law Journal.

O'M. & H. O'Malley and Hardcastle, English Election Cases.

O. N. B., or Old. Nat. Brev. Old Natura Brevium.

O. St. Ohio State Reports, Supreme Court.

O. St. Bar Asso. Ohio State Bar Association Reports.

O. & T. Oyer and Terminer.

O'Brien (U. C.) Fr. O'Brien's Upper Canada Practice Reports.

Oct. Str. Strange's Reports, English Courts, octavo edition.

Odg. L. & S. Odgers on Libel and Slander.

Off. (Minn.). Officer's Minnesota Reports.

Off. Gaz. Pat. Off. Official Gazette, United States Patent Office, Washington, D. C.

Ogd. (La. Ann.). Ogden's Louisiana Annual Reports.

Ogd. (Nova Scotia). Ogden's Reports, Nova Scotia Supreme Court.

Ohio. Ohio Reports.

Ohio C. C. Ohio Circuit Court Reports.

Ohio L. J. Ohio Law Journal.

Ohio Leg. N. Ohio Legal News, Norwalk, Ohio.

Ohio Prob. Ohio Probate Court Reports.

Ohio R. Cond. Ohio Reports, Condensed.

Ohio St. Ohio State Reports.

Okla. Oklahoma Territory Reports.

Olc. (U. S.). Olcott's United States District Court Reports.

Olc. Adm. Olcott's Admiralty Reports

United States District Court, Southern District of New York.

Old. (Nova Scotia). Oldright's Nova Scotia Reports.

Old Ben. Benloe in Benloe and Dalison, English Common Pleas Reports.

Oliver B. & L. Oliver, Beavan, and Lefroy's Reports (5-7 Railway and Canal Cases).

Oll. B. & Fitz. (New Zealand). Ollivier, Bell, and Fitzgerald's New Zealand Reports.

Oll. Bell. & Fitz. Sup. (New Zealand). Ollivier, Bell, and Fitzgerald (Supreme Ct. N. Z.)

O'M. & H. O'Malley and Hardcastle's English Election Cases.

Ont. Ontario Reports.

Ont. App. Ontario Appeal Reports.

Ont. El. Cas. Ontario Election Cases.

Ont. Pr. Ontario Practice Reports.

Op. Att.-Gen. (N. Y.). Opinions of the Attorneys-General of New York (Sickels's Compilation).

Op. Att.-Gen. (U. S.). Opinions of the Attorneys-General of the United States.

Or. Oregon Reports.

Or. T. B. Orleans Term Reports (1-2 Martin's Louisiana Reports).

Oreg. Oregon Reports.

Orl. Bridg. Orlando Bridgman's Reports, English Common Pleas.

Orl. T. B. Orleans Term Reports (1-2 Martin's Louisiana Reports).

Orm. (Ala.). Ormond's Alabama Reports (12-15 Alabama).

Otto (U. S.). Otto's United States Supreme Court Reports.

Out. (Pa.). Outerbridge's Reports (97-98 Pennsylvania State).

Over. (Tenn.). Overton's Tennessee Reports.

Overt. (Tenn.). Overton's Reports.

Owen. Owen's King's Bench and Common Pleas Reports.

Owen (New South Wales). Owen's New South Wales Reports.

P. 1891, or 1891 P. English Law Reports, Probate Division, 1891.

P. 1892, or 1892 P. English Law Reports, Probate Division, 1892.

P. 1893, or 1893 P. English Law Reports, Probate Division, 1893.

P. 1894, or 1894 P. English Law Reports, Probate Division, 1894.

P. A. D. Peters's Admiralty Decisions.

P. C. App. Privy Council Appeals, English Law Reports.

P. C. L. J. Pacific Coast Law Journal, San Francisco.

P. C. R. Parker's Criminal Reports, New York.

P. C. Rep. Privy Council Reports, English.

P. D. English Law Reports, Probate Division.

P. Div. Probate Division, English Law Reports.

P. E. I. Rep. Prince Edward Island Reports (Haviland's).

P. F. S. (Pa.). P. F. Smith's Pennsylvania State Reports (51-81½ Pennsylvania State).

P. Jr. & H., or P. & H. (Va.). Patton, Jr., and Heath's Virginia Reports.

P. L. J. Pittsburgh Law Journal, Pa.

P. L. R. Pennsylvania Law Record, Philadelphia.

P. N. P. Peake's English Nisi Prius Cases.

P. O. Cas. Perry's Oriental Cases, Bombay.

P. P. & P. Precedents of Private Acts of Parliament.

P. R. Parliamentary Reports; Pennsylvania Reports, by Penrose and Watts; Pyke's Reports, Canada.

P. R. C. P. Practical Register in Common Pleas.

P. R. C. P., or P. R. Ch. Practical Registry in Chancery.

P. R. U. C. Practice Reports, Upper Canada.

P. R. & D. Power, Rodwell, and Dew's Election Cases, English.

P. S. R. Pennsylvania State Reports.

P. W., or P. Wm. Peere Williams's English Chancery Reports.

P. & C. Prideaux and Cole's Reports, English Courts (4 New Session Cases).

P. & D. Perry and Davison's English Queen's Bench Reports.

P. & D. Probate and Divorce, Law Reports.

P. & H. Patton and Heath's Virginia Reports (2 Virginia).

P. & K. Perry and Knapp's Election Cases.

P. & M. Philip and Mary (thus *P. & M.* denotes the first year of the reign of Philip and Mary).

P. & R. Pigott and Rodwell's Election Cases, English.

P. & W. Penrose and Watts's Pennsylvania Reports.

Pa. Pennsylvania Reports, by Penrose and Watts (Pennsylvania State Reports.)

Pa. or Paine (U. S.). Paine's Reports, United States Circuit Court, 2d Circuit.

Pa. Adv. R. Pennsylvania Advance Reports, by Allison.

Pa. Co. Ct. Pennsylvania County Court Reports.

Pa. Dist. Pennsylvania District Court Reports.

Pa. L. G. Legal Gazette Reports (Campbell's), Pennsylvania.

Pa. L. J., or Pa. Law Jour. Pennsylvania Law Journal Reports, Pennsylvania Courts.

Pa. Law Series. Pennsylvania Law Series, Philadelphia, Pa.

Pa. Rep. Pennsylvania Reports.

Pa. St. Pennsylvania State Reports.

Pa. St. Tr. Pennsylvania State Trials (Hogan's).

Pac. Coast L. J. Pacific Coast Law Journal, San Francisco.

Pac. L. Rep. Pacific Law Reporter.

Pac. Law Mag. Pacific Law Magazine, California.

Pac. Law Rep. Pacific Law Reporter, San Francisco.

Pac. Rep. Pacific Reporter.

Pal. (N. Y.). Paine's United States Circuit Court Reports.

Pal. Ch., or Paige (N. Y.) Paige's New York Chancery Reports.

Paige Cas. Dom. Rel. Paige's Cases in Domestic Relations.

Paige Cas. Part. Paige's Cases in Partnership.

Paige Ch. (N. Y.) Paige's New York Chancery Reports.

Paine (U. S.) Paine's United States Circuit Court Reports.

Pal. or Palm. Palmer's English King's Bench Reports.

Palm. (Vt.) Palmer's Vermont Reports.

Palmer. Palmer's English King's Bench Reports.

Pand. Pandects.

Papy. Papy's Reports, English Exchequer.

Papy (Fla.) Papy's Florida Reports.

Par. Sel. Cas. Parsons's Select Equity Cases.

Park. Parker's English Exchequer Reports.

Park. (N. H.) Parker's New Hampshire Reports.

Park., or Park. Cr. (N. Y.) Parker's New York Criminal Reports.

Park. Dig. Parker's California Digest.

Park. Ex. Parker's English Exchequer Reports.

Park. Rev. Cas. Parker's English Exchequer Reports (Revenue Cases).

Parker. Parker's English Exchequer Reports.

Parker (N. Y.) Parker's Criminal Reports, New York.

Parl. Cas. Parliamentary Cases (House of Lords Reports).

Par. Eq. Cas. (Pa.) Parsons's Select Equity Cases.

Pasch. (Tex.) Paschal's Texas Reports (28-31 Texas).

Pat. Paton's Scotch Appeal Cases; Paterson's Scotch Appeal Cases.

Pat. (N. S. W.) Paterson's New South Wales Reports.

Pat. App. Cas. Paton's Scotch Appeal Cases, English House of Lords (Craigie, Stewart, and Paton's Reports).

Pat. Dec. Patent Decisions.

Pat. Dig. Pattison's Missouri Digest.

Pat. El. Cas. (U. C.) Patrick's Election Cases, Upper Canada.

Pat. H. L. Sc. Paton's House of Lords Reports, Appeals from Scotland.

Pat. L. Rev. Patent Law Review.

Pat. Off. Dec. Patent Office Decisions.

Pat. Off. Gaz. Official Gazette, United States Patent Office, Washington, D. C.

Pat. Rev. Patent Law Review, American.

Pat. Sc. App. Paterson's Scotch Appeal Cases.

Pat. & Heath (Va.) Patton and Heath's Virginia Reports.

Pat. & Mur. (N. S. W.) Paterson and Murray's Reports, New South Wales.

Pat. Sc. App. Paterson's Scotch Appeal Cases.

Paton. (Craigie, Stewart, and) Paton's Scotch Appeal Cases.

Paton Sc. App. Paton's Scotch Appeal Cases.

Patr. El. Cas. Patrick's Election Cases, Upper Canada.

Patt. Dig. (Mo.) Pattison's Digest of Missouri Reports.

Patt. & H. (Va.) Patton and Heath's Virginia Special Court of Appeals Reports.

Pattee Cas. Cont. Pattee's Cases in Contracts.

Pattee Cas. Dom. Rel. Pattee's Cases in Domestic Relations.

Pattee Cas. Eq. Pattee's Cases in Equity.

Pattee Cas. Pers. Pattee's Cases in Personalty.

Pattee Cas. Real. Pattee's Cases in Realty.

Patton & H. (Va.) Patton and Heath's Reports, Virginia Special Court of Appeals.

Peak. Ad. Cas. Peake's Additional Cases.

Peake N. P. Peake's English Nisi Prius Reports.

Pear. (Pa.) Pearson's Pennsylvania Reports.

Pearce, or Pearce Cr. Cas. Pearce's Crown Cases, English Courts; Dearsley's Crown Cases; Denison's Crown Cases Reserved, vol. 2.

Pearson (Pa.) Pearson's Pennsylvania Reports.

Peck (Ill.) Peck's Reports, Illinois Supreme Court (11-38 Illinois).

Peck (Tenn.) Peck's Tennessee Supreme Court Reports.

Peckw. Eng. El. Cas. Peckwell's English Election Cases.

Peere Wms., or Peere Williams. Peere Williams's Reports, English Chancery.

Pen. (N. J.) Pennington's New Jersey Supreme Court Reports.

Pen., or Pen. & Watts (Pa.) Penrose and Watts's Pennsylvania Reports.

Penn. Pennsylvania State Reports; Pennypacker's Pennsylvania Reports; Penrose and Watts's Pennsylvania Reports.

Penn. (N. J.) Pennington's New Jersey Reports.

Penn. Co. Ct. Rep. Pennsylvania County Court Reports.

Penn. Dist. Rep. Pennsylvania District Reports.

Penn. L. G., or Penn. Leg. Gaz. Pennsylvania Legal Gazette Reports (Campbell's).

Penn. Law Jour. Pennsylvania Law Journal Reports, Pennsylvania Courts.

Penn. Legal Gazette Rep. Legal Gazette Reports.

Penn. St. Pennsylvania State Reports.

Penn. St. Sup. Pennsylvania State Supplement.

Penn. Sup. Ct. Dig. Pennsylvania Supreme Court Digest.

Penna. L. R., or Penn. Law Rec. Pennsylvania Law Record, Philadelphia.

Penning. (N. J.) Pennington's Reports, New Jersey.

Penny. (Pa.) Pennypacker's Pennsylvania Supreme Court Reports (1-3 Pennsylvania).

Penr. & W. Penrose and Watts's Reports, Pennsylvania Supreme Court (2-3 Pennsylvania).

- Peo. L. Adv.** People's Legal Adviser, Utica, N. Y.
- Per. Or. Cas.** Perry's Oriental Cases, Bombay.
- Per & Dav.** Perry and Davison's Reports, English Queen's Bench.
- Per. & K. El. Cas.** Perry and Knapp's Election Cases, English.
- Perry.** Sir Erskine Perry's Reports, in Morley's (East) Indian Digest; Perry's Oriental Cases.
- Perry & D.** Perry and Davison's English King's Bench Reports.
- Perry & K. Eng. El. Cas.** Perry and Knapp's English Election Cases.
- Pet. (Pr. Edw. Is.).** Peters's Prince Edward Island Reports.
- Pet. (U. S.).** Peters's United States Supreme Court Reports.
- Pet. (U. S.) C. C.** Peters's United States Circuit Court Reports.
- Pet. Ad. (U. S.).** Peters's Admiralty Decisions, United States District Court.
- Pet. Brooke.** Petit Brooke, or Brooke's New Cases, English King's Bench (Bellew's Cases *temp.* Hen. VIII.).
- Pet. Cond. (U. S.).** Peters's Condensed Reports, United States Supreme Court.
- Pet. Dig.** Peters's Digest of United States Supreme Court Reports.
- Peters (C. C.).** Peters's Circuit Court Reports.
- Peters Adm.** Peters's Admiralty Decisions, United States District of Pennsylvania.
- Petit Br.** Petit Brooke, or Brooke's New Cases, English King's Bench.
- Ph.** Phillimore's English Ecclesiastical Reports (see Phil.).
- Ph. or Phil.** Phillips's Reports, English Chancery.
- Ph. El. Cas.** Phillips's Election Cases.
- Ph. Ev.** Philipps on Evidence.
- Ph. St. Tr.** Phillips's State Trials.
- Phal. Crim. Cas.** Phalen's Criminal Cases.
- Pheney Rep.** Pheney's New Term Reports.
- Phil. or Phil. Ch.** Phillips's English Chancery Reports; Phillips's English Election Cases.
- Phil. (N. Car.).** Phillips's North Carolina Supreme Court Reports.
- Phil. Ch. (N. Car.).** Phillips's North Carolina Reports.
- Phil. (Pa.).** Philadelphia Reports.
- Phill. Ecc.** Phillimore's English Ecclesiastical Cases.
- Phil. El. Cas.** Phillips's English Election Cases.
- Phil. Eq. (N. Car.).** Phillips's North Carolina Equity Reports.
- Phil. Ev.** Philipps on Evidence.
- Phil. Fam. Cas.** Philipps's Famous Cases in Circumstantial Evidence.
- Phil. St. Tr.** Phillips's State Trials.
- Phila.** Philadelphia Reports (Legal Intelligence).
- Phila. Leg. Int.** Philadelphia Legal Intelligence.
- Phill.** Phillimore's Reports, English Ecclesiastical Courts.
- Phill. Ch.** Phillips's English Chancery Reports.
- Phill. Ch. (N. Car.).** Phillips's North Carolina Reports.
- Phill. Ecc.** Phillimore's English Ecclesiastical Reports.
- Phill. El. Cas.** Phillips's English Election Cases.
- Phill. Ev.** Philipps on Evidence.
- Phill. Int. L.** Phillimore's International Law.
- Phill. L. (N. Car.).** Phillips's North Carolina Law Reports.
- Phillips.** Phillips's Reports, English Chancery.
- Phillips (N. Car.) Eq.** Phillips's Equity Reports, North Carolina Supreme Court.
- Philipps Ev.** Philipps on Evidence.
- Phillips (N. Car.) L.** Phillips's Law Reports, North Carolina Supreme Court.
- Phillips St. Tr.** Phillips's State Trials.
- Phillips El. Cas.** Phillips's Election Cases.
- Pick. (Mass.).** Pickering's Massachusetts Supreme Court Reports.
- Pig. & R.** Pigott and Rodwell's Registration Appeal Cases, English.
- Pike (Ark.).** Pike's Arkansas Reports (1-5 Arkansas).
- Pinn. (Wis.).** Pinney's Wisconsin Reports.
- Pist. Mau.** Piston's Mauritius Reports.
- Pitc. Cr. Cas.** Pitcairn's Scotch Criminal Cases.
- Pitts. L. J. N. S.** Pittsburgh Law Journal, New Series.
- Pitts. Leg. J.** Pittsburgh Legal Journal.
- Pittsb. (La.).** Pittsburgh Reports.
- Pittsb. Leg. J.** Pittsburgh Legal Journal.
- Pittsb. Rep.** Pittsburgh Legal Journal Reports.
- Pl., or Pl. Com.** Plowden's Commentaries or Reports, English King's Bench.
- Pl. C.** Placita Coronæ (Pleas of the Crown).
- Pl. Cr. Con. Tr.** Plowden's Criminal Conversation Trials.
- Plowd.** Plowden's English King's Bench Reports.
- Plowd. Crim. Con. Tr.** Plowden's Criminal Conversation Trials.
- Pol.** Pollexfen's Reports, English King's Bench.
- Pol. Sci. Quar.** Political Science Quarterly.
- Poll.** Pollexfen's English King's Bench Reports (see also Pol.).
- Pol. Cont.** Pollock on the Principles of Contract.
- Pol. Dig. Part.** Pollock's Digest on the Law of Partnership.
- Pollex.** Pollexfen's English King's Bench Reports.
- Pollock Lead. Cas.** Pollock's Leading Cases.
- Pollock on Contract.** Principles of Contract at Law and in Equity, by Frederick Pollock.
- Poor L. Mag.** Poor Law Magazine of Scotland.
- Poor L. Mag. (N. S.).** Poor Law Magazine of Scotland (N. S.).
- Pop. or Poph.** Popham's English King's Bench Reports.
- Poph. 2.** Cases at the end of Popham's Reports.
- Port. (Ala.).** Porter's Alabama Supreme Court Reports.
- Port. (Ind.).** Porter's Reports, Indiana Supreme Court (3-7 Indiana).
- Post (Mich.).** Post's Reports, Michigan Supreme Court (23-34 Michigan).

- Post (Mo.).** Post's Reports, Missouri Supreme Court (42-63 Missouri).
Pot. Dwar. Potter's Dwarrior on Statutes.
Poth. Pand. Pothier's Pandects.
Pott. Dwarrior. Potter's edition of Dwarrior on Statutes.
Pow. E. & D. Power, Rodwell, and Dew's English Election Cases.
Pr. or Price. Price's Reports, English Exchequer.
Pr. C. K. B. Practice Cases in the King's Bench.
Pr. Ch. Precedents in Chancery (Finch).
Pr. Co., or Pr. Ct. Prerogative Court.
Pr. Dec. (Ky.). Kentucky Printed Decisions (Sneed's Decisions).
Pr. Div. Probate Division, English Law Reports; Pritchard's Divorce and Matrimonial Cases.
Pr. Exch. Price's Exchequer Reports, English.
Pr. Falc. President Falconer's Reports, Scotch Court of Session.
Pr. R. Practice Reports.
Pr. Reg., or Pr. Reg. C. P. Practical Register in Common Pleas.
Pr. Reg. B. C. Practical Register in the Bail Court.
Pr. Reg. Ch. Practical Register in Chancery (Styles's).
Pr. & Div. Probate and Divorce, English Law Reports.
Pr. Cas. Prater's Cases on Conflict of Laws.
Pract. The Practitioner.
Prat. Cas. Prater's Cases on Conflict of Laws.
Pratt Bott. Bott's English Poor Law Cases, Pratt's edition.
Pratt P. L. Cas. Pratt's English Poor Law Cases.
Prob. Dig. Cas. Preble's Digest of Patent Cases.
Proc. Ch. Precedents in Chancery, English.
Pres. Falc. President Falconer's Scotch Session Cases (Gilmour and Falconer).
Pres. Shep. T. Preston's Sheppard's Touchstone.
Prest. Est. Preston on Estates.
Preston Conv. A Treatise on Conveyancing.
Pri. or Price. Price's English Exchequer Reports.
Price & S. Tr.-mark Cas. Price and Stewart's Trade-mark Cases.
Price Prac. Cas. Price's Practice Cases, English Chancery.
Prick. (Id.). Prickett's Idaho Reports.
Prid. Free. Prideaux Precedents in Conveyancing.
Prid. & C. Prideaux and Cole's Reports, English (4 New Sessions Cases).
Prin. Dec. Kentucky Decisions, printed by Sneed.
Pritch. Ad. Dig. Pritchard's Admiralty Digest.
Prob. Div. Probate Division, English Law Reports.
Prob. & Adm. Div. Probate and Admiralty Division, English Law Reports.
Prob. & Mat. Cas. English Probate and Matrimonial Cases.
Proc. B. & B. Proctor's Bench and Bar of New York.
Prop. Lawy. Property Lawyer.
Proudf. Land Dec. (U. S.). Proudfoot's United States Land Decisions.
Prt. Rep. Practice Reports.
Psych. & M. L. J. Psychological and Medical-Legal Journal, New York.
Puff. Puffendorf's Law of Nature and Nations.
Pugs. (N. B.). Pugsley's New Brunswick Reports.
Pugs. & B. (N. B.). Pugsley and Burbridge's New Brunswick Reports.
Puls. (Me.). Pulsifer's Maine Reports (65-68 Maine).
Pump Ct. Pump Court.
Punj. Rec. Punjab Record.
Purd. Dig. (Pa.). Purdon's Digest of the Laws of Pennsylvania.
Putm. Ch. Dig. Putman's United States Equity Digest.
Pyke (L. C.). Pyke's Lower Canada Reports.
Q. B. English Queen's Bench Reports (Adolphus and Ellis, N. S.).
Q. B. (Quebec). Queen's Bench Reports, Quebec.
Q. B. (U. C.). Queen's Bench Reports, Upper Canada.
(1891) Q. B. English Law Reports, Queen's Bench Division, 1891.
(1892) Q. B. English Law Reports, Queen's Bench Division, 1892.
(1893) Q. B. English Law Reports, Queen's Bench Division, 1893.
(1894) Q. B. English Law Reports, Queen's Bench Division, 1894.
Q. B. D. English Law Reports, Queen's Bench Division.
Q. C. Queen's Council.
Q. L. B. Quebec Law Reports.
Q. S. Quarter Sessions.
Q. t. Qui tam.
Q. v. *Quod vide* (to which refer).
Q. war. Quo warranto.
Qu. cl. fr. Quare clausum fregit.
Qu. L. Jour. Quarterly Law Journal, Richmond, Va.
Qu. L. Rev. Quarterly Law Review, Richmond, Va.
Quart. Jour. Econ. Quarterly Journal of Economics, Boston, Mass.
Quebec L. Rep. Quebec Law Reports.
Queens. L. J. Queensland Law Journal.
Queens. L. R. Queensland Law Reports.
Quin. or Quincy (Mass.). Quincy's Massachusetts Reports.
Quinti, Quinto. Year Book, 5 Hen. V.
Quo. war. Quo warranto.
R. King Richard (thus *r. R. I.* signifies the first year of the reign of King Richard I.).
R. Rawle's Pennsylvania Reports; Rettie, Crawford, and Melville's (4th Series) Scotch Session Cases.
R. The Reports. Coke's
R. C. Record Commission; Railway Cases.
R. C. & C. R. Revenue, Civil, and Criminal Reporter, Calcutta.
R. I. Rhode Island Reports.

R. J. & P. J. Revenue, Judicial, and Police Journal, Calcutta.

R. L. & S. Ridgeway, Lapp, and Schoales's Reports, Irish King's Bench.

R. L. & W. Robert, Leaming, and Wallis's County Court Reports, English.

R. M. Charl't. (Ga.). R. M. Charlton, Georgia Superior Court Reports.

R. N. P. Roscoe's Nisi Prius.

R. P. Cas. Real Property Cases, English.

R. P. & W. (Pa.). (Rawle) Penrose and Watts's Pennsylvania Reports.

R. R. & Can. Cas. Railway and Canal Cases, English.

R. S. Revised Statutes.

R. t. F. English Chancery Cases *temp.* Finch.

R. t. Hardw. English King's Bench Cases *temp.* Hardwicke.

R. t. Holt. Reports *temp.* Holt, English King's Bench; Holt's Reports.

R. t. Q. A. Reports *temp.* Queen Anne (11 Modern Reports).

R. & B. Cas. Redfield and Bigelow's Leading Cases on Bills and Notes.

R. & C. Cas. Railway and Canal Cases, English.

R. & M. Ryan and Moody's English Nisi Prius Reports.

R. & M., or R. & My. Russell and Mylne's Reports, English Chancery.

R. & R. Russell and Ryan's English Crown Cases Reserved.

Ra. Ent. Lord Raymond's Entries.

Rail. Cas., or Ry. Cas. English Railway and Canal Cases.

Rail. & Corp. L. J. Railway and Corporation Law Journal.

Railw. & Can. Cas. English Railway and Canal Cases.

Ram Cas. P. & E. Ram's Cases of Pleading and Evidence.

Ram F., or Ram on Facts. Ram on Facts as Subjects of Inquiry by a Jury.

Ram. & Mor. Ramsey and Morin's Montreal Law Reporter.

Ran. (Fla.). Raney's Florida Reports.

Rand. (Kan.). Randolph's Kansas Reports (21-24 Kansas).

Rand. (La.). Randolph's Reports, Louisiana Supreme Courts (7-11 Louisiana).

Rand. (Va.). Randolph's Reports, Virginia Court of Appeals.

Rang. Dec. Sparks's Rangoon Decisions, British Burmah.

Rap. Fed. Dig. Rapalje's Federal Reference Digest.

Rap. N. Y. Dig. Rapalje's New York Reference Digest.

Ratt. L. C. Rattigan's Leading Cases on Hindoo Law.

Raw. or Rawle (Pa.). Rawle's Pennsylvania Reports.

Rawle P. & W. (Pa.). (Rawle) Penrose and Watts's Pennsylvania Reports.

Ray. T. Sir Thomas Raymond's Reports, English King's Bench.

Raym., or Raym. Ld. Raymond's Reports, English King's Bench.

Raym. Ent. Raymond's Book of Entries.

Raym. T. Sir Thomas Raymond's English King's Bench Reports.

Rayn. Rayner's Tithe Cases, English Exchequer.

Real Est. Rec. Real Estate Record, New York.

Real Pr. Cas. Real Property Cases, English.

Rec. Dec. Vaux's Recorder's Decisions, Philadelphia.

Red. (Me.). Redington's Maine Reports.

Red. (N. Y.). Redfield's New York Surrogate Court Reports.

Red. A. & B. R. Cas. Redfield's American Railway Cases.

Red. Cas. Wills. Redfield's Leading Cases on Wills.

Red. & Big. Cas. B. & N. Redfield and Bigelow's Leading Cases on Bills and Notes.

Redf. (N. Y.). Redfield's New York Surrogate Court Reports.

Redf. Am. Railw. Cas. Redfield's American Railway Cases.

Redf. L. C. Wills. Redfield's American Cases upon the Law of Wills.

Redf. Lead. Am. Ry. Cas. Redfield's Leading American Railway Cases.

Redf. Lead. W. Cas. Redfield's Leading Cases on Wills.

Redf. Surr. (N. Y.). Redfield's Reports, New York Surrogate Court.

Redf. & B. Cas. Redfield and Bigelow's Leading American Cases on Bills and Notes.

Reding. (Me.). Redington's Reports, Maine Supreme Court (31-35 Maine).

Reed Fraud. Reed's Leading Cases on Statute of Frauds.

Reeve Dom. Rel. Reeve on Domestic Relations.

Reeves Cas. Wills. Reeves's Cases on Wills.

Reeves Eng. L., or Reeves H. E. L. Reeves's History of the English Law.

Reg. The Daily Register, New York.

Reg. Cas. Registration Cases.

Reilly Alb. Arb. Cas. Albert's Arbitration Cases, Reilly's edition.

Rem. Cr. Tr. Remarkable Criminal Trials.

Rem. Tr. Cummins and Durphy's Remarkable Trials.

Rep. Coke's Reports, English King's Bench.

Rep., or Rep. (N. Y.), or Rep. (Wash.). The Reporter, Washington and New York.

Rep. Cas. Eq. Gilbert's Chancery Reports.

Rep. Cas. Madr. Reports of Cases, De-wanny Adawlut, Madras.

Rep. Cas. Pr. Reports of Cases of Practice, English Common Pleas; Cooke's Reports.

Rep. Ch. Reports in Chancery, English Chancery.

Rep. Com. Cas. Reports of Commercial Cases, Bengal.

Rep. Const. (S. Car.). Reports of the Constitutional Court of South Carolina.

Rep. Eq. Reports in Equity; Gilbert's Cases in Equity.

Rep. in Ch. Reports in Chancery, English.

Rep. Pat. Reports of Patents, etc., Cases.

Rep. Q. A. Reports *temp.* Queen Anne (11 Modern Reports).

Rep. Sel. Cas. Ch. Kelynge's (W.) Reports, English Chancery.

Rep. t. Finch. English Chancery Cases *temp.* Finch.

Rep. t. Hardw. English King's Bench Cases *temp.* Hardwicke.

Rep. t. Holt. Reports *temp.* Holt, English King's Bench; Holt's Reports.

Rep. t. O. Br. Carter's English Common Pleas Reports *temp.* O. Bridgman.

Rep. t. Q. A. Reports *temp.* Queen Anne (11 Modern Reports).

Rep. t. Talb. Reports *temp.* Talbot, English Chancery.

Rep. Yorke Ass. Reports of Assizes at Yorke (Clayton's Reports).

Report. Coke's Reports, English King's Bench.

Reporter. The Reporter, American.

Reports. Coke's English King's Bench Reports.

Rettie. Rettie, Crawford, and Melville's Scotch Session Cases.

Rev. C. & C. Rep. Revenue, Civil, and Criminal Reporter, Bengal.

Rev. Crit. La Revue Critique, Montreal.

Rev. J. & P. J. Revenue, Judicial, and Police Journal, Bengal.

Rev. Leg. Revue Légale, Lower Canada.

Rev. St. Revised Statutes.

Reyn. (Miss.). Reynolds's Mississippi Reports.

Rhodes Dig. (Cal.). Rhodes's Digest of California Reports.

Rice Ch. (S. Car.). Rice's South Carolina Equity Reports.

Rice Dig. (S. Car.). Rice's Digest of South Carolina Reports.

Rice Dig. Pat. Rice's Digest of Patent Office Decisions.

Rice L. (S. Car.). Rice's South Carolina Law Reports.

Rich. (N. H.). Richardson's New Hampshire Reports.

Rich. L. (S. Car.). Richardson's South Carolina Law Reports.

Rich. N. S. (S. Car.). Richardson's Reports, New Series, South Carolina.

Rich. & H. St. Ry. Dec. Richardson and Hook's Street Railway Decisions.

Rich. & W. (N. H.). Richardson and Woodbury's New Hampshire Reports (2 New Hampshire).

Ridge. Ridgeway's Reports, English Chancery and King's Bench.

Ridge. (or Ridge. t. Hard., or Ridge. Cas., or Ridge. & Hard.). Ridgeway's Reports *temp.* Hardwicke, Chancery and King's Bench.

Ridge. Ap. (or P. C.). Ridgeway's Irish Appeal (or Parliamentary) Cases.

Ridge. L. & S. Ridgeway, Lapp, and Schoales's Reports (Irish Term Reports).

Ridge. P. C. Ridgeway's Appeal Cases, Ireland.

Ridge. Rep. (St. Tr.). Ridgeway's (individual) Reports of State Trials in Ireland.

Ridge. Ridgeway's English King's Bench and Chancery Cases *temp.* Hardwicke.

Ridge. Ir. P. Cas. Ridgeway's Irish Parliamentary Cases.

Ridge. L. & S. Ridgeway, Lapp, and Schoales's Irish King's Bench Reports.

Ridge., or Ridge. Cas. t. Hardw. Ridgeway's Reports, English Chancery and King's Bench.

Ridge. Ap., or Ridge. Parl. Cas. Ridgeway's Appeals from Ireland, English House of Lords.

Ridge. L. & S. Ridgeway, Lapp, and Schoales's Irish King's Bench Reports.

Ridge. Parl. Cas. Ridgeway's Cases in Parliament.

Ridge. St. Tr. Ridgeway's State Trials.

Riley Ch. (S. Car.). Riley's South Carolina Equity Reports.

Riley L. (S. Car.). Riley's South Carolina Law Reports.

Riv. Ann. Reg. Rivington's Annual Register.

Rob. Robinson's Reports, English House of Lords, Scotch Appeals.

Rob. (Cal.). Robinson's Reports, California Supreme Court.

Rob. (Hawaiian). Robinson's Hawaiian Reports.

Rob. (La.). Roberts's Louisiana Annual Reports.

Rob. (Mo.). Robards's Missouri Reports.

Rob. (Nev.). Robinson's Nevada Reports (1 Nevada).

Rob. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24-30.

Rob. (Tex.). Robards's Texas Reports.

Rob. (U. C.). Robinson's Upper Canada King's Bench Reports.

Rob. (Va.). Robinson's Virginia General Court Reports.

Rob. Adm. Robinson's English Admiralty Reports.

Rob. App. Robinson's Scotch Appeals, English House of Lords.

Rob. C. Christopher Robinson's English Admiralty Reports.

Rob. Cas. Robinson's Scotch Appeal Cases.

Rob. Conscr. Cas. (Tex.). Robards's Conscript Cases, Texas.

Rob. Dig. Robertson's Lower Canada Digest.

Rob. Dig. (Vt.). Roberts's Digest Vermont Reports.

Rob. Ecc. Robertson's Ecclesiastical Cases, English.

Rob. Jr., or Rob. Wm. William Robinson's Reports, English Admiralty.

Rob. L. & W. Co. Ct. Roberts, Leaming and Wallis's English County Court Cases.

Rob. Mar. (N. Y.). Robertson's New York Marine Court Reports.

Rob. Pat. Cas. Robb's Patent Cases.

Rob. Pr. (U. C.). Robinson's Upper Canada Practice Reports.

Rob. Sc. App. Robinson's Scotch Appeals, English House of Lords.

Rob. Sr. Ct. (N. Y.). Robertson's New York Superior Court Reports.

Rob. Wm. Adm. William Robinson's Reports, English Admiralty.
Rob. & J. Dig. (Ont.). Robinson and Joseph's Digest Ontario Reports.
Rob. & Jac. (Tex.). Robards and Jackson's Texas Reports.
Robards (Mo.). Robards's Reports, Missouri Supreme Court (12-13 Missouri).
Robb Pat. Cas. Robb's Patent Cases, United States Courts.
Robert. Robertson's Scotch Appeal Cases.
Robin. Robinson's Scotch Appeal Cases.
Robin. (La.). Robinson's Louisiana Reports.
Robinson App. Robinson's House of Lords Appeals from Scotland.
Robt. (N. Y.). Robertson's New York Superior Court Reports.
Rodm. (Ky.). Rodman's Kentucky Reports.
Rog. C. H. R. Rogers's City Hall Recorder, New York.
Rol. or Rolle. Rolle's Reports, English King's Bench.
Rol. Ab. Rolle's Abridgment, English.
Rolle. Rolle's English King's Bench Reports.
Rolle Abr. Rolle's Abridgment of the Common Law.
Rolls Ct. Rep. Rolls Court Reports, English.
Rom., or Rom. N. Cas. Romilly's Notes of Cases, English Chancery.
Root (Conn.). Root's Connecticut Reports.
Roscoe Bdg. Cas. Roscoe's Digest of Building Cases.
Roscoe Cr. Roscoe's Digest of the Law of Evidence in Criminal Cases.
Roscoe Cr. Ev. Roscoe on Criminal Evidence.
Roscoe Jur. Roscoe's Jurist, London.
Roscoe N. P. Roscoe's Digest of the Law of Evidence at Nisi Prius.
Rose. Rose's English Bankruptcy Reports.
Rose Dig. (Ark.). Rose's Digest of Arkansas Reports.
Ross Lead. Cas. Ross's Leading Cases in Commercial Law.
Row. (Vt.). Rowell's Vermont Reports.
Rowe. Rowe's Reports, English Parliamentary and Military Cases.
Roy. Dig. (Va.). Royall's Digest of Virginia Reports.
Rt. Law Repts. Rent Law Reports, India.
Ruff. or Ruffin (N. Car.). Ruffin's North Carolina Reports (vol. 1 Hawk.).
Runn., or Runnell (Iowa). Runnell's Iowa Reports (38-39 Iowa).
Russ. Russell's English Chancery Reports.
Russ. Cr. Russell on Crimes and Misdemeanors.
Russ. Elec. Cas. (Nova Scotia). Russell's Election Cases, Nova Scotia.
Russ. Eq. Dec. (Nova Scotia). Russell's Equity Decisions.

Russ. t. Eld. Russell's English Chancery Reports *temp.* Eldon.
Russ. & C. (Nova Scotia). Russell and Chesley's Nova Scotia Equity Reports.
Russ. & G. (Nova Scotia). Russell and Geldert's Nova Scotia Reports.
Russ. & M. Russell and Mylne's English Chancery Reports.
Russ. & R. Russell and Ryan's English Crown Cases Reserved.
Ry. Railway; Railroad.
Ry. Cas. Railway Cases, Reports of.
Ry. & C. T. Cas. Railway and Canal Traffic Cases, English.
Ry. & Corp. L. J. Railroad and Corporation Law Journal.
Ry. & M. Ryan and Moody's Nisi Prius Cases, English Courts.
S. Section; Shaw and Dunlop's Reports, 1st series, Scotch Court of Session.
S. A. L. R. South Australian Law Reports.
S. App. Shaw's Scotch House of Lords Appeal Cases.
S. C. South Carolina Reports, Court of Appeals and Court of Errors.
S. C. Bar Asso. South Carolina Bar Association Reports.
S. C. C. Select Chancery Cases, English Chancery; Cases in Chancery.
S. C. E. Select Cases Relating to Evidence (Strange).
S. C. R. South Carolina Reports, New Series; Harper's South Carolina Reports; Supreme Court Reports.
S. Car. South Carolina; South Carolina Reports, New Series.
S. D. A. Sudder Dewanny Adawlut Reports, India.
S. D. & B. Shaw, Dunlop, and Bell's Scotch Court of Session Reports, 1st series.
S. D. & B. Sup. Shaw, Dunlop, and Bell's Supplement containing House of Lords Decisions.
S. Dak. South Dakota Reports.
S. E. Rep. Southeastern Reporter.
S. F. A. Sudder Foujdaree Adawlut Reports, India.
S. J. Solicitor's Journal.
S. Just. Shaw's Justiciary Cases, Scotch Justiciary Court.
S. L. C. Smith's Leading Cases.
S. L. C. A. Stuart's Lower Canada Appeal Cases.
S. L. J. Scottish Law Journal, Edinburgh.
S. L. R. Southern Law Review, St. Louis, Mo.; Scottish Law Reporter, Edinburgh.
S. p. Same point; same principle.
S. S. C. Sandford's Reports, New York City Superior Court Reports, vols. 3-7.
S. Teind. Shaw's Scotch Teind Court Cases.
S. V. A. R. Stuart's Vice-Admiralty Reports, Lower Canada.
S. W. L. J. & Rep. Southwestern Law Journal and Reporter, Tennessee.
S. W. Rep. Southwestern Reporter.

S. & B. Smith and Batty's Irish-English King's Bench Reports.
S. & C. Saunder and Cole's English Bail Court Reports.
S. & D. Shaw and Dunlop's Scotch Court of Session, First series.
S. & G. Smale and Giffard's English Vice-Chancellors' Reports.
S. & L. Schoales and Lefroy's Reports, Irish Chancery.
S. & M. Shaw and MacLean's Appeal Cases, House of Lords.
S. & M. (Miss.). Smedes and Marshall's Mississippi Reports.
S. & E. (Pa.). Sergeant and Rawle's Pennsylvania Reports.
S. & S. Simons and Stuart's English Vice-Chancellors' Reports.
S. & Sc. Sausse and Scully's Reports, Irish Chancery.
S. & Sm. Searle and Smith's Reports, English Probate and Divorce Cases.
S. & T. Swabey and Tristram's Reports, English Probate and Divorce Cases.
Salk. Salkeld's English King's Bench Reports.
Salm. Abr. Salmon's Abridgment of State Trials.
San Fran. L. Bull. San Francisco Law Bulletin.
San Fran. L. J. San Francisco Law Journal.
Sand., or Sandf. (N. Y.). Sandford's New York Superior Court Reports.
Sand., or Sandf. Ch. (N. Y.). Sandford's New York Chancery Reports.
Sand. L. Rep. Sandwich Island (Hawaiian) Reports.
Sanf. (Ala.). Sanford's Alabama Reports.
Sans. Ins. Dig. Sansum's Insurance Digest.
Sar. Ch. Sen. Saratoga Chancery Sentinel.
Sau. & S. Sausse and Scully's Reports, Irish Chancery.
Saund. Saunders's English King's Bench Reports.
Saund. Pl. & Ev. Saunders's Pleading and Evidence in Civil Actions.
Saund. & C. Saunders and Cole's English Bail Court Reports.
Saund. & Mac. Saunders and Macrae's English County Court Cases.
Sausse & Sc. Sausse and Scully's Irish Rolls Court Reports.
Sav. or Savile. Savile's English Common Pleas Reports.
Saw. or Sawy. (U. S.). Sawyer's United States Circuit and District Courts Reports.
Sax., or Saxe. (N. J.). Saxton's New Jersey Chancery Reports.
Sayer. Sayer's English King's Bench Reports.
Sc. Scott's English Common Pleas Reports.
Sc (Ill.). Scammon's Illinois Reports.
Sc. Div. App. Cas. Scotch and Divorce Appeal Cases.
Sc. Jur. Scottish Jurist, Court of Session.
Sc. L. J. Scottish Law Journal, Glasgow.
Sc. L. M. Scottish Law Magazine and Sheriff Court Reporter.

Sc. L. R. Scottish Law Reporter, Edinburgh.
Sc. N. R. Scott's New Reports, English.
Sc. Sess. Cas. Scotch Court of Session Cases.
Sc. & Div. App. Cas. English Law Reports, Scotch and Divorce Appeal Cases.
Scam. (Ill.). Scammon's Illinois Reports.
Sch. & Lef. Schoales and Lefroy's Reports, Irish Chancery.
Schalck (Jamaica). Schalck's Jamaica Reports.
Schm. L. J. Schmidt's Law Journal, New Orleans.
Schoales & L. Schoales and Lefroy's Reports, Irish Chancery.
Sci. fa. Scire facias.
Scot. or Scott. Scott's Reports, English Courts.
Scot. N. R., or Scott. N. R. Scott's New Reports, English Common Pleas.
Scot. Jur. Scottish Jurist, Edinburgh.
Scot. L. J. Scottish Law Journal and Sheriff Court Record.
Scot. L. Mag. Scottish Law Magazine.
Scot. L. Rep. Scottish Law Reporter.
Scot. L. T. Scottish Law Times, Edinburgh.
Scot. Law Rev. Scottish Law Review, Glasgow.
Scott. Scott's English Common Pleas Reports.
Scott N. R. Scott's New Reports, English Common Pleas.
Scratch. L. Ass. Dec. Scratchley's Decisions in Life Assurance.
Searle Dig. Searle's Minnesota Digest.
Searle & Sm. Searle and Smith's Reports, English Probate and Divorce.
Sebast. Dig. Tr. M. Sebastian's Digest of Cases on Trade Marks.
Seod. Pt. Edw. III. Part 3 of the Year Books.
Seod. Pt. H. VI. Part 8 of the Year Books.
Sedg. Lead. Cas. Real Est. Sedgwick's Leading Cases on Real Estate.
Sedgw. Lead. Cas. Dam. Sedgwick's Leading Cases on the Law of Damages.
Seign. Rep. (L. C.). Seigniorial Reports, Lower Canada.
Sel. Cas. (N. F.). Select Cases, Newfoundland and Courts.
Sel. Cas. (N. Y.). Select Cases, Yates *et al.*, New York.
Sel. Cas. Ch., or Sel. Ch. Cas. Select Chancery Cases, English Chancery.
Sel. Cas. D. A. Select Cases, Sudder Dewanny Adawlut, India.
Sel. Cas. Ev. Select Cases in Evidence (Strange).
Sel. Cas. N. W. P. Selected Cases, Northwest Provinces, India.
Sel. Cas. t. Br. Cooper's Select Cases *temp.* Brougham.
Sel. Cas. t. King. Select Cases in Chancery *temp.* King.
Sel. Cas. t. Nap. Drury's Select Cases *temp.* Napier, Irish Chancery.
Sel. Cas. with Opin. Select Cases with Opinions, by a Solicitor.

Sel. Dec. Bomb. Selected Decisions, Sudder Dewanny Adawlut, Bombay.

Sel. Dec. Madr. Selected Decrees, Sudr Udawlut, Madras.

Sel. L. Cas. Select Law Cases.

Seld. (N. Y.). Selden's New York Court of Appeals Reports.

Seld. Notes (N. Y.). Seldon's Notes, New York Court of Appeals Reports.

Selw. & Barn. The First Part of Barnwall and Alderson's English King's Bench Reports.

Serg. & R. (Pa.). Sergeant and Rawle's Pennsylvania Reports.

Sess. Ca. Session Cases, Scotch.

Sess. Cas. Session Cases; English Settlement Cases.

Sess. Pap. C. C. C. Session Papers, Central Criminal Court.

Sess. Pap. O. B. Session Papers, Old Bailey.

Sett. Cas. Settlement Cases, English.

Sev. Sevestre's Reports, Calcutta.

Sev. S. D. A. Sevestre's Sudder Dewanny Adawlut Reports, Bengal.

Sh. Shower's English Parliamentary Cases; Shower's English King's Bench Reports; Shaw's Scotch Appeal Cases; Shaw, etc., First Series Scotch Court of Session Cases; Shaw's Scotch Justiciary Cases; Shaw's Scotch Teind Court Reports; Sheldon's Buffalo (N. Y.) Superior Court Reports; Shadford's Reserved judgments, Victoria.

Sh. App. Shaw's Appeal Cases, English House of Lords, Appeals from Scotland.

Sh. Crim. Cas. Shaw's Criminal Cases (Scotch Justiciary Court).

Sh. Dig. Shaw's Digest of Decisions, Scotland.

Sh. Jus. Shaw's Justiciary Cases, Scotland.

Sh. Wils. & C. Shaw, Wilson and Courtenay's House of Lords' Cases, Scotch Appeals.

Sh. & Dun. Shaw and Dunlop's Scotch Court of Session Reports.

Sh. & M'L. Shaw and McLean's Appeal Cases, English House of Lords.

Shad. (Vict.). Shadford's Victoria Reports.

Shand (S. Car.). Shand's South Carolina Reports.

Sharp. Ins. Dig. Sharpstein's Digest of Life and Accident Insurance Cases.

Shars. Tab. Cas. Sharswood's Connecticut Table of Cases.

Sharsw. & B. Real Prop. Cas. Sharswood and Budd's Cases on Real Property.

Shaw. Shaw, Scotch Appeal Cases; Shaw, etc., First Series Scotch Court of Session Cases; Shaw's Scotch Justiciary Cases; Shaw's Scotch Teind Reports.

Shaw App. C. Shaw's Scotch Appeal Cases, House of Lords.

Shaw Dec. Shaw's, etc., Decisions in the Scotch Court of Session, First Series.

Shaw Dig. Sc. Shaw's Digest Scotch Reports.

Shaw, Dunl. & B. Shaw, Dunlop, and Bell's (First Series) Scotch Session Cases.

Shaw G. B. (Vt.). G. B. Shaw's Vermont Reports.

Shaw H. L. Shaw's Scotch Appeal Cases, House of Lords.

Shaw (J.) Jus. Shaw's Scotch Justiciary Cases.

Shaw Teind. Shaw's Teind Court Reports, Scotland.

Shaw W. G. (Vt.). W. G. Shaw's Reports, Vermont Supreme Court.

Shaw W. & C. Shaw, Wilson, and Courtenay's Reports, English House of Lords; Scotch Appeals (Wilson and Shaw's Reports).

Shaw & D. Shaw and Dunlop's Reports, Scotch Court of Session.

Shaw & Macd. Shaw and Maclean's Scotch Appeal Cases.

Sheld. Buff. (N. Y.). Sheldon's Buffalo City Court Reports.

Shep. (Ala.). Shepherd's Reports, Alabama Supreme Court (19-21, 25-41 Alabama).

Shep. (Me.). Shepley's Maine Reports.

Shep. Cas. Sheppard's Cases of Slander, etc.

Shep. Sel. Cas. (Ala.). Shepherd's Alabama Select Cases.

Shep. Touch. Sheppard's Touchstone.

Sheph. (Ala.). Shepherd's Alabama Reports.

Shepl. (Me.). Shepley's Reports, Maine Supreme Court (13-18, 21-30 Maine).

Shepp. Cas. Sheppard's Cases of Slander.

Shepp. Touch. Sheppard's Touchstone.

Ship. Gaz. Shipping Gazette, London.

Shipp (N. Car.). Shipp's North Carolina Reports (66-67 North Carolina).

Shir. (N. H.). Shirley's New Hampshire Reports.

Shir. L. C. Shirley's Leading Cases Made Easy.

Shirl. Com. L. Cas. Shirley's Common Law Cases.

Shirl. Crim. L. Cas. Shirley's Criminal Law Cases.

Show. or Shower. Shower's English King's Bench Reports; Shower's Parliamentary Cases.

Show. K. B. Shower's English King's Bench Reports.

Show. P. Cas. Shower's Cases in Parliament.

Sick. (N. Y.). Sickels's New York Court of Appeals Reports (46-66 New York Appeals).

Sick. Min. Dec. Sickels's Mining Laws and Decisions.

Sick. Op. Att. (N. Y.). Sickels's Opinions of the Attorneys-General of New York.

Sid. or Siderfin. Siderfin's English King's Bench Reports.

Silv. App. (N. Y.). Silvernail's New York Court of Appeals Reports.

Silv. Sup. (N. Y.). Silvernail's New York Supreme Court Reports.

Sim. Simons's English Chancery Reports.

Sim. Cas. Simonds's Patent Cases.

Sim. Dig. Simmons's Digest Wisconsin Reports.

Sim. Dig. Pat. Simonds's Digest of Patent Office Decisions.

Sim. N. S. Simons's New Series English Vice-Chancellors' Reports.

Sim. & St. Simons and Stuart's English Vice-Chancellors' Reports.

Sinclair. Sinclair's Manuscript Scotch Court of Session Cases.

Sir T. J. Sir Thomas Jones's Reports.

Six Circ. Cas. Cases on the Six Circuits, Irish Nisi Prius.

Skill. Pol. Rep. (N. Y.). Skillman's New York Police Reports.

Skin. Skinner's English King's Bench Reports.

Skink. (Mo.). Skinker's Missouri Reports (65-68 Missouri).

Skinn. Skinner's Reports, English King's Bench.

Slade (Vt.). Slade's Vermont Reports (15 Vermont).

Sloan Leg. Reg. Sloan's Legal Register, New York.

Smale & G. Smale and Giffard's English Vice-Chancellors' Reports.

Smed. & M., or Smed. & Mar. (Miss.). Smedes and Marshall's Mississippi Reports.

Smedes Ch. (Miss.). Smedes's Mississippi Chancery Reports.

Sm. Smith's Reports, English King's Bench.

Sm. (E. D.). E. D. Smith's Reports, New York Common Pleas.

Sm. (Ind.). Smith's Reports, Indiana.

Sm. (K. B.). Smith's Reports, English King's Bench.

Sm. (Me.). Smith's Reports (61-64 Maine).

Sm. (N. H.). Smith's Reports, New Hampshire.

Sm. (N. Y.). Smith's Reports (15-27 New York Court of Appeals).

Sm. (Pa.), or Sm. (P. F.). Smith's Reports (51-81 Pennsylvania State).

Sm. (Wis.). Smith's Reports (1-11 Wisconsin).

Sm. C. C. M. Smith's Circuit Courts-Martial Reports, Maine.

Sm. Cond. (Ala.). Smith's Condensed Alabama Reports.

Sm. Eng. Smith's Reports, English King's Bench.

Sm. L. C. Smith's Leading Cases.

Sm. L. J. J. P. Smith's Law Journal, London.

Sm. Merc. Law. Smith on Mercantile Law.

Sm. & B. Ry. Cas. Smith and Bate's Railway Cases, American Courts.

Sm. & Bat. Smith and Batty's Reports, Irish King's Bench.

Sm. & G. Smale and Giffard, English Chancery.

Sm. & M. (Miss.). Smedes and Marshall's Mississippi Reports.

Smith (Cal.). Smith's California Reports.

Smith (E. D.) (N. Y.). E. D. Smith's New York Common Pleas Reports.

Smith (Ind.). Smith's Reports, Indiana Supreme Court.

Smith (Me.). Smith's Reports, Maine Supreme Court (61-64 Maine).

Smith (N. H.). Smith's New Hampshire Reports.

Smith (N. Y.). Smith's Reports, New York Court of Appeals (15-27 New York).

Smith (Pa.). Smith's Reports, Pennsylvania Supreme Court (51-80 Pennsylvania State).

Smith (Wis.). Smith's Reports, Wisconsin Supreme Court (1-11 Wisconsin).

Smith C. P., or E. D. E. D. Smith's Common Pleas Reports, New York.

Smith Cond. (Ala.). Smith's Condensed Alabama Reports.

Smith, Eng., or Smith K. B. J. P. Smith's English King's Bench Reports.

Smith L. C. Smith's Leading Cases in Various Branches of the Law.

Smith Merc. Smith on Mercantile Law.

Smith P. F., or Pa. P. F. Smith's Pennsylvania State Reports.

Smith & B. Smith and Batty's Irish King's Bench Reports.

Smith & B. Ry. Cas. Smith and Bates's American Railway Cases.

Smith & Batty. Smith and Batty's Irish King's Bench Reports.

Smith & S. Dig. Vict. Smith and Skinner's Digest of Victorian Reports.

Smoult. Notes of Cases in Smoult's Collection of Orders, Calcutta.

Smythe. Smythe's Reports, Irish Common Pleas and Exchequer.

Sneed (Ky.). Sneed's Kentucky Decisions, Kentucky Court of Appeals.

Sneed (Tenn.). Sneed's Tennessee Reports.

Snow Cas. Int. L. Snow's Cases on International Law.

So. Aus. L. R. South Australian Law Reports.

So. Car. South Carolina Reports.

So. Car. Const. South Carolina Constitutional Reports (by Treadway, by Mill, or by Harper).

So. L. J. & Rep. Southern Law Journal and Reporter.

So. L. Rev. Southern Law Review.

So. L. Rev. (N. S.). Southern Law Review, New Series.

So. L. T. Southern Law Times.

So. Lit. Mess. Southern Literary Messenger.

So. Rep. Southern Reporter.

So. W. Rep. Southwestern Reporter.

So. West. L. J. Southwestern Law Journal, Nashville, Tenn.

Sol. Gen. Solicitor-General.

Sol. J. Solicitors' Journal, London.

Sol. J. & Rep. Solicitors' Journal and Reporter.

Som. Somerset Gazette.

South. (N. J.). Southard's New Jersey Reports.

South Atl. Rep. South Atlantic Reporter.

South Aus. L. R. South Australia Law Reports.

South Car. South Carolina.

South. L. J. & Rep. Southern Law Journal and Reporter, Nashville, Tenn.

South. L. Rev. Southern Law Review, Nashville, Tenn.

South. L. Rev. N. S. Southern Law Review, New Series, St. Louis, Mo.

South. L. T. Southern Law Times.

South W. L. J. Southwestern Law Journal.
Southard, or **Southard (N. J.)**. Southard's New Jersey Law Reports, vols. 4. 5.
Southeast. Rep. Southeastern Reporter.
Southern Rep. Southern Reporter.
Southw. L. J. Southwestern Law Journal and Reporter.
Southwest. Rep. Southwestern Reporter.
Sp. Spinks's English Ecclesiastical and Admiralty Reports; Spear's South Carolina Law Reports.
Sp. Eq., or Ch. Spear's South Carolina Equity Reports.
Sp. Laws. Spirit of Laws, by Montesquieu.
Sp. Fr. Cas. Spinks's Prize Cases.
Sp. & Sel. Cas. Special and Selected Law Cases.
Sparks. Sparks's Reports, British Burmah.
Spauld. (Me.). Spaulding's Maine Reports.
Spears, or Speers Ch. (S. Car.). Speers's South Carolina Equity Reports.
Spears, or Speers L. (S. Car.). Speers's South Carolina Law Reports.
Spec. & Sel. L. Cas. Special and Selected Law Cases.
Spel. Rep. Spelman's Manuscript Reports, English King's Bench.
Speno. (Minn.). Spencer's Reports (Minnesota Reports, vol. 20).
Speno. (N. J.). Spencer's New Jersey Reports.
Spens Sel. Cas. (Bombay). Spens's Bombay Select Cases.
Spinks. Spinks's English Ecclesiastical and Admiralty Reports.
Spinks Fr. Cas. Spinks's Prize Cases, English Admiralty.
Spoon. (Wis.). Spooner's Wisconsin Reports (12-15 Wisconsin).
Spott. Sir R. Spottiswoode's Reports, Scotch Court of Session.
Spott. C. L. Eq. Rep. Spottiswoode's Common Law and Equity Reports.
Spr., or Sprague (U. S.). Sprague's United States District Court Decisions.
St. Story's United States Circuit Court Reports; Stair's Scotch Court of Session Reports; Stuart (Milne and Peddie), Scotch Session Cases.
St. Cas. Stillingfleet's Ecclesiastical Cases, English.
St. Ch. Cas. Star Chamber Cases.
St. Ecc. Cas. Stillingfleet's Ecclesiastical Cases, English.
St. M. & P. Stuart, Milne and Peddie's Scotch Session Cases.
St. Rep., or N. Y. St. Rep. New York State Reporter.
St. Tr. State Trials, English King's Bench.
Stair. Stair's Scotch Court of Session Cases.
Stant. (O.). Stanton's Ohio Reports.
Stant. Dig. (Ky.). Stanton's Digest of Kentucky Reports.
Star Ch. Cas. Star Chamber Cases.
Star. Ev. Starkie on Evidence.
Star. N. P., or Stark. N. P. Starkie's English Nisi Prius Reports.
Star Sess. Star Session Cases.
Stark. Cr. Pl. Starkie's Criminal Pleading.
Stark. S. & L. Starkie on Slander and Libel.

Starkie N. P. Starkie's English Nisi Prius Reports.
Stat. Marl. Statute of Marlbridge.
Stat. Tr. State Trials.
Stat. Westm. Statute of Westminster.
Stat. Winch. Statute of Winchester.
Steph. Comm. Stephen's Commentaries on the Laws of England.
Steph. Dig. (Que.). Stephens's Quebec Law Digest.
Steph. Dig. Cr. Stephen's Digest of the Criminal Law.
Steph. Ev. Stephen's Digest of the Law of Evidence.
Steph. Pl. Stephen's Principles of Pleading.
Stev. Dig. (N. B.). Stevens's Digest of New Brunswick Reports.
Stew. (Ala.). Stewart's Alabama Reports.
Stew. (N. J.). Stewart's New Jersey Reports (28-33 New Jersey Equity).
Stew. Adm. (Nova Scotia). Stewart's Nova Scotia Admiralty Reports.
Stew. Dig. (N. J.). Stewart's New Jersey Digest.
Stew. & P., or Stew. & Port. (Ala.). Stewart and Porter's Alabama Reports.
Stiles (Iowa). Stiles's Iowa Reports (22-37 Iowa).
Stiles Dig. (Iowa). Stiles's Digest Iowa Reports.
Stillingsf. Ec. Stillingfleet's Ecclesiastical Cases.
Sto. (U. S.). Story's United States Circuit Court Reports.
Sto. Ag. Story on Agency.
Sto. Bail. Story on Bailments.
Sto. Bills. Story on Bills of Exchange.
Sto. Civ. Pl. Story on Civil Pleading.
Sto. Con. L. Story on Conflict of Laws.
Sto. Eq. Jur. Story on Equity Jurisprudence.
Sto. Eq. Pl. Story on Equity Pleadings.
Sto. Part. Story on Partnership.
Stock. (Md.). Stockett's Maryland Reports (27-53 Maryland).
Stock. M. & M. Dig. (Md.). Stockett, Merrick, and Miller's Digest Maryland Reports.
Stockt. (N. B.). Stockton's New Brunswick Reports.
Stockt. (N. J.). Stockton's New Jersey Reports.
Story (U. S.). Story's United States Circuit Court Reports.
Str. or Stra. Strange, English King's Bench, 1715-1748.
Str. Cas. Ev., or Str. Svo. Strange's Cases of Evidence ("Octavo Strange").
Str. N. C. Strange's Notes of Cases, Madras.
Strange. Strange's English King's Bench Reports.
Stringf. (Mo.). Stringfellow's Missouri Reports (9-11 Missouri).
Strobh. Ch. (S. Car.). Strobhart's South Carolina Equity Reports.
Strobh. L. (S. Car.). Strobhart's South Carolina Law Reports.
Stu. or Stuart. Stuart, Milne, and Peddie's Reports, Scotch Court of Session.
Stu. Adm. Stuart's Lower Canada Vice-Admiralty Reports.

- Sta. App.** Stuart's Appeal Cases (Lower Canada King's Bench Reports).
Sta. K. B. (or **L. C.**). Stuart's Lower Canada Reports.
Sta. M. & P. Stuart, Milne, and Peddie's Scotch Court of Session Cases.
Stuart (L. C.). Stuart's King's Bench Reports, Lower Canada.
Stuart Adm. (L. C.). Stuart's Vice-Admiralty Reports, Lower Canada.
Stuart M. & P. Stuart, Milne, and Peddie's Reports, Scotch Court of Session.
Sty. or Style. Style's English King's Bench Reports.
Sud. Dew. Adul. Sudder Dewanny Adawlut Reports, India.
Sud. Dew. Rep. Sudder Dewanny Reports, Northwest Provinces, India.
Sug. Est. Sugden on the Law of Estates.
Sug. Pow. Sugden on Powers.
Sug. V. & P. Sugden on Vendors and Purchasers.
Sum., or Sumn. (U. S.). Sumner's United States Circuit Court Reports.
Sumn. Ves., or Sum. Ves. Sumner's edition of Vesey's Reports.
Sup. Ct. Cir. Supreme Court Circular.
Sup. Ct. Rep. Supreme Court Reporter, United States.
Supp. Ves. Jr. Supplement to Vesey Jr.'s Reports.
Surr. The Surrogate (periodical).
Susq. Leg. Chron. Susquehanna Legal Chronicle.
Suth. Sutherland's Reports, Calcutta.
Suth. F. B. B. Sutherland's Full Bench Rulings, Bengal.
Suth. W. Rep. Sutherland's Weekly Reporter, Calcutta.
Sw. Swanton's English Chancery Reports; Swabey's English Admiralty Reports; Swinton's Scotch Justiciary Cases.
Sw. & Tr. Swabey and Tristram's Reports, Probate and Divorce, English.
Swab., or Swa. Ad. Swabey's Admiralty Reports, English.
Swab. & T. Swabey and Tristram's English Probate and Divorce Reports.
Swan. Swanton's English Chancery Reports.
Swan (Tenn.). Swan's Tennessee Supreme Court Reports.
Swan. Ch. Swanton's English Chancery Reports.
Swanst. Swanston's English Chancery Reports.
Sween., or Sweeney (N. Y.). Sweeney's New York Superior Court Reports.
Sweet M. Sett. Cas. Sweet's Marriage Settlement Cases.
Swift Dig. (Conn.). Swift's Connecticut Digest.
Swin. Jus. Cas. Swinton's Justiciary Cases, Scotland.
Swin. Reg. App. Swinton's Scotch Registration Appeal Cases.
Swinb. Wills. Swinburne on Wills.
Swint. Swinton's Scotch Justiciary Cases.
Swint. S. Reg. Cas. Swinton's Scotch Registration Cases.
Syllabi. The Syllabi, American.
Syme. Syme's Scotch Justiciary Cases.
Syn. Ser. Synopsis Series of the United States Treasury Decisions.
T. B. Mon. (Ky.). T. B. Monroe's Kentucky Reports.
T. Jones. T. Jones's Reports, English King's Bench and Common Pleas.
T. L. Termes de la Ley.
T. R. Term Reports, English King's Bench.
T. R. (N. Y.). Caines's (Term) Reports, New York.
T. R. N. S. Term Reports, New Series.
T. Raym. Sir Thomas Raymond's Reports, English King's Bench.
T. U. P. Charl. (Ga.). T. U. P. Charlton's Georgia Superior Court Reports.
T. & C. (N. Y.). Thompson and Cook's New York Supreme Court Reports.
T. & G. Tyrwhitt and Granger's Reports, English Exchequer.
T. & M. Temple and Mew's Crown Cases, English.
T. & P. Turner and Phillips's Reports, English Chancery.
T. & R. Turner and Russell's English Chancery Reports.
Tait. Tait's Manuscript Decisions, Scotch Court of Session.
Tait Ind. Tait's Index to Scotch Session Cases.
Talb. or Talbot. Cases *temp.* Talbot, English Chancery.
Taml. or Tamlyn. Tamlyn's English Rolls Court Reports.
Tan., or Taney (U. S.). Taney's United States Circuit Court Decisions, by Campbell.
Tann. (Ind.). Tanner's Indiana Reports (8-14 Indiana).
Tapp., or Tappan (O.). Tappan's Reports, Ohio Courts of Common Pleas, Fifth Circuit.
Tarle. (N. S. W.). Tarleton's New South Wales Term Reports.
Tate Index. Tate's Digested Index, Virginia Reports.
Taunt. Taunton's English Common Pleas Reports.
Tax. L. Rep. Tax Law Reporter.
Tayl. (N. Car.), or (J. L.). Taylor's North Carolina Reports.
Tayl. (U. C.). Taylor's Upper Canada King's Bench Reports.
Tayl. Ev. Taylor's Law of Evidence.
Tayl. K. B. Taylor's Upper Canada King's Bench Reports.
Tayl. Land. & T. Taylor on Landlord and Tenant.
Tayl. & B. Taylor and Bell's Bengal Reports.
Taylor. Taylor's North Carolina Reports; Taylor's Upper Canada Reports; Taylor's Bengal Reports.
Tel. The Telegram, London.
Tem. Templar, English.
Temp. Geo. II. Cases in Chancery *temp.* George II.
Temp. & M. Temple and Mew's English Crown Cases.
Tenn. Tennessee Reports.
Tenn. (Ch.). Tennessee Chancery Reports.
Tenn. Bar. Asso. Tennessee Bar Association Reports.
Tenn. Leg. Rep. Tennessee Legal Reporter, Nashville.

Term. Term Reports, English King's Bench (Durnford and East's Reports).

Term (N. C.). Taylor's North Carolina Supreme Court Term Reports.

Terr. (Tex.). Terrell's Texas Reports (52 Texas).

Terr. & W. (Tex.). Terrell and Walker's Texas Reports (38-51 Texas).

Tex. Texas Reports.

Tex. App. Texas Appeals Reports, Criminal Reports.

Tex. App. Civ. Cas. Texas Appeals, Civil Cases.

Tex. Crim. Rep. Texas Criminal Reports.

Tex. Ct. Rep. Texas Court Reporter.

Tex. L. J. Texas Law Journal, Tyler, Texas.

Tex. L. Rep. Texas Law Reporter.

Tex. L. Rev. Texas Law Review.

Tex. Sup. 25 Texas Supplement.

Tex. Unrep. Cas. Texas Unreported Cases.

Th. C. C. (Mass.). Thatcher's Criminal Cases, Massachusetts.

Th. Cas. Const. Law. Thomas's Leading Cases in Constitutional Law.

Th. & C. (N. Y.). Thompson and Cook's New York Supreme Court Reports.

Thach. Cr. (Mass.). Thatcher's Criminal Cases, Massachusetts.

Thay. Cas. Const. L. Thayer's Cases on Constitutional Law.

Thay. Cas. Ev. Thayer's Cases on Evidence.

Themis. The American Themis, New York.

Themis L. C. Themis, Lower Canada.

Theob. Wills. Theobald on Wills.

Thom. (Wyo.). Thomas's Wyoming Territory Reports.

Thom. Dec. 1 Thomson's Nova Scotia Reports.

Thom. Lead. Cas. Thomas's Leading Cases in Constitutional Law.

Thom. Rep. 2 Thomson's Nova Scotia Reports.

Thom. Sel. Dec. Thomson's Select Decisions, Nova Scotia.

Thom. & F. (Md.). Thomas and Franklin's Maryland Chancery Reports.

Thomp. (Cal.). Thompson's Reports, California Supreme Court (39-40 California).

Thomp. (N. S.). Thompson's Reports, Nova Scotia.

Thomp. (Tenn.). Thompson's Tennessee Reports.

Thomp. Nat. Bk. Cas. Thompson's National Bank Cases.

Thomp. Tenn. Cas. Thompson's Unreported Tennessee Cases.

Thomp. & C. (N. Y.). Thompson and Cook's Reports, New York Supreme Court.

Thoms. (Nova Scotia). Thomson's Nova Scotia Reports.

Thorn. Thornton's Notes of Cases Ecclesiastical and Maritime, English.

Tidd Pr. Tidd's Practice of the Courts of King's Bench and Common Pleas in Personal Actions and Ejectment.

Tiff. (N. Y.). Tiffany's Reports, New York Court of Appeals (28-39 New York).

Times L. Rep. Times Law Reports.

Tinw. Tinwald's Scotch Court of Session Reports.

Tithe Cas. Tithes Cases, English.

To. or Toth. Tothill's English Chancery Reports.

To. Jo. Sir Thomas Jones's English King's Bench Reports.

Tobey (R. I.). Tobey's Rhode Island Reports (9-10 Rhode Island).

Toml. Cas. Tomlins's Cases of Election Evidence, English.

Toml. Suppl. Brown. Tomlins's Supplement to Brown's Parliament Cases.

Toth. Tothill's English Chancery Reports.

Touch. Sheppard's Touchstone, commonly cited as Shep. Touch.

Town. Sl. & L. Townshend on Slander and Libel.

Towns. St. Tr. Townsend's Modern State Trials, Eng.

Tr. App., or Trans. App. (N. Y.). Transcript Appeals, New York.

Treadw. (S. Car.). Treadway's South Carolina Constitutional Reports.

Trem. Pl. Cr. Tremaine's Pleas of the Crown.

Trist. Suppl., or Tristram. Tristram's Supplement to 4 Swabey and Tristram.

Tru. Ry. Rep. Truman's American Railway Reports.

Tuck. (N. Y.). Tucker's New York Surrogate Court Reports.

Tuck. (Newfoundland). Tucker's Newfoundland Reports.

Tuck. Sel. Cas. (N. F.). Tucker's Select Cases, Newfoundland Courts.

Tuck. Sur. Tucker's Reports, New York Surrogate Court.

Tudor Cas. Eq. Tudor's Leading Cases in Equity.

Tudor Lead. Cas. Merc. Tudor's Leading Cases on Mercantile and Maritime Law.

Tudor Lead. Cas. R. P. Tudor's Leading Cases on Real Property.

Tupp. Ont. App. Tupper's Ontario Appeal Reports.

Tupp. Pr. (U. C.). Tupper's Practice Reports, Upper Canada.

Turn. Turner's Reports, English Chancery.

Turn. (Ark.). Turner's Arkansas Reports.

Turn. & Ph. Turner and Phillips's English Chancery Reports.

Turn. & Russ. Turner and Russell's English Chancery Reports.

Tutt. (Cal.). Tuttle's California Reports (23-32 and 41-51 California).

Tutt. & Carp. Tuttle and Carpenter's Reports (52 California).

Tyl., or Tyler (Vt.). Tyler's Vermont Reports.

Tyng (Mass.). Tyng's Massachusetts Reports (2-17 Massachusetts).

Tyrw. Tyrwhitt's English Exchequer Reports.

Tyrw. & G. Tyrwhitt and Granger's Reports, English Exchequer.

U. Utah Reports.

U. B. P. Upper Bench Precedents *temp.* Car. I.

U. C. Upper Canada.

U. C. App. Upper Canada Court of Appeals Reports.

U. C. C. P. Upper Canada Common Pleas Reports.

U. C. Ch. Upper Canada Chancery Reports.

- U. C. Cham.** Upper Canada Chambers Reports.
U. C. Err. & App. Upper Canada Error and Appeals Reports.
U. C. Jur. Upper Canada Jurist.
U. C. K. B. Upper Canada King's Bench Reports.
U. C. L. J. Upper Canada Law Journal.
U. C. L. J. (N. S.). Upper Canada Law Journal, New Series.
U. C. Local Cts. Gaz. Upper Canada Local Courts Gazette.
U. C. O. S. Upper Canada Queen's Bench and Practice Reports, Old Series.
U. C. Pr. Upper Canada Practice Reports.
U. C. Q. B. Upper Canada Queen's Bench Reports.
U. C. Q. B. (O. S.). Upper Canada, Queen's Bench, Old Series.
U. C. Rep. Upper Canada Reports.
U. S. United States Supreme Court Reports.
U. S. App. United States Circuit Court of Appeals Reports.
U. S. C. C. United States Circuit Court; United States Court of Claims.
U. S. Cr. Dig. United States Criminal Digest.
U. S. Ct. Cl. United States Court of Claims Reports.
U. S. Dig. Abbott's United States Digest.
U. S. Eq. Dig. United States Equity Digest.
U. S. First Compt. Dec. United States First Comptroller's Decisions.
U. S. Jur. United States Jurist, Washington, D. C.
U. S. L. J. United States Law Journal, New Haven and New York.
U. S. L. Mag. United States Law Magazine.
U. S. Law Int. United States Law Intelligencer and Review, Providence and Philadelphia.
U. S. Law Jour. United States Law Journal, New Haven and New York.
U. S. R. S. United States Revised Statutes.
U. S. Reg. United States Register, Philadelphia.
U. S. Rev. St. United States Revised Statutes.
U. S. St. at Large. United States Statutes at Large.
U. S. St. Tr. United States State Trials (Wharton's).
U. S. Sup. Ct. Op. United States Supreme Court Opinions.
U. S. Sup. Ct. Rep. United States Supreme Court Reporter.
University Law Rev. University Law Review, New York City.
Up. Can. E. & A. Upper Canada Error and Appeal Court Reports.
Utah T. Utah Territory Reports.
V. *Versus* (against); Victoria. (See Ves.)
V. C. Vice-Chancellor; Vice-Chancellor's Court.
V. C. Rep. Vice-Chancellors' Reports, English.
V. L. B. Victorian Law Reports, Australia.
V. N. Van Ness's Prize Cases. U. S. District Court.
V. & B. Vesey and Beames's English Chancery.
V. & S. Vernon and Scriven's Reports, Irish King's Bench and Irish House of Lords.
Va. Virginia Reports.
Va. Cas. Virginia Cases, General Court.
Va. L. J. Virginia Law Journal, Richmond.
Va. L. Reg. Virginia Law Register, Lynchburg, Va.
Van K. Van Koughnet's Reports (15-21 Upper Canada Common Pleas Reports).
Van Ness (U. S.). Van Ness's Prize Cases, United States District Court, District of New York.
Vanderstr. (Ceylon). Vanderstraaten's Ceylon Reports.
Vat. or Vatt. Vattel's Law of Nations.
Vaugh. or Vaughan. Vaughan's English Common Pleas Reports.
Vaux (Pa.). Vaux's Recorder's Decisions, Pennsylvania.
Ve., or Ves. & B. Vesey and Beames's English Chancery Reports.
Veaz. (Vt.). Veazey's Vermont Reports (36-46 Vermont).
Vend. Ex. Venditioni Exponas.
Ventr. or Ventris. Ventris's English King's Bench and Common Pleas Reports.
Verm. Vermont Reports.
Vern. Vernon's English Chancery Reports.
Vern. & S. Vernon and Scriven, Irish King's Bench and Irish House of Lords.
Vernon. Vernon's English Chancery Reports.
Ves. Vesey's Reports (Vesey Jr.'s Reports when the volume cited has a higher number than 2).
Ves. Jr. or Jun. Vesey, junior's, English Chancery Reports.
Ves. Jun. Supp. Supplement to Vesey Jr.'s Reports, English Chancery.
Ves. sen. or Sr. Vesey, senior.
Ves. & B. Vesey and Beames's English Chancery Reports.
Vet. Na. Br. Old Natura Brevium.
Ves. Vezezy's (Vesey) English Chancery Reports (see Ves.).
Viet. Victorian Reports.
Viet. L. B. Victorian Law Reports.
Viet. L. B. Eq. Victorian Law Report, Equity.
Viet. L. B. Ins. Pr. & M. Victorian Law Reports, Insolvency, Probate, and Matrimonial.
Viet. L. B. Law. Victorian Law Reports, Law.
Viet. L. B. Min. Victorian Law Reports, Mining.
Viet. L. T. Victorian Law Times.
Viet. Rev. Victorian Review.
Viet. St. Tr. Victorian State Trials.
Vin. Abr. Viner's Abridgment of Law and Equity.
Vir. (Me.). Virgin's Maine Reports (52-60 Maine).
Vir. L. J. Virginia Law Journal.
Virg. Virginia Reports.
Virg. Cas. Virginia Cases.
Vr., or Vroom (N. J.). Vroom's New Jersey Reports.
Vs. *Versus*, against.
Vt. Vermont Reports.
W. King William (thus 1 W. I. signifies the first year of the reign of King William I.); Statute of Westminster.
W. Bl. William Blackstone, English King's Bench and Common Pleas Reports.

W. C. C. Washington's United States Circuit Court Reports.

W. Coast Rep. West Coast Reporter.

W. Dig. Weekly Digest.

W. H. Chron. Westminster Hall Chronicle, London.

W. H. & G. Welsby, Hurlstone, and Gordon's Reports, English Exchequer (1-9 Exchequer).

W. Jo., or W. Jones. W. Jones's Reports, English King's Bench and Common Pleas.

W. Kel. Wm. Kelynge's Reports, English King's Bench and Chancery.

W. L. Bull. Weekly Law Bulletin.

W. L. Gaz. Western Law Gazette, Cincinnati.

W. L. Jour. Western Law Journal, Cincinnati.

W. L. M. Western Law Monthly, Cleveland.

W. L. Rep. Washington Law Reporter, Washington.

W. N. Weekly Notes, England.

W. N. Cas. (Pa.). Weekly Notes of Cases, Pennsylvania.

W. R. West's Reports *temp.* Hardwicke, English Chancery; Weekly Reporter.

W. R. Weekly Reporter, English.

W. R. Calc. Sutherland's Weekly Reporter, Calcutta.

W. Rep. Weekly Reporter.

W. Rob. W. Robinson's English Admiralty Reports.

W. T. R. Weekly Transcript Reports, New York.

W. Va. West Virginia Reports.

W. Va. Bar. West Virginia Bar, Morgantown, W. Va.

W. W. & D. Willmore, Wollaston, and Davies' Reports, English Queen's Bench.

W. W. & H. Willmore, Wollaston, and Hodge's Reports, English Queen's Bench.

W. & B. Dig. Walker and Bates's Ohio Digest.

W. & C. Wilson and Courtenay's Scotch Appeal Cases.

W. & L. Dig. Wood and Long's Illinois Digest.

W. & M. William and Mary (thus 1 W. & M. denotes the first year of the reign of William and Mary).

W. & M. (U. S.). Woodbury and Minot's Reports, United States Circuit Court, First Circuit.

W. & S. Wilson and Shaw's Scotch Appeal Cases.

W. & S. (Pa.). Watts and Sargeant's Pennsylvania Reports.

W. & T. Eq. Cas., or W. & T. L. C. White and Tumor's Leading Cases in Equity.

Wa. Watts's Pennsylvania Reports; Wales.

Wadd. Dig. Waddilove's Digest of Cases in English Ecclesiastical Courts.

Wait Dig. Wait's New York Digest.

Walk. (Mich.). Walker's Michigan Chancery Reports.

Walk. (Miss.). Walker's Reports, Mississippi High Court of Errors and Appeals (1 Mississippi).

Walk. (Tex.). Walker's Reports, Texas Supreme Court (25 Texas).

Walk. Ch. Walker's Michigan Chancery Reports.

Walk. & B. Dig. (Ohio). Walker and Bates's Digest Ohio Reports.

Walker. Walker's Mississippi Reports; Walker's Michigan Chancery Reports; Walker's Texas Reports (25 Texas).

Wall. Wallace's Philadelphia Reports; Wallis's Irish Chancery Reports.

Wall. (C. C.). Wallace's Circuit Court Reports.

Wall. (Jr.) C. C. Wallace's (Jr.) Circuit Court Reports.

Wall. (Pa.). Wallace's Legal Intelligencer Reports, Pennsylvania Courts (Philadelphia Reports).

Wall. (U. S.). Wallace's United States Supreme Court Reports.

Wall. (U. S. C. C.). Wallace's United States Circuit Court Reports.

Wall. Ch. Wallis's Irish Chancery Reports.

Wall. Jr. (U. S.). Wallace's (Jr.) United States Circuit Court Reports.

Wall. Sen. Wallace's (J. B.) United States Circuit Court Reports.

Wallis. Wallis's Reports, Irish Chancery.

Walsh. Walsh's Registry Cases, Ireland.

Warb. Cas. Crim. L. Warburton's Cases in Criminal Law.

Ward. (Ohio). Warden's Reports (2-4 Ohio State).

Ward. Week. L. Gaz. Warden's Weekly Law Gazette.

Ward. & S. (Ohio). Warden and Smith's Reports (3 Ohio State).

Warden. Warden's Reports, Ohio Supreme Court (2- Ohio State).

Warden & Sm. Warden and Smith's Reports, Ohio Supreme Court (3 Ohio State).

Ware (U. S.). Ware's United State District Court Reports.

Wash. Washington Reports.

Wash. (U. S.). Washington's United States Circuit Court Reports.

Wash. (Va.). Washington's Reports, Virginia Court of Appeals.

Wash. C. Ct. Washington's Reports, United States Circuit Court, Third Circuit.

Wash. Dig. Washburn's Vermont Digest.

Wash. Jur. Washington Jurist.

Wash. L. Exch. Washington Law Exchange.

Wash. Law Rep. Washington Law Reporter, Washington.

Wash. T. Washington Territory Supreme Court Reports.

Washb. (Vt.). Washburn's Vermont Reports (16-23 Vermont).

Wat. (C. G. H.). Watermeyer's Cape of Good Hope Reports.

Wat. Cr. Dig. (U. S.). Waterman's United States Criminal Digest.

Wat. & O'C. Dig. (N. S. W.). Watkins and O'Connor's Digest New South Wales Reports.

Waterm. Cr. Dig. Waterman's Criminal Digest.

Watermeyer. Watermeyer's Cape of Good Hope Reports.

Watts (Pa.). Watts's Pennsylvania Supreme Court Reports.

Watts (W. Va.). Watts's West Virginia Reports.

Watts & S. (Pa.). Watts and Sergeant's Pennsylvania Supreme Court Reports.

Web. P. Cas. Webster's Patent Cases, English.

- Webb.** Webb's Reports, Kansas Supreme Court (6-17 Kansas).
Webb, A.B. & W. Webb, A'Beckett, and Williams's Victorian Reports, Australia.
Webb, A.B. & W. Eq. Webb, A'Beckett, and Williams's Equity Reports, Victoria.
Webb, A.B. & W. I. P. M. Webb, A'Beckett, and Williams's Insolvency, Probate, and Matrimonial Reports, Victoria.
Webb, A.B. & W. Min. Webb, A'Beckett, and Williams's Mining Cases, Victoria.
Webb, Dig. (Tex.). Webb's Digest Texas Criminal Cases.
Webb. & D. (Tex.). Webb and Duval's Texas Reports (1-3 Texas).
Webst. Pat. Cas. Webster's English Patent Cases.
Weekl. Cin. L. B. Weekly Cincinnati Law Bulletin.
Weekl. Dig. Weekly Digest, New York.
Weekl. Jur. Weekly Jurist, Illinois.
Weekl. L. Gas. Weekly Law Gazette, Cincinnati.
Weekl. L. Mag. Weekly Law Magazine.
Weekl. L. Rec. Weekly Law Record, American.
Weekl. L. Rev. Weekly Law Review, San Francisco.
Weekl. No. Weekly Notes of Cases, London.
Weekl. No. Cas. Weekly Notes of Cases, Philadelphia.
Weekl. Reprtr. Weekly Reporter, London; Weekly Reporter, Bengal.
Weekl. Trans. Weekly Transcript.
Weekl. Trans. Repts. Weekly Transcript Reports, New York.
Weight. Med. Leg. Gaz. Weightman's Medical-Legal Gazette, London.
Wel. Welsh's Irish Registry Cases.
Wells L. & F. Wells's Questions of Law and Fact.
Welsb. H. & G. Welsby, Hurlstone, and Gordon's English Exchequer Reports.
Welsh (N. Y.). Welsh's Weekly Reports, New York Supreme Court.
Welsh Reg. Cas. Welsh's Irish Registry Cases.
Wend. (N. Y.). Wendell's New York Supreme Court Reports.
West. West's Reports, English House of Lords; Western's Tithe Cases.
West. (Vt.). Weston's Vermont Reports.
West, or West t. H. West's Reports *temp.* Hardwicke, English Chancery.
West Ch. West's English Chancery Reports *temp.* Hardwicke.
West Coast Rep. West Coast Reporter.
West H. L. West's Reports, English House of Lords.
West. Jur. Western Jurist, Des Moines, Iowa.
West. L. Jour. Western Law Journal.
West. L. M., or West. L. Mo. Western Law Monthly, Cleveland.
West. L. O. Western Legal Observer.
West. L. T. Western Law Times.
West. Leg. News. Western Legal News.
West. Rep. Western Reporter.
West. Res. L. J. Western Reserve Law Journal, Cleveland.
West. T. Cas. Western's Tithe Cases.
West t. H. West's Reports, English Chancery, *temp.* Hardwicke.
West Va. West Virginia Reports, Supreme Court.
Western Jur. Western Jurist.
Westm. Statute of Westminster.
Westm. Hall Chron. Westminster Hall Chronicle.
Weston (Vt.). Weston's Reports, Vermont Supreme Court (12-14 Vermont).
Weth. (U. C.). Wethey's Upper Canada Queen's Bench Reports.
Wh. (Pa.). Wharton's Reports, Pennsylvania.
Wh. (U. S.). Wheaton's Reports, United States Supreme Court.
Wh. Cr. Cas. Wheeler's Criminal Cases, New York.
Wh. & T. Lead. Cas., or White & T. White and Tudor's Leading Cases in Equity.
Whar. (Pa.). Wharton's Pennsylvania Reports.
Whar. Dig. Wharton's Pennsylvania Digest.
Whart. (Pa.). Wharton's Pennsylvania Reports.
Whart. Dig. Wharton's Digest.
Whart. St. Tr. Wharton's State Trials in the United States.
Wheat. (U. S.). Wheaton's United States Supreme Court Reports.
Wheel. Wheeler's New York Criminal Cases; Wheelock's Texas Reports (32-37 Texas).
Wheel. (Tex.). Wheelock's Texas Reports.
Wheel. Abr. C. L. Cas. Wheeler's Practical Abridgment of American Common Law Cases.
Wheel. Cr. (N. Y.). Wheeler's Criminal Cases, New York.
Whit. Index. Whitmore's Index to California Reports.
Whit. Mass. L. Cas. Whitman's Massachusetts Libel Cases.
Whit. Pat. Cas. Whitman's Patent Cases.
White (W. Va.). White's West Virginia Reports (10-15 West Virginia).
White Just. Rep. White's Justiciary Reports, Scotch.
White W. N. Dig. White's Weekly Notes Digest.
White & T. Lead. Cas. White and Tudor's Leading Cases in Equity.
Whitm. Lib. Cas. Whitman's Massachusetts Libel Cases.
Whitm. Pat. Law Rev. Whitman's Patent Law Review, Washington, D. C.
Whitm. Pat. Rep. Whitman's Patent Reports.
Whitt. Whittlesey's Missouri Reports (32-41 Missouri Supreme Court).
Wight. or Wightw. Wightwick's English Exchequer Reports.
Wight El. Cas. Wight's Election Cases, Scotland.
Wil. (Ohio.). Wilcox's Ohio Reports (10 Ohio).
Wilo. Cond. Wilcox's Condensed Reports, Ohio.
Wiles. Wiles's Reports, or Willes's Reports, English.
Wilk. P. & M. Wilkinson, Paterson, and Murray's Reports, New South Wales.
Wilk. & Ow. Wilkinson and Owen's Reports, New South Wales.
Wilk. & Pat. Wilkinson and Paterson's Reports, New South Wales.

Will. Willes's English Common Pleas Reports.

Will. (Mass.). Williams's Massachusetts Reports (1 Massachusetts).

Will. (Mass.). Cit. Williams's Massachusetts Citations.

Will. (Peere). Peere Williams's Reports, English Chancery.

Will. (Vt.). Williams's Vermont Reports (27-29 Vermont).

Will. Abr. Cas. Williams's Abridgment of Cases.

Will. P. Peere Williams's English Chancery Reports.

Will. R. P. Williams on Real Property.

Will. Saund. Williams's Notes to Saunders's Reports.

Will. W. & D. Willmore, Wollaston, and Davison's English King's Bench Reports.

Will. W. & H. Willmore, Wollaston, and Hodges, King's Bench.

Will. & H. Willmore and Hodges's English King's Bench Reports.

Willies. Willes's English Reports.

Williams (Mass.). Williams's Reports, Massachusetts Supreme Court (1 Massachusetts).

Williams (Vt.). Williams's Reports, Vermont Supreme Court (27-29 Vermont).

Williams, or Williams P. Peere Williams's Reports, English Chancery.

Williams Ex. Williams on Executors.

Williams Notes. Williams's Notes to Saunders's Reports.

Williams P. Peere Williams's English Chancery Reports.

Williams S. Williams's Notes to Saunders's Reports.

Willis. Cas. Cont. Williston's Cases on Contracts.

Willis. Cas. Sales. Williston's Cases on Sales.

Willm. W. & D. Willmore, Wollaston, and Davison's Reports, English Queen's Bench.

Willm. W. & H. Willmore, Wollaston, and Hodges's Reports, English Queen's Bench.

Wilm., or Wilm. N. O. Wilmot's Notes of Opinions, English King's Bench Reports.

Wils. Wilson, English King's Bench and Common Pleas.

Wils. (Cal.). Wilson's Reports, California Supreme Court (1 California).

Wils. (Ind.). Wilson's Indiana Superior Court Reports.

Wils. (Or.). Wilson's Oregon Reports (1-3 Oregon).

Wils. Ch. Wilson's English Chancery Reports.

Wils. Ent. Wilson's Entries and Pleadings (same as 3 Lord Raymond).

Wils. Ex. Wilson's English Exchequer Reports.

Wils. K. B. Sergeant Wilson's English King's Bench Reports.

Wils. Super. Ct. Wilson's Superior Court, Indiana.

Wils. & C. Wilson and Courtenay's Reports, English House of Lords, Appeals from Scotland.

Wils. & S. Wilson and Shaw's Scotch Appeal Cases.

Wilson. Wilson's English Common Pleas

Reports; Wilson's English Chancery Reports; Wilson's English Exchequer Equity Reports; Wilson's Indiana Superior Court Reports; Wilson's Oregon Reports (1-2 Oregon).

Win. or Winch. Winch's Reports, English Common Pleas.

Winst. (N. Car.). Winston's North Carolina Law Reports.

Winst. Ch. (N. Car.). Winston's North Carolina Equity Reports.

Winst. L. (N. Car.). Winston's North Carolina Reports.

Wis. Wisconsin Reports.

Wis. Leg. News. Wisconsin Legal News.

Wisc. Wisconsin Reports.

Withr. (Iowa). Withrow's Iowa Reports (9-20 Iowa).

Withr. Corp. Cas. Withrow's American Corporation Cases.

Withr. & S. Dig. Iowa. Withrow and Stiles's Digest of Iowa Reports.

Wkly. L. Bul. Weekly Law Bulletin and Ohio Law Journal, Columbus.

Wm. Bl. William Blackstone's English King's Bench Reports.

Wm. Rob. William Robinson's New Admiralty Reports, English Admiralty.

Wms. Peere Williams's English Chancery Reports.

Wms. (Mass.). Williams's Massachusetts Reports (1 Massachusetts).

Wms. (Vt.). Williams's Vermont Reports (27-29 Vermont).

Wms., or Wms. P. Peere Williams's Reports, English Chancery.

Wms. Ann. Reg. Williams's Annual Register, New York.

Wms. Ex. Williams on Executors.

Wms. Notes. Williams's Notes to Saunders's Reports.

Wms. P. Peere Williams's Reports, English Chancery.

Wms. P. P. Williams on Personal Property.

Wms. Peere. Peere Williams's English Chancery Reports.

Wms. R. P. Williams on Real Property.

Wms. S. Williams's Notes to Saunders's Reports.

Wms. Saund. Notes to Saunders's Reports, by the late Sergeant Williams; continued to the present time by the Right Hon. Sir Edward Vaughan Williams, 1871.

Wol. Wollaston's English Bail Court Reports.

Wolf. & B. El. Cas. Wolferstan and Bristow's English Election Cases.

Wolf. & D. El. Cas. Wolferstan and Dew's English Election Cases.

Woll., or Woll. P. C. Wollaston's English Bail Court Reports.

Wood. Woods's United States Circuit Court Reports; Wood's English Tithe Cases.

Wood. (U. S.). Woods's United States Circuit Court Reports.

Wood Decr., or Wood H. Hutton Wood's Decrees in Tithe Cases.

Wood Tithe Cas. Wood's Tithe Cases.

Wood. Tr. Woodfall's Celebrated Trials, Eng.

Wood. & M., or Woodb. & M. (U. S.). Woodbury and Minot's United States Circuit Court Reports.

ABDICATE. (See, generally, PUBLIC OFFICERS.)—To resign an office.¹

- Woodf. L. & T.** Woodfall on Landlord and Tenant.
Woodm. Cr. Cas. Woodman's Reports of Thacher's Criminal Cases, Massachusetts.
Woods (U. S.). Woods's United States Circuit Court Reports.
Wool., or Woolw. (U. S.). Woolworth's United States Circuit Court Reports.
Woolw. (Neb.). Woolworth's Reports, Nebraska Supreme Court (1 Nebraska).
Woolw. (U. S.). Miller's United States Circuit Court Decisions, by Woolworth.
Word. Elect. Cas. Wordsworth's Election Cases.
Wr., or Wr. (Pa.). Wright's Pennsylvania Reports (37-50 Pennsylvania State).
Wr. Ch., or Wr. (O.). Wright's Chancery Reports, Ohio.
Wr. N. P. (O.). Wright's Nisi Prius Reports, Ohio.
Wright (O.). Wright's Reports, Ohio Supreme Court, at Law, and in Chancery.
Wright (Pa.). Wright's Reports, Pennsylvania Supreme Court (37-50 Pennsylvania State).
Wright N. P. Wright's Nisi Prius Reports, Ohio.
Ws. Exs. Williams on Executors and Administrators, 8th ed.
Wy. Wyoming Reports; Wythe's Virginia Chancery Reports.
Wy. Cin. L. Bul. Weekly Cincinnati Law Bulletin.
Wy. Dick. Wyatt's Dickens's Chancery Reports.
Wy. Jur. Weekly Jurist.
Wy. L. Gaz. Weekly Law Gazette.
Wyatt, W. & A'B. Eq. Wyatt, Webb, and A'Beckett's Equity Reports, Victoria.
Wyatt, W. & A'B. I. P. & M. Wyatt, Webb, and A'Beckett's Insolvency, Probate, and Matrimonial Reports, Victoria.
Wyatt, W. & A'B. Min. Wyatt, Webb, and A'Beckett's Mining Cases, Victoria.
Wyatt, W. & A'Beckett. Wyatt, Webb, and A'Beckett's Victorian Reports.
Wyatt & W. (Viot.). Wyatt and Webb's Victorian Reports.
Wyatt & W. Law. Wyatt and Webb's Law Reports, Victoria.
Wym. Wyman's Reports, Bengal.
Wynne. Wynne's Boville Patent Cases.
Wyo. Wyoming Reports.
Wyo. T. Wyoming Territory Reports.
Wythe (Va.), or Wythe Ch. Wythe's Reports, Virginia High Court of Chancery.
Y. Yeates's Pennsylvania Reports.
Y. B. Year Books, English King's Bench, etc.
Y. B. Edw. I. Year Books of Edward I., English King's Bench.
Y. B. S. C. Year Books, Selected Cases.
Y. & C. Ch. Young and Collyer's English Exchequer Equity Reports.
Y. & C. Ex. Young and Collier's English Exchequer Cases.
Y. & C. V. C. Young and Collyer's English Vice-Chancellors' Reports.
Y. & J. Young and Jervis's English Exchequer Reports.
Yale L. J. Yale Law Journal.
Yates Sel. Cas. (New York). Yates's Select Cases, New York.
Yea., or Yeates (Pa.). Yeates's Pennsylvania Reports.
Yel. or Yelv. Yelverton's English King's Bench Reports.
Yerg. (Tenn.). Yerger's Tennessee Supreme Court Reports.
York Leg. Rec. York Legal Record.
You. Young's Reports, English Exchequer Equity.
You. & Coll. Ch. Young and Collyer's English Chancery Cases.
You. & Coll. Ex. Young and Collyer's Reports, Exchequer Equity.
You. & Jer. Young and Jervis's Reports, English Exchequer.
Young (Minn.). Young's Minnesota Reports (21-26 Minnesota).
Young Adm. (Nova Scotia). Young's Nova Scotia Admiralty Decisions.
Young M. L. Cas. Young's Maritime Law Cases, English.
Younge. Younge's English Exchequer Equity Reports.
Younge & Coll. Ch. Younge and Collyer's English Vice-Chancellors' Reports.
Younge & Coll. Ex. Younge and Collyer's English Exchequer Equity Reports.
Younge & J. Younge and Jervis's Exchequer Reports.
Younge's Adm. Dec. (Can.). Young's Admiralty Decisions.
Zab. (N. J.). Zabriskie's New Jersey Reports.
Zinn. Lead. Cas. Zinn's Leading and Select Cases on the Laws of Trust.

1. Where a policeman, appointed under the Act of 1853 by the legislature of New York, was by virtue of the Act of 1857 continued on the police force, but while obeying the commissioners under the Act of 1853, refused to act under the new board of police on the ground that the Act of 1857 was unconstitutional, it was held that such conduct did not amount to an *abdication*. *People v. Board of Police*, 26 Barb. (N. Y.) 487. The court said: "Lord Somers, in his speech delivered in 1688, when James II. vacated the throne, said: 'The word *abdicate* doth naturally and properly signify entirely to renounce, throw off, disown, relinquish any thing or person, so as to have no further to do with it; and that whether it be done by express words, or in writing, or by doing such acts as are inconsistent with the holding and retaining of the thing.' *** But, nevertheless, whatever may be the manner by which the incumbent of an office indicates his intention of resigning or *abdicating* it, whether by acts inconsistent with the retention of the office, or by a formal renunciation of it, it is never consummated—he is never legally out of office—until his resignation is accepted, either expressly or by the appointment of another in his place."

ABDUCTION.

- I. DEFINITION, 163.**
- II. ABDUCTION OF WIFE, 163.**
 - 1. *Rights of Husband—General Rule, 163.*
 - 2. *Gist of the Action, 164.*
 - 3. *When Action does not Lie, 164.*
 - 4. *Remedy by Habeas Corpus, 165.*
- III. ABDUCTION OF HUSBAND, 166.**
 - 1. *Remedies of Wife—Common-law Rule, 166.*
 - 2. *Modern Decisions, 166.*
 - 3. *Gist of the Action, 167.*
 - 4. *When Action does not Lie, 167.*
 - 5. *Wife's Right to Habeas Corpus, 167.*
- IV. ABDUCTION OF CHILD, 167.**
 - 1. *Rights of Parents—General Rule, 167.*
 - 2. *Gist of the Action, 168.*
 - 3. *When Action does not Lie, 169.*
- V. MEASURE OF DAMAGES, 171.**
 - 1. *In Action by Husband, 171.*
 - 2. *In Action by Wife, 172.*
 - 3. *In Action by Parent, 172.*
- VI. ABDUCTION AS A CRIME, 173.**
 - 1. *Common-law Rule, 173.*
 - 2. *Under the Statutes, 173.*
 - a. *In General, 173.*
 - b. *The Taking, 174.*
 - (1) *What Constitutes, 174.*
 - (2) *Gist of the Offense, 175.*
 - (3) *When Offense Complete, 176.*
 - (4) *From Parent's Custody, 176.*
 - (5) *Purpose of the Taking must be Proved, 177.*
 - 3. *Defenses, 178.*
 - a. *What are, 178.*
 - (1) *Connivance of Parent, 178.*
 - (2) *Justifiable Taking, 178.*
 - b. *What are not, 178.*
 - (1) *Consent of Female, 178.*
 - (2) *Ignorance of Age, 179.*
 - (3) *Previous Unchastity, 179.*
 - (4) *Parent's Harsh Treatment, 179.*
 - (5) *Merger of Offense, 179.*
- VII. EVIDENCE, 179.**
 - 1. *On Abduction of Wife, 179.*
 - a. *Statements of Wife, 179.*
 - b. *Acts of Husband, 180.*
 - c. *Declarations of Third Person, 180.*
 - 2. *On Abduction of Husband, 180.*
 - 3. *On Abduction of Child, 180.*
 - a. *Age of Child, 180.*
 - b. *Of Parents' Consent, 181.*
 - c. *Of Legal Custody, 181.*

- d. Of Female's Moral Character*, 181.
- e. In Mitigation of Damages*, 181.
- 4. *Evidence of Intent and Motive*, 181.
- 5. *Statements and Acts of Defendant*, 181.
- 6. *Corroborative Evidence*, 182.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see 1 *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, p. 50.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *APPRENTICE*; *CRIMINAL LAW*; *EXTRADITION*; *GUARDIAN AND WARD*; *HUSBAND AND WIFE*; *KIDNAPPING*; *MASTER AND SERVANT*; *PARENT AND CHILD*; *RECAPTION*; *SE-
DUCTION*.

I. DEFINITION.—Abduction is the unlawful taking or detention, by force, fraud, or persuasion, of a person, as a wife, a child, or a ward, from the possession, custody, or control of the person legally entitled thereto.¹

II. ABDUCTION OF WIFE—1. **Rights of Husband—General Rule.**—Whoever by fraud, persuasion, or violence entices or takes a man's wife away from him is liable to the husband for the injury thereby done him.²

1. **Definition.**—Cent. Dict.; Webster's Dict.; Anderson's L. Dict.; State v. George, 93 N. Car. 567; Carpenter v. People, 8 Barb. (N. Y.) 606; Rob. El. Law, §§ 233, 236, 237; 3 Black. Com. 139; 2 Addison on Torts (4th ed.), p. 1099; Cooley on Torts (2d ed.), p. 225.

In State v. Chisenhall, 106 N. Car. 679, the court said: "'Our statute' (says Ashe, J., in State v. George, 93 N. Car. 567) 'is broad and comprehensive in its terms, and embraces all means by which the child may be abducted.' The crime is defined in the statute by the term 'abduction,' which is a term of well-known signification, and means, in law, 'the taking and carrying away of a child, a ward, a wife, etc., either by fraud, persuasion, or open violence.' Webster's Dict."

In People v. Seeley, 37 Hun (N. Y.) 192, the court in defining "abduction" says: "As the unlawful act mentioned in the statute constitutes the crime of abduction, we are aided in giving construction to the statute by the definition and meaning of the phrase 'abduction' as the same is used by jurists, law writers, and lexicographers. Blackstone defines abduction to be the taking or carrying away of the child of a parent, or the wife of a husband, either by fraud, persuasion, or open violence. (3 Black. Com. 139, 140.) When the word is used as a law phrase, Webster adopts and approves of this definition."

The word "abduction" is applied to the unlawful seizure or detention of a female for the purpose of marriage, concubinage, or prostitution. Brown's Law Dict., § 2; N. Y. Rev. Stat. 553, §§ 24, 26; 1 Russell on Crimes (9th Am. ed.) 940; 3 Black. Com., 139, 141.

2. **Remedies of Husband.**—By the common law the husband's remedy was by writ of ravishment or by an action of trespass *vi et armis, de uxore rapta et abducta*. 3 Steph. Com. 437; Fitzherbert Nat. Brev. 87; 3 Black. Com. 139.

The remedy did not lie in recovering possession of the wife, but in damages for tak-

ing her away. 3 Black. Com. 139; 2 Inst. 434.

The husband may also bring an action on the case to recover damages against whomsoever persuades or entices his wife to live separate from him without sufficient cause. 3 Black. Com. 139; Law of Nisi Prius 78. See Bro. Abr., tit. Trespass, 213; Bro. Abr. 207, 440; Winsmore v. Greenback, Willes 577; Higham v. Vanosdol, 101 Ind. 160; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100; Remsen v. Hay, N. Y. Wkly. Dig. 443; Friend v. Thompson, Wright (Ohio) 636; Perry v. Lovejoy, 49 Mich. 529; Heermance v. Janus, 47 Barb. (N. Y.) 120. Even if it be her own father. Bennett v. Smith, 21 Barb. (N. Y.) 439; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

Enticement must be Active.—The enticement must be caused by the defendant knowingly, and by direct and active interference. Schuneman v. Palmer, 4 Barb. (N. Y.) 225; Perry v. Lovejoy, 49 Mich. 529.

But it is not necessary that the defendant's conduct should be the sole cause of the wife's desertion; it is enough to support the action for enticing away if it is the controlling cause. Hadley v. Heywood, 121 Mass. 239.

Consent of Wife.—In Higham v. Vanosdol, 101 Ind. 160, the court, by Mitchell, J., said: "The husband's right of action is complete against any stranger who has lent countenance to the breaking up of his household, and it is no defense for such person to show that the wife consented, or that he did not otherwise persuade or entice her away, except to furnish the means and opportunity for the elopement, he himself carrying and keeping her away until at his pleasure she was returned. The wife had no power to consent." See White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; 1 Chit. Pl. 168; Lawyer v. Fritcher, 130 N. Y. 239.

Action Barred.—A recovery in an action of trespass *de uxore rapta et abducta* is a bar to an action on the case for enticing the wife

2. Gist of the Action.—The gist of the action by the husband lies in the loss of the *consortium*—the conjugal fellowship and comfort of his wife's society—which he is entitled to in law.¹

3. When Action does not Lie.—But where another harbors a man's wife in good faith, from motives of humanity, the husband has no right of action against him.² Nor has he any cause of action where the loss of his wife's society is due to his own brutality or tortious acts,³ or where she leaves him on

away. *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

This ruling is in accordance with the maxim *nemo debet bis vexari pro eadem causa*.

1. Loss of Wife's Society Gist of the Action.—1 Robinson's Elementary Law 233; Cooley on Torts (2d ed.) 224; *Perry v. Lovejoy*, 49 Mich. 531; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Barnes v. Allen*, 1 Keyes (N. Y.) 394; *Winsmore v. Greenbank*, Willes 577; *Schuneman v. Palmer*, 4 Barb. (N. Y.) 227. See also *Bigaouette v. Paulet*, 134 Mass. 123.

In *Weeden v. Timtrell*, 5 T. R. 360, the court, by Ashurst, J., said: "The gist of the action is the loss of the comfort and society of the plaintiff's wife; that is always inserted in declarations of this kind as a material and substantial allegation, and the forms of pleading are evidence of the law."

The principle was carried further in *Bennett v. Smith*, 21 Barb. (N. Y.) 441, where the court by Strong, J., said: "The wife owes to the husband the duty of living with him, and seeking to promote his interests and happiness, and by preventing the performance of that duty a wrong is done to him, involving a pecuniary loss as well as a loss of peace and comfort in the marriage relation. Whoever is the wrongdoer, whether the father of the wife or any other person, he should be subject to an action for damages by the husband."

2. Harboring Wife in Good Faith.—*Philp v. Squire*, Peake 82; *Schuneman v. Palmer*, 4 Barb. (N. Y.) 225; *Turner v. Estes*, 3 Mass. 317; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196. See *Hilliard on Torts* 509, 510; Cooley on Torts (2d ed.) 265.

Where a third person harbors a man's wife the burden is upon the husband, in an action against such person, to establish the unworthy motives from which it was done, for when the defendant acts from motives of humanity and in good faith towards the wife the action will not lie; because the wife is an individual, having separate rights which the law will uphold and protect against her husband, amongst which is the right to invoke and receive shelter and protection against his cruelty and oppression. *Barnes v. Allen*, 1 Keyes (N. Y.) 390, 1 Abb. App. Dec. (N. Y.) 111.

In order to determine whether any wrong has been done the husband, for which an action will lie, the *quo animo* of the defendant's act is the material point of inquiry. *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196. See *Heermance v. Janus*, 47 Barb. (N. Y.) 124; *Schuneman v. Palmer*, 4 Barb. (N. Y.) 225; *Perry v. Lovejoy*, 49 Mich. 529. But in *Bennett v. Smith*, 21 Barb. (N. Y.) 441, it

was held that a person is liable without reference to his motives or intentions.

In *Tasker v. Stanley*, 153 Mass. 148, where an action was brought by a husband against certain persons for procuring and enticing his wife to live separately from him, the court, by Holmes, J., said: "In order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives; and so are all the cases." See *Modisett v. McPike*, 74 Mo. 636; *Rinehart v. Bills*, 82 Mo. 534, 52 Am. Rep. 385; *Hoard v. Peck*, 56 Barb. (N. Y.) 202; *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469; *Campbell v. Carter*, 3 Daly (N. Y.) 165; 2 *Hilliard on Torts* (3d ed.) 510.

Notice by Husband not to Harbor his Wife.—In *Philp v. Squire*, Peake 82, the plaintiff's wife came to the house of the defendant, to whose wife she was related, and represented that she was ill treated and that her husband had turned her out of doors. The plaintiff notified the defendant not to harbor her. Actual ill treatment was not proven. Lord Kenyon held that the action would not lie, and that it was of no consequence whether the wife's representations of ill treatment were true or not. Notice from the husband forbidding an outsider to harbor his wife is sufficient to show that it is against his will; and where one harbors the wife of another under a previous agreement, if he continues to harbor her after such notice by the plaintiff, it will amount to abduction. *Barbee v. Armstead*, 10 Ired. (N. Car.) 530, 51 Am. Dec. 404. See *Schuneman v. Palmer*, 4 Barb. (N. Y.) 225; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Turner v. Estes*, 3 Mass. 317.

The Old Law.—The modern decisions modify the severity of the old law, which "was so strict on this point that if one's wife missed her way upon the road it was not lawful for another man to take her into his house unless she was benighted and in danger of being lost or drowned." 3 Black. Com. 139; Bro. Abr., tit. Trespass, 213. See Bro. Abr. 207, 440.

3. Harboring Wife who Leaves Husband because of Ill Treatment.—*Winsmore v. Greenbank*, Willes 577; *Houlston v. Smyth*, 2 C. & P. 22, 12 E. C. L. 9; *Barnes v. Allen*, 1 Keyes (N. Y.) 394; *Johnson v. Allen*, 100 N. Car. 140; *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469. But see *Hadley v. Heywood*, 121 Mass. 236, where it was held that the fact that the plaintiff's cruelty con-

account of indifference to him, and not through the active interference of another.¹ The law also, basing its conclusions on the law of nature, allows larger privileges to parents in harboring a married daughter than it gives to strangers to shelter her, and they will be protected against the husband for doing so, especially where his conduct is such as to endanger his wife's safety, or is so immoral and indecent as to render him grossly unfit for her society.²

4. Remedy by Habeas Corpus.—Where a man's wife is kept in custody away from him and against her will, he is entitled to a writ of habeas corpus for the purpose of liberating her.³

tributed to his wife's leaving him was no defense to an action brought by the husband against the person who enticed her away.

Where a drunken husband neglects and abuses his wife, her father may recover and protect her and her children, and no action lies against him on the part of the husband. *Rabe v. Hanna*, 5 Ohio 530.

In *Berthon v. Cartwright*, 2 Esp. 480, it was held that any person may safely harbor a wife and not be liable to an action for abduction if the wife has been forced to leave her husband's house through ill treatment or fear of bodily injury. And see *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Smith v. Lyke*, 13 Hun (N. Y.) 204.

It has been held that parents will be justified in interfering if the appearances seem to indicate ill treatment or necessity for interference, although no occasion for interference really exists. *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 792.

In *Johnson v. Allen*, 100 N. Car. 140, the court, by Merrimon, J., said: "Mere ill treatment of the wife did not warrant the defendant in entertaining her, thus keeping and encouraging her to stay away and apart from her husband. The purpose and policy of the law are, that husband and wife shall live harmoniously together, and, if need be, that each shall endure the shortcomings of the other. They may not separate because of slight, or even serious, differences and disagreements, and mere ill treatment of one towards the other; and it is only when the husband treats his wife with violence—endangers her personal safety—that a stranger shall be justified in giving her continued shelter, support, and protection against the husband's will. Otherwise the strength and permanency of the marriage relation would be impaired, to the great detriment of family ties and the good order and wellbeing of society."

1. *Perry v. Lovejoy*, 49 Mich. 529. See *Barnes v. Allen*, 1 Keyes (N. Y.) 392; *Houlston v. Smyth*, 2 C. & P. 22, 12 E. C. L. 9.

2. **Right of Parents to Harbor and Protect Child.**—In *White v. Ross*, 47 Mich. 172, the facts were that there was a clandestine marriage between the plaintiff and the defendants' daughter, the daughter continuing to live with her parents; when the defendants heard of the marriage they were very angry and threatened violence if the daughter was taken away, but after a week's delay said she might go and live with the plaintiff if she wanted to, and no obstacle should be interposed; she expressed repugnance to her hus-

band, and determined to stay with her parents; there was no further evidence of solicitation or compulsion than as above. It was held that on these facts the parents would not be liable.

In *Bennett v. Smith*, 21 Barb. (N. Y.) 442, the court said: "In respect to what facts will support an action by a husband for depriving him of his wife, there is, in principle, a clear distinction between the cases where the action is against a parent of the wife, and where it is against a stranger. Parents are under obligations, by the law of nature, to protect their children from injury and relieve them when in distress. * * * Where the conduct of a husband is such as to endanger the personal safety of his wife, or is so immoral and indecent as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents ought to, and I have no doubt have, the right not only to receive her into and allow her the comforts of their house, which even a stranger may do in such a case, but also to advise her to come and remain there." To the same effect are *Turner v. Estes*, 3 Mass. 317; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Payne v. Williams*, 4 Baxt. (Tenn.) 583; *Glass v. Bennett*, 89 Tenn. 478; *Smith v. Lyke*, 13 Hun (N. Y.) 205; *Barnes v. Allen*, 1 Keyes (N. Y.) 390; *Burnett v. Burkhead*, 21 Ark. 77, 76 Am. Dec. 358; *Friend v. Thompson*, *Wright* (Ohio) 636; *Schoul. Dom. Rel.* (3d ed.) 57, 58. And a clear case of want of justification on the part of the parents should be required to be shown before they should be held responsible. *Cooley on Torts* (2d ed.) 265; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196.

Malice must be Proved.—Before an action will lie against the parents, the husband must prove malice on their part in enticing his wife away from him; not necessarily spiteful, malicious, or revengeful conduct, but such conduct injurious to the husband and intentionally personal as malice in law would be inferred from. *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Westlake v. Westlake*, 34 Ohio St. 635, 32 Am. Rep. 397. See *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 792; *Friend v. Thompson*, *Wright* (Ohio) 639; *Rabe v. Hanna*, 5 Ohio 530; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Campbell v. Carter*, 3 Daly (N. Y.) 165. The burden of proving malice is on the plaintiff. *Barnes v. Allen*, 1 Keyes (N. Y.) 390.

3. **Habeas Corpus.**—Spelling on Extra Rel., § 1314; *Ex p. Newton*, 2 Smith 617; *Rex v. Brooke*, 4 Burr. 1991; *Rex v. Clarkson*, 1

III. ABDUCTION OF HUSBAND—1. Remedies of Wife—Common-law Rule.—At common law the wife could not maintain an action for the abduction or enticement of her husband, because her legal being was merged entirely in his, and she had no standing in court; and also because all damages recovered belonged to him absolutely.¹

2. Modern Decisions.—It is held generally now that a wife may bring an action for damages against any one who in any way deprives her of the society, support, or protection of her husband. Such is the law in those states where by statute the wife has the right to sue in her own name for personal injuries and is otherwise freed from her common-law disabilities.²

Strā. 445; *Sanders v. Rodway*, 13 Eng. L. & Eq. 463, 16 Jur. 1005. See 1 Frās. Dom. Rel. 240, 241; Schouler Dom. Rel. (3d ed.) 48.

But where a wife is voluntarily, of her own desire and without any restraint, living apart from her husband, the court will not grant a habeas corpus on his application for the purpose of restoring her to his custody. *Ex p. Sandilands*, 12 Eng. L. & Eq. 463; Reg. v. Leggatt, 18 Q. B. 781, 83 E. C. L. 781; Rex v. Mead, 1 Burr. 542.

In Reg. v. Leggatt, 18 Q. B. 781, 83 E. C. L. 781, the court, by Lord Campbell, C. J., in refusing to grant the writ, said: "We have always felt great tenderness in dealing with writs of habeas corpus. * * * The object of a habeas corpus is to restore to liberty a person who has been unjustly deprived of it. * * * But here the wife is under no restraint whatever, and is by her own desire living with her son, from whom it is proposed to take her. Whether the husband has a right to the custody of her or not is a question *alieni fori*; we have no jurisdiction over it. If a writ of habeas corpus were to issue and the wife were to be brought before us, we could not compel her to return to her husband. She would be at liberty to go where she chose. If she has no good cause for remaining away from her husband, he may obtain a decree of the ecclesiastical court ordering her to return to him. This case is quite different from that of an infant. There the parent has a right to the custody of the child. * * * But a husband has no such right at common law to the custody of his wife."

1. Sir William Blackstone states the rule at common law thus: "We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom." 3 Black. Com. p. 142; *Postlewaite v. Postlewaite*, 1 Ind. App. 475. See also cases in succeeding notes in this section; and 26 Am. Law Rev. 36-49.

2. *United States*.—*Mehrhoth v. Mehrthoff*, 26 Fed. Rep. 13; *Waldron v. Waldron*, 45 Fed. Rep. 315.

Connecticut.—*Foot v. Card*, 58 Conn. 4, 23 Am. St. Rep. 258.

Illinois.—*Bassett v. Bassett*, 20 Ill. App. 543.

Indiana.—*Postlewaite v. Postlewaite*, 1 Ind. App. 473; *Wolf v. Wolf*, 130 Ind. 599; *Haynes v. Nowlin*, 129 Ind. 581.

Michigan.—*Warren v. Warren*, 89 Mich. 123.

New Hampshire.—*Seaver v. Adams* (N. H., 1890), 19 Atl. Rep. 776.

New York.—*Bennett v. Bennett*, 116 N. Y. 584; *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40; *Breiman v. Paasch*, 7 Abb. N. Cas. (Brooklyn City Ct.) 249; *Baker v. Baker*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 293; *Warner v. Miller*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 221; *Churchill v. Lewis*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 226; *Simmons v. Simmons* (Supreme Ct.), 4 N. Y. Supp. 221. See also *Manwarren v. Mason* (Supreme Ct.), 29 N. Y. Supp. 915.

Ohio.—*Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Clark v. Harlan*, 1 Cinc. Super. Ct. Rep. (Ohio) 418.

Conflicting Judgments.—Although the weight of authority seems to be in favor of placing the wife on an exact equality with the husband in this particular, and of giving her the right to bring an action on the case against whomsoever entices him away from her, yet there are many judgments which deny her this right. See *Van Arnan v. Ayers*, 67 Barb. (N. Y.) 544; *Mulford v. Clewell*, 21 Ohio St. 191; *Logan v. Logan*, 77 Ind. 558; *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79; *Doe v. Roe*, 82 Me. 503, 17 Am. St. Rep. 499.

In *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, it was held that the wife had no right, either at common law or under the statutes freeing her from her common-law disabilities, to the society, support, and affection of her husband, and that she could not maintain an action for damages for enticing him away. It would seem from the opinion that such right, together with the right to sue therefor, must be conferred expressly by statute.

In *Doe v. Roe*, 82 Me. 503, 17 Am. St. Rep. 499, the court, by Walton, J., said: "It is true that a husband may maintain an action for the seduction of his wife. But such an action has grounds on which to rest that cannot be invoked in support of a similar action in favor of the wife. A wife's infidelity may impose upon her husband the support of another man's child. And what is still worse, it may throw suspicion upon the legitimacy of his own children. A husband's infidelity can inflict no such consequences on his wife. An action in favor of the husband for the seduction of his wife has been regarded as of doubtful expediency. It has been abolished in England. * * * If such actions were maintainable by wives, such a power would furnish them with the means of inflicting untold misery upon others, with

3. Gist of the Action.—The gist of the action is the loss of the *consortium* or conjugal society of the husband.¹

4. When Action does not Lie.—In order to maintain the action the wife must affirmatively prove that the defendant was the abductor and enticer. The action will not lie when the loss of conjugal fellowship is due to her own or her husband's misconduct.²

5. Wife's Right to Habeas Corpus.—A wife may sue out a writ of habeas corpus for the unlawful abduction or detention of her husband.³

IV. ABDUCTION OF CHILD—1. Rights of Parents—General Rule.—A father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child by enticing or abducting such child away from him, or by harboring the child after he has left the father's house.⁴ The action lies also on behalf of the mother after the

little hope of redress for themselves. At any rate we are satisfied that the law never has, and does not now, secure to wives such a power, and if it is deemed wise that they should have it, the legislature and not the court must give it to them."

1. *Lynch v. Knight*, 9 H. L. Cas. 588; *Foot v. Card*, 58 Conn. 4, 23 Am. St. Rep. 258. See *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Clark v. Harlan*, 1 Cinc. Super. Ct. (Ohio) 418; *Baker v. Baker*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 293; *Warner v. Miller*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 221; *Churchill v. Lewis*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 226; *Jaynes v. Jaynes*, 39 Hun (N. Y.) 40; *Biglow on Torts* 153; *Cooley on Torts* 228, note.

In *Lynch v. Knight*, 9 H. L. Cas. 588, the court, by Campbell, L. C., said: "If there be shown a concurrence of loss and injury from the act complained of, we are bound to say this action lies. Nor can I allow that the loss of *consortium* or conjugal society can give a cause of action to the husband alone. I think it may be a loss which the law may recognize, to the wife as well as to the husband."

"If at common law the husband could maintain an action for the loss of the *consortium* of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of the *consortium* of the husband." *Gilmore, C. J.*, in *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

In *Clark v. Harlan*, 1 Cinc. Super. Ct. Rep. (Ohio) 422, the court, by Storer, J., said: "If the husband's right to claim damages for the loss of his wife's society, his *solatium*, as the civilians term it, arise by virtue of the contract of marriage, the same result, for stronger reasons, should follow the loss of the husband's *consortium* by the wife. His care of her whole social life, his protection from injury of her person, of her property, and of her good name, are alike demanded by the marital tie and the first principles of justice. He cannot lightly disregard the obligations he has solemnly assumed, or ignore the relation he bears to her to whom he has pledged his affections until the bond is severed by death or the judgment of the law."

2. Misconduct of the Parties.—*Warner v. Miller*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 221; *Churchill v. Lewis*, 17 Abb. N. Cas. (N.

Y. Supreme Ct.) 226; *Buckel v. Suss*, 28 Abb. N. Cas. (N. Y. Super. Ct.) 21.

Where a man frequents a bawdy-house it is held that the action of abduction or enticement will not lie against the keeper on mere evidence of such frequenting. *Churchill v. Lewis*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 226.

A wife cannot maintain an action for enticing away her husband where the evidence shows that she herself left him and applied for a divorce. *Buckel v. Suss*, 28 Abb. N. Cas. (N. Y. Super. Ct.) 21.

3. Right of Wife to Writ of Habeas Corpus.—*Spelling Extra Rel.*, § 1314; *Cobbett v. Hudson*, 15 Q. B. 988, 69 E. C. L. 988; *Ex p. Cobbett*, cited in 15 Q. B. 181, note (b), 69 E. C. L. 181.

In the Matter of *Ferrens*, 3 Ben. (U. S.) 445, the court, by Blatchford, J., said: "It has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a habeas corpus to inquire into the cause of his detention. In the case of *People v. Mercein* (3 Hill (N. Y.) 407) the Supreme Court of New York intimate that such authority from the person detained is not ordinarily necessary. In the case of *Ashby and White* (14 Howell's State Trials 814) the House of Lords in England, in 1704, resolved 'that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents or friends, to apply for and obtain a writ of habeas corpus in order to procure his liberty by due course of law.' This resolution was assented to by the House of Commons (page 826). In the present case the petitioner states, in her petition, that she is the wife of the recruit, and is dependent upon him for support. This is, I think, sufficient to authorize her to prosecute the writ."

4. Right of Father in Case of Abduction of Child.—*Schouler Dom. Rel.* (3d ed.), § 260; 2 *Hilliard on Torts* (3d ed.) 519, 521; *Kirkpatrick v. Lockhart*, 2 Brev. (S. Car.) 276; *Sargent v. Mathewson*, 38 N. H. 54; *Everett v. Sherfey*, 1 Iowa 356; *Steele v. Thacher*, Ware (U. S.) 91; *Jones v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98. See *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; *Plummer v. Webb*, Ware (U. S.) 75; *Grand Rapids*, etc., R. Co.

father's death,¹ or on behalf of one standing *in loco parentis*.²

2. Gist of the Action.—The gist of the action for the abduction of a child would seem to be not the loss of service, but the loss to the parent of the comfort and society of the child, though the authorities are not in harmony upon the question.³

v. Showers, 71 Ind. 451; *Thompson v. Howard*, 31 Mich. 308; *Emerson v. Howland*, 1 Mason (U. S.) 45; *Hills v. Hobert*, 2 Root (Conn.) 48; *Caughey v. Smith*, 47 N. Y. 244.

It is doubtful whether under the old law a father had a right of action for the abduction of any of his children other than his son and heir. The question was raised in *Barham v. Dennis*, Cro. Eliz. 770, where it was held that he had not, though the opposite view was also set forth. However, since the abolition of military tenures the action for the abduction and marriage of an heir is gone, and a parent now, in the same manner as a husband for the abduction of his wife, may proceed against the abductor of any of his children by writ of ravishment or action of trespass *vi et armis de filio vel filia raptio vel abducto*. 3 Black. Com. 140, 141; *Fitzherbert Nat. Brev.* 90; *Gray v. Jefferies*, Cro. Eliz. 55.

1. Mother's Right of Action.—*Jones v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98.

The action must be on the case and not trespass *vi et armis*. In the analogous case of an action for seduction, the same doctrine is held. *Gray v. Durland*, 50 Barb. (N. Y.) 100; *Dedham v. Natick*, 16 Mass. 135; *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339; *Furnam v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441.

On habeas corpus proceedings it has been held that a mother has no legal authority over her minor child and no right to his services. This is placed on the ground that at common law she was not bound to support him. *Com. v. Murray*, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; *Logan v. Murray*, 6 S. & R. (Pa.) 175, 9 Am. Dec. 422; *South v. Denniston*, 2 Watts (Pa.) 477; *Coon v. Moffit*, 3 N. J. L. 169, 4 Am. Dec. 392; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338.

In *Worcester v. Marchant*, 14 Pick. (Mass.) 510, it was held that under *Massachusetts Stat.* 1784, c. 72, § 11, which provides that every master of a ship who shall carry or transport out of Massachusetts an infant, etc., without the consent of his parent, etc., shall be liable for the damages sustained by the parent, etc., in a special action on the case, no action could be maintained by an infant's mother or stepfather, because they have no legal right to the minor's society or services.

2. One in Loco Parentis.—In *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593, the court, by Ashburn, J., said: "To recognize the doctrine that one standing *in loco parentis*, clothed with the lawful custody of an infant under five years old, has no legal capacity to sue or maintain an action for damages, either general or special, against the child thief, would be an unwarranted restriction

upon the common-law rights of the citizen. It would be no less restrictive to hold that no action can be maintained for such cause, by reason of the fact that the infant, because of its tender years, is unable to render any valuable services. The action rests upon the right to service, and not upon actual services."

See also *State v. Bratton*, 15 Am. Law Reg. N. S. 359; *State v. Smith*, 6 Me. 462; *Dumain v. Gwynne*, 10 Allen (Mass.) 272; *Cone v. Dougherty*, 1 Pa. Leg. Gaz. 13; *Ex p. Waldron*, 13 Johns. (N. Y.) 418; *U. S. v. Green*, 3 Mason (U. S.) 482; *Mercein v. People*, 25 Wend. (N. Y.) 101; *Gishwiler v. Dodez*, 4 Ohio St. 615; *Ex p. Shumput*, 6 Rich. (S. Car.) 344; *Lyons v. Blenkin*, Jac. 245.

A person standing *in loco parentis* is entitled to maintain this action the same as one who is actually the parent. *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302.

Guardian.—A guardian has the same right of action as a father when his ward is stolen or ravished away from him. 3 Black. Com. 141; *Fitzherbert Nat. Brev.* 90, 139; 2 P. Wms. (Eng.) 108; 12 Car. II. c. 24.

Stepfather.—But the rule does not extend to a stepfather. See *Worcester v. Marchant*, 14 Pick. (Mass.) 510; *Tubb v. Harrison*, 4 T. R. 118; *Freto v. Brown*, 4 Mass. 676. Unless he voluntarily assumes the care and support of a stepchild. The test of the relationship is whether a person holds the child out as a member of his own family. *St. Ferdinand Loretto Academy v. Bobb*, 52 Mo. 357; *Cooper v. Martin*, 4 East 77; *Sharp v. Cropsey*, 11 Barb. (N. Y.) 224. As to an adopted child, see *Brown v. Welsh*, 27 N. J. Eq. 429.

Master and Apprentice.—An indictment will not lie against a man for enticing an apprentice to leave his master's service; for such wrong is of a private nature, and to the prejudice of a single person only. The remedy is by action on the case. *Reg. v. Daniell*, 6 Mod. 99.

3. Abduction of Child—Gist of the Action.—In *Kirkpatrick v. Lockhart*, 2 Brev. (S. Car.) 276, a father was held entitled to damages in an action of trespass *vi et armis* for the abduction of his daughter, although it was not laid in the declaration that he thereby lost the services of his child, and although there was no evidence of a forcible taking. The court, by Brevard, J., said: "I mention these cases to exhibit the true foundation of these kinds of actions, and to show that the allegation of special damage *per quod* is founded on a mere fiction, which seems to have been suggested by a narrow technical mind, or to have originated in a base and sordid principle of pecuniary interest. In truth and justice it forms no essential ingredient in the cause of action, and is unworthy of the notice of an enlightened and feeling judicatory. We

3. When Action does not Lie.—The fact that persons who harbor and employ a child know that he wrongfully left his father's service will not support the father's action against them for enticing him away; the father must prove that inducements were presented to the child, while in his custody and service, which caused him to leave it.¹

Emancipation or Abandonment of Child.—A parent may lose his right of action by emancipating his child or by turning him away or abandoning him.²

are, therefore, of opinion there is no necessity to resort to this absurd fiction to support an action so well founded in justice, reason, and policy. The true ground of action cannot be the loss of service, for a child may be of an age so tender or of a constitution so delicate as to be incapable of rendering any service. The true ground of action is the outrage and deprivation; the injury the father sustains in the loss of his child; the insult offered to his feelings; the heart-rending agony he must suffer in the destruction of his dearest hopes, and the irreparable loss of that comfort and society which may be the only solace of his declining age." See also *Redford v. McKowl*, 3 Esp. 119.

In *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593, it was held that the action rested upon the right to service, and not upon actual service.

There seems to be no reason why a parent or one standing *in loco parentis* may not sue on either ground, but he cannot do so upon both. In *Thompson v. Howard*, 31 Mich. 308, it was held that a person cannot take contradictory positions, and where he has a right to choose one of his modes of redress his election of one will preclude him from adopting the other. Therefore where the father brought an action on the case for the unlawful enticing away and harboring his minor son, after he had first brought assumpsit for the son's wages during the same period on the basis of an implied contract, and after a trial had submitted the case to the jury and upon their disagreeing had discontinued the suit, it was held that the action on the case would not lie.

In *Evans v. Walton*, L. R. 2 C. P. 615, where the plaintiff's daughter, who was about nineteen years of age, resided with him as a member of his family, and assisted him in his business, procured her mother's consent to her quitting her home for a few days by means of a fictitious letter of invitation dictated by the defendant, and the defendant then took her to a lodging-house, where she cohabited with him for nine days and then returned home, it was held that there was a sufficient continuing relation of master and servant *de facto*, and sufficient evidence of a wrongful enticing away of the daughter by the defendant, to entitle the father to maintain the action, although there was no allegation that the defendant debauched her or that there was any binding contract of service between her and the plaintiff. See *Hall v. Hollander*, 4 B. & C. 660, 10 E. C. L. 436.

1. *Butterfield v. Ashley*, 2 Gray (Mass.) 254, 6 Cush. (Mass.) 249. In this case a minor ran away from his parent and went

to Boston. He told the defendant, a ship-owner, that he had run away and wanted to ship with him. The defendant at first refused, but consented later on the representation that the boy had his father's consent. He signed shipping articles, and afterwards requested to be released. In a suit for damages for enticing away a minor servant, it was held that the facts presented did not constitute an enticement, as there was no active interference on the part of the defendant to cause the original leaving. 1 Black. Com. 429; 3 Black. Com. 142; Reeve Dom. Rel. (3d ed.) 6291; 2 Chit. Pl. (6th Am. ed.) 546.

In *Stuart v. Simpson*, 1 Wend. (N. Y.) 376, it was held that the defendant must have knowledge that the persons he employed were the servants of another, and that such facts must be shown by the plaintiff. See 3 Stark. Ev. (Met. ed.) 1310.

Child Harbored, etc., by Defendant with Knowledge.—But where the action is for harboring the child, if the defendant knows that he has run away from his father, and boards him and allows him to work on his farm as he pleases, and does so with the intention of encouraging him, or with the knowledge that he was aiding or encouraging him, to remain away from his father, the person so harboring the child becomes liable to the father. *Sargent v. Mathewson*, 38 N. H. 54. See *Cutting v. Seabury*, Sprague (U. S.) 522.

Notice from the Parent.—The action will lie also after notice has been given the defendant that he is employing the minor child of another, if he so continues to employ him. *Sherwood v. Hall*, 3 Sumner (U. S.) 127. See *Ferguson v. Tucker*, 2 Har. & G. (Md.) 182; *Blake v. Lanyon*, 6 T. R. 221; *Everett v. Sherfey*, 1 Iowa 356.

In *Conant v. Raymond*, 2 Aik. (Vt.) 243, which is *in pari materia*, it was held that if a master whose apprentice has wrongfully left his service gives out that he will not receive him again, others may lawfully employ him, although specially notified by the master not to harbor him, unless the master also makes known a change of resolution and signifies a willingness to receive the apprentice back again.

2. Parent Emancipating or Abandoning Child.—*Everett v. Sherfey*, 1 Iowa 356; *Wodell v. Coggeshall*, 2 Met. (Mass.) 89, 35 Am. Dec. 391; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593. See also *Whiting v. Earle*, 3 Pick. (Mass.) 202, 15 Am. Dec. 207; *Jenny v. Alden*, 12 Mass. 378; *Nightingale v. Withington*, 15 Mass. 275, 8 Am. Dec. 101; *Benson v. Remington*, 2 Mass. 115; *Angel v. McLellan*, 16 Mass. 28, 8 Am. Dec. 118; *Whipple v. Dow*, 2 Mass. 415; *Freto v. Brown*, 4 Mass. 675; *Dawes v. Howard*, 4 Mass. 99; *Com. v. Ham-*

Enticement of Daughter for Purpose of Marriage.—The enticement of a daughter away from her father for the purpose of marriage, if such marriage is actually consummated, will not give the father a right of action against her abductor.¹

ilton, 6 Mass. 273; *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73; *Canovar v. Cooper*, 3 Barb. (N. Y.) 115; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Chilson v. Philips*, 1 Vt. 41; *Gale v. Parrot*, 1 N. H. 28; *Keen v. Sprague*, 3 Me. 77; *Sumner v. Sebec*, 3 Me. 223; *Plummer v. Webb*, 4 Mason (U. S.) 380; *Rex v. Wilmington*, 5 B. & Ald. 525; *Com. v. Murray*, 4 Binn. (Pa.) 492, 5 Am. Dec. 112; *Eubanks v. Peak*, 2 Bailey (S. Car.) 497.

Father and Mother Living Apart—Child in Care and Custody of Mother.—In *Steele v. Thacher*, Ware (U. S.) 91, the facts showed that the plaintiff's son was living away from home and had made a verbal apprenticeship with another to learn the barber's trade; that he had been discharged and had shipped with the defendant as the emancipated apprentice of the barber. The plaintiff brought a libel in admiralty for the wrongful abduction of his minor child. The defendant, among other things, denied the relationship of parent and child. Ware, J., in speaking of the parents' right to the custody and control of their minor children, said: "But these parental rights may, like other rights, be waived or renounced, and that either expressly or by implication. The parent may renounce his right to the earnings of his child, by a special agreement with the child that he shall have the exclusive enjoyment of them himself. Besides, these parental rights are connected with parental duties, and may be forfeited by a neglect of these duties. The parent is bound to maintain, to protect, and to educate his child. * * * His right of control over the person of his child * * * has its foundation in the performance of these duties." If the parent turns his child out of his house and refuses to maintain him, or if he abandons all care of him, suffers him to go at large, * * * he forfeits his right of control over his person."

In *Wodell v. Coggeshall*, 2 Met. (Mass.) 89, 35 Am. Dec. 391, the father brought an action of trespass on the case for enticing his minor child from his care, custody, and control. The defendant denied that the father had the care, custody, and control of the child at the time of the alleged enticement. The evidence showed that the son had not lived with his father for several years, nor had he received any aid or support from him; that the father and mother lived apart, and the son had made his home with his mother, and that at her solicitation the defendant had shipped him for a whaling voyage. There was also evidence to show that the father had a boarding-place; that the son might have resided with him; and that the father had not consented to his living with his mother; also, that before the vessel put to sea he had forbidden the defendant to take away his son. The jury were instructed that to maintain an action for enticing away a minor "it must appear that the son was under the care and custody

of the father, and that the defendants took him from the father's employment; that if he actually suffered his son to remain under the custody of the mother, to be supported and employed by her, he could not aver that the son was enticed from his care and custody; and that if the defendant found the boy in the care and custody of the mother, as far as she could control him, and so far as he was under the care and control of any one, then the plaintiff could not aver that the defendants seduced the son from his service. * * * Also, that proof of notice to the defendant * * * that the boy was his son, and forbidding him to take him, was not alone sufficient to enable him to maintain this action; and that he must show something more, namely, that the boy was under his custody and care when he shipped." The jury returned a verdict for the defendants. It was held that there was no error in the instructions. See 2 Kent Com. (13th ed.) 192 and note; *Com. v. Dougherty*, 1 Pa. Leg. Gaz. 63.

Reassertion of Control after Emancipation.—In *Everett v. Sherfey*, 1 Iowa 356, the facts showed that the father and son had a quarrel, and that the son left home and worked for various people for some time without any objections from his father; that the father had by publication in the newspapers warned all persons against trusting the son on his credit; that the son went to live with the defendants, and after he had been there several months, the plaintiff gave notice to the defendants not to harbor or employ his son. It was held that the father had emancipated his son, and the defendants were not liable for any acts up to the time of the notice; but that a father might reassert his control over his son, and that the defendants were liable for harboring after notice from the plaintiff. See also 2 Kent Com. (13th ed.) 194.

1. Enticement for Purpose of Marriage.—*Jones v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98. The reason for this rule is that the action being founded on the right of the parent to the control of his child, where there is a valid marriage the rights of the husband are superior to those of the parent. *Goodwin v. Thompson*, 2 Greene (Iowa) 329; *Aldrich v. Bennett*, 63 N. H. 415, 56 Am. Rep. 529; *Hervey v. Moseley*, 7 Gray (Mass.) 479, 66 Am. Dec. 515; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Holland v. Beard*, 59 Miss. 161, 42 Am. Rep. 360.

In *Hills v. Hobert*, 2 Root (Conn.) 48, the evidence showed that the defendant was being prosecuted by the plaintiff and his daughter for seducing her; that he hired another person to court and marry her, fraudulently representing him to be a man of property, and after they were married to give a joint discharge of all liability under the bastardy prosecution. In an action by the father against the defendant for procuring the enticement and marriage of his daughter, it was held on demurrer that the action would lie.

V. MEASURE OF DAMAGES—1. In Action by Husband.—Where an action is brought by a husband for the abduction of his wife, the measure of damages must depend upon the previous relations of the parties; and this is a question for the jury.¹

Mother's Consent Procured by Fraud.—Consent of the mother to the child's leaving home, if obtained by fraud, is no defense to an action for enticing away such a child. *Kreag v. Anthus*, 2 Ind. App. 482; *Evans v. Walton*, L. R. 2 C. P. 615.

Request of Mother.—Nor is it a defense that the defendant took the child at the request of its mother whom he believed to be the lawful custodian. *Rice v. Nickerson*, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

Immorality on the Part of the Father and Family, or previous sexual intercourse by the child, is no defense for enticing away the child. *Dobson v. Cothran*, 34 S. Car. 518.

1. Dependent upon Prior Relations of the Parties.—*Cooley on Torts* (2d ed.) 263, 264.

In *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791, the court, by Okey, J., said: "A man properly demeaning himself is entitled to the society and assistance of his wife against all the world. Whoever unlawfully deprives him of such society or assistance is liable to an action. In estimating damages, however, each case must be determined by the circumstances attending it, and the motive of the intervening person must be ever kept in view. The cases may be properly divided into two classes: one where a villain interferes for the purpose of seduction, or the sole ground of interference is malice; the other where friends, usually parents, interfere for the protection of the wife and the offspring, if any. In the first class the husband, if without fault, is always entitled to damages; in the latter, if the motive of the intervening person was pure, and the appearances seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed. Much will be forgiven the parents of a wife who honestly interfere in her behalf, though the interference was wholly unnecessary, and may have been detrimental to her interest and happiness, as well as that of her husband; still, where the motive is not protection of the wife, but hatred and ill-will of the husband, it is no answer to his action for such interference that the offenders were his wife's parents. *Friend v. Thompson*, Wright (Ohio) 639; *Rabe v. Hanna*, 5 Ohio 530." See *Johnson v. Allen*, 100 N. Car. 131.

Reason of the Rule.—Any unhappy relations existing between the plaintiff and his wife, not caused by the conduct of the defendant, may affect the question of damages, and are properly submitted to the jury; but they are in no sense a justification or palliation of the defendant's conduct. They are allowed to affect the damages, not because the acts of the defendant are less reprehensible, but because the conduct of the husband is such that the injury which such acts occasion is less than it otherwise might have been. *Hadley v. Heywood*, 121 Mass. 239.

Previous Relations Shown by Statements of Letters of Wife.—Statements made or letters written by the wife may be proved to show the previous state of their relations. *Willis v. Bernard*, 8 Bing. 376, 21 E. C. L. 325. See *Palmer v. Crook*, 7 Gray (Mass.) 418; *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469; *White v. Ross*, 47 Mich. 172.

What may be Shown in Mitigation of Damages—Common Drunkard.—The fact that the husband is a common drunkard or otherwise a man of bad character will not mitigate damages. *Norton v. Warner*, 9 Conn. 172. See, *contra*, — *v. Moor*, 1 M. & S. 284.

Connivance.—But it is competent to show that he had suffered no damage by reason of his conniving at his wife's wantonness or allowing her to prostitute herself: *volenti non fit injuria*.

Turning Wife out of Doors—Association by her with Lewd Women.—Or if he turns her out of doors, or she associates with lewd women, it shows that her society was of no value to him. *Norton v. Warner*, 9 Conn. 172; *Duberley v. Gunning*, 4 T. R. 651.

Ill Temper.—Intolerable ill temper may be proved in mitigation. 1 Selw. N. P. 30.

Husband's Infidelity.—So, also, may the man's infidelity to his wife be proved in mitigation. *Bromley v. Wallace*, 4 Esp. 237; *Hodges v. Windham*, Peake 39; *Wyndham v. Wycombe*, 4 Esp. 16.

Husband's Social Position.—It has been held in the *United States* that the rank or quality of the plaintiff will not affect the question of damages. *Norton v. Warner*, 9 Conn. 174; *Buford v. M'Luny*, 1 Nott & M. (S. Car.) 277. See Decl. Ind., § 1.

But a different opinion seems to prevail in *England*. 3 Black. Com. 140; Esp. Dig. 343 (ed. 1794).

Pecuniary Circumstances of Defendant as Enhancing the Damages.—And it has been held that evidence of the pecuniary circumstances of the defendant may be given in order to enhance the damages. *Johnson v. Allen*, 100 N. Car. 139. See *Adcock v. Marsh*, 8 Ired. (N. Car.) 360; *Howell v. Howell*, 10 Ired. (N. Car.) 84; *McAulay v. Birkhead*, 13 Ired. (N. Car.) 28, 55 Am. Dec. 427; *Reeves v. Winn*, 97 N. Car. 246, 2 Am. St. Rep. 287; *Bradley v. Morris*, Busb. (N. Car.) 395; *Smithwick v. Ward*, 7 Jones (N. Car.) 64, 75 Am. Dec. 453.

Punitive Damages.—Punitive damages may be recovered when abduction is accompanied by seduction. *Johnson v. Allen*, 100 N. Car. 131.

But a man who estranges a wife's affections is liable, although there is no elopement or adultery. *Rinehart v. Bills*, 82 Mo. 534, 52 Am. Rep. 385. Or if he takes her with her own consent, but against her husband's. *Higham v. Vanosdol*, 101 Ind. 160.

Excessive Damages.—The court will not set aside the verdict of the jury because the

2. In Action by Wife.—The measure of damages in an action by the wife for alienating her husband's affection and causing him to abandon her is based on the actual injury done her by the loss of her husband's affection and support, and on the pecuniary circumstances of the defendant.¹

3. In Action by Parent—General Rule.—Where a parent brings an action for the abduction of a child the jury may grant actual compensatory damages estimated on the basis of loss of service, and in their discretion punitive damages also.²

No Claim Made for Special Damage.—If no claim is made for special damage the parent may recover actual damage, and also the expenses incurred in getting possession of the child.³

Exemplary Damages may be recovered where aggravating circumstances are shown. It is not necessary that there should be fraud, malice, or oppression; the manner in which the wrong is done and the consequences attending it will determine the amount.⁴

damages were excessive, except in extreme cases. *Winsmore v. Greenbank*, Willes 577; *Duberley v. Gunning*, 4 T. R. 651.

1. Principle upon which Damages Estimated.—In *Waldron v. Waldron*, 45 Fed. Rep. 315, the court, by Bunn, J. (charging the jury), said: "If you find for the plaintiff, you will return a verdict that you find the defendant guilty, and you will assess the damages the plaintiff will be entitled in that case to recover. These should be apportioned and assessed according to the extent and character of the injury sustained by the plaintiff in consequence of the wrongful act of the defendant, from a consideration of all the circumstances in evidence in the case. If the injury caused by the wrongful act of the defendant has been great, the damages should be proportionately great. If the injury has been small, the damages should be proportionately small. If the jury should find from the evidence that the marital relations of the plaintiff and Waldron were unhappy; that when he left her and came to Chicago on June 6, 1886, he had already lost his respect and affection for the plaintiff; that on account of the infelicity of their relations he then deserted and abandoned her without any hope of condonement or reconciliation; and that by reason of these things the marital relation existing between them was of little or no value to the plaintiff; the jury, in such case, may, in the exercise of a sound discretion, if they think they are justified on a full consideration of all the evidence, return a verdict for a very small sum, or for nominal damages; but this is a question of fact wholly for the jury. The ground of damages will be mainly the injury to the plaintiff's feelings, the loss of her husband's support, his affections, his aid, society, and companionship, caused by the wrongful acts of the defendant, and should be fairly and dispassionately assessed according to the nature and extent of the injury so sustained by the plaintiff, from a full and careful consideration of all the evidence and circumstances in the case, including, of course, the evidence given you of the pecuniary circumstances of the defendant; and, in addition to the damages compensatory in character,

if the jury believe that the injury was inflicted wantonly and maliciously, they may, in their discretion, add thereto such sum as you may think just and proper as exemplary or punitive damages, as a punishment to the defendant."

2. Reg. v. Hopkins, C. & M. 254; *Lawyer v. Fritcher*, 130 N. Y. 239. See also *People v. DeLeon*, 109 N. Y. 229, 4 Am. St. Rep. 444; *Lipe v. Eisenlerd*, 32 N. Y. 233; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; *White v. Nellis*, 31 N. Y. 405; *Ingerson v. Miller*, 47 Barb. (N. Y.) 47; *Badgley v. Decker*, 44 Barb. (N. Y.) 588; *Bundy v. Dodson*, 28 Ind. 295; *Sherwood v. Hall*, 3 Sumn. (U. S.) 127; *Caughey v. Smith*, 47 N. Y. 244; *Everett v. Sherfey*, 1 Iowa 356; *Plummer v. Webb*, 4 Mason (U. S.) 380; *Stowe v. Heywood*, 7 Allen (Mass.) 118; *Sargent v. Mathewson*, 38 N. H. 54.

Common-law Idea—Loss of Service.—The right of action at the common law appears to have been limited to the right to recover damages for loss of service, which led to the conclusion that when the child was so young as to be incapable of rendering service no action would lie. *Hall v. Hollander*, 7 D. & R. 133, 4 B. & C. 660; *Eager v. Grimwood*, 1 Exch. 61; *Grinnell v. Wells*, 7 M. & G. 1033, 49 E. C. L. 1033, 8 Scott N. R. 741.

Modern Doctrine.—But this is no longer the law. See *Kirkpatrick v. Lockhart*, 2 Brev. (S. Car.) 276; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593.

3. Rice v. Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

4. Circumstances of Aggravation—Exemplary Damages.—*Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *Conant v. Raymond*, 2 Atk. (Vt.) 243.

He may also recover expenses incurred by reason of sickness caused by the defendant's wrongful act. *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593.

The father may recover for his mental suffering caused by the injury, though he may not introduce evidence thereof distinct from and in addition to that which shows the nature and extent of the injury. *Stowe v. Heywood*, 7 Allen (Mass.) 118.

VI. ABDUCTION AS A CRIME—1. Common-law Rule.—Where minor children are taken from their parents, or from those standing *in loco parentis*, by sinister means, whether by violence, deceit, conspiracy, or any corrupt or improper practice, as by intoxication, for the purpose of marrying them, such criminal means will render the act an offense at common law, although the parties themselves may consent to the marriage.¹

Marrying Female under Age, without Consent of Parent or Guardian.—But merely marrying a woman under age, without the consent of her parent or guardian, is not a crime.²

2. Under the Statutes—*a.* IN GENERAL.—The statutes in the various jurisdictions constitute the taking or detaining of a woman against her will with intent to marry her, or to have her married to another, or to have carnal knowledge of her or that another shall have such knowledge, a crime, and provide adequate punishment. So the taking away, detaining, or alluring a woman, under an age limited by the local law, by fraud or otherwise, out of the possession and against the will of her father or other person having the lawful charge or care of her, with the same intent, is made a felony and punished accordingly.³

1. Abduction as a Crime at Common Law.—1 East P. C. c. 11, § 9, p. 459; 1 Russell on Crimes 940; 3 Chit. Com. Law 713; Rex v. Grey Mich., 34 Car. 2, 3 St. Tr. 519; Rex v. Moor, 2 Mod. 130; Reg. v. Blacket, 7 Mod. 39; Rex v. Twisleton, 1 Lev. 257, 1 Sid. 387, 2 Keb. 432; Rex v. Thorp, Carth. 384, 5 Mod. 221, Com. 27, 12 Mod. 516; Rex v. Pierson, Andr. 310; Rex v. Story, 3 Keb. 101; Rex v. Ossulston, 2 Stra. 1107; Rex v. Ward, 1 W. Bl. 386; Rex v. Furas, B. R. temp. W. & M., MS. Tracy; Rex v. Harris, 4 T. R. 202; Rex v. Sainsbury, 4 T. R. 457. See Stat. Westm., 2113 Edw. I. c. 35; 2 Inst. 440; 2 P. Wms. 110; Reg. v. Mears, 2 Den. C. C. 79; Rex v. Pigot, 12 Mod. 516. In Rex v. Twisleton, 2 Keb. 432, which was an information for conspiracy and the deceitful and riotous taking away of a girl of fifteen without her father's consent, the court conceived it to be an offense at common law and held that the statutes 4 and 5 Ph. & Mary and 3 Hen. VII. (relating to abduction) were but for aggravation of punishment and did not create an offense originally. But see Rex v. Marriot, 4 Mod. 145.

A conspiracy to seduce would be an offense at common law, or to induce a woman to become a prostitute. Reg. v. Howell, 4 F. & F. 160.

In *New Hampshire* an indictment at common law may be sustained for an assault and false imprisonment and for kidnapping. State v. Rollins, 8 N. H. 550.

In *Virginia* the statute made it a crime to abduct a girl under sixteen years of age; it was held that an indictment could not be supported, at common law, for abducting a girl over sixteen. Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

In *North Carolina* the statute against abducting children fixes the age at fourteen years. It was held that an indictment would not lie at common law for the abduction of a child fifteen years of age. State v. Sullivan, 85 N. Car. 506.

In State v. Rice, 76 N. Car. 194, an indict-

ment was found against the defendant for enticing a minor servant from the service of its parent. It was held that the statute applied only to servants by contract or indenture; and that the indictment could not be supported under the common law, because abduction of a child was not a public offense unless made so by statute.

The court in these *North Carolina* cases decided that there is no authority for the proposition that the abduction of a female is an indictable offense at common law. As it is a disputed question, the benefit of the doubt has been given in the text in favor of the elastic energy of the common law.

Where the common-law method of indictment is superseded by statutory method, see Rex v. Marriot, 4 Mod. 144; Hartley v. Hooker, Cowp. 524. Where it is cumulative, see Rex v. Robinson, 2 Burr. 803; Rex v. Davis, Sayer 133; Rex v. Boyall, 2 Burr. 832; Rex v. Balme, Cowp. 648; Cates v. Knight, 3 T. R. 442; Rex v. Harris, 4 T. R. 202; Rex v. Sainsbury, 4 T. R. 451.

2. 1 East P. C., c. 11, s. 9, p. 458; Russell on Crimes 940.

3. For the early statutes on this question, and their provisions, see 1 East P. C., c. xi. 452, 462; Russell on Crimes 940, 961; 3 Hen. VII., c. 2; 39 Eliz., c. 9; 4 and 5 Ph. & M., c. 8; 9 Geo. IV., c. 31, § 19; 10 Geo. IV., c. 34, § 23.

The law is now settled in *England* by 24 and 25 Vict., c. 100, § 53; and for the provision of similar enactments in the *United States* see the various local statutes.

Georgia.—Under the *Georgia Code*, inveigling children is, under § 4338, as much kidnapping as forcible abduction under § 4367. Dowda v. State, 74 Ga. 12.

Under the *Georgia Code*, § 4368, one who persuades a girl of sixteen to leave her parents and without their knowledge or consent to go with him into another county, is guilty of kidnapping. Thweatt v. State, 74 Ga. 821.

To carry off with her consent, for the pur-

b. THE TAKING—(1) *What Constitutes—Force or Violence Unnecessary*.—It is not necessary in order to constitute a *taking* that force or violence be used. It may be accomplished by persuasion, enticement, or device; but it must be accomplished by the active influence of the accused, and for the illicit purpose forbidden by the statute.¹

But Active Influence for the Illicit Purpose Necessary.—There must be some positive act to get the female away from the person having the legal charge of her; mere seduction does not amount to a taking, nor does receiving or affording protection to a girl who has left her parents of her own accord.²

pose of marriage, a girl of fourteen, is not kidnapping under *Georgia Code*, § 4368. *Cochran v. State*, 91 Ga. 763.

Kentucky.—As to facts showing guilt under the *Kentucky* statute, see *Malone v. Com.*, 91 Ky. 307. Under this statute the offense may be complete though the woman is insane. *Higgins v. Com.*, 94 Ky. 54. Under this statute the gravamen of the offense is the detention against the woman's will. *Payner v. Com.* (Ky., 1892), 19 S. W. Rep. 927. And the indictment must allege the fact of detention. *Krambiel v. Com.* (Ky., 1887), 2 S. W. Rep. 555.

New York.—For facts held to justify a conviction of the crime of abduction of a girl by a Chinaman, see *People v. Wah Lee Mon* (Supreme Ct.), 13 N. Y. Supp. 767.

Pennsylvania.—The offense defined by the *Pennsylvania* statute, which is equivalent to the common-law offense of kidnapping, has no application to contests between parents for the possession of their children. *Burns v. Com.*, 129 Pa. St. 138. See also *Com. v. Myers*, 146 Pa. St. 24.

Texas.—Under the *Texas* statute, nonconsent is essential to a conviction. *Castillo v. State*, 29 Tex. App. 127.

1. *Persuasion, Enticement, or Device Sufficient; Force Unnecessary*.—*State v. Johnson*, 115 Mo. 480; *State v. Jamison*, 38 Minn. 21; *State v. Keith*, 47 Minn. 559; *Mason v. State*, 29 Tex. App. 24; *People v. Demousset*, 71 Cal. 611; *People v. Seeley*, 37 Hun (N. Y.) 190; *Reg. v. Manktelow*, 6 Cox C. C. 143; *People v. Carrier*, 46 Mich. 422; *Reg. v. Timmons*, 8 Cox C. C. 401; *Reg. v. Olifier*, 10 Cox C. C. 402.

In *State v. Gordon*, 46 N. J. L. 432, the defendant persuaded a girl in *New York* to go away with him, and they went to *New Jersey*; while there he interposed his will to prevent her from returning. It was held that the abduction was complete in *New Jersey* by his detaining her, and that he could be indicted in that state, albeit the original taking was done out of the jurisdiction. It will not amount to abduction within the meaning of the statute if the girl's mother allows or encourages the girl in a lax course of life, as it is held to amount to a consent to the taking away of her daughter. *Reg. v. Primelt*, 1 F. & F. 50.

It has been held that a conviction under the *Mississippi* statute cannot be had unless the female was taken away unlawfully, against her will, and by force, menace, fraud, deceit, stratagem, or duress, compelled or induced to be defiled. *Lampton v. State* (Miss., 1892), 11 So. Rep. 656.

It was held in *People v. Carrier*, 46 Mich. 422, that enticement need not necessarily involve a direct proposition, but that the defendant's conduct might be equivalent thereto, even though, for the purpose of evading the statute, he attempted himself to avoid a proposition, and even though he so managed the matter that the proposition appeared to come from the girl or from somebody else. See, further, *Beyer v. People*, 86 N. Y. 369; *Schnicker v. People*, 88 N. Y. 194; *Kauffman v. People*, 11 Hun (N. Y.) 82.

In *State v. Jamison*, 38 Minn. 21, the defendant had been criminally intimate with the girl previously, and she was pregnant by him. He took her away and sent her home to his mother's for the purpose of hiding her disgrace, and that she might be cared for. The court, by *Vanderburgh, J.*, said: "It must not only appear that the female was taken away or induced to leave through the active influence or persuasion of the accused, but it must also appear that it was done for the illicit purpose defined, and without such proof the prosecution must fail." It was held that the purpose of the taking was not the one forbidden by the statute.

2. *Instances*.—*People v. Parshall*, 6 Park Cr. Rep. (N. Y.) 129. In this case the defendant met the girl on the street, but not by any previous agreement, and took her away to a place where he seduced her. The evidence showed that he had never been to the girl's house, nor did he even know that she had any parents, and that he had not influenced her in any way to leave her parents. It was held that he was not guilty of taking the girl within the statute.

In *People v. Plath*, 100 N. Y. 590, 53 Am. Rep. 236, upon the trial of an indictment for abduction, it appeared that the defendant kept a dance-hall or concert saloon in the city of *New York*. The testimony of K., the female alleged to have been abducted, was to the effect that she was about fifteen years of age, of somewhat dissolute character, living with her parents in *Newark*; that in company with a young companion, a former inmate of a house of prostitution, she went to *New York* without the consent of her parents, and in strolling about came to and entered the defendant's saloon; after sitting in the bar-room for a while she asked the defendant "how much it was to see the entertainment." He answered, "Nothing, my little dear; come in," and asked if they had come to stay, to which K. replied that she had. He then invited them upstairs, took indecent liberties with their persons, and offered K. a dress, which she refused.

(2) *Gist of the Offense.*—The gist of the offense is the taking with intent to marry or carnally know; it is immaterial what kind of inducements are held out.¹ It will amount to abduction and a taking within the meaning of the

She remained in the place voluntarily for about a month, leading the life of a prostitute. No evidence was given that the defendant knew K.'s true name, her place of residence, or that he had any previous acquaintance with her or her family, their circumstances, or condition. Other witnesses testified that they visited the saloon while K. was there; that there were a number of men and women dancing and drinking, and among them K.; that they asked the defendant if he had a young girl from Newark, by the name of K., but he denied any knowledge of such a girl, and offered to allow them to search the premises. While they were talking K. disappeared. They inspected the upper rooms, the appearance of which, as described, indicated that they were used for purposes of prostitution. A physical examination of K.'s person showed that attempts at sexual intercourse had been made, but that it had not been accomplished. It was held that the evidence failed to sustain a conviction for enticing away within the statute.

In *Reg. v. Miller*, 14 Moak Rep. 633, the girl was in the lawful charge of her master, who gave her permission to visit her family. While away with his permission she met the defendant, but not in pursuance of any previous agreement, and they went away and cohabited together for a day or two. It was held not to amount to a taking.

In *Reg. v. Hibbert*, 11 Cox C. C. 246, the prisoner met the girl on the street and took her to a house and seduced her, and afterward took her back to where he found her. He did not know that she had a parent. It was held that he had not taken the girl within the meaning of the statute.

A fraudulent detention will amount to abduction. *Reg. v. Johnson*, 15 Cox C. C. 481.

Where a wife separates from and leaves her husband and takes their two-year-old child with her, the person aiding and assisting her to leave is not guilty of abduction in taking the child from its father's control or possession. The mother has equal rights with the father to the control of their children. *State v. Angel*, 42 Kan. 216.

1. *What Amounts to a "Taking"*—Instances.—Under the *North Carolina* statute, the act of taking is the gist of the offense, and may be accomplished by persuasion or any verbal inducements. *State v. Chisenhall*, 106 N. Car. 676.

In *Slocum v. People*, 90 Ill. 274, the defendant met the girl by appointment a short distance from her father's house, about twice a week, and took her away a short distance and had intercourse with her; she returning to the house almost immediately after the act. It was held that there had been a taking from her father's possession.

In *Reg. v. Hopkins*, C. & M. 254, 41 E. C. L. 143, the prisoner fraudulently gained the consent of the girl's parents to his tak-

ing her away, by representing that he had secured a place for her at service. He took her to his house and cohabited with her for ten days. It was held that he was guilty of taking within the statute.

In *People v. Brown*, 71 Hun (N. Y.) 601, the female was at service, and, in pursuance of an agreement between the defendant and another man and his wife, all four went to a neighboring town, ostensibly to attend the county fair. After visiting several saloons and a show during the day, they went to a hotel, and late at night the woman of the party sent the girl to bed, and shortly afterward the defendant came to her room and she let him in and he stayed all night. This was repeated two or three nights. It was held that he was guilty within the *New York* statute.

It does not relieve the prisoner of the guilt of taking the female, even if she proposed the going and he simply aided her in getting away. Thus, in *Reg. v. Robins*, 1 C. & K. 456, 47 E. C. L. 456, the prisoner, at the solicitations of the female, agreed to elope with her; at night he brought a ladder and put it under her window and aided her to descend, and they went away. It was held that he was guilty of taking under the *English* statute.

In *Reg. v. Tinkler*, 1 F. & F. 513, the facts showed that the girl was an orphan; her sister had placed her with the prosecutrix. The defendant, who was the husband of one of the girl's sisters, promised her father on his deathbed to take care of her, and, believing that he was entitled to her possession, he forcibly took her out of the possession of the prosecutrix. It was held that it was not error to direct the jury to find for the defendant.

In *England*, at one time, motives of lucre constituted a material part of the offense, and unless the female was an heir apparent, the taking was held not within the statute. 12 Coke 100; 1 Russell on Crimes 942; *Burton v. Morris*, Hob. 182; Cro. Car. 485; *Brown's Case*, 1 Ventr. 243. But see 24 and 25 Vict., c. 100, § 54.

The taking alone did not constitute the offense under the early *English* law; it was necessary that the woman should have been married or seduced by the abductor. *Wakefield's Case*, 2 Lew 1; *Fulwood's Case*, Cro. Car. 493; *Swendsen's Case*, 5 St. Tr. 452; *Rex v. Gordon*, R. & R. C. C. 48. But this is not now the law. 1 Russell on Crimes 942.

In *People v. Fowler*, 88 Cal. 138, it was held that the gist of the offense was the taking away of the child against the will of the person having lawful charge of her, for the purposes of prostitution, and that one who did so acted at her peril and could not defend herself on the plea of ignorance of the age of the child. Necessarily the gist of the offense will vary more or less with the provision of the local statutes.

statute if the female leaves in pursuance of inducements held out to her, although such inducements were held out some time previous to the act of leaving, and the person who held them out disapproved of her leaving at the time she actually left.¹

(3) *When Offense Complete.*—The offense is complete when the taking with the intent to marry or carnally know is actually effected; it is immaterial whether the marriage or defilement takes place subsequently or not.²

(4) *From Parent's Custody.*—A female, under the statutes relating to the abduction of women, is, in contemplation of law, in the charge of her father, whether she is living with him or not, and even though she may not know that her father is alive.³ His care of her is not broken unless she leaves home with the intention of not returning.⁴ Where the girl is living with other per-

1. *Reg. v. Olifier*, 10 Cox C. C. 402. In this case, the defendant, a married man, paid attentions to the young woman alleged to have been abducted, and it was understood between them that they were to be married as soon as he could secure a divorce from his wife, and it was agreed that they should go away together. While he was away some facts, discreditable to the person at whose house she had met the defendant, came to the knowledge of her parents, and, fearing that she might be forcibly deprived of her visits to see him, she ran away and went to this person's house. When the defendant learned of this he was displeased, and said she had done wrong, but finally they went away together to London and Paris. It was held that, as the evidence showed that the girl had left in pursuance of a previous understanding or inducements held out to her by the defendant, he was guilty of enticing within the statute. *Reg. v. Robbins*, 4 F. & F. 59.

2. *When the Offense Complete—Gravamen of Offense.*—1 Russell on Crimes 941; 24 and 25 Vict., c. 200, §§ 53, 54.

In *State v. Johnson*, 115 Mo. 480, where it was held that the fact that the female was unchaste was no defense to the action, the court, by Burgess, J., said: "It was the 'taking away' for the purpose of concubinage that constituted the offense and violated the law, whether sexual intercourse followed or not." See also *State v. Gibson*, 108 Mo. 575; *Slocum v. People*, 90 Ill. 274; *State v. Gibson*, 111 Mo. 92; *Henderson v. People*, 124 Ill. 607, 7 Am. St. Rep. 391.

Under a statute against stealing a child with the intention of concealing it from its parents, the intent to unlawfully conceal is the gist of the action, and it is erroneous to instruct the jury that the taking is the gist. *Mayo v. State*, 43 Ohio St. 567. The intent with which the act is done may be inferred from the subsequent acts of the parties. *Beyer v. People*, 86 N. Y. 369.

In *Henderson v. People*, 124 Ill. 607, 7 Am. St. Rep. 391, the court said: "The gravamen of the offense is the purpose or intent with which the enticing and abduction is done, and hence the offense, if committed at all, is complete the moment the subject of the crime is removed beyond the power and control of her parents, or of others having lawful charge of her, whether any illicit intercourse ever takes place or not. Subsequent acts are

only important as affording the most reliable means of forming a correct conclusion with respect to the original purpose and intention of the accused."

3. *When Child in Custody of Parent, in Legal Contemplation.*—*People v. Cook*, 61 Cal. 478; *State v. Round*, 82 Mo. 679. See *Reg. v. Boswell*, 2 Cox C. C. 279; *Reg. v. Olifier*, 10 Cox C. C. 402.

In *State v. Round*, 82 Mo. 679, the female went to visit an uncle in the adjoining state, with the permission of her parents. While there, the defendant called for her and represented that her mother was ill and that her parents wanted her to come home. On the way home they stayed together over night in the woods, and he accomplished her seduction. It was held that the girl was in the possession of her father, in the contemplation of the law, at the time of the taking, and that the crime was committed in *Missouri*.

A girl under eighteen was placed by her father in the employ of C. She left the service in about a week without the knowledge or consent of her father. She then led an immoral life until she met the defendant. An improper intimacy at once commenced between the defendant and herself; and, at its beginning, he proposed that she should go into a house of prostitution and support him out of the money made by her as an inmate of such house. It was held that the defendant was guilty, as the girl, when taken, was, in contemplation of the law, in charge of her father. *People v. Cook*, 61 Cal. 478.

In *Reg. v. Timmins*, 8 Cox C. C. 401, the girl, with whom the prisoner had previously stayed overnight, met him on the street by previous agreement and went away with him and stayed three days. It was held that she was in her father's possession when the taking or enticing was accomplished. The mother is equally with the father entitled to the custody of her children. *State v. Angel*, 42 Kan. 216.

The parent has the right to the services and control of his child during his minority, by operation of law, and it is no objection to a prosecution that the child had not contracted in writing to serve the parent. *Gandy v. State*, 81 Ala. 68. See also *People v. Congdon*, 27 Mich. 351.

4. *Leaving Parent—Intention to Return.*—*Reg. v. Mycock*, 12 Cox C. C. 28. In this case the evidence showed that the defendant was a barman at a tavern opposite

sons with her parents' consent, or where she has been given a home by charitable persons, such persons have charge of her in contemplation of law.¹

(5) *Purpose of the Taking must be Proved.*—Where the defendant is charged under a criminal statute with abducting a female for the purpose of prostitution, concubinage, or otherwise, the indictment must be brought and proved in accordance with the terms of the statute.²

the residence of the girl alleged to have been abducted; that he became acquainted with the girl in question, and they were accustomed to meet and go for a walk together. On the day on which the abduction was said to have taken place, the girl and the prisoner met by previous appointment and went for a walk as usual; while walking they passed the railway station, and the defendant proposed that they should go in, and she consented. He took tickets, and they went to Manchester by the next train, staying there together two nights. The girl testified that she thought the defendant intended to marry her when he took her to Manchester. It was contended for the defendant that he was not guilty because he had not taken her out of the possession of her father, as the evidence showed that she left her father's house of her own free will, and that the crown had not proved that the defendant knew the girl was under age. The court, by Willes, J., said: "The girl was just as much in the possession of her father when she was walking in the streets, unless she had given up the intention of returning home, as if she had actually been in her father's house when taken off. Lastly, the prisoner was bound to ascertain the girl's age; or, failing that, to take the consequences of abducting her, if it turned out that she was under age." See *Reg. v. Olifier*, 10 Cox C. C. 402.

1. *Living Separate and Apart from Parent, but with Latter's Consent.*—*People v. Carrier*, 46 Mich. 442; *State v. Ruhl*, 8 Iowa 452.

In *Reg. v. Miller*, 13 Cox C. C. 179, the facts showed that the girl was out at service and had her master's permission to go home for a few days. On the way home she stopped and called out the prisoner, who walked part of the way home with her, and she agreed to meet him the next day and go away with him, which she did for several days. It was held that there was not a taking from her father's possession within the statute, and that it was not a taking from her master's possession, as she had permission to go away.

Where the custody of the child has been awarded to the wife on a divorce, the husband may be convicted of abducting under the *New Hampshire* statute, if he forcibly takes away his child, as in such a case the wife's custody is paramount. *State v. Farrar*, 41 N. H. 53.

All girls under sixteen years of age are presumptively in charge of some one. *People v. Carrier*, 46 Mich. 442.

2. *Object for Which Female was Taken must be Proved.*—*State v. Brow*, 64 N. H. 577; *State v. Stoyell*, 54 Me. 24, 89 Am. Dec. 716; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *People v. Parshall*, 6 Park. Cr. Rep. (N. Y.) 129.

In *State v. McCrum*, 38 Minn. 154, the prosecution was under a statute containing a clause against enticing a female "into a house of assignation, ill-fame, or elsewhere for the purpose of prostitution." It was held that the place to which the female was enticed was an important element of the offense, and must be proven to be a house of ill-fame or one of similar character.

In *State v. Gibson*, 108 Mo. 575, a prosecution under a statute against taking for "concubinage or prostitution," the defendant proved that his purpose in taking the female away was to save his son from prosecution for getting her with child, and also to hide the girl from disgrace. It was held that he was not guilty of the offense charged.

An attempt to commit this crime is not within the statute; but where another statute allows a conviction for an attempt, such conviction may be properly had when the evidence does not prove the crime named in the indictment. *People v. Milne*, 60 Cal. 71.

Prostitution.—Prostitution means common, indiscriminate intercourse with men. *Haygood v. State*, 98 Ala. 61; *Nichols v. State*, 127 Ind. 406; *Com. v. Cook*, 12 Met. (Mass.) 93; *State v. Ruhl*, 8 Iowa 447; *Carpenter v. People*, 8 Barb. (N. Y.) 603.

A forcible abduction and intercourse is not abduction for the purpose of prostitution. *U. S. v. Zes Cloya*, 35 Fed. Rep. 493.

If the original intention of the defendant was to render the girl a prostitute, she is guilty even though she did not succeed. *Slocum v. People*, 90 Ill. 280.

Concubinage.—In some cases it has been held that a single act of cohabitation will constitute the offense; in others that it will not, but that there must be several. *State v. Johnson*, 115 Mo. 480; *State v. Gibson*, 111 Mo. 92 (Thomas, J., *dissenting*); *State v. Wilkinson*, 121 Mo. 485. The case of *State v. Feasel*, 74 Mo. 524, which holds the contrary view, was *overruled* by *State v. Gibson*, 111 Mo. 92.

It was held in *State v. Gibson*, 111 Mo. 92, that a count in an indictment which charged three men with abducting a female for the purpose of concubinage by having intercourse with them charges no offense, as she could not be the concubine of all three.

In *State v. Richardson*, 117 Mo. 586, the defendant was shown to be a teacher and a minister with a family; he made love to the prosecutrix, and they planned an elopement, which was carried out, they going away and staying in different places for two nights, when they were apprehended and brought back. It was held that the prisoner was rightly convicted of taking away the girl for the purpose of concubinage.

* In *State v. Overstreet*, 43 Kan. 299, evi-

When the chastity of the woman is a material element in the offense charged, it must be proved by the prosecution.¹ But the state is not bound to prove that the defendant knew that a female whom he had abducted was under age.²

3. Defenses—*a*. WHAT ARE—(1) *Connivance of Parent*.—Where the parent encourages or connives at a lax course of life and conduct in the daughter, it will amount to a constructive consent to the abduction, and may be pleaded in defense by the person charged with such crime.³ But the consent of the parent is no defense where it is obtained by fraud.⁴

(2) *Justifiable Taking—Marriage*.—The defendant will be justified also where it appears that the taking was for purposes other than those forbidden by the statute, as, for instance, where the defendant is engaged to marry the woman, and they go off to consummate the engagement.⁵

b. **WHAT ARE NOT—(1) *Consent of Female*.**—The consent of the female to the taking, her voluntary going away, or even the fact that she proposed to the defendant that they should go away, and declared her intention of leaving her father's house, are no defense to the charge of abduction.⁶

dence that the defendant stayed overnight alone in a club-room with the prosecutrix; that she went to his house when his wife was away; and that he showed her attentions, gave her presents, and wrote letters to her, was held sufficient to justify a conviction for enticing away for the purpose of concubinage.

In *Slocum v. People*, 90 Ill. 274, the evidence showed that the defendant was in the habit of meeting the prosecutrix a short distance from her father's house and taking her to his house and having connection with her three or four times a week; also that his wife frequently called her into the house for the same purpose. It was held to amount to a taking for the purpose of concubinage.

In *People v. Parshall*, 6 Park. Cr. Rep. (N. Y.) 129, it was held that a purpose of concubinage would not be inferred where the defendant, when the offense was charged to have been committed, was a married man, living with his wife at the place where the acts of concubinage were alleged to have occurred, and when the girl was under fourteen years of age and physically undeveloped.

In *Michigan*, the rule laid down by the courts is that the word "concubinage" has no established common-law meaning, but covers any lewd intercourse between the parties. *People v. Cummons*, 56 Mich. 544.

A statute against enticing away a female "for the purpose of prostitution, concubinage, or marriage," covers every purpose of unlawful enticement. *People v. Bristol*, 23 Mich. 118.

1. Chastity of the Woman.—*Com. v. Whitaker*, 131 Mass. 224. But see *Slocum v. People*, 90 Ill. 274, where it was said that the presumption of law was in favor of chastity, and that it was for the defendant to prove the contrary.

2. Reg. v. Mycock, 12 Cox C. C. 28; *Reg. v. Robins*, 1 C. & K. 456, 47 E. C. L. 456.

3. Consent of Parent.—*Reg. v. Primelt*, 1 F. & F. 50. The facts in this case showed that the female abducted was very attractive; that her mother allowed her to go where she

pleased and with whom she pleased; that she stayed out late nights and went to dances at public houses; that her mother left the door unlocked to facilitate her entrance at any time she chose to come in. It was held that the mother had so encouraged the girl in a lax course of life as constructively to amount to a consent. In summing up, the court told the jury that if "they thought the mother had, by her conduct, countenanced her daughter in a lax course of life, by permitting her to go out alone at night, and to dance at public inns, this was not a case that came within the intent of the statute, but was one where what had occurred, though unknown to her, could not be said to have happened against her will." This ruling was followed in *Brown v. State*, 72 Md. 477. See *State v. Stone*, 106 Mo. 1; *State v. Chisenhall*, 106 N. Car. 676.

In *People v. Fowler*, 88 Cal. 136, it was held that where the mother had the actual custody of a minor female, she had the legal charge of her person within the *California* Penal Code, § 267, and that it was no defense to a charge of abducting such female minor that, as between the father and mother, the latter may have had the better right to the custody of the child, and may have given her consent to the abduction.

4. Consent of Parent Procured through Fraud.—*Reg. v. Hopkins*, C. & M. 254, 41 E. C. L. 143.

5. Justifiable Taking.—*People v. Marshall*, 59 Cal. 386. In this case the defendant showed that he was engaged to be married to the girl alleged to have been abducted, and that they went away for the purpose of being married, and that he in good faith intended to marry her. This was held to be a good defense.

6. Consent of Female.—*Reg. v. Keppers*, 4 Cox C. C. 167; *Reg. v. Mankletow*, 6 Cox C. C. 143; *Rex v. Twisleton*, 2 Keb. 432; *State v. Stone*, 106 Mo. 1; *People v. Cook*, 61 Cal. 478; *People v. Dolan*, 96 Cal. 315; *Tucker v. State*, 8 Lea (Tenn.) 633.

In *Reg. v. Biswell*, 2 Cox C. C. 279, the girl proposed to the defendant that they should

(2) *Ignorance of Age*.—Ignorance of the girl's age, or even a strong reason for believing from her appearance or statements that she was over the age limited by statute, is no defense.¹

(3) *Previous Unchastity*.—Where the local statute does not so provide or intend, the previous unchastity of the female is no defense to a charge of abduction.²

(4) *Parent's Harsh Treatment*.—The parent's harsh treatment of his family is no defense to one who fraudulently entices and carries away his daughter.³

(5) *Merger of Offense*.—A defendant cannot plead, in defense to a charge of abduction, that when such abduction for the purpose of concubinage is complete it amounts only to seduction.⁴

VII. EVIDENCE—1. On Abduction of Wife—*a*. STATEMENTS OF WIFE.—Statements by the wife, at and before the time of the alleged enticement, to the effect that her husband ill treated her, are admissible to prove a reason for leaving him in justification of the defendant's harboring her against the husband's will.⁵ Such statements may be given in evidence by the husband also

go away together, and, at the same time, made the statement that she intended to leave her father's house for good. It was held that the fact that she consented to the going, and even proposed it, was no defense.

1. *Ignorance of Age of Female*.—People v. Fowler, 88 Cal. 136; State v. Johnson, 115 Mo. 480; People v. Dolan, 96 Cal. 315; Reg. v. Prince, 13 Cox C. C. 138; Reg. v. Robins, 1 C. & K. 456, 47 E. C. L. 456.

Any one dealing with an unmarried female does so at his peril, and if she turns out to be under age, he is liable, notwithstanding the fact that she stated that she was over the age mentioned in the statute. Reg. v. Olifier, 10 Cox C. C. 402.

However, under a Texas statute enacting that a person is guilty of no offense who, laboring under a mistake of fact, commits an act that would otherwise be criminal, it was held that if the defendant had reason to believe, on diligent inquiry, that the girl was over age required by statute, he could not be convicted. Mason v. State, 29 Tex. App. 24.

2. *Previous Unchastity of Woman*.—People v. Demoussset, 71 Cal. 611; State v. Johnson, 115 Mo. 480. But see State v. Feasel, 74 Mo. 524; People v. Carrier, 46 Mich. 442; People v. Cook, 61 Cal. 478; Brown v. State, 72 Md. 468; State v. Gibson, 111 Mo. 92; Lyons v. State, 52 Ind. 426.

Under the Tennessee statute, previous intercourse is no defense to a prosecution, where it is proven that the female was leading a chaste life at the time of the alleged abduction. Scruggs v. State, 90 Tenn. 81. *Contra*, in Jenkins v. State, 15 Lea (Tenn.) 674, it was held that it was a good defense that the female abducted was lewd or a prostitute at the time of the alleged abduction. The court, by Cooke, J., said: "The object the legislature had in view in the passage of this * * * statute was to prevent the taking or enticing innocent and virtuous young females away from their parents, guardians, etc., for the purpose of making them prostitutes or concubines. We cannot conceive that the legislature could have had the purpose of visiting such punishment upon

a person who merely goes with a prostitute, by an arrangement which, it may be, was contrived and proposed by her, to some place where they can more conveniently indulge in illicit intercourse." (This statute did not make the previous chastity of the female an element of the offense.)

And in State v. Gibson, 111 Mo. 92, the court, by Sherwood, C.J., said: "The intention of the statute was to prevent virtuous girls under a certain age from being taken away from under parental or other legitimate control and converted into concubines or prostitutes. If, however, before being thus taken away a girl has already lost her virtue, she is not within the protection of the statute; it came to save the virtuous, not the unchaste and the harlot." Where previous chastity is required by the statute, it is an important element of the offense, and must be proven by the state. Evidence tending to prove that the female did not possess actual personal virtue, or evidence of previous illicit intercourse with other men, may be shown. Lyons v. State, 52 Ind. 426.

3. Gravett v. State, 74 Ga. 191.

4. People v. Bristol, 23 Mich. 118.

An objection to the verdict because there is evidence that the defendant was guilty of rape is not well taken. State v. Stone, 106 Mo. 1.

5. *Statements of Wife as to Husband's Ill Treatment*.—Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469. See Palmer v. Crook, 7 Gray (Mass.) 420; Coleman v. White, 43 Ind. 429.

But statements made by a wife to a third person, and not part of the *res gesta*, and not accompanying the leaving, and which do not impute any violence or ill treatment, are not admissible even in mitigation of damages. In Glass v. Bennett, 89 Tenn. 482, Turney, C.J., said: "The declarations of Mrs. Bennett, made at the time she left her home, explanatory of her troubled mental condition and of her reasons for going to her father's house with her child, are competent as parts of the *res gesta*. * * * Mrs. Bennett's declarations to her father, mother, and brother, or others, assigning causes for

to show the state of her feelings towards him at the time of the alleged seduction;¹ but the wife's statements concerning the words and acts of the defendant are not admissible in order to prove the charges against him.²

b. ACTS OF HUSBAND.—Parents who harbor their married daughter may prove in justification that the husband is immoral, abusive, a drunkard, and that he ill treated his wife.³

c. DECLARATIONS OF THIRD PERSON.—Statements of a person not a defendant in an action for abduction, but charged with having conspired with the defendants for that purpose, are admissible to show his connection with the conspiracy if the conspiracy is proved, but they are not evidence against the defendants unless they were made in furtherance of the common design.⁴

2. On Abduction of Husband.—A father, in justification of the abduction of his son and in mitigation of damages, may adduce evidence to prove that his son married the plaintiff while drunk, and that he never had any affection for her either before or after marriage.⁵

3. On Abduction of Child—*a.* AGE OF CHILD.—Statements of the father and mother as to the age of their child are the best evidence of that fact. Entries of birth, in the family Bible, are only secondary evidence.⁶

leaving her home and returning to her father's and remaining there, are competent, going to establish or disprove a justification on the part of the defendants, or either of them, in advising her, if they did so, to remain away from her home and husband. * * * Everything that can legitimately inculpate or exculpate the father and brother on the one part, or the husband and his sisters and brothers-in-law on the other, is competent for the consideration of the jury in the trial of the facts raised by the issues." And in *Winsmore v. Greenbank*, Willes 577, it was held that the declarations of the wife in such a case are not evidence on either side.

1. Statements, Letters, etc., of Wife Admissible to Prove State of her Feelings toward Husband.—*Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *Starkie Ev.* (10th ed.) 89.

The wife's letters and statements may be proved to show the state of her feelings. *Cooley on Torts* (2d ed.) 263.

Declarations of the wife within a few days after the marriage, expressing her wishes in relation to living with the plaintiff as his wife, are admissible. *Bennett v. Smith*, 21 Barb. (N. Y.) 447, 1 Greenl. Ev. (14th ed.), § 108, and notes.

Where the claim is that the plaintiff's wife left voluntarily through dislike of her husband, he may produce letters from her to him in evidence to rebut such a defense. See *Perry v. Lovejoy*, 49 Mich. 531; *Cooley on Torts* (2d ed.) 225, note 2; *Willis v. Bernard*, 8 Bing. 376, 21 E. C. L. 325; *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430.

In *White v. Ross*, 47 Mich. 172, the facts showed a clandestine marriage between the plaintiff and the defendant's daughter which was never consummated by cohabitation; and no force was used by the parents to keep their daughter from the plaintiff. It was held that without evidence tending to show improper interference by the parents with the plaintiff's affairs, letters from the plain-

tiff's wife, written after marriage, showing affection for him, were not admissible, as the state of her feelings at this stage of the case was immaterial.

2. *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430.

3. *Bennett v. Smith*, 21 Barb. (N. Y.) 439.

4. *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430.

5. *Bassett v. Bassett*, 20 Ill. App. 543. In this case the court, by Pillsbury, J., said: "We are of the opinion that this evidence was admissible on the ground, first, that it should be considered in mitigation of damages. The plaintiff claims that by the act of the defendant she was deprived of the love and affection of her husband, for which she claims damages. Marriage of itself cannot be considered as conclusive proof of that mutual regard and love which should be entertained by husband and wife, and where one of them seeks to recover damages for the loss of love and affection, we know of no case that goes so far as to deprive the defendant of the right of showing the real feelings of the other to the plaintiff. So it has been held in cases brought by the husband for criminal conversation, that evidence as to the terms on which the plaintiff and his wife lived together was competent in mitigation of damages. * * * We are unable to see why the same principle should not apply in this case."

But declarations of the husband, made in the absence of the defendant, to the effect that the defendant was doing all he could to bring about a separation between the plaintiff and the husband, are not admissible. *Westlake v. Westlake*, 34 Ohio St. 634, 32 Am. Rep. 397.

6. Statements of Parents as to Age of Child.—*Dobson v. Cothran*, 34 S. Car. 518; *Taylor v. Hawkins*, 1 McCord (S. Car.) 164.

An entry in a family Bible as to the age of a female is inadmissible to show that she was under sixteen, unless a case is made justifying the introduction of hearsay evidence. *People v. Sheppard*, 44 Hun (N. Y.) 565.

b. OF PARENTS' CONSENT.—Evidence of acts showing the consent of the parent to the child's abduction is admissible on behalf of the defendant;¹ and so the statements and acts of the parents are admissible to prove that they did not consent, and that they tried to find and bring their daughter back.²

c. OF LEGAL CUSTODY.—Proof of legal custody is required only when the child is taken from one other than the parent or guardian.³

d. OF FEMALE'S MORAL CHARACTER.—Evidence of the previous unchastity of the female has in some cases been held admissible and in others not, according to what is made the gist of the offense under the local statutes.⁴ But evidence of illicit intercourse with other men subsequent to the alleged abduction is not admissible, nor is evidence of the immoral character of the female members of the abducted girl's family admissible in favor of the defendant.⁵

e. IN MITIGATION OF DAMAGES.—In an action for harboring and seducing the plaintiff's child, evidence in mitigation of damages may be given to prove that the plaintiff and his family were of dissolute character.⁶

4. Evidence of Intent and Motive.—The subsequent conduct of the parties is admissible in evidence in order to prove the original intention and motive of the defendant in making the abduction.⁷

5. Statements and Acts of Defendant.—Voluntary confessions of the defendant are admissible against him.⁸ So are letters in his handwriting without date or signature, but similar in character to other letters written by him and re-

1. Evidence Showing Consent of Parent.—The defendant, in order to prove that a girl had been encouraged by her parents to lead a lax course of life, and that she was not taken from them without their consent, may give evidence of the fact that she was an inmate of a bawdy-house at the time of her abduction. *Brown v. State*, 72 Md. 477. See *Gravett v. State*, 74 Ga. 191.

In a suit for abducting a minor child, if the father does not claim special damages, the defendant cannot show that he took the child at the request of its mother, who had been awarded the custody in divorce proceedings had in another state. *Rice v. Nickerson*, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

2. Evidence that there was no Consent.—The mother may testify that she did not consent to the defendant's taking her daughter, and also to her efforts to find her. *State v. Stone*, 106 Mo. 1.

The declarations of the father are also admissible to prove that he did not consent to his daughter's abduction. *State v. Chisenhall*, 106 N. Car. 676. The precautions that he took to prevent her being taken may also be shown. *Gravett v. State*, 74 Ga. 191. But where the action is against a father for enticing away his daughter, the declarations of the defendant's wife that she took her daughter away by force and without her consent are not admissible, as they would in effect be making the mother a witness to charge her husband. *Burnett v. Burkhead*, 21 Ark. 77, 76 Am. Dec. 358; *Funkhouser v. Pogue*, 13 Ark. 295; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791.

3. Ex p. Estrado, 88 Cal. 316.

4. Evidence of Previous Unchastity.—Such evidence was held immaterial and rejected in *People v. Demoussset*, 71 Cal. 611. See *State v. Johnson*, 115 Mo. 480; *State v. Gib-*

son, 111 Mo. 92. But it was admitted in justification in *Brown v. State*, 72 Md. 468; *Jenkins v. State*, 15 Lea (Tenn.) 674.

5. Evidence of Subsequent Illicit Intercourse.—*Scruggs v. State*, 90 Tenn. 81.

6. Evidence of Dissoluteness of Plaintiff and Family in Mitigation of Damages.—*Dobson v. Cothran*, 34 S. Car. 518. Evidence of good treatment of a child after abduction is not admissible, where no damages are claimed for injury done after removal. *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341. Nor is a statement by a child abducted for immoral purposes, that she would not leave the house of the defendant until paid the money she had earned. *Dobson v. Cothran*, 34 S. Car. 518.

7. People v. Carrier, 46 Mich. 442. The fact of subsequent sexual intercourse is evidence of the original intention of the defendant in taking. *State v. Johnson*, 115 Mo. 480.

Evidence that the defendant took the female to a house of prostitution will justify a conviction of taking for "purposes of prostitution." *People v. Marshall*, 59 Cal. 386.

Under an indictment for abducting an heiress for motives of lucre, it has been held to be evidence to establish the motive, to show that the defendant had told third persons that he knew the girl would have a certain sum of money when she attained her majority. *Reg. v. Barratt*, 9 C. & P. 387, 38 E. C. L. 167.

Under a statute providing for the punishment of one who abducts a female infant for the purpose of prostitution, there need not be direct evidence of the purpose; if the fact and circumstances sufficiently indicate the purpose, this is enough. *Ex p. Estrado*, 88 Cal. 316.

8. Confession of Defendant.—*State v. George*, 93 N. Car. 567.

ceived by the girl.¹ But evidence that the defendant committed other offenses similar to the one charged is not admissible against him.²

6. Corroborative Evidence.—Where a conviction cannot be had under the statutes without corroborative evidence, such evidence must extend to every material element of the offense, but it need not be in itself sufficient to establish the guilt of the defendant.³

ABET. (See also the title AIDER AND ABETTOR, where the subject of aiding or abetting crimes is fully treated.)—The words “aid” and “abet” in legal phraseology are pretty much the synonyms of each other; they comprehend all assistance rendered by acts, words of encouragement or support, or by presence actual or constructive to render assistance should it become necessary. No particular acts are necessary.⁴

ABEYANCE. (See also the title REAL PROPERTY.)—This word as applied to real property, whether estates or dignities, denotes that the same are in expectation, remembrance, or intendment of the law. Abeyance is said to be of two sorts, being either (first) abeyance of the fee simple, or (second) abeyance of the freehold. The first is where there is an actual estate of freehold *in esse*, but the right to the fee simple is suspended, and is to revive upon the happening of some event; e.g., in the case of a lease to A for life, remainder to the right heirs of B, who is alive, the fee simple is in abeyance until B dies.⁵ Similarly, during the incumbency of each successive incumbent of a church, he having only a freehold interest therein, the fee simple is in abeyance.⁶ The

1. *Letters*.—State v. Overstreet, 43 Kan. 299.

But on the trial of an indictment charging the defendant with abducting a woman for the purpose of marrying her, evidence that after the affair he wrote her letters threatening to kill her if she did not marry him, was held to be incompetent. State v. Maloney, 105 Mo. 10.

2. *Evidence of the Commission of Other Like Offenses*.—People v. Gibson, 6 N. Y. Crim. Rep. 390. In this case it was held error to admit evidence of the fact that other girls had been seen to enter the defendant's rooms, to show that he was in the habit of enticing young girls in there. Cargill v. Com. (Ky., 1890), 13 S. W. Rep. 916.

3. State v. Keith, 47 Minn. 560; People v. Plath, 100 N. Y. 590, 53 Am. Rep. 236.

A medical examination of a young girl eight months after the commission of the alleged offense is admissible. State v. Keith, 47 Minn. 560.

4. Raiford v. State, 59 Ala. 108, citing Bouv. and Webster Dict. See also Frantz v. Lenhart, 56 Pa. St. 366.

A statute providing that any one *abetting* in a crime might be prosecuted as principal was held not to apply to a purchaser of liquors. The court said: “But we are satisfied that the purchaser is not an *abettor* of the offense within the meaning of the statute. The *abetting* intended by it is a positive act in aid of the commission of the offense, a force, physical or moral, joined with that of the perpetrator in producing it. This is clear from the context, where *abetting* is classed with ‘assisting,’ ‘causing,’ ‘hiring,’ and ‘commanding.’ The *abettor*, within the meaning of the statute, must stand in the same relation to the crime as the criminal—approach it from the same direction, touch it at the same point. This is not the

case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges another to fight with him. If the other knocks him down, he has induced, but in no proper sense *abetted*, this act of violence. He has not contributed any force to its production. He touches the offense wholly on the other side. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale, but he cannot be said to ‘assist’ him in it. The whole force, moral or physical, that went to the production of the crime as such, was the seller's.”

5. Co. Litt. 342b.

6. “The Fee, or Inheritance, being in Abeyance.—That is (as the word signifies) in expectation, remembrance, and contemplation in law, there being no person *in esse* in whom it can vest; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly granted neither to John nor to Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis*; it remains, therefore, according to Littleton and earlier writers, including Blackstone, in waiting or *abeyance* during the life of Richard. 2 Bl. Com. 107; 3 Th. Co. Litt. 102, 103.” 2 Minor Ins. (3d ed.) 74.

“Mr. Fearn, however, considers that the inheritance can in no case be properly said to be in *abeyance*, but that it remains in the grantor, or, in the case of a will, in the deviser's heirs, until the contingency occurs on which it is to vest. 2 Bl. Com. 107, note 8; Fearn's Rem. 351, 360, 363.” 2 Minor Ins. (3d ed.) 75, 388, 389.

second species of abeyance, i.e., an abeyance of the freehold itself, occurs on the death of an incumbent, and until the appointment of his successor.¹

It was customary in speaking of a thing in abeyance to say that it was *in nubibus*, which was rather a profane expression, or *in gremio legis*,² the latter phrase denoting that the fee simple or freehold which was in abeyance was meanwhile under the care or protection of the law.

There is no abeyance either of the fee simple or of the freehold in the case of conveyances operating under the statute of uses, for in these what is not given away remains in the grantor until it is so given.³

If a freehold could commence to pass *in futuro*, there would be an abeyance and want of a tenant against whom to bring a *præcipe*, and the law will not suffer the land to be in abeyance a single day, if possible to prevent this.⁴

ABIDE. (See also the title EVENT.)—To abide a judgment, order, or award, is to perform it, to execute it, to conform to it.⁵

When contingent remainders began to be allowed, a question arose, which is yet scarcely settled, what becomes of the inheritance, in such a case as this, during the life of J. S.? A. the tenant for life, has but a life interest; J. S. has nothing, and his heir is not yet in existence. The ancient doctrine that the remainder must vest at once or not at all, has been broken in upon; but the judges could not make up their minds also to infringe on the corresponding rule, that the fee simple must, on every feoffment which confers an estate in fee, at once depart out of the feoffor. They, therefore, sagely reconciled the rule which they left standing, to the contingent remainders which they had determined to introduce, by affirming that, during the contingency, the inheritance was either in *abeyance*, or *in gremio legis*, or else *in nubibus*. Co. Litt. 342a; 1 P. Wms. 515, 516; Bac. Abr., tit. Remainder and Reversion (c). Modern lawyers, however, venture to assert that what the grantor has not disposed of must remain in him, and cannot pass from him until there exists some grantee to receive it. Fearn, Cont. Rem. 361. See, however, 2 Prest. Abst. 100-107, where the old opinion is maintained. And when the gift is by way of use under the statute of uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, result to the grantor. So in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator. Fearn, Cont. Rem. 351; Egerton v. Massey, 3 C. B. N. S. 338, 91 E. C. L. 337; Williams on Settlements, 207-210. See the title CONTINGENT REMAINDERS.

In Wallach v. Van Riswick, 92 U. S. 212, the court said: "It is argued on behalf of the defendant, that because, under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere; for it is said that a fee can never be in *abeyance*; and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a maxim of the common law that a fee cannot be in *abey-*

ance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; and it is therefore of no weight in the inquiry what was intended by the Confiscation Act and concurrent resolution. Undoubtedly there are some anomalies growing out of the congressional legislation, as there were growing out of the statutes of 5th and 18th Elizabeth; but it is the duty of the court to carry into effect what Congress intended, though it must be by denying the applicability of some common-law maxims, the reasons of which have long since disappeared. It has not been found necessary in England to hold that a reversion remained in a traitor after his attain, though the statutes declared that the forfeiture shall be during his natural life only."

1. "The Freehold being in Abeyance.—This, at common law, is never admitted, at least by the act of the party, for two reasons: first, that if it were allowed there would be none to render the military service; second, that there would be none to sue or to be sued for the title during such *abeyance*." 2 Bl. Com. 107, note 7; 3 Th. Co. Litt. note G. But by the statutes of uses, wills, and grants, which dispense with actual livery of seisin, a conveyance of the freehold does not put the freehold in *abeyance*, and is therefore freely allowed."

2 Minor Ins. (3d ed.) 75; Co. Litt. 342b.
2. Carter v. Barnardiston, 1 P. Wms. 516.

3. Brown's Law Dict. (Sprague's ed.).

4. The necessity under the feudal system that there should be always some one ready to perform the lord's services was not the only reason which introduced the maxim of the common law that a freehold can never be placed in *abeyance*. It had a better foundation, which continues still to exist, that there should be always some person to answer the real action brought for the recovery of the property. Lyle v. Richards, 9 S. & R. (Pa.) 322.

5. Erickson v. Elder, 34 Minn. 370; Hodge v. Hodgdon, 8 Cush. (Mass.) 294; Jackson v. State, 30 Kan. 88.

A bond so conditioned is not satisfied by appearance alone. Taylor v. Hughes, 3 Me. 433; Hodge v. Hodgdon, 8 Cush. (Mass.)

ABIDING CONVICTION. (See also the title REASONABLE DOUBT.)—A settled and fixed conviction following a careful examination and comparison of the whole evidence.¹

294; *Jackson v. State*, 30 Kan. 88; *Molton v. Hooks*, 3 Hawks (N. Car.) 342.

Arbitration. (See also the title ARBITRATION AND AWARD.)—The meaning of the term *abide by* is not the same as to "acquiesce in" or "not dispute." To *abide by* an award is the same as to *abide* an award, to stand to the determination of the arbitrators, and to take the consequences of the award. It means simply to await the award without revoking the submission. It can never be construed to mean that the defendant should not be at liberty to dispute the validity of any award that might be made. *Shaw v. Hatch*, 6 N. H. 162. See *Marshall v. Reed*, 48 N. H. 36.

Where a bond was conditioned to pay stipulated damages in case defendant did not *abide by* and perform an award, it was held that an averment of an award in favor of plaintiff, and a refusal of defendant to pay the award on demand, showed a breach of the bond. *Sleeper v. Pickering*, 17 N. H. 461.

Abide the Judgment.—In *McGarry v. State*, 37 Kan. 9, it was held that a provision to abide the judgment and orders of the court did not mean that the plaintiff or his sureties should pay or satisfy the judgment, but that he should surrender himself to the custody of the court. The court said: "Does the word *abide* mean pay or satisfy, or does it mean endure, or suffer, or acquiesce in, or something else? It is believed that the word *abide* never means pay or satisfy, while it does sometimes mean endure or suffer. And to construe the word to mean to pay or satisfy is to give the statute in which it is found a harsh and needlessly severe construction. It would compel a party to enter into a recognition with sufficient sureties to pay or satisfy a judgment, if any should ever be rendered against him, or to go to jail and be imprisoned possibly for months before any trial could be had, and although he might be ever so innocent."

Abide and Perform.—Where a bond in *ne exeat* was given conditioned "to *abide* and perform the judgment of the court," and the surety on the bond, having placed his principal in the custody of the court, petitioned to be released from the bond, his attorney contending that the effect of the bond was to *abide* the event of the suit, the motion was denied, the court stating that it could not regard a bond to perform, etc., as equivalent to one to *abide* the event of the suit, and further holding that in *ne exeat* a surety had no right to surrender his principal. *Griswold*, Petitioner, 13 R. I. 126.

Await and Abide.—A condition of a recognition on an appeal, which is conditioned for the defendant's appearance, "to await the action of the court," is not sufficient when the statute prescribes the words "to *abide* the judgment of the court." *Wilson v. State*, 7 Tex. App. 38.

"Abide the Decision."—The plaintiff in a bill in equity, praying for a discovery, for an account of the rents and profits of real estate, to which he claimed title as tenant in common with the defendant, who denied his title, and for general relief, petitioned at law for partition of the premises, and by agreement, with consent of the court, a docket entry was made in the action at law that it was "to *abide* decision" in the suit in equity. A verdict was afterwards returned by a jury on an issue framed in the suit in equity to try the title in the premises, and at the argument of exceptions taken at the trial an amendment of this verdict was agreed to, and the case was sent to a master to state an account. It was held that the docket entry did not require the petitioner at law to await the final decree in equity, but partition should be ordered in conformity with the title so determined. The court said that the question was not the abstract meaning of the term, but its meaning as applied to the two cases to which it referred. *Hodges v. Pin-gree*, 108 Mass. 585.

Abiding the Event.—For definition see *supra*, this title; see also the title EVENT; for complete treatment of the subject see 1 ENCYC. OF PL. & PR. 53.

Where it was stipulated that several suits should *abide* the event of one, it was held that after being refused judgment on one ground, taking it on another ground was no waiver of the right to take judgment upon the ground which was refused. The court said: "What was meant by the words '*abide* the event'? Certainly not that the same order of proceedings should be taken, step by step, in the succeeding cases as in the first. The parties had in view no such parrot-like repetition of forms without meaning, if the end was predestined. They meant the final outcome and the end of the litigation; that the side finally successful in the first case should be successful in all." *Commercial Union Assur. Co. v. Scammon*, 35 Ill. App. 659.

Costs Abiding Event.—See 1 ENCYC. PL. & PR. 59.

1. *Hopt v. Utah*, 120 U. S. 439. In this case it was held that a charge to the jury in a criminal case, "that if, after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an *abiding conviction* of the defendant's guilt, they have no reasonable doubt," was not erroneous. The court, by Field, J., said: "The word *abiding* here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the

ABILITY. (See also the title PECUNIARY.)—This term has given rise to judicial construction as used in several phases. See note.¹

ABJURE. A total abandonment of the state.²

ABLE. See note.³

ABLE-BODIED imports an absence of those palpable and visible defects which evidently incapacitate the person for performing the ordinary duties of a soldier, and does not imply an absolute freedom from all physical ailments.⁴

ABODE. See the titles DOMICIL; RESIDENCE; PERMANENT (for permanent place of abode); USUAL PLACE OF ABODE.

exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities."

And in *Battles v. Tallman*, 96 Ala. 403, it was held that an instruction that the jury must have an *abiding conviction* implies such a degree of certainty as would justify a verdict of guilt in a criminal case, and is, therefore, erroneous in a civil one. See also *Griffiths v. State*, 90 Ala. 588.

1. **Construed Equivalent to "Pecuniary Ability"—Statute of Frauds.**—An English statute, 9 Geo. IV., c. 14, § 6, provides that no action could be brought to charge a person by reason of a representation given concerning the *ability* of another person unless reduced to writing and signed. It was held that the representation should relate to the *ability* of the other person effectually to perform and satisfy the engagement of a pecuniary nature into which he has proposed to enter. *Lyde v. Barnard*, 1 M. & W. 101.

Ability to Support Wife. (See also the title DIVORCE.)—Under the *Vermont* statute authorizing a divorce on the ground of cruel neglect to support the wife when the husband has sufficient pecuniary *ability* to provide for her, it was held that it must be shown, to entitle the wife to a divorce, that the husband had sufficient property to provide suitable maintenance, and that it was not sufficient to show that he had the capacity to acquire ample means. And see *Washburn v. Washburn*, 9 Cal. 475.

But in *Wisconsin*, under a statute providing a penalty for abandonment of the wife, where the husband has sufficient *ability* to support her, it was held that the words "being of sufficient *ability*" referred as well to the husband's capacity or skill to earn or acquire money as to property actually owned by him. See also *Keller v. Keller*, 24 Wis. 522.

2. In *Mead v. Hughes*, 15 Ala. 141, 50 Am. Dec. 123, the court said: "The decision of this court in *Arthur v. Broadnax*, 3 Ala. 557, 37 Am. Dec. 707, affirms that if the husband has *abjured* the state and remains abroad,

the wife meanwhile trading as a *feme sole* could recover on a note which was given to her as such. We must consider the term *abjure*, as there used, as implying a total abandonment of the state, a departure from the state without the intention of returning; and not a renunciation of one's country, upon an oath of perpetual banishment, as the term originally implied."

3. A *Maine* statute declares that expenses incurred for providing nurses, etc., to an infected person shall be at the charge of the person sick, "if *able*." It was held that the possession of six hundred dollars in available personal securities rendered a person *able* in the meaning of the statute, where the charges were one hundred and seventy-six dollars. *Hampden v. Newburgh*, 67 Me. 370.

4. *Darling v. Bowen*, 10 Vt. 148, in which case it was held that a physical disability or bodily infirmity, not apparent, does not exempt a person from enrolment in the militia. The enrolling officer is the judge, and error of judgment cannot be inquired into collaterally, such as in a suit for a trespass for taking and selling a mare, the property of the plaintiff, or in an amercement for nonappearance at training.

There being no exception made by the charter of a city or the ordinance imposing a tax, in favor of persons not *able-bodied*, and no constitutional restriction upon legislation in this respect, the fact that a citizen upon whom the tax is imposed is not *able-bodied* constitutes no defense to the imposition of the tax. *Maccomb v. Twaddle*, 4 Ill. App. 254.

A statute of *Vermont*, in force in 1797, provided that every healthy, *able-bodied* person residing within that state, and being of peaceable behavior, should be deemed to be legally settled in the town in which he should have first resided for the space of one year. It was held that in determining whether a person was healthy and *able-bodied* within the intent of the statute, the test is not his ability or inability during the time to perform ordinary labor and thereby support himself and family, but that a person is to be deemed not to have been healthy and *able-bodied* who during the year received an injury which afterward resulted in permanent disability, although not incapacitating him during the year for ordinary labor. *Marlborough v. Sisson*, 26 Conn. 57.

ABORTION.

By EDWIN P. COX.

I. DEFINITION, 186.

II. THE OFFENSE—HOW REGARDED, 187.

1. *At Common Law*, 187.
2. *By Statute*, 188.

III. ELEMENTS OF THE OFFENSE, 188.

1. *Pregnancy*, 188.
2. *Intent*, 188.
3. *Means*, 189.
4. *Results—Death of Mother—Death of Child*, 190.

IV. WHO MAY BE CRIMINALLY LIABLE, 191.

1. *As Principals*, 191.
 - a. *The Woman Herself*, 191.
 - b. *Others as Principals*, 191.
2. *As Accessories and Accomplices*, 191.
 - a. *The Woman Herself*, 191.
 - b. *Others as Accessories and Accomplices*, 192.
3. *Persons Selling, Advertising, or Giving Away Instruments or Drugs, etc.*, 192.

V. ATTEMPTS, 193.

VI. EVIDENCE, 193.

VII. DEFENSES, 195.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see I *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, p. 62.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCESSORY; ACCOMPLICE; AIDER AND ABETTOR; ATTEMPTS TO COMMIT CRIME; CIRCUMSTANTIAL EVIDENCE; CRIMINAL LAW; DYING DECLARATIONS; EXPERT AND OPINION EVIDENCE; HEARSAY EVIDENCE; LIBEL AND SLANDER; MEDICAL JURISPRUDENCE; RES GESTÆ.*

I. DEFINITION.—By abortion is understood the act of miscarrying or producing young before the natural time; before the fœtus is perfectly formed; and to cause or produce an abortion is to cause or produce this premature bringing forth of the fœtus.¹

1. *Abrams v. Foshee*, 3 Iowa 278, 66 Am. Dec. 77; *Butler v. Wood*, 10 How. Pr. (N. Y. Supreme Ct.) 224.

"The act of bringing forth what is yet imperfect, and particularly the delivery or expulsion of the human fœtus prematurely or before it is yet capable of sustaining life. Also, the thing prematurely brought forth, or product of an untimely process." Abb. Law Dict., quoted in *Belt v. Spaulding*, 17 Oregon 130.

Abortion — Miscarriage — Premature Labor.—

"The expulsion of the ovum or embryo, within the first six weeks after conception, is technically miscarriage; between that time and the expiration of the sixth month, when the child may by possibility live, it is termed abortion; if the delivery be soon after the sixth month, it is termed premature labor. But the criminal attempt to destroy the fœtus, at any time before birth, is termed in law a miscarriage, varying as we have seen

II. THE OFFENSE—HOW REGARDED—1. At Common Law—With Consent of Woman and before Quickening.—According to some authorities, it never was an act punishable at common law to commit abortion with the consent of the mother, provided it was done before the child became quick;¹ but others are not disposed thus to restrict the criminal act, and hold that it may be committed at any stage of pregnancy.²

After Quickening.—If the abortion was committed after quickening, it was punishable only as a misdemeanor; and the attempt to commit abortion after quickening was likewise punished as a misdemeanor.³

in degree of offense and punishment, whether the attempt were before or after the child had quickened.' Chitty's Med. Jur. 410. Other writers on the subject give a similar definition of the term 'miscarriage.' Hoblyn's Dictionary. The converse of this last proposition cannot be true, as there are undoubtedly many miscarriages involving no moral wrong." *Smith v. State*, 33 Me. 59, 54 Am. Dec. 607.

Miscarriage, both in law and philology, means the bringing forth the fœtus before it is perfectly formed and capable of living; and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word "abortion" in its primary meaning is synonymous with and equivalent to "miscarriage." It has a secondary meaning, in which it is used to denote the offspring. *Mills v. Com.*, 13 Pa. St. 632.

Whether Abortion Necessarily Imports a Crime.—In *Belt v. Spaulding*, 17 Oregon 130, the court said: "It will be observed, the word 'abortion' does not occur in the section, and there is no statute defining or punishing it as a crime. The term itself does not import a crime; it simply means, according to Webster, the act of miscarrying; the expulsion of an immature product of conception; miscarriage; the immature product of an untimely birth." See also *People v. Aiken*, 66 Mich. 484, 11 Am. St. Rep. 512.

1. Abortion, with Mother's Consent and before Quickening.—*Com. v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 390; *Com. v. Bangs*, 9 Mass. 387; *Com. v. Jackson*, 15 Gray (Mass.) 187; *Mitchell v. Com.*, 78 Ky. 204, 29 Am. Rep. 227; *State v. Cooper*, 22 N. J. L. 53, 51 Am. Dec. 248; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *People v. Sessions*, 58 Mich. 594; *Abrams v. Foshee*, 3 Iowa 274, 66 Am. Dec. 77; *Hatfield v. Gano*, 15 Iowa 178.

In 1 Arch. Crim. Pr. & Pl. 951 the following language is used: "Abortion as a crime is to be found only in modern treatises and modern statutes. No trace of it is to be found in the ancient common-law writers. * * * It is perfectly certain, by the unanimous concurrence of all the authorities, that that offense could not be committed unless the child had quickened."

"Quick with Child."—In one instance a distinction was taken between the phrases "quick with child" and "with quick child," it being held that the former means simply having conceived. *Reg. v. Wycherley*, 8 C. & P. 262, 34 E. C. L. 381. See also *Evans v. People*, 49 N. Y. 86. The court, in *State v. Cooper*, 22 N. J. L. 57, 51 Am. Dec.

248; said in reference to the above: "There is no foundation whatever in law for this distinction. The ancient authorities show clearly that the terms are synonymous, both importing that the child had quickened in the womb, and that the period had arrived when the life of the infant, in contemplation of law, had commenced. *Baynton's Case*, 14 State Trials 634; 1 Hale P. C. 368; 4 B. C. 395." According to common understanding, a woman is not "quick with child" until she has felt the child move within her. *Com. v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 396; *Mitchell v. Com.*, 78 Ky. 204, 29 Am. Rep. 227.

2. The question was so determined by the Supreme Court of Pennsylvania in *Mills v. Com.*, 13 Pa. St. 630. The court observes: "It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with and violates the mysteries of nature in the process by which the human race is propagated and continued. It is a crime against nature, which obstructs the fountains of life, and therefore it is punished. The next error assigned is that it ought to have been charged in the count that the woman had become quick. But although it has been so held in *Massachusetts* and in some other states, it is not, I apprehend, the law in *Pennsylvania*, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated."

The Supreme Court of *North Carolina*, following the doctrine of the case, said in reference to the above extract: "This enunciation of the law, so careful and distinct in expression, dispenses with the necessity for further discussion." *State v. Slagle*, 83 N. Car. 630. To the same effect is *Com. v. Demain*, 6 Pa. L. J. 29.

And Mr. Bishop observes in regard to the same language: "This, in principle, seems to be the reasonable and just doctrine." *Bishop Stat. Crimes*, § 744.

Mr. Wharton regards the question as doubtful. *Wharton Cr. L.* (8th ed.), § 592.

3. *State v. Reed*, 45 Ark. 334; *Holliday v. People*, 9 Ill. 111; *Com. v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 396; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248; *Evans v. People*, 49 N. Y. 86; *State v. Slagle*, 82 N. Car. 630.

Without Consent of Woman.—If done without the woman's consent, the act was held to constitute an aggravated assault.¹

2. By Statute.—The statutes enacted on this subject in most of the states fail to draw any distinction between the commission of the offense, or attempt at commission, before and after the quickening of the child in the womb, making it a felony in either case. But some states still retain the distinction, punishing the act or attempt more severely when done after quickening.²

III. ELEMENTS OF THE OFFENSE—1. Pregnancy—Quick with Child.—Under the statutes in most of the states it is immaterial whether the woman be quick with child or not, the criminal act being complete if done at any time during pregnancy.³ In *Michigan*, however, it is essential that the fœtus be quickened.⁴

2. Intent.—It is essential to prove the evil intent, as specified in the statutes, or implied from the nature of the case, in order for the crime to be complete, since that is the gravamen of the offense.⁵ The intent to produce an abortion must exist when the means are used.⁶

How Shown.—This intention may be shown by circumstances, and by either direct or indirect testimony.⁷

1. Abortion without Consent of Woman.—In *Com. v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 396, Shaw, C.J., delivering the opinion of the court, used this language: "The use of violence upon a woman, with an intent to procure her miscarriage, without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law." See also *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248.

2. See the various local statutes. And see *State v. Watson*, 30 Kan. 281.

3. Stage of Pregnancy Immaterial.—*State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148; *Wilson v. State*, 2 Ohio St. 319; *Com. v. Tibbetts*, 157 Mass. 519; *Com. v. Taylor*, 132 Mass. 261; *Com. v. Wood*, 11 Gray (Mass.) 86. In this latter case the court was inclined to the view that an indictment on *Massachusetts* Stat. 1845, ch. 27, for procuring a miscarriage, could not be maintained if the fœtus had previously lost its vitality so that it could never have matured into a living child.

Under the *Vermont* statute it is not essential that the fœtus should be alive at the time the attempt at abortion is made. *State v. Howard*, 32 Vt. 380. See also *State v. Stewart*, 52 Iowa 284; *Com. v. Grover*, 16 Gray (Mass.) 602; *Eckhardt v. People*, 83 N. Y. 462, 38 Am. Rep. 462.

When Pregnancy Ceases.—It seems that pregnancy ceases when the child has come forth from the womb, though it is still attached by the umbilical cord, and though the afterbirth has not been removed. *Com. v. Brown*, 14 Gray (Mass.) 415.

4. *People v. McDowell*, 63 Mich. 229.

5. Intent the Gravamen of Offense.—*Reg. v. Isaacs*, L. & C. 220; *Reg. v. Hillman*, L. & C. 343; *Reg. v. Titley*, 14 Cox C. C. 502; *People v. Josselyn*, 39 Cal. 393; *Dougherty v. People*, 1 Colo. 514; *Slattery v. People*, 76 Ill. 217; *State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148; *Com. v. Wood*, 11 Gray (Mass.) 85; *State v. Owens*, 22 Minn. 238; *State v. Murphy*, 27 N. J. L. 112; *State v. Drake*, 30 N. J. L. 422; *State v. Gedicke*, 43

N. J. L. 86; *People v. Lohman*, 2 Barb. (N. Y.) 216; *Wilson v. State*, 2 Ohio St. 319.

6. *Slattery v. People*, 76 Ill. 217. In this case a husband assaulted and beat his wife, she being then about three months pregnant. Shortly afterwards she had a miscarriage. It was not proved that the husband desired or intended such a result. It was held that a conviction for abortion could not be sustained.

7. Evidence of Intention—Knowledge of Pregnancy.—Evidence relating to the accused's possession of instruments to produce an abortion, and her use of them, and her knowledge upon the subject, and that she held herself out for the performance of such service, with the instruments, for hire, is admissible to show knowledge and intent. *People v. Sessions*, 58 Mich. 594.

Acts of the defendant tending to show knowledge of a woman's pregnancy and his intention to commit an abortion on her, whether prior or subsequent to the particular act charged, may be proved. *Scott v. People*, 141 Ill. 195.

In *Hatchard v. State*, 79 Wis. 357, proof that the defendant said she had operated on hundreds of other girls was held to be admissible to show intent.

In *Com. v. Holmes*, 103 Mass. 440, in order to show the intent and purpose of the act, it was admitted in evidence that the defendant had told A.'s mother to send A. to her, to get rid of her child, adding that she had operated already five times on one person.

Proof of the examination of the girl by the defendant as to her pregnancy is admissible in evidence against him. *People v. Josselyn*, 39 Cal. 393.

It was held in *Powe v. State*, 49 N. J. L. 34, that where there exists a fully formed belief in the existence of pregnancy, there may exist as fully formed an intent to cause a miscarriage, even without absolute knowledge of pregnancy.

Letters of the prisoner to the woman and evidence of conversations with her are admissible to show intent. *Hays v. State*, 40

Criminal Intent Implied.—The production of an abortion implies a criminal intent.¹

3. Means.—The means denounced by the various statutes are the unlawful or malicious supplying, or administering to a pregnant woman, or causing or procuring to be taken by her,² any drug, poison, substance, or noxious thing,³

Md. 633; *Jones v. State*, 70 Md. 326, 14 Am. St. Rep. 362.

A woman testified that she was *enccinte* by defendant and that he gave her "Dr. Lyon's Spanish Drops." The prisoner testified that he did not know that she was *enccinte*, but that he gave her the medicine to restore menstruation. It was held that it was not reasonable to suppose that the defendant would have taken the trouble he did to procure the medicine, which he doubtless knew and believed would cause a miscarriage, unless he had known the woman was *enccinte*, and furnished it to her with the intention of producing an abortion. *State v. Montgomery*, 71 Iowa 630.

Proof of mere advice to take medicine, where no medicine, drug, or substance of any kind is taken, is not sufficient to convict of the crime of abortion, under *New York Pen. Code*, § 294, providing that any person who, with intent thereby to procure the miscarriage of a woman, advises her to take any medicine, is guilty of abortion. *People v. Phelps*, 15 N. Y. Supp. 440.

It is often important in determining the intent to show who the father of the child was, and so the state may prove that a certain person never had intercourse with the woman. *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319.

At a trial upon the charge of having used a certain instrument with intent to produce an abortion, evidence that the defendant also administered other unlawful treatment to the same woman on two occasions other than that named in the indictment is admissible to show his intent, and his knowledge that the woman was *enccinte*. *Com. v. Corkin*, 136 Mass. 429.

Evidence showing that ergot was administered to the deceased shortly before her death was held to be admissible to prove that, according to popular opinion, ergot would produce abortion, since the fact proved might show a motive for administering it, and the intention with which it was done. *Carter v. State*, 2 Ind. 617.

1. Criminal Intent Implied.—Where an act is unlawful in itself, proof of justification must be shown by the defendant, and if he should fail in this the law implies a criminal intent. *Scott v. People*, 141 Ill. 195; *Dougherty v. People*, 1 Colo. 514; *State v. Glass*, 5 Oregon 73.

2. Administering.—To constitute an administering there need not be an actual manual delivery of the substance. *Rex v. Cadman*, 1 M. C. C. 114; *Rex v. Harley*, 4 C. & P. 369, 19 E. C. L. 423; *Robbins v. State*, 8 Ohio St. 131; *State v. Morrow*, 40 S. Car. 221.

The accused may cause the drug to be

taken, although it is in fact taken out of his presence. *State v. Morrow*, 40 S. Car. 22; *Reg. v. Wilson*, 7 Cox C. C. 190.

In *Jones v. State*, 70 Md. 326, 14 Am. St. Rep. 362, on an indictment under *Maryland Acts* 1868, ch. 179, § 2, charging that the accused "did knowingly use and cause to be used certain means" for the purpose of unlawfully causing a miscarriage and abortion, letters from him to the woman, one of which contained minute directions as to how a bottle of ergot that accompanied it should be taken, and proof by the woman that she administered to herself the drug sent, and in other respects also followed the instructions given by him, were held to be admissible in evidence, although the accused was not present when the woman took the drug and did the other things which he advised her to do.

But in order to convict under an indictment for abortion charging "an administering or causing to be taken," some of the drug must be actually swallowed by the woman. *Rex v. Cadman*, 1 M. C. C. 114; *Rex v. Harley*, 4 C. & P. 369, 19 E. C. L. 423; *Reg. v. Wilson*, 7 Cox C. C. 190; *People v. Phelps*, 133 N. Y. 267; *Lamb v. State*, 66 Md. 285.

But under the *New Jersey* statute it is not necessary to aver that the poison, drug, etc., advised to be taken was actually taken or swallowed, nor is it necessary to prove it on the trial, as the advising to take the potion is the overt act made criminal by the statute. *State v. Murphy*, 27 N. J. L. 112. See also *State v. Hyer*, 39 N. J. L. 600.

3. Noxious Thing.—If a drug is dangerous to a pregnant woman, it is held to be "a noxious thing." *Reg. v. Cramp*, 5 Q. B. Div. 307; *Dougherty v. People*, 1 Colo. 517.

Whether a thing is noxious is often a matter of circumstance and quantity, and is a question for the jury. *Reg. v. Hillman*, 9 Cox C. C. 386; *Dougherty v. People*, 1 Colo. 517.

In *Reg. v. Hennah*, 13 Cox C. C. 547, it was held that a thing must be noxious in itself, and not merely when taken in excess.

In *Reg. v. Isaacs*, L. & C. 220, it was held that a small quantity of savin and featherfew, sufficient only to produce a slight disturbance in the stomach, was not a noxious thing.

In *State v. Gedicke*, 43 N. J. L. 86, *Scudder, J.*, delivering the opinion, said: "The poison, drug, medicine, or other thing must be noxious or hurtful in itself. If it possesses this quality, and is administered, prescribed, advised, or directed to be taken with the intent to cause or procure a miscarriage when the woman is pregnant with child, the crime is complete, whether in the opinion of others it is capable of producing this result or not."

or unlawfully using or causing to be used any instrument or other methods whatsoever,¹ with intent to procure or cause an abortion.²

4. Results—Death of Mother—Death of Child.—At Common Law, if the death of the woman resulted from the measures used to procure an abortion, it was murder.³

By Statute in most of the states of the Union, where the death of the woman ensues from the means used, the offense has been reduced to murder in the second degree, or to manslaughter.⁴

Death of Child.—At common law, according to the weight of authority, to cause the destruction of the child before it had quickened in its mother's womb was no offense, if done with the mother's consent. Although the common law for many civil purposes recognizes the existence of a child from its conception, it does not for the purpose of punishing its destruction recognize it as a living being until it has quickened and stirred in its mother's womb.⁵

1. Mode of Accomplishment not Material.—The means which may be used are various, and it is sufficient to prove that the crime was committed by one of the means alleged in the indictment. *Navarro v. State*, 24 Tex. App. 378 (where the means used were striking, beating, and kicking); *Com. v. W—*, 3 Pittsb. (Pa.) 463 (where the defendant advised excessive exercise, and it was taken 'n his absence); *Com. v. Brown*, 14 Gray (Mass.) 419; *Scott v. People*, 141 Ill. 195; *Com. v. Snow*, 116 Mass. 47.

2. Means need not be Effectual.—Under the statutes of many of the states, the drug or substance need not be effectual in causing an abortion, it being only necessary that the accused should believe it to be effectual. *State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148; *Dougherty v. People*, 1 Colo. 514; *Com. v. Morrison*, 16 Gray (Mass.) 224; *State v. Gedicke*, 43 N. J. L. 86.

Texas Statute.—Where it was charged that the accused administered cotton-root tea in order to procure an abortion, and expert witnesses introduced by the state testified that while medical books claimed that an abortion could be produced by such treatment, they had no personal knowledge of it, but were of the opinion that cotton-root tea could not produce abortion as it was administered in the case, it was held that under the *Texas* Penal Code, art. 538, requiring the evidence in support of such a charge to show that the means used were calculated to produce abortion, no conviction could be had. *Williams v. State* (Tex. App., 1892), 19 S. W. Rep. 897. See also *Watson v. State*, 9 Tex. App. 237.

3. At Common Law.—Russell on Crimes 540; Wharton on Homicide, § 41; 1 East Pleas of the Crown 230; 1 Hale 430; 2 Bish. on Crim. Law, § 691; 4 Black. Com. 201; *Tinckler's Case*, 1 East P. C. 354; *Reg. v. Fretwell*, L. & C. 161, 9 Cox C. C. 153; *State v. Moore*, 25 Iowa 128, 95 Am. Dec. 776; *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815; *State v. Thurman*, 66 Iowa 693; *State v. Baldwin*, 79 Iowa 714; *Peoples v. Com.*, 87 Ky. 487; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *Com. v. Hersey*, 2 Allen (Mass.) 173; *Com. v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 396; *People v. Sessions*, 58 Mich. 594; *Com. v. Keeper of Prison*, 2 Ashm. (Pa.) 227; *State v. Dickinson*, 41 Wis. 299.

In *Com. v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 396, Shaw, C. J., in delivering the opinion of the court, used this language: "So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice any more than in the case of a duel, where in like manner there is the consent of the parties."

4. Under Statute.—*State v. Dickinson*, 41 Wis. 299; *Hatchard v. State*, 79 Wis. 357; *Solander v. People*, 2 Colo. 48; *Com. v. Leach*, 156 Mass. 99; *People v. Olmstead*, 30 Mich. 431; *People v. McDowell*, 63 Mich. 229; *People v. Aikin*, 66 Mich. 460, 11 Am. St. Rep. 512; *State v. Moore*, 25 Iowa 128, 95 Am. Dec. 776.

In *Maine*, if the death of the mother results from an attempt to destroy the child after it has become quick in its mother's womb, it is murder; if it results from an attempt at miscarriage prior to the quickening of the child, it is manslaughter. *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607.

Under the *Illinois* statute, if death is caused by producing abortion, it is murder. *Beasley v. People*, 89 Ill. 571.

In *Yundt v. People*, 65 Ill. 373, the defendant produced an abortion upon a woman who was quick with child, and a fatal sickness followed in consequence thereof, which resulted in her death. The indictment was for manslaughter, and not for producing an abortion, under the common law or the statute. The defendant was adjudged guilty as charged.

5. At Common Law.—*Mitchell v. Com.*, 78 Ky. 204, 29 Am. Rep. 227; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248; *Com. v. Parker*, 9 Met. (Mass.) 263, 43 Am. Dec. 391; *Com. v. Bangs*, 9 Mass. 387; *Com. v. Jackson*, 15 Gray (Mass.) 187; *Abrams v. Foshee*, 3 Iowa 274, 66 Am. Dec. 77; *Hatfield v. Gano*, 15 Iowa 178; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *People v. Sessions*, 58 Mich. 594.

Contra.—There are, however, cases maintaining the contrary view. See *State v. Slagle*, 82 N. Car. 630; *Com. v. Demain*, 6

The wilful killing of an unborn child after it has quickened is not a felony, except as it is rendered so by statute, but is a misdemeanor.¹

According to the better authority, if a person in attempting to commit an abortion causes a child to be born so much earlier than the natural time that it is much less capable of living, and it afterwards dies by reason of exposure to the external world, such person is guilty of murder.²

IV. WHO MAY BE CRIMINALLY LIABLE—1. **As Principals**—*a. THE WOMAN HERSELF*.—In most of the states of the Union a woman who commits an abortion on herself is guilty of no crime, she being regarded rather as the victim than the perpetrator of the crime.³ But in some of the states, and in *England*, she is liable to the same punishment as one who commits an abortion on another.⁴

b. OTHERS AS PRINCIPALS.—Under the statutes any one who unlawfully or maliciously supplies, or administers to a pregnant woman, or causes or procures to be taken by her, any drug, poison, substance, or noxious thing, or unlawfully uses or causes to be used any instrument or other means whatsoever, with intent to procure or cause an abortion, is a principal.⁵

2. **As Accessories and Accomplices**—*a. THE WOMAN HERSELF*.—According to the weight of authority, both in *England* and the *United States*, a pregnant

Pa. L. J. 29; *Mills v. Com.*, 13 Pa. St. 633; *Bish. Stat. Cr.*, § 746; *Russell on Crimes* 522.

1. **By Statute**.—*Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *People v. Stockham*, 1 Park. Cr. Rep. (N. Y.) 424; *Lohman v. People*, 2 Barb. (N. Y.) 216; *Evans v. People*, 49 N. Y. 88.

By the general laws of *New York*, the killing of a quick child is manslaughter in the first degree when caused by an injury to the mother which would be murder if it resulted in the death of the mother. *Evans v. People*, 49 N. Y. 88.

2. **Death of Child after Birth**.—*Reg. v. West*, 2 C. & K. 784, 61 E. C. L. 784; *Rex v. Senior*, 1 M. C. C. 344; *Reg. v. Trilloe*, 2 M. C. C. 260; *Com. v. Brown*, 14 Gray (Mass.) 419; *Wharton's Crim. L.* (8th ed.), § 592; *Russell on Crimes* 671; 3 *Coke Inst.* 50; 1 *Hawk. P. C.*, c. 31, § 16; 4 *Black. Com.* 198; 1 *East P. C.*, c. 5, § 14, p. 228. *Contra*, 1 *Hale* 432; *Saund.* 21.

3. **Generally Woman not Criminally Liable**.—*Com. v. Wood*, 11 Gray (Mass.) 85; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248.

It is not criminal for a woman to swallow a potion, or to consent to an operation or other means being used to procure an abortion. No act of hers is made criminal by statute. Her guilt or innocence remains as at common law, and her offense at common law is against the life of the child. *State v. Murphy*, 27 N. J. L. 112; *State v. Hyer*, 39 N. J. L. 598; *Com. v. Boynton*, 116 Mass. 343; *Solander v. People*, 2 Colo. 48; *Smith v. Gaffard*, 31 Ala. 45.

It was held in *Hatfield v. Gano*, 15 Iowa 177, that it was the person who used the means with the pregnant woman to procure the abortion, and not the woman herself, whom the legislature intended to punish. *Abrams v. Foshee*, 3 Iowa 274, 66 Am. Dec. 77.

4. **New York**.—In *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319, it was held that a

woman could not be indicted for procuring an abortion on herself, the law regarding her rather as the victim than the perpetrator of the crime.

But by § 295 of the *New York Penal Code* of 1891 a pregnant woman who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year nor more than four years. See *People v. Meyers*, 5 N. Y. Crim. Rep. 120. See also *Frazer v. People*, 54 Barb. (N. Y.) 306.

California.—The penal code of this state, § 275, makes it a felony for a woman to solicit of any person any medicine, drug, or substance whatever, and take the same, or to submit to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life.

England.—In *England*, by 24 and 25 Vict., c. 100, § 58, a person who commits an abortion on herself is equally guilty with the person who commits an abortion on another, and subject to the same punishment.

5. *State v. Owens*, 22 Minn. 238; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *State v. Murphy*, 27 N. J. L. 112.

In *Com. v. Brown*, 14 Gray (Mass.) 419, where one defendant advised, ordered, and commanded two other defendants to administer ergot to a pregnant woman, with intent to cause a miscarriage, it was held that he was a principal and not an accessory.

Where it was proven that a woman offered to produce an abortion on a girl, stating that she had operated on hundreds of others, and afterwards assisted her husband in the operation, it was held that she did not act under the compulsion of the husband, but voluntarily, and was therefore a principal. *Hatchard v. State*, 79 Wis. 357.

woman who takes medicine or submits to other means to produce an abortion is not an accomplice, even though she solicits the use of the means employed.¹ And it is held that, not being an accomplice, the woman does not need corroboration in her testimony.² But her moral implication is a proper question for consideration by the jury in weighing her testimony.³

b. OTHERS AS ACCESSORIES AND ACCOMPLICES.—Any person who aids, abets, or assists the woman or any other person to procure an abortion, is an accessory or accomplice.⁴ It is essential, however, that the person so acting have knowledge that the object of the person whom he assists is to procure an abortion.⁵

3. Persons Selling, Advertising, or Giving Away Instruments or Drugs, etc.—In many of the states of the Union it is made a misdemeanor to sell, give away, or advertise any instrument, drug, or other means for the purpose of procuring an abortion.⁶

1. Woman not an Accomplice—England.—Reg. v. Boyes, 1 B. & S. 311; Rex v. Hargrave, 5 C. & P. 170.

Kentucky.—Peoples v. Com., 87 Ky. 487.

Massachusetts.—Com. v. Boynton, 116 Mass. 343; Com. v. Brown, 121 Mass. 69; Com. v. Drake, 124 Mass. 21; Com. v. Follansbee, 155 Mass. 274.

Minnesota.—State v. Owens, 22 Minn. 238; State v. Pearce, 56 Minn. 226.

New Jersey.—State v. Hyer, 39 N. J. L. 598.

New York.—People v. Meyers, 5 N. Y. Crim. Rep. 120; Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319; People v. Vedder, 98 N. Y. 630; People v. McGonegal, 136 N. Y. 62.

Texas.—Watson v. State, 9 Tex. App. 237.

In *Com. v. Wood*, 11 Gray (Mass.) 85, the court said: "We think the court rightly instructed the jury that the woman was not, under the statute, technically an accomplice, for she could not have been indicted with him."

Wharton's Crim. Ev., § 440, maintains that the woman is an accomplice provided she submits willingly to the operation, but is not if fraud or force is used; citing *People v. Josselyn*, 39 Cal. 393, to support the proposition. This case, however, does not support the contention. The decision was rendered under the *California* statute of 1861, in which it was expressly provided that no physician or surgeon should be convicted on the uncorroborated testimony of the woman upon whom the abortion was alleged to have been performed. This statute has since been repealed.

2. Corroboration not Necessary.—Com. v. Wood, 11 Gray (Mass.) 85; State v. Hyer, 39 N. J. L. 598; People v. Lohman, 2 Barb. (N. Y.) 216; People v. Meyers, 5 N. Y. Crim. Rep. 120; Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319; Watson v. State, 9 Tex. App. 239.

Ohio.—The *Ohio* Rev. Stat., § 6804, punishes the woman as an aider and abettor, if she voluntarily participates in the unlawful act; and in such a case, if, on the trial of the principal, she is introduced as a witness by the state, her evidence should be regarded as that of an accomplice, and would therefore need corroboration. State v. McCoy (Ohio, 1894), 39 N. E. Rep. 316.

3. Weight of Testimony Question for Jury.—Com. v. Brown, 121 Mass. 69; Com. v. Drake,

124 Mass. 21; People v. Lohman, 2 Barb. (N. Y.) 216; People v. Vedder, 98 N. Y. 630; Watson v. State, 9 Tex. App. 239; Wandell v. State (Tex. Crim. App., 1894), 25 S. W. Rep. 27.

The fact that the abortion was committed by the solicitation or consent of the woman herself does not in the slightest degree lessen the criminality of the act, after it has been proved. Com. v. Snow, 116 Mass. 47; Com. v. Wood, 11 Gray (Mass.) 85.

4. Third Persons as Accomplices and Accessories.—Solander v. People, 2 Colo. 48; Crichton v. People, 1 Abb. App. Dec. (N. Y.) 467; State v. Pearce, 56 Minn. 226; Willingham v. State (Tex. Crim. App., 1894), 25 S. W. Rep. 424.

Encouragement.—The father of the woman upon whom an abortion was performed testified that the accused had told him of his daughter's pregnancy, and that he (the accused) could give her a drug that would remove it. The father replied, "All right; anything to save my child." It was held that this was sufficient encouragement to constitute the father an accomplice. Watson v. State, 9 Tex. App. 237.

Procuring Physician.—Where the defendant received a woman to board for the purpose of having an abortion performed, and afterwards procured a physician to operate on the woman, it was held that such defendant was an accessory before the fact. Com. v. Adams, 127 Mass. 15.

Accompanying Woman to Place of Performance.—Where a woman who had been an intimate companion of the deceased, knew of her pregnancy, and her intention to have an operation performed to produce abortion, accompanied her to the house of the accused, and remained in another room while the alleged operation was being performed, it not being charged that she aided or abetted the defendant in any way in the commission of the alleged crime, it was held that she was not an accomplice of the accused. People v. McGonegal, 136 N. Y. 62. See also Com. v. Drake, 124 Mass. 21.

5. Knowledge of the Object in View Necessary.—Com. v. Follansbee, 155 Mass. 274.

In *Texas*, any person who furnishes the means for procuring an abortion, knowing the purpose intended, is guilty as an accomplice. Tex. Pen. Code, § 532.

6. Statutes.—See, for example, the statutes

V. ATTEMPTS.—It is a punishable offense to attempt to commit an abortion, whether the effort is successful or not.¹ An attempt implies both a purpose and an actual effort to effect that purpose.²

VI. EVIDENCE—The Woman.—The evidence of the woman upon whom the abortion is committed is admissible, and conviction may be had upon her uncorroborated testimony; her credibility as a witness being a question for the jury.³

Dying Declarations—The courts are divided as to whether or not the dying declarations of the woman are admissible in evidence against the accused.⁴ It is held, under the common-law rule, that where the death of the woman is not the subject of the charge, her dying declarations are not admissible.⁵

Res Gestæ.—Certain acts and declarations which are contemporaneous with the main fact under consideration, and so connected with it as to illustrate its character, are properly admissible in evidence as being part of the *res gestæ*.⁶

of *Indiana, Iowa, Massachusetts, Ohio, Rhode Island, and Vermont.*

Where the statute against supplying instruments for the purpose of procuring abortion requires the instrument to be of a character fitted for that purpose, the defendant cannot be convicted where he gives a pregnant woman a common English catheter, even though he told her at the time that it would procure a miscarriage, as that is not the purpose for which that instrument is made. *State v. Forsythe*, 78 Iowa 595.

1. Failure of Attempt Immaterial.—It is not necessary that the attempt should have the effect intended, nor that the drug administered should be likely to produce the result. The criminal intention is the main consideration. *State v. Owens*, 22 Minn. 238.

The guilt is not determined by the success or failure of the effort. *State v. Reed*, 45 Ark. 333; *Slatery v. People*, 76 Ill. 217; *Scott v. People*, 141 Ill. 195; *Bassett v. State*, 41 Ind. 303; *State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *Com. v. Taylor*, 132 Mass. 261; *State v. Murphy*, 27 N. J. L. 112; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248; *State v. Geddicke*, 43 N. J. L. 86; *State v. Slagle*, 82 N. Car. 630; *Bishop on Statutory Crimes*, § 744.

2. Attempt Defined.—"An attempt is an intent to do a particular thing, with an act toward it falling short of the thing intended." 1 Bish. Crim. L., § 728; *Scott v. People*, 141 Ill. 195. See, generally, the title ATTEMPT TO COMMIT CRIME.

3. Woman upon whom the Abortion is Committed as a Witness.—It was held in *People v. Vedder*, 98 N. Y. 30, that the woman upon whom an abortion is committed is not an accomplice, and, therefore, the provision of the code prohibiting a conviction upon the testimony of an accomplice, unless corroborated, does not apply to her testimony. *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319; *Watson v. State*, 9 Tex. App. 237; *Com. v. Wood*, 11 Gray (Mass.) 85; *State v. Hyer*, 39 N. J. L. 568; *People v. Meyers*, 5 N. Y. Crim. Rep. 120; *People v. Lohman*, 2 Barb. (N. Y.) 216.

In *State v. Dyer*, 59 Me. 303, the victim of the abortion was held to be a competent witness, even though her husband was indicted as an accessory. *Com. v. Reid*, 8 Phila. (Pa.) 385; *Navarro v. State*, 24 Tex. App. 378.

If the woman is not technically an accomplice, she may, nevertheless, conspire with others to produce the abortion, and the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act. *Solander v. People*, 2 Colo. 48.

In *Ohio*, the woman is regarded as an accomplice, and her testimony therefore needs corroboration. *State v. McCoy* (Ohio, 1894), 39 N. E. Rep. 316. See, generally, the title ACCOMPLICES.

4. Admissibility of Dying Declarations.—*Rex v. Hutchinson*, 2 B. & C. 608, note; *Storer & Heard Crim. Abor.* 208; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596.

In *Railing v. Com.*, 110 Pa. St. 100, *overruling Com. v. Bruce*, 5 Crim. L. Mag. 680, it was held that death considered in and of itself is not a constituent element of the offense of abortion; therefore dying declarations are inadmissible against the defendant in a prosecution charging that crime.

Dying declarations of the woman have been received in evidence in the following cases: *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815; *State v. Leeper*, 70 Iowa 748; *Maine v. People*, 9 Hun (N. Y.) 113; *Rhodes v. State*, 128 Ind. 189; *State v. Baldwin*, 79 Iowa 714; *Peoples v. Com.*, 78 Ky. 487.

In *Minnesota*, the dying declarations of the woman have been held admissible as evidence, even where her husband was charged as an accomplice. *State v. Pearce*, 56 Minn. 226.

5. Com. v. Homer, 153 Mass. 343; *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *Reg. v. Hind*, 8 Cox C. C. 300.

Generally.—The general rule is, that dying declarations are admissible only when the death of the woman is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. *Rex v. Mead*, 2 B. & C. 605, 9 E. C. L. 196; 1 Greenl. Ev., § 156; *Rex v. Lloyd*, 4 C. & P. 233, 19 E. C. L. 360; *Runyan v. Price*, 15 Ohio St. 8, 86 Am. Dec. 459; *People v. Davis*, 56 N. Y. 95. See the title DYING DECLARATIONS.

6. Res Gestæ.—1 Greenl. Ev., § 108; *Solander v. People*, 2 Colo. 48; *People v. Mc-*

Death of the Woman.—The death of the woman may be proved as a part of the history of the case,¹ and then the procurement of the abortion is the *corpus delicti*.² Evidence may also be introduced as to the cause of death.³

Experts.—It is allowable to introduce physicians as medical experts, in order to prove whether or not an abortion has been committed on the woman, and, in case of death, whether or not death was the result of an abortion.⁴

Medical Books.—It is held that medical books are not admissible evidence, but that medical men may give their opinions as witnesses, which opinions may, in a measure, be founded on the contents of standard medical books as a part of their general knowledge.⁵

Instruments.—Evidence that instruments calculated to produce abortion were found in the possession of the accused is admissible, and such instruments may be exhibited to the jury.⁶

Dowell, 63 Mich. 229; *People v. Davis*, 56 N. Y. 95; *State v. Glass*, 5 Oregon 73.

Upon a trial on the charge of abortion, where the fact of the deceased party's going to the house of the defendant for the purpose of having him perform an abortion on her was material, it was held that the declarations of the deceased as to her purpose in going there, made at the time she departed for defendant's house, were competent evidence as part of the *res gesta*. *State v. Howard*, 32 Vt. 380.

But a Narrative of a Past Transaction is not admissible in evidence, it being merely hearsay. *Maine v. People*, 9 Hun (N. Y.) 113; *Com. v. Felch*, 132 Mass. 23; *Hays v. State*, 40 Md. 633; *People v. Aikin*, 66 Mich. 460, 11 Am. St. Rep. 512; *State v. Clements*, 15 Oregon 237.

Declarations to a Physician.—On a prosecution for abortion, a physician, who, after the commission of the crime, was selected by the public prosecutor to attend and examine the woman, and did attend and examine her with her consent, was allowed to testify, as a witness for the prosecution, to his opinion, founded on his observations of the woman and her narration of the circumstances, that an abortion had been committed. The woman was alive at the time of the trial. It was held that his testimony was inadmissible, because it was a narration of past events and not part of the *res gesta*. *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661. See also *Com. v. Hersey*, 2 Allen (Mass.) 173.

Exclamations Indicating Present Pain, made immediately after the operation was charged to have been performed, have been held admissible. *Com. v. Fenno*, 134 Mass. 217; *Rhodes v. State*, 128 Ind. 189; *Com. v. Leach*, 156 Mass. 99.

1. **Proof of Death of the Woman.**—*Com. v. Thompson*, 159 Mass. 56; *People v. Van Zile*, 143 N. Y. 368.

2. **Corpus Delicti.**—*Traylor v. State*, 101 Ind. 65; *People v. Aiken*, 66 Mich. 460, 11 Am. St. Rep. 512.

3. **Cause of Death.**—*People v. Aikin*, 66 Mich. 460, 11 Am. St. Rep. 512.

The injured parts of the body of the deceased, preserved in spirits, may be exhibited to the jury, in connection with the testimony of the physician who made the post-mortem examination, in order to show the cause of

the woman's death. *Com. v. Brown*, 14 Gray (Mass.) 419.

Evidence of cuts, wounds and bruises found in the womb of the deceased is admissible in order to prove that death was caused by an abortion or attempted abortion. *Com. v. Blair*, 126 Mass. 40.

4. **Expert Testimony.**—*Com. v. Leach*, 156 Mass. 99; *Com. v. Thompson*, 159 Mass. 56; *Com. v. Follansbee*, 155 Mass. 274; *Carter v. State*, 2 Ind. 617; *Slattery v. People*, 76 Ill. 217; *State v. Glass*, 5 Oregon 73.

A physician testifying as an expert that he has discovered no traces of an abortion may properly be asked whether under such circumstances an abortion would occur. *Bathrick v. Detroit Post, etc., Co.*, 50 Mich. 629, 45 Am. Rep. 63; *State v. Smith*, 32 Me. 370.

Where experts have testified that a woman could not have introduced a sea-tangle tent into her uterus without aid, it is competent for the defense to prove by another witness that she has often introduced the same instrument into her own uterus unaided. *Com. v. Leach*, 156 Mass. 99.

It was held to be error to allow a medical expert to give an opinion founded partly upon dying declarations of the victim of an alleged abortion. *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661.

It is improper to permit a witness who nursed the deceased during the last days of her sickness to give her opinion as to what caused the death of the deceased, without proof of any minute examination of the person of the deceased, or of any facts on which she based her opinion, or of any knowledge or experience in such matters. *People v. Olmstead*, 30 Mich. 431.

5. **Admissibility of Medical Books.**—*Collier v. Simpson*, 5 C. & P. 73, 24 E. C. L. 219; *Carter v. State*, 2 Ind. 617; 1 Greenl. Ev., § 595, note 3.

In *Massachusetts*, in accordance with well-settled practice, medical books are not allowed to be read in evidence. *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Com. v. Brown*, 121 Mass. 69.

6. **Instruments.**—*People v. Vedder*, 34 Hun (N. Y.) 280; *Com. v. Brown*, 14 Gray (Mass.) 419.

In *Com. v. Blair*, 126 Mass. 40, evidence that the accused had such an instrument in

Circumstances.—The evidence to convict of the crime of abortion, with the exception of the testimony of the victim, is almost always circumstantial; and therefore the question as to the admissibility of collateral facts in evidence is often to be determined by the nature of each case; evidence that would be admissible in one case would not necessarily be admissible in another.¹

Burden of Proof—As to Necessity of Abortion.—Where the statute makes it an essential element of the offense that the abortion was not necessary to save the life of the woman, a majority of the courts hold that the burden is on the prosecution to prove the absence of such necessity.²

As to Advice of Physician.—But it is held that the burden of proof is on the defendant to show that he had the advice of a physician that the operation was necessary, the latter fact being one peculiarly within the knowledge of the defendant.³

VII. DEFENSES.—The fact that the operation is necessary to preserve the life of the woman or the child is a valid defense;⁴ also the fact that it was ad-

his possession five months before the time of the alleged operation was admitted.

Where an indictment charges an attempt to procure an abortion by means of several different instruments, it is not necessary to prove that the accused used all the instruments described. It is sufficient to prove the use of one of the instruments as alleged. *Scott v. People*, 141 Ill. 195.

It is not necessary to prove the character of the instruments. *Com. v. Snow*, 116 Mass. 47.

1. Evidence Ordinarily Circumstantial—Illustrations.—On a trial upon the charge of abortion, evidence that a foetus was found secreted about the building where the operation was alleged to have been performed was held to be admissible, as tending very strongly to show the *corpus delicti*. *State v. Howard*, 32 Vt. 380.

Where defendant is charged with having procured an abortion upon a woman who was at that time an inmate of her house, it is competent to show the character of the house—that it is a house of ill fame—so that the jury may judge whether the place is one where the alleged crime could be safely attempted, without fear of detection. *Hays v. State*, 40 Md. 633.

The prosecution having proved that the defendant had administered medicine to the deceased, which might have the result of producing an abortion, and that an abortion was produced, from the effects of which she died; it was held that a circular published by defendant three years previously, tending to show that he was in the business of consulting in reference to the procuring of abortions, was admissible evidence. *Weed v. People*, 3 Thomp. & C. (N. Y.) 50.

On the trial of a charge of manslaughter in the commission of abortion, which resulted in the death of the mother, evidence of a woman who attended the mother the day before her death, washing her and changing her clothes, as to the condition of the bed and the clothes, and also as to a peculiar, offensive odor which she observed, was held to be admissible. *People v. Olmstead*, 30 Mich. 431.

2. Necessity of Abortion—Proof of.—1 *Greenl. Ev.*, § 78; *Moody v. State*, 17 Ohio St. 110;

State v. Meek, 70 Mo. 355, 35 Am. Rep. 427; *Hatchard v. State*, 79 Wis. 357; *State v. Clements*, 15 Oregon 237.

It is a general rule of law that the burden of proof is upon the party who bases his cause of action upon a negative allegation. Exceptions to the rule obtain only when the proof is readily at the command of the defendant, and is practically beyond the reach of the prosecution. The circumstances attending the procurement of an abortion, tending to prove that it was unnecessary for the purpose of preserving the life of the mother, ordinarily can be shown quite as easily on the part of the prosecution as the fact of necessity for that purpose can be proved by the defendant. *Moody v. State*, 17 Ohio St. 110. *Contra*, *Bradford v. People*, 20 Hun (N. Y.) 309.

3. Advice of Physician as to Necessity—Proof of.—*State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427; *Hatchard v. State*, 79 Wis. 357. See also *Moody v. State*, 17 Ohio St. 110.

In *State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427, Hough, J., delivering the opinion of the court, said: "In cases like the one before us, it has been held that while it is necessary for the state to produce some evidence that the abortion was unnecessary to save the life of the mother, the burden of showing that it was advised by a physician to be necessary for that purpose is upon the defendant, and this for the reason that from the very nature of the case it might be impossible for the state to prove that such advice was not given, while testimony that it was so advised, being in its nature of a secret and confidential character and peculiarly within the knowledge of the defendant, could generally be easily produced by him."

Where the evidence shows that the defendant operated with a knife upon the womb of a healthy woman nineteen years of age, and shortly afterwards she was delivered of a partly grown child, and was immediately attacked with peritonitis, of which she died, it raises an irresistible inference that it was not necessary to kill the child in order to save the mother's life. *Hatchard v. State*, 79 Wis. 357.

4. Necessity a Defense.—*Bassett v. State*, 41

vised to be necessary by a physician.¹ The intent to produce an abortion must exist when the means are used; hence it would be a good defense, if proven, that the abortion was the result of accident.²

ABOUT. (See also the title MORE OR LESS.)—The term "about" in its common acceptation means near to, in action; or near to, in the performance of some act;³ or near to, in quantity.

Ind. 303; State v. Owens, 22 Minn. 238; State v. Clements, 15 Oregon 237; State v. Stokes, 54 Vt. 179.

If the destruction of a quick child is necessary in order to preserve the life of the mother, it is a complete defense to the charge of abortion. State v. Fitzporter, 93 Mo. 390.

The "necessity" mentioned in the various statutes is intended to cover only those cases where the death of the mother might reasonably be expected to result from natural causes unless the child is destroyed; the fact that the woman has threatened to commit suicide unless relieved of her child, is not such a "necessity" as the statutes contemplate. Hatchard v. State, 79 Wis. 357.

As to the burden of proving the necessity, see *supra*, this title, *Evidence*; also the title BURDEN OF PROOF.

1. Advice of Physician a Defense.—State v. Meek, 70 Mo. 355, 35 Am. Rep. 427; State v. Fitzporter, 93 Mo. 390.

The statutes of some states require that two physicians shall advise the operation to be necessary in order to constitute a valid defense; and it has been held in *Wisconsin*, under the statute, that it was no defense to the charge that one of the defendants, who was a physician, thought the operation necessary to save the mother's life, if the evidence showed that it was in fact not necessary for that purpose. Hatchard v. State, 79 Wis. 357. See also State v. McIntyre, 19 Minn. 93; Moody v. State, 17 Ohio St. 110.

2. Accident a Defense.—Slattery v. People, 76 Ill. 217.

Consent of Woman no Defense.—The fact that the woman consented to the operation is no defense to the charge of abortion. Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Crichton v. People, 6 Park. Cr. Rep. (N. Y.) 363; Com. v. Wood, 11 Gray (Mass.) 85; Com. v. Snow, 116 Mass. 47.

Nonpregnancy no Defense.—It is held in *England*, and in some of the *United States*, that the fact that the woman was not pregnant at the time of the attempt is no defense to a charge of attempt to commit abortion, since the injury to the mother is the real offense. Reg. v. Goodhall, 2 Cox C. C. 40; State v. Howard, 32 Vt. 380; Com. v. Wood, 11 Gray (Mass.) 86; Wilson v. State, 2 Ohio St. 319; Powe v. State, 48 N. J. L. 34; Com. v. Taylor, 132 Mass. 261; Com. v. Tibbetts, 157 Mass. 519; Com. v. Follansbee, 155 Mass. 274.

3. Webst. Dict., followed in Jackson v. Burke, 4 Heisk. (Tenn.) 614.

Contract to Pay Claim of About One Hundred and Fifty Dollars.—Where the defendant contracted to pay a claim of *about* one hundred and fifty dollars, it was held that he must pay the claim although it amounted to 150

dollars more, the claim being otherwise identified. Turner v. Whidden, 22 Me. 121.

About the Person—Concealed Weapons. (See also the title CARRYING CONCEALED WEAPONS.)—In Warren v. State, 94 Ala. 80, a conviction was sustained for carrying concealed weapons "*about* the person," on proof that the defendant carried a pistol in a hand satchel, which was suspended from his shoulder by a strap around his neck, although the satchel was locked and the key kept in his pocket.

In State v. McManus, 89 N. Car. 555, a conviction was sustained for carrying concealed weapons *about* the person. The defendant testified that he was carrying the pistol in his dinner basket to exchange it for a watch. The court said: "It is insisted that the pistol, if in the basket and concealed, was not *about* the person of the defendant, though upon his lap. Such is not the meaning of the statute. The language is not 'concealed *on* his person,' but 'concealed *about* his person;' that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it if prompted to do so by any violent motive. If the pistol was concealed in the basket, and that was in the defendant's lap, on his arm, or fastened about his person, or if placed near his person though not touching it, this would be sufficient. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged."

A person who, being in the room of another where there are several persons, has a pistol in his vest pocket, and wilfully or knowingly covers or keeps it from sight, violates the statute. Owen v. State, 31 Ala. 387.

A charge that a person carried a pistol *about* his person is supported by proof that he carried it in his hand. Woodward v. State, 5 Tex. App. 296.

Assignment for Benefit of Creditors.—Where an assignment was made "in trust to pay the debts due the following persons, viz.," and then followed the names and debts, and a debt due one creditor was put down "*about* \$11,000," which was in fact upwards of thirteen thousand dollars, it was held that the trust included the latter sum. Browne v. Weir, 5 S. & R. (Pa.) 400. To the same effect see Chapin v. Clarke, 7 Grant's Ch. (U. C.) 75. And see generally the title ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

About to Expire—Appointment of Officer.—It was provided in *Mississippi* that the governor should fill by appointment, with the advice and consent of the senate, offices the terms of whose incumbents were *about* to expire. It was held that the appointment was to be made at the session of the legislature immediately preceding the expiration of the term.

The Supreme Court of the United States has laid down three rules for the construction of the terms "about" or "more or less" in executory contracts

The court said: "The meaning is (since the senate only convenes periodically, unless by extraordinary convocation of the legislature), the governor shall make his nomination to that body at a session immediately preceding the expiration of the term. That satisfies the intent of the words 'about to expire.'" *Brady v. Howe*, 50 Miss. 617.

Charter Party.—A charter party provided that the ship should proceed to the port of loading and there load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of ten hundred and eighty tons, the actual capacity of the ship being twelve hundred and ten tons. It was held that the words "say about 1100 tons" were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity, but that three per cent was a fair amount of excess over eleven hundred tons to allow in estimating what was a full and complete cargo of about eleven hundred tons, and consequently the cargo actually provided fell short of the charterer's obligation by fifty-three tons. *Morris v. Levison*, 1 C. P. Div. 155.

In *The Alert*, 61 Fed. Rep. 504, where a steamer's charter provided that the vessel should be delivered for the charterer's use "about April 10th," it was held that the word about would not warrant any failure to deliver on the date named, except such as occurred through accidental causes arising upon a voyage commenced in due season to arrive at the date named under the usual conditions of navigation, and did not justify any delay in making a seasonable start.

About to Sail.—The words "about to sail from Benizaf with cargo for Philadelphia," contained in a charter party, were held to mean, under the circumstances of the case, to sail as soon as with reasonable diligence a cargo could be got on board. The court said: "The word about can only be construed with reference to the subject matter and circumstances with regard to which it is used; it has a more uncertain meaning than the words 'almost,' 'nearly,' 'well-nigh,' and unless I adopt the method last above indicated, I think we are entirely without any guide in ascertaining its meaning as used in this charter, and what was the intention of the parties expressed by it." *Von Lingen v. Davidson*, 1 Fed. Rep. 178.

It was held in *Hawes v. Lawrence*, 4 N. Y. 345, that a contract for sale of oil "to arrive per ship Marcia, sailed from London on or about the 15th of March," contained a mere representation as to the time of sailing, and not a warranty, and that the vendees were bound though the ship did not sail until March 26th. See generally the title CHARTER PARTY.

Pleading.—In *Lippincott v. Smith*, 4 N. J. L. 106, it was held that an allegation in the state of demand that defendant "about the month of September" took away, etc., was sufficient.

Southard, J., dissented. And see *Corey v. Swagger*, 74 Ind. 211.

About the Premises—Intoxicating Liquors.—(See also the title INTOXICATING LIQUORS.) The *Alabama* statute provides that it shall be unlawful for any person without a license to sell vinous or spirituous liquors in any quantity, if the same is drunk on or about the premises. This statutory prohibition embraces places over which the seller has no legal right to exercise authority or control, but which are so near his premises, and so situated in relation thereto, that they are within the mischief intended to be remedied; but where the liquor is taken by the purchaser, in the quart measure of the seller, to a place on the opposite side of the street, out of view of the seller's house, about fifty feet distant therefrom, and in front of another store, and is there drunk, the court cannot assume, as a legal conclusion, that such place is within the statute. *Easterling v. State*, 30 Ala. 46.

In *Whaley v. State*, 87 Ala. 83, it was held that if liquor sold by the defendant was drunk within five or six steps of his store and in full view of the premises, it was drunk about his premises in the meaning of the statute, and that it would avail nothing that the liquor was drunk by the purchaser in the public road, over which the defendant had no control, or that the defendant failed to notice the fact and time of its being drunk. The court cited, as supporting this decision, the following cases and authorities: *Christian v. State*, 40 Ala. 376; *Pearce v. State*, 40 Ala. 720; *Brown v. State*, 31 Ala. 353; *Patterson v. State*, 36 Ala. 297; *Powell v. State*, 63 Ala. 177; *Easterling v. State*, 30 Ala. 46; *Clark's Man. Cr. Law*, §§ 1609, 1610.

On the authority of *Pearce v. State*, 40 Ala. 720, it was held that the defendant was properly convicted of selling liquor "drunk on or about his premises" (Code, § 4204), on proof that the liquor was sold from a jug which he had, in a field where he was working with others, more than a mile from his house, and in the plantation of another person, over which he had no control. *Powell v. State*, 63 Ala. 177.

About Arriving.—In a complaint against a railroad company for negligence, it was averred that the plaintiff attempted to descend the steps when the train was "about arriving." The court said: "About, in the connection here used, means nearly, not far from; that is, near, not far from, the arrival of the train." *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159.

About—Attachment Laws. (See also the title ATTACHMENT.)—In *Jackson v. Burke*, 4 Heisk. (Tenn.) 614, the complainant alleged that he had reason to believe "that the defendant will convey and dispose of his property." This was held not sufficient to authorize the issuance of an attachment. The court said: "The word about, in the sense of the attachment laws, must be taken in its common acceptance as defined by lexi-

of sale, and the cases set out in the notes will be found in accord with these rules:

cographers, 'near to in action, or near to in the performance of some act.' Webst. Dict. We hold that to authorize an attachment, on the ground that the defendant is *about* fraudulently to dispose of his property, the charge in the affidavit, if not in the words of the statute, must import that defendant is on the eve of such fraudulent disposition of his property; and we are of opinion that the charge that the defendant *will* dispose of his property in order to defraud his creditors is not sufficient to authorize the issuance of an attachment." See also *McHaney v. Cawthorn*, 4 Heisk. (Tenn.) 509; *Wrompelmair v. Moses*, 3 Baxt. (Tenn.) 467. Compare *Frere v. Perret*, 25 La. Ann. 500, set out below.

In *Meyers v. Farrell*, 47 Miss. 283, the court, in construing the term "*about* to remove," as used in the attachment law of that state, said: "What is the meaning of the term '*about* to remove'? *About*—does that imply the next hour, or day, or week, or month? Does the statute convey the idea that necessarily the act must be done within any definite space of time? The implication is quite strong that the 'removal' will shortly occur, but no more definiteness and precision is set forth than the word *about* imports. Among the definitions or senses in which the word is used, given by lexicographers, are 'near to, in performance of some act,' 'concerned in,' 'engaged in,' etc. Webster's Unabridged Dictionary. It is an ordinary word of no artificial or technical signification, and should receive the rendering which is given to it in common parlance. If the debtor is engaged in the act or is near to the performance of the act of 'removal,' if he entertains the purpose and is making preparations to carry it out, then the creditor is entitled to the writ. It would be hurtful in practice to attempt to declare precisely what is implied in the terms '*about* to remove.' For experience would show that many meritorious cases would fall within the intendment of the remedy, which might be excluded by a rule laid down in advance. We think it wiser and safer in the administration of practical justice to leave each case, as it arises, to be governed by its own special facts."

In *Elliott v. Keith*, 32 Mo. App. 585, the trial court thus instructed the jury upon the meaning of the term "*about* to remove": "Before you can find that he was *about* to do so, you must believe * * * defendant was preparing and intended to make an immediate removal." The appellate court held the instruction too narrow, and reversed the decision, saying: "The evidence in the case at bar undoubtedly tended to show that the defendant contemplated removing from this state to Washington Territory. If he had a fixed purpose to do so, and was making preparations to that end by disposing of all of his property and converting it into money at the time suit was instituted, the mere fact that he was not ready to step aboard the train, or to instantly start, ought not to defeat the attach-

ment. Of course he must have been *about* to go, intending to go, etc., and it devolves upon plaintiff to establish that fact as contradistinguished to a reasonable belief upon plaintiff's part that the defendant was *about* to go. But we are of opinion that the instruction under consideration limited and narrowed the meaning of the statute too much. The words of the statute adopted in this clause of plaintiff's affidavit for attachment create a right. They have no technical significance, and should receive the rendering given to them in common parlance. It is safer to adopt them verbatim, in instructions, and trust the average understanding of jurors with a proper interpretation of them."

In *Bennett v. Avant*, 2 Sneed (Tenn.) 152, a distinction is drawn between the word "absconding" and the words "*about* to abscond."

Where the defendant contended that the term "will convert," instead of "is *about* to convert," her property into money, was too vague and indefinite to authorize the attachment against her, it was held that the allegations and affidavit in the case substantially complied with the law and justified the attachment. *Frere v. Perret*, 56 La. Ann. 500. But see, *contra*, *Jackson v. Burke*, 4 Heisk. (Tenn.) 614, set out above.

Descriptions of Land.—The word *about*, where the context limits and restrains its meaning, does not materially impair the certainty of a description. *Corey v. Swagger*, 74 Ind. 211; *Adams v. Harrington*, 114 Ind. 72.

In an action of ejectment the plaintiff failed to establish the exact dimensions or the exact locality of the premises claimed. The words of description used in the instrument which he relied upon were, "being *about* 30 feet," etc. It was held that this did not fix the dimensions of the lot. *Finelite v. Sinnott*, 57 N. Y. Super. Ct. 57.

By the use of the term *about*, in describing the length of the line in a deed of conveyance, it is understood that exact precision was not intended; but if the place where the monument stood, by which the distance was controlled and determined, cannot be ascertained, the grantee must be limited to the number of rods or feet given. *Cutts v. King*, 5 Me. 482.

A description of a piece of land as containing "*about* seven acres" and bounded by a canal was held to include to the centre of the canal. Without that there would have been only about six acres. *Goodyear v. Shanahan*, 43 Conn. 204.

The description of the quantity of land, though corresponding in the number of acres with the statement in a former conveyance, and especially when accompanied with the qualifying words "more or less" or *about* so many acres, does not furnish strong evidence of the purpose of the grantor to restrict the limits of the premises to those which were conveyed in such former deed. *Wheeler v. Randall*, 6 Met. (Mass.) 529.

First. Where the goods are identified by reference to independent circumstances, e.g., all the goods deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or to be shipped in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific goods, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

Second. Where no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, in such cases, only provides against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

Third. But the qualifying words may be supplemented by other stipulations or conditions, e.g., "as much as the seller shall manufacture or the buyer shall require," and they will then govern the contract.¹

A contract to convey "about sixty-five acres" cannot be performed by conveying thirty-six acres. *Baltimore, etc., Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374. The court said: "The force of the qualifying word, we think, is simply that while the parties do not bind themselves to the precise quantity of sixty-five acres, it imports that the actual quantity is a near approximation to that mentioned; that is to say, within a fraction of an acre, or perhaps it might cover a discrepancy of one or two acres."

In *Bodley v. Taylor*, 5 Cranch (U. S.) 224, Marshall, C.J., says that where an entry upon public lands is to begin at a designated point about seven miles from another well-known place, and when the former cannot be found, about seven miles may be taken to mean seven miles. So in *Johnson v. Pannel*, 2 Wheat. (U. S.) 206, it was held that, in ascertaining a place to be found by its distance from another place, the vague words *about*, "nearly," or the like, are to be rejected if there are no other words rendering it necessary to retain them, and the distance mentioned is to be taken positively. Where an entry calls for land on a certain creek "about seven miles" from its mouth, the word *about* must be rejected and the distance taken in a straight line. *Sanders v. Morrison*, 2 T. B. Mon. (Ky.) 109. See also *Shipp v. Miller*, 2 Wheat. (U. S.) 316; *Cutts v. King*, 5 Me. 482.

"If in a contract in writing to sell land the tract is described as containing 'about one hundred and forty acres,' the import of the qualifying word *about* is simply that the actual quantity is a near approximation to that mentioned. When there is found to be a material and variable variation, a court of equity, upon a petition for specific performance, will give the word its proper effect. In this case the county surveyor, upon actual measurement, found one hundred and thirty-four and seventy-four hundredths acres in the tract. It was of the value of about fifty-five dollars per acre." *Stevens v. McKnight*, 40 Ohio St. 341.

"In stating also the number of acres conveyed, it is usual to represent it as *about*

so many; yet the word *about*, although it negatives the conclusion that entire precision is intended, is without any legal operation whatever. In these cases it is properly used, and carries with it a meaning readily understood, as do many other words which do not vary, in legal construction, the extent of the premises conveyed. If this word, then, when properly used, is without legal effect, I cannot consider it as having any influence in this deed, where, no fixed terminating point being stated, it appears to be used improperly, and without definite meaning." *Purinton v. Sedgley*, 4 Me. 286.

In *Bellknap v. Sealey*, 14 N. Y. 147, 67 Am. Dec. 120, the contract was to convey a parcel containing about nine acres of land. Upon survey the parcel contained but four and a fraction acres. This was held to be a material misrepresentation.

1. **Executory Contract of Sale—Contracts to Furnish "About So Much."**—*Brawley v. United States*, 96 U. S. 168; approved in *Benjamin on Sales*, § 691. (See also the titles SALES; MORE OR LESS.) It is well settled that while the term *about* a certain amount is not precise, it does, nevertheless, indicate an approximation in quantity. *Sample v. Upton*, 74 Mich. 416; *Reuter v. Sala*, 4 C. P. Div. 239; *Salmon v. Boykin*, 66 Md. 541. *About*, in this sense, means not far from. *Indianapolis Cabinet Co. v. Herrmann*, 7 Ind. App. 467.

A contract which called for the delivery of "about five hundred tons nitrate of soda" was construed to be a contract for the sale of five hundred tons, with such exception covered by the word *about* as the variance usually found to exist in such cases, arising from some little difference in the mode of weighing, might require; and it was held to be not performed by delivering four hundred tons. *Bourne v. Seymour*, 16 C. B. 336.

The plaintiffs agreed to purchase of the defendants "about 300 quarters, more or less," of rye. The ship brought three hundred and fifty quarters, and the defendants refused to deliver any part unless the plaintiffs would accept the whole. It was held that by the words *about* and "more or less" the parties could not be taken to have contemplated so large

ABOVE.—For the construction of this word as used in corporate charters, see note.¹

an excess as fifty over three hundred quarters. *Cross v. Eglin*, 2 B. & Ad. 106, 22 E. C. L. 36. See *Brawley v. U. S.*, 96 U. S. 163.

Where there was a contract to furnish about one thousand tons of iron, an offer of four hundred tons was held not a sufficient performance. *Norrington v. Wright*, 115 U. S. 188.

In an agreement to sell "a cargo of old railroad iron, to be shipped per barque Charles William, * * * at thirty dollars per ton, delivered on the wharf, * * * dangers of the seas excepted—about 300 or 350 tons," the figures "about 300 or 350 tons" are undoubtedly to be taken as part of the contract; but taken with the context, they manifestly express an estimate only, and do not control the descriptive clause designating and limiting the subject of the contract. And accordingly it was held that the delivery at port of discharge of as much as a vessel seaworthy and in good order could carry, though only two hundred and twenty-seven tons, was a compliance. *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589. But the term strongly indicates that no warranty of quantity was intended.

The plaintiffs having been informed by S., a commission agent, that the defendants had a quantity of old iron in their yard for sale, "about 150 tons," wrote to the defendants: "We are buyers of good wrought scrap-iron free of light and burnt iron, for our American house, and understand from S. that you have for sale about 150 tons. We can offer you 80s. per ton." There were three intermediate letters relating to the place of delivery and expense of carting, and then the defendants wrote: "We accept your offers for old iron, viz., 80s. per ton, we delivering alongside vessel in one of the London docks. Please let us know when you can send a man here to see it weighed, and also inform us where to send it." Before S. saw the plaintiffs he had seen in the yard of the defendants, who were builders, a heap of iron, and said: "You seem to have about 150 tons there." The reply was, "Yes, or more." The defendants delivered only forty-four tons, that being the quantity of the heap in the yard. The plaintiffs recovered fifty pounds damages in an action for short delivery. It was held that the words "about 150 tons" were merely words of estimate and expectation, and there was no warranty as to quantity, and therefore the defendants were not bound to deliver one hundred and fifty tons; that the subject matter of the contract was not one hundred and fifty tons of iron, but the iron which S. had seen in the defendant's yard. *McLay v. Perry*, 44 L. T., N. S. 152.

The plaintiffs, by written contract, sold to defendants a quantity of linseed oil, "to arrive per ship Marcia from London, sailed on or about the 15th of March ult." It was held that the statement in the contract as to the time of sailing was a mere representation

and not a warranty, and, being made without fraud, that the defendants were bound to accept and pay for the oil, although the vessel did not sail until the 26th of March. *Hawes v. Lawrence*, 4 N. Y. 345.

In *McConnel v. Murphy*, L. R. 5 P. C. 203, where the sale was of "all of the spars manufactured by A., say about 600, averaging 16 inches, the above spars will be out of the lot manufactured by J. B.," the court held that a tender of four hundred and ninety-six spars, which were all of the specified lot that averaged sixteen inches, was a substantial performance of the contract by the vendor. These words, "say about 600," were held to be words of expectation and estimate only, not amounting to an understanding that the quantity should be six hundred. The case of *Gwillim v. Daniell*, 2 C. M. & R. 61, 5 Tyr. 644, was approved and followed; and the effect of the word "say," when prefixed to the word about, was considered as emphatically marking the vendor's purpose to guard himself against being supposed to have made any absolute promise as to quantity. See, further, *Leeming v. Snaith*, 16 Q. B. 275; *Barker v. Windle*, 6 El. & Bl. 675; *Hayward v. Scougall*, 2 Campb. 56.

In *Moore v. Campbell*, 10 Exch. 323, 23 L. J. Exch. 310, the sale was of fifty tons of hemp, and the vendor offered the buyer two delivery orders from a warehouse for about thirty tons and about twenty tons, respectively, which the buyer declined unless the vendor would guarantee that the whole quantity amounted to fifty tons. The vendor refused, and on the trial offered evidence that it was the usage of trade in Liverpool, where the contract was made, to insert the word about in delivery orders of goods warehoused. It was held that, if this evidence had been offered in reference to the purchase of fifty tons of goods contracted to be sold and delivered simply, the evidence would be inadmissible; but if the contract was to sell and deliver goods in a warehouse, and there was a known usage of the place that warehousemen would not accept delivery orders in any other form, by reason of objecting to make themselves responsible for any particular quantity, the delivery warrants made in that form would, if tendered, be a sufficient compliance with the vendor's duty under the contract.

1. **Above and Below.**—In *McLeod v. Burroughs*, 9 Ga. 213, where a charter declared "that it shall not be lawful for any person or persons at any time or times to build any bridge or keep any ferry on the river Great Ogeechee within five miles either above or below" another bridge on the same stream, it was held that the distance of five miles was to be measured on the course of the river. The court said: "Having first spoken of a bridge or ferry on the river, the natural meaning of above and 'below' would seem to be above and below in the course of that river; otherwise the meaning of those words is indefi-

ABRIDGE.—To abridge means to epitomize, to reduce, to contract.¹

ABROAD.—As to when the term "abroad" is used as equivalent to the expression "beyond the sea," see the title **BEYOND THE SEAS.**²

ABSCOND—ABSCONDING DEBTOR. (See also the titles **ATTACHMENT**; **ARREST.**)—To abscond, in a legal sense, means to hide, conceal, or absent one's self clandestinely, with the intent to avoid legal process.³

nite. If *above* and below be not on the line of the river, where is *above*, and where below? The ordinary meaning of these words, used in such connection, is not that of location—it cannot be here, because, in other words in this section, the location of the prohibited bridge and ferry is fixed—but that of course or direction."

Restriction on Loans by Savings Bank.—In *Williams v. McDonald*, 42 N. J. Eq. 395, the court said: "The words of the restriction are awkwardly expressed, but mean at least double the amount of the sum invested and double all encumbrances. The word *above* signifies excess, and the word 'double' qualifies this excess, so that it may read double the investment and double the encumbrances. This is an ordinary and approved estimate of real estate as security for loans." This case was *approved* in *Williams v. McKay*, 46 N. J. Eq. 25.

1. *Story v. Holcombe*, 4 McLean (U. S.) 310. This was a case of copyright, in which the court held that a fair *abridgment*, though injuring the sale of the original work, was not an infringement. See the title **COPYRIGHT**.

Abridgment.—To constitute a true and proper *abridgment* of a work, the whole must be preserved in its sense: and then the act of *abridgment* is an act of understanding, employed in carrying a larger work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader. *Strahan v. Newberry*, Lofft's Rep. 775.

Abridgment Distinguished from Compilation.—In *Story v. Holcombe*, 4 McLean (U. S.) 314, cited above in this note, the court makes a distinction between compilation and *abridgment*, saying: "Between a compilation and an *abridgment* there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors; an *abridgment* is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work *abridged*, and consequently conveys substantially the same knowledge. The former cannot adopt the arrangement of the works cited; the latter must adopt the arrangement of the work *abridged*. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book: a fair *abridgment*, though it may injure the original, is lawful."

2. **Naval Officers—Mileage.**—The *United States* statute allows a certain mileage to officers for traveling expenses when under orders, but allows only expenses when travel-

ing *abroad*. It was held that an officer traveling from San Francisco to New York by way of Panama was entitled to mileage. The court said: "We think the Court of Claims was correct in its conclusion that the question whether travel is *abroad* or within the United States should be determined by the termini of the journey rather than by the route actually taken. Instances are frequent where an officer ordered from one place to another within the United States is obliged to perform the whole or a substantial part of his journey either upon the high seas or upon foreign soil. If, for example, he were ordered from Buffalo to Detroit, or from New York to Galveston by sea, it would be sticking in the bark to speak of either as 'travel *abroad*,' because in one case the most direct route lies through Canada, and in the other the voyage is made upon the high seas. While the voyage in question was not literally 'in the United States,' it was such within the intent and spirit of the enactment. An officer is to be understood as traveling *abroad* when he goes to a foreign port or place under orders to proceed to that place, or from one foreign port to another, or from a foreign port to a home port. But where he is ordered to proceed from one place in the United States to another, and the government for its own purpose requires him to proceed by sea rather than by land, he ought not thereby to be disentitled to his mileage by the nearest traveled route." *Lewis v. Monson*, 151 U. S. 545.

3. **Attachment.**—*Gandy v. Jolly*, 34 Neb. 536, *quoting with approval* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 34. The court in this case holds also that it is not necessary to depart from the state. It may not be known for some time whether the debtor has left the state or not. So in *Stouffer v. Niple*, 40 Md. 477, it is held that if one secretly removes from his usual place of residence, with the intention to evade the payment of his just debts, or to injure or defraud his creditors, he will be regarded as having *absconded*, although he may not have left the state, and he may be proceeded against, under the law of attachment, as an *absconding debtor*. See also *Field v. Adreon*, 7 Md. 213.

If a person depart from his usual residence, or remain absent therefrom, or conceal himself in his house so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an *absconding debtor*. But if he depart from the state or from his usual abode with the intention of returning, and without any fraudulent design, he has not *absconded* or absented himself within the intentment of the law. Where a debtor de-

parts from one town and goes to another in the same state, where he works openly for over three months, he does not *abscond*, though his whereabouts are unknown to his friends in the first mentioned town. The question of withdrawal with the view to elude process is one for the jury. *Fitch v. Waite*, 5 Conn. 117.

Where the statute provides for the case of a *debtor absconding*, an attachment stating that he is about to *abscond* does not allege sufficient cause for the issuance of the writ. To *abscond* in a legal sense means to hide, conceal, or absent one's self clandestinely, with the intent to avoid legal process. *Bennett v. Avant*, 2 Sneed (Tenn.) 152.

The word *abscond* imports that the parties did reside within the district and had removed themselves privately and fraudulently. *Dunlop v. Harris*, 5 Call (Va.) 47.

A certificate of a magistrate that a debtor is not about to *abscond* or has money, etc., does not meet an affidavit of a creditor alleging that he has money secreted and is about to remove out of the state. *In re Proctor*, 27 Vt. 118.

A debtor shut up in his own house from his creditors is an *absconding debtor*. *Ives v. Curtiss*, 2 Root (Conn.) 133.

Publicly going or moving out of the state is not *absconding*. *Boardman v. Bickford*, 2 Aik. (Vt.) 345.

In *Malvin v. Christoph*, 54 Iowa 562, the court approved Bouvier's definition, "to go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed in order to avoid their process."

"One may be about to remove out of the state, which *ex vi termini* presupposes his presence in the state, and consequently not absent from it, and at the same time not be in the act of *absconding*, for the reason that one about to remove may arrange and prepare to do so publicly and not in a clandestine manner, as is meant by the word *abscond*. * * * We hold that one 'about to remove his goods and effects out of the state' may yet be present in, or not absent or *absconding* from, the state." *Mandel v. Peet*, 18 Ark. 243.

Temporary Absence.—In *Thompson v. Newton*, 2 La. 411, the court says: "The generally received meaning of the word to *abscond* we believe to be the act of a person who leaves any particular place clandestinely, or of one who conceals or hides himself. According to the latter signification, which appears to be that accorded to it by lexicographers, it is synonymous with the word 'conceal.'" The court held that one departing without any attempt at concealment and with the intention to return was not an *absconder*.

Affidavit.—In *Wallis v. Wallace*, 6 How. (Miss.) 256, an affidavit for attachment was in the past tense, viz., that the debtor "hath *absconded*," and it was argued therefore that the affidavit was insufficient. The court upheld the affidavit, saying: "The term *abscond*, in the act, has been considered as equivalent to the term 'conceal,' which is used in connection with it. If the affidavit had stated that the debtor 'hath concealed

himself so that ordinary process cannot be served,' it would be difficult, according to the well-established grammatical construction of our language, to reconcile such statement with the argument that he had abandoned his lurking place and had resumed his accustomed walks in society."

An affidavit stating a debtor to be "about to *abscond* himself and his property out of the state, so that the process of law cannot be served," is equivalent to the assertion that he is about to remove himself and property out of the state privately, and therefore complies substantially with a statutory oath that defendant is about to remove himself from the state so that the ordinary process of law cannot be served upon him. *Ware v. Todd*, 1 Ala. 199.

Not Leaving State.—A party may *abscond* and subject himself to the operation of the attachment laws against *absconding debtors*, and still not depart from the limits of the state. A party may not be a citizen for political purposes, and yet be a citizen for commercial or business purposes and liable to attachment. *Field v. Adreon*, 7 Md. 213. See also *Gandy v. Jolly*, 34 Neb. 536; *Stouffer v. Niple*, 40 Md. 477; *Fitch v. Waite*, 5 Conn. 117.

Evidence.—"The fact of converting a large amount of goods into money by auction sales, and at a large sacrifice, and in a clandestine manner, furnished a reasonable presumption that [the debtor] intended to *abscond* or absent himself, so as to avoid the service upon him of the ordinary process of law," and evidence of such acts should be admitted. *Ross v. Clark*, 32 Mo. 296.

The Kansas Statute of Limitations provides. "If, when a cause of action accrues against a person, he be out of the state or has *absconded* or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so *absconded* or concealed." It was held that *absconding* and "concealing" so used refer to the acts of the party in the state. Secretly leaving another state is not *absconding* or concealing from the reach of process here. *Hoggett v. Emerson*, 8 Kan. 262; *Frey v. Aultman*, 30 Kan. 181; *Myers v. Center*, 47 Kan. 324.

Arrest.—The *Oregon Code* authorizes the arrest of an *absconding debtor*. In *Norman v. Zieber*, 3 Oregon 205, the court defines *abscond* as follows: "Bouvier defines *abscond*, 'to go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed in order to avoid their process;' and the ordinary acceptance of the term includes an idea of secrecy. We must treat subdivision 1 of section 106 as unconstitutional and void, or hold that the 'removal' that authorizes an arrest is something more than a mere leaving of the state in an open and public manner or in the ordinary course of the defendant's business as an officer or seaman on board a vessel in which he has been habitually employed."

In *Burrichter v. Cline*, 3 Wash. 136, the court says: "An *absconding debtor* is one

ABSENT—ABSENCE, ETC. (In statutes of limitations see the titles **BEYOND THE SEAS**, **LIMITATIONS OF ACTIONS**; as to presumption of death arising from, see the title **DEATH**; as to presumption of continuance of life, see the title **DEATH**; as to survivorship, see the title **SURVIVORSHIP**.)—By absence is sometimes meant that a person is not at the place of his domicile, yet, his place of residence being known, or news or information having been received from him, his existence is not uncertain. But in a more confined and more technical sense absence signifies that the residence of the person who is not at the place of his domicile is unknown, and that for this reason his existence is doubtful.¹

who leaves or is about to leave the jurisdiction or who conceals himself within the jurisdiction for the purpose of avoiding the process of the courts." The court doubts in that case whether the provision of the *Washington* Code of 1881 allowing the arrest of *absconders* is still operative.

1. Bouv. Law Dict.

Failure to Appear.—The *Kansas* statute provides that a judgment rendered in a justice's court in the defendant's *absence* may be set aside. It was held that *absence* meant that the defendant was not present at the trial, and did not signify that he had failed to appear in the action at any time. The court said: "The naked question presents itself to us, whether the word *absence* means personal *absence* of the defendants at the time the trial is had and judgment rendered, or whether it refers to the fact that there has been no appearance at all of the defendants before the court. On the one hand it is claimed that the word *absence* should have its ordinary and usual meaning—not present, withdrawn from the place—and that it refers to the time of the trial of the case and the rendering of the judgment. On the other hand it is contended that it means that the defendant has not appeared in the case; that *absence* is equivalent to nonappearance. The latter view of the case is taken by the Supreme Court of Nebraska in construing a statute precisely like section 114. (*Strine v. Kaufman*, 12 Neb. 423.) We are not satisfied with the reasoning of that case, nor inclined to follow it as a precedent. The court held that the word *absence* in their statute is synonymous with default, and that if there had been no default there had been really no *absence*. Thus it has been held in that state that if there has been a default there can be no appeal from a judgment rendered; but if the defendant had made an appearance, and trial was subsequently had and judgment rendered in his *absence*, the defendant could appeal. The court held that the words 'in his *absence*' are not to be taken literally, but that *absence* is used as an equivalent to 'nonappearance to the action.' We prefer to give the word *absence* its ordinary definition, and treat it as meaning that the defendants were not actually present at the time of the trial and the rendering of the judgment." *Covart v. Haskins*, 39 Kan. 573.

A judgment by default in a civil action against a defendant on whom personal service was made and by whom an appearance was entered is not rendered in his *absence*,

within *Massachusetts* Pub. Stats., c. 187, § 22, and a petition for a review, filed more than a year after it has been rendered, but within a year after he had notice thereof, is too late. *Riley v. Hale*, 146 Mass. 465. See also *Manning v. Nettleton*, 140 Mass. 421.

Absence means nonappearance in a suit, not *absence* without knowledge or notice; and a petition for reversal of a decree of judicial separation under 20 and 21 Vict., c. 85, § 23, on the ground that it was obtained in the petitioner's *absence*, is good on demurrer, though alleging personal service of the citation in the separation suit. *Phillips v. Phillips*, L. R. 1 P. & D. 169.

Attachment Laws. (See also the titles **ABSCOND**; **ATTACHMENT**.)—In *Mandel v. Peet*, 18 Ark. 236, it was held that the word *absence*, as used in the *Arkansas* statute, should not be taken or understood in its literal sense, but as intended to mean those who have absconded or are nonresidents. Mere *absence* from the state temporarily on business or pleasure does not bring them within the mischief of the act.

In *Den v. Wharton*, 1 Yerg. (Tenn.) 135, an *absent* debtor was held to be one who had removed from home to avoid process, and not a nonresident.

Temporary absence is not sufficient. *Charlton County v. Moberly*, 59 Mo. 238. And in *Kingsland v. Worshaw*, 15 Mo. 657, it is held that where the *absence* is such that a summons issued upon the day the attachment is sued out will be served upon the defendant in sufficient time before the return day to give the plaintiff all the right which he can have at the return term, the defendant has not so *absented* himself as that the ordinary process of law cannot be served upon him.

Absent and Absconding Debtor. (See also **ABSCOND**.)—"Who is an *absent* and absconding debtor? He who lives without the state, or he who has intentionally concealed himself from his creditors or withdrawn himself from the reach of their suits, with intent to frustrate their just demands. Thus, if a person depart from his usual residence, or remain *absent* therefrom, or conceal himself in his house, so that he cannot be served with process, with intent unlawfully to delay or defraud his creditors, he is an absconding debtor. But if he depart from the state, or from his usual abode, with the intention of again returning and without any fraudulent design, he has not absconded nor *absented* himself within the intentment of the law." *Fitch v. Waite*, 5 Conn. 121.

Absent Distinguished from Absconding.—An affidavit, to obtain an attachment, stated that the defendant "*absents* himself from his creditors and is not a resident," etc. This was held deficient, counsel arguing that there is a distinction between *absenting* and absconding. *Conrad v. Conrad*, 17 N. J. L. 154.

Nonresident Distinguished from Absent Defendant.—In *Curd v. Letcher*, 3 J. J. Marsh. (Ky.) 443; the court said: "A man may be a citizen of Kentucky and yet a nonresident, and he may be a resident and yet an *absent* defendant." See also *Den v. Wharton*, 1 Verg. (Tenn.) 134.

And in *Wheeler v. Wheeler*, 35 Ill. App. 124, it was held that the word *absence*, with reference to a person in a statute other than the statute of limitations, must be taken to mean one who has been present, not a nonresident.

And in *Cochran v. Fitch*, 1 Sandf. Ch. (N. Y.) 142, the court holds that *absent* applies to both residents and nonresidents. And see *Paine v. Drew*, 44 N. H. 317.

Absence and "nonresidence" are not convertible terms; a statute authorizing an attachment on proof of nonresidence is not satisfied by an affidavit that the defendant "is not at this time within the state." *Croxall v. Hutchings*, 12 N. J. L. 84.

In *Cochran v. Fitch*, 1 Sandf. Ch. (N. Y.) 142, the court, to determine whether an attachment in another state was a bar to an action in *New York*, construes the *Connecticut* statute, saying: "The laws of Connecticut relative to the collection of debts by foreign attachment (Statutes of Connecticut compiled in 1838, page 287, etc.) authorize an attachment of debts due from any person to an *absent* or absconding debtor in favor of any creditor of the latter, and prohibit the garnishee from paying the debt to the *absent* debtor after notice of the proceedings. The statute is not limited to debtors residents of the state and temporarily absent, as was contended by the counsel for the complainant. The term *absent* debtor applies equally to nonresidents and residents; the title of the statute is 'Foreign Attachment;' its provisions are obviously intended for nonresident debtors; and in the 'Act for the Regulation of Civil Actions' (Stat. of Conn. above cited, pp. 41, 44), which directs in part the mode of proceeding on attachments, the statute speaks expressly of a defendant who is not a resident or inhabitant of the state. *Sill v. U. S. Bank*, 5 Conn. 102, is an authority for the application of the act to the complainant."

But in *State v. Superior Ct.*, 6 Wash. 353, it was held that an affidavit upon which publication of summons was based was insufficient where it merely stated that the defendant was *absent* from the county, the court holding that the word *absence*, as used in the statute, was equivalent to nonresidence.

In *Wash v. Heard*, 27 Miss. 400, where a statute used the term "out of the state" in reference to one class of debtors, and *absence* in reference to another, it was held that by *absence* must have been meant nonresidence.

Prior Presence.—"But the words '*absent* from,' it is said, can apply properly only to those who have been residents. The word *absent*, when used as a verb, as in the sentence '*to absent* himself,' implies prior presence. So the word *absentee* means one who withdraws or has removed from his country, state, or home. But the word *absence*, though primarily it may have supposed prior presence, yet, in common usage, simply means a state of being away from or at a distance from, not in company with. And the word *absent*, when used as an adjective in common and ordinary use, simply means not present, and refers only to the condition or situation of the person or thing spoken of at the time of speaking, without any allusion or reference to any prior situation or condition of the same person or thing; so that there is really nothing in the words used in our present statute that is more favorable to the construction claimed by the defendant than that which has almost uniformly been given to similar statutes everywhere." *Paine v. Drew*, 44 N. H. 317. But see *Wheeler v. Wheeler*, 35 Ill. App. 124; *Snoddy v. Cage*, 5 Tex. 106. And see *Hyman v. Bayne*, 83 Ill. 256.

But in *Buchanan v. Rucker*, 9 East 194, a judgment had been obtained in the island of Tobago against a party stated to be "formerly of the city of Dunkirk, now of the city of London, merchant." He was cited by a summons which had been served by posting up a "copy of the declaration at the courthouse door," and, failing to appear, judgment had been entered against him as in default. The judgment was attempted to be maintained on the ground that it was authorized by the local laws in cases of persons *absent* from the island. Lord Ellenborough, in delivering the judgment of the court, said: "By persons *absent* from the island must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the court; but it can never be applied to a person who, for aught that appears, never was present within or subject to the jurisdiction. * * * '*Absent* from the island' must be taken only to apply to persons who had been present there and were subject to the jurisdiction of the court out of which the process issued." And to the same effect see *Wheeler v. Wheeler*, 35 Ill. App. 124; *Snoddy v. Cage*, 5 Tex. 105; *Hyman v. Bayne*, 83 Ill. 256.

Intention to Remain Away Formed after Departure—Bankruptcy.—In *Wyndham v. Patterson*, 4 Campb. 286, it was held that where a trader left England for purposes of trade, but remained abroad with intent to delay his creditors, he thereby *absented* himself within the meaning of a statute providing that traders *absenting* themselves to delay creditors shall be adjudged bankrupt.

The result of the cases is that a man's intentionally keeping away from any place where he would, in the ordinary course of things, be, is *absenting* himself, though it is not an act of bankruptcy unless it be with intent to defeat or delay his creditors. *Ex p. Meyer*, L. R. 7 Ch. 188.

ABSENTEE.—An absentee is a person who has resided in the state and has departed without leaving any one to represent him. It means, also, a person who never was domiciliated in the state and resides abroad.¹

ABSOLUTE. (See also **ABSOLUTELY**.)—The term "absolute" means complete, unconditional, not relative, not limited, independent of anything extraneous. It is used in law to distinguish an estate in fee from an estate in remainder, the rights of man in a state of nature from those pertaining to him in his social relations; as in algebra to designate "any pure number standing without the conjunction of literal characters."²

Absent Officers and Soldiers—Desertion, etc. (See also the title **MILITARY LAW**.)—An officer of the army ordered home to await orders is not *absent* from duty with leave so as to fall within the act placing officers *absent* from duty with leave on half-pay. *U. S. v. Williamson*, 23 Wall. (U. S.) 411.

Intentional *absence* without leave from military service does not constitute a desertion; there must accompany it an intent not to return. *Hanson v. South Scituate*, 115 Mass. 336.

One who, by reason of being an officer or private in the United States army, is *absent* from the state, is within a statute of limitations providing for *absence* on public business. *Gregg v. Matlock*, 31 Ind. 373.

The 103d article of war (Rev. Stat., § 1342) bars a trial for an offense committed more than two years before the issuing of the order for trial, "unless by reason of the offender *absenting* himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." It was held that the language of this statute must be construed as that of other statutes of limitations, and the absence means *absence* from jurisdiction of military courts; that is, from the United States. *In re Davison*, 4 Fed. Rep. 507.

Out of the State.—The General Statutes of *Massachusetts* provide for the granting of a review upon petition, "provided that if the judgment complained of was rendered in the *absence* of petitioner and without his knowledge," the petition should be filed within one year of notice, etc. It was held that *absence* did not mean out of the state only, but was intended to apply to all cases of default, without service of process, in the several cases mentioned in the statute. *James v. Townsend*, 104 Mass. 371.

Death.—One who is dead is not *absent*. *Rockland v. Morrill*, 71 Me. 455; *Redfern v. Rumney*, 1 Cranch (C. C.) 300.

Absence of Justice of the Peace.—A *Canada* statute provides that where a prosecution for a certain offense is brought before two justices, no other justices shall sit unless one or both of the original justices is *absent*. The court said: "I think the word *absence* in this section does not necessarily mean actual *absence* from the place or room where the trial is held, but would apply to a case where the justices had, for some cause, become incapable of sitting and taking part in the proceedings. If such was the case, I think they would be *absent* within the meaning of the act, though not *absent* in fact." *Byrne v. Arnold*, 24 New Bruns. 164.

Absence of Judge.—Where a statute provided that in case of the *absence* of the county judge the county clerk should fill his place, it was held that the judge, though *absent* from the county seat, had sufficient power to execute and issue bonds advancing county interests and do certain ministerial acts and buy a seal being authorized by the code to procure one. *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6.

Although a district judge may be present on the bench during the trial of a cause, yet, if he is not there for the purpose of taking part in the trial and decision, he may be regarded as *absent*. *Bingham v. Cabbot*, 3 Dall. (U. S.) 36.

Absence of Governor.—The constitution of *Louisiana* provides that in case of "*absence* from the state" of the governor, the powers and duties of his office shall devolve upon the lieutenant-governor. This was held not to refer to mere temporary *absence*; and the fact that the governor was at a place out of the state, but within a few hours' ride of the capital, for a period of twenty-one days, did not authorize the lieutenant-governor to exercise the functions of governor. *State v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551. See *People v. Parker*, 3 Neb. 409, 19 Am. Rep. 634.

Absence of Coroners.—In *Reg. v. Perkins*, 7 Q. B. 165, 53 E. C. L. 165, it was held that a coroner was *absent* from an inquest, within the meaning of a statute providing that his deputy might act in his *absence*, when he was holding another inquest, although he was accidentally present at the conclusion of the inquest held by the deputy.

1. *Morris v. Bienvam*, 30 La. Ann. 878; *Dreville v. Cucullu*, 18 La. Ann. 695.

The term *absentee* embraces persons residing abroad who have never been domiciliated in this state, as well as those who, having once resided here, have since left the state. *Guillemin's Succession*, 2 La. Ann. 634.

The word *absentee* means one who withdraws or has removed from his country, state, or home. *Paine v. Drew*, 44 N. H. 317.

2. *Johnson v. Johnson*, 32 Ala. 637.

It signifies without any condition or encumbrance. *Bouv. Law Dict.*, followed in *Converse v. Kellogg*, 7 Barb. (N. Y.) 597.

Complete, final, perfect, unconditional, unrestricted. *Rap. & Law. Dict.*, followed in *Fuller v. Missroon*, 35 S. Car. 314; *In re Reed*, 21 Vt. 638.

That is an *absolute* interest in property which is so completely vested in the individual that he can by no contingency be deprived

of it without his own consent. *Hough v. City F. Ins. Co.*, 29 Conn. 20, 76 Am. Dec. 581.

"The word *absolute* came originally from the Latin, and means to 'loose from.' Webster gives many meanings to the word, as, *inter alia*, 'completed, or regarded as complete; finished; perfect; total; as, absolute perfection, absolute beauty. (2) Freed or loosed from any limitation or condition; uncontrolled; unconditional. (3) Positive; clear; certain. (6) Unconditioned; unrelated.'" *People v. Ferry*, 84 Cal. 34.

Absolute means free, uncontrolled. *Williams v. Vancleave*, 7 T. B. Mon. (Ky.) 393.

"The term '*absolute*' has no fixed, unvarying meaning. When used in connection with an interest in property it is not always synonymous with 'unqualified.' Used in connection with 'estate' it means an estate in lands not subject to, or defeasible upon, any condition. 1 Burrill's Law Dict. 14. It may be quite as often and as pertinently used in contradistinction to 'contingent' or 'conditional,' as to 'qualified' or 'encumbered.'" *Washington F. Ins. Co. v. Kelly*, 32 Md. 450, 3 Am. Rep. 149.

Insurance—Absolute Interest. (See also the title FIRE INSURANCE.)—A policy of insurance provided that "if the interest in property to be insured be a leasehold interest or other interest not *absolute*, it must be so represented and expressed in the policy." It was held that a mortgagor's estate was an *absolute* interest, and that an omission to disclose the mortgage was not a breach of the condition. *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149.

A policy of insurance contained the clause, "if the interest in the property to be insured is not *absolute*, it must be so represented to the company and expressed in the policy in writing," etc. The applicant described the property as "his house." It was shown that at the time the legal title was in another; that insured had a contract for the purchase, had paid part of the purchase money, and was in possession. The court charged that he was to be regarded as the owner of the property if he had the equitable title, and his interest was such that the loss would fall on him if the property was destroyed. This was held to be correct. *Hough v. City F. Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581. The court said: "That is an *absolute* interest in property, which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent. * * * So, too, he is the owner of such absolute interest who must necessarily sustain the loss if the property is destroyed. The subject of insurance was an interest, not a title. It is an interest, not a title, of which the conditions of insurance speak. The terms 'interest' and 'title' are not synonymous. A mortgagor in possession, and a purchaser holding under a deed defectively executed, have, both of them, *absolute* as well as insurable interests in the property, though neither of them has the legal title. * * * It seems to have been the leading object of the framers

[of this condition] to protect the company against the payment of losses to individuals who had not in fact sustained them. Thus the first clause provides that property held in trust or on commission must be insured as such, because in the one case the *cestui que trust* and not the trustee, and in the other the consignor and not the factor, would be the real or principal loser by the destruction of the property. So in regard to the holder of property under a lease, or whose interest in the property is contingent, if the property is destroyed, the entire loss may fall on the landlord in the one case, and in the other, instead of falling upon the individual insured, may, by the happening of the contingency, be cast entirely upon another. The condition in question speaks only of the character of the interest to be insured, not of its quantity. *Absolute* is here synonymous with 'vested,' and is used in contradistinction to contingent or conditional. The plaintiff had a vested interest in the property, of which he could not be deprived against his will—an interest dependent upon no contingency for its existence—an *absolute* interest."

In *Washington F. Ins. Co. v. Kelly*, 32 Md. 452, 3 Am. Rep. 149, the court said: "The case of *Reynolds v. State Mut. Ins. Co.*, 2 Grant's Cas. (Pa.) 326, was that of a mutual policy, which contained, however, the clause we are now considering, and also required disclosure of encumbrances. The assured had made a contract for the purchase of the property, and had paid but a small sum upon it, much less than the amount insured. The judge below, in his charge to the jury, said, in reference to this clause: 'We also consider the insured had not an estate *absolute*. It is obvious that in speaking of a "leasehold interest, or other interest not *absolute*," the company had in view the necessity of its officers knowing the character of the insured's interest in the property. A fee simple is an estate *absolute*. Here Mr. Reynolds had no *absolute* estate of the kind, but a mere equity, to be changed to a fee-simple estate on paying the purchase money. The *absolute* estate remained in the vendors.' But when the case went up, the Supreme Court are careful to limit their decision. 'What we decide now,' they say, 'is this simple point, that one who occupies property for which he has no deed, but which he has agreed to purchase, cannot conceal the facts and have it insured on his own account for a larger sum than the amount of the purchase money he has actually paid at the time of the insurance. With this rule standing directly in his way the plaintiff could not possibly recover, and the other questions raised in the argument are, therefore, of no importance.' This cannot, therefore, be regarded as a decision in conflict with the *Connecticut* case (*Hough v. City F. Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581), and I have been able to discover none that is."

A married woman is an *absolute* owner of her real property within the meaning of the policies. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582. So one may be the *absolute* owner of property

though it is subject to a lien for the purchase money. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 375. See also *West Rockingham Mut. F. Ins. Co. v. Sheets*, 26 Gratt. (Va.) 854.

In *Gaylord v. Lamar F. Ins. Co.*, 40 Mo. 13, 93 Am. Dec. 289, a purchaser under a decree of foreclosure which allowed fifteen months for redemption was held to be an *absolute* owner.

Absolute Purchase of Pew.—The words "*absolute* purchase of any pew in the church," in statute, are held not to mean that the purchaser is to hold free from all claim or control of the incumbent or churchwardens, or free from all interest of these persons in the general property of the church; but they are used in opposition to the rights of the leaseholders of pews and of those who have only sittings; and, subject to the necessary incidents of such a species of property, a person may be not improperly said to be an *absolute* purchaser of, and to have a freehold of inheritance in, the pew which he has bought. Ejectment, however, is not maintainable. *Ridout v. Harris*, 17 U. C. C. P. 88. See generally the title PEWS.

Absolute Total Loss. (See also the title ABANDONMENT and TOTAL LOSS, in MARINE INSURANCE.) An *absolute* total loss takes place when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless, and is one which entitles the insured to claim the whole amount of his subscription, without giving notice of abandonment. *Burt v. Brewers', etc., Ins. Co.*, 9 Hun (N. Y.) 383.

Absolute Rights of Individuals.—By the *absolute* rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy out of society or in it. 1 Black. Com. 123; *People v. Berberich*, 20 Barb. (N. Y.) 224.

Minors. (See also the title INFANTS.)—A sale of a minor's property without the prescribed formalities is *absolutely* null, but may be ratified by the minor after majority expressly or by implication. *Means v. Robinson*, 7 Tex. 502; *Clay v. Clay*, 35 Tex. 509.

Whether in Conveyances the Term Absolute Carries the Fee.—In *Fuller v. Missroon*, 35 S. Car. 314, it was held that where a deed provided that the estate was to vest *absolutely*, the grantee took the fee. The court said: "Fortunately, the words 'to vest *absolutely*' occur here. As said by the circuit judge: Mr. Blackstone, in 2 Comm., p. 104, in speaking of freehold estates of inheritance, uses *absolutely* as synonymous with 'fee simple.' In *Rapalje and Lawrence's Law Dictionary*, in speaking of the owner of the estate in fee simple, it is said he 'is the *absolute* owner of land or other realty.' The same dictionary, in speaking of the legal definition of the term *absolute*, says the meaning is 'complete, final, perfect, unconditional, unrestricted.'"

To the same effect see *McLure v. Young*, 3 Rich. Eq. (S. Car.) 559; *Myers v. Anderson*, 1 Strobbh. Eq. (S. Car.) 344, 47 Am. Dec.

537; and *Moseley v. Hankinson*, 22 S. Car. 323.

By the words, "The rest and residue of all my property, personal, real, or mixed (after paying all just and lawful demands against my estate), I give and bequeath to my beloved wife," an *absolute* inheritable title or an estate in fee is passed, in *Massachusetts*. *Lincoln v. Lincoln*, 107 Mass. 590.

In *Oswald v. Kopp*, 26 Pa. St. 518, it was held that a gift of personal and real property *absolutely* to testator's wife carried the fee.

But on bequest to wife of personalty *absolutely*, having full confidence that she will leave the surplus to be divided, at her decease, justly among testator's children, the widow is entitled to the income for life merely, and is a trustee for the children of the principal. *Coates's Appeal*, 2 Pa. St. 129.

In *Greenawalt v. Greenawalt*, 71 Pa. St. 483, the court said: "*Absolute* is not a word used legally to distinguish a fee from a life estate, but to distinguish a qualified or conditional from a simple fee."

Absolute Conviction—Absolute Certainty, etc. (See also the title REASONABLE DOUBT.)—The trial court, after defining reasonable doubt, said: "It [referring to reasonable doubt] must be such doubt as nearly approaches conviction;" and added, "I mean, the opinion of his guilt must nearly approach what is called *absolute* conviction." The appellate court said: "Is there any difference between conviction and *absolute* conviction? Do they mean the same thing? The word *absolute* came originally from the Latin, and means to 'loose from.' Webster gives many meanings to the word, as, *inter alia*, 'completed or regarded as complete; finished; perfect; total; as, absolute perfection, absolute beauty. (2) Freed or loosed from any limitation or condition; uncontrolled; unconditional. (3) Positive; clear; certain. (6) Unconditioned; unrelated.' We think there is a difference, and that *absolute* conviction means conviction beyond a possibility of doubt, which the law does not require a jury to attain to to render a verdict against a defendant. It is said in *People v. Padilla*, 42 Cal. 540: 'The truth of any fact which is to be proven by evidence cannot be established beyond the possibility of a doubt, and yet the jury may be entirely satisfied of its truth.' Certainly, if it can or cannot be established beyond the possibility of a doubt, it need not be so established in order to justify a verdict of guilty against a defendant. In this connection may be noted the remarks on the import of the word *absolute* in *People v. Davis*, 64 Cal. 440, in which case it was held 'that *absolute* moral certainty was a greater degree of certainty than moral certainty.' In *People v. Strong*, 30 Cal. 154, an instruction asked by defendant on the point of reasonable doubt, or one cognate, containing the words '*absolute* moral certainty,' was said to be substantially and almost literally in the language of the books which treat of the subject, referring to *Burrill on Circumstantial Evidence* 181, 182, and to 1 *Starkie Ev.* 482, 483, 510. In this the court probably went too far; but, as the instruction was given at defendant's request, it furnished no

ABSOLUTELY. (See also ABSOLUTE.)—The word "absolutely" is an appropriate expression for the exclusion of the idea that an estate is either partial or conditional.¹

ground for reversal. In Davis's case it was asked by defendant, and the court held the refusal proper on the ground above stated. There was no error, then, in the direction to the jury that their opinion must approach *absolute* certainty; that is, a conviction so perfect, complete, and unconditioned as to exclude the possibility of a doubt." *People v. Ferry*, 84 Cal. 34.

Absolutely Incompatible. (See also the title REASONABLE DOUBT.)—In a prosecution for murder the court refused to give the following instruction: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be *absolutely* incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." On appeal it was held that the words "*absolutely* incompatible" contained in the instruction implied that the proof of the defendant's guilt must be established beyond the possibility of a doubt, and for that reason the court did not err in refusing the instruction. *State v. Rover*, 13 Nev. 17.

Absolute Ownership of Personal Property. (See the title PERPETUITIES.)—The *New York* statute against accumulations provides that the "*absolute* ownership of personal property shall not be suspended" for a longer period than of two lives in being. *Absolute* is used in the statute as equivalent to perfect and opposed to conditional, signifying without any condition or incumbrance. *Converse v. Kellogg*, 7 Barb. (N. Y.) 597; *Williams v. Lande*, 74 Hun (N. Y.) 428. In the latter case it was held that a contract which provided that certain shares of stock should not be sold, but should be delivered to and held by a third party, was within the statute. See also *Manice v. Manice*, 43 N. Y. 303.

Absolute Imbecility—Testamentary Capacity. (See also the title TESTAMENTARY CAPACITY.)—In *Campbell v. Campbell*, 130 Ill. 477, the trial court instructed that the testator's mind, "when impaired by age and disease, must be impaired to the point of lunacy or *absolute* imbecility," or he would not be incapable. The appellate court said: "The word *absolute*, in respect of the sense in which it is used in the instruction, is defined as 'completed or regarded as complete; finished; perfect; total; and the synonyms are 'perfect, total, and complete.' There are many degrees in the weakness of mind before reaching total or perfect or *absolute* imbecility; that is, before reaching utter and complete destitution of reason or rationality; and it must be apparent to every one that a man before reaching this point may be incapable."

An Absolute Conveyance is one which vests the entire interest in the property conveyed, both legal and equitable, in the grantee. *Phinney v. Broschell*, 80 N. Y. 544.

An *absolute* conveyance, an *absolute* right, an *absolute* estate, an *absolute* sale, is that which cannot be defeated or changed by any

condition, restriction, or limitation. So is an *absolute* petition. *Falconer v. Buffalo*, etc., R. Co., 69 N. Y. 498.

Wills.—A condition annexed to a devise, that no condition should be made until ten years after the death of testator's widow, was void as to personal estate, as suspending the *absolute* ownership beyond the period prescribed by the statute. *Converse v. Kellogg*, 7 Barb. (N. Y.) 590.

Absolute Nullities are of two kinds—those resulting from stipulations derogating from the force of laws made for the preservation of public order or good morals, and those established for the interest of individuals. *Means v. Robinson*, 7 Tex. 516.

Absolute Title.—An *absolute* title to lands cannot exist at the same time in different persons or in different governments. An *absolute* title must be an exclusive title or at least a title which excludes all others not compatible with it. *Johnson v. McIntosh*, 8 Wheat. (U. S.) 588.

"An **Absolute Fee Simple** is such as has no bounds or limits annexed to it, and is an estate to a man and his heirs *absolutely* forever.' * * * But the word *absolute* prefixed to 'fee simple' in the statute is very significant. It was designed to prevent any inference that the substituted estate might be a determinable fee." *Lott v. Wyckoff*, 1 Barb. (N. Y.) 574.

Absolute Sale.—See the titles CONDITIONAL SALES; SALES.

1. A clause in a will bequeathing property to testator's daughters, and directing the shares to "vest *absolutely* in them and their respective heirs of their bodies forever," does not create a separate estate in daughter married at the date of the will. *Johnson v. Johnson*, 32 Ala. 637.

Where the first section of a statute vested the estate of an assignor in his assignee on the presentation of a petition, etc., the provision in a subsequent section that it should become "*absolutely* vested" has no new operation. *Sayer v. Dufaur*, 11 Q. B. 325, 63 E. C. L. 324.

"**Absolutely**" Equivalent to "Utterly."—*Pearsoll v. Chapin*, 44 Pa. St. 14.

Due Absolutely.—The phrase "due *absolutely* and not on a contingency" is applicable to the past earnings of a party payable in the future on the estimate and certificate of a third person. *Ware v. Gowen*, 65 Me. 534.

Absolutely Incompatible.—In a prosecution for murder the court refused to give the following instruction: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be *absolutely* incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." On appeal it was held that the words "*absolutely* incompatible" contained in the instruction implied that the proof of the defendant's guilt must be established beyond the possibility of a doubt,

ABSORPTIVE SUBSTANCE. See note.¹

ABSTRACT. (See also the article **ABSTRACT OF TITLE**.)—The term “abstract,” as applied to records, ordinarily means a mere brief, and not a copy of that from which it is taken.²

and for that reason the court did not err in refusing the instruction. *State v. Rover*, 13 Nev. 17. See also **ABSOLUTE** and the title **REASONABLE DOUBT**.

Absolutely Entitled—English Eminent Domain Act.—*In re Hobson's Trusts*, 7 Ch. Div. 708, it was held that trustees of a settlement or will with a power of sale are persons *absolutely* entitled to purchase money for land, paid into court under an act providing for taking lands for public improvements. But *In re Smith*, 40 Ch. Div. 386, *In re Hobson's Trusts*, 7 Ch. Div. 708, was doubted. See also *In re Evans's Settlement*, 14 Ch. Div. 511; *In re St. Luke's*, Middlesex, W. N. (80) 58; *In re Ward*, 54 L. J. Ch. 231, 28 Ch. Div. 719; *Ex p. Haberdashers' Co.*, 31 S. J. 126; *In re Curwen*, W. N. (80) 83.

A tenant for life is not a person “*absolutely* entitled.” *Mackenzie v. Mackenzie*, 5 De G. & S. 338. But persons duly appointed new trustees are “*absolutely* entitled.” *In re Russell*, 20 L. J. Ch. 196; *In re Baxter*, 2 Sm. & G. App. v.; *In re Ellis's Settlement*, 24 Beav. 426.

Druggist's Prescription—Absolutely Necessary.—A *West Virginia* statute provides that a prescription, to justify a druggist in sale of liquors on Sunday, must specify that liquors are *absolutely* necessary. It was held that the omission of the word *absolutely* rendered the prescription insufficient. The court said: “While, in a general sense, it may be said that the word ‘necessary,’ like the word ‘perfect,’ implies the superlative degree, and that, therefore, when a thing is declared to be necessary it is essential, and *ex vi termini* implies all that would be expressed by the words ‘*absolutely* necessary,’ still the word *absolutely* is not unfrequently used to emphasize the degree of necessity when it is intended to express an extreme case. This latter use is sanctioned by custom, and it cannot be said to be either improper or meaningless. The spirit of our liquor legislation justifies the conclusion that it is only in extreme cases that the use of spirituous liquors was intended to be legally permitted. Besides, it is a canon of construction that effect must be given to every word used in the statute if that be possible. Consequently, the legislature having used the word *absolutely*, and that word having the effect of intensifying the degree of necessity for the use of the liquor, as well as qualifying the degree of its use, we do not feel authorized in holding that a prescription omitting that word is a sufficient compliance with the statute.” *State v. Tetrick*, 34 W. Va. 137.

1. **Patents.**—“When the patents Nos. 337,298 and 337,299 were issued the difference between them was that between an ‘*absorptive substance*,’ or an ‘*absorptive substance* adapted to be transformed into active material,’ on the one hand, and ‘active material, or material adapted to become active,’ on the other. There is a theoretical and scientific difference between the articles which may be called

absorptive and ‘active.’ Spongy lead has no oxygen, but will absorb oxygen and thus become active. The oxides of lead have absorbed oxygen, and are therefore active; but ‘it is admitted that the moment a battery, constructed with plates, having either coating, is charged or discharged, all distinction vanishes.’ As the terms are used in the electrical art they are synonymous, and it is especially certain that as these two patents are phrased there is no substantial difference in the character of the inventions which are described and claimed.” *Electrical Accumulator Co. v. Brush Electric Co.*, 1 U. S. App. 320, 554.

2. *Dickinson v. Chesapeake, etc.*, R. Co., 7 W. Va. 413; *McCracken v. Graham*, 14 Pa. St. 211.

A certificate read: “United States Land Office, Springfield, Mo., August 10, 1868. I certify that the within plat is a correct *abstract* of the records in this office. John S. Waddill, Register.” It was held that the word *abstract* was used in the sense of “copy,” as required by statute. *Wilhite v. Barr*, 67 Mo. 284.

Embezzlement—Abstracting. (See also the title **EMBEZZLEMENT**.)—The *United States* statute provides for the offense of *abstracting* money from a national bank. Upon the meaning of the term *abstracting*, as thus used, the court, in *United States v. Northway*, 120 U. S. 334, said: “Unlike the word ‘misapply,’ as used in the same section, the word *abstract* is not ambiguous, because it does not appear from other parts of the statute that there are two or more kinds of abstracting, both unlawful, but only one described as a criminal offense. The word *abstract*, as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use.” And in *United States v. Harper*, 33 Fed. Rep. 479, the court said: “In considering this charge it is proper to state that the term *abstract*, as used in section 5209, has no technical meaning like the word ‘embezzle,’ but is employed in the statute, and is to be understood, in its ordinary and popular sense, as taking or withdrawing from; so that to abstract the moneys, funds, credits, and assets of a national bank by any of its officers named in the act is to take or withdraw the same from the possession or control of the association. But the mere taking or withdrawal of its funds or moneys or other assets from the bank's possession is not in and of itself alone sufficient to constitute the criminal offense of *abstraction* which is described in the statute. It must further appear, in order to complete the offense, that this taking or withdrawing was without the knowledge and consent of the association, and that the funds and assets so taken and withdrawn were converted to the use, benefit, and advantage of the officer or agent of the bank *abstracting* the same, and with intent to injure or defraud or deceive, as indicated in the statute.”

ABSTRACT OF TITLE.

By L. P. McGEHEE.

I. DEFINITION, 211.

II. OBJECT OF THE ABSTRACT, 211.

III. CONTENTS AND SUFFICIENCY, 211.

1. *In General*, 211.
2. *Effect of Recording Statutes*, 212.
3. *Period for which Title Shown*, 212.
 - a. *English Rule*, 212.
 - b. *Practice in the United States*, 212.

IV. WHO MUST FURNISH THE ABSTRACT, 212.

1. *In England*, 212.
2. *In the United States*, 213.

V. TIME OF DELIVERING THE ABSTRACT, 213.

VI. SHOWING THE TITLE BY THE ABSTRACT, 214.

1. *General Principles*, 214.
2. *Vendee's Objections*, 215.

VII. PREPARING THE ABSTRACT, 216.

1. *Preliminary*, 216.
2. *Searching*, 216.
 - a. *In General*, 216.
 - b. *Public Records—Duty of Officials*, 216.
 - c. *Effect of Official Search*, 217.
3. *Arrangement and Form*, 217.
 - a. *Generally*, 217.
 - b. *Abstracting Documents*, 218.
 - (1) *Conveyances in General*, 218.
 - (2) *Wills*, 218.
 - (3) *Judicial Sales*, 218.
 - (4) *Execution Sales*, 219.
 - (5) *Tax Sales*, 219.
 - (6) *Liens and Incumbrances*, 219.
 - (7) *Miscellaneous*, 219.

VIII. ABSTRACTS AS EVIDENCE, 219.

1. *Of Lost Deeds*, 219.
2. *Miscellaneous*, 220.

IX. LIABILITY OF EXAMINERS OF TITLES, 220.

1. *General Rule as to Degree of Care and Skill*, 220.
2. *When Enforced*, 220.
3. *Who may Enforce*, 221.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW AND EVIDENCE related to this subject, see the following titles in this work: ACKNOWLEDGMENTS; ADVICE OF COUNSEL; ALTERATION OF INSTRUMENTS; ATTORNEY AND CLIENT; DEEDS; GRANTS; RECORD; RECORDING ACTS; RESCISSION; VENDOR AND PURCHASER.

I. DEFINITION.—An abstract of title, or brief of title as it is sometimes called, is a short and methodical summary of the documents and facts which affect the title to a piece of land.¹

II. OBJECT OF THE ABSTRACT.—The object of the abstract is to enable the vendee or his counsel to judge of the precise state of the title, and to ascertain how far it is affected by incumbrances of every description.²

Duty to Examine.—The duty to investigate rests upon the vendee, for by the common law the maxim *caveat emptor* applies to purchasers of real estate, as well as to purchasers of personal property.³

III. CONTENTS AND SUFFICIENCY—**1. In General.**—In order to permit the purchaser to pass safely upon the title, in view of the responsibility resting upon him, the abstract should be a clear exposition of everything relating thereto.

Summary of Grants, Patents, Conveyances, Incumbrances, etc.—It should contain a full summary of all grants, patents, conveyances, wills, and all records and judicial proceedings whereby the title is in any way affected, and should show the exact state of the property with regard to all incumbrances or liens which have at any time affected it, such as mortgages, judgments, mechanics' liens, notices of *lis pendens*, taxes, assessments, and the like.⁴

Constructive Notice—Inquiries in Pais.—But the abstract should go even further: the doctrine of constructive notice will imply notice of facts and instruments in many cases where no actual notice exists;⁵ and it may become necessary to institute inquiries *in pais* as to questions of possession, pedigree, marriage, death, and devolution of title by descent from intestate ancestors, or as to easements arising from implied dedication or prescription.⁶ Such inquiries should be made diligently, and their result embodied in the abstract.

Duty of Vendor.—Where, as in *England*, the duty rests upon the vendor to furnish an abstract, he must disclose every fact within his knowledge relating to the title.⁷

1. In *Banker v. Caldwell*, 3 Minn. 94, Flaudrau, J., quotes the following apt and clear definition from Burrill's Law Dictionary: "In conveyancing; an abstract or summary of the most important parts of the deeds and other instruments composing the evidences of a title to real estate; arranged usually in chronological order, and intended to show the origin, course, and incidents of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges, incumbrances, liens, and liabilities to which the property may be subjected, and of which it is, in any way, material for purchasers to be apprised. Abstracts of title constitute an important part of the learning of conveyancing, and in *England* have been illustrated by treatises expressly devoted to the subject." Very similar is the definition of Warvelle on Abstracts (2d ed.), c. 1, § 2.

2. 1 Preston on Abstracts 1-5; Willard on Real Estate and Conveyancing (2d ed.) 527; *Taylor v. Williams*, 2 Colo. App. 559.

3. Broom's Legal Maxims (8th ed.) 768; *Gwillim v. Stone*, 3 Taunt. 433; *Upton v. Tribilcock*, 91 U. S. 45; *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554.

"If a man buys lands whereunto another hath title, which the buyer knoweth not, yet ignorance shall not excuse him." Doctor and Student, bk. 2, c. 47. Of course, covenants and warranties may change the rule. See the article VENDOR AND PURCHASER.

The place of the abstract in negotiating a sale is more clearly defined in *English* practice

than in the *United States*. In *England*, the abstract is an implied feature in every sale of land, and its object is to show a marketable title in the vendor. See *infra*, this article, *Who must Furnish Abstract*, and note.

4. What the Abstract should Contain. — In *Taylor v. Williams*, 2 Colo. App. 559, Richmond, P. J., said the abstract "should contain whatever concerns the sources of the title, and its conditions. Not only should the descent and line of the title be clearly traced out, and all incumbrances, all chances of eviction, or adverse claims should be shown, but material parts of all patents, deeds, wills, judicial proceedings, and other records or documents which touch the title, and also liens and incumbrances of every nature, should be set forth."

Reference to Original Documents and Records. —The investigator should refer to the original documents or records in every instance; he cannot trust the marginal entries of record clerks as to the satisfaction of mortgages and the like. *Wacek v. Frink*, 51 Minn. 282. And see *Wilson v. Tucker*, 3 Stark. 154.

5. See the article NOTICE.

6. **Parish Books, Family Documents, etc.**—In such cases resort may be had to parish books, family documents, and the like. See the articles AGE; DEATH; EVIDENCE; DEDICATION; FAMILY; MARRIAGE; PEDIGREE.

7. **What Vendor must Disclose.**—The vendor must disclose every instrument which constitutes a part of his title, *Oakden v. Pike*, 34 L. J. Ch. 620, 13 W. R. 673; and every fact

2. Effect of Recording Statutes.—Under the recording statutes in force in the *United States*, it is usually the case that the whole title is contained in instruments of record. So far is this true, that cases are found which limit the abstract maker's duties to abstracting the records, and define an abstract from this point of view.¹

3. Period for which Title Shown—*a. ENGLISH RULE.*—The old rule in *England* was that the abstract should show the title for sixty years,² and this was said to be by analogy to the statute of limitations against a writ of right.³ As succeeding statutes have shortened the time necessary to bar an action for real property, the requirement as to the abstract has been made less strenuous. Under the Vendor and Purchaser Act of 1874, an abstract that shows title for forty years is enough.⁴

b. PRACTICE IN THE UNITED STATES.—No rule exists in the *United States* as to the period required to be covered by an abstract. The best usage carries the title back, where possible, to the original grant from the state, and traces all incumbrances and claims of every sort, with due regard to the periods within which claims might be asserted thereunder by the local statutes of limitations.⁵

IV. WHO MUST FURNISH THE ABSTRACT—**1. In England.**—In *England*, the production of the abstract is implied in every sale of land, and is one of the most important steps in completing the contract.⁶ The vendor furnishes the abstract, and he must afford the purchaser an opportunity to compare it with the documents abstracted, and this at the vendor's expense.⁷

within his knowledge relating thereto, *Edwards v. Wickwar*, 35 L. J. Ch. 48. He may not suppress defects in the title, *Edwards v. Wickwar*, 35 L. J. Ch. 48; nor incumbrances, although they might have been subsequently discharged, *Drummond v. Tracy*, 1 Johns. 608; or are of doubtful priority, *Palmer v. Locke*, 18 Ch. Div. 381. But where the abstract shows a good equitable title, it need not show the devolution of the legal estate. *Camberwell, etc., Bldg. Soc. v. Holloway*, 13 Ch. Div. 754. See *infra*, this article, *Showing the Title by the Abstract*.

1. The term "abstract of title" means a statement in substance of what appears on the public records affecting the title to the property in question. *Union Safe Deposit Co. v. Chisholm*, 33 Ill. App. 647. And see *Chase v. Heaney*, 70 Ill. 268.

An abstract is a summary or epitome of the facts relied upon as evidence of title, and should contain a note of all conveyances, transfers, or other facts relied on as evidences of the claimant's title, together with all such facts appearing of record as may impair it. *Heinsen v. Lamb*, 117 Ill. 549. See also *Smith v. Taylor*, 82 Cal. 533.

2. **Old English Rule.**—*Williams on Real Property* (6th ed.) 450; *Sugden on Vendor and Purchaser* (13th ed.) 281. And see *Cooper v. Emery*, 1 Ph. 388; *Purvis v. Rayer*, 9 Price 488; *Souter v. Drake*, 5 B. & Ad. 992, 27 E. C. L. 250.

Root of the Title.—The title, assumed to be good, from which the abstract is adduced, is called "the root" of the title. The title may begin with deed or will, *Cottrell v. Watkins*, 1 Beav. 361; *Parr v. Lovegrove*, 4 Drew. 170; or may be shown from long and uninterrupted possession, *Cottrell v. Watkins*, 1 Beav. 361. See also the article **VENDOR AND PURCHASER**.

3. 32 Henry VIII., c. 2. See Willard on Real Estate and Conveyancing (2d ed.) 527. But compare *Williams on Real Property* (6th ed.) 450.

4. **Modern English Rule.**—See 37 & 38 Vict., c. 78; *In re Johnson*, 30 Ch. Div. 42. But by the same acts, recitals in deeds over twenty years old are *prima facie* evidence of the facts recited, and where title begins from a deed over twenty years old, reciting seizin in fee, the vendee cannot demand further abstracts, except so far as he may prove the recital inaccurate. *Bolton v. London School Board*, 7 Ch. Div. 766.

5. This may be impossible, especially in the older states, by reason of the condition of the records. In such cases the possibilities of investigation should be exhausted, or the investigation begun at some period beyond the statute of limitations, as in the *English* practice. It should be noted, however, that deeds upon record, no matter how old they may be, affect a purchaser with notice; and where there are conditions therein, a breach of the same, even after the lapse of a century, may defeat the estate; consequently an exhaustive search is always safest. *Martindale on Abstracts of Title*, §§ 17, 18, 19. See the articles **ESTATES**; **CONDITIONS**.

6. *Pomeroy on Specific Performance*, § 413.

7. **English Rule: Vendor Furnishes Abstract.**—*Williams on Real Property* (6th ed.) 450; 1 *Preston Abstracts*, tit. 1; *Dart on Vendor & Purchaser* (6th ed.) 141; *In re Ford*, 10 Ch. Div. 365; *In re Johnson*, 30 Ch. Div. 42. See also *Morris v. Kearsley*, 2 Y. & Coll. 139.

But it seems doubtful whether the purchaser may demand inspection of deeds earlier than the title required to be shown—for example, sixty years. *Parr v. Lovegrove*, 4 Drew. 170.

Of Course, Special Agreement may throw the

2. In the United States.—In the *United States* an abstract is not an implied feature of every sale of land.¹

Caveat Emptor.—Since every title is of record, the application of the doctrine of *caveat emptor*, in the absence of special agreement, requires the purchaser to satisfy himself as to the sufficiency of the title, and for that purpose to make the necessary investigations and abstracts.²

Special Agreement.—But frequently the matter is arranged by agreement, and, of course, the terms of such agreement are controlling.³

V. TIME OF DELIVERING THE ABSTRACT.—The *English* rule as to the time of delivering the abstract differs at law and in equity.

duty of investigating upon the purchaser. *Thomas v. Blackman*, 1 Colly. 301.

The *English Practice* is the *Natural Consequence* of the fact that in *England*, titles are unrecorded, and that muniments of title are, in general, in the hands of the owner of the property. Since the deeds are in the vendor's possession, he fills his implied contract to make good title by furnishing an abstract of his muniments of title to the purchaser, allowing the latter, through his solicitor, to compare the abstract with the originals. The possession of the abstract passes rightfully to the vendee, though he may lose his right thereto if the negotiations are broken off. *Coppinger on Title Deeds* 37. See also *infra*, this article, *Showing the Title by the Abstract*.

1. Abstract not Implied in Every Case.—*Pomerooy on Specific Performance*, § 413; *Wade v. Killough*, 5 Stew. & P. (Ala.) 450.

In *Alabama*, however, it is incumbent on the vendor, when required to do so by the vendee, to furnish the latter an abstract of his title. *Chapman v. Lee*, 55 Ala. 623.

But it seems doubtful whether the abstract which the vendee can require is anything more than such information as to the title as will enable him to prepare and tender to the vendor a satisfactory conveyance of the property. *Wade v. Killough*, 5 Stew. & P. (Ala.) 450.

2. Purchaser must Examine for Himself—Reason of the Rule.—In *Espy v. Anderson*, 14 Pa. St. 308, *Coulter, J.*, after remarking that the original deeds forming the chain of title cannot be tendered with the deed to the vendee in cases where the original deed covers a large tract of which only a part is sold, proceeds: "In this country, where titles are on record, it is of no consequence, because the vendee can resort to the record for information as to the title. The rule is *caveat emptor*. It is the duty, therefore, of a purchaser to examine for himself. The defendant is not bound to accept a doubtful title, but it is his business to show that it is doubtful or positively bad. In *England* it is customary to give to the vendee an abstract of the title, but that is not usual here. It is common, however, to recite the chain of title in the preamble to the deed." See also *Patten v. Stewart*, 24 Ind. 332.

Where there is no provision as to who shall furnish the abstract, it is the duty of the purchaser to provide one and to satisfy himself as to the condition of the title. *Easton v. Montgomery*, 90 Cal. 307.

3. Thus the Agreement may Provide that the Vendee must investigate the title. *Carr v. Roach*, 2 Duer (N. Y.) 20; *Fruhauf v. Bendheim* (Supreme Ct.), 6 N. Y. Supp. 264; *Nason v. Armstrong*, 21 Ont. App. 183.

But more Often the Duty is Assumed by the Vendor. For instances see *Benson v. Shotwell*, 87 Cal. 49; *Boas v. Farrington*, 85 Cal. 535; *Taylor v. Williams*, 2 Colo. App. 559; *Hale v. Cravener*, 128 Ill. 408; *Mead v. Altgeld*, 136 Ill. 298; *Union Safe Deposit Co. v. Chisholm*, 33 Ill. App. 647; *Constantine v. East*, 8 Ind. App. 291; *Horn v. Butler*, 39 Minn. 515; *Johnston v. Johnson*, 43 Minn. 5; *Kane v. Rippey*, 24 Oregon 338.

Default of Vendor—Recovery by Vendee of Expenses.—If the vendor at the time fixed is unable to convey a good title, the vendee may recover back the amount spent by him in investigating the title. *Turner v. Reynolds*, 81 Cal. 214; *Hewison v. Hoffman* (C. Pl.), 4 N. Y. Supp. 621; *Uhl v. Loughran* (Supreme Ct.), 2 N. Y. Supp. 190; *Porterfield v. Payne*, 57 Hun (N. Y.) 591; *Wetmore v. Bruce*, 118 N. Y. 319.

Default of Vendee—Tender of Abstract Unnecessary.—Where the agreement is that the vendor shall furnish a satisfactory abstract, and that thereupon the vendee shall pay the purchase money, if the vendee notifies the vendor of his inability to perform the contract by reason of want of funds, the vendor need not tender an abstract in order to put the vendee in default. *Johnston v. Johnson*, 43 Minn. 5.

Notice to Vendee where Abstract may be Inspected—Estoppel.—Where the vendor who has agreed to furnish a satisfactory abstract gives notice to the vendee of the place where it may be found and inspected, and the vendee does not object at the time, the latter cannot rescind. *Papin v. Goodrich*, 103 Ill. 86.

Right to Hold Abstract as Security.—Where A, wishing to borrow money from B on a mortgage, gave B's attorney an abstract to the title of the property mortgaged, for the purpose of decreasing the expenses of the search, which A was by contract to pay, the abstract became a part of the security for the loss, and B was entitled to hold it until the mortgage was paid. *Holm v. Wust*, 11 Abb. Pr., N. S. (N. Y. Supreme Ct.) 113.

But the purchaser to whom the vendor has delivered abstracts cannot rescind for defect of title and retain the abstracts as security for the earnest money. *Jackson v. Conlin*, 50 Ill. App. 538.

Rule at Law.—At law the vendor must have the abstract ready at the appointed time at his peril, and upon default the purchaser may recover his deposit.¹

Rule in Equity.—In equity, if the vendor does not tender the abstract at the appointed time, the vendee must demand it, or he will be considered as having waived his strict rights;² and if the vendor delivers the abstract after the proper time, and the vendee receives it, he is considered as having waived the delay.³

Reasonable Time.—Where the abstract is to be furnished in a reasonable time, the question of what is a reasonable time depends upon the circumstances of the case.⁴

VI. SHOWING THE TITLE BY THE ABSTRACT—1. General Principles.—In every agreement to sell there is implied, by law, an agreement to make a good title to the property sold.⁵ In *England* always, and in the *United States* by special agreement, the vendor shows by means of his abstract that he has good title,⁶ and the vendee is entitled to an abstract which shows a good title such as will enable him to complete his purchase.⁷

1. 2 *White & Tudor's Lead*. Cas. 557; *Berry v. Young*, 2 Esp. 640, note. And see *Williams v. Daly*, 33 Ill. App. 454.

Abstract Defective—Right of Vendor to Additional Time.—Where the contract calls for an abstract showing good title by a day certain, the vendor has no right to demand time to furnish an additional abstract, if the first is defective. *Howe v. Hutchison*, 105 Ill. 501.

2. *Guest v. Homfray*, 5 Ves. 818.

No Time Appointed for Delivery—Duty of Vendee.—If no time for delivering the abstract is appointed, the vendee must demand it in time to leave a sufficient period for completion of the contract before the time named in the agreement. *Jones v. Price*, 3 Anstr. 924. And see *Wilson v. Wittrock*, 19 U. C. Q. B. 391. See also *Compton v. Bagley* (1892), 1 Ch. 319, where, after repeated delays, the purchaser's solicitor demanded the abstract within fourteen days, and in default thereof the purchaser was held justified in rescinding.

3. **Waiver of Delay.**—*Seton v. Slade*, 7 Ves. 265; *Smith v. Burnam*, 2 Anstr. 527; *Pincke v. Curteis*, 4 Bro. C. C. 329; *Paine v. Meller*, 6 Ves. 349. In such cases the vendor cannot insist on the vendee sending in his objections within the time limited. *Upperton v. Nickolson*, L. R. 6 Ch. 436.

Extension of Time to Vendor—Duty of Vendee as to Notice.—A purchaser of land who has given the vendor further time to remedy defects in the abstract of title may not rescind for failure to furnish additional abstracts within a reasonable time, without notifying the vendor that he will wait no longer, where he receives the abstracts furnished as if he meant to have them examined with a view to determine as to their sufficiency, and subsequently claims to retain them as security for the payment of the earnest money, although knowing that they were not delivered to him for that purpose. *Jackson v. Conlin*, 50 Ill. App. 538.

4. *Jackson v. Conlin*, 50 Ill. App. 538. It was held in this case that, under a contract for the sale of land providing that an abstract of title shall be furnished within a reasonable

time, the abstract need not be furnished within the thirty-five days in which a payment falls due by the terms of the contract; but such payment cannot be required until the abstract has been supplied and a reasonable time allowed for its examination.

5. *Sugden on Vendor and Purchaser* (13th ed.) 281; *Williams on Real Property* (6th ed.) 450; *Shreck v. Pierce*, 3 Iowa 350. See, for the rule and exceptions, the article **VENDOR AND PURCHASER**; and see the same article as to what is a good or marketable title.

6. Under the usual reference as to title, the title is made out when it is proved, but is first shown when the facts necessary to make it out are specifically alleged on the abstract, and are within the vendor's power to prove. *Parr v. Lovegrove*, 4 Drew. 170. As to the vendor's duty to disclose incumbrances, see *supra*, this article, *Contents and Sufficiency, in General*.

7. **A Perfect Abstract.**—A perfect abstract of title is one that shows such a title as enables the purchaser to complete his purchase. *Blackburn v. Smith*, 2 C. & K. 561. And see *McIntosh v. Rogers*, 12 Ont. Pr. Rep. 389.

Purchaser Dispensing with Proof as to Certain Period.—The purchaser is not entitled to be furnished with an abstract of the title beyond the time he has dispensed with proof of it. *Poppleton v. Buchanan*, 4 C. B., N. S. 20.

Good Record Title.—Under a contract for the purchase of a farm requiring the vendor to convey by warranty deed and to furnish a full abstract, he is required to convey a good record title. *Constantine v. East*, 8 Ind. App. 291.

The Vendor can Make a Good Title where a good title appears on the face of the abstract and where he is able and willing to prove the deeds and facts therein alleged; whatever he puts upon his abstract, he is bound to prove and verify. *Parr v. Lovegrove*, 4 Drew. 170.

Innocent Omission in the Chain—Rescission by Vendee.—If the abstract shows a clear title, by reason of an innocent omission of the registrar who prepared it, and the vendor is aware of the omission, but represents the abstract as correct, the vendee may rescind

2. Vendee's Objections.—The *English* practice is, that after receiving an abstract and perusing it the vendee shall send in such further "requisitions" as to defects or omissions therein as he thinks fit; and in the *United States* the practice is similar where, by contract, the vendor furnishes the abstract.¹

To be Made in Reasonable Time.—The vendee must present such requisitions within a reasonable time, and, if he fails to do so, he will be considered as having waived all objections.²

upon discovering the defect, and the vendor cannot show the invalidity of the incumbrance omitted. *Scadin v. Sherwood*, 67 Mich. 230.

Good and Marketable Title.—Where the vendor furnished an abstract which failed to show whether there were judgments against or conveyances by the vendor, although it showed title in him, this was held to be valid ground of objection, under a contract that the vendor should furnish an abstract showing good and marketable title. *Union Safe Deposit Co. v. Chisholm*, 33 Ill. App. 647.

"Warranty Deed Conveying Clear Title with Abstract."—Where the agreement is that the vendor is to furnish "a warranty deed conveying clear title with abstract," the purchaser may insist on the abstract showing clear title, as a condition precedent to the purchase; and if the abstract shows defects in the vendor's title, the vendor may not show that the defects disclosed in the abstract do not exist. *Taylor v. Williams*, 2 Colo. App. 559. And see *Smith v. Taylor*, 82 Cal. 533; *Boaz v. Farrington*, 85 Cal. 535; *Benson v. Shotwell*, 87 Cal. 49; *Howe v. Hutchison*, 105 Ill. 501; *Mead v. Altgeld*, 136 Ill. 298; *Kane v. Rippey*, 24 Oregon 338; *Kane v. Rippey*, 22 Oregon 296.

Where, in such a case, the vendee brought suit for return of a payment upon the purchase-money, the complaint alleging that the abstract did not show good title, and the vendor, in his answer, did not deny this allegation, it was held that the vendee was entitled to judgment upon the pleadings. *Horn v. Butler*, 39 Minn. 515.

Purchaser of Shares in a Mine.—The purchaser of shares in a mining company is not entitled to a regular abstract of the title of the mines themselves, but he is entitled to evidence to show that the subject matter of the purchase is what it professes to be, and that the proposed form of transfer to him will give him a valid title. *Curling v. Flight*, 2 Ph. 613.

Title to be Approved by Attorney.—Where by the terms of the contract the title is to be approved by the vendee's attorney after due examination of the abstract, the vendee cannot be required to complete the sale when his attorney rejects the title, although the title may be good. *Allen v. Pockwitz*, 103 Cal. 85. See also *Boulton v. Bethune*, 21 Grant's Ch. (U. Can.) 110.

1. Lee on Abstracts 20; Warvelle on Abstracts 4.

Vendee Entitled to Verification of Abstract.—The vendee is not only entitled to an abstract showing on its face a good title, but he is entitled to have such abstract verified. *Granger v. Latham*, 14 Grant's Ch. (U. Can.) 209.

The vendee is entitled to the verification of an abstract which he has waived the right to demand; e.g., of an abstract furnished to him, upon his request, by the vendor after he has accepted the title. *Gordon v. Harnden*, 18 Grant's Ch. (U. Can.) 231.

But the vendor or his solicitor cannot be forced to answer general questions asked for the purpose of negating incumbrances, without regard to any defect in the abstract. *In re Ford*, 10 Ch. Div. 265.

Perusal and Certification.—The completed abstract is submitted frequently to counsel for perusal, who, after examination, appends his opinion of the validity of the title shown, and points out material defects if there are any. This opinion is properly in the form of a signed certificate at the end of the abstract.

2. *Stevenson v. Polk*, 71 Iowa 278. See also *Nason v. Armstrong*, 21 Ont. App. 183; *Jackson v. Conlin*, 50 Ill. App. 538.

Where the Vendee Receives and Examines an Abstract according to contract, and allows the vendor to go on and remedy defects in title which he points out, he cannot afterwards insist on other objections, but he must present all his objections within a reasonable time after receiving the abstract. *Stevenson v. Polk*, 71 Iowa 278.

The Vendee may Show, it seems, Specific Defects in the abstract, although he has not made his objections within the proper time. *Ward v. Grimes*, 9 Jur., N. S. 1097, 11 W. R. 794.

Special Agreement—Time Essential.—Where it is agreed specifically that objections not made within a reasonable time are deemed waived, time is essential. *Morley v. Cook*, 2 Hare 106.

If the Vendor has been Delinquent in furnishing the abstract, but the vendee has accepted it when furnished, the vendor cannot insist upon the vendee furnishing his objections within the time specified in the contract. *Upperton v. Nicholson*, L. R. 6 Ch. 436.

Refusal of Vendor to Explain Apparent Defects.—Where the vendor refuses to explain apparent defects in the abstract, merely claiming that the deed as to which the mistake is alleged is wrongfully recorded, the purchaser may refuse to complete the sale and may demand a return of the deposit, though the title afterward proves good. *Benson v. Shotwell*, 87 Cal. 49. See also *Boaz v. Farrington*, 85 Cal. 535.

If the Vendee has Accepted the Title, and, by reason of his failure to pay the purchase money, the vendor has rescinded the contract, the vendee cannot avail himself of a defect in the abstract of the title. *Soper v. Arnold*, L. R. 14 App. Cas. 429.

Default of Vendee—Contract Void at Option of Vendor.—Where, by agreement, the vendor is to furnish an abstract which the vendee is to

VII. PREPARING THE ABSTRACT—1. Preliminary.—The first process in preparing an abstract is to obtain a sketch of the chain of title—a memorandum showing the transfers of title to the estate under examination, for the period to be covered by the abstract. This is drawn up from a preliminary search of the records, or from the title deeds to the property, and shows in outline who was interested therein at any given time, and, consequently, in whose power it was to transfer the title to the estate and create incumbrances thereon at such time.

2. Searching—*a.* IN GENERAL.—The next step is to make exhaustive searches of all public records against the names and for the periods pointed out by the preliminary memorandum.¹

***b.* PUBLIC RECORDS—DUTY OF OFFICIALS.**—The public records are open to inspection and examination.² By statute in some states it is the duty of the officials having them in charge to furnish searches when required, on payment of the proper fees.³

have thirty days to examine, and the vendee is to make payment within such time, and in default thereof the contract is to be void, and the vendor furnishes a satisfactory abstract, but the vendee fails to make payment, the contract becomes void at the option of the vendor without further act on his part. *Paget v. Park*, 50 Minn. 186.

Waiver of Acceptance.—Where the vendor, after the vendee's acceptance of the title, furnishes an abstract and answers requisitions as to matters therein, the acceptance is waived. *Aldwell v. Aldwell*, 6 U. Can. Pr. Rep. 183.

1. Sketch of the Chain of Title.—What should be the extent of such search may be gathered from the remarks above as to the form and sufficiency of abstracts, and the hints below as to abstracting different kinds of documents. In addition to the searches so made, inquiries *in pais* should include not only the subjects referred to above, but also the existence of easements or servitudes, public or private, by prescription or actual dedication. See the article **EASEMENTS**.

Registry Laws—Search against Grantor.—Under the registry laws generally of the *United States*, search against the grantor need not go back of the period at which he acquired record title. *Rawle on Covenants of Title* 428; *Dodd v. Williams*, 3 Mo. App. 278; *State v. Bradish*, 14 Mass. 296.

2. Right of Access to Public Records.—The decisions as to the rights of abstract makers and abstract companies to examine abstracts and copy records are not in accord. In some states it is held that free access should be furnished to the records; and the fact that the law allows the clerk to charge a fee for a personal search does not entitle him to demand such fee for allowing to others access to the record. *Linn v. McCarty*, 39 N. J. L. 287; *West Jersey Title, etc., Co. v. Barber*, 49 N. J. Eq. 474 (*compare* *Flemming v. Hudson County*, 30 N. J. L. 280); *State v. Rachac*, 37 Minn. 372; *Com. v. O'Donnell*, 15 Phila. (Pa.) 197; *Burton v. Tuite*, 78 Mich. 363, *overruling* *Webber v. Townley*, 43 Mich. 534, 38 Am. Rep. 213.

Reasonable Regulations.—But rights afforded to abstract makers copying records, to accumulate material for future use, are subject to

reasonable regulations. *People v. Richards*, 99 N. Y. 620. And see *People v. Reilly*, 38 Hun (N. Y.) 429; *People v. Cornell*, 47 Barb. (N. Y.) 329.

In *Wisconsin* any person may examine the records; subject, however, to the payment of fees, when allowed, and to the reasonable supervision of the officer in charge. *Hanson v. Eichstaedt*, 69 Wis. 538.

Rule in Other States.—In other states the right of free access to the records is granted only to those interested therein; it is denied to persons satisfying idle curiosity or accumulating material for speculative purposes. *Randolph v. State*, 82 Ala. 527, 60 Am. Rep. 761. And see *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 318; *Phelan v. State*, 76 Ala. 49; *Dean v. People*, 7 Colo. 200; *Buck v. Collins*, 51 Ga. 391, 21 Am. Rep. 236; *Cormack v. Wolcott*, 37 Kan. 391; *Boylan v. Warren*, 39 Kan. 301; *Belt v. Prince George County Abstract Co.*, 73 Md. 289.

In the case of *In re Webster*, 18 U. C. Q. B. 87, it is held that the registrar must make searches personally, but that he need not allow others to inspect the records. See also *Ross v. McLay*, 26 U. C. C. P. 190.

3. Duty of Officials under Statutes.—*M'Caraher v. Com.*, 5 W. & S. (Pa.) 21; *Ziegler v. Com.*, 12 Pa. St. 227; *Philadelphia v. Anderson*, 142 Pa. St. 357; *Lusk v. Carlin*, 5 Ill. 396. And see local statutes; for example, N. Y. Code Civ. Pro., § 961.

English Statutes.—The same duty devolves upon the registrar under the registry acts of Middlesex and Yorkshire in *England*. *Taylor on Evidence* (8th ed.), § 1645.

The English "Transfer of Land Act" (1862-1865) authorizes the registrar to examine titles registered thereunder, and to give certificates of title which are *prima facie* evidence of the matters therein contained. *Taylor on Evidence* (8th ed.), § 1644.

Distinction between Official's Duty to Search and the Furnishing of Abstracts.—The duty to search must be distinguished from the duty to make a complete abstract; and in case the official in charge of records undertakes the latter business, he is liable upon the same principles as any other abstract maker. *National Sav. Bank v. Ward*, 100 U. S. 195; *Lusk v. Carlin*, 5 Ill. 395; *Mechanics' Bldg.*

c. **EFFECT OF OFFICIAL SEARCH.**—Where a statute makes it the duty of an official in charge of records to furnish searches, he is liable upon his bond for omissions therein;¹ but this liability extends no further than to the person at whose requisition the search is prepared.²

3. **Arrangement and Form.**—a. **GENERALLY.**—The search being complete, the next duty of the abstractor is to go through the original documents or records shown thereon, abstracting their contents, making extracts, and preparing material to perfect the abstract and to give to it its final form and arrangement.

Caption and Index.—The completed document should have a caption showing the contents and method of arrangement, and, if lengthy and complicated, an index.

Order.—The ordinary arrangement is chronological.

Assoc. v. Whitacre, 92 Ind. 548; *Smith v. Holmes*, 54 Mich. 104; *Mallory v. Ferguson*, 50 Kan. 685.

Search must be Exhaustive.—Where the registrar certifies that the "above conveyances appear of record," he does not fulfil his duty of searching, and mandamus will lie to compel the issuance of a certificate as to all registries appearing of record. *In re Registrar*, 12 U. C. C. P. 225.

1. *M'Caraher v. Com.*, 5 W. & S. (Pa.) 21; *Ziegler v. Com.*, 12 Pa. St. 227; *Philadelphia v. Anderson*, 142 Pa. St. 357; *Com. v. Harmer*, 6 Phila. (Pa.) 90; *Lusk v. Carlin*, 5 Ill. 395. See also *Mechanics' Bldg. Assoc. v. Whitacre*, 92 Ind. 547; and *infra*, this article, *Liability of Examiners of Titles*.

Official's Liability for Search Made by Third Party.—Where an official undertakes to make a search for assessments, and hands to the person requiring such search a search made by a third person, receiving his regular fees therefor, he is liable. *Morange v. Mix*, 44 N. Y. 315.

Effect of Party's Knowledge of Omission from Certificate.—Where the person requiring the search has actual knowledge of a mortgage omitted from the registrar's certificate, he cannot claim against the registrar for payments made thereon after such notice. *Brega v. Dickey*, 16 Grant's Ch. (U. Can.) 494.

Estoppel by Search.—Where it is the duty of the receiver of taxes of a city to furnish, for a specified fee, certificates of all taxes which are liens on real estate, and he gives the purchaser of the land a certificate that there are no unpaid taxes for certain years, the receiver represents the city in so doing, although he is an elective officer; and the city is estopped from asserting a tax lien against the land arising during the period covered by such certificate, when the purchaser, in reliance upon such certificate, paid the purchase money to the vendor. *Philadelphia v. Anderson*, 142 Pa. St. 357.

Informalities in Search—Omission of Official Seal.—The official does not avoid liability by failing to affix his official seal to the search. *Ziegler v. Com.*, 12 Pa. St. 227. It was held also in this case that it did not avail the officer that there was no proof of the payment of the fee required by law.

Must be Actual Loss.—Where there is no

actual damage in consequence of the falsity, there is no cause of action. *U. S. Wind Engine, etc., Co. v. Linville*, 43 Kan. 455; *Batty v. Fout*, 54 Ind. 482.

Upon the principle that only the damages resulting from the direct consequences of an act can be recovered, it has been held in *New York* that where the loss was the consequence, not of an omission in the search, but of the failure to pay a judgment omitted, the clerk certifying the search is not liable. *Kimball v. Connolly*, 3 Keyes (N. Y.) 57, 33 How. Pr. (N. Y.) 247.

Mistake in Requisition.—An official is not liable where the order for the search gives incorrectly the name of the person against whom the search is to be made. *Com. v. Owen*, 2 W. N. C. (Pa.) 200.

Liability of Sureties Barred.—The liability of the sureties on official bonds is barred in accordance with the statute of limitations. *Com. v. Harmer*, 6 Phila. (Pa.) 90.

No Duty to Search.—This liability is not incurred where it is not the duty of the officials to make searches. *Mallory v. Ferguson*, 50 Kan. 685.

But an Intentional False Certificate in such cases is misconduct in office, warranting removal. *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172.

2. *Com. v. Harmer*, 6 Phila. (Pa.) 90; *Siewers v. Com.*, 87 Pa. St. 15; *Houseman v. Girard Mut. Bldg., etc., Assoc.*, 81 Pa. St. 256; *Mallory v. Ferguson*, 50 Kan. 685. See also *infra*, this article, *Liability of Examiners of Titles*.

If the Official Republishes and Reaffirms a search certified to A, at the request of and for B, such reaffirmance will bind the official and make him liable in damages for omissions resulting in damage to B. *Siewers v. Com.*, 87 Pa. St. 15. And where A seeks to borrow money on mortgage from B, and B's conveyancer requests A to get, and pay for, an official search, which fails to return prior mortgages given by A, this does not prevent the official's liability to B. *Houseman v. Girard Mut. Bldg., etc., Assoc.*, 81 Pa. St. 25; *Peabody Bldg., etc., Assoc. v. Houseman*, 89 Pa. St. 261, 33 Am. Rep. 757. And see *Dickle v. Nashville Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616. But compare *National Sav. Bank v. Ward*, 100 U. S. 195.

Plats and Sketches.—Plats and sketches should be inserted whenever they will assist to a more complete understanding of the situation of the property.

Official Searches.—If there are official searches, they should be attached to the abstract and made a part thereof.

The Transaction Complete.—When the transaction has been completed and the deed to the purchaser recorded, these searches should be handed to the proper official, and a continuation entered upon them showing the purchaser's deed and also showing that there are no other conveyances or incumbrances of record since the beginning of the transaction.

b. ABSTRACTING DOCUMENTS—(1) Conveyances in General.—An abstract ought to set out every part of the documents abstracted which may affect the title in any way.¹

Particulars of the Documents which the Abstract should Set Forth.—It therefore should set forth the general character and date of the instrument, the parties, the recitals, the consideration, the granting clause, the description of the property conveyed, the *habendum* and *reddendum*, with any limitations or conditions, warranties or covenants, especially those peculiar to the instrument, the acknowledgment or proof, the record or registration, with dates, and the volume and page of the record.² Each of these particulars, or any other which appears, should be scrutinized carefully with regard to its effect upon the estate conveyed under the laws in force.

Necessary Grantors and their Power to Convey.—Thus it should be noted whether all necessary grantors joined, and had power to convey.³

Execution; Acknowledgment; Extinction of Dower and Curtesy.—Also, whether the execution and acknowledgment are in conformity with law; and whether possible estates by dower and curtesy have been extinguished.⁴

Trusts and Powers.—And further, whether trusts and powers, if any, are valid; their effect, and whether they have been exercised, released, or extinguished.⁵

What Parts Quoted and what Abstracted Merely.—Judgment and experience must decide how far it is necessary to set forth the various particulars *in ipsius verbis*; but in general it may be said that the description of the property, the limitations or conditions attached to the estate, and any covenants beyond those common to all deeds should be quoted at large, while provisions merely formal should be abstracted.

(2) Wills.—The remarks as to conveyances in general apply, in a large measure, to wills. The capacity of the testator to make a will is first to be considered; and the execution, attestation, probate, and registration in conformity with the statute are of the utmost importance. Particular care should be taken to examine powers and trust estates conferred, and, as wills are construed liberally to carry out the intention of the testator as gathered from the whole instrument, it is best to set forth all important parts of the document verbatim.⁶

(3) Judicial Sales.—Judicial sales are sales made by order of a court, as distinguished from sales made by execution on a writ. The foreclosure

1. An abstract of title should set out every part of the documents abstracted which may affect the judgment of the purchaser; and the purchaser is entitled to consider that any part which is not set out in the abstract has no bearing upon the title. *Burnaby v. Equitable, etc., Soc.*, 54 L. J. Ch. 466, 52 L. T., N. S. 350. The second point here decided would certainly not be held good under the system of registered titles prevailing in the *United States*.

2. See the article **REAL PROPERTY**, for various kinds of conveyances by which title is transferred. See the articles **LEASE**; **MORT-**

GAGE, etc. For the analysis and offices of the various parts of a deed, see the article **DEEDS**; also the articles **ACKNOWLEDGMENTS**; **BOUNDARIES**; **DATE**; **REAL COVENANTS**; **RECITALS**; **RECORDING ACTS**; **SEALS**. For the effect of alterations, erasures, etc., see the article **ALTERATION OF INSTRUMENTS**; and for the effect of various defects, see the article **MISTAKE**.

3. See the article **GRANTOR AND GRANTEE**. As to misnomer, see the article **NAME**.

4. See the articles **ACKNOWLEDGMENTS**; **DOWER**; **CURTESY**.

5. See the articles **TRUSTS**; **POWERS**.

6. See generally the article **WILLS**.

of mortgages, judgments in partition, and decrees in probate proceedings are examples of judicial sales. The points to be observed particularly in abstracting in this connection are, the jurisdiction of the court in general of the subject matter and of the person (careful attention should be given to this point in probate proceedings);¹ whether all necessary parties were joined and duly served with process, or duly appeared; the bill, complaint, or petition (whether it states a cause of action which would be good on general demurrer); the judgment, order, or decree; the sale (whether all formalities were complied with); the report of the sale; confirmation of the sale; and the deed.²

(4) *Execution Sales*.—In regard to execution sales the following should be particularly observed: the judgment (attachment, if any); the execution; claims of exemption; inquisition or appraisal (if required by the act); notice of sale; sale; redemption; confirmation; the deed.³

(5) *Tax Sales*.—Tax titles are looked upon always with suspicion, and should be investigated carefully. The slightest flaw in the proceedings will invalidate them. The points to be observed chiefly are, the validity of the assessment; the levy; special assessments (sidewalks, paving, etc.); the collector's warrant; return of delinquent list; judgment and proceedings; notice of sale; the sale; the transfer or deed (as the statute may require). The records must be searched for some time after the transfer, to see if the conveyance has been impeached.⁴

(6) *Liens and Incumbrances*.—Matters of this kind are largely controlled by local laws. In general, the purchaser must guard against: liens in favor of the United States; debts due the state; official bonds; taxes; special assessments; judgments and executions; recognizances; attachments; *lis pendens*; mechanics' liens; vendors' liens; trustees' expenses; mortgages and deeds of trust; leases; dower and curtesy; easements; and the like.⁵

It is apparent that in cases of many of these liens the abstractor's work is complete when a careful search has been made, and no abstracting is necessary. The periods which such searches must cover depend upon the local statutes. When it appears that any lien or incumbrance has attached, the abstractor must follow up all the records and other available sources of information to ascertain whether it has been extinguished, or still burdens the property.

(7) *Miscellaneous*.—Matters the knowledge of which arises from investigations conducted *in pais*, should be set forth by reference to the actual evidence of the facts, and in the last resort by properly framed affidavits.⁶

VIII. ABSTRACTS AS EVIDENCE.—1. *Of Lost Deeds*.—Where deeds have been lost, abstracts made therefrom have been admitted as secondary evidence to prove their execution and contents.⁷

1. Wherever there is a sale by the court, it is a necessary part of the title to show that the court has jurisdiction to sell; and the vendor, though he may by his conditions protect himself from producing the pleadings themselves, must set forth in his abstract so much of the proceedings in the suit as is necessary to show that the court had such jurisdiction. *Waters v. Waters*, 36 L. J. Ch. 195, 15 W. R. 191, 15 L. T., N. S. 406.

2. See the article JUDICIAL SALES.

3. See the article EXECUTION.

4. See the articles TAXATION; TAX TITLES.

5. See the article INCUMBRANCES, and the various kinds of incumbrances specifically.

6 Such Affidavits are not Admissible as Evidence.—*Manny v. Stockton*, 34 Ill. 306; *Quinn v. Rawson*, 5 Ill. App. 130.

Usage.—But in default of other evidence usage sanctions their employment. When-

ever used, care should be taken that they are prepared with all due formalities. See the article AFFIDAVITS.

In a case under the Vendor and Purchaser Act, Ontario (Can.) Rev. Stat., c. 109, § 3, where the title depended upon possession evidenced by declarations, the vendor was directed to obtain affidavits from the declarants, giving the vendee an opportunity to cross-examine; and it was held that the vendee, if not satisfied with that, was entitled, though he might be thought unreasonable, to have the evidence taken *viva voce*, and to have his title sanctioned by decree, for which purpose leave was given him to institute a suit for specific performance, the costs of which were reserved. In *re Boustead*, 12 Ont. Rep. 488.

7. *Moulton v. Edmonds*, 1 De G., F. & J. 246.

2. **Miscellaneous—Tax Sales.**—Abstracts properly verified have been held admissible in *ex parte* proceedings to cancel a tax sale.¹

IX. LIABILITY OF EXAMINERS OF TITLES—1. General Rule as to Degree of Care and Skill.—Whenever a person undertakes for hire the performance of a duty demanding skill as well as care, he is understood to have engaged to use a degree of diligence and skill adequate to the due performance of his undertaking;² and one who undertakes the examination of titles is liable for want of ordinary care or skill in the performance of the task.³

2. **When Enforced.**—If the abstractor fails to make necessary searches,⁴ or searches without due care,⁵ or takes the advice of counsel on a case care-

In general, the abstract is not admissible as evidence of title, but it may be introduced to show whether the abstract as furnished did or did not come up to the requirements in the agreement relating thereto. *Kane v. Rippey*, 22 Oregon 296. See also *Reed v. Ranks*, 10 U. C. C. P. 202.

Illinois.—After the great fire of Chicago the state of Illinois found it necessary to allow proof of lost or destroyed deeds by abstracts of title made in the course of business. 2 Starr & Curt. Ann. Stat. Ill. 2002 (amended by Illinois Laws of 1887, p. 261). And see *Richley v. Farrell*, 69 Ill. 264; *Russell v. Mandell*, 73 Ill. 136; *Miller v. Shaw*, 103 Ill. 277; *Heinsen v. Lamb*, 117 Ill. 549; *Converse v. Wead*, 142 Ill. 132.

1. **New York.**—Upon an application to the comptroller of taxes to cancel a tax sale, certified searches of title, verified by affidavit, may be received and acted upon as evidence of the original ownership of land sold for taxes. *People v. Wemple*, 67 Hun (N. Y.) 495.

Texas—In Trespass to Try Title.—By statute in Texas, in an action of trespass to try title to land, either party after issue joined may demand an abstract of his title from the other. The practice is something like that relating to bills of particulars. 2 Sayles Texas Civ. Stat., § 4796 *et seq.*

When such abstract has been filed, the party who filed it cannot attack the chain of title between the common source and the sovereignty. *Evans v. Foster*, 79 Tex. 48; nor can he exclude from evidence, for want of proof of execution, a deed which his abstract, as filed, shows is a link in his own title, *Wichita Land, etc., Co. v. Ward*, 1 Tex. Civ. App. 307.

2. **Story on Bailments** (9th ed.), § 431.

This is the true meaning of the doctrine of ordinary care and skill as applied to such a case. See *Bigelow on Torts* (4th ed.) 296, 298. See also the articles ATTORNEY AND CLIENT; BAILMENTS; NEGLIGENCE.

3. **Degree of Care and Skill Required.**—*Chase v. Heaney*, 70 Ill. 268; *Dodd v. Williams*, 3 Mo. App. 278; *Rankin v. Schaeffer*, 4 Mo. App. 108; *National Sav. Bank v. Ward*, 100 U. S. 195; *Lattin v. Gillette*, 95 Cal. 317. See also *supra*, this article, *Effect of Official Search*.

Where the Employer Himself Makes Inquiries as to certain incumbrances, and leads his attorney to believe that he is satisfied as to them, it is not negligence in the attorney to

omit further inquiries on the subject. *Waine v. Kempster*, 1 F. & F. 695.

Error of Judgment.—The examiner is not liable for a mere error of judgment. *Chapman v. Chapman*, L. R. 9 Eq. 276; *Dodd v. Williams*, 3 Mo. App. 278; *Watson v. Muirhead*, 57 Pa. St. 161.

The Examiner is not an Insurer or Guarantor. *Rankin v. Schaeffer*, 4 Mo. App. 108; *Dundee, etc., Invest. Co. v. Hughes*, 20 Fed. Rep. 39.

But in *Page v. Trutch* (U. S. C. C.), 3 Cent. L. J. 559, it is held that when an attorney certifies that a security is a good one, he warrants that the title is good, and that it is free from palpable and grave doubt or serious question.

Contract, not Tort.—The liability of the examiner is for breach of contract, and not in tort. *Russell v. Polk County Abstract Co.*, 87 Iowa 233; *Lattin v. Gillette*, 95 Cal. 317.

Liability Survives.—The liability of a deceased attorney for negligence in investigating a title survives against his personal representatives. *Knights v. Quarles*, 4 Moore 532, 2 B. & B. 102; *Allen v. Clark*, 7 L. T., N. S. 781, 11 W. R. 304.

Unlawful Detention of Abstracts.—If the attorney employed to examine a title unlawfully detains his employer's abstracts of title and searches, he is liable for conversion; and the measure of damages is the cost of procuring other similar searches. *Watson v. Cowdrey*, 23 Hun (N. Y.) 169.

Trust Relation.—The relation of an abstract maker and his employer is, in its sacredness and confidential character, second only to that existing between attorney and client, and any abuse of the trust imposed will be emphatically rebuked. *Vallette v. Tedens*, 122 Ill. 607, 3 Am. St. Rep. 502. In this case it was held that where an abstract maker abuses and violates his trust and uses the information obtained in his confidential relations to acquire title in his own name, he will, in equity, be considered to hold such title in trust for his principal.

4. **Failure to Make Necessary Searches.**—*Cooper v. Stephenson*, 16 Jur. 424, 24 L. J. Q. B. 292.

5. **Want of Due Care.**—*Wakefield v. Chowen*, 26 Minn. 379; *Wacek v. Frink*, 51 Minn. 282; *Gilman v. Hovey*, 26 Mo. 282; *Clark v. Marshall*, 34 Mo. 429; *Smith v. Holmes*, 54 Mich. 104; *Chase v. Heaney*, 70 Ill. 268.

Mistake as to Quantity of Land Conveyed.—Where the abstractor states incorrectly the quantity of land previously conveyed, he

lessly and defectively stated,¹ he is liable for resulting loss.²

Duty of Employer.—But it is the duty of the employer, on discovering the defect in the abstract, to take proper measures to avert the loss; and if he fails to do so he cannot hold the examiner liable.³

Actual Damage Necessary.—It is necessary to prove actual damage,⁴ and to show that the loss resulted from the defect wherewith the examiner is charged.⁵

3. Who may Enforce.—The general doctrine is that the liability extends only to the person for whom the abstract is made;⁶ but there are well-considered cases holding that where a person makes an abstract for one party to a transaction, which he knows will be used, and which in fact is used, to influence the action of the other party thereto, he is liable to such other party.⁷

ABSURDITY.—Within the rule of construction that the legislature will not be presumed to have intended an absurdity, by an absurdity is meant not only that which is physically impossible, but also that which is morally so; and that is to be regarded as morally impossible which is contrary to reason, or, in other words, which could not be attributed to a man in his right senses.⁸

ABUSE AND MISUSE.—Abuse, in strictness, signifies to injure, diminish in value, or wear away by using improperly.

Abuse or misuse of corporate privileges is any positive act in violation of the charter and in derogation of public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corporation.⁹

will be liable to respond in damages to the employer. *Clark v. Marshall*, 34 Mo. 429.

Relying on Marginal Entries.—If the abstractor relies on the registrar's marginal entry that a mortgage has been satisfied, and does not examine the original record, he is liable in damages to his employer. *Wacek v. Frink*, 51 Minn. 282.

Relying on Extracts.—Nor can he rely on extracts made from a will, without examining the original document. *Wilson v. Tucker*, 3 Stark 154.

Agreement for Abstract to Cover Certain Period Only.—Where the abstractor engages to make an abstract from a certain date only, he is under no duty to inquire into the existence of judgments or conveyances recorded prior to that time. *Wakefield v. Chowen*, 26 Minn. 379.

1. *Ireson v. Pearman*, 3 B. & C. 799. And see generally the article *ADVICE OF COUNSEL*.

2. **Measure of Damages.**—The measure of damages is the employer's actual loss as measured by the amount which he has had to pay to get the title, *Allen v. Clark*, 7 L. T., N. S. 781; or the amount which it has cost to remove incumbrances. See *Dodd v. Williams*, 3 Mo. App. 281; *Morange v. Mix*, 44 N. Y. 315.

3. **The Employer, after Discovering an Error in the abstract,** must use ordinary diligence to avert a loss and to inform the abstractor of such error, in order that the latter may take measures to avert the consequences of the mischief; and if, through failure to use these precautions, a loss occurs, the employer cannot recover. *Roberts v. Leon Loan, etc., Co.*, 63 Iowa 76.

4. *U. S. Wind Engine, etc., Co. v. Linville*, 43 Kan. 455; *Batty v. Fout*, 54 Ind. 482.

5. *Kimball v. Connolly*, 3 Keyes (N. Y.) 57, 33 How. Pr. (N. Y.) 247.

Statute of Limitations.—The statute of limitations begins to run from the time the abstract is furnished, not from the time when

the damage occurs. *Russell v. Polk County Abstract Co.*, 87 Iowa 233; *Lattin v. Gillette*, 95 Cal. 317; *Rankin v. Schaeffer*, 4 Mo. App. 108.

6. *National Sav. Bank v. Ward*, 100 U. S. 195; *Dundee Mortgage, etc., Co. v. Hughes*, 20 Fed. Rep. 39; *Page v. Trutch* (U. S. C. C.), 3 Cent. L. J. 559; *Dickle v. Nashville Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616; *Mallory v. Ferguson*, 50 Kan. 685. And see *Donaldson v. Haldane*, 7 Cl. & F. 760. Also *supra*, this article, *Effect of Official Search*.

Abstractor Employed by One Person and Paid by Another.—If the investigator is employed by one party, it does not affect his liability that the expense of the examination is paid by another. *Page v. Trutch* (U. S. C. C.), 3 Cent. L. J. 559.

7. Where A refused to purchase a tract of land from B unless furnished with an abstract of title, and B thereupon procured an abstract from an abstract company, and the company warranted it to be a true and perfect abstract, the company is liable to A, who, relying on the abstract and guaranty, has purchased the property and sustained loss through the omission of a conveyance therein. *Dickle v. Nashville Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616. See also *Houseman v. Girard Mut. Bldg., etc., Assoc.*, 81 Pa. St. 256; *Peabody Bldg., etc., Assoc. v. Houseman*, 89 Pa. St. 261, 33 Am. Rep. 757. But compare *National Sav. Bank v. Ward*, 100 U. S. 195, where the liability in a similar case is limited strictly to the employer. (*Waite, C.J., Swayne and Bradley, JJ., dissented.*)

8. *State v. Hayes*, 81 Mo. 585. See, generally, the title *STATUTES*.

9. *Baltimore v. Pittsburgh, etc., R. Co.*, 3 Pittsbg. (Pa.) 20; *Erie, etc., R. Co. v. Casey*, 26 Pa. St. 319. See also the titles *CORPORATIONS (PRIVATE)*; *ULTRA VIRES*.

A malicious abuse of legal process is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect.¹

ABUT—ABUTTER. (See also **ADJOINING** and the title **ABUTTING OWNERS**.)—Premises abut upon a street, road, or other premises where no other street, road, or land intervenes.²

1. *Mayer v. Walter*, 64 Pa. St. 283. See also the titles **PUBLIC OFFICERS**; **SERVICE OF PROCESS**; **SHERIFF**.

Abuse of Discretion.—Upon the meaning of the term "*abuse of discretion*," as a ground for the ordering of a new trial, the court, in *Murray v. Buell*, 74 Wis. 19, says: "The term '*abuse of discretion*' exercised in any case by the trial court, as used in the decisions of courts and in the books, implying, in common parlance, a bad motive or wrong purpose, is not the most appropriate. It is really a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence."

"The discretion of the court below is a legal discretion, to be reasonably exercised. *Abuse of discretion* in making such orders does not necessarily imply a wilful abuse or intentional wrong. In a legal sense discretion is *abused* whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered." *Sharon v. Sharon*, 75 Cal. 1.

Abuse of discretion, and especially gross and palpable *abuse of discretion*, which are the terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an *abuse of discretion*. *People v. New York Cent. R. Co.*, 29 N. Y. 431.

Abuse a Woman or Child. (See the title **RAPE**.)—The word *abuse*, applied to a woman, is never used except with reference to sexual intercourse. The expression *abusing*, in an indictment, implies assaulting and something more. A rule for a habeas corpus directed to two justices before whom the prisoner had been tried for unlawfully assaulting and abusing a woman was discharged, two judges holding that the justices had jurisdiction, no charge of rape having been made, and the other two holding that, as there was evidence of rape, the word *abuse* in the information sufficiently covered the case to take it out of the jurisdiction. *In re Thompson*, 6 H. & N. 193.

The word as used in a statute punishing carnal knowledge or *abuse of children* applies only to injuries to the genital organs, and does not include ill usage. *Dawkins v. State*, 58 Ala. 376, 29 Am. Rep. 754.

Abuse, as used in the *Nebraska Criminal Code*, was held equivalent to ravish. The court said: "Webster defines the verb *abuse* thus: 'to violate; to ravish;' and the noun *abuse* the same authority defines as 'violation; rape; as abuse of a female child.'" *Palin v. State*, 38 Neb. 867.

The terms "carnally knowing" and "*abus-*

ing unlawfully" do not contemplate actual force or the absence of the will, but that, although no force be used, and the female yield her consent, yet, she being under the age of puberty, she is incapable of consenting. *Charles v. State*, 11 Ark. 407.

2. *Holt v. City Council*, 127 Mass. 408.

Declaration in trespass as to an acre of land with the *abuttals*. Verdict, Guilty as to one half. It was held that the plaintiff had not failed in his *abuttals*. *Winckworth v. Mayo*, Cro. Jac. 184.

"Doubtless it is true that the words 'bounding' and *abutting* have no such inflexible meaning as to require the lots assessed or injured to touch the improvement, though the usual meaning of the words is that the things spoken of do actually adjoin. Without entering very much into the origin of the word *abutting*, it is sufficient to say that, according to Latham, it does not imply that the things spoken of are 'necessarily in contact;' and to the same effect see Webster, Worcester, and Murray. In ascertaining the meaning of such word, of course, regard must be had to the intent of the law-maker, though it will be seen that the usual meaning conveyed is that the things spoken of touch or come together. *Holt v. Somerville*, 127 Mass. 408; *Wakefield Urban Sanitary Authority v. Mander*, 5 C. P. Div. 248." *Cohen v. Cleveland*, 43 Ohio St. 196. And in that case it was held that the plaintiff was not an *abutting* owner upon a structure forty-five feet above the street.

Front and Side of Lot.—"We know that in a narrow and restricted sense the term *abutting* is used in reference to that which touches a lot at the end and 'adjoining' to that which is on the side (1 Bouvier's Law Dict., *Abuttals*); but we do not think the term is used in this statute in such restricted sense, but rather includes everything which touches the lot, whether in front or on the sides." *Lawrence v. Killam*, 11 Kan. 511.

Rear of Lot.—Under a statute providing for assessment of owners of premises for the purpose of paving footways, etc., upon which said premises were fronting, adjoining, or *abutting*, said owners are only responsible for the footways on which their respective premises *abutted*; the north side, for instance, not being responsible for the footways on the south. *Wakefield Urban Sanitary Authority v. Mander*, 5 C. P. Div. 248. See, generally, the title **SPECIAL ASSESSMENTS**.

Adjoining Lot not Abutting on the Street.—Commissioners appointed to assess the cost of improving a street upon the lots *abutting* on the same are not authorized to extend their assessment of such a lot upon an adjoining lot of the same owner which is not bounded by the street. Such party's assess-

ABUTMENT.—The abutment, in the sense in which the term is ordinarily used, is part of the bridge.¹

ment should be confined to his lot which borders upon the street to be improved. *Springfield v. Green*, 120 Ill. 270.

Stream Intervening.—Where a small stream intervened between a lane and a lot of land, it was held by one judge that the premises adjoined but did not *abut* the lane, and by another that they were *abutting*. *Wakefield Board of Health v. Lee*, 1 Exch. Div. 336.

Railroad Intervening.—A lot cannot be said to front on a public road when a railroad, the bed of which is owned by the company, runs between the lot and the road. *Philadelphia v. Eastwick*, 35 Pa. St. 75.

County Road Intervening.—An estate opposite a park, separated from it by a county road, is not an *abutting* estate. *Holt v. Somerville*, 127 Mass. 408.

"*Abutting* lot" denotes a lot bounded on the side of a public street, in the bed or soil of which the owner of the lot has no title, estate, interest, or private rights except such as are incident to a lot so situated. *Hughes v. Metropolitan El. R. Co.*, 130 N. Y. 26; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1.

1. *Bardwell v. Jamaica*, 15 Vt. 438. In speaking of a bridge in connection with the use for which bridges are erected, we can no more exclude the *abutment* than the flooring or framework of the bridge. Where a declaration alleged an injury to have been caused by the defects in a bridge, and it was shown that the defects were in the *abutment*, there was not such a variance as to be ground for reversing the judgment.

The *abutment* is as much a part of the bridge as the pier, the arches, or the timbers. It consists of that mass of stone or solid work at the end of the bridge by which the extreme arches or timbers are sustained. But the word *abutment* is sometimes used to designate that which unites one end of a thing to another (see Webster's Dict.); and in that sense it must have been used in the state of the case, for it was admitted upon the argument that the horse fell from that part of the way which connects the *abutment* (proper) of the bridge with the land, ordinarily called the *filling up*. *Sussex County v. Strader*, 18 N. J. L. 112.

ABUTTING OWNERS.

By CHARLES SUMNER LOBINGIER, M.A., LL.M.

- I. DEFINITION, 224.
- II. SCOPE OF ARTICLE, 225.
- III. RIGHTS OF ABUTTERS, 225.
 - 1. *Use and Enjoyment of Property in Respect to the Street*, 225.
 - a. *Easement of Access*, 225.
 - (1) *In General*, 225.
 - (2) *Access Obstructed by Semi-public Improvements*, 227.
 - b. *Enjoyment of Light and Air*, 228.
 - c. *Preservation of Property*, 229.
 - (1) *In General*, 229.
 - (2) *Compensation for Indirect Impairment in Value by Public Improvements*, 231.
 - 2. *Right of Abutting Owners to Use of Streets*, 234.
 - a. *For Purposes of Deposit, etc.*, 234.
 - b. *Projections, Excavations, etc.*, 235.
 - 3. *Abutters upon Rural Roads*, 236.
 - a. *Restrictions upon Rights of Public in Rural Roads*, 236.
 - b. *Extent of Abutters' Rights in Rural Roads*, 242.
- IV. LIABILITIES OF ABUTTING OWNERS, 243.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the titles *EMINENT DOMAIN; STREETS AND HIGHWAYS*, in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *BOUNDARIES; BRIDGES; CONSTITUTIONAL LAW; DAMAGES; DRAINS AND SEWERS; ELEVATED RAILROADS; EMINENT DOMAIN; FENCES; GAS COMPANIES; HIGHWAYS; ICE AND ICE COMPANIES; LATERAL AND SUBJACENT SUPPORT; MINES AND MINING; MUNICIPAL CORPORATIONS; NAVIGABLE WATERS; NUISANCES; PARKS AND PUBLIC SQUARES; PIPE LINES; PARTY WALLS; PRIVATE WAYS; RAILROADS; STREET RAILWAYS; SPECIAL ASSESSMENTS; STREETS AND SIDEWALKS; TAXATION; TELEGRAPHS AND TELEPHONES; TREES; TURNPIKES; WATER COMPANIES; WATER WORKS (MUNICIPAL)*.

I. DEFINITION—In Broadest Sense.—The phrase “abutting owners” in its widest and largest meaning may be said to comprehend every holder in fee of real property. For, since all tracts of land “abut” upon or adjoin¹ others, every landowner becomes in this literal sense an “abutting owner.”

In Ordinary Legal Sense.—In its ordinary legal usage, however, the term has a much more limited signification. By what appears to be a growing² accepta-

1. The words “abut” and “adjoin” are used interchangeably. See *Century Dictionary*, *ad verbum*. See also *ABUT; ABUTTER*.

2. Note, for instance, the following original definition by Follett, C.J., in *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461: “The term ‘abutting owner’ will be

used in this judgment to denote a person having land bounded on the side of a public street and having no title or estate in its bed or soil, and no interests or private rights in the street except such as are incident to lots so situated.” This, it will be observed, limits the term even more narrowly than the definition adopted in the text, for a street is but one

tion, an "abutting owner" is one who owns real property bordering on a public highway; and the law of the subject is chiefly concerned with the rights and duties of such owner in connection with the highway.¹ It is with this more restricted meaning that the phrase has been adopted as the title of this treatise, and in this sense it will be used in the following pages.

II. SCOPE OF ARTICLE.—A complete and exhaustive treatise on the law of "abutting owners" would embrace a very considerable proportion of the whole body of the law.² And such a discussion of the subject would be out of place here, because, if for no other reason, each of these related subjects has a well-recognized place in legal classification by itself, where discussions of it would naturally be sought.

It is desirable, however, that there may be found in some one place a composite presentation of general principles applicable to a subject of such great importance, yet which is almost never treated as a unit, but scattered through discussions of many other subjects. Moreover, there are some phases of the law of abutting owners which, partly by reason of this very submergence in other topics, and partly because they are less familiar, and until lately have been less extensively litigated, are seldom adequately treated at all. Such, for example, is the law of abutters upon rural roads.

This article aims to meet the purposes just indicated. It will endeavor to state the general principles of the law of abutting owners and to present the details of such divisions of the subject as are less known and most commonly neglected, with cross-references to those more familiar titles where the remaining portions will be treated in detail.

III. RIGHTS OF ABUTTERS—1. **Use and Enjoyment of Property in Respect to the Street**—*a. EASEMENT OF ACCESS*—(1) *In General*.—The owner of property abutting on a public highway is entitled, as one of the primary incidents of his ownership, to the right of free ingress and egress.³ This right exists whether the abutter owns the fee to the centre of the street, leaving the public with merely an easement of passage, or whether the title to the entire highway is vested in the latter.⁴

The Right a Species of Private Property.—The right is a species of private property

species of highway, and the language just quoted would, if taken literally, exclude from the category of abutters, landowners along country roads.

1. By this is meant, of course, highways on land. For a discussion of the law of "riparian owners," or those whose property abuts on water, see the title **NAVIGABLE WATERS**.

2. See the list of cross-references at the beginning of this article.

3. **Right of Access Absolute.**—See *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41, 7 Am. & Eng. R. Cas. 593, where the court says: "It may not be very important to the general public whether they shall be able to get to the private property of an individual, but it is important to the individual whether he should be able to get to and from his residence or business, and whether the public have the means of getting there for social or business purposes. If there be an obstruction in the street in front of or near his abutting property, so as to prevent access to it, the damage which he sustains is different, not merely in degree, but in kind, from that experienced in common with other citizens; and he may maintain a private action for the special injury to him, notwithstanding there is also a remedy in behalf of the public. In

most of the cases which have arisen the obstruction in the street was immediately in front of the lot of the party complaining of it; but the reason of the rule, and therefore the rule itself, extends to the case of any obstruction which cuts off all means of public access to the plaintiff's lot. *Wilder v. De-Cou*, 26 Minn. 10; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Hawley v. Baltimore*, 33 Md. 270; *Park v. Chicago, etc., R. Co.*, 43 Iowa 636; *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61." See, to the same effect, *Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309; *Helm v. McClure* (Cal., 1895), 40 Pac. Rep. 437; *Selden v. Jacksonville*, 28 Fla. 558; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379, 40 Am. Rep. 598; *Schaidt v. Blaul*, 66 Md. 141; *Adams v. Chicago, etc., R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 11 Am. St. Rep. 679; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268; *Matter of New York El. R. Co.*, 36 Hun (N. Y.) 435; *Fanning v. Osborne*, 34 Hun (N. Y.) 121; *Pierce v. Cleland*, 133 Pa. St. 189.

4. **Question of Ownership of Fee.**—*Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41, 7 Am. & Eng. R. Cas. 593; *Lackland v. North Missouri R. Co.*, 31 Mo. 187.

of which the owner may not be deprived without due compensation,¹ and it is a right which he may have enforced by the writ of injunction.²

Interference with Right—Obstructions.—Accordingly, the owner of a hackney coach cannot acquire the right to station it in front of abutting premises in such a way as to interfere with access thereto, even though a city ordinance purport to confer such right.³ So the abutting owner may, by injunction, prevent a street-railway company from heaping up snow between its tracks and his premises, and leaving it there for a period longer than is reasonably necessary, and thus interfering with ingress and egress.⁴ An exhibition of a public show in a store window attracting and detaining a crowd of people on the opposite sidewalk, thus impeding access to a store fronting thereon, will be enjoined for similar reasons.⁵

In *New Jersey*, where the title of abutting owners extends *ad medium filum via*, the legislature has no power to appropriate the streets for use as a public market without compensation to such abutting owners.⁶

Where bridges and viaducts interfere with an abutting owner's access to his premises he may be entitled to damages, even though they were constructed under color of public authority,⁷ or by a county.⁸

But in *Florida* it is held that the construction of a viaduct by a municipal corporation conjointly with a private corporation, the result of which is not only to cut off free access, but also to abridge the enjoyment of light and air on the part of abutting owners, is not a "taking" or "appropriation" of private property within the constitutional guaranty.⁹ Abutting owners are entitled to damages for deprivation of their right of access by reason of the construction by a city of a drainage canal.¹⁰

1. **Due Compensation.**—*Theobald v. Louisville, etc., R. Co.*, 66 Miss. 279, 14 Am. St. Rep. 564; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Branahan v. Hotel Co.*, 39 Ohio St. 333, 48 Am. Rep. 457; *Maysville, etc., R. Co. v. Conner (Ky., 1895)*, 29 S. W. Rep. 344; *Dantzer v. Indianapolis Union R. Co. (Ind., 1894)*, 39 N. E. Rep. 223; *Kaje v. Chicago, etc., R. Co. (Minn., 1894)*, 59 N. W. Rep. 493; *Houston v. Kleinecke (Tex. Civ. App., 1894)*, 26 S. W. Rep. 250.

2. **Injunction to Enforce Right.**—*Schaidt v. Blaul*, 66 Md. 141; *Knapp v. St. Louis Transfer R. Co. (Mo., 1894)*, 28 S. W. Rep. 627; *Prime v. Twenty-third St. R. Co.*, 1 Abb. N. Cas. (N. Y. Super. Ct.) 63; *Jaques v. National Exhibit Co.*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 250; *Branahan v. Hotel Co.*, 39 Ohio St. 333, 48 Am. Rep. 457; *Helm v. McClure (Cal., 1895)*, 40 Pac. Rep. 437. And see cases in note 3, *supra*, and in the following notes.

3. **Ordinance Authorizing the Stationing of Coaches in Front of Abutting Premises.**—*Branahan v. Hotel Co.*, 39 Ohio St. 333, 48 Am. Rep. 457. Here the court said: "The right of access to the street for business purposes is of great value. The finding of the court is that this is destroyed. This easement appendant to the abutting property is a valuable property right of which the owner cannot be divested except when taken for public use and after due compensation. The city is clothed with power over the streets and is charged with the duty of keeping them open for public use and free from nuisance. It may enlarge these general public uses without infringing the rights of the adjacent owner; but where additional burdens are imposed, even for a

public purpose, which materially impair the incidental property right of the lot owner, equity will enjoin until compensation is made." See, to the same effect, *McCaffrey v. Smith*, 41 Hun (N. Y.) 117. And compare *Cohen v. New York*, 113 N. Y. 532; *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Lippincott v. Lasher*, 44 N. J. Eq. 120; *Rex v. Cross*, 3 Campb. 224. But see *Sikes v. Manchester*, 59 Iowa 65; *Norristown v. Moyer*, 67 Pa. St. 367.

4. **Heaping Snow in Front of Abutting Premises.**—*Prime v. Twenty-third St. R. Co.*, 1 Abb. N. Cas. (N. Y. Super. Ct.) 63.

5. *Jaques v. National Exhibit Co.*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 250.

6. **Appropriating Streets for Market Purposes.**—*State v. Laverack*, 34 N. J. L. 201.

7. **Bridges and Viaducts Constructed by Public Authority.**—*McNulta v. Ralston*, 5 Ohio Cir. Ct. Rep. 330; *Willamette Iron Works v. Oregon, etc., R. Co. (Oregon, 1894)*, 37 Pac. Rep. 1016; *Pueblo v. Strait (Colo., 1894)*, 36 Pac. Rep. 789; *Spencer v. Metropolitan St. R. Co.*, 120 Mo. 154.

8. *Frater v. Hamilton County*, 90 Tenn. 661. In this case, however, the court assumed, for want of sufficient averments to the contrary, that the bridge was built on a private street, and expressly left undecided the question as to whether the destruction of the easement of access from a public road by the erection of a bridge would be "a taking of private property."

9. *Selden v. Jacksonville*, 28 Fla. 558.

10. **Drainage Canal Constructed by City.**—*Houston v. Kleinecke (Tex. Civ. App., 1894)*, 26 S. W. Rep. 250.

(2) *Access Obstructed by Semi-public Improvements.*—Questions involving the exercise of the abutting owner's right of access from the public highway to his property have most frequently arisen where access has been obstructed or impeded by structures in the street constituting part of the plants of certain semi-public improvements, such as steam railroads, street railways, and the poles and wires of telegraph and telephone companies. It is not in accordance with the plan of this article to set forth all of these subjects in detail, but simply to state the general principles, leaving the more extended discussion to subsequent articles where they will be oftenest sought.¹

General Rule as to Compensation.—In regard to all these enterprises, while it is conceded that the proper authority may grant them the use of the streets, yet when such use effects a perversion of the street from its ordinary and proper purposes, and constitutes an infringement upon the abutting owner's right of access, he is entitled to compensation. Recognizing the usefulness and even necessity of this class of public improvements, the courts have not treated their promoters as trespassers, but the question in regard to each class of enterprises is whether or not it constitutes such a new and additional burden upon abutting owners as will entitle them to damages.

Steam Railroads.—In the case of steam railroads the prevailing rule is that their operation on a public highway in so far as they interfere with the abutting owner's right of access does constitute such a new and additional burden as will require the operators to respond in damages to the injured abutter.²

Street Railways.—Street railways, whether propelled by electrical,³ ani-

1. See the titles DAMAGES; DRAINS AND SEWERS; EMINENT DOMAIN; GAS COMPANIES; HIGHWAYS; MUNICIPAL CORPORATIONS; NUISANCES; PIPE LINES; RAILROADS; STREET RAILWAYS; STREETS AND SIDEWALKS; TELEGRAPHS AND TELEPHONES; WATER COMPANIES; WATER WORKS (MUNICIPAL).

2. **Damages Allowed for Obstruction by Steam Railroad—California.**—Southern Pac. R. Co. v. Reed, 41 Cal. 256.

Connecticut.—Imlay v. Union Branch R. Co., 26 Conn. 249, 68 Am. Dec. 392.

Illinois.—Indianapolis, etc., R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; Lake Erie, etc., R. Co. v. Scott, 132 Ill. 438.

Indiana.—Pennsylvania R. Co. v. Stanley, 10 Ind. App. 421.

Iowa.—Hitchcock v. Chicago, etc., R. Co., 88 Iowa 242; Enos v. Chicago, etc., R. Co., 78 Iowa 28.

Kansas.—Leavenworth, etc., R. Co. v. Curtan, 51 Kan. 432; Atchison, etc., R. Co. v. Davidson, 52 Kan. 739; Atchison, etc., R. Co. v. Leuning, 52 Kan. 732.

Kentucky.—Maysville, etc., R. Co. v. Conner (Ky., 1895), 29 S. W. Rep. 344; Henderson Belt R. Co. v. Dechamp, 95 Ky. 219.

Michigan.—Grand Rapids, etc., R. Co. v. Heisel, 47 Mich. 393. Compare 38 Mich. 62, 31 Am. Rep. 306.

Minnesota.—Gray v. First Div. St. Paul, etc., R. Co., 13 Minn. 315; Brakken v. Minneapolis, etc., R. Co., 29 Minn. 41, 7 Am. & Eng. R. Cas. 593; Kaje v. Chicago, etc., R. Co. (Minn., 1894), 59 N. W. Rep. 493; Adams v. Chicago, etc., R. Co., 39 Minn. 286, 12 Am. St. Rep. 644; Lamm v. Chicago, etc., R. Co., 45 Minn. 71; Hayes v. Chicago, etc., R. Co., 46 Minn. 349.

Mississippi.—Theobald v. Louisville, etc., R. Co., 66 Miss. 279, 14 Am. St. Rep. 564.

Missouri.—Wallace v. Kansas City, etc., R. Co., 47 Mo. App. 491; Martin v. Chicago, etc., R. Co., 47 Mo. App. 452.

New Jersey.—Starr v. Camden, etc., R. Co., 24 N. J. L. 592.

New York.—Henderson v. New York Cent., etc., R. Co., 78 N. Y. 423; Reining v. New York, etc., R. Co., 128 N. Y. 157; Egerer v. New York Cent., etc., R. Co., 130 N. Y. 108.

Tennessee.—East End St. R. Co. v. Doyle, 88 Tenn. 747.

Vermont.—Wead v. St. Johnsbury, etc., R. Co., 64 Vt. 52.

Washington.—Hatch v. Tacoma, etc., R. Co., 6 Wash. 1.

Wisconsin.—Evans v. Chicago, etc., R. Co., 86 Wis. 597.

Compare with the foregoing the following cases: Chicago, etc., R. Co. v. Union Invest. Co., 51 Kan. 600; Ottawa, etc., R. Co. v. Peterson, 51 Kan. 604; Kansas, etc., R. Co. v. Mahler, 45 Kan. 565; Herndon v. Kansas, etc., R. Co., 46 Kan. 560; Wichita, etc., R. Co. v. Smith, 45 Kan. 264; Louisville, etc., R. Co. v. Orr, 91 Ky. 109; Harrison v. New Orleans, etc., R. Co., 34 La. Ann. 462, 44 Am. Rep. 438; Jones v. Erie, etc., R. Co., 151 Pa. St. 30.

3. **Electrical Railways—California.**—Finch v. Riverside, etc., R. Co., 87 Cal. 597.

Maryland.—Green v. City, etc., R. Co., 78 Md. 294.

Michigan.—Detroit City R. Co. v. Mills, 85 Mich. 634; People v. Fort Wayne, etc., R. Co., 92 Mich. 522; Dean v. Ann Arbor St. R. Co., 93 Mich. 330.

Missouri.—Ransom v. Citizens' R. Co., 104 Mo. 375.

New Jersey.—Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380.

Pennsylvania.—Lockhart v. Craig St. R.

mal,¹ or (probably) steam² power, have not been generally treated by the courts as constituting additional burdens upon the highway so as to entitle the abutting owner to damages.³

Telegraph and Telephone Poles and Wires.—Poles and wires of telegraph and telephone companies have also been held by some of the courts to constitute a new and additional burden, and to so infringe upon the rights of abutting owners as to require compensation,⁴ but the contrary rule prevails in some jurisdictions.⁵

Pipe Lines.—In reference to the laying of pipes along urban streets, the rule seems to prevail that abutting owners are not entitled to damages, and that such a use of the highway is not an additional burden;⁶ but the contrary doctrine obtains where a rural road is sought to be used for such a purpose.⁷

b. ENJOYMENT OF LIGHT AND AIR.—Another of the primary rights of abutting owners in respect of the public highways is that of enjoying the free influx of light and air.⁸

Co., 8 Pa. Co. Ct. Rep. 470; *Com. v. West Chester*, 9 Pa. Co. Ct. Rep. 542.

But see *Nichols v. Ann Arbor, etc.*, R. Co., 87 Mich. 361; *East End St. R. Co. v. Doyle*, 88 Tenn. 747.

1. **Horse Railways.**—*Connecticut.*—*Elliot v. Fair Haven, etc.*, R. Co., 32 Conn. 579.

Florida.—*State v. Jacksonville St. R. Co.*, 29 Fla. 590; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409, 17 Am. & Eng. R. Cas. 184.

Georgia.—*South Carolina R. Co. v. Steiner*, 44 Ga. 558 (*dictum*).

Indiana.—*Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

Louisiana.—*Brown v. Duplessis*, 14 La. Ann. 854.

Maryland.—*Hiss v. Baltimore, etc.*, R. Co., 52 Md. 242, 36 Am. Rep. 371.

New Jersey.—*Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252.

Texas.—*Texas, etc.*, R. Co. *v. Rosedale St. R. Co.*, 64 Tex. 80, 53 Am. Rep. 739.

Wisconsin.—*Hobart v. Milwaukee City R. Co.*, 27 Wis. 194, 9 Am. Rep. 461.

But see *Carli v. Stillwater St. R., etc.*, Co., 28 Minn. 373, 41 Am. Rep. 290, where a different rule was applied in the case of the owner of land abutting on a navigable river.

And compare also, as announcing a different doctrine from the cases first above cited, *Craig v. Rochester, etc.*, R. Co., 39 N. Y. 404; *Cincinnati, etc.*, St. R. Co. *v. Cummins*, 14 Ohio St. 523.

But where a horse-railway company uses the street for storing and switching its cars to an unreasonable extent, and to the injury of the abutting owner, he has a right of action against the company, even though the city is the owner in fee of the street. *Mahady v. Bushwick R. Co.*, 91 N. Y. 48, 14 Am. & Eng. R. Cas. 142, 43 Am. Rep. 661.

2. *Newell v. Minneapolis, etc.*, R. Co., 35 Minn. 112, 59 Am. Rep. 303. But see *contra*, *White v. Northwestern, etc.*, R. Co., 113 N. Car. 610.

3. For a detailed treatment of the law applicable to these various enterprises, see the titles EMINENT DOMAIN; MUNICIPAL CORPORATIONS; STREET RAILWAYS.

4. **Telegraph and Telephone Companies.**—*Board of Trade Tel. Co. v. Barnett*, 107

Ill. 507, 47 Am. Rep. 453; *American Telephone, etc.*, Co. *v. Smith*, 71 Md. 535; *Chesapeake, etc.*, Telephone Co. *v. Mackenzie*, 74 Md. 36; *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559, 24 Am. St. Rep. 290; *Broome v. New York, etc.*, Telephone Co., 42 N. J. Eq. 141; *Eels v. American Telephone, etc.*, Co., 65 Hun (N. Y.) 516, *affirmed* in 143 N. Y. 133; *Blashfield v. Empire State Telephone, etc.*, Co., 71 Hun (N. Y.) 532; *Dusenbury v. Mutual Tel. Co.*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 440; *Metropolitan Telephone, etc.*, Co. *v. Colwell Lead Co.*, 67 How. Pr. (N. Y. Super. Ct.) 365. See also *infra*, this title, *Abutters on Rural Roads*.

5. *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Julia Bldg. Assoc. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398.

In *Willis v. Erie Tel., etc.*, Co., 37 Minn. 347, the court was equally divided on the question. See also *infra*, this title, *Abutters on Rural Roads*.

6. **Pipe Lines in Urban Streets.**—*Crooke v. Flatbush Water Works Co.*, 29 Hun (N. Y.) 245, 27 Hun (N. Y.) 72; *Tompkins v. Hodgson*, 2 Hun (N. Y.) 146; *Story v. New York El. R. Co.*, 90 N. Y. 161, 43 Am. Rep. 146 (*dictum*); *West v. Bancroft*, 32 Vt. 371.

7. **Pipe Lines in Rural Roads.**—See *infra*, this title, *Abutters on Rural Roads*.

8. **Light and Air.**—In *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 291, *Ruger, C.J.*, said: "An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legal-

In New York.—This right has most often in recent years become the subject of litigation as a result of the construction of elevated railroads, and in the state of *New York*, where such enterprises are most common, the doctrine obtains that in so far as these structures impede the free passage of light and air between the street and abutting premises, they are encroachments upon this right of the abutter for which he must be compensated.¹

In Minnesota.—In *Minnesota* the same doctrine has been extended to ordinary steam railroads where they infringe upon the abutter's easement of light and air.²

c. PRESERVATION OF PROPERTY—(1) In General—Theory of Exercise of Right of Eminent Domain.—One of the fundamental incidents of ownership is, of course, the right of preserving property intact. The owner is entitled to protect his land and buildings against all others, not excepting the government itself; for the taking or damaging of private property in the exercise of the original or delegated right of eminent domain is permitted only upon the theory that the property is restored in another form and the owner thus made whole.³

Lateral and Subjacent Support.—A part of this larger incident of ownership is the right to the support of the adjoining land and of the soil beneath, or, as it is commonly termed, the right of lateral and subjacent support. Every owner of real estate is entitled to have the soil preserved and supported in its natural condition, and the privileges of adjoining owners are so far limited that they may not so excavate or otherwise change the position of their land as to leave that of their neighbor less firmly supported,⁴ and public authorities in opening,

ized robbery than any other form of acquiring property." See also *Barnett v. Johnson*, 15 N. J. Eq. 481; *Codman v. Evans*, 5 Allen (Mass.) 311, 81 Am. Dec. 748; *Adams v. Chicago, etc., R. Co.*, 39 Minn. 286, 36 Am. & Eng. R. Cas. 7, 12 Am. St. Rep. 644.

See also the titles ANCIENT LIGHTS; ELEVATED RAILROADS; MUNICIPAL CORPORATIONS; NUISANCES; RAILROADS; STREETS AND SIDEWALKS.

1. Elevated Railroad Cases.—*Story v. New York El. R. Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 506, 43 Am. Rep. 146; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 288; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157, 30 Am. & Eng. R. Cas. 418, 60 Am. Rep. 437; *Pond v. Metropolitan El. R. Co.*, 112 N. Y. 188, 8 Am. St. Rep. 734; *Powers v. Manhattan R. Co.*, 120 N. Y. 178; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 11 Am. St. Rep. 461; *Kane v. New York El. R. Co.*, 125 N. Y. 164; *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252; *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432. Compare *Holloway v. Southmayd*, 139 N. Y. 390; *Dill v. Board of Education*, 47 N. J. Eq. 421. See also the following decisions from inferior courts: *Woolsey v. New York El. R. Co.* (Supreme Ct.), 9 N. Y. Supp. 133; *Glover v. Manhattan R. Co.*, 51 N. Y. Super. Ct. Rep. 1; *Ireland v. Metropolitan El. R. Co.*, 52 N. Y. Super. Ct. 450; *Peyser v. Metropolitan El. R. Co.*, 12 Daly (N. Y.) 70, 13 Daly (N. Y.) 122; *Third Ave. R. Co. v. New York El. R. Co.*, 19 Abb. N. Cas. (N. Y. Super. Ct.) 261; *Mattlage v. New York El. R. Co.*, 67 How. Pr. (N. Y. C. Pl.) 232; *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. 138; *Taylor v. Metropolitan El. R. Co.*, 50 N. Y. Super. Ct. 311; *Greene v. New York Cent., etc., R. Co.*, 65 How. Pr. (N. Y. Super. Ct.)

154; *Pond v. Metropolitan El. R. Co.*, 42 Hun (N. Y.) 567; *Hine v. New York El. R. Co.*, 54 Hun (N. Y.) 425; *Foot v. Manhattan R. Co.*, 58 Hun (N. Y.) 478.

2. Minnesota—Extension of Doctrine to Ordinary Steam Railroads in Certain Cases.—*Adams v. Chicago, etc., R. Co.*, 39 Minn. 286, 36 Am. & Eng. R. Cas. 747, 12 Am. St. Rep. 644; *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71.

3. See the titles CONSTITUTIONAL LAW; EMINENT DOMAIN.

4. Lateral Support of Land.—The rule is briefly stated by Mitchell, J., in the recent case of *Schultz v. Bower* (Minn., 1894), 59 N. W. Rep. 631, as follows: "The right of lateral support from the adjacent soil is an absolute right of property; and, as a consequence of this principle, it follows that for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy against the party by whom the mischief has been done. This does not depend upon negligence, but upon the violation of the right of property."

The doctrine is set forth by numerous authorities:

England.—*Dalton v. Angus*, L. R. 6 App. Cas. 740; *Partridge v. Scott*, 3 M. & W. 220; *Wyatt v. Harrison*, 3 B. & Ald. 871, 23 E. C. L. 205; *Harris v. Ryding*, 5 M. & W. 60; *Smart v. Morton*, 5 El. & Bl. 30, 85 E. C. L. 30, 30 Eng. L. & Eq. 385.

United States.—*Northern Transp. Co. v. Chicago*, 99 U. S. 635. Compare *U. S. v. Peachy*, 36 Fed. Rep. 160.

Alabama.—*Myer v. Hobbs*, 57 Ala. 175, 20 Am. Rep. 719.

California.—*Green v. Berge* (Cal., 1894), 38 Pac. Rep. 539.

widening, or grading streets must compensate the abutting owner for any interference with this easement of support.¹

Rule as to Acquired Easement of Support.—The rule is less strict in reference to structures and extra burdens upon lands, because there the easement of support is an acquired and not a natural one, and the adjoining owner is usually liable for endangering their support when he fails to give notice of the proposed excavation, or carries it on in a negligent and unskilful manner.²

Connecticut.—Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352.

Delaware.—Stimmel v. Brown, 7 Houst. (Del.) 219.

Illinois.—Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Mamer v. Lussem, 65 Ill. 484; Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242.

Indiana.—Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109.

Kansas.—Byers v. Leavenworth Lodge, 54 Kan. 321.

Kentucky.—Watson Lodge v. Drake (Ky. 1895), 29 S. W. Rep. 632; Oneil v. Harkins, 8 Bush (Ky.) 650.

Louisiana.—Bonquois v. Monteleone (La., 1895), 17 So. Rep. 305.

Maryland.—Baltimore, etc., R. Co. v. Reaney, 42 Md. 117; Shafer v. Wilson, 44 Md. 268.

Massachusetts.—Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; White v. Dresser, 135 Mass. 150, 46 Am. Rep. 454; Callender v. Marsh, 1 Pick. (Mass.) 418; Foley v. Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771.

Minnesota.—McCullough v. St. Paul, etc., R. Co., 52 Minn. 12; Nichols v. Duluth, 40 Minn. 389, 12 Am. St. Rep. 743; Dyer v. St. Paul, 27 Minn. 457.

Michigan.—Buskirk v. Strickland, 47 Mich. 389.

Missouri.—Busby v. Holthaus, 46 Mo. 161; Charles v. Rankin, 22 Mo. 566.

New Jersey.—McGuire v. Grant, 25 N. J. L. 362, 47 Am. Dec. 49; Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. 452.

New York.—Lasala v. Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Bellows v. Sackett, 15 Barb. (N. Y.) 96; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279.

Pennsylvania.—Scranton v. Phillips, 94 Pa. St. 15; Carlin v. Chappel, 101 Pa. St. 348, 47 Am. Rep. 722; Jones v. Wagner, 66 Pa. St. 429, 5 Am. Rep. 385; Hoy v. Sterrett, 2 Watts. (Pa.) 327, 27 Am. Dec. 313; Wheatley v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721; Haverstick v. Sipe, 33 Pa. St. 368; Wier's Appeal, 74 Pa. St. 230; Horner v. Watson, 79 Pa. St. 242, 21 Am. Rep. 55; McGettigan v. Potts, 149 Pa. St. 155.

South Dakota.—Ulrick v. Dakota L. & T. Co., 2 S. Dak. 285.

Vermont.—Richardson v. Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 693.

Virginia.—Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581.

See also the titles EASEMENTS; EMINENT DOMAIN; LATERAL AND SUBJACENT SUPPORT;

MINES AND MINING; MUNICIPAL CORPORATIONS; PARTY WALLS; STREETS AND SIDEWALKS; RAILROADS; SURFACE WATERS.

1. *England.*—Backhouse v. Bonomi, 9 H. L. Cas. 503; Hunt v. Peake, 1 Johns. 705, 29 L. J. Ch. 785; Humphries v. Brogden, 12 Q. B. 739; Wyatt v. Harrison, 3 B. & Ad. 871, 23 E. C. L. 205.

California.—Hendricks v. Spring Valley Min., etc., Co., 58 Cal. 190, 41 Am. Rep. 257.

Connecticut.—Fellowes v. New Haven, 44 Conn. 240, 26 Am. Rep. 47.

Georgia.—Mitchell v. Rome, 49 Ga. 19; Rome v. Omberg, 28 Ga. 46, 73 Am. Dec. 748.

Illinois.—Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243.

Indiana.—Aurora v. Fox, 78 Ind. 1; Delphi v. Evans, 36 Ind. 90, 10 Am. Rep. 12.

Massachusetts.—Callender v. Marsh, 1 Pick. (Mass.) 418; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Gilmore v. Driscoll, 122 Mass. 201, 23 Am. Rep. 312.

Minnesota.—Armstrong v. St. Paul, 30 Minn. 299; Dyer v. St. Paul, 27 Minn. 457.

New York.—Moore v. Albany, 98 N. Y. 396; Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Farrand v. Marshall, 19 Barb. (N. Y.) 380.

North Carolina.—Meares v. Wilmington, 9 Ired. (N. Car.) 73.

Ohio.—Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421.

2. **Buildings and Additional Burdens.**—*England.*

—Bibby v. Carter, 4 H. & N. 153, 28 L. J. Ex. 182; Peyton v. London, 9 B. & C. 725, 17 E. C. L. 483, 4 M. & R. 625; Walters v. Pfeil, M. & M. 362; Massey v. Goyner, 4 C. & P. 161, 19 E. C. L. 321; Partridge v. Scott, 3 M. & W. 220; Brown v. Windsor, 1 C. & J. 20; Hyde v. Thornborough, 2 C. & K. 250, 61 E. C. L. 250; Trower v. Chadwick, 3 Bing. N. Cas. 334, 32 E. C. L. 142, 4 Bing. 1.

California.—Sullivan v. Zeiner, 98 Cal. 346; Conboy v. Dickinson, 92 Cal. 602; Aston v. Nolan, 63 Cal. 269.

Illinois.—Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243.

Kentucky.—Oneil v. Harkins, 8 Bush (Ky.) 650; Shrieve v. Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401; Louisville, etc., R. Co. v. Bonhays, 94 Ky. 67.

Indiana.—Moellering v. Evans, 121 Ind. 195; Block v. Haseltine, 3 Ind. App. 491; Briggs v. Klosse, 5 Ind. App. 129.

Maryland.—Shafer v. Wilson, 44 Md. 268.

Massachusetts.—Foley v. Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312.

Missouri.—Smith v. Hardesty, 31 Mo. 411; Busby v. Holthaus, 46 Mo. 161.

New Jersey.—Schultz v. Byers, 53 N. J. L. 442.

(2) *Compensation for Indirect Impairment in Value by Public Improvements.*

—For the actual appropriation of private property for public use, there is a legal guaranty of compensation to the owner, as old as Magna Charta.¹

Deprivation of Possession.—Hence, wherever the extension of public improvements deprives the abutting owner of the *possession* of his property, there is no question of his right to be compensated.²

Impairment of Usefulness and Value.—But where, as has often been the case in recent years, public improvements in the street do not require the abutter's property to be literally taken, but do result in impairing its usefulness to him and depreciating its market value, a different question is presented, and the landowner's interests are less fully protected.

Common-law Rule.—At common law the owners of property abutting upon city streets were not generally entitled to damages for consequential injuries by reason of public improvements like grading, or changing the grade of streets, or constructing drains and sewers and water mains.³ If, however, the

New York.—*Panton v. Holland*, 17 Johns. (N. Y.) 92; *Eno v. Del Vecchio*, 4 Duer (N. Y.) 66, 6 Duer (N. Y.) 17; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Austin v. Hudson River R. Co.*, 25 N. Y. 334; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; *Dorrity v. Rapp*, 72 N. Y. 307; *Bernheimer v. Kilpatrick* (Supreme Ct.), 6 N. Y. Supp. 858.

Ohio.—*McMillen v. Watt*, 27 Ohio St. 306. *Pennsylvania.*—*Richart v. Scott*, 7 Watts (Pa.) 460, 32 Am. Dec. 779.

1. See the title CONSTITUTIONAL LAW.

2. See the title EMINENT DOMAIN.

3. **No Common-law Right to Compensation.**—One of the early and leading cases is *Callender v. Marsh*, 1 Pick. (Mass.) 417, where Parker, C.J., discussing the right of the public authorities to alter the grades of a street without compensation to the abutter, says: "The streets on which plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient; and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. The standing laws of the land giving to surveyors the power to make these improvements, every one who purchases a lot upon the summit or on the decline of a hill is presumed to foresee the

changes which public necessity or convenience may require, and may avoid or provide against a loss. * * * That it might be proper for the legislature, by some general act, to provide that losses of the kind complained of in this suit should be compensated by the town or city within which improvements may be made for the public good, or by the owners of land which may be particularly benefited, is not for us to deny; but without such legislative provision we have no authority upon the subject, it being clear that by the common law as well as by our statutes the defendant in this action is not liable to damages."

And Chief Justice Bronson, in *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357, observes: "The opening of a new thoroughfare may often result in advancing the interest of one man or a class of men, and even one town, at the expense of another. The construction of the Erie canal destroyed the business of hundreds of tavern-keepers and common carriers between Albany and Buffalo, and greatly depreciated the value of their property, and yet they got no compensation. And new villages sprang up on the line of the canal, at the expense of old ones on the former line of travel and transportation. Railroads destroy the business of stage proprietors, and yet no one has ever thought a railroad charter unconstitutional because it gave no damages to stage owners. The Hudson River railroad will soon drive many fine steamboats from the river; but no one will think the charter void because it does not provide for the payment of damages to the boat owners. A fort, jail, workshop, fever hospital, or lunatic asylum erected by the government may have the effect of reducing the value of a dwelling-house in the immediate neighborhood; and yet no provision for compensating the owner of the house has ever been made in such a case. Many other illustrations might be mentioned, but it cannot be necessary to enlarge. The opening of a street in a city is not necessarily an injury to the adjoining landowners. On the contrary, it is in almost every instance a benefit to them. The damage which they sometimes sustain be-

depreciation resulted from prosecuting the work in a negligent and unskilful

cause the level of the street does not correspond with the level of their land is usually more than compensated by the increased value which the property acquires from having a new front on a street. In some instances the landowner will suffer a heavy loss; and this case may, perhaps, be one of the number; but it is *damnum absque injuria*, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work." The doctrine is confirmed by the following array of authorities:

England.—*Whitehouse v. Fellowes*, 10 C. B., N. S. 779, 100 E. C. L. 765; *Mersey Dock v. Gibbs*, 11 H. L. Cas. 713; *British Cast Plate Manufacturers v. Meredith*, 4 T. R. 796; *Sutton v. Clarke*, 6 Taunt. 29; *Hall v. Smith*, 2 Bing. 156, 9 E. C. L. 357.

United States.—*Smith v. Washington*, 20 How. (U. S.) 135; *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593; *Cheever v. Shedd*, 13 Blatchf. (U. S.) 258.

Arkansas.—*Simmons v. Camden*, 26 Ark. 276, 7 Am. Rep. 620.

Colorado.—*Denver v. Vernia*, 8 Colo. 399.

Connecticut.—*Fellowes v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447; *Hollister v. Union Co.*, 9 Conn. 436, 25 Am. Dec. 36; *Hooker v. New Haven, etc., Co.*, 14 Conn. 146, 36 Am. Dec. 477; *Bradley v. New York, etc., R. Co.*, 21 Conn. 294; *Clark v. Saybrook*, 21 Conn. 313; *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Burritt v. New Haven*, 42 Conn. 174.

Florida.—*Dorman v. Jacksonville*, 13 Fla. 538, 7 Am. Rep. 253.

Georgia.—*Roll v. Augusta*, 34 Ga. 326; *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89; *Markham v. Atlanta*, 23 Ga. 402; *Rome v. Omberg*, 28 Ga. 46, 73 Am. Dec. 748.

Illinois.—*Chicago v. Rumsey*, 87 Ill. 348; *East St. Louis v. Wiggins Ferry Co.*, 11 Ill. App. 254; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Roberts v. Chicago*, 26 Ill. 249; *Murphy v. Chicago*, 29 Ill. 287, 81 Am. Dec. 307.

Indiana.—*Mattingly v. Plymouth*, 100 Ind. 545; *Baker v. Shoals*, 6 Ind. App. 319; *Snyder v. Rockport*, 6 Ind. 237; *Lafayette v. Spencer*, 14 Ind. 399; *Macy v. Indianapolis*, 17 Ind. 267; *Lafayette v. Bush*, 19 Ind. 326; *Lafayette v. Fowler*, 34 Ind. 140; *Terre Haute v. Turner*, 36 Ind. 522.

Iowa.—*Meyer v. Burlington*, 52 Iowa 560; *Creal v. Keokuk*, 4 Greene (Iowa) 47; *Russell v. Burlington*, 30 Iowa 262; *Burlington v. Gilbert*, 31 Iowa 356, 7 Am. Rep. 143.

Kansas.—*M. E. Church v. Wyandotte*, 31 Kan. 721.

Kentucky.—*Keasy v. Louisville*, 4 Dana (Ky.) 154, 29 Am. Dec. 395. But see *contra*, *Louisville v. Louisville Rolling Mill Co.*, 3 Bush (Ky.) 416, 96 Am. Dec. 243.

Louisiana.—*Bennett v. New Orleans*, 14

La. Ann. 120; *Reynolds v. Shreveport*, 13 La. Ann. 426.

Massachusetts.—*Callender v. Marsh*, 1 Pick. (Mass.) 418; *Brown v. Lowell*, 8 Met. (Mass.) 172.

Maine.—*Mason v. Kennebec, etc., R. Co.*, 31 Me. 215; *Hovey v. Mayo*, 43 Me. 322.

Michigan.—*Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Pontiac v. Carter*, 32 Mich. 164 (Cooley, J., reviewing the cases).

Minnesota.—*Lee v. Minneapolis*, 22 Minn. 13; *Henderson v. Minneapolis*, 32 Minn. 319, 6 Am. & Eng. Corp. Cas. 4 (holding also that no change in the rule was effected by the city charter); *Keil v. St. Paul*, 47 Minn. 288.

Missouri.—*Tate v. Missouri, etc., R. Co.*, 64 Mo. 149; *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406; *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89; *Hoffman v. St. Louis*, 15 Mo. 651.

Nebraska.—*Nebraska City v. Lampkin*, 6 Neb. 27.

New York.—*Smith v. White Plains*, 67 Hun (N. Y.) 81; *In re Furman St.*, 17 Wend. (N. Y.) 649; *Graves v. Otis*, 2 Hill (N. Y.) 466; *Wilson v. New York*, 1 Den. (N. Y.) 595; *Benedict v. Goit*, 3 Barb. (N. Y.) 459; *Waddell v. New York*, 8 Barb. (N. Y.) 95; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Mills v. Brooklyn*, 32 N. Y. 489.

Pennsylvania.—*Green v. Reading*, 9 Watts (Pa.) 382; *Henry v. Pittsburg, etc., Bridge Co.*, 8 W. & S. (Pa.) 85; *Charlton v. Allegheny City*, 1 Grant Cas. (Pa.) 208; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Reading v. Keppelman*, 61 Pa. St. 233.

Rhode Island.—*Rounds v. Mumford*, 2 R. I. 154.

Tennessee.—*Humes v. Knoxville*, 1 Humph. (Tenn.) 403, 34 Am. Dec. 657.

Virginia.—*Smith v. Alexandria*, 33 Gratt. (Va.) 208, 36 Am. Rep. 788; *Kehrer v. Richmond*, 81 Va. 745.

Washington.—*Parke v. Seattle*, 5 Wash. 1.

Wisconsin.—*Dore v. Milwaukee*, 42 Wis. 108; *Wallich v. Manitowoc*, 57 Wis. 9; *Smith v. Eau Claire*, 78 Wis. 457; *Alexander v. Milwaukee*, 16 Wis. 256.

A Different Doctrine has been announced in *Ohio*. In *Cohen v. Cleveland*, 43 Ohio St. 192, the court says: "Injuries resulting from the change of established grades in streets, though made in accordance with the statute, and without negligence or malice, and other injuries of a kindred character, have been held to afford ground for the recovery of damages against municipal corporations. *Rhodes v. Cleveland*, 10 Ohio 159, 36 Am. Dec. 82; *McCombs v. Akron*, 15 Ohio 479; *sub nom. Akron v. McComb*, 18 Ohio 229, 51 Am. Dec. 453; *Crawford v. Delaware*, 7 Ohio St. 459; *Youngstown v. Moore*, 30 Ohio St. 133; *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421. And see *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; *Cincinnati, etc., St. R. Co. v. Cummins*, 14 Ohio St. 523; *Richards v. Cincinnati*, 31 Ohio St. 506; *Story v. New York El. R. Co.*, 90 N. Y. 122,

manner, the abutting owner could demand compensation, even at common law.¹

Under Constitutions and Statutes.—And now by constitutions and statutes in most of the states, a remedy in the form of damages is provided for consequential injuries to abutting property from public improvements. The addition to the usual constitutional clause forbidding private property to be taken, of the words, "or damaged," is generally held sufficient to confer this remedy.²

43 Am. Rep. 146. This court has, however, constantly acknowledged that *McCombs v. Akron*, 15 Ohio 479, and cases following it, is a departure from the current of authority elsewhere; and, although these cases have not found favor with the judges delivering the opinions in *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Hill v. Boston*, 122 Mass. 378, 23 Am. Rep. 332; *Alexander v. Milwaukee*, 16 Wis. 256; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, we are entirely content with the doctrine, and would not change it if we could. But the justice of the Ohio rule, the firmness with which it has been adhered to for nearly half a century, and the manner in which it is recognized and enforced in our statutes, have established the doctrine as a rule of property, and it is now too late to inquire whether *McCombs v. Akron*, 15 Ohio 479, was properly decided." See also the recent case of *Smith v. Wayne County*, 50 Ohio St. 628.

1. **Injuries from Work Negligently Done.**—See, for a recent case illustrating this rule, *West Covington v. Schultz* (Ky., 1895), 30 S. W. Rep. 410. There appears to be no statutory provision in *Kentucky* allowing damages for mere consequential injuries. The court, at any rate, places its decision upon common-law grounds. The facts and the rule of law applicable thereto are stated as follows: "In the construction of this street the contractor placed dirt upon the premises of the plaintiff to the depth of five or six feet, against her door and windows, preventing ingress and egress by the front door or the window, and entirely covering her shrubbery on her lot back of her house. The work was also so carelessly done as to cause water after rains to flow in large volumes through her dwelling, and to such an extent as compelled her to abandon it. While the town denies the injury, the proof is conclusive on that subject; and the defense is that the town had the right to grade this street in accordance with the ordinance, although it might injure appellee's premises. This is a mistaken view of the law; for where there is a trespass or an entry upon the premises of the owner, and injury results, an action can be sustained for the wrong. The facts in this case show not only an inconvenience to the property owner by the making of a low or high grade in front of appellee's property that might lessen its value, and to which the property owner must submit unless it should interfere with the right of ingress or egress, and not then if the town supplies the right of way, but it is an invasion of private right, terminating in the destruction of the property. It was the duty of the city to have erected a barrier to this dirt, so as to pre-

vent the injury to the dwelling, or required the appellee to do so; but to destroy her property because the street had to be graded to comply with the ordinance, is no defense whatever, and doing so knowingly is an aggravation of the wrong. The cases of *Kemper v. Louisville*, 14 Bush (Ky.) 87, and *Pearson v. Zable*, 78 Ky. 170, sustain this view of the question. The owners of lots hold them subject to the right of the city to improve them in a proper and reasonable manner, and there is no remedy, although there may be a diminution of value to the lots by reason of the improvement; but when the improvement results in a direct injury to the lots, as causing water to flow upon them in such a manner as to injure the value, or to throw dirt upon the premises against the consent of the owner, in all such cases an action will be allowed for the injury, if the city authorities direct the execution of the work in the manner causing the injury." See, to the same effect, *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406; *Krug v. St. Mary's*, 152 Pa. St. 37.

In *Hendershott v. Ottumwa*, 46 Iowa 658, 26 Am. Rep. 182, in raising the grade a mass of earth was rolled in front of plaintiff's lots, destroying part of his hedge. The court held that he was entitled to recover, saying: "If, in making changes in the natural surface of streets, the city is negligent in construction, so that the adjacent lots are injured by reason of such negligence, the city is liable for such injury. *Cotes v. Davenport*, 9 Iowa 227; *Ellis v. Iowa City*, 29 Iowa 229; *Wallace v. Muscatine*, 4 Greene (Iowa) 373, 61 Am. Dec. 131; *Aurora v. Reed*, 57 Ill. 30, 11 Am. Rep. 1. Other authorities might be cited in support of the foregoing propositions were it necessary."

2. **Damages Allowed by Constitution or Statute.**—*Reardon v. San Francisco*, 66 Cal. 492, 7 Am. & Eng. Corp. Cas. 454, 56 Am. Rep. 109, is one of the leading cases on this point. The court reviews most of the authorities up to that time (1885), and then says: "We cannot think that the convention, in inserting in the constitution of this state the word 'damaged,' in the connection in which it is found, and the people, in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy as well where one existed before as where it did not; to superadd to the guaranty found in the former constitution of this state, and in nearly all of the other states, a guaranty against damage where none previously existed. The provision includes damage to

2. Right of Abutting Owners to Use of Streets—*a*. FOR PURPOSES OF DEPOSIT, ETC.—Aside from the general right of abutting owners to have the highway so managed and preserved that the free use and enjoyment of their property will not be impaired from that quarter, such owners have also certain peculiar rights in the use of the street distinct from those of the public, and sometimes even curtailing the latter.¹

Building Materials.—Among these is the right of the abutter to use the street front along his premises for the purpose of temporarily depositing building material.²

private property, including land, and whatever is attached to it. If lands and buildings on it, or either, are damaged, this provision requires it to be compensated." See also the following cases:

United States.—*Chicago v. Taylor*, 125 U. S. 161, 22 Am. & Eng. Corp. Cas. 384; *Blanchard v. Kansas City*, 16 Fed. Rep. 444; *Mollandin v. Union Pac. R. Co.*, 14 Fed. Rep. 394; *McElroy v. Kansas City*, 21 Fed. Rep. 257.

Alabama.—*Montgomery v. Townsend*, 80 Ala. 489; *Avondale v. McFarland* (Ala., 1893), 13 So. Rep. 504.

Arkansas.—*Hot Springs R. Co. v. Williamson*, 45 Ark. 429.

California.—*Eachus v. Los Angeles Consol., etc., R. Co.*, 103 Cal. 614; *Delong v. Warren* (Cal., 1894) 36 Pac. Rep. 1009.

Colorado.—*Denver v. Bayer*, 7 Colo. 113; *Pueblo v. Strait* (Colo., 1894), 36 Pac. Rep. 789; *Longmont v. Parker* (Colo., 1890), 23 Pac. Rep. 443.

Connecticut.—*Healey v. New Haven*, 49 Conn. 394, 2 Am. & Eng. Corp. Cas. 450.

Georgia.—*Atlanta v. Green*, 67 Ga. 386.

Illinois.—*Rigney v. Chicago*, 102 Ill. 64; *Chicago, etc., R. Co. v. Ayres*, 106 Ill. 518; *Joliet v. Blower*, 155 Ill. 414, *affirming* 49 Ill. App. 464.

Indiana.—*Lafayette v. Wortman*, 107 Ind. 404.

Iowa.—*Conklin v. Keokuk*, 73 Iowa 343; *Ressegieu v. Sioux City* (Iowa, 1895), 63 N. W. Rep. 184.

Kansas.—*Parker v. Atchison*, 46 Kan. 14.

Maine.—*Chase v. Portland*, 86 Me. 368.

Massachusetts.—*Woodbury v. Beverly*, 153 Mass. 245.

Minnesota.—*Munger v. St. Paul* (Minn., 1894), 58 N. W. Rep. 601.

Mississippi.—*Vicksburg v. Herman* (Miss., 1894), 16 So. Rep. 434.

Missouri.—*Stickford v. St. Louis*, 75 Mo. 309; *Heinrich v. St. Louis* (Mo., 1894), 28 S. W. Rep. 626; *Carson v. Springfield*, 53 Mo. App. 289.

Nebraska.—*Harmon v. Omaha*, 17 Neb. 548, 7 Am. & Eng. Corp. Cas. 474, 52 Am. Rep. 420; *Hammond v. Harvard*, 31 Neb. 635.

New Jersey.—*Van Riper v. Essex Public Road Board*, 38 N. J. L. 23; *State v. Sayre*, 41 N. J. L. 158.

New York.—*People v. Green*, 64 N. Y. 606; *Matter of Church of Our Lady of Mercy*, 57 Hun (N. Y.) 590; *McCall v. Saratoga Springs*, 56 Hun (N. Y.) 639.

Pennsylvania.—*New Brighton v. Feirsol*,

107 Pa. St. 280; *Philadelphia v. Rudderow* (Pa., 1895), 31 Atl. Rep. 53; *O'Brien v. Philadelphia*, 150 Pa. St. 589.

Rhode Island.—*Anness v. Providence*, 13 R. I. 17; *Aldrich v. Providence*, 12 R. I. 241.

Tennessee.—*Nashville v. Nichol*, 3 Baxt. (Tenn.) 338.

Texas.—*Texarkana v. Talbot* (Tex. Civ. App., 1894), 26 S. W. Rep. 451; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537.

West Virginia.—*Johnson v. Parkersburg*, 16 W. Va. 402, 27 Am. Rep. 779.

Wisconsin.—*French v. Milwaukee*, 49 Wis. 584.

A Contrary Doctrine obtains in *Florida*. See *Selden v. Jacksonville*, 28 Fla. 558.

1. For a more detailed treatment of this branch of the subject, see the title STREETS AND SIDEWALKS.

2. Right of Abutter to Deposit Building Materials.—*O'Linda v. Lothrop*, 21 Pick. (Mass.) 297, where Morton, J., said: "When the owner of a lot in such a situation has occasion to build, and for that purpose to dig cellars, he may rightfully lay his building materials and earth within the limits of the street, provided he takes care not improperly to obstruct the same, and to remove them within a reasonable time. It is very obvious that, without this privilege, it would be in some situations nearly or quite impracticable to build at all." See also *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Mallory v. Griffey*, 85 Pa. St. 275; *Palmer v. Silverthorn*, 32 Pa. St. 65. Compare *dicta* in *Com. v. Passmore*, 1 S. & R. (Pa.) 219; *People v. Cunningham*, 1 Den. (N. Y.) 530, 43 Am. Dec. 709; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 388; *State v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108; *Graves v. Shattuck*, 35 N. H. 268, 69 Am. Dec. 536; *Hundhausen v. Bond*, 36 Wis. 29; *Raymond v. Sheboygan*, 70 Wis. 318; *King v. Cleveland*, 28 Fed. Rep. 835, *approved* in 132 U. S. 295; *Chicago v. Robbins*, 2 Black (U. S.) 418.

In *Raymond v. Keseberg*, 84 Wis. 302, the court observes, as to the origin and nature of this right: "We hold that the right is the right of an abutter simply as an abutter, and not as an owner of the fee of any part of the street. Being the right of an abutter as such alone, it is founded on and limited by reasonable necessity, to be determined in each case by the facts of the case. Doubtless the right may be regu-

Deposit of Goods by Tradesmen.—Merchants have the right to use that portion of the street in front of their stores for the purpose of unloading and conveying goods back and forth.¹

Use must be Reasonable.—But such use of the streets is intended to be temporary only, and cannot be continued for an unreasonable time.²

Considerations Determining the Question of Reasonableness.—Reasonableness in this regard is a question which "must depend in a great measure upon the locality, its accustomed usage, and the exigencies of the public, it being apparent that what would obstruct travel and work an inconvenience to the public in the crowded streets of London, or on Broadway in New York, might be harmless in the streets of a less populous place."³

Obstructing Street Cars.—Abutters have no inalienable right to place drays and trucks at right angles to the sidewalk for the purpose of unloading goods, if street cars are thereby obstructed.⁴

b. PROJECTIONS, EXCAVATIONS, ETC.—The privilege of projecting structures from one's premises into the street is one which might lead to great abuses, and is therefore subject to stricter limitations than the temporary use of the streets discussed above.

Certain Projections as Nuisances.—A bay window⁵ projecting beyond a building line though sixteen feet above the sidewalk, a passageway⁶ nearly as high, connecting two buildings on opposite sides of the street, a fruit stand⁷ permanently and materially encroaching upon the sidewalk in a populous part of a city, and steps⁸ projecting into a highway, have been held to be public nuisances. The projection of a stairway into an alley,⁹ of awnings¹⁰ and show-cases¹¹ into a street, and the erection of hay scales¹² in a highway have all been declared to be illegal. So the use of shop windows for advertising purposes

lated, as it often is, by reasonable municipal regulations as to the space to be occupied; but in the absence of any such regulations the question of the extent of the reasonable necessity must depend upon the circumstances of each particular case."

1. Merchants Loading and Unloading Goods.—"The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily in their transit to the storehouse." *Haight v. Keokuk*, 4 Iowa 214. See also *Welsh v. Wilson*, 101 N. Y. 254, 12 Am. & Eng. Corp. Cas. 649, 54 Am. Rep. 698; *Callanan v. Gilman*, 107 N. Y. 360, 23 Am. & Eng. Corp. Cas. 59, 1 Am. St. Rep. 831; *Manley v. Leggett*, 62 Hun (N. Y.) 562; *Sikes v. Manchester*, 59 Iowa 65; *Mathews v. Kelsey*, 58 Me. 56, 4 Am. Rep. 248; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380.

2. Use must be Temporary Only.—*McCloughry v. Finney*, 37 La. Ann. 27; *People v. Cunningham*, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; *Callanan v. Gilman*, 107 N. Y. 360, 23 Am. & Eng. Corp. Cas. 59, 1 Am. St. Rep. 831; *Com. v. Passmore*, 1 S. & R. (Pa.) 219; *North Manheim Tp. v. Arnold*, 119 Pa. St. 390, 4 Am. St. Rep. 650, 4 Am. Rep. 653; *Jochem v. Robinson*, 66 Wis. 638, 57 Am. Rep. 298; *Benjamin v. Storr*, L. R. 9 C. P. 400. Compare *Kerr v. Fargue*, 54 Ill. 482, 5 Am. Rep. 146; *Dennis v. Sipperly*, 17 Hun (N. Y.) 69; *Flynn v. Taylor*, 53 Hun (N. Y.) 167; *Northrop v. Burrows*, 10 Abb. Pr. (N. Y. Suprem. Ct.) 365; *Rex v. Jones*, 3 Campb. 230; *Fritz v. Hobson*, 42 L. T. 225.

3. Question of Reasonableness—upon What De-

pendent.—*State v. Edens*, 85 N. Car. 527, citing *Rex v. Russell*, 6 East 427; *Rex v. Jones*, 3 Campb. 230; *Rex v. Cross*, 3 Campb. 224. Compare *Judd v. Fargo*, 107 Mass. 264; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Denby v. Willer*, 59 Wis. 240, 6 Am. & Eng. Corp. Cas. 226; *Jochem v. Robinson*, 66 Wis. 638, 57 Am. Rep. 298, 72 Wis. 199.

4. Drays and Trucks Obstructing Street Cars.—*Taylor v. Bay City St. R. Co.*, 101 Mich. 140; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194, 9 Am. Rep. 461.

5. Bay Window.—*Reimer's Appeal*, 100 Pa. St. 182, 45 Am. Rep. 373.

6. Passageway.—*Bybee v. State*, 94 Ind. 443.

7. Fruit Stand.—*State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117. And see *Com. v. Wentworth*, Bright. (Pa.) 318; *St. John v. New York*, 3 Bosw. (N. Y.) 484. But compare *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576; *Elwood v. Bullock*, 13 L. J. Q. B. 330; *Rex v. Smith*, 4 Esp. 111; *State v. Edens*, 85 N. Car. 526.

8. Steps.—*Com. v. Blaisdell*, 107 Mass. 234.

9. Stairway Projecting into Alley.—*Pettis v. Johnson*, 56 Ind. 139.

10. Awnings.—*Pedrick v. Bailey*, 12 Gray (Mass.) 161; *Hume v. New York*, 74 N. Y. 264; *Lavery v. Hannigan*, 52 N. Y. Super. Ct. 463; *Simis v. Brookfield* (Super. Ct.), 34 N. Y. Supp. 695. Compare *Drake v. Lowell*, 13 Met. (Mass.) 292.

11. Simis v. Brookfield (Super. Ct.), 34 N. Y. Supp. 695.

12. Hay Scales.—*Emerson v. Babcock*, 66 Iowa 257, 55 Am. Rep. 273.

may become a nuisance by attracting crowds of people, blockading the street, and thus interfering with the rights of other abutters as well as of the general public.¹

In *Maryland*, however, it has been held that a porch projecting over the building line into the sidewalk was a lawful structure;² and the use of awnings may be authorized.³

Excavations.—Excavations under the street with openings thereto are likely to infringe even more seriously upon the rights of the public than structures on the surface, and hence are generally subject to greater limitations.

Right of Municipality to Forbid Excavations.—A municipal corporation has the right, of course, to forbid excavations under the sidewalk unless made according to its prescribed regulations.⁴ But it is held in some states that excavations under the sidewalk by abutting owners may be authorized.⁵

Liability of Municipality.—And in *Indiana* the rule is that the municipality is not liable for permitting such excavations to remain open.⁶ But, generally, the rule is that injuries resulting to passers-by from such excavations are actionable.⁷

Permission as to Projections and Excavations Revocable without Compensation.—Permission granted to abutters by the municipality to construct projections and excavations into the street may be revoked without compensation to the licensee.⁸

Consent of City—How Implied.—A city's consent to the construction of a vault under the sidewalk may be inferred from the acquiescence of its officers for nine years.⁹

May not Excavate so as to Render Street Unsafe.—An abutter has no right even upon his own land to so excavate as to loosen the soil of the street and render it unsafe, and he may be enjoined therefrom at the instance of an opposite abutter.¹⁰

3. Abutters upon Rural Roads—*a.* RESTRICTIONS UPON RIGHTS OF PUBLIC IN RURAL ROADS—Rural and Urban Highways Distinguished.—Between the rights of landowners whose property abuts on city streets, and those owning land along a rural highway, there exist some important differences,¹¹ which

1. **Crowds Blockading Street, Attracted by Advertisements in Window.**—*Elias v. Sutherland*, 18 Abb. N. Cas. (N. Y.) 126; *People v. New York*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 123; *Rex v. Carlile*, 6 C. & P. 636. *Compare* *Jacques v. National Exhibit Co.*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 250; *Dennis v. Siperly*, 17 Hun (N. Y.) 69.

2. **Porch.**—*Garrett v. Janes*, 65 Md. 271.

3. **Use of Awnings may be Authorized.**—*Hoey v. Gilroy*, 129 N. Y. 132.

4. *Davis v. Clinton*, 50 Iowa 585. *Compare* *Gregsten v. Chicago*, 40 Ill. App. 607.

5. *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Everett v. Marquette*, 53 Mich. 450. *Compare* *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Kuechenmeister v. Brown* (C. Pl.), 34 N. Y. Supp. 180. But see *Breeze v. Power*, 80 Mich. 172; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308.

6. **Indiana.**—*Lafayette v. Blood*, 40 Ind. 62. **New York.**—*Compare* *McCarthy v. Syracuse*, 46 N. Y. 194; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672.

7. *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55; *Stephani v. Brown*, 40 Ill. 428; *Brown v. Evans*, 15 Kan. 88; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Kuechenmeister v. Brown* (C. Pl.), 34 N. Y. Supp. 180; *Congreve v. Smith*, 18 N. Y. 79; *Whalen*

v. Gloucester, 4 Hun (N. Y.) 24; *Anderson v. Dickie*, 1 Robt. (N. Y.) 238; *Creed v. Hartman*, 29 N. Y. 591, 86 Am. Dec. 341; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498; *Jennings v. Van Schaick*, 108 N. Y. 530; *Stevenson v. Joy*, 152 Mass. 45; *Dickson v. Hollister*, 123 Pa. St. 421, 10 Am. St. Rep. 533; *Papworth v. Milwaukee*, 64 Wis. 389. See *contra*, *Lafayette v. Blood*, 40 Ind. 62; *Calder v. Smalley*, 66 Iowa 219, 55 Am. Rep. 270; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Kirkpatrick v. Knapp*, 28 Mo. App. 427. *Compare* *Augusta v. Hafers*, 59 Ga. 151; *Nelson v. Godfrey*, 12 Ill. 22.

8. *Winter v. Montgomery*, 83 Ala. 589; *Norfolk v. Chamberlaine*, 29 Gratt. (Va.) 534; *Gregsten v. Chicago*, 40 Ill. App. 607.

9. *Babbage v. Powers*, 130 N. Y. 281, *affirming* (Supreme Ct.) 7 N. Y. Supp. 306.

10. *Milburn v. Fowler*, 27 Hun (N. Y.) 568, where the court, by Cullen, J., says: "Any obstruction or interference with a highway is unlawful and *per se* a nuisance. One cannot dig a pit on his own land so close to the highway that a traveler may fall into it unawares. Certainly he cannot then dig that pit so as to cause a subsidence or destruction of the highway itself."

11. **Rural Highways Distinguished from Urban.**—The streets of a town are fairly subject to

justify a separate treatment in this article. The rights of the rural abutter as regards the highway which bounds his premises are in general much more extensive than those of the urban abutter.¹

Rights of Rural Abutter at Common Law.—For the former is first of all a proprietor. At common law he is the owner of the fee *ad medium filum viæ*, or (if his land extends on both sides) of the entire highway;² and he does not convey his

many purposes to which a highway in the country would not be. *Haight v. Keokuk*, 4 Iowa 214. And see *Bloomfield, etc., Natural Gas Light Co. v. Calkins*, 62 N. Y. 386, where the court emphasizes the distinction between urban and rural highways in respect to the right to lay pipes thereon, saying: "It may be urged with some apparent reason that the appropriation of land for a street in a city carries with it the idea that it is to be used for all necessary purposes, as such street, which the interest of the public, and the comfort, enjoyment, or the health of the locality, may demand. Concede, then, that these improvements were proper for cities, it by no means follows that the appellant had a right to use the highway in question for the same purpose, and that, as a necessary result of the reasoning, the gas pipes may be properly laid over the land of the respondent. And it may be remarked that most of the cases cited, if not all of them, state or assume that there is a distinction between the street of a city and a highway in the country. Every one of the improvements referred to may, in cities, be considered as a necessary incident to the public right to repair, improve, increase the value of property, and add to its beauty and the wealth of a large local population. Usually constructed without objection, they do not ordinarily interfere with other rights which have been lawfully acquired and enjoyed, and they confer many advantages which counterbalance any supposed detriment or injury. Whether these rights can be strictly maintained as to cities it is not necessary to determine in this case. It is enough to say that the rule claimed has no application to a country highway, because the circumstances are entirely different. Nor does the rightful use of land appropriated for a street for the purposes before stated in any way disturb the position that a public highway in the country stands entirely upon a different footing." See also this distinction drawn in *Chesapeake, etc., Telephone Co. v. Mackenzie*, 74 Md. 36; *Eels v. American Telephone, etc., Co.*, 143 N. Y. 133, *affirming* 65 Hun (N. Y.) 516; *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113.

But in *Cater v. Northwestern Tel. Exch. Co.* (Minn., 1895), 63 N. W. Rep. 111, this view is attacked by Mitchell, J., in delivering the majority opinion, where he says, speaking of telephone poles in the highway: "So far as there is any distinction between rural and urban highways, there would be much more reason for holding such structures an additional servitude in the latter than in the former. It is a matter of common knowledge that telegraph and telephone

lines along the side of a country road rarely, if ever, appreciably interfere with either public travel or the easements of the abutting landowner; whereas, in the cities, especially on business streets, where the buildings extend out to the line of the street, the numerous wires stretched upon the cross-arms frequently materially interfere with access, light, and air, as well as render protection of the buildings more difficult in case of fire."

1. Rights of Rural Abutter the more Extensive.—*Chesapeake, etc., Telephone Co. v. Mackenzie*, 74 Md. 36. Here the court says: "The use to which streets in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, as we have just observed, all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface. But with respect to streets in populous places the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains, and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam, and other things capable of that mode of distribution." See also *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113, quoted above; *Eels v. American Telephone, etc., Co.*, 143 N. Y. 133, *affirming* 65 Hun (N. Y.) 516; Elliott on Roads and Streets, c. 18, pp. 299, 303.

2. Rural Abutter as Proprietor.—The leading case on the extent of adjoining owner's rights is *Goodtitle v. Alker*, 1 Burr. 133, where Lord Mansfield, holding that such an owner might maintain ejectment, quoted 1 Rolle's Abridgment 392, to the effect "that the king has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil;" and added: "So do all the trees upon it and mines under it (which may be extremely valuable). The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude or easement of a way over it by a writ of *ad quod damnum*. It is like the property in a market or fair. There is no reason why he should not have a right to all

title to the public, as is sometimes done by urban owners when their lands are platted into streets.¹

Public Have only Easement of Passage.—The public possess, of course, the easement of passage, but their rights are strictly limited to this.² They have no right, as against the abutter, to use the highway for other purposes, such as hunting,³ and one who stops on the highway in front of a house, uttering abusive

remedies for the freehold; subject still, indeed, to the servitude or easement. An assize would lie if he should be disseized of it; an action of trespass would lie for an injury done to it." See also *Harrison v. Rutland* (1893), 1 Q. B. 142; *Dovaston v. Payne*, 2 H. Bl. 527; *Stevens v. Whistler*, 11 East 51.

The rule in this country was thus stated at an early day in *Connecticut*: "An idea has been entertained by some that the public have the fee in highways, and are the owners of the soil over which they are laid. This erroneous opinion originated in a misconception of the nature of a highway. A highway is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and re-pass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil nor give the public the legal possession of it. Such is the description of a highway by all the common-law writers; and this being the nature of it, the consequence clearly follows that the right of freehold is not touched by establishing a highway, but the freehold continues in the original owner of the land in the same manner it was before the highway was established, subject to the easement." *Peck v. Smith*, 1 Conn. 132, 6 Am. Dec. 216. And see also the following cases: *Barclay v. Howell*, 6 Pet. (U. S.) 513; *Lyman v. Arnold*, 5 Mason (U. S.), 195; *Consumers' Gas Trust Co. v. Huntsinger* (Ind. App., 1895), 39 N. E. Rep. 423; *Haslett v. New Albany Belt, etc.*, R. Co., 7 Ind. App. 603, *citing Cox v. Louisville, etc.*, R. Co., 48 Ind. 178; *Terre Haute, etc.*, R. Co. v. Scott, 74 Ind. 29; *Terre Haute, etc.*, R. Co. v. Rodel, 89 Ind. 128, 46 Am. Rep. 164; *Hamilton County v. Indianapolis Natural Gas Co.*, 134 Ind. 209; *Louisville, etc.*, R. Co. v. Liebfried, 92 Ky. 407; *Bradley v. Pharr*, 45 La. Ann. 426; *Peabody Heights Co. v. Sadtler*, 63 Md. 533; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861; *Omaha, etc.*, R. Co. v. Beeson, 36 Neb. 365; *Wright v. Carter*, 27 N. J. L. 76; *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Gidney v. Earl*, 12 Wend. (N. Y.) 98; *Pearsall v. Post*, 20 Wend. (N. Y.) 111; *Bloomfield, etc.*, Natural Gas Light Co. v. Calkins, 62 N. Y. 386; *Dailey v. State* (Ohio, 1894), 37 N. E. Rep. 710, where the court says: "Whatever may be the rule in other states, we have supposed that the question of the right in the highway of a landowner whose title extends to the centre of the road is not an open one in *Ohio*. The question has been the subject

of adjudication in a score of cases decided by this court, notably in the following: *Bingham v. Doane*, 9 Ohio 167; *Crawford v. Delaware*, 7 Ohio St. 459; *Cincinnati, etc.*, St. R. Co. v. Cummins, 14 Ohio St. 523; *Hatch v. Cincinnati, etc.*, R. Co., 18 Ohio St. 123; *McClelland v. Miller*, 28 Ohio St. 502; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Lawrence R. Co. v. O'Hara*, 48 Ohio St. 343; *Sterling's Appeal*, 111 Pa. St. 35, 56 Am. Rep. 246; *Phillips v. Dunkirk, etc.*, R. Co., 78 Pa. St. 180; *Western Union Tel. Co. v. Williams*, 86 Va. 696, *citing Bolling v. Petersburg*, 3 Rand. (Va.) 563; *Home v. Richards*, 4 Call (Va.) 441, 2 Am. Dec. 574; *Harris v. Elliott*, 10 Pet. (U. S.) 25.

1. *Lindsay v. Omaha*, 30 Neb. 512. In this case Cobb, C. J., after quoting the *Nebraska* statute which provides for laying out cities and villages, and additions thereto, says: "Some years ago, in writing the opinion in *Omaha, etc.*, R. Co. v. Rogers, 16 Neb. 117, I made a thorough examination of the adjudicated cases of the states having statutory provisions similar, or nearly so, to our own above cited, and came to the conclusion that the fee-simple title to the streets of cities or villages, which passes by virtue of the acknowledgment and recording of the plats, passes to and vests in the city or village."

And in *Indianapolis, etc.*, R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624, it was observed: "It cannot be successfully contested that appellees owned the fee of the land to the centre of the old highway. It was never conveyed to the city by any formal grant, by plat or otherwise. The adjoining proprietors never parted with the fee. Had they platted the grounds into lots and streets, under the statute the plat itself, when recorded, would have operated as a grant of the fee to the corporation. This they did not do. The city could and did acquire an interest in the street, although the grounds were never set apart for that specific purpose, in the manner prescribed in the statute. It may be by dedication, or common user, and in such cases the fee would remain in the original proprietors, burdened with a public easement. *Illinois, etc.*, Canal v. Haven, 11 Ill. 554; *Hunter v. Middleton*, 13 Ill. 54; *Manly v. Gibson*, 13 Ill. 308."

2. **Public Right Restricted to Easement of Passage.**—*Harrison v. Rutland* (1893), 1 Q. B. 142, where Kay, L. J., says: "Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner, to whom it still belongs. These propositions are amply established by judicial decisions."

3. **No Right to Use Highway for Purpose of**

and insulting language to the owner, thereby becomes a trespasser.¹ Even the time-honored privilege of the drover must be exercised with strict regard to the abutter's rights, and if the former's cattle in passing along the highway stray into an adjoining field, even through a gap in the fence, the drover is bound to remove them within a reasonable time or the abutter may impound them.²

Pipe Lines.—The greater limitations upon the use of the highway by other than abutters in the case of rural as compared with urban ways is well illustrated by the law governing pipe-line companies. While a different rule obtains in regard to city streets,³ it seems to be well settled that pipes cannot be laid in a rural highway without compensation to the abutting owner, because they constitute an additional burden upon his estate.⁴ Parties laying pipes along a road without having obtained the consent of the abutting owners, or acquired the right by condemnation proceedings, are liable to others injured thereby,⁵ and the abutter may even tear up and remove the pipes.⁶

Hunting.—Reg. v. Pratt, 4 El. & Bl. 860, 82 E. C. L. 860; Harrison v. Rutland (1893), 1 Q. B. 142.

1. Adams v. Rivers, 11 Barb. (N. Y.) 390.

2. **Drovers' Rights and Liabilities.**—In Goodwyn v. Cheveley, 4 H. & N. 631, the court, by Bramwell, B., said: "If the question was whether the drovers ought to be punished for what they did, I should say they ought not. But the question is, what is the defendant's right in the matter? His right is to have his land trespassed upon as little as possible; that is, to no greater extent than is absolutely unavoidable. I therefore think that a reasonable time was such as, and no more than, was required for the act of driving the cattle out of the field. The case was argued as though there had been some hardship on the plaintiff in having his cattle distrained and impounded, but there is none. Was the defendant to have his crops grazed upon until the plaintiff could get a convenient time to remove the cattle? If so they might have continued in the defendant's field for twenty-four hours because the drovers could not sooner have housed the other cattle. If the question be whether the defendant's herbage is to be grazed upon by the plaintiff's cattle without any compensation, until it is convenient for the drovers to remove them, or whether the plaintiff is to be subjected to the inconvenience of getting his cattle out of the pound, it seems to me that the plaintiff ought to bear the loss, for he had no right to have his cattle in the defendant's field; and his immunity from the consequence of his cattle having trespassed on the defendant's land only extended so far as was necessary, and there was no physical impossibility in their being immediately driven out. Another consideration will show the hardship on the defendant. He finds cattle grazing in his field; he has no notice that they will be taken away, nor is there anything to indicate whether he may or may not impound them. How long is he to let them remain? What is he to do? Is he to inquire of every one he meets whether he has seen any persons driving other cattle along the road with the appearance of an intention to return and

remove the cattle from his field? He can do nothing but impound them." The learned baron had directed a verdict at *nisi prius* for the defendant, in the action against the abutter for impounding. His colleagues on appeal held that the question of whether the cattle were removed within a reasonable time should have been left to the jury, and therefore sent the case back; but the general views expressed above were not questioned.

3. See *supra*, this title, *Access Obstructed by Semi-public Improvements*.

4. **Pipe Lines in Rural Highways.**—Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 19 Am. St. Rep. 113. In this case the court, by Elliott, J., said: "The authorities, although not very numerous, are harmonious upon the proposition that laying gas pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner. Bloomfield, etc., Natural Gas Light Co. v. Calkins, 62 N. Y. 386, 1 Thomp. & C. (N. Y.) 549; Bloomfield, etc., Natural Gas Light Co. v. Richardson, 63 Barb. (N. Y.) 437; Stumpf's Appeal, 116 Pa. St. 33; Webb v. Ohio Gas Fuel Co., 16 Wkly. Law Bull. (Ohio) 121." See, in addition to the above, Consumers' Gas Trust Co. v. Huntsinger (Ind. App., 1895), 39 N. E. Rep. 423; Lebanon Light, etc., Co. v. Leap (Ind., 1894), 39 N. E. Rep. 57; Sterling's Appeal, 111 Pa. St. 35, 56 Am. Rep. 246 (evidently the case intended to be cited by Judge Elliott in the above quotation); Goodson v. Richardson, L. R. 9 Ch. 221. And compare Bollinger v. Southern Pipe Line Co., 2 Pa. Dist. Rep. 604; White v. Yazoo City, 27 Miss. 357.

5. Lebanon Light, etc., Co. v. Leap (Ind., 1894), 39 N. E. Rep. 57.

6. **Right of Abutter to Remove Pipes.**—Consumers' Gas Trust Co. v. Huntsinger (Ind. App., 1895), 39 N. E. Rep. 423, the court, by Ross, C.J., saying: "The building of a pipe line along a highway does not come within the uses for which highways were intended. It has been decided by our Supreme Court, following the decisions of other courts of last resort, that the laying of gas pipes along a highway is the imposition of an additional

Acquiescence of Abutter.—But if he acquiesces in the prosecution of the work until after large sums of money have been expended thereon, and the enterprise is one of great importance to the public, the abutter may lose his right to an injunction.¹

Poles.—In reference to the erection, along rural highways, of poles for stringing electric wires, the authorities are not so harmonious. The majority of them hold that these also constitute an additional burden, and that they cannot be erected, even under permission of the public authorities, without making due compensation to the abutting owners.² There are other decisions, how-

burden upon the fee from that embraced in the easement for road purposes, and that compensation must be made to the owner of the fee. *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113. It is evident, therefore, that the appellant company, although engaged in a public enterprise, had no right to appropriate private property without compensation; and it is no excuse to say that because it is engaged in such enterprise, and has expended large sums of money in putting in its plant and extending its pipe lines, it can summarily enter upon the lands of another without right and lay its lines, and thus acquire the right to maintain them. When it entered upon the lands of Matilda Harless without her permission it was unlawfully there, and she had a right not only to expel appellant's servants who were engaged in the unlawful work therefrom, but she had the right also to tear up and remove the pipes which they had placed upon her land. In order to do this she might call to her assistance any person who might be willing to assist, and those thus assisting could incur no liability except they used unnecessary force or violence in doing the same."

1. Abutter may by Acquiescence Lose his Right to Injunctive Relief.—"In adjudging that he has no right to an injunction we do not hold that he may not in a proper case recover damages for the invasion of his legal rights. What we here decide is that the case made is not one justifying resort to the extraordinary remedy of injunction. The effect of our decision is that he has mistaken his remedy. The work in which the gas company is engaged is one in which the general community have an interest, and to arrest the work by injunction would do great injury to many citizens. Persons other than the company have an interest, and they are so numerous that it is the duty of the courts to protect that interest where it can be done without materially impairing the rights of any private citizen; and that can be done in this instance, for the appellant, in the appropriate action and upon making a proper case, can be fully compensated in damages for all injury that he may have suffered. There is present here an element of public policy which exerts a controlling influence. The good of the community forbids that one who occupies such a position as the appellant does should be permitted to arrest work essential to the successful discharge of the company's duty to supply the community with fuel in the form of natural

gas. Public policy, as has been demonstrated in analogous cases, requires that the rights of the community should be protected and the landowner left to his remedy at law. *Louisville, etc., R. Co. v. Beck*, 119 Ind. 124; *Louisville, etc., R. Co. v. Soltwedde*, 116 Ind. 257, 9 Am. St. Rep. 852; *Bravard v. Cincinnati, etc., R. Co.*, 115 Ind. 1; *Sherlock v. Louisville, etc., R. Co.*, 115 Ind. 22; *Midland R. Co. v. Smith*, 113 Ind. 233; *Indiana R. Co. v. Allen*, 113 Ind. 308, 3 Am. St. Rep. 650. Nor does this rule operate unjustly, for the landowner is not deprived of compensation. On the contrary, the right to compensation is left open to him, and it is his own fault if he does not recover full compensation for all the loss he has actually sustained. Blended with the element of public policy is another influential one, and that is this: the appellant, without objection, knowingly permitted the work to proceed until it reached a stage at which it would be ruinous to the company which had invested such large sums of money to stop it by injunction. These two elements in their combined strength certainly make a case in which an injunction should, upon plain principles of equity, be denied. *Logansport v. Uhl*, 99 Ind. 531, 9 Am. Rep. 109; *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351." *Elliott, J.*, in *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113.

2. Poles in Highway—Prevailing Doctrine.—"We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous, and exclusive use and possession of some part of the public highway itself, and therefore cannot be simply a new method of exercising such old public easement. It is a totally different and distinct kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. All these might be varied, increased as to number, capacity, or form, altered as to means or rapidity of locomotion, or transformed in their nature or character, and still the use of the highway might be substantially the same—a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war

ever, in which the contrary doctrine is vigorously defended.¹

Sewers.—The construction of a metropolitan sewer along a public road was held in *Massachusetts* not to impose an additional servitude,² but a different rule may fairly be said to obtain elsewhere.³

Steam Railroads.—Steam railroads, though of a semi-public character, become additional burdens if they occupy any part of the highway, and the owner of the fee must be compensated.⁴ It is held in *Florida*, however, that an abutter on a country road cannot recover damages for the diminution in value of his residence property caused by railway obstructions, unless there is physical contact between the latter and the residence portion, or that part of the highway immediately abutting thereon.⁵

with that of the legitimate public easement in a highway. * * * The argument is pressed upon us that the question to be decided in this case is new, and that it ought to be decided with reference to the wants and customs of the advancing civilization, which, it is alleged, is doing so much to render life more comfortable, attractive, and beautiful. Courts are frequently addressed with such arguments, which are quite forcible, and they have in this case been very eloquently, plausibly, and aptly advanced. The answer to be made is that, although this particular phase of the question, strictly speaking, may itself be new, yet the principle which governs our decision is as old almost as the common law itself; and in deciding this appeal favorably to the defendant herein we should be overruling and making nothing of cases which have been regarded as the law for generations past. A majority of the states whose courts have considered the question have decided it in accordance with our own views. The cases are collected in the brief of the learned counsel for the respondent herein. Let the defendant pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, and hence the refusal of an owner will not stop the proposed undertaking. The amount of the compensation is not now the question, but that in many cases it can be anything more than merely nominal would seem to be a proposition which would not require great elaboration of argument to make plain. The use would frequently be but a technical encroachment upon the rights of the adjoining owner, and there would be but little fear that anything more than nominal damages would be allowed." Peckham, J., delivering the opinion in *Eels v. American Telephone, etc., Co.*, 143 N. Y. 133, *affirming* 65 Hun (N. Y.) 516. See, to the same effect, *Pacific Postal Tel. Cable Co. v. Irvine*, 49 Fed. Rep. 113; *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 158; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *American Telephone, etc., Co. v. Pearce*, 71 Md. 535; *Broome v. New York, etc., Telephone Co.*, 42 N. J. Eq. 141; *State v. Newark*, 49 N. J. L. 344; *Dusenbury v. Mutual Tel. Co.*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 440, *Metropolitan Tele-*

phone, etc., Co. v. Colwell Lead Co., 67 How. Pr. (N. Y. Super. Ct.) 365, 50 N. Y. Super. Ct. 488; *Tiffany v. U. S. Illuminating Co.*, 51 N. Y. Super. Ct. 280, 67 How. Pr. (N. Y.) 73; *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. Rep. 369; *Western Union Tel. Co. v. Williams*, 86 Va. 696 (Lewis and Richardson, JJ., *dissenting*). And see strong dissenting opinions by Start, C. J., and Buck, J., in *Cater v. Northwestern Tel. Exch. Co.* (Minn., 1895), 63 N. W. Rep. 115. In *Willis v. Erie Tel., etc., Co.*, 37 Minn. 347, the court was equally divided. The same doctrine has been applied to urban streets, the title to which is in the abutters. *Chesapeake, etc., Telephone Co. v. Mackenzie*, 74 Md. 36; *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559, 24 Am. St. Rep. 290.

1. **Doctrine that Poles are not an Additional Burden.**—*Mitchell, J.*, in *Cater v. Northwestern Tel. Exch. Co.* (Minn., 1895), 63 N. W. Rep. 111. See also, as championing this side of the controversy, *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *People v. Eaton*, 100 Mich. 208, *following* *Detroit City R. Co. v. Mills*, 85 Mich. 634, a street railway case; *Julia Bldg. Assoc. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 485; *State v. Flad*, 23 Mo. App. 185; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 9 Am. St. Rep. 370. And compare *Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.) 424, 54 Am. Rep. 284; *Rocke v. American Telephone, etc., Co.*, 41 N. J. Eq. 35.

2. **Sewer in Public Road—Massachusetts Doctrine.**—*Lincoln v. Com.* (Mass., 1895), 41 N. E. Rep. 113. Compare *Titus v. Boston*, 161 Mass. 209.

3. *Murray v. Gibson*, 21 Ill. App. 488; *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113; *VanBrunt v. Flatbush*, 128 N. Y. 50.

4. See *supra*, this title, *Access Obstructed by Semi-public Improvements*. See also the titles EMINENT DOMAIN; HIGHWAYS; RAILROADS.

5. In *Jacksonville, etc., R. Co. v. Thompson*, 34 Fla. 346, the court, by Lidden, C. J., said: "In the declaration the plaintiff alleges that he has been, by the acts of the defendant complained of, cut off and deprived of his rights of ingress and egress to and from his residence aforesaid to the city of Palatka. In the absence of any allegation of any physical contact between the obstruction com-

Private Railway.—A purely private railway cannot lawfully be permitted in the public road at all, and the abutting owner is entitled to the aid of the courts in compelling its removal.¹

b. EXTENT OF ABUTTERS' RIGHTS IN RURAL ROADS.—It will be seen from the foregoing that we have here an extreme instance of that dual form of possession which arises from the existence of what was known in the Roman law (and thence translated into our own) as a servitude.² The interest of the public is that of a servient estate, while the abutter's is a strongly dominant one.

Soil of Highway, Minerals, etc.—As proprietor and holder of the dominant estate, the abutter owns the soil of the highway and the minerals and other materials thereof.³

Trees—Grass—Herbage.—To him also belong the trees growing in the highway,⁴

plained of and the residence property of the plaintiff, or that the obstruction was upon that portion of the public road immediately abutting said property, we do not consider these averments as equivalent to declaring that the plaintiff was denied all ingress and egress to his property. Construing these averments in connection with other portions of the pleading, they only meant to assert that ingress and egress to the property from the city of Palatka was made more difficult, inconvenient, and expensive by reason of the obstruction. Unless we so construe this portion of the declaration, it is fatally repugnant to those portions which allege that he was, by reason of the same obstruction, 'compelled to travel and convey his goods and supplies and necessities for himself and family, and haul his farm products a long distance in order to reach the city of Palatka.' Such repugnancy would make the declaration objectionable upon demurrer."

1. Strictly Private Railway in Public Road.—*Bradley v. Pharr*, 45 La. Ann. 426; *Mikesell v. Durkee*, 34 Kan. 509 (a case of a city street). In the former case the court says: "The railroad constructed by defendant is not 'for the public or common utility,' or for 'public use,' and is not a 'public or common work.' It is a purely private work, for exclusive private use; and we can discover in the law no broader warrant for the construction of such a work on that portion of plaintiff's land occupied by the public road than on any other portion thereof. Whatever incidental benefits may arise to the public from such a construction on the public road would be conferred in greater degree by a like construction on plaintiff's land adjoining the road; and such benefits can no more sustain the construction, in violation of his legal rights, in one case than in the other."

2. Elliott on Roads and Streets, c. 18, pp. 299, 303.

3. Right of Rural Abutter to Soil of Highway, Mines, Pasturage, etc.—*Tucker v. Eldred*, 6 R. I. 404, where the court says: "By the general rules of law, the public have but an easement upon the land lying within the lines of the highway. Notwithstanding the laying out of the highway and the condemnation of the land to the use of the public for travel, the title to the soil, and all the profits thereof, consistent with the existence of the ease-

ment, remain in the original owner. He has a right to the freehold and to all the profits which may be derived from it, consistently with the right of passage of the public—to all mines beneath the surface, to all trees, grass, and pasturage upon and above the surface. *Goodtitle v. Alker*, 1 Burr. 133; *Stevens v. Whistler*, 11 East 51; *Doe v. Wilkinson*, 3 B. & C. 413, 10 E. C. L. 135; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Gidney v. Earl*, 12 Wend. (N. Y.) 98." See, to the same effect, *Aurora v. Fox*, 78 Ind. 1; *Cuming v. Prang*, 24 Mich. 522; *Althen v. Kelly*, 32 Minn. 280; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861; *Viliski v. Minneapolis*, 40 Minn. 304; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498; *Williams v. Kenney*, 14 Barb. (N. Y.) 629; *Fisher v. Rochester*, 6 Lans. (N. Y.) 225.

4. Trees Growing in Highway—England.—*Goodtitle v. Alker*, 1 Burr. 143.

Canada.—*Beauchamp v. Montreal*, 7 Mont. Super. Ct. 382; *O'Connor v. Nova Scotia Telephone Co.*, 22 Canada Supreme Ct. 276.

United States.—*Barclay v. Howell*, 6 Pet. (U. S.) 498; *Lyman v. Arnold*, 5 Mason (U. S.) 198.

Iowa.—*Overman v. May*, 35 Iowa 89; *Bills v. Belknap*, 36 Iowa 583; *Quinton v. Burton*, 61 Iowa 471; *Crismon v. Deck*, 84 Iowa 344.

Kansas.—*Shawnee County v. Beckwith*, 10 Kan. 608.

Maine.—*Wellman v. Dickey*, 78 Me. 29.

Massachusetts.—*Brainard v. Clapp*, 10 Cush. (Mass.) 6, 57 Am. Dec. 74.

Michigan.—*Clark v. Dasso*, 34 Mich. 86; *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 233, 38 Am. Rep. 246.

New Hampshire.—*Baker v. Shephard*, 24 N. H. 208; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536.

New Jersey.—*Weller v. McCormick*, 52 N. J. L. 470; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 78.

New York.—*Lancaster v. Richardson*, 4 Lans. (N. Y.) 136; *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498; *Edsall v. Howell* (Supreme Ct.), 33 N. Y. Supp. 892.

Ohio.—*Phifer v. Cox*, 21 Ohio St. 248, 8

together with the grass and herbage therein.¹

How these Rights may be Protected.—And in defense of these property rights he may maintain trespass,² ejectment,³ and other actions.⁴

Construction of Underground Passageway.—Where the abutter owns the land on both sides of the road, he may have an underground passageway for his cattle from one side to the other.⁵

Fencing up Part of Highway.—It is said that an abutter cannot acquire the right to fence up any portion of the highway by adverse possession, however long continued.⁶

IV. LIABILITIES OF ABUTTING OWNERS—Defects in Highway; General Rule.—Liabilities of abutting owners for injuries incurred by travelers on the highway arise chiefly through some overt act of negligence. Without such acts on their part, abutters do not become so liable unless liability is specially imposed by statute or charter.⁷ In *Illinois*, however, it is held that the injured party may

Am. Rep. 58; *Dailey v. State* (Ohio, 1894), 37 N. E. Rep. 710.

Pennsylvania.—*Sanderson v. Haverstick*, 8 Pa. St. 294; *Chambers v. Furry*, 1 Yeates (Pa.) 167.

Rhode Island.—*Tucker v. Eldred*, 6 R. I. 404.

Contra—Georgia.—Contrary to the current of authority, it is held in *Georgia* that trees along the highway belong to the public. *Castleberry v. Atlanta*, 74 Ga. 164.

Where the Abutter Owns the Fee, as is generally the case, he cannot recover from a telegraph or telephone company for injuring the trees in the highway along his land while constructing its line. *Dailey v. State* (Ohio, 1894), 37 N. E. Rep. 710; *O'Connor v. Nova Scotia Telephone Co.*, 22 Canada Supreme Ct. 276.

But in *Wisconsin* it is held that where trees along a city street have become an obstruction they may be removed by the authorities without compensating the abutter, and without granting him a hearing. *Chase v. Oshkosh*, 81 Wis. 313.

For the further details of this subject see the title TREES.

1. **Herbage.**—*Woodruff v. Neal*, 28 Conn. 165; *Tucker v. Eldred*, 6 R. I. 404.

In *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363, the court says: "The owner of the soil over which a highway is located is entitled to the emblements growing thereon, and to the entire use of the land, except the right which the public have to use the land and materials thereon for the purpose of building and maintaining a highway suitable for the safe passage of travelers. This doctrine has been long established by numerous authorities. *Goodtitle v. Alker*, 1 Burr. 133; *Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263. These authorities fully establish that he may maintain trespass, or ejectment, for injuries to his rights as such owner of the soil. The public acquire only an easement in the land taken, consisting of the right to use the materials in and upon the land taken for building and maintaining a suitable way, and of using the

way when constructed for passing and re-passing. The public and the highway surveyor, who is the agent of the public for certain purposes, have no right to appropriate any of the materials or emblements of the land taken to any other purpose."

2. *Goodtitle v. Alker*, 1 Burr. 143; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363.

3. *Goodtitle v. Alker*, 1 Burr. 143; *Doe v. Wilkinson*, 3 B. & C. 413, 10 E. C. L. 135; *Louisville, etc., R. Co. v. Liebfried*, 92 Ky. 407.

4. *Mikesell v. Durkee*, 34 Kan. 509 (citing *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668; *Ewell v. Greenwood*, 26 Iowa 377; *Wilson v. Mineral Point*, 39 Wis. 160); *Bradley v. Pharr*, 45 La. Ann. 426; *Ladd v. French* (Supreme Ct.), 6 N. Y. Supp. 56; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498; *Harrison v. Rutland*, (1893) 1 Q. B. 142; *O'Connor v. Nova Scotia Telephone Co.*, 22 Canada Supreme Ct. 276; *Dailey v. State* (Ohio, 1894), 37 N. E. Rep. 710. And see generally cases in foregoing notices to this section.

5. *Pemberton v. Dooley*, 43 Mo. App. 176.

6. *Heddleston v. Hendricks* (Ohio, 1895), 40 N. E. Rep. 408.

7. **Nonliability of Abutters for Mere Defects in Highway.**—See *Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, where the court, by *Ruger, C.J.*, in an opinion which exhaustively reviews the authorities, says: "We have thus referred at length to many of the cases holding the nonliability of the lot owners, for the reason that there seems to have been quite a common impression, in which judges and lawyers have shared, that abutting owners are in some way liable to an injured party for damages occasioned from their neglect to keep sidewalks in repair when that duty is in any way enjoined upon them. It seems to us that there could never have been any logical cause for such impression, and it seems it has no foundation in the reported cases. Any other conclusion than that reached by us would, we think, be most unfortunate, as it would tend to relax

maintain a joint action against the municipality and the abutting owner.¹

When Defect is Occasioned by Abutter.—The rule is different, however, where the abutter himself has caused the defect which produced the injury. Abutters are liable to passers-by who are injured by obstructions or excavations made in the street by the former, providing the latter are not guilty of contributory negligence.²

Expenses of Public Improvements.—An important branch of this division of the general subject of abutting owners is that which relates to the liability of abutting property and of its owners for a proportionate share of the expense of public improvements, but this forms so completely distinct a subject in itself that it may best be reserved for separate treatment elsewhere.³

ACADEMY. (See also the titles SCHOOLS; UNIVERSITIES AND COLLEGES; TAXATION.)—"Academy" originally meant a garden, grove, or villa near Athens, where Plato and his followers held their philosophical conferences; but of course we are not to adopt this as the present meaning of the word. It has acquired, by the usage of modern times, a variety of meanings. It is

the vigilance of municipal corporations in the performance of their duties in respect to the repair of streets and highways, and impose that duty upon those who might be utterly unable to discharge it. It would tend directly to demoralize the public service and lead to disorder, decay, and impassability of the public highways."

Further Authorities.—See to the same effect: *California*.—Eustace v. Jahns, 38 Cal. 3. *Connecticut*.—Hartford v. Talcott, 48 Conn. 425, 40 Am. Rep. 189.

Indiana.—Elkhart v. Wickwire, 87 Ind. 77. *Iowa*.—Keokuk v. Independent Dist., 53 Iowa 352, 36 Am. Rep. 226.

Kansas.—Jansen v. Atchison, 16 Kan. 358. *Louisiana*.—Betz v. Limingl, 46 La. Ann. 113.

Maryland.—Flynn v. Canton Co., 40 Md. 312, 17 Am. Rep. 603.

Massachusetts.—Kirby v. Boylston Market Assoc., 14 Gray (Mass.) 249, 74 Am. Dec. 682.

Michigan.—Taylor v. Lake Shore, etc., R. Co., 45 Mich. 74, 40 Am. Rep. 457.

Minnesota.—Noonan v. Stillwater, 33 Minn. 198, 53 Am. Rep. 23.

New Jersey.—Weller v. McCormick, 47 N. J. L. 397, 54 Am. Rep. 175.

New York.—Law v. Kingsley, 82 Hun (N. Y.) 76; Avery v. Syracuse, 29 Hun (N. Y.) 537; Fulton v. Tucker, 3 Hun (N. Y.) 529.

Rhode Island.—Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502.

Wisconsin.—Hill v. Fond du Lac, 56 Wis. 242.

1. Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; McDonald v. Lockport, 28 Ill. App. 157.

For the details of this subject, see the titles HIGHWAYS; MUNICIPAL CORPORATIONS; NEGLIGENCE; STREETS AND SIDEWALKS.

2. **Abutters' Liabilities for Defects in Highway Caused by Them**—*England*.—Tarry v. Ashton, 1 Q. B. Div. 314.

United States.—Robbins v. Chicago, 4 Wall. (U. S.) 657.

California.—Pastene v. Adams, 49 Cal. 87; Barry v. Terkildsen, 72 Cal. 254, 1 Am. St. Rep. 55; Malloy v. Hibernia Sav., etc., Soc. (Cal., 1889), 21 Pac. Rep. 525.

Dakota.—Sanders v. Reister, 1 Dakota 145. *Georgia*.—Maddox v. Cunningham, 68 Ga. 431, 45 Am. Rep. 500.

Illinois.—Nelson v. Godfrey, 12 Ill. 20; Severin v. Eddy, 52 Ill. 189; Gridley v. Bloomington, 68 Ill. 47.

Indiana.—Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727.

Iowa.—Calder v. Smalley, 66 Iowa 219, 55 Am. Rep. 270.

Kansas.—Osage v. Larkin, 40 Kan. 206, 10 Am. St. Rep. 186.

Maine.—Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Stratton v. Staples, 59 Me. 94.

Maryland.—Murray v. McShane, 52 Md. 217, 36 Am. Rep. 367.

Massachusetts.—Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Jager v. Adams, 123 Mass. 20, 25 Am. Rep. 7; Smethurst v. Independent Cong. Church, 148 Mass. 261, 12 Am. St. Rep. 550.

Michigan.—Wilkinson v. Detroit Steel, etc., Works, 73 Mich. 405.

Minnesota.—Landru v. Lund, 38 Minn. 538.

Nebraska.—Omaha Hotel Assoc. v. Walter, 23 Neb. 280.

New Hampshire.—Garland v. Towne, 55 N. H. 55, 20 Am. Rep. 164.

New Jersey.—Temperance Hall Assoc. v. Giles, 33 N. J. L. 260.

New York.—Church of Ascension v. Buckhart, 3 Hill (N. Y.) 193; Congreve v. Morgan, 18 N. Y. 84, 72 Am. Dec. 495; Congreve v. Smith, 18 N. Y. 79; Sexton v. Zett, 44 N. Y. 432, affirming 56 Barb. (N. Y.) 119; Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; Manger v. Harrison, 14 N. Y. Wkly. Dig. 201.

Ohio.—Nagle v. Brown, 37 Ohio St. 7.

Pennsylvania.—Bush v. Johnston, 23 Pa. St. 209; Homan v. Stanley, 66 Pa. St. 464, 5 Am. Rep. 389; Piollet v. Simmers, 106 Pa. St. 96, 51 Am. Rep. 496.

Wisconsin.—Jochem v. Robinson, 66 Wis. 638, 57 Am. Rep. 298, 72 Wis. 199; Denby v. Willer, 59 Wis. 241.

Compare with the foregoing, Jones v. Nichols, 46 Ark. 207, 55 Am. Rep. 575.

3. See the titles SPECIAL ASSESSMENTS; TAXATION.

sometimes used to designate a school for teaching a particular art or science. But it is commonly understood to mean a school or seminary of learning (holding a rank between a university or college and a common school) in which the arts and sciences in general are taught.¹

ACCEPT. (For cross-references see ACCEPTANCE.)—The word "accepted" imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound.²

1. *Academy of Fine Arts v. Philadelphia County*, 22 Pa. St. 498. In this case it was held that the *academies* meant to be exempted from taxation by the Pennsylvania Act of 16th April, 1838, were those designed for purposes of education of a general character. The Pennsylvania Academy of Fine Arts, in Philadelphia, is not exempted by that act from taxation.

Wilson v. State, 35 Ark. 427, was an indictment for selling liquor within three miles of an *academy*. Counsel for defendant asked that the jury be instructed that "by *academy* is meant a seminary of learning or school holding a rank between a university or college and a common school. A university or college is the highest grade of institution of learning, and a common school is where the ordinary branches of education are taught." This instruction was refused by the trial judge, and the refusal was approved by the appellate court, which said: "His honor the circuit judge did not deem it necessary for him to indorse all these definitions. The term *academy*, employed in the statute, in the indictment, in the prohibiting order of the county court, and by the witnesses, is one in common use, and doubtless the jury very well understood its meaning as ordinarily used and applied to a grade of schools."

2. *Tempest v. Fitzgerald*, 3 B. & Ald. 683.

The delivery of goods to the place where the purchaser's agent directed, and the shipping by the agent to a port where defendant had given general directions to have such goods sent, constitute a sufficient acceptance. *Snow v. Warner*, 10 Met. (Mass.) 132, 43 Am. Dec. 417.

Where there was a parol contract for the sale of a horse, payment on delivery, and the purchaser called and exercised the horse and gave some directions, but before payment or delivery the horse died, it was held that the buyer was not liable for the price. "The word *accepted* imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound." *Tempest v. Fitzgerald*, 3 B. & Ald. 680.

There is no *acceptance* where a verbal purchase of winter tares was made to be paid for on delivery and to be delivered when called for. *Howe v. Palmer*, 3 B. & Ald. 321.

Upon a verbal contract of sale of goods of more than fifty dollars value, a delivery of them, in accordance with such contract, to a general carrier, not designated or selected by the buyer, does not constitute such a delivery and *acceptance* under the statute of frauds as to pass the title to the goods. *Rodgers v. Phillips*, 40 N. Y. 530.

Where a merchant sold goods to another upon an arrangement that a third party was to collect the account and pay over the same, less a commission, and such third party was furnished with duplicate bills of account, made out in the name of the purchaser, and wrote across those retained by the merchant the word "*accepted*," signing his name, such third party did not thereby make himself liable as a guarantor. *Hatch v. Antrim*, 51 Ill. 106.

An affidavit that a person has *accepted* an office does not sufficiently show a user to comply with the statute 5 and 6 Will. IV., c. 76, § 50, and a *quo warranto* cannot be granted against him on such affidavit. *Reg. v. Slatter*, 11 Ad. & El. 505, 39 E. C. L. 153.

Accept and Receive Distinguished.—The *New York* statute of frauds provides that in certain cases the contract shall be void unless "the buyer shall *accept* and receive part of such goods." It was held that a delivery of goods to a general carrier, in pursuance of the order of a purchaser, to be transported to him, is not such an "*acceptance* and receipt" of the goods as takes the case out of the statute. *Rodgers v. Phillips*, 40 N. Y. 519.

A board of supervisors accepted an architect's plans on condition of receiving a reliable bid on the basis of such plans. It was held that the *receipt* of a bid alone was necessary, not the *acceptance* of a bid. The court said: "In the next place it is argued that the condition was not fulfilled; that the first resolution means that a bid of the kind specified must be *accepted* by the board; and that it did not accept any. But the resolution does not say *accepted*. It says 'received.' And we do not think the expressions are equivalent. Probably most men have received many invitations and proposals which they have not *accepted*. In popular usage the words certainly differ in meaning. And we are not aware of any technical meaning which they have. The context supports this view. For it is provided that the party bidding must be 'reliable,' and that he must be willing to give bonds. What was the use of putting in these provisions upon defendant's theory? The whole would be included in the word *accepted*. The object probably was to be reasonably sure that the plans did not require too great an outlay, and this was accomplished when the board found a reliable party who was willing to do the work and give bonds for its satisfactory performance." *In re Rowland's Estate* (Cal., 1888), 16 Pac. Rep. 315.

Acceptable Price.—In *Condict v. Cowdrey*, 57 N. Y. Super. Ct. 66, it was held, where a broker sued for commissions, that the words in his client's letter, "the price I may ac-

ACCEPTANCE.—In the law of sales, see the title SALES; of other medium than money as payment, see the title PAYMENT; acceptance of checks, see the title CHECKS; so as to remove contract from operation of statute of frauds, see the title FRAUDS, STATUTE OF; acceptance of charter by corporation, see the title CORPORATIONS (PRIVATE); land dedicated to public, see the title DEDICATION; of an offer, see the title CONTRACTS; acceptance of bills and notes, see the title BILLS AND NOTES; of orders, see the title ORDERS; as to tender, see the title TENDER.

ACCESS. (See also the titles BASTARDY; HUSBAND AND WIFE; LEGITIMACY.)—At common law neither the husband nor wife could prove access or nonaccess. A statute allowing the parties to testify in their own behalf does not change the rule,² unless expressly indicated.³

cept for the land," did not refer to money actually paid. The court said: "The words in that letter, 'the price I may *accept*' for the land, are similar to those used in one of the opinions above cited. There the words '*acceptable price*' clearly mean price, or rate of payment, satisfactory to the vendor, and do not mean money actually paid in consummation of the sale." The case referred to in the opinion is that of *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 381, 22 Am. Rep. 441.

2. *Boykin v. Boykin*, 70 N. Car. 262, 16 Am. Rep. 776.

3. *Tioga County v. South Creek Tp.*, 75 Pa. St. 436. In this case it is said: "That issue born in wedlock, though begotten before, is presumptively legitimate, is an axiom of law so well established that to cite authorities in support of it would be a mere waste of time. So the rule that the parents will not be permitted to prove nonaccess for the purpose of bastardizing such issue is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nev-

ertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child, is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it."

Access of Light. (See also the title ANCIENT LIGHTS.)—"In my judgment the word *access* as used in § 3, 2 and 3 Wm. IV., c. 71 (*Access and Use of Light*), does not refer to the *access* through the orifice, through the aperture or window, but to the freedom of passage over the servient tenement; and I think some confusion has arisen from supposing that the *access* referred to there is the *access* through the window of the dominant tenement. Undoubtedly the two are closely connected together, because the right acquired under this section of the statute by the dominant tenement is governed and measured by the *access* to the dominant tenement, and therefore the aperture which lets the light into the dominant tenement defines in a manner familiar to us all the area which must be kept free over the servient tenement. The two things are closely connected together; the one is the measure of the other; but they are not the same thing." *Scott v. Pape*, 31 Ch. Div. 554. See also *Greenwood v. Hornsey*, 33 Ch. Div. 471; *Cooper v. Straker*, 40 Ch. Div. 21.

ACCESSION.

By ARCHIBALD R. WATSON.

I. DEFINITION, 247.

II. GENERAL PRINCIPLES, 247.

III. APPLICATION OF THE DOCTRINE TO PERSONALTY, 248.

1. *Labor Performed upon, or Materials Added to, Property without Owner's Consent*, 249.
 - a. *Under Bona Fide Mistake as to Ownership*, 249.
 - b. *By Wilful Trespasser*, 251.
 - c. *Liability of Owner for Compensation*, 252.
 - d. *What Constitutes a Change of Species*, 253.
2. *Mortgagees of Personality*, 254.

IV. APPLICATION OF THE DOCTRINE TO PERSONALTY WHEN ANNEXED TO REALTY, 255.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the various forms of action, such as *REPLEVIN*, *TROVER*, and the like, in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCRETION*; *AGISTMENT*; *ANIMALS*; *BAILMENTS*; *CONFUSION OF GOODS*; *EMBLEMENTS*; *FIXTURES*.

I. DEFINITION.—Accession is a source of title to property, by virtue of its incorporation with, or annexation to, that which is already the property of the individual in whom the right to the acquisition is thus vested.¹

II. GENERAL PRINCIPLES.—*Scope of Article.*—The property to which title is thus acquired may be either real or personal;² but as the subject of the acquisition of title to real property by accession is considered under a subsequent title,³ this article will be confined in its scope to a discussion of the doctrines relating to the acquisition of title to personality as a result of its incorporation or union with other personality, or as a result of its annexation to realty.

To What Causes Due.—Accession may be due to either natural or artificial causes, or to a combination of both, in which last instance it has been denominated "mixed accession."⁴

1. Sweet Law Dict.

"The ownership of a thing, whether it be real or personal, movable or immovable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially. This is called the right of accession." Bouv. Law Dict.

In the French and Louisiana Codes, the right of accession is defined to be the right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accession, either naturally or artificially. 2 Kent Com. (13th ed.) 360; *Zella v. Southern Yacht Club*, 34 La. Ann. 837.

Derivation of "Accession."—The word "accession" is derived from the Latin *accessio*,

which latter word was used to denote one of the three methods of originally acquiring property; one of the other two being *occupatio*, where that which belongs to no one is acquired by him who first takes it; and the third being *traditio*, where title is acquired by a transfer of ownership. See 2 Black. Com. 405; 2 Kent Com. (13th ed.) 361.

In Connection with International Law, accession is the absolute or conditional acceptance, by one or several states, of a treaty already concluded between other sovereignties. Bouv. Law Dict. See generally the title *INTERNATIONAL LAW*.

2. See Bouv. Law Dict.

3. See the title *ACCRETION*.

4. **Natural, Artificial, and Mixed Accession.**—Accession, it has been held, may be either

An Accession falls to the Principal.—The entire subject is fairly comprehended in the maxim *accessio cedit principali*—an accession shall fall to the principal. This rule however is not free from exception, nor can it, in all cases, be readily determined what is the principal and what the accessory.¹

III. APPLICATION OF THE DOCTRINE TO PERSONALTY—Owner of Principal Materials.—It is a generally recognized rule of property that a product which results from the combination of the materials of several individuals belongs to the one who contributes the principal element.² Thus, where saddles were manufactured,

natural, artificial, or mixed. Natural accession is where addition is made to the original property by the operation of nature, without premeditated human design; as where land is gradually washed away and deposited on another's land, thereby vesting title to such increase in the owner of the land upon which the deposit is made. Artificial or industrial accession is that produced by the labor and industry of man; as where, out of materials not all the property of a single individual, a new thing is produced; or in the case of "confusion of goods;" or where a building is erected by one upon the land of another, which involves the consideration of the doctrine of "fixtures." Mixed accession is the result of a combination of natural and artificial forces, as where one sows or plants in the ground of another. See 2 Colquhoun Rom. Civ. Law, §§ 979-995.

100.—The title to ice is in the owner of the water upon which it is formed. Higgins v. Kusterer, 41 Mich. 318, 32 Am. Rep. 160.

1. Summary of Doctrine of Accession.—In 2 Schouler on Personal Property 37, it is said, with respect to accession: "Upon the whole, this modern doctrine of accession appears to be thus properly summed up: One whose personal property has been taken by another without authority may follow and recover it from any wilful trespasser who has worked it into the composition of any chattel which presents the appropriated materials as still capable of identification; and even, according to the *New York* cases, where the materials taken cannot be absolutely identified in the new product. Even where the trespass was not wilful, but accidental, as through some mistake of fact, and the materials taken can still be identified, and the labor and materials of the trespasser are not shown to have gone farther than the appropriated materials towards producing the present valuable chattel, the owner of the materials is still entitled to the chattel. But where no element of wilfulness or intentional wrong whatever appears on the part of him who applied another's materials, and the identity of those materials has finally disappeared in the new product; or where it can be shown that his own labor and materials contributed essentially more to the value of the present chattel than those materials which he took without intending a wrong, he shall keep the chattel as his own, making, however, due compensation to the owner of the materials for what he took. The true object of the rule is, first of all, to protect owners whose rights of property are invaded; next, to screen an involuntary or casual tres-

passer, who has expended of his own toil or materials in good faith, from punishment more severe than mere carelessness or honest error deserves."

2. *Connecticut*.—Beers v. St. John, 16 Conn. 322.

Kansas.—Arnott v. Kansas Pac. R. Co., 19 Kan. 95.

Kentucky.—Lampton v. Preston, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104.

Maine.—Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582.

Massachusetts.—Comins v. Newton, 10 Allen (Mass.) 518; Stevens v. Briggs, 5 Pick. (Mass.) 177; Ryder v. Hathaway, 21 Pick. (Mass.) 305.

Michigan.—Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

New York.—Pierce v. Schenck, 3 Hill (N. Y.) 28; Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Hyde v. Cookson, 21 Barb. (N. Y.) 92; Gregory v. Stryker, 2 Den. (N. Y.) 628; Foster v. Pettibone, 7 N. Y. 435, 57 Am. Dec. 43; McConihe v. New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 140; Stephens v. Santee, 49 N. Y. 35; Mack v. Snell, 140 N. Y. 193, 37 Am. St. Rep. 534.

Tennessee.—Dunn v. Oneal, 1 Sneed (Tenn.) 106, 60 Am. Dec. 142.

Parts of Two Chains Made into One.—In Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582, an action of trespass was brought for an iron chain. It appeared that the plaintiff and the defendant each had a chain which had been broken into various pieces. The plaintiff carried the broken pieces of the two chains to a blacksmith and had them united so as to make two other chains. The defendant carried away one of these chains, a very small part of which had been formed with some of the links which had previously been his. Verdict was rendered for the plaintiff, and in upholding the decision of the trial court, Howard, J., on appeal, said: "This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of law that if the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole by right of accession. This was a rule of the Roman and of the English law, and has been adopted, as it is understood, in the United States generally." Similar observations are made in Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; and Dunn v. Oneal, 1 Sneed (Tenn.) 106, 60 Am. Dec. 142.

partly out of the materials of one party, but principally out of the materials of another, it was held that the latter party acquired, by reason of his ownership of the principal materials, title to the saddles when finished.¹

Union of Materials must be Complete.—It seems to be regarded as the correct doctrine, however, that the union of materials must be so complete as to render ready separation impossible; for it has been held that there was no occasion for the application of the law of accession, where wheels and axles belonging to one party had been added to the wagon-bed of another.²

1. Labor Performed upon, or Materials Added to, Property without Owner's Consent.—*a. UNDER A BONA FIDE MISTAKE AS TO OWNERSHIP.*—A person who, under a *bona fide* mistake as to ownership, performs labor upon, or adds materials to, the property of another, may acquire title to the entirety, if the result of the labor performed or materials added has been such as to transform the original materials into a new species.³

New Rails Made from Old Ones, with New Iron Added.—A railroad company made a contract with a rolling-mill company for the making, at the mill, of new rails out of old rails supplied by the railroad, with the addition of new iron to be supplied by the mill; and it was held that if the railroad company furnished the chief or principal part of the material for the new rails, the property in the material and in the new rails as finished remained in the railroad. *Arnott v. Kansas Pac. R. Co.*, 19 Kan. 95.

Manufacture of Shears.—In *Mack v. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, it appeared that there was a contract between the parties relating to the manufacture of a lot of shears, whereby one of the parties was to furnish the principal materials and the other was to add some materials, and manufacture and complete the shears according to a sample agreed upon. It was held that the materials added became the property of the first party by virtue of the law of accession.

The Property in a Rifle with a Skeleton Stock was held to be unchanged because there was fitted thereto a wooden stock, and a new lock was substituted for the old. *Comins v. Newton*, 10 Allen (Mass.) 518.

When the Article is not Substantially Changed.—An article repaired by the addition of repairer's materials, provided it remains substantially the same thing, belongs, together with the additional materials, to the owner of the original article. Thus, a worn-out wagon, repaired by the addition of materials, though of greater value than the wagon in its worn-out condition, remains, nevertheless, the property of the owner of the wagon. *Gregory v. Stryker*, 2 Den. (N. Y.) 628.

Cars, constructed principally out of the materials of the manufacturer, are the property of the manufacturer until delivered. *McConihe v. New York, etc., R. Co.*, 20 N. Y. 495, 75 Am. Dec. 420.

1. *Dunn v. Oneal*, 1 Sneed (Tenn.) 106, 60 Am. Dec. 140.

2. **When the Parts are Severable.**—In *Clark v. Wells*, 45 Vt. 4, 12 Am. Rep. 187, it appeared that a wagon was sold by B. to H., with the condition that it was to remain the property of the vendor until the purchase-money was paid; and that the purchase-money was never paid. Afterward, at the

instance of H., the plaintiff repaired the wagon by substituting new wheels and axles for the old. H. took the wagon thus repaired from the plaintiff's shop, without his knowledge or consent. Afterward H. gave his note to the plaintiff for such repairs, with the condition and agreement that the running part of said wagon should remain the property of the plaintiff until said note was paid. B. thereafter took possession of the wagon, with the new gear added by the plaintiff, and sold it to the defendant, without knowledge of the plaintiff's claim, whereupon the plaintiff sued the defendant, in trover, for the conversion of the wheels and axles. It was held that the action could be maintained. The court said: "We think the ordinary repairs upon a personal chattel, such as making new bolts, nuts, thills, and the like, become accretions to and merge in the principal thing, and become the property of the general owner. But in this case, the wheels and axles constitute the running part of the wagon. They could be followed, identified, severed without detriment to the wagon, and appropriated to other use without loss. The plaintiff was the owner, and never parted with the property. He had the right to resume possession when H. failed to pay the note. The property remained in him as perfectly as if, in the exigency of a broken wheel or axle, he had loaned them for temporary use. * * * We think, under the facts stated in this case, the property in those wheels and axle continued in the plaintiff, and that an action lies for the conversion."

3. *England.*—*Martin v. Porter*, 5 M. & W. 352; *Wild v. Holt*, 9 M. & W. 672.

Alabama.—*Riddle v. Driver*, 12 Ala. 590.

Connecticut.—*Swift v. Barnum*, 23 Conn. 523.

Iowa.—*Murphy v. Sioux City, etc., R. Co.*, 55 Iowa 473.

Kentucky.—*Lampton v. Preston*, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104.

Maine.—*Eaton v. Munroe*, 52 Me. 63.

Michigan.—*Wetherbee v. Green*, 22 Mich. 315, 7 Am. Rep. 653.

Minnesota.—*Lindsay v. Winona, etc., R. Co.*, 29 Minn. 411, 43 Am. Rep. 228.

New York.—*Betts v. Lee*, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307; *Rockwell v.*

Relative Value of Completed Product and Original Materials.—The same is true if the completed product is so valuable, in comparison with the value of the original materials, as to justify the position that the original materials are themselves but accessories to the labor performed or materials added, as contributing to the value of the completed thing.¹

Saunders, 19 Barb. (N. Y.) 483; Hyde v. Cookson, 21 Barb. (N. Y.) 92; Baker v. Wheeler, 8 Wend. (N. Y.) 508, 24 Am. Dec. 66; Firmin v. Firmin, 9 Hun (N. Y.) 572.

North Carolina.—Worth v. Northam, 4 Ired. (N. Car.) 102.

Pennsylvania.—Snyder v. Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466.

Vermont.—Gallup v. Josselyn, 7 Vt. 337.

Specification.—The acquisition of title by a change of species is what is denominated by Blackstone and other text writers "specification." See 2 Black. Com. 404.

When Right by Specification may be Acquired.—"Right by specification," said Robertson, J., in Lampton v. Preston, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104, "can only be acquired when, without the accession of any other material, that of another person, which has been used by the operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities which identify it."

Change must be Sufficient to Destroy Identity.—Even though one is not a wilful trespasser, he acquires no property in another's goods by changing their form, where the change is not sufficient to destroy their identity. Firmin v. Firmin, 9 Hun (N. Y.) 572. See also Gallup v. Josselyn, 7 Vt. 337.

"The civil law," said the court in Betts v. Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 369, "required the thing to be changed into a different species, and to be incapable of being restored to its ancient form, as grapes made into wine, before the original proprietor could lose his title; nor even then did the other party acquire any title by the accession unless the materials had been taken away in ignorance of their being the property of another."

The Manufacture of Canvas into Sails.—The manufacture of sails out of canvas is not such a change of species as will vest in the manufacturer the title to the sails. The owner of the canvas, therefore, remains the owner of the canvas when made into sails, and may maintain an action of replevin therefor. Eaton v. Munroe, 52 Me. 63.

Grass—Hay.—One who enters upon the land of another and cuts the grass growing thereon, and makes it into hay, does not thereby acquire any property in it. Murphy v. Sioux City, etc., R. Co., 55 Iowa 473; Lindsay v. Winona, etc., R. Co., 29 Minn. 411, 43 Am. Rep. 228.

Trees Made into Boards.—In Davis v. Easley, 13 Ill. 193, the owner of trees wrongfully cut brought replevin for boards made therefrom. In upholding the plaintiff's right to maintain the action, the court declared the general principle that the owner of property wrongfully taken might pursue it, so long as it was capable of identification, whatever alteration in form it might have undergone, unless it

was annexed to, or made a part of, some other thing which was the principal; as, for instance, timber converted into a house.

1. The Question of Relative Values.—"No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundredfold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it nor adds materially to the value. There may be complete changes, with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article." Cooley, J., in Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

In Lampton v. Preston, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104, it appeared that there had been a controversy as to boundary between adjacent landowners, in which one was awarded property which had previously been occupied by another, and upon which there were a number of bricks, some burned and some in an unburned state, which had been manufactured by the occupant. These bricks were claimed by the newly established proprietor and converted to his own use, whereupon the present suit was brought by the unsuccessful litigant in the boundary issue, to recover their value. In this case Robertson, J., took occasion to consider at length the principles of right by "specification" and "accession," as applicable to the facts presented; the conclusion reached being that, in the first particular, the change of species as to the burned brick was sufficiently complete to vest title thereto in the innocent laborer; and with regard to the right by accession, that the value of burned brick was too disproportionate, as compared with that of the original clay, to allow the owner of the latter to claim the brick. The opinion of the court in this case is very interesting, containing, as it does, a full and luminous discussion of the doctrines of title by accession and specification. See also Baker v. Meisch, 29 Neb. 227.

In Lewis v. Courtright, 77 Iowa 190, it appeared that the defendant had purchased what purported to be the right to make hay on plaintiff's wild land, of one whom he believed to be authorized to sell such right, but who had in fact no such authority. The uncut grass was worth not more than ten cents per acre, while the hay made from an acre was worth three or four dollars. The defendant acted in entire good faith, and cut

Test as to Value.—Just what this proportion of values must be does not seem to have been exactly determined; it having merely been held that a change of property should be admitted when the value of that which has been expended upon the original materials is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner "so gross and palpable as to be apparent at the first blush."¹

b. BY WILFUL TRESPASSER.—If a trespasser, with knowledge that the property operated upon belongs to another, wrongfully makes additions thereto or performs labor thereon, the original proprietor will retain title to his original materials and acquire title to the completed product, without regard to the comparative value of the labor performed or materials added,² and without regard to a change of species wrought, provided the original materials can be traced.³ Thus, where corn, the property of one individual, had been

no more grass after he was informed that he was proceeding without the owner's authority. The plaintiff sought to recover, not the value of the grass, but of the cured hay. It was held that he could not so recover.

1. Cooley, J., in *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520.

2. *Alabama*.—Riddle v. Driver, 12 Ala. 590.

Illinois.—Davis v. Easley, 13 Ill. 193.

Kentucky.—Lampton v. Preston, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104; Strubbee v. Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251.

Maine.—Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627.

Massachusetts.—Willard v. Rice, 11 Met. (Mass.) 493, 45 Am. Dec. 226.

Mississippi.—Heard v. James, 49 Miss. 236.

New Hampshire.—Barron v. Cobleigh, 11 N. H. 557.

New York.—Hart v. Ten Eyck, 2 Johns. Ch. N. Y. 62; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Roth v. Wells, 29 N. Y. 471; Hyde v. Cookson, 21 Barb. (N. Y.) 92; Baker v. Wheeler, 8 Wend. (N. Y.) 508, 24 Am. Dec. 66.

Pennsylvania.—Snyder v. Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466.

Wisconsin.—Jenkins v. Steanka, 19 Wis. 128, 88 Am. Dec. 75; Single v. Schneider, 30 Wis. 570.

In the Digest of Justinian, lib. 10, tit. 4, leg. 12, § 3, it appears: "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, knowing they are not his own, he shall be compelled by action to produce said wine, oil, or garments."

In Vinnius' Institutes, tit. 1, pl. 25, the rule is similarly stated: "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

3. *Arkansas*.—Brock v. Smith, 14 Ark. 431.

Iowa.—Murphy v. Sioux City, etc., R. Co., 55 Iowa 473.

Maine.—Freeman v. Underwood, 66 Me. 229.

Michigan.—Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653. Compare *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520.

Minnesota.—Nesbitt v. St. Paul Lumber Co., 21 Minn. 491.

New York.—Betts v. Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; Curtis v. Groat, 6 Johns. (N. Y.) 169, 5 Am. Dec. 204; Chandler v. Edson, 9 Johns. (N. Y.) 362; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Brown v. Sax, 7 Cow. (N. Y.) 95; Kinsey v. Leggett, 71 N. Y. 395.

Pennsylvania.—Snyder v. Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466.

As a general rule, where expense has been bestowed by a wrongdoer upon another's property without changing its form, as by paying freight on it, or the like, he is entitled to no deduction therefor. Kinsey v. Leggett, 71 N. Y. 395.

Timber Converted into Rails and Posts.—In Snyder v. Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466, it was held that replevin would lie for timber converted into rails and posts by a wilful trespasser. "A wilful trespasser," said the court, "cannot acquire title to property merely by changing it from one article into another, as by working trees cut down into shingles, or into cordwood, logs, or rails. And that the law has been so from time immemorial is evident from the year-books, where it is said that whatever alteration of form any property may undergo, the owner thereof may take it in its new shape, provided he can prove the identity of the original materials; as if leather be made into shoes, cloth into a garment, trees squared into timber, or iron made into bars."

The Civil Law.—In Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, Ruggles, J., said: "The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product in its improved state belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property."

made into whiskey by another, a wilful trespasser, it was adjudged that the manufactured product belonged to the owner of the corn.¹

c. LIABILITY OF OWNER FOR COMPENSATION—Involuntary Wrongdoer.—Where a chattel, the property of another, has been improved or added to under a mistake as to its ownership, and remains in the possession of the party who has performed the labor or added the materials, and the latter is sued for the conversion thereof, recovery should be had only to the extent of the value of the original materials, and not the value of the chattel in its improved state.²

Wilful Wrongdoer.—But in an action against a wilful wrongdoer for the taking and conversion of a chattel, where the defendant has increased the value of the thing sued for, the owner is entitled to recover the value of the property in its new form, and the trespasser is not allowed any deduction or compensation for the value of the improvements.³

When no Liability Exists, though there is Honest Mistake.—If the property has come to the possession of the owner of the original materials, the improvement or alteration not having been sufficient to effect a change of title, there is no liability to compensate the other party for the labor performed or materials

1. *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307.

2. **Measure of Recovery.**—Maule, J., in *Reid v. Fairbanks*, 13 C. B. 729, which was an action of trover for a ship which had been greatly improved after conversion, said: "It may be that the wrongdoer, who acquires no property in the thing he converts, acquires no lien for what he expends upon it, and the owner may bring detinue or trover. But it does not follow that if the owner brings trover he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have sustained by the conversion of their ship." "That is," said Jervis, C.J., in the same case, "what she was really worth when the defendants converted her."

In *Aborn v. Mason*, 14 Blatchf. (U. S.) 405, the owner of a certain lot of wool and yarn delivered it to a manufacturer to be made into cloth, at a specified price, it also being provided that the wool and yarn and the product should remain in the various stages of manufacture the property of the original owner of the materials. The manufacturer, after adding a large amount of materials to the original stock, became bankrupt, and the partially manufactured goods came into the possession of his assignee, of whom the owner of the wool and yarn demanded them, offering to pay the charges. The assignee declined to deliver them, but completed their manufacture, expending thereon about eight hundred dollars, and afterwards sold the manufactured product for three thousand two hundred dollars. The owner of the wool and yarn brought an action of trover against the assignee, and it was held that he could recover only the value of his original materials, or, rather, the value of the manufactured product less the materials furnished by the manufacturer, his assignee, and the cost of manufacture. In this case the court said: "But courts have not been satisfied with a rigid rule which would invariably permit a plaintiff to recover the enhanced value without any deduction for

the labor and expenses which, in the absence of fraud, have been bestowed upon such property by the defendant, and have not enforced the rule to its full extent." And the following cases were cited: *Wood v. Morewood*, 3 Q. B. 440, 43 E. L. L. 810; *Hilton v. Woods*, L. R. 4 Eq. 432; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

A case very similar to the one just set forth was that of *Hyde v. Cookson*, 21 Barb. (N. Y.) 95. Here a tanner had agreed to manufacture into leather, and deliver to the plaintiff, a quantity of hides belonging to the latter. After partially doing the work the tanner became insolvent, making an assignment to the defendants, who refused to return the hides to the plaintiff. Thereupon an action was brought against the assignees for the conversion of the hides; and the measure of damages was held to be the value of the plaintiff's interest in the hides, and not their enhanced value, when manufactured into leather.

In *Clement v. Duffy*, 54 Iowa 635, it is declared that the rule, that one who bestows labor upon another's property, as by taking his grain and threshing it, is not entitled, in an action for the taking, to compensation for his labor, should be limited to wilful wrongdoers.

3. *Rice v. Hollenbeck*, 19 Barb. (N. Y.) 664; *Joslin v. Cowes*, 60 Barb. (N. Y.) 55; *Spicer v. Waters*, 65 Barb. (N. Y.) 234; *Firmin v. Firmin*, 9 Hun (N. Y.) 572; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Baker v. Meisch*, 29 Neb. 227; *Gray v. Robinson* (Arizona, 1893), 33 Pac. Rep. 712.

In *Moody v. Whitney*, 38 Me. 176, 61 Am. Dec. 239, it was held that the original owner must have possessed himself of the property with its accessions to entitle him to support trover for the value of the article and its improvements, but that a demand on the part of the original owner and refusal by the taker, after it had passed into its improved condition, might be regarded as evidence of a conversion after the first taking, which might admit of a recovery of the enhanced value.

added, even though such other party was under an honest mistake as to ownership.¹

d. WHAT CONSTITUTES A CHANGE OF SPECIES.—There is much confusion of opinion as to what constitutes such an alteration of species or change of identity as to effect a transfer of title to the thing transformed.²

No Settled Rule—Certain Distinctions.—On account of this lack of unanimity, no rule of universal application can be deduced from the authorities, but it may be of advantage to call attention to a distinction which seems to have been made by the decisions on this point, but never clearly recognized; namely, between cases involving the acquisition of title in this manner by a trespasser without wrongful intent, and cases involving the acquisition of title by a wilful wrongdoer. In the latter instance, a simple change of species is not enough to effect a transfer of title to the article thus resulting, if the fact that such article was made from the materials of another is susceptible of proof; while in the former instance the mere loss of apparent identity is said to be sufficient.³

1. *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520.

2. **Change of Identity.**—Ruggles, J., delivering the opinion of the court in *Silbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307, said: "There is great confusion in the books upon the question what constitutes change of identity. In one case (5 Hen. VII., folio 15) it is said that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity, and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it cannot be reclaimed by the owner, because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (Moore 20) trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber, 'because the greater part of the substance remained.' But if this were the true criterion, it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is therefore no definite settled rule on this question." See also the observations of Cooley, J., in *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653.

The Various Tests Applied.—In the opinion of the court in *Lampton v. Preston*, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104, attention is

also called to the lack of unanimity of the decisions as to what constitutes a change of species. The court observes that in some authorities it is said that the proper test of the right of the first owner is the identity of the thing or material; in others, its susceptibility of reduction into the original species; in others, the nonaccession of adventitious value exceeding that of the original material; and in others, the retention, by the material, of its specific character or kind or qualities; and quotes from Justinian, lib. 2, tit. 1, p. 75: "If the species or manufactured article can be reduced to its former rude materials, then the owner of such materials is to be reckoned the owner of the species; but if the species cannot be so reduced, then he who made it is understood to be the owner of it; for example, a vessel can easily be reduced to the rude mass of brass, silver, or gold of which it was made; but wine, oil, or flour cannot be converted into grapes, olives, or corn; neither can mulse be separated into wine and honey. But if a man makes any species, partly with his own and partly with the materials of another, as if he should make mulse with his own wine and another's honey, or should make a garment with an intermixture of his own wool with that of another, it is not to be doubted in such cases but that he who made the species is master of it."

3. **Distinction between Cases of Wilful Trespasser and Mere Wrongdoer.**—In *Silbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307, Ruggles, J., said: "There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whiskey in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron. * * * In all

2. Mortgagees of Personality—General Rule.—Mortgagees of personality have a lien upon the increment of, and accessions to, the property covered by the mortgage.¹

Articles in Incomplete State.—Where articles in an incomplete state are mortgaged, they become when finished part of the original security.²

Live Stock.—A mortgage upon live stock is said to cover its natural increase and produce.³

Plants and Shrubs.—And it has been held that plants and shrubs, the growth of cuttings from plants and shrubs which were mortgaged, pass to the mortgagee by accession.⁴

cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation."

In *Curtis v. Groat*, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204, it was held that, where a person entered upon the land of another and cut timber, which he made into coal, such person cannot maintain trover for coal which remains in the possession of the owner of the timber. The court uses this language: "The defendant's timber, by being cut and converted into coal, had, indeed, lost its primitive form, but the identity of the original material was here ascertained or admitted. * * * This case, then, comes within the decision of *Betts v. Lee*, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368, and the principle mentioned in that case, that a wilful trespasser cannot acquire a title to property merely by changing it from one species into another, applies to this case."

Where bricks had been made from the land of another and burned by a party under honest mistake as to the title to the realty, they were held to be the property of the laborer, although proved to have been made from another's earth, and susceptible of reduction to the original species again by a chemical process. *Lampton v. Preston*, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104. See also *Riddle v. Driver*, 12 Ala. 590; *Wetherbee v. Green*, 22 Mich. 319, 7 Am. Rep. 653; *Wilson v. Nason*, 4 Bosw. (N. Y.) 167; *Benedict v. National Bank*, 4 Daly (N. Y.) 177; *Barry v. Brune*, 8 Hun (N. Y.) 399; *Newton v. Porter*, 5 Lans. (N. Y.) 425; *Chandler v. Edson*, 9 Johns. (N. Y.) 362; *Babcock v. Gill*, 10 Johns. (N. Y.) 287.

1. Lien upon Increment of Property Mortgaged—*United States Courts.*—*Merchants' Nat. Bank v. McLaughlin*, 2 Fed. Rep. 128; *Fowler v. Merrill*, 11 How. (U. S.) 375.

Illinois.—*Simmons v. Jenkins*, 76 Ill. 479.

Iowa.—*Thorpe v. Cowles*, 55 Iowa 408.

Maine.—*Pulcifer v. Page*, 32 Me. 404, 54 Am. Dec. 582.

Maryland.—*Evans v. Merriken*, 8 Gill & J. (Md.) 39.

Massachusetts.—*Comins v. Newton*, 10 Allen (Mass.) 518; *Sumner v. Hamlet*, 12 Pick. (Mass.) 76.

New Hampshire.—*Cudworth v. Scott*, 41 N. H. 456.

New York.—*Frost v. Willard*, 9 Barb. (N. Y.) 440.

Rhode Island.—*Jenckes v. Goffe*, 1 R. I. 511.

See also the authorities cited in the following notes to this subdivision.

The Mortgage of a Vessel attaches to a new set of sails provided by the mortgagor, after the execution of the mortgage, to replace old sails. *Southworth v. Isham*, 3 Sandf. (N. Y.) 448.

Rolling Stock.—Repairs and improvements made upon rolling stock, by a company which has, subsequently to the mortgage, acquired the right to control the road, are in the nature of accessions to a mortgaged chattel, and subject first to the mortgage that has priority of date. *Hamlin v. Jerrard*, 72 Me. 62.

Putnam v. Cushing, 10 Gray (Mass.) 334; *Harding v. Coburn*, 12 Met. (Mass.) 333, 46 Am. Dec. 680; *Perry v. Pettingill*, 33 N. H. 433; *Dunning v. Stearns*, 9 Barb. (N. Y.) 630.

Additions Made to Unfinished Machinery which is covered by a mortgage are also included in the mortgage. *Ex p. Ames*, 1 Low. (U. S.) 561; *Jenckes v. Goffe*, 1 R. I. 511.

A Mortgage on Leather, cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor. *Putnam v. Cushing*, 10 Gray (Mass.) 334. In the opinion of the court in this case it was said: "The property still remained in the mortgagee, notwithstanding the change by the completion of the work as originally designed; the materials being cut and prepared therefor before the mortgage. It was not the case of a new acquisition of articles of property not held by the mortgagor at the time of making the mortgage, but merely of labor performed upon materials and stock of the plaintiff, acquired by his mortgage. In such case the accession will pass to the mortgagee."

Unfinished Pruning Shears.—A mortgage upon unfinished pruning shears has been held to cover them when finished, though greatly increased in value. *Perry v. Pettin-gill*, 33 N. H. 433.

A Mortgage upon Cucumbers in Bulk, and in brine, has been held to cover them when pickled and in bottles. *Dunning v. Stearns*, 9 Barb. (N. Y.) 630.

Elmore v. Fitzpatrick, 56 Ala. 400; *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 726; *Gundy v. Biteler*, 6 Ill. App. 510; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151. *Compare* *Winter v. Landphere*, 42 Iowa 471; *Thorpe v. Cowles*, 55 Iowa 408.

Pledge.—In case of a pledge, not only the thing pledged passes, but also, as accessory, its natural increase, as, for instance, the young of a flock of sheep. *Story on Bailments*, 292.

4. Bryant v. Pennell, 61 Me. 108, 14 Am. Rep. 550.

IV. APPLICATION OF THE DOCTRINE TO PERSONALTY WHEN ANNEXED TO REALTY—

General Rule.—The produce of the soil belongs to the proprietor thereof;¹ and the owner of real property, to which personalty is attached, thereby becomes the owner of the personalty, the chattel being regarded as having become merged in and a part of the realty.²

1. **Crops** belong to the party who is in lawful possession of the land upon which they are grown. *Montgomery v. Merrill*, 65 Cal. 432; *Reilly v. Ringland*, 39 Iowa 106; *Freeman v. McLennan*, 26 Kan. 151; *Crotty v. Collins*, 13 Ill. 567. And see *Simpkins v. Rogers*, 15 Ill. 397; *Thomes v. Moody*, 11 Me. 139; *De Mott v. Hagerman*, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443; *Brothers v. Hurdle*, 10 Ired. (N. Car.) 490, 51 Am. Dec. 400. See also the title EMBLEMENTS.

It has been held, however, that where a trespasser is in possession of land, and both sows and harvests crops, such crops, after they are gathered, belong to the trespasser, even as against the owner of the land. *Lindsay v. Winona, etc.*, R. Co., 29 Minn. 411, 43 Am. Rep. 228. See also *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663.

Trees belong to the owner of the soil in which the root grows. *Waterman v. Soper*, 1 Ld. Raym. 737; *Adams v. Smith*, 1 Ill. 283; *Hoffman v. Armstrong*, 46 Barb. (N. Y.) 337.

A Tree which Grows upon the Dividing Line between two property owners will belong to such owners equally. *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225.

Where an action of trespass was brought for carrying away boards, the defendants pleaded, that as the tree from which the boards were made, though the trunk thereof was upon the plaintiff's land, had been nourished and supported by the extension of its roots into the defendant's soil, he, the defendant, had a right to the boards carried away. The court held the plea to be bad, however, observing that the plaintiff could not "limit the roots of the tree, how far they shall grow and go." *Masters v. Pollie*, 2 Roll. Rep. 141. See also *Holder v. Coates, M. & M.* 112.

2. *Mathes v. Dobschuetz*, 72 Ill. 438; *Hannibal, etc., R. Co. v. Crawford*, 68 Mo. 80; *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Fryatt v. Sullivan Co.*, 7 Hill (N. Y.) 529; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Caldwell v. Eneas*, 2 Mill (S. Car.) 348, 12 Am. Dec. 681; *Jenkins v. McCurdy*, 48 Wis. 628, 33 Am. Rep. 841. And see *Butler v. Page*, 7 Met. (Mass.) 40, 39 Am. Dec. 757; *New York, etc., R. Co. v. Western Union Tel. Co.*, 36 Hun (N. Y.) 205; *Lacustrine Fertilizer Co. v. Lake Guano, etc.*, Co., 82 N. Y. 476.

Where a Rail Fence is built upon the land of another, title to the rails becomes vested in the owner of the land. *Wentz v. Fincher*, 12 Ired. (N. Car.) 297, 55 Am. Dec. 416. See also *Ricketts v. Dorrel*, 55 Ind. 470; *State v. Graves*, 74 N. Car. 396.

Manure Made upon a Farm, in the ordinary course of husbandry, is a part of the real estate. *Sawyer v. Twiss*, 26 N. H. 345. And see *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333.

House Built upon Land of Another.—By the Roman law, a house built upon the land of another, with no matter whose materials, became the property of the owner of the land by the law of accession; for without the land which gives it support, say the writers, the structure could not exist. See 2 Colquhoun Rom. Law, § 991; *Ortolan Rom. Law*, § 394. See also *Aldrich v. Husband*, 131 Mass. 480.

Personalty of One Person Attached to Realty of Another by Third Party.—Where a third party attached the personal property of one individual to the land of another, it was held that the owner of the personalty could not be so deprived of his property if it could be moved without great inconvenience and injury. *Shoemaker v. Simpson*, 16 Kan. 43.

In *Reese v. Jared*, 15 Ind. 142, 77 Am. Dec. 88, it appeared that J. had employed R. to erect a house on a certain lot, and was to pay him therefor by conveying to him a certain other lot. R. was to furnish the materials. After building the house he discovered that in the agreement under which it was built there were mistakes in the numbers of the lots to be built upon and to be taken in payment. So, apprehending loss to himself, and with a view to prevent it, he sold, while yet in possession thereof, the house he had erected for J., to S., and moved it into a lot belonging to S., placing it upon a permanent brick foundation. J. then sued R. and S., not for the value of the house, but to recover possession of the specific article—the house itself. *Perkins, J.*, delivering the opinion of the court, said: "When the lumber, out of which the house in question was constructed, was growing in the tree, it was real estate. While at the saw-mill, in the log and lumber, it was personal estate. When erected into a house on a permanent foundation on J.'s lot, it became real estate again. When traveling on rollers from J.'s to S.'s lot, it became a second time personal estate, and when fixed on a permanent foundation on S.'s lot it returned again to its original character of real estate. Whose real estate?" Citing several passages from Bent's Commentaries, the court continued: "According to the above-quoted authority, the recovery in this case should have been the value of the house, not the house itself." And see *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532; *Rives v. Dudley*, 3 Jones Eq. (N. Car.) 126, 67 Am. Dec. 231.

"It is a principle of law," said the court in *Cross v. Marston*, 17 Vt. 533, 44 Am. Dec. 353, "that the owner may pursue his property wherever he can trace it. But when the property has lost its identity, it ceases to have its legal existence; as, if one man should convert a quantity of bricks, and erect them into a house, and then deed the house to a third person, these bricks will have lost their identity—they are so changed in their char-

Qualification.—Where, however, one party contemplates making additions to the real estate of another, as the placing of a structure thereon, the personality may retain its characteristics, and the title thereto be retained by a contract with the owner of the realty to that effect.¹

acter that they cease to be chattels, and the owner cannot pursue them against such third person."

Building Temporarily upon Land—How Regarded.—When a building is but temporarily upon and not attached to land, as during its transit from one lot to another, it is regarded as personal property. *Titus v. Mabee*, 25 Ill. 257; *Salter v. Sample*, 71 Ill. 430.

Buildings Covered by Mortgage.—When buildings covered by a mortgage are removed to and attached to another freehold, not included in the mortgage, they become a part of such freehold, and are lost to the mortgagee. *Harris v. Bannon*, 78 Ky. 568; *Tomlinson v. Thompson*, 27 Kan. 72.

The case of *Peirce v. Goddard*, 22 Pick. (Mass.) 559, 33 Am. Dec. 764, was submitted on an agreed statement of facts, by which it appeared that D., being the owner of a lot of land with a dwelling-house thereon, mortgaged the same to the plaintiff; afterwards he took down the house, and with the materials thereof partly, and partly with new materials, built a new house on another lot of his own at some distance; and after the new house was completed, he, for a valuable consideration, sold the last-mentioned lot and house to the defendant. There were two counts in the declaration—one for the conversion of the newly erected house, and the other for the conversion of the materials with which it was built, belonging to the old house. The plaintiff's counsel insisted that the old house was the property of the plaintiff, and that D. had no right to take it down, and could not therefore acquire any property in the materials by such a wrongful act; that the new house, being built from the materials of the old house in part, became the property of the plaintiff, although new materials were added, by the right of accession; and that D., having no property in the house as against the plaintiff, could convey no title to it to the defendant. It was held, however, that the materials of which the house was built became the property of the owner of the land by the law of accession. The court in this case cite the rule as laid down by Chancellor Kent, in volume 2 of his Commentaries, pp. 360, 361: "If," he says, "A builds a house on his own land with the materials of another, the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer

to the owner of the materials for the value of them."

In Bro., tit. Property, pl. 23, it is said that if timber be taken and made into a house, it cannot be reclaimed by the owner, for the nature of it is changed, and it has become a part of the freehold.

1. Agreement that House shall Remain Personalty.—An agreement between parties that a house shall remain personal property is effectual. *Sagar v. Eckert*, 3 Ill. App. 412; *Walton v. Wray*, 54 Iowa 531.

Agreement for Tenant to Remove House within Limited Time.—An agreement, however, which merely gives the tenant the right to remove a structure within thirty days after notice of the termination of the lease, does not constitute such building personalty. *Stafford v. Adair*, 57 Vt. 63.

Subsequent Purchaser: How Affected by such Agreements.—In *Sullivan v. Jones*, 14 S. Car. 362, it was decided that an agreement that mill-stones placed in a mill should remain personalty, was valid and effectual, and might be enforced even against a subsequent owner of the mill. It has been held, however, in another case, to be a general rule that the owner of real property cannot, by agreement between himself and another, make that which is a part of the realty, personal property, as against a subsequent purchaser of the land for value and without notice, there having been no actual severance when the subsequent grant was made. *Lacus-trine Fertilizer Co. v. Lake Guano, etc., Co.*, 82 N. Y. 476.

Consent of Owner of Land to Erection of House.—Where the owner of land consents to the erection of a building thereon, with the materials and for the use of another, such use being disconnected from the use of the land, the building will remain the property of the builder with whose materials it was made. *Corwin Dist. Tp. v. Moorehead*, 43 Iowa 466. And see *Rush County v. Stubbs*, 25 Kan. 322.

Intention.—Even though a structure, by reason of its not being attached to the soil, would not be regarded as realty ordinarily, it may become a part of the real property upon which it rests if an intention to that effect is manifested. *Freeman v. Lynch*, 8 Neb. 192; *Doscher v. Blackiston*, 7 Oregon 143; *Lipsky v. Borgmann*, 52 Wis. 256, 38 Am. Rep. 735.

ACCESSORY.

By L. P. McGEHEE.

I. DEFINITIONS, 257.

II. ACCESSORY DISTINGUISHED FROM PRINCIPAL, 258.

1. *Constructive Presence*, 258.
2. *Actors in a Common Criminal Design*, 259.
3. *Principal Ex Necessitate*, 259.
4. *Acting through Innocent Agent*, 260.

III. WHO MAY BE AN ACCESSORY, 260.

IV. OFFENSES WHICH ADMIT OF ACCESSORIES, 260.

V. DEPENDENCE OF ACCESSORY ON PRINCIPAL, 262.

1. *At Common Law*, 262.
2. *As Modified by Statute*, 263.

VI. ACCESSORY BEFORE THE FACT, 264.

1. *Generally*, 264.
2. *Intent*, 264.
3. *Relation between Crime and Incitement*, 265.

VII. ACCESSORY AFTER THE FACT, 266.

1. *Generally*, 266.
2. *The Felony Complete*, 266.
3. *Accessory's Knowledge of Felony*, 267.
4. *Accessory's Act of Assistance*, 267.
5. *Harboring Wife or Kindred*, 268.

VIII. ACCESSORY GUILTY ALSO IN ANOTHER CAPACITY, 269.

IX. EVIDENCE, 269.

X. PUNISHMENT, 270.

XI. JURISDICTION, 271.

XII. EXTRADITION OF ACCESSORIES, 271.

CROSS-REFERENCES.

As to the INDICTMENT AND TRIAL, see 1 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* p. 66.

For matters related to the subject ACCESSORY, see the following titles in the *ENCYCLOPÆDIA OF LAW*: *ACCOMPLICE*; *AIDER AND ABETTOR*; *CRIMINAL LAW*; and the titles where particular crimes are treated.

I. DEFINITIONS—Accessory Generally.—An accessory is one who is not the chief actor in a felonious offense, nor present at its performance, but is in some way concerned therein, either before or after the act committed.¹

1. 4 Bl. Com. 34; U. S. v. Hartwell, 3 Cliff. (U. S.) 227; Able v. Com., 5 Bush (Ky.) 698; Connaughty v. State, 1 Wis. 171, 60 Am. Dec. 370.

An accessory is "one who participates in a felony too remotely to be deemed a principal." 1 Bishop New Crim. Law, § 663.

1 C. of L.—17.

These definitions embody the common-law conception of an accessory. Statutory definitions have substantially changed the meaning of the term in several states. Thus, in the *Illinois Criminal Code* the term is so defined as to include principals in the second degree. 1 Starr & Curtis's *Illinois Annot. Stats.* 828, ¶ 331.

Accessory Before the Fact.—An accessory before the fact is one who, being absent at the time the crime is committed, yet procures, counsels, or commands another to commit it.¹

Accessory After the Fact.—An accessory after the fact is one who, knowing the felony to have been committed, receives, relieves, comforts, or assists the felon.²

II. ACCESSORY DISTINGUISHED FROM PRINCIPAL³—1. **Constructive Presence.**—It results from the definitions that absence from the scene of the crime is necessary to constitute an accessory either before or after the fact.⁴ The most ancient authorities of the law recognized a third species of accessories, namely, accessories at the fact. These, however, were at an early period distinguished as principals in the second degree, or aiders and abettors. To bring one within this class, his presence at the commission of the felony is necessary; but it is held a presence, in construction of law, if he is near enough to render assistance to the main design should the need arise.⁵ Thus, constructive presence may be actual absence. But in all cases the accused is an accessory merely, if he is too far from the scene of the crime to render assistance if the occasion should arise.⁶

1. 1 Hale P. C. 615; U. S. v. Hartwell, 3 Cliff. (U. S.) 227; Griffith v. State, 90 Ala. 583; Hatley v. State, 15 Ga. 346; People v. Katz, 23 How. Pr. (N. Y. Supreme Ct.) 93; State v. Ricker, 29 Me. 86; State v. Sims, 2 Bailey (S. Car.) 31; Com. v. Smith, 11 Allen (Mass.) 256; Able v. Com., 5 Bush (Ky.) 698; State v. Cassady, 12 Kan. 550; State v. Maxent, 10 La. Ann. 743; Myer v. State, 42 Miss. 642.

Mr. Bishop's definition, quoted in *Spear v. Hiles*, 67 Wis. 361, is "a person whose will contributes to a felony committed by another as principal, while he himself is too far away to aid in the felonious act." 1 Bishop New Crim. Law, § 673.

Accessories before the fact are termed accomplices in the Penal Code of *Texas*. *Cook v. State*, 14 Tex. App. 101; *Ogle v. State*, 16 Tex. App. 361.

2. 1 Hale P. C. 618; 4 Bl. Com. 37; U. S. v. Hartwell, 3 Cliff. (U. S.) 227; State v. Davis, 14 R. I. 283; Loyd v. State, 42 Ga. 221; Wren v. Com., 26 Gratt. (Va.) 952; Tully v. Com., 11 Bush (Ky.) 154; State v. Cassady, 12 Kan. 423; Harris v. State, 7 Lea (Tenn.) 124; Warden v. State, 24 Ohio St. 146.

3. **Principal and Accessory Before the Fact Distinguished.**—In *State v. Poynier*, 36 La. Ann. 572, Manning, J., observed: "The distinction between principals and accessories before the fact is in most cases a distinction without a difference, and often requires nice and subtle verbal refinements to express it. In some of our states it has been abolished by statute—in others, judicial decisions have attenuated it until it is perceptible only by a close mental effort. The fact is, it is not a creature of statutory law, but wholly of judicial construction, the origin of which is so vague and indeterminate that the text-writers have not found out where to place it. It is supposed to have originated at a time when criminal lawyers puzzled their wits and taxed their ingenuity to invent metaphysical shades of distinction, such for instance as that between principals and accessories at the fact, which once existed but is now exploded. The distinction between principals and accessories before the fact is fast following its kindred technical refinement."

4. **Absence Necessary to Constitute an Accessory.**

—If the party were present when the offense was committed, he is not an accessory. *Rex v. Gordon*, 1 Leach C. C. 515; 1 East P. C. 352; *Rex v. Butteris*, 6 C. & P. 147. See *Reg. v. Brown*, 14 Cox C. C. 144; *Able v. Com.*, 5 Bush (Ky.) 698; *Hatley v. State*, 15 Ga. 346; *Dugger v. State*, 27 Tex. App. 95; U. S. v. Hartwell, 3 Cliff. (U. S.) 221; *State v. Farr*, 33 Iowa 561; 4 Bl. Com. 35. See also remarks of *Shope, J.*, in *Usselson v. People*, 149 Ill. 612.

How Modified by some of the Criminal Codes.—But it is otherwise under the peculiar definition of the criminal codes of some of the states: "An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime." 1 Starr & Cur. *Illinois* Annot. Stats. 828, § 331; *Usselson v. People*, 149 Ill. 612. So in *Nevada*, see *State v. Hamilton*, 13 Nev. 386. See also statutes of *California*. See also *infra* this title, *Dependence of Accessory on Principal—As Modified by Statute*.

5. See the title AIDER AND ABETTOR; see also 1 Russell's Crim. L. 49.

6. 1 Hawk P. C. c. 29, § 16; *State v. Poynier*, 36 La. Ann. 577; *State v. Hamilton*, 13 Nev. 386; *Reg. v. Tuckwell*, Car. & M. 215; *Wixson v. People*, 5 Park. Cr. Rep. (N. Y.) 119; *Rex v. Soares*, R. & R. C. 25; *Rex v. Manners*, 7 C. & P. 801; *True v. Com.*, 90 Ky. 651; *Com. v. Knapp*, 9 Pick. (Mass.) 496; 20 Am. Dec. 491; *State v. Wisdom*, 8 Port. (Ala.) 511; *Rex v. Kelly*, R. & R. C. 421. "The last cited case," says Sir James Stephen, Dig. Crim. L. art. 37, note, "perhaps marks the line between a principal in the second degree and an accessory. In that case B. stole horses and brought them to A., who was waiting half a mile off; A. and B. then rode away on them. It was held that A. was an accessory before the fact."

"Although an act be committed in pursuance of a previously concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offense is committed, are not principals." Per Goldthwaite, J., in *State v. Wisdom*, 8 Port. (Ala.) 511, citing *Rex v. Soares*, R. & R. 25; *Rex v. Davis*, R. & R. 113; *Archbold's Crim. L.* 44.

2. Actors in a Common Criminal Design.—The principle that, where several persons are engaged in a common criminal design, with a distribution of the parts, and each takes the part assigned to him, all are equally guilty, is often applied to distinguish principal from accessory.¹

3. Principal Ex Necessitate.—Where the nature of the means employed to

For obvious reasons the tendency of the courts has been to consider parties, though at a distance from the scene of crime, as aiders and abettors, that is principals, rather than accessories. See the title *AIDER AND ABETTOR*. Since the passage of statutes making the offense of an accessory before the fact a substantive felony of the same grade as that of the principal criminal, the distinction has become unimportant and practically obsolete.

1. When all the Participants are Principals—Accomplices and Principals Distinguished.—*Com. v. Ahearn*, 160 Mass. 300; *Reg. v. Kelly*, 2 C. & K. 379; 61 E. C. L. 3; *Rex v. Standley*, R. & R. C. C. 305; *State v. Nash*, 7 Iowa 347; *State v. Shelledy*, 8 Iowa 479; *State v. Myers*, 19 Iowa 517; *State v. Heyward*, 2 Nott. & M. (S. Car.) 312; 10 Am. Dec. 604; *Trimble v. State* (Tex. Crim. App., 1894), 26 S. W. Rep. 727. See also the title *CRIMINAL CONSPIRACY*.

In *Smith v. State*, 21 Tex. App. 123, it is said, collecting the authorities in that state: "We believe that the distinction drawn by us between principal offenders and accomplices as known to our code has been as clearly and accurately stated as we are able to present it, in the cases of *Cook v. State*, 14 Tex. App. 96, and *Bean v. State*, 17 Tex. App. 61. In the former case it is said: 'We are of opinion that the proper distinction between these two characters of offenders is this: The acts constituting an accomplice are auxiliary only, all of which may be and are performed by him anterior and as inducements to the crime about to be committed; whilst the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but, when it is actually committed, is doing his part of the work assigned him in connection with the plan and furtherance of the common purpose, whether he be present where the main fact is to be accomplished or not. Where the offense is committed by the perpetration of different parts which constitute one entire whole, it is not necessary that the offenders should be in fact together at the perpetration of the offense, to render them liable as principals. In other words, an accomplice under our statute is one who has completed his offense before the crime is actually committed, and whose liability attaches after its commission by virtue of his previous acts in bringing it about through the agency or in connection with third parties. The principal offender acts his part individually in furtherance of and during the consummation of the crime.' In *Bean v. State* it is said: 'The dividing line between the two is the commencement of the commission of the principal offense. If the parties acted together in the commission of the offense, they are principals. If they agreed to commit the offense together, but did not act together in its commission, the one who actually committed it is the principal, while the other, who is not present at the commission, and who was not in any way aiding in

its commission, as by keeping watch or by securing the safety or concealment of the principal, would be an accomplice. To constitute a principal, the offender must either be present where the crime is committed or he must do some act during the time when the offense is being committed which connects him with the act of commission in some of the ways named in the statute. Where the acts committed occur prior to the commission of the principal offense, or subsequent thereto, and are independent of, and disconnected with, the actual commission of the principal offense, and no act is done by the party during the commission of the principal offense, such a party is not a principal offender, but is an accomplice or an accessory according to the facts.' In *Welsh v. State*, 3 Tex. Ct. 413, where the employer ordered his servants to take all the cattle they could find, and that in the meantime he would go ahead and make arrangements to ship or sell them, he was held to be a principal offender, because he was engaged at the time of the theft in performing his part in the consummation of the conspiracy to steal and dispose of them. In *Scale v. State*, 7 Tex. App. 361, part of the conspirators were to steal the horses in question, whilst the rest were to get up provisions and an outfit to enable them all jointly to take the horses to Fort Elliott and sell them. (See statement in *McKeen v. State*, 7 Tex. App. 631.) They were all held principal offenders because doing their separate parts and acting together in consummating the conspiracy. In *McC Campbell v. State*, 9 Tex. App. 124, 35 Am. Rep. 726, it is said: 'If the facts should show an actual participancy by appellant in the original fraudulent taking, a conviction may be sustained for the offense charged, although the appellant may not have been personally present at such taking.' In *Cohea v. State*, 9 Tex. App. 173, it is said: 'He need not be actually present at the taking, if the act was committed in pursuance of a common intent and a previously formed design where the mind united and concurred with that of the actual taker.'"

One of the Confederates Signalling to the Others—A Principal.—In *State v. Hamilton*, 13 Nev. 386, one Laurie had conspired with others to rob a stage on the road from Eureka to some point in Nye County. Laurie was to observe when the stage left Eureka, and by building a fire on a mountain in Eureka County to signal his confederates in Nye County, thirty or forty miles off. On the principle that by building such fire he acted a part in a common criminal design, he was held to be a principal. See also *State v. Tally* (Ala., 1894), 15 So. Rep. 722.

Party Absent from the Scene to Facilitate Commission of the Crime—A Principal.—In *State v. Poynier*, 36 La. Ann. 572, it is held that one who, with knowledge that a crime has been determined on, keeps away from the scene to facilitate its execution, is a principal, although not near enough to give assistance physically.

effect the crime is such that the criminal is absent when the crime is accomplished, his absence does not make him an accessory, but he is *ex necessitate* the principal.¹

4. **Acting through Innocent Agent.**—If one accomplishes a criminal design through the instrumentality of an innocent agent, he is the principal; but if the agent is himself privy to the criminal intent, the absent director of the crime is but an accessory.²

III. WHO MAY BE AN ACCESSORY.—One may be an accessory by procuring a crime, although such procurer is incompetent to commit the offense in person, by reason of age, sex, condition, or class.³

IV. OFFENSES WHICH ADMIT OF ACCESSORIES—Common Law Felony.—By the common law only crimes of the grade of felony admit of accessories.⁴

Statutory Felony.—Statutory felonies have, in this respect, the incidents of felonies at common law, and consequently admit of accessories,⁵ and so with general statutory definitions of felony.⁶

Treason.—All in any way concerned in the higher crime of treason are principals.⁷

1. Thus, where one lays poison, or prepares a trap or pitfall, for another, he is *ex necessitate* the principal. 4 Bl. Com. 34. 35.

2. *People v. Adams*, 3 Den. (N. Y.) 208; *Wixson v. People*, 5 Park. Cr. Rep. (N. Y.) 119; *People v. McMurray*, 4 Park. Cr. Rep. (N. Y.) 234; *People v. Katz*, 23 How. Pr. (N. Y. Supreme Ct.) 93; *People v. Hall*, 57 How. Pr. (N. Y. Supreme Ct.) 342; *McCarney v. People*, 83 N. Y. 412, 38 Am. Rep. 456; *People v. Lyon*, 99 N. Y. 210; *Lake Shore, etc., R. Co. v. Goldberg*, 2 Ill. App. 228.

If A. gives B. a forged note in order that B. may utter it, if the latter is ignorant of the note being forged, the uttering by the latter is the uttering of the former although A. was absent at the time of the actual uttering. *Rex v. Palmer*, 1 New Rep. 96, 2 Leach 978. So too where a counterfeit is passed by an innocent boy, acting for a guilty principal. *Com. v. Hill*, 11 Mass. 136; *Gregory v. State*, 26 Ohio St. 510, 20 Am. Rep. 774. But if he who received the note knew that it was forged, the person who gave it is but an accessory. *Rex v. Soares, R. & R. C. C.* 25.

3. See *U. S. v. Bayer*, 4 Dill. (U. S.) 407; *State v. Sprague*, 4 R. I. 257; *U. S. v. Snyder*, 14 Fed. Rep. 554; *State v. Comstock*, 46 Iowa 265; *Lord Audley's Case*, 3 How. St. Tr. 413; *People v. Chapman*, 62 Mich. 280; *People v. McKane* (N. Y., 1894), 38 N. E. Rep. 950.

A man may be accessory before the fact in stealing his own goods, if he procure another to do so with a felonious design. *Cro. Eliz.* 537.

The majority of the cases cited concern aiders and abettors, but the principle is announced as to accessories before the fact as well, and evidently applies to them. There is no reason in principle why the same should not be true of accessories after the fact, but no cases seem to have arisen.

4. *Stratton v. State*, 45 Ind. 476, *Wilson v. State*, 1 Wis. 184.

Petit Larceny.—Petit larceny, although a felony at common law (2 East Cr. L. 736; 3 Chitt. Cr. L. 924), never admitted of accessories. 1 Hale P. C. 530; *Foster* 73; *Rex v. Evans, Foster* 73; 2 East P. C. 744; *Ward v. People*, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144; *State v. Goode*, 1 Hawks (N. Car.) 463; *State v. Barden*,

1 Dev. (N. Car.) 518. And in states where all larceny has been reduced to the grade of petit larceny by statute, there can be no accessories. *State v. Fox*, 94 N. Car. 928; *State v. Gaston*, 73 N. Car. 93, 21 Am. Rep. 459.

5. Where an act of parliament declares an offense to be felony, though it mentions nothing of accessories before or after, yet virtually and consequentially those that counsel or command the offense are accessories before the fact, and those who knowingly receive the offender are accessories after. 1 Hale P. C. 614; 3 Inst. 59; *Rex v. Bear*, 2 Salk. 417; *Reg. v. Tracy*, 6 Mod. 30; *Rex v. Sadi*, 1 Leach C. C. 468; *Rex v. Soares, R. & R.* 25; *U. S. v. Wilson, Baldw.* (U. S.) 104; *Hughes v. State*, 12 Ala. 458; *Meister v. People*, 31 Mich. 99; *State v. Pybass*, 4 Humph. (Tenn.) 442. Yet while this is the presumption, a clear expression of the legislative will overcomes it, and the whole becomes largely a question of statutory construction. 1 Hale P. C. 614; *Meister v. People*, 31 Mich. 99. See *Stamper v. Com.*, 7 Bush (Ky.) 612.

6. Where a statute defines felony as an offense for which the punishment is imprisonment in the state prison, every such offense admits of accessories before the fact. *Nichols v. State*, 35 Wis. 308.

7. **Treason.**—Every act of incitement, aid, or protection, which in felony would render a man accessory before or after the fact, in the case of high treason (whether by common law or by statute) makes him a principal. 2 Inst. 183; 1 Hale P. C. 613; 2 Hawk. P. C. c. 29, § 2, 5; *Foster* 341; 4 Bl. Com. 35; 1 Roscoe Cr. Ev. (8 Am. ed.) 181; *Throgmorton's Case*, 1 Dyer 98 b. pl. 56; *Somerville Case*, 1 Anderson 109; *Anonymous*, J. Kel. 19; *Dalison* 14; *Anonymous*, *Dalison* 16; *Rex v. Clayton*, 1 C. & K. 128; *U. S. v. Greathouse*, 4 Sawyer (U. S.) 457; *Whittaker v. English*, 1 Bay (S. Car.) 15; *Chanet v. Parker*, 1 Mill (S. Car.) 333; *State v. Lymburn*, 1 Brev. (S. Car.) 397; *State v. Goode*, 1 Hawks (N. Car.) 463. High treason at common law is the only treason known to American law, or to English law since the statute 9 Geo. IV. chap. 31, abolishing petit treason, and high treason has become simply treason.

The Maxim, "in Treason all are Principals," Considered.—While the cases all announce that

Misdemeanor.—The same is true in regard to the lower offenses which are misdemeanors.¹

"in treason all are principals," or that "there are no accessories in treason," the application of this principle is involved in doubt. In *Queen v. Tracy*, 6 Mod. 30, Lord Holt said: "It is to be known that a fact which will make one accessory in felony, in treason and trespass make him a principal; and sure one may leave the matter either way, viz., making him principal or laying it special, as the case may appear upon evidence. In treason all are principals, and if upon statute 25 Edw. III. c. 2, one conspires the death of the queen and is committed to prison for the same, and one procures him to escape or harbor him after such time as he knows him charged with treason, or to have committed treason, you may indict him upon the special matter that A. committed treason and that B. knew of it and received him, and yet this is not one of the treasons mentioned by that statute, but it is so by necessary consequences of law."

If this dictum be correct the indictment may be either special or against the defendant as principal. If the accessory may be indicted as principal it would naturally result that he may be tried independently of and before the actual principal. But the authorities are otherwise.

In *U. S. v. Burr*, 4 Cranch (U. S.) 469, Marshall, C. J., after examining the reason of the rule requiring the trial of the principal to precede that of the accessory in felonies, said: "The whole reason of the law, then, relative to the principal and accessory, so far as respects the order of trial seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent. If from reason we pass to authority, we find it laid down by Hale, Foster, and East, in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by Leach, in his notes on Hawkins, and is not, so far as the court has discovered, anywhere contradicted." This seems to reduce the rule that there can be no accessories to treason to an empty form of words. Chief Justice Marshall, going further, seems inclined to hold that the whole doctrine of accessorial treason has no application to treason as defined in the Constitution of the *United States*. In the same case he says: "The authority of the English cases on this subject depends in a great measure on the adoption of the common-law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly applicable to treasons committed within the *United States*. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact, and the question whether the reasonableness of the act may be decided, in the first instance, in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of

principal and accessory, rather than on the positive authority of those decisions."

1. **Misdemeanors.**—1 Hale P. C. 613; 4 Bl. Com. 36; *U. S. v. Mills*, 7 Pet. (U. S.) 138; *Scott v. State*, 30 Ala. 503; *English v. State*, 35 Ala. 428; *Hubbard v. State*, 10 Ark. 378; *Sanders v. State*, 18 Ark. 198; *Kinnebrew v. State*, 80 Ga. 232; *Stratton v. State*, 45 Ind. 468; *Lay v. State* (Ind. App., 1895), 39 N. E. Rep. 768; *State v. Gurnee*, 14 Kan. 111; *State v. Ruby*, 68 Me. 543; *State v. Murdock*, 71 Me. 454; *Com. v. Dale*, 144 Mass. 363; *Williams v. State*, 12 Smed. & M. (Miss.) 59; *Hogsett v. State*, 40 Miss. 522; *Wagner v. State* (Neb., 1894), 61 N. W. Rep. 85; *State v. Dowell*, 106 N. Car. 722, 19 Am. St. Rep. 568; *People v. Lyon*, 99 N. Y. 210; *State v. Munson*, 25 Ohio St. 381; *Curlin v. State*, 4 Yerg. (Tenn.) 143. The general doctrine is thus stated by Dick, D. J., in *U. S. v. Sykes*, 58 Fed. Rep. 1000: "In misdemeanors, any person who advises, procures, aids, or abets in the commission of the offense, or who, having knowledge that such offense has been committed, in any way assists the wrongdoer in concealing his crime or in making his escape from the officers of the law, is a principal; the general rule of law being that whatsoever participation in the transactions either before or after the fact would make the party an accessory in felony will make him a principal in a misdemeanor, and he may be so charged in a bill of indictment." The statement of this rule of law is usually limited to accessories before the fact. Participation in misdemeanors after the fact is committed is hardly noticed by the law. See *Stratton v. State*, 45 Iowa 468; *Kinnebrew v. State*, 80 Ga. 232.

In *U. S. v. Gooding*, 12 Wheat. (U. S.) 460, Story, J., said: "Under such circumstances [in misdemeanors] there is no room for the question of actual or constructive presence or absence; for whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of an actor indispensable to furnish a right to try the person who aids or abets the act; each in the eye of the law is deemed guilty as a principal."

Reason of the Rule.—The reason of this rule of the law is thus stated by Blackstone, 4 Com. 36: "In trespass" (and trespass is here to be taken in its wide sense as equivalent to misdemeanor, see 1 Bish. New Crim. L. § 625; Anderson's Dict of Law, *sub voce*) "all are principals, because the law, *qua de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors."

Illustrations.—Thus, one who employs another to commit, or incites another to, any of the following offenses is a principal:

Assault and Battery.—*Rex v. Jackson*, 1 Lev. 124; *State v. McClintock*, 8 Iowa 203; *Bell v. Miller*, 5 Ohio 250; *Baker v. State*, 12 Ohio St. 214; *State v. Lymburn*, 1 Brev. (S. Car.) 397; *Dunman v. State*, 1 Tex. App. 593.

Assault with Intent to Commit Rape.—*State v.*

Manslaughter.—Since from the nature of the offense there can be no deliberation or premeditation in manslaughter, it follows that there can be no accessories before the fact therein,⁷ but there may be accessories after the fact.⁸

Forgery.—In forgery, it was anciently laid down that there could be no accessories, but this applies only to forgery at the common law, which was but a misdemeanor.⁹

V. DEPENDENCE OF ACCESSORY ON PRINCIPAL—1. At Common Law.—The conception which was the basis of the whole doctrine of accessories at the common law, was that of an offense at once distinct and dependent.¹

In what Manner Distinct.—It was distinct, so that it was necessary to draw the in-

Jones, 83 N. Car. 605; State v. Dowell, 106 N. Car. 722, 19 Am. St. Rep. 568.

Arresting One on a Forged Warrant.—Reg. v. Tracy, 6 Mod. 30.

Betting on Election.—Williams v. State, 12 Smed. & M. (Miss.) 58; Com. v. McAtee, 8 Dana (Ky.) 28.

Concealing and Conveying Away Slaves Charged with Capital Offenses.—State v. Westfield, 1 Bailey (S. Car.) 132.

Passing or Attempting to Pass Counterfeit Money.—U. S. v. Morrow, 4 Wash. 733; Reg. v. Greenwood, 2 Den. (C. C.) 453; State v. Cheek, 13 Ired. (N. Car.) 114.

Fitting Out Ship for Illegal Voyage.—U. S. v. Gooding, 12 Wheat. (U. S.) 460.

Forging Railroad Ticket, if such Forgery be Misdemeanor.—Com. v. Ray, 3 Gray (Mass.) 448.

Keeping Gaming-house.—Stevens v. People, 67 Ill. 587.

Keeping House of Prostitution.—People v. Erwin, 4 Den. (N. Y.) 129; Lowenstein v. People, 54 Barb. (N. Y.) 299; State v. Engeman (N. J., 1892), 23 Atl. Rep. 676; Com. v. Gannett, 1 Allen (Mass.) 7; 79 Am. Dec. 693; People v. Wright, 90 Mich. 362; Ross v. Com., 2 B. Mon. (Ky.) 417; State v. M'Gregor, 41 N. H. 407.

Violating Municipal Ordinance.—St. Johnsbury v. Thompson, 59 Vt. 301, 59 Am. Rep. 731.

Attempting to Set Fire to a Malt-house.—Reg. v. Clayton, 1 C. & K. 128.

Removal of Illicit Distilled Spirits.—U. S. v. Sykes, 58 Fed. Rep. 1000.

Maintaining Indictable Nuisance.—Com. v. Mann, 4 Gray (Mass.) 213.

Selling of Liquor Without License.—Kinnebrew v. State, 80 Ga. 232; Faircloth v. State, 73 Ga. 426; Com. v. Nichols, 10 Met. (Mass.) 259; 43 Am. Dec. 432; Com. v. Park, 1 Gray (Mass.) 553; Com. v. Ahearn, 160 Mass. 300; Smith v. Adrian, 1 Mich. 495; Schmidt v. State, 14 Mo. 137; State v. Stewart, 31 Me. 515; State v. Dow, 21 Vt. 484.

Trespass de Bonis Asportatis.—Whitney v. Turner, 2 Ill. 253.

For a Discussion of Exceptions to the Rule as to misdemeanors, see Harney v. State, 8 Lea (Tenn.) 113, where a student buying liquor within four miles of an incorporated institution of learning, where the law forbade a sale within such limits, was held not to be guilty of the offense.

A Few Cases cast some Doubt upon the Rule as to misdemeanors. See Rex v. Else, R. & R. C. C. 142; Hatley v. State, 15 Ga. 346. But these have been expressly overruled and disapproved in Reg. v. Greenwood, 2 Den. C. C. 453; Killebrew v. State, 80 Ga. 232.

In *Illinois*, under the statutory definition of accessories, there may be accessories in misdemeanors as in felonies. Van Meter v. People, 60 Ill. 168.

7. Manslaughter.—1 Hale P. C. 616, citing Rex v. Bibithe, 2 Rep. 43; Adams v. State, 65 Ind. 565; State v. Desmond, 5 La. Ann. 398. Yet in some cases there may be accessories to manslaughter. In Reg. v. Gaylor, 7 Cox C. C. 253; Dears. & B. C. C. 288, the prisoner had procured certain drugs and gave them to his wife, with intent that she should take them in order to produce abortion. She took them in his absence and died from their effects. On an indictment against him for manslaughter, it was objected that he was only an accessory before the fact, and that in law there cannot be an accessory before the fact to manslaughter. It was held that he was properly found guilty of manslaughter. During the argument, Bramwell, B., said: "Suppose a man for mischief give another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, another had counselled him to do it, would not he who counselled be an accessory before the fact?" See also People v. Newberry, 20 Cal. 440; Stipp v. State, 11 Ind. 62; State v. Bogue, 52 Kan. 79.

8. No Accessories Before the Fact in Manslaughter.—In Rex v. Greenacre, 8 Car. & P. 35; 34 E. C. L. 280, Greenacre was indicted for murder, and Gale as accessory after the fact. It was held that if the offense of Greenacre was reduced to manslaughter, Gale might, notwithstanding, be found guilty as accessory after the fact. In charging the jury, Tindal, C. J., said: "It will not be necessary, in order to find the prisoner Gale guilty of the offense with which she is charged, that the prisoner Greenacre should have been guilty of murder; but if he was guilty of another felony, viz., the offense of manslaughter, if she consorted with him, and, knowing that he had committed the offense, assisted in any way to screen him from the hand of justice, it will be sufficient." See Reg. v. Richards, L. R. 2 Q. B. Div. 311.

9. Boothes' Case, Moor. 666; 2 Hawk. P. C. c. 29, § 2; 2 East P. C. 973, and authorities cited; 1 Russell on Crimes (9th Am. ed.) 60.

1. In Stoops v. Com., 7 S. & R. (Pa.) 491; 10 Am. Dec. 482, Duncan, J., said: "The offense of the accessory, though different from that of the principal, is yet, in judgment of law, connected with it, and cannot subsist without it."

dictment against the accessory as such, and if the evidence showed the accused to be a principal, there could be no conviction,¹ and a trial and acquittal in one capacity was no bar to indictment in the other.²

In what Manner Dependent.—Its dependence was embodied in the maxim *accessorius sequitur naturam sui principalis*, the accessory follows the nature of his principal. From this it results: first, that the accessory cannot be guilty of a greater offense than his principal; and, second, that it is necessary to establish the guilt of the principal before the accessory can be tried.³

Statute of Limitations.—It has been held that accessory and principal are so far identified that the Statute of Limitations runs against the former no more than against the latter.⁴

2. As Modified by Statute—Accessory Before the Fact.—The tendency of modern legislation as concerns accessories before the fact has been to do away with the technical rules, by the operation of which the offense of the accessory was regarded as derivative and dependent. Some statutes in addition to retaining the common-law remedies against such offenders provide that they may be indicted and convicted of a substantive felony whether the principal offender shall or shall not have been convicted.⁵ Under other statutes the distinctions between principals and accessories before the fact have been practically swept away, and the latter are regarded merely as substantive offenders whose guilt is wholly independent of that of the principal.⁶

1. *Reg. v. Fallon*, 9 Cox C. C. 242; *Rex v. Plant*, 7 C. & P. 575; *Hughes v. State*, 12 Ala. 453; *Smith v. State*, 37 Ark. 274; *People v. Gassaway*, 28 Cal. 405; *McCoy v. State*, 52 Ga. 287; *Wade v. State*, 71 Ind. 535; *Able v. Com.*, 5 Bush (Ky.) 698; *State v. Allen*, 37 La. Ann. 685; *State v. Scannell*, 39 Me. 68; *Meister v. People*, 31 Mich. 99; *Josephine v. State*, 39 Miss. 613; *State v. Dewey*, 65 N. Car. 572; *Walrath v. State*, 8 Neb. 80; *State v. Wyckoff*, 31 N. J. L. 65; *People v. Katz*, 23 How. Pr. (N. Y. Supreme Ct.) 93; *Norton v. People*, 8 How. (N. Y.) 137; *McKeen v. State*, 7 Tex. App. 631; *Phillips v. State*, 26 Tex. App. 228; 8 Am. St. Rep. 471; *Rix v. State* (Tex., 1894), 26 S. W. Rep. 505; *Thornton v. Com.*, 24 Gratt. (Va.) 669; *People v. Keeper*, 2 West. Coast Rep. 878.

2. 1 Hale P. C. 625, 626; *Rex v. Birchenough*, R. & M. C. C. 477, 7 C. & P. 575; *State v. Larkin*, 49 N. H. 36; 6 Am. Rep. 456. In the opinion in the last case all the authorities are reviewed by Smith, J., and the opinion of Lord Hale (1 P. C. 625, 626; 2 P. C. 244) that one acquitted on a charge of being principal could not afterwards be indicted as accessory before the fact is shown to have been finally overruled, and the errors of Mr. Wharton, § 532 Am. Crim. Law, are pointed out. See also *State v. Buzzell*, 58 N. H. 257; 42 Am. Rep. 586; *Reynolds v. People*, 83 Ill. 479; 25 Am. Rep. 410.

Under modern statutes, whereby one may be indicted as principal and punished on evidence of being an accessory before the fact, or (in some jurisdictions) indicted as an accessory and convicted as principal, this must be otherwise.

3. 4 Bl. Com. 36; *U. S. v. Burr*, 4 Cranch (U. S.) 469. This principle appears at every point in the common-law rules regulating the indictment and trial of accessories. Thus, the indictment against an accessory must aver the principal's guilt. *Rex v. Baldwin*, 3 Camp. 265; *Jordan v. State*, 56 Ga. 92; *Ulmer v. State*, 14 Ind. 52; *Tully v. Com.*, 11 Bush (Ky.) 154;

State v. Ricker, 29 Me. 84; *State v. Chittum*, 2 Dev. (N. Car.) 49; *State v. Duncan*, 6 Ired. (N. Car.) 98; *Holmes v. Com.*, 25 Pa. St. 221. The accessory could be tried only after the conviction or outlawry of the principal unless both were tried together. *Foster*, 360; 1 Hale P. C. 623; *U. S. v. Burr*, 4 Cranch (U. S.) 503; *Ex parte Bowen*, 25 Fla. 214; *Simmons v. State*, 4 Ga. 465; *Edwards v. State*, 80 Ga. 127; *Harty v. State*, 3 Blackf. (Ind.) 386; *Com. v. Phillips*, 16 Mass. 426; *State v. York*, 37 N. H. 175; *Starin v. People*, 45 N. Y. 333; *Baron v. People*, 1 Park Cr. Rep. (N. Y.) 246; *State v. Groff*, 1 Murph. (N. Car.) 270; *State v. Duncan*, 6 Ired. (N. Car.) 98; *Sampson v. Com.*, 5 W. & S. (Pa.) 385; *Stoops v. Com.*, 7 S. & R. (Pa.) 491; 10 Am. Dec. 482; *Holmes v. Com.*, 25 Pa. St. 221; *Whitehead v. State*, 4 Humph. (Tenn.) 278; *State v. Pybass*, 4 Humph. (Tenn.) 442. On the trial of the accessory proof of the principal's guilt was essential. See *infra* this title, *Evidence*.

4. **The Crime of an Accessory Before the Fact to a Murder is Murder**, and is not barred by the Statute of Limitations. *People v. Mather*, 4 Wend. (N. Y.) 256.

5. Such is the statute of 7 Geo. IV. c. 64, which has been followed by many of the states of the Union. When the indictment is for a substantive offense under such a statute, proof of the principal's guilt seems essential. *State v. Ricker*, 29 Me. 84. See *Tully v. Com.*, 11 Bush (Ky.) 154.

6. **Accessory Before the Fact Regarded as Substantive Offender.**—Thus, one may be indicted as a principal and convicted on evidence which at common law would have established that he was an accessory before the fact. *Reg. v. Manning*, 2 C. & K. 886, 61 E. C. L. 886; *Wicks v. State*, 44 Ala. 398; *Raiford v. State*, 59 Ala. 106; *Griffith v. State*, 90 Ala. 583; *Jolly v. State*, 94 Ala. 19; *People v. Outeveras*, 48 Cal. 19 (*overruling* earlier cases); *People v. Rozelle*, 78 Cal. 84; *Minich v. People*, 8 Colo. 451; *State v. Hamlin*,

Accessory After the Fact.—The guilt of an accessory after the fact is still regarded as derivative, as at common law; but many modern statutes provide that such an accessory may be indicted and tried whether the principal offender has or has not been previously convicted, or has been pardoned, or is or is not amenable to justice.¹

VI. ACCESSORY BEFORE THE FACT—1. Generally.—In order that a person may be guilty as an accessory before the fact, it is necessary, first, that he should have shared the criminal or mischievous design of the principal felon; and, second, that that design should have been substantially effected through his incitement thereto.

2. Intent.—There must be a criminal design,² but it is immaterial whether it

47 Conn. 118, 36 Am. Rep. 54; *State v. Phelps* (S. Dak., 1894), 59 N. W. Rep. 471; *Territory v. Guthrie*, 2 Idaho 398; *Baxter v. People*, 8 Ill. 381; *Dempsey v. People*, 47 Ill. 323; *Yoe v. People*, 49 Ill. 410; *Spies v. People*, 122 Ill. 242; *Usselson v. People*, 149 Ill. 612; *Wade v. State*, 71 Ind. 535; *Bonsell v. U. S.*, 1 Green (Iowa) 111; *State v. Comstock*, 46 Iowa 265; *State v. Hessian*, 58 Iowa 68; *State v. Empey*, 79 Iowa 460; *State v. Baldwin*, 79 Iowa 714; *State v. Pugsley*, 75 Iowa 742; *State v. Cassady*, 12 Kan. 551; *State v. Beebe*, 17 Minn. 241; *State v. Fredericks*, 85 Mo. 145; *State v. Orrick*, 106 Mo. 111; *State v. Chapman*, 6 Nev. 320; *People v. Blivins*, 112 N. Y. 79; 8 Am. Rep. 701; *People v. Batterson*, 50 Hun (N. Y.) 44; *Campbell v. Com.*, 84 Pa. St. 187; *Brandt v. Com.*, 94 Pa. St. 290; *Com. v. Hughes*, 11 Phila. (Pa.) 430; *State v. Duncan*, 7 Wash. 336. So it seems in *Massachusetts* under the *Massachusetts Gen. Sts.* § 168, s. 4. *Com. v. Wallace*, 108 Mass. 12. And so by statute in *Mississippi*. See *Mississippi Annotated Code* (1890), § 950.

In *Arkansas* one who incites to felony can only be indicted as an accessory. *Smith v. State*, 37 Ark. 274; *Williams v. State*, 41 Ark. 173.

In *Ohio* one indicted for forgery cannot be convicted on proof that he induced the crime, being absent. *Chidester v. State*, 25 Ohio St. 433, but compare *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496; *Wilson v. State* (Ohio), 2 Cin. Ct. Rep. 40.

In *Virginia* the accessory must be indicted as such and cannot be indicted for a substantive felony. *Hatchett v. Com.*, 75 Va. 925.

1. See e.g., *Stat.* 24 and 25 Vict. c. 94, § 3; *New York Pen. Code*, § 32. Cf. *Reg. v. Fallon*, 1 L. & C. 217.

So an accessory after the fact cannot be indicted as a principal. *People v. Gassaway*, 28 Cal. 405; *People v. Keefer*, 65 Cal. 232; *State v. Allen*, 37 La. Ann. 685; *Wade v. State*, 71 Ind. 535; *State v. Jones*, 3 Wash. 175.

In *Iowa*, *quære* whether an accessory after the fact is indictable and punishable as a principal. *State v. Empey*, 79 Iowa 460.

2. Criminal Design Necessary.—Where persons are indicted as accessories to an assault with intent to kill, they cannot be convicted unless there was a common purpose in the minds of the principal and the defendants to kill, and the assault was done in the attempt to accomplish such common purpose, or unless the assault was made by the principal with an intent in his mind to kill, of which the defendants had knowledge, and they did some act in

furtherance of the attempted accomplishment of such purpose. *State v. Hickam*, 95 Mo. 322; 6 Am. St. Rep. 54.

To constitute one an accessory before the fact to the felony of uttering a forged note, he must have known when he gave the advice that the note was forged; otherwise he has done no wrong. *State v. Seran*, 28 N. J. L. 519.

If a particular intent is an essential element in the crime, an accessory before the fact must participate in such intent. *Wagner v. State* (Neb., 1894), 61 N. W. Rep. 85.

In *Hicks v. U. S.*, 150 U. S. 443, H. was indicted jointly with R. for the murder of C. Before the day of trial R. was killed, whereupon H. was tried separately. It was clearly proved at the trial that H. did not kill C., nor take any part in the physical struggle which resulted in his death at the hands of R. There was evidence tending to show that by his language and gestures H. abetted R. The court instructed the jury that if the facts show that he either aided or abetted or advised or encouraged R., he was made a participant in the crime as thoroughly and completely as though he had with his own hand fired the shot which took the life of the man killed. This instruction was held error, the court saying: "It omitted to instruct the jury that the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting R. So far as the instruction goes, the words may have been used for a different purpose, and yet have had the actual effect of inciting R. to commit the murderous act."

It is necessary in all cases that the accessory have the same intent with the principal. *Meister v. People*, 31 Mich. 99.

Feigned Accomplice.—Since in such case there is no criminal intent, a person who joins others in the commission of a crime for the purpose of exposing it and bringing the criminals to punishment is not an accessory before the fact. *People v. Collins*, 53 Cal. 185; *Campbell v. Com.*, 84 Pa. St. 187; *Com. v. Hollister*, 157 Pa. St. 13; *Williams v. State*, 55 Ga. 391.

Illustrations.—In the following cases the defendants were held not to be accessories:

A man supplies a pregnant woman with poison; he knows that she means to use it to procure her own abortion, but acts unwillingly, being influenced by her threats of self-destruction if he refuses, and hoping that she will change her mind. She does so use it and dies. Even if the woman is guilty of self-murder,

originated with the principal or accessory.¹ A bare knowledge and concealment of the fact that a felony is to be committed is not sufficient to render one an accessory;² nor will words that amount to a bare permission make an accessory.³

3. Relation between Crime and Incitement—In what Guilt Consists.—The guilt of an accessory before the fact consists in his having incited to a crime afterwards accomplished;⁴ but if the principal commits the crime contemplated, it is immaterial that he accomplished it in a manner or under circumstances differing from those suggested by the accessory, or that the incitement was general without any specification of time, manner, or place.⁵

When a Different Crime is Committed.—Yet if the principal varies totally and substantially from the terms of the instigation, and commits an entirely different crime, the person who has incited him will not be accessory to such crime.⁶ The

the man is not an accessory before the fact thereto. *Reg. v. Fretwell*, L. & C. 161.

A. acts as a stakeholder in a prize-fight between B. and C. Otherwise he has nothing to do with the fight, and he is not present at it. B. and C. fight, and B. is killed. A. is not an accessory before the fact to the manslaughter of B., even if there can be an accessory before the fact in such a case. *Reg. v. Taylor*, L. R. 2 Cr. Cas. Rep. 147; 12 Moak Eng. Rep. 636.

One who is merely present at a homicide but does not participate therein is not an accessory. *Lowery v. State*, 72 Ga. 649.

1. In *Keithler v. State*, 10 Smed. & M. (Miss.) 192, there was an indictment against one Keithler as accessory before the fact to a murder committed by Silas. Starkey, C. J., said: "It is not material that Keithler should have originated the design. If Silas had previously formed it and Keithler encouraged him to carry it out by stating falsehoods or otherwise, he is guilty."

2 Knowledge and Concealment of Fact that Crime is to be Committed.—1 Hale P. C. 616; 2 Hawk. P. C. c. 29, § 23; *Tullis v. State*, 41 Tex. 598; *Alford v. State*, 31 Tex. Crim. Rep. 299.

L. swore that M., himself, and several others were members of a secret organization called "Ku-Klux;" that this band was bound by oath to keep secret the doings and works of their order; that H. rendered himself obnoxious to the order, and that it was resolved that H. should be put to death. When this resolution was adopted L. was present, but opposed the resolution and never did assent to it. M. and one R. volunteered to do the act. In the course of the following week M. & R. came to witness's house, and after night picked up their guns and left, telling the wife of the witness to set the clock back, as they were going to kill H., but returned after a while and stated that the night was too dark to accomplish their purpose. Some time after that H. was killed, and M. soon afterwards confessed to witness that he and R. had done it, and described how they had done the act. L. had kept the secret until about one year before the trial, when he divulged it. His reason was that he was afraid of personal violence at the hands of the band. He had been examined as a witness before the coroner's jury that held the inquest over H.'s dead body, and also before a grand jury, and had denied any knowledge of the authors of the crime. It was held that L. was not an accomplice. *Melton v. State*, 43 Ark. 367.

In order to render one liable as accessory before the fact to a crime, the evidence must with reasonable certainty point out the particular crime to which he is accessory, and show that he had knowledge of, and aided in, its commission. *State v. Clouser*, 69 Iowa 313.

3. So, if A. says he will kill J. S., and B. says, "You may do your pleasure for me." 1 Hale, P. C. 616; 2 Hawk. P. C. b. 2, c. 29, § 16.

4. If One Counsels the Commission of a Felony, but the individual to whom such counsel is given does not commit the felony, the person who has given the counsel is not liable as an accessory. *Ogden v. State*, 12 Wis. 532; 78 Am. Dec. 754.

Soliciting and Inciting a person to commit an offense, where no other act is done except the soliciting and inciting, is a misdemeanor only. *Reg. v. Gregory*, 10 Cox C. C. 459; 1 L. R. C. C. 77; 36 L. J. M. C. 60; 16 L. T. N. S. 388; 15 W. R. 774; *State v. Jordan*, 75 N. Car. 27.

5. 2 Hawk. P. C. c. 29, s. 20; *Hughes v. State*, 79 Ala. 31; *Griffith v. State*, 90 Ala. 583; *Sage v. State*, 127 Ind. 15; *State v. Tazwell*, 30 La. Ann. 884. Where death results from a felonious act of the principal, brought about by the counsel or command of the accessory, the latter is guilty, although death may not have resulted immediately or directly from the acts of either of the wrongdoers. Nor is it necessary that the acts or words of the accessory should directly incite or expressly command the principal to commit the homicide; it is enough if it appears that the acts or words of the accessory were intended to secure the unlawful killing of the deceased, and that they effected that result. *Sage v. State*, 127 Ind. 15.

It makes no difference whether the advice or encouragement is by acts or words, *Brennan v. People*, 15 Ill. 511; or whether it be by words spoken or printed in a newspaper, *Spies v. People*, 122 Ill. 1.

6. *Foster* 369.

When Principal Departs from Terms of the Instigation.—Thus, if A. commands B. to set fire to another's house, and he in so doing commits a robbery, A. is accessory, but not to the robbery, for that is a thing of a distinct and un-consequential nature. 1 Hale P. C. 617; 4 Bl. Com. 37.

A. counsels B. to poison C. B. gives C. a poisoned apple. C. hands the apple to D., who, B. remaining silent, eats it and dies. A. is not accessory to the murder of D. *Saunders' Case*, Plowd. 475.

On an indictment against W. for procuring

instigator is, however, an accessory before the fact, though his instructions are exceeded and the crime committed is different from that contemplated by him, if it is a probable consequence of his advice and likely to flow from it;¹ or if the crime committed is the result of a mistaken attempt to follow the instructions given by him.²

Withdrawal of Advice—Notice.—A person is not an accessory before the fact who has advised the commission of a crime, but who repents before it has been accomplished and withdraws his advice, if the principal before the execution of the crime has notice that the advice has been withdrawn.³

Direct Communication Unnecessary.—It is not essential that there should have been direct communication between the accessory and the principal felon; it is enough if the accessory directs an intermediate agent to procure another to commit the felony.⁴

VII. ACCESSORY AFTER THE FACT.—1. **Generally.**—Three conditions must unite to render one an accessory after the fact: *first*, the felony must be complete; *second*, the accessory must have knowledge that the principal committed the felony; *third*, the accessory must harbor or assist the principal felon.⁵

2. **The Felony Complete.**—The offense of an accessory after the fact consists in harboring the perpetrator of a felony. It follows that in order to fix the alleged accessory's guilt it is essential that the felony should be complete.⁶

R. and P. to wound, etc., with intent to maim, etc., one S., it is error to admit testimony of a rape committed by R. and P. after they had broken open the dwelling where S. was lodging, because the rape was a distinct offense from that charged in the indictment, and unconnected therewith, and because it was a total and substantial departure from that instructed, and W. could not be held responsible as accessory thereto. *Watts v. State*, 5 W. Va. 532; *State v. Lucas*, 55 Iowa 321; *State v. Lucas*, 57 Iowa 501. See *People v. Knapp*, 26 Mich. 112; *Huling v. State*, 17 Ohio St. 583.

1. **When Crime Committed a Probable Consequence of the Advice.**—So, when murder results from an attempted robbery, or the burning of two houses from the arson of one. *Foster* 370.

If A. procures C. to commit a robbery, and C. commits a murder to conceal the robbery, A. is guilty as accessory before the fact to the murder. *State v. Davis*, 87 N. Car. 514.

But one who has only advised or encouraged a misdemeanor is not necessarily responsible for a murder committed by his co-conspirator, not in furtherance but independent of the common design. *People v. Keifer*, 65 Cal. 232.

2. **Where Wrong Person is Murdered.**—A. may be accessory before the fact to the murder of B., if the murder was committed by C. in the belief that B. was another person whose description was given by A. to C., with the intention that such other person should be murdered by C. *Foster* P. C. 370-372.

If the intent be to kill one person, and the principal, by mistake, kills another, this will not be a defense to the accessory. *Wynn v. State*, 63 Miss. 260.

3. **Effect of Withdrawal of Advice.**—If A., after advising another to murder a third person, withdraws his advice by letter, and the letter is duly received, but notwithstanding the murder is committed afterward, there cannot be conviction of A. as accessory before the fact. 1 Hale C. P. 618.

4. *Foster* 125; 2 Hawk. P. C. c. 29, §§ 1, 10,

Earl of Summerset's Case, cited in 19 Howell's St. Tr. 804; *Rex v. Cooper*, 5 C. & P. 535; *Com. v. Smith*, 11 Allen (Mass.) 243. It will be sufficient even if the accessory does not name the person to be procured, but merely directs the agent to employ some person. *Rex v. Cooper*, 5 C. & P. 535.

5. *State v. Davis*, 14 R. I. 281; *Wren v. Com.*, 26 Gratt. (Va.) 952.

6. **Felony must be Complete.**—*Harrel v. State*, 39 Miss. 702; 80 Am. Dec. 95; *State v. Davis*, 14 R. I. 281; *Wren v. Com.*, 26 Gratt. (Va.) 952. In *Harrel v. State*, 39 Miss. 702; 80 Am. Dec. 95, Harrel was indicted as accessory after the fact to the crime of murder, committed by R. H. The court, by Smith, C. J., said: "The evidence adduced on the trial rendered it highly probable, if not certain, that the aid and assistance which were proved to have been given by the plaintiff in error, with the intent to enable R. H. to effect his escape, were, in point of fact, given after the mortal blow was dealt, but before the death of the party whose life had been assailed, but which occurred within a very short time thereafter. * * * It is clear that the felony charged in the indictment to have been committed by the said R. H. was the murder of T. H., and not an assault and battery upon him with intent to commit murder. It is therefore certain that until T. H. died, the felony alleged in the indictment, and in respect to which the plaintiff in error was charged as accessory after the fact, was not consummated. In order to fix the guilt of the party charged as accessory after the fact, it is essential that the alleged felony should be complete. Until such felony has been consummated, any aid or assistance rendered to a party, in order to enable him to escape the consequences of his crime, will not make the person affording such assistance guilty as an accessory after the fact. This is the rule recognized, without exception, by all the authorities. 1 Hale 622; 2 Hawkins, ch. 29, § 35; 4 Bl. Com. 38; 3 Greenleaf on Ev. p. 47; Roscoe's Crim. Ev. 220."

3. Accessory's Knowledge of Felony.—The accessory must have notice express or implied of the principal having committed a felony in order that his guilt as accessory may be established.¹

4. Accessory's Act of Assistance.—The act which renders one an accessory after the fact is assistance rendered to the felon personally,² either to conceal the crime or to evade justice.³ It matters not that this assistance be rendered through an

Where one is charged as an accessory to a crime, it must appear that the crime was committed by the principal; it is not enough to show that the defendant harbored A., charged with the murder, unless it be also shown that A. committed the murder. *Poston v. State*, 12 Tex. App. 408.

When Larceny is Complete.—Where goods have been so far removed from the possession of the owner that their further removal could not be deemed a continuing part of the original taking, the offense of larceny is so far complete that one engaging in their further removal will be only an accessory. 2 Russ. on Crimes, 9 Ed. *547. Thus, where K. was indicted for theft and it appeared that H. & S. broke open a warehouse and stole thereout certain goods, which they carried along the street thirty yards and then fetched K., who was apprised of the robbery, and assisted in carrying away the property, it was held that he was only an accessory and not a principal. *Rex v. King*, R. R. C. C. 332.

But see *Conner v. State*, 25 Ga. 515; 71 Am. Dec. 184, where the effect of the ruling seems to be that one may become a principal in larceny by receiving and appropriating the stolen property from the hands of the actual thieves ten days after the original theft. See also *Minor v. State*, 58 Ga. 551.

1. Knowledge of Accessory Requisite.—2 Hawk. P. C. c. 29, § 32.

The attainder of the felon is not of itself notice to all persons in the same county, and neither in justice nor in reason does it create an absolute presumption of notice, though it may be evidence to go to a jury. *Rex v. Burridge*, 3 P. Wms. 497.

One who aids in the disposition of stolen property is not thereby guilty of larceny either as principal or accessory, unless he knows the property to have been stolen. Knowledge of the crime is essential to constitute an accessory after the fact. *State v. Empey*, 79 Iowa 460; *Rex v. Lee*, 6 C. & P. 536; 25 E. C. L. 530.

Knowledge of the commission of the felony must be brought home to the accused, and whether he had such knowledge is always a question for the jury. *Wren v. Com.*, 26 Gratt. (Va.) 952.

It is sufficient that the alleged accessory had good reason to believe the person aided by him guilty of felony, and fleeing from justice, to render aid given him unlawful. It is not necessary to prove that the accessory had actual knowledge of the facts connected with the guilt of the perpetrator of the principal crime. *Tully v. Com.*, 13 Bush (Ky.) 142.

2. Accessory Rendering Assistance.—To substantiate the charge of harboring a felon, it must be shown that the party charged did some act to assist the felon personally. *Reg. v. Chapple*, 9 C. & P. 355; 38 E. C. L. 150.

In *Loyd v. State*, 42 Ga. 221, the court said: "We hold that both at common law and under our statute the law contemplates some assistance or act done to the felon himself." See also *People v. Dunn*, 7 N. Y. Cr. Rep. 174.

Receiving Stolen Property.—So the mere receipt of stolen goods knowing them to have been stolen did not make an accessory at the common law. 1 Hale P. C. 616; *People v. Teal*, 1 Wheel. Cr. Cas. (N. Y.) 199, note; *People v. Dunn*, 7 N. Y. Cr. Rep. 174; *People v. Sheppardson*, 48 Cal. 189.

But it is otherwise where such receipt is for the purpose of facilitating the escape from justice of the principal felon, or is attended with some benefit to him. *Loyd v. State*, 42 Ga. 221.

By statute, however, the receiver of stolen property is made an accessory after the fact. The earliest of such statutes was 3 W. & M. c. 9, s. 4; 3 Chit. Cr. L. 951. See, generally, the title RECEIVING STOLEN PROPERTY.

3. What Constitutes an Accessory After the Fact.—Where a person is charged as an accessory after the fact to a murder, the question for the jury is, whether such person, knowing the offense to have been committed, was either assisting the murderer to conceal the death, or in any way enabling him to evade the pursuit of justice. *Rex v. Greenacre*, 8 C. & P. 35.

In *Reg. v. Hansill*, 3 Cox C. C. 597, Erle, J., said: "The assistance must tend to prevent the principal felon from being brought to justice. The question is, did [the accused] after the felony was completed, assist the felon to elude justice?"

In *People v. Dunn*, 7 N. Y. Cr. Rep. 173, Cullen, J., said: "To constitute an accessory it is not sufficient to assist the prisoner to elude punishment, because failing to prosecute or preventing the attendance of witnesses would produce that result. But to constitute the offense one must help the prisoner to elude or evade capture."

In *Wren v. Com.*, 26 Gratt. (Va.) 956, Christian, J., said: "As to the receiving, relieving, and assisting one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial, or punishment is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and such like assistance to one known to be a felon would constitute a man accessory after the fact. 1 Hale 619, 621; 2 Hawk. c. 29, § 26. But merely suffering the

agent, and that the accessory personally does no act of relieving;¹ but mere inaction or omission does not constitute an accessory after the fact;² nor even writing to witnesses not to appear against the felon,³ nor receiving money not to testify against him.⁴ Assistance rendered to an accessory before the fact constitutes one an accessory after the fact.⁵

5. Harboring Wife or Kindred.—By common law, the wife might harbor her husband without incurring liability as an accessory, but the exemption extended no further than this.⁶ Other relations are protected by statute in various states.⁷

principal to escape will not make the party accessory after the fact; for it amounts at most but to a mere omission. 1 Hale 619; 9 H. iv. 1. Or if he agree for money not to prosecute the felon; or if, knowing of a felony, fails to make it known to the proper authorities: none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony, or the misprision of it, the doer will not be an accessory. 1 Bish. § 633; 1 Hale 618. 'The true test (says Bishop, § 634) whether one is accessory after the fact, is to consider whether what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment; the kind of help rendered appearing to be unimportant.' In *Reg. v. Chapple*, 9 C. & P. 355, it was held that 'to substantiate the charge of harboring a felon, it must be shown that the party charged did some act to assist the felon personally.' This decision is in strict accordance with the established principles of the common law. See *Arch. Crim. Plead. and Prac.* 78, 79, note."

Illustration.—A., a lad who was a clerk in a banking-house, robbed his employers: after doing so, he went to the lodging of B., who was much older than himself, and who had relations in America. A. stayed twenty minutes at B.'s lodgings; and after that, on the same night, A. and B. started together by the coach, and went from Reading to Liverpool, intending to embark for America. It was held that B. might be convicted as an accessory after the fact, in harboring, receiving, and maintaining A., the principal felon. *Rex v. Lee*, 6 C. & P. 536.

Aid Rendered for Other Purposes.—Under the statutes of *Missouri* one cannot be punished as an accessory after the fact who conceals or aids a felon, not in order that he may escape from justice, but for some other purpose. *State v. Reed*, 85 Mo. 194.

So in *Kansas*, where P. was about to be arrested for rape, and F. who was a surety for P. on certain notes, learned of the impending arrest and visited P. in order to make arrangements with regard to said notes, and immediately after the visit of F., P. fled, it was held that F. was not an accessory, even though during such visit he said something which caused P. to abscond. The guilty intent is essential. *State v. Fry*, 40 Kan. 311.

One who knowing of a crime conceals it from the magistrate from anxiety for his own safety is not an accessory after the fact. *Carroll v. State*, 45 Ark. 539.

Sufficiency of Evidence.—Under *Texas Penal Code*, § 86, an accessory is defined as "one who, knowing that an offense has been committed, conceals the offender, or gives him any other

aid, in order that he may evade an arrest or trial, or the execution of his sentence;" and evidence which established that immediately after the commission of homicide the principal and the accused had a private conversation after which the principal mounted a horse and disappeared, and that the accused induced the only two other witnesses of the crime to testify to a statement, fabricated by himself, to the end that upon the trial the principal might be acquitted or released on nominal bond, was held sufficient to constitute the accused an accessory within the statute and the purview of the general law. *Blakeley v. State*, 24 Tex. App. 616, 5 Am. St. Rep. 912.

1. Assistance Rendered through Agent.—A prisoner who employed another person to harbor the principal felon may be convicted as accessory after the fact, though he himself did no act of relieving. *Rex v. Jarvis*, 2 M. & Rob. 40. See also *State v. Hudson*, 50 Iowa 157, where the defendant, on trial as accessory after the fact, sent money to the principal felon by the latter's wife and brother.

2. Mere Inaction or Omission not Sufficient.—So, merely suffering the principal to escape, 1 Hale P. C. 619; or knowing of a felony and not discovering it, 1 Hale P. C. 371, 618.

Mere silence, or approval of the commission of a felony after it is done, does not constitute one an accessory. *People v. Johnson*, 81 Mo. 483; *State v. Hann*, 40 N. J. L. 228.

But see *White v. People*, 81 Ill. 333, where it was held that if two persons are the only ones present at the killing of another, and one does the killing and the other does not aid, abet, or assist, but afterwards they both with guilty knowledge conceal the fact of the crime, the one not participating is an accessory after the fact.

3. 3 Inst. 139; 1 Hale P. C. 620.

4. *Roscoc Cr. Ev.* (8th Am. ed.) 187, citing *Moo*. 8.

5. 2 Hawk. P. C. c. 29, § 1; *State v. Payne*, 1 Swanst 383.

6. **Common Law Exemption.**—1 Hale P. C. 621; *People v. Dunn*, 7 N. Y. Cr. Rep. 187.

The husband is even liable for harboring his wife, *People v. Dunn*, 7 N. Y. Cr. Rep. 187; and the relations of master and servant, brother and sister, and the like, are not protected, 2 Hawk. P. C. c. 2, § 34.

7. Statutory Exemptions.—Thus, in *Rhode Island* and *Missouri*, husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, are protected. *State v. Davis*, 14 R. I. 281; *State v. Reed*, 85 Mo. 194.

So in *Vermont*. *State v. Butler*, 17 Vt. 145.

The protected relations in *Texas* include domestic servants. *Texas Penal Code*, § 87.

VIII. ACCESSORY GUILTY ALSO IN ANOTHER CAPACITY.—A man may be guilty as accessory both before and after the fact, as where he incites another to larceny, and after the crime is accomplished in his absence, assists the actual thief in secreting the stolen property.¹ Again, the acts which constitute one an accessory may also make him guilty of another substantive felony.²

IX. EVIDENCE—Accessory's Guilt Dependent upon that of Principal.—Since the accessory's guilt is dependent on the guilt of the principal, it is necessary to establish the guilt of the latter upon the trial of the accessory.³ The accessory may controvert the principal's guilt even after the latter's conviction,⁴ and proof of the acquittal of the principal is a complete defense of the accessory.⁵

Statutory Modifications.—These rules have been much modified by statute, and now in many jurisdictions the acquittal of the principal offers no obstacle to the conviction of the accessory.⁶

1. **Same Party Guilty as Accessory both Before and After the Fact.**—*Norton v. People*, 8 Cow. (N. Y.) 137; *Rex v. Blackson*, 8 C. & P. 43; *Minor v. State*, 58 Ga. 551; *Able v. Com.*, 5 Bush (Ky.) 698.

2. The fact that the circumstances proved for the purpose of showing aid to the principal would constitute the offense of subornation of perjury, will not defeat the prosecution of the accused as accessory after the fact to murder. In such case the prosecutor may frame the indictment for either offense. *Blakeley v. State*, 24 Tex. App. 616; 5 Am. St. Rep. 912; *Groves v. State*, 76 Ga. 808.

3. *People v. Collins*, 53 Cal. 185; *Ex parte Bowen*, 25 Fla. 214; *Bowen v. State*, 25 Fla. 645; *Edwards v. State*, 80 Ga. 127; *Tully v. Com.*, 11 Bush (Ky.) 154; *State v. Ricker*, 29 Me. 84; *Territory v. Dwenger*, 2 N. Mex. 73; *Buck v. Com.*, 107 Pa. St. 486; *Poston v. State*, 12 Tex. App. 408; *Armstrong v. State* (Tex. App., 1894), 26 S. W. Rep. 829; *Hatchett v. Com.*, 75 Va. 925; *Ogden v. State*, 12 Wis. 532; 78 Am. Dec. 754. Compare *State v. Jones*, 7 Nev. 208.

When the accessory is tried before the conviction of the principal, acts and conduct of the principal immediately following the commission of the offense and tending to show that he committed it are competent evidence to prove the guilt of the principal. *State v. Rand*, 33 N. H. 216; *State v. Richter*, 29 Me. 84.

Any evidence is admissible to establish the principal's guilt which would be admissible against him were he on trial. *State v. Duncan*, 6 Ired. (N. Car.) 98; *Buck v. Com.*, 107 Pa. St. 486.

Plea of Guilty—Confessions, Admissions.—A plea of guilty received and recorded is equivalent to a prior conviction of the principal. *Groves v. State*, 76 Ga. 808; *State v. Sims*, 2 Bailey (S. Car.) 29; *State v. Crank*, 2 Bailey (S. Car.) 66; 23 Am. Dec. 117; *Jones v. People*, 20 Hun (N. Y.) 545.

For the sole purpose of ascertaining the guilt of the principal his confession is admissible on the trial of an accessory before the fact. *Morrow v. State*, 14 Lea (Tenn.) 475; *Self v. State*, 6 Baxt. (Tenn.) 244; *Rex v. Blick*, 4 C. & P. 377; 17 E. C. L. 428. Only such confessions of a principal as would be competent evidence on his own trial are admissible on the trial of an accessory. *Smith v. State*, 46 Ga. 298. Yet the principal's confessions, admissions, or

declarations have been excluded as against the accessory. *Rex v. Turner*, 1 M. C. C. 347; *State v. Newport*, 4 Harr. (Del.) 567; *State v. Rand*, 33 N. H. 216; *Ogden v. State*, 12 Wis. 532; 78 Am. Dec. 754; *Buck v. Com.*, 107 Pa. St. 486. See *Territory v. Dwenger*, 2 N. Mex. 73.

4. **Accessory may Controvert Principal's Guilt.**—*Rex v. Smith*, 1 Leach C. C. 288; *Levy v. People*, 80 N. Y. 327; *State v. Duncan*, 6 Ired. (N. Car.) 98. Thus, the accessory may show that the offense of his principal did not amount to felony, but to a mere breach of trust, *Rex v. Smith*, 1 Leach C. C. 298; or that there was no crime committed, or that his principal was, not in a situation where he could take part as principal, *Com. v. Knapp*, 10 Pick. (Mass.), 477; 20 Am. Dec. 534. The guilt of the principal being open for the accused to controvert, it is open for the prosecution to rebut his proof thereon and to produce evidence of the commission of the principal crime *aliunde* the record. *Levy v. People*, 80 N. Y. 327.

5. *U. S. v. Crane*, 4 McLean (U. S.) 217; *Bowen v. State*, 25 Fla. 645; *McCarty v. State*, 44 Ind. 214; 15 Am. Rep. 232; *Ray v. State*, 13 Neb. 55; *State v. Ludwick*, Phill. (N. Car.) 401; *State v. Jones*, 101 N. Car. 719.

6. **Under Some Statutes Acquittal of Principal no Bar to Conviction of Accessory.**—*Reg. v. Pulham*, 9 C. & P. 280; *Reg. v. Hughes*, Bell C. C. 242; *People v. Bearss*, 10 Cal. 68; *People v. Newberry*, 20 Cal. 439; *State Bogue*, 52 Kan. 79; *State v. Patterson*, 52 Kan. 335; *People v. Kief*, 126 N. Y. 661; *Noland v. State*, 19 Ohio 131; *Evans v. State*, 24 Ohio St. 456.

On the trial of B., who was jointly charged with K. with the crime of manslaughter, the evidence tended to show that K. was guilty as principal, and B. as accessory before the fact. It was held that the acquittal of K. was not a bar to a prosecution against B. under the information. *State v. Bogue*, 52 Kan. 79. In this case the court by Allen, J., said: "It is contended that the subsequent acquittal of Doctor Kidd compels the vacation of the judgment against the defendant, and his discharge from further prosecution. It may be conceded that, at common law, the acquittal of the principal acquitted the accessory also, and that the conviction of the principal must precede or accompany that of one charged as an accessory. (1 Whar. § 237; 1 Bish. New Crim. Law, § 667.) Section 115 of the criminal code provides:

Record of Principal's Conviction as Evidence.—The record of the principal's conviction is *prima facie* but not conclusive evidence of his guilt.¹

Corroboration of Evidence of Accessory After the Fact.—An accessory after the fact is not an accomplice of his principal so that his testimony needs corroboration in order to convict the principal.²

X. PUNISHMENT.—The offense of an accessory before the fact was, at common law, a felony punishable in the same manner as the principal felony.³ The modern statutes generally abolish all distinction between an accessory before the fact and principal, and provide the same punishment for both.⁴ Accessories after the fact were felons by common law, but they were usually allowed the benefit of clergy.⁵ Prosecutions against them were rare.⁶ The tendency of modern

'Any person who counsels, aids or abets in the commission of any offense may be charged, tried and convicted in the same manner as if he were principal.' The evident purpose of the legislature of our own and other states where similar statutes have been enacted was, to do away with those subtle distinctions of the common law between principals in the first and second degree and accessories before the fact, and to permit the trial of participants in the crime independently of each other, so that each should suffer punishment for his own guilt without being dependent on the result of the prosecutions against others. Of course, if the crime be committed through the instrumentality of another, the acts of such instrument, essential to establish the guilt of the person on trial, must be shown. The statute does not in any manner enlarge or diminish the essential elements of criminality. It merely does away with a somewhat arbitrary nomenclature which has come down from English jurisprudence, and has been found to be a serious stumbling-block in the administration of criminal justice. We think a guilty accessory may be punished, even though the principal escape."

1. Record of Principal's Conviction Prima-facie Evidence.—*Com. v. Knapp*, 10 Pick. (Mass.) 477; 20 Am. Dec. 534; *State v. Sims*, 2 Bailey (S. Car.) 29; *State v. Chittum*, 2 Dev. (N. Car.) 49; *State v. Duncan*, 6 Ired. (N. Car.) 236; *State v. Mosley*, 31 Kan. 355; *Anderson v. State*, 63 Ga. 675; *Baxter v. People*, 7 Ill. 578; *People v. Buckland*, 13 Wend. (N. Y.) 592; *Levy v. People*, 80 N. Y. 327.

Such record is properly introduced in evidence in the form of a certified copy of the original minutes of the court, where the principal was tried and convicted under the *New York* statute. *People v. Gray*, 25 Wend. (N. Y.) 465.

In *Keithler v. State*, 10 Smed. & M. (Miss.) 192, such a record is held to be admissible to prove the conviction of the principal, and all its legal consequences, "though of course not evidence of the guilt of the prisoner," the accessory. See *Lyne v. State*, 36 Miss. 617.

It was held in *State v. Crank*, 2 Bailey (S. Car.) 66; 23 Am. Dec. 117, that the record of the conviction of the principal must be introduced, if the accessory is brought to trial after such conviction; but if the accessory is charged also as aider and abettor, the guilt of the principal may be proved by parol, although he has been convicted.

The record may be introduced though the conviction of the principal was founded on evi-

dence not admissible against the accessory. *State v. Chittum*, 2 Dev. (N. Car.) 49. Compare *State v. Sims*, 2 Bailey (S. Car.) 29.

The accessory cannot take advantage of error in the record against the principal. *State v. Duncan*, 6 Ired. (N. Car.) 236.

An averment of the conviction of the principal is supported by the record, however erroneous the judgment may be. *Rex v. Baldwin*, 3 Cam. 265.

In *California*, the distinction between principals and accessories before the fact being abolished, the accessory is to be tried as a principal, and the record of the conviction of the principal is inadmissible. *People v. Bearss*, 10 Cal. 68.

2. *Lowery v. State*, 72 Ga. 649; *Allen v. State*, 74 Ga. 769. But compare *Polk v. State*, 36 Ark. 117.

3. 4 Bl. Com. 39; 3 Inst. 88; *Able v. Com.*, 5 Bush (Ky.) 698.

4. Accessory Before the Fact and Principal Punished alike under Modern Statutes.—In *Brennan v. People*, 15 Ill. 517, it is said: "One who counsels or procures another to commit a crime, although he may be absent when the act is done, is equally guilty with the one perpetrating it. By the express provisions of our statute he is deemed to be a principal offender, and may be indicted and punished as such." *Loughridge v. State*, 6 Mo. 594; *People v. Kennedy*, 5 Cal. 133; *Hatchett v. Com.*, 75 Va. 925; *Nuthill v. State*, 11 Humph. (Tenn.) 247. But the accessory can receive no greater punishment than his principal; and if there be mitigating circumstances in favor of the principal whereby his punishment is reduced, the punishment of the accessory shall also be reduced. *Nuthill v. State*, 11 Humph. (Tenn.) 247.

A statute providing that the accessory before the fact "shall receive and suffer the same punishment as would be inflicted on the person convicted of having stolen or feloniously taken the said goods," etc., was held not to be violated by a sentence of accessory and principal to the same term of imprisonment, although the sentence provided alternative fines for both, and the fine of the accessory was the larger of the two. *Anderson v. State*, 63 Ga. 675. In this case *Bleckley, J.*, said: "The better construction [of the statute] probably is that the latter [punishment of accessory] shall not exceed what the former [punishment of principal] might have been had the court seen proper to inflict the maximum of the law."

5. 4 Bl. Com. 39.

6. "Prosecutions against such persons [ac-

statutes is to consider their offense as a minor and separate offense, and to provide a lighter punishment therefor.¹

XI. JURISDICTION.—The jurisdiction of the offense of an accessory is in the county where his offense was committed, although the principal's offense was in another county.² Under an act of Congress giving exclusive jurisdiction of an offense to the *United States* courts, an accessory to such offense cannot be prosecuted in a state court.³

XII. EXTRADITION OF ACCESSORIES.—Under the extradition laws in force between the *United States* and *Canada*, an accessory before the fact to an extraditable offense may be extradited; but it is otherwise in the case of an accessory after the fact.⁴

cessories after the fact] grounded on the common law are seldom instituted at the present time, nor do they appear to have been frequent for many years past, nor to have had any great effect. Foster, 372." 1 Russ. Cas. (9th Am. ed.) 66.

1. See the criminal statutes generally.

But in *Tennessee* the common-law rule was followed with certain exceptions. Long v. State, 1 Swan (Tenn.) 287.

2. **Accessory to Crime Committed in Another County or State.—Where Tried.**—People v. Hodges, 27 Cal. 340; Tully v. Com., 13 Bush (Ky.) 142; State v. Hamilton, 13 Nev. 386; Baron v. People, 1 Park. Cr. Rep. (N. Y.) 246; People v. Hall, 57 How. Pr. (N. Y.) 342.

In some states, by statute, the accessory may be tried in the county where his own offense or that of the principal was committed. See New York Pen. Code, § 32.

Under *Massachusetts* Gen. Sts. c. 168, § 5, one who procures a felony to be committed in a county of that commonwealth, by means of letters written elsewhere, can be convicted in that county as accessory before the fact. Com. v. Pettes, 114 Mass. 357.

Where a felony is procured in one state to be committed in another state, the accessory before the fact cannot be tried in the latter state. State v. Moore, 26 N. H. 448; 59 Am. Dec. 354; Johns v. State, 19 Ind. 421. Compare State v. Cassady, 12 Kan. 550; People v. Adams, 3 Den. (N. Y.) 190; State v. Chapin, 17 Ark. 561; 65 Am. Dec. 452.

In *State v. Moore*, 26 N. H. 448; 59 Am. Dec. 354. Woods, J., in delivering the opinion of the court, said: "At common law, an accessory to the crime committed in another county, it is said, could be indicted in neither county. 1 Chitty's Cr. L. 178; 1 Hale 62, 3. But by the statute of 2 and 3 Edw. VI. chap. 24, § 4, it was enacted, 'That when any murder or felony shall be hereafter committed and done in one county, and another person or more shall be accessory or accessories in any manner of wise to any such murder or felony in any other county, that an indictment—found or taken against such accessory or accessories upon the circumstances of such matter, before the justices of peace or other justices or commissioners to inquire of felonies, in the county where such offenses of accessory or accessories in any manner or wise shall be committed or done—shall be as good and effectual in the

law as if the said principal offense had been committed or done in the same county where the same indictment against such accessory shall be found.' Upon the question before us, in connection with the provisions of this statute, we have looked into the authorities, and will now refer to them briefly and state the result. The law upon this subject, we think, is quite clear and well established, unless our statutes may be found to have altered it. In 1 Chitty's Cr. L. 191, the doctrine is laid down thus: 'If a shot be fired in one county, or poison be administered, which becomes fatal in another, the venue must be laid in the latter; but it would be otherwise if A. in one county should procure B., a guilty agent, to commit a murder in the second, because in that case A. would be an accessory before the fact, and triable as such in the county where he was guilty of the murderous contrivance. On the other hand, if a person unconscious of the guilty design, as a child without discretion, be employed in the commission of murder, the venue must be laid in the county where the death happened, for they are merely the instruments, and the contriver is the principal.' * * * According to the authorities cited, which are believed to contain and to show what was the law of England upon the subject under consideration, after the passage of the act of 2 and 3 Edward VI. chap. 24 (A.D. 1549), we think there can be no doubt that in England an accessory in a felony before the fact could, in virtue of that act, be tried for the offense only in the county in which he committed the offense of procuring or advising the commission of the principal offense, which was committed in another county. And it seems to us that this view is in accordance with the general principle of the common law that crimes are local, and can only be tried in the county where they are committed. The crime of the accessory, if it can be regarded as committed anywhere, is committed at the place where the intelligent agent is procured to commit the principal act. And, so far as we are advised, the law of England remained the same from the passage of the act aforesaid to the time of the American Revolution."

3. Com. v. Felton, 101 Mass. 204.

4. Reg. v. Browne, 31 U. C. C. P. 484; *In re Counhaye*, 8 L. R. Q. B. 410, 417. See, generally, the title EXTRADITION.

ACCIDENT. (See also the following titles: ACCIDENT (IN EQUITY); ACCIDENT INSURANCE; ACT OF GOD; BILLS OF LADING; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CIVIL DAMAGE ACTS; COLLISIONS (IN MARITIME LAW); COMPARATIVE NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DAMNUM ABSQUE INJURIA; DEATH BY WRONGFUL ACT; ELECTRIC RAILROADS; ELEVATED RAILROADS; ELEVATORS; EMPLOYERS' LIABILITY INSURANCE; EXPLOSIONS; FELLOW SERVANTS' IMPUTED NEGLIGENCE; INEVITABLE ACCIDENTS; INJURIES TO ANIMALS; INJURIES TO CHILDREN; LAW OF THE ROAD; MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILROADS; UNAVOIDABLE ACCIDENTS.)—An accident is an event from an unknown cause, or an unusual and unexpected event from a known cause; a chance or casualty.¹ The test of liability for the result of an acci-

1. *Crutchfield v. Richmond, etc., R. Co.*, 76 N. Car. 320.

The word *accident*, when used to express a result produced by human action, is generally if not universally understood to mean a thing done or a disaster caused or produced without design or unintentionally; an event or occurrence which happens unexpectedly from the uncontrollable operations of nature alone and without human agency; or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. *Morris v. Platt*, 32 Conn. 85.

The Equitable Definition of the Term "Accident" includes not only inevitable casualties, such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons without the fault, negligence, or misconduct of the party. *Bostwick v. Stiles*, 35 Conn. 198; *Alexander v. Bailey*, 2 Lea (Tenn.) 639. See the title ACCIDENT (IN EQUITY).

The word *accident*, in its legal sense, has been defined to be "(1) an event happening without the concurrence of the will of the person by whose agency it was caused; (2) an event that takes place without one's foresight or expectation." *State v. Lewis*, 107 N. Car. 978.

Business Misfortunes.—*Accident* does not include the usual misfortunes in business. *Langdon v. Bowen*, 46 Vt. 512.

Accident and Negligence.—In *McCarty v. New York, etc., R. Co.*, 30 Pa. St. 251, it was contended that the trial judge's use of the word *accident* led the jury to believe that a loss occasioned by an *accident* was something different from a loss occasioned by negligence, whereas the two are identical. The appellate court said: "If *accident* and negligence be not opposites, we cannot regard them as identical without confounding cause and effect. Accident, and its synonyms casualty and misfortune, may proceed or result from negligence, or other cause known or unknown. What the court meant, and in effect said, was, that the loss complained of may have resulted from the negligence of the defendants or from other causes beyond their control—if from the first, they would be liable for it; if from the last, they would not—and the jury were left to determine from the evidence whether it was fairly ascribable

to that cause for which, they were thus instructed, the defendants would be liable. It is impossible for us to see any error in such instructions."

In *Henry v. Grand Ave. R. Co.*, 113 Mo. 525, where the trial judge had instructed that, "if the jury believe from the evidence that the injuries sustained by the plaintiff were merely the result of *accident*, then your verdict will be for the defendant." This was held to be no error. The appellate court said: "The further objection is made that the court erred in giving defendant's first instruction; and it is insisted that it entirely eliminates the question of negligence. Especially is the use of the word *accident* objected to. Mr. Webster defines *accident* as 'a coming or falling; an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, and therefore not expected; chance; casualty; contingency.' This objection, we think, is overcome by the use of the word 'merely,' next preceding it—a word the meaning of which is well understood, and implies, as used in this instruction, that there must not have been any negligence or carelessness on the part of the employee of the defendant contributing to the injury. Words should be taken in their usual and ordinary meaning, and as generally understood. *Henry, etc., Co. v. Evans*, 97 Mo. 47. And we think, when used in this instruction, it was understood to mean that if the injury was purely *accidental*, and without fault on the part of defendant's servant, it was not liable. It is admitted by counsel in their brief that, if some qualifying term had been used, the objection to the word *accident* would not obtain; for instance, 'unavoidable' or 'inevitable.' It seems to us, however, that the use of the word 'merely' made the instruction quite as intelligible and as easily understood as if the word 'unavoidable' or 'inevitable' had been used, and that it did not, as contended for, eliminate the question of negligence."

Result of Negligence—Omission.—A charge was asked that if "the jury believe that the death of the slave was the result of *accident* and without design, then the plaintiff could not recover." The appellate court said: "*Accident*, in this connection, may be defined, 'chance, casualty, an event that takes place * * * without design' (Webster's Dic-

dent turns upon the fact whether the person causing the accident was guilty of negligence or not; if there is no fault there is no liability. While this subject will be elaborately treated elsewhere in this work,¹ it has been thought not amiss to give here a number of cases in which the facts have been held to constitute an *accident* for which the defendant was not liable.² To

tionary). As we understand the charge, it asserts the proposition that duties omitted cannot constitute the negligence to which the law attaches accountability; that there must also be acts of commission. This view is erroneous. Diligence, when the law imposes it as a duty, implies that 'we shall do those things we ought to do, and leave undone those things we ought not to do.' It requires action as well as forbearance to act. *Accident* repels the imputation of faults committed, but not of duties omitted." *Armstrong v. Holley*, 29 Ala. 305.

Personal Injuries through Accident.—As to a state of facts warranting the use of the term *accident* as the cause of plaintiff's injuries, see *Field v. Davis*, 27 Kan. 407.

Snowstorm—Charter Party.—An exception in a charter party against "riots, strikes, or any other *accident*" does not include a snowstorm. An *accident* is not an ordinary occurrence, but something which happens out of the ordinary course of things. A snowstorm, however, is one of the ordinary operations of nature, and may be described rather as an incident than an *accident*. *Fenwick v. Schmalz*, L. R. 3 C. P. 313.

1. See the title NEGLIGENCE.

2. Railroads. (See also the titles CARRIERS OF PASSENGERS; NEGLIGENCE; RAILROADS.)—If a railroad bed, engine, and cars are in good order, and the engineer and other attendants are skilful and careful, and yet the rail breaks and the train is crushed, and the employees and passengers are killed, that is an unusual and unexpected event from a known cause, and therefore an *accident*. But if the track is out of order and the engine worn and unmanageable, and on account thereof there is the like result as above stated on the good road, that is not an unusual and unexpected event, but a usual and expected event from such a cause; it is not an *accident*, but it is negligence. *Crutchfield v. Richmond*, etc., R. Co., 76 N. Car. 320.

Where a railroad employee, in getting out of the way of a train suddenly started without signal, stepped between the railroad track and a sandbank two feet distant, and while there a quantity of sand fell from the bank, striking him and knocking him against the moving cars, and the wheels of one of the cars ran over his leg and injured him, it was held that, as the immediate and direct cause of the injury was the falling of one of the bank, and this was not the effect or consequence of the omission or act of the defendant, the plaintiff could not recover. *Handelun v. Burlington*, etc., R. Co., 72 Iowa 709.

A railroad company is not liable in damages for the death of a man caused by the explosion of a torpedo with which he intermeddled while walking on the railroad track, and

which had been placed there by the company as a danger signal to approaching trains. *Carter v. Columbia*, etc., R. Co., 19 S. Car. 20, 45 Am. Rep. 754.

Where a mule caught his foot in a hole in a railroad track, the company was held not liable, as the hole was so small that no one could have foreseen the result. *Nelson v. Chicago*, etc., R. Co., 30 Minn. 74.

A Telegraph Wire sagged across a track from no known cause, and struck a brakeman upon a moving train, and broke. In an unexplained manner the wire became fastened to the brake, and at the same time coiled around the deceased, dragging him for some distance and inflicting injuries causing his death. It was held that this was an unforeseen *accident* for which the defendant was not liable. *Wabash*, etc., R. Co. v. *Locke*, 112 Ind. 404.

Accidents from Machinery. (See also the titles MASTER AND SERVANT; FELLOW SERVANTS.)—So *accidents* from machinery are within the rule where their liability to happen is proved only by their happening. *Richards v. Rough*, 53 Mich. 212; *Sjogren v. Hall*, 53 Mich. 274.

Leakage of Water from a Neighboring Dam or Reservoir. (See also the titles DAMS; SURFACE WATERS; WATER COMPANIES.)—Where water from a newly constructed reservoir broke through some old vertical shafts apparently filled with earth, and flooded a mine, which ran to passages connected with the old shafts, it was held that the constructor of the reservoir was liable for the damage caused. *Fletcher v. Rylands*, L. R. 1 Exch. 265, affirmed in L. R. 3 H. L. 330. *Blackburn, J.*, said: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes *** is *prima facie* answerable for all the damage which is the natural consequence of its escape." This doctrine was repudiated in *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, where it was held that one who erected upon his premises a steam boiler, having in it no defect known to him, or discoverable by the application of known tests, and who operated it with care and skill, was not answerable to an adjacent proprietor for damages caused by its explosion. "Here, if one builds a dam *** and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part." The *English* view is also disapproved in *Garland v. Towne*, 55 N. H. 57, 20 Am. Rep. 164, and *Marshall v. Welwood*, 38 N. J. L. 339. As supporting the *English* view, see *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Shipley v. Fifty Associates*, 106 Mass. 198; *Wilson v. New Bedford*, 103 Mass. 261, 11 Am. Rep. 352; *Gorham v. Gross*, 125 Mass.

constitute an accident in this sense the casualty must be such as the defend-

232, 28 Am. Rep. 234; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Boynnton v. Rees*, 9 Pick. (Mass.) 528; *Smith v. Fletcher*, L.R. 7 Ex. 305, *approving* *Fletcher v. Rylands*, 1 Ex. 265, set out above.

Floods. (See also the title **FLOODS**.)—Damage from extraordinary flood falls under this rule. *Brown v. Susquehanna Boom Co.*, 109 Pa. St. 57, 58 Am. Rep. 708. Also delay from flood. *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

Fences. (See also the titles **FENCES**; **INJURIES TO ANIMALS**.)—In *Robinson v. Grand Trunk R. Co.*, 32 Mich. 322, it was held that the company was not liable for injuries to animals, due to the blowing down of its fences by a sudden and heavy wind. See also *Indianapolis, etc., R. Co. v. Truitt*, 24 Ind. 162; *Pittsburg, etc., R. Co. v. Smith*, 26 Ohio St. 124.

Civil Damage Act. (See also the title **CIVIL DAMAGE ACTS**.)—In *Bobier v. Clay*, 27 Q. B. (Ont.) 438, it was held, where the deceased, being intoxicated, fell off a bench in the barroom and was placed upon the floor in a small room adjoining, with nothing under his head, and died of apoplexy or congestion of the brain, that this was not a case of death by *accident* within the statute, but of death from natural causes induced by intoxication.

Assault—Self-defense. (See also the title **ASSAULT AND BATTERY**.)—Where one in defending himself against an assault injures a bystander, the injury is an accident, and the injurer not liable. *Morris v. Platt*, 32 Conn. 75.

To the same effect is *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615. See also *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55.

In *Weaver v. State* (Tex. Crim. App., 1894), 24 S. W. Rep. 648, it was held error to refuse an instruction that the defendant should be acquitted if the striking was accidental.

Accidentally Striking Another.—The defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose accidentally struck the plaintiff in the eye, severely injuring him. It was held that he was not liable. *Brown v. Kendall*, 6 Cush. (Mass.) 292.

The defendant threw a stone at the plaintiff's daughter and put out her eye. It appeared that the injury was accidental. It was held that the plaintiff could not recover. *Harvey v. Dunlop, Hill & D. Supp.* (N. Y.) 193.

Accidental Shooting. (See also the titles **HOMICIDE**; **MANSLAUGHTER**; **MURDER**.)—One hunting in a wilderness is not bound to anticipate the presence of another man, and he is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware. *Bizzell v. Booker*, 16 Ark. 308.

Several persons were having a playful altercation, during which one of them, in sport, pointed at another an old pistol thought to be unloaded, but which went off and killed the

latter; this was held not to be manslaughter. *Robertson v. State*, 2 Lea (Tenn.) 239.

In *Weaver v. Ward*, Hob. 134, it was held that, where one soldier wounds another in skirmishing for exercise, an action for trespass will not lie unless it appears that the defendant was guilty of negligence.

Manslaughter. (See also the titles **HOMICIDE**; **MANSLAUGHTER**; **MURDER**.)—A being on board a ship, and B in a boat alongside, had a dispute about the payment for some goods, both being intoxicated. A, to get rid of B, pushed away the boat with his foot; B, reaching out to lay hold of a barge to prevent his boat from drifting away, overbalanced himself and fell into the water and was drowned. A was charged with manslaughter on the coroner's inquisition. It was held, on the trial, that the facts did not constitute that offense. *Rex v. Waters*, 6 C. & P. 328, 25 E. C. L. 423.

Explosions are within the rule. *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 510; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Spencer v. Campbell*, 9 W. & S. (Pa.) 32; *U. S. v. Taylor*, 5 McLean (U. S.) 242; *Marshall v. Welwood*, 38 N. J. L. 339; *Reg. v. Gregory*, 2 F. & F. 153. See also the title **EXPLOSIONS**.

Children. (See also the title **INJURIES TO CHILDREN**.)—Where a child of tender years, not possessing sufficient discretion to avoid danger, is permitted by his parents to be on a public highway without any one to guard him, and is there run over by a traveler and injured, neither trespass nor case lies against the traveler unless the injury was voluntary or arose from culpable negligence on his part. *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273.

Where a child came upon the defendant's premises without permission and fell into an uncovered cistern, it was held that the defendant was not liable. *Hargreaves v. Deacon*, 25 Mich. 1.

Animals Fera Nature—Domestic Animals. (See also the title **ANIMALS**.)—For accidental damage by animals *fera nature*, as, for example, bees, there is no liability. *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630.

Rats are, it seems, a necessary evil in navigation, and their presence therefore in a ship in reasonable numbers does not render her unseaworthy. Their action is not an act of God, but it is an inevitable accident; and therefore if they gnaw a hole in a ship and let in the sea-water, this is a "danger or accident of the seas" within the meaning of the ordinary exception in a charter party, and the owners are not liable. *Pandorf v. Hamilton*, 16 Q. B. Div. 629. *Compare* *Carstairs v. Taylor*, L. R. 6 Exch. 217.

The owner of a domestic animal is not in general liable for an injury committed by such animal, unless it be alleged and shown that the defendant had notice of its vicious propensities. *Van Leuven v. Lyke*, 1 N. Y. 515. But the owner of a mischievous dog will be liable even as regards a trespasser who is bitten in the daytime by the animal, it being at large on its master's premises.

ant could not have avoided by the use of the kind and degree of care neces-

Loomis v. Terry, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306.

So there is no liability for accidental injury to domestic animals. *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349, 53 Am. Rep. 384; *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478; *Leseman v. South Carolina R. Co.*, 4 Rich. (S. Car.) 413; *Hess v. Lupton*, 7 Ohio 216; *Aurora Branch R. Co. v. Grimes*, 13 Ill. 587; *Illinois Cent. R. Co. v. Carraher*, 47 Ill. 333; *Durham v. Musselman*, 2 Blackf. (Ind.) 96, 18 Am. Dec. 133; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167; *Caulkins v. Mathews*, 5 Kan. 191; *Maltby v. Dible*, 5 Kan. 430; *Hughes v. Hannibal*, etc., R. Co., 66 Mo. 325; *Turner v. Thomas*, 71 Mo. 596. *Compare* *Young v. Harvey*, 16 Ind. 314; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.

Horses. (See also the title HORSES.)—Where horses become frightened and run away, the owner or driver is not responsible for the damages that they may do, if he is without fault, or for damage from other causes. *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Bigelow v. Reed*, 51 Me. 325; *Unger v. Forty-second St.*, etc., R. Co., 51 N. Y. 497; *Strouse v. Whittlesey*, 41 Conn. 559; *Center v. Finney*, 17 Barb. (N. Y.) 94; *Goshorn v. Smith*, 92 Pa. St. 435; *Goodman v. Taylor*, 5 C. & P. 410, 24 E. C. L. 385.

In *Gibbons v. Pepper*, 4 Mod. 405, it was held that if a horse runs away with his rider and strikes against another, the rider is not liable.

In *Wakeman v. Robinson*, 1 Bing. 213, 8 E. C. L. 478, the defendant's horse was frightened and ran against that of the plaintiff, injuring him. The defendant was held not liable. To the same effect see *Goodman v. Taylor*, 5 C. & P. 410, 24 E. C. L. 385; *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145.

In *Holmes v. Mather*, L. R. 10 Exch. 261, the defendant's horse, while being driven by his servant, ran away and knocked down and injured the plaintiff. It was held that the plaintiff could not recover damages.

Fires—Sparks from a Steam Dredge. (See also the title FIRES.)—It has been held that a steam dredge emitting sparks and causing neighboring property to take fire is within the rule. *Hinds v. Barton*, 25 N. Y. 544; *Teall v. Barton*, 40 Barb. (N. Y.) 137.

Fires—Sparks from Locomotives. (See also the title FIRES.)—The test in the case of a chartered railroad company is whether, in using its engines, it fails in the diligence which good specialists in this department are accustomed to exercise. *Flynn v. San Francisco*, etc., R. Co., 40 Cal. 14, 6 Am. Rep. 595; *Rood v. New York*, etc., R. Co., 18 Barb. (N. Y.) 80; *Philadelphia*, etc., R. Co. v. *Yeiser*, 8 Pa. St. 366; *Aldridge v. Great Western R. Co.*, 3 M. & G. 515, 42 E. C. L. 272; *Morris*, etc., R. Co. v. *State*, 36 N. J. L. 553; *Field v. New York Cent. R. Co.*, 32 N. Y. 339.

In *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733, it was held that the rule is otherwise as

to unchartered railroads, and that the emission of sparks is in itself evidence of negligence.

Fire Spreading from One's Premises. (See also the title FIRES.)—In *Clark v. Foot*, 8 Johns. (N. Y.) 422, the rule is thus laid down: If A sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B, his neighbor, no action lies against A, unless there was some negligence or misconduct in him or his servant. See also *Tourtellot v. Rosebrook*, 11 Met. (Mass.) 460; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Bachelor v. Heagan*, 18 Me. 32; *Hewey v. Nourse*, 54 Me. 256; *Fraser v. Tupper*, 29 Vt. 409; *Miller v. Martin*, 16 Mo. 508, 57 Am. Dec. 242; *Dewey v. Leonard*, 14 Minn. 153; *Bizzell v. Booker*, 16 Ark. 308; *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Case v. Hobart*, 25 Wis. 654; *Lansing v. Stone*, 37 Barb. (N. Y.) 15; *Simons v. Monier*, 29 Barb. (N. Y.) 419; *Hinds v. Barton*, 25 N. Y. 544; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Livingston v. Adams*, 8 Cow. (N. Y.) 175; *Dean v. McCarty*, 2 U. C. Q. B. 448; *Gillson v. North Grey R. Co.*, 33 U. C. Q. B. 129; *Achenbach v. Johnston*, 84 N. Car. 264; *Stout v. M'Adams*, 3 Ill. 67, 33 Am. Dec. 441; *Hanlon v. Ingram*, 3 Iowa 81; *Harding v. Fahey*, 1 Greene (Iowa) 377. *Compare* *Krippner v. Biebl*, 28 Minn. 139; *Reiper v. Nichols*, 31 Hun (N. Y.) 491; *Read v. Pennsylvania R. Co.*, 44 N. J. L. 280; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Burton v. McClellan*, 3 Ill. 434; *Ayer v. Starkey*, 30 Conn. 304 (under statute).

A party who sets fire to logs and brush on his own land is not liable to an action, though it is blown on the lands of his neighbor and burns his barn, unless the party setting the fire is also guilty of negligence or carelessness in setting it at that place and time. *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Hays v. Miller*, 6 Hun (N. Y.) 320.

In *Read v. Pennsylvania R. Co.*, 44 N. J. L. 282, it was held that without negligent kindling or guarding of a fire no liability could be fixed upon a person from whose premises it spread and destroyed the property of another. The court cited, as sustaining the position, *Vaughan v. Menlove*, 3 Bing. N. Cas. 468, 32 E. C. L. 208; *Filliter v. Phippard*, 11 Q. B. 347, 63 E. C. L. 347; *Tourtellot v. Rosebrook*, 11 Met. (Mass.) 460.

In *Filliter v. Phippard*, 11 Q. B. 347, 62 E. C. L. 347, it is said that *accidental* means simply not arising from negligence.

Handling Dangerous Goods in Ignorance of their Character. (See also the titles CARRIERS OF PASSENGERS; WAREHOUSES.)—*Accident* from the handling of dangerous goods in ignorance of their character creates no liability. *Parrott v. Wells*, 15 Wall. (U. S.) 524; *Pierce v. Winsor*, 2 Cliff. (U. S.) 18. See also *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

Ice and Snow. (See also the titles ICE AND SNOW; STREETS AND SIDEWALKS.)—An *accident*

sary to the exigency, and in the circumstances in which he was placed.¹

dent from slipping on ice and snow in front of a dwelling-house is not actionable unless an obligation rests upon the owner to remove the same. *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Chambers v. Ohio L. Ins.*, etc., Co., 1 Disney (Ohio) 327; *Moore v. Gadsden*, 93 N. Y. 12; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189.

So also as to ice or snow falling from the roof of a house. *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 249, 74 Am. Dec. 682. Compare *Shipley v. Fifty Associates*, 101 Mass. 251; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164.

Fall of a Structure.—Where an action is brought to recover damages on account of injury done by the *accidental* falling of a structure, proof that there was no fault or negligence imputable to the defendant, and that there was no original imperfection in the structure, is sufficient to avoid liability on his part. *Burton v. Davis*, 15 La. Ann. 448.

Leaving Wagon in Street.—As to facts which were held to justify defendant in leaving his wagon in the street and to relieve him from liability for damage caused thereby, see *Newcomb v. Van Zile*, 34 Hun (N. Y.) 275.

1. *England.*—*Wakeman v. Robinson*, 1 Bing. 213, 8 E. C. L. 478.

California.—*Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.

Connecticut.—*Morris v. Platt*, 32 Conn. 75; *Jones v. Woodhull*, 1 Root (Conn.) 298.

Illinois.—*Western Union Tel. Co. v. Quinn*, 56 Ill. 319.

Louisiana.—*Shawhan v. Clarke*, 24 La. Ann. 390.

Maine.—*Woodward v. Aborn*, 35 Me. 271, 58 Am. Dec. 699.

Massachusetts.—*Sullivan v. Scripture*, 3 Allen (Mass.) 564; *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Dickinson v. Boyle*, 17 Pick. (Mass.) 78, 28 Am. Dec. 281; *Barnard v.*

Poor, 21 Pick. (Mass.) 378; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354.

Missouri.—*Ellet v. St. Louis*, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623; *Conway v. Reed*, 66 Mo. 355, 27 Am. Rep. 354.

New Jersey.—*Brown v. Elliott*, 17 N. J. Eq. 353.

Pennsylvania.—*Baltimore*, etc., R. Co. v. *Sulphur Springs Ind. School Dist.*, 96 Pa. St. 65, 2 Am. & Eng. R. Cas. 166, 42 Am. Rep. 529.

Wisconsin.—*Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157.

In *Kellar v. Shippee*, 45 Ill. App. 381, an instruction which charged that the plaintiff in error was not liable if the colt (the subject of the action) lost its life *accidentally*, was held bad in failing to define *accident* so that the jury might understand that it meant an event causing damage, happening *accidentally* and without fault.

An *accident* may be defined as an event happening unexpectedly and without fault. Where there is fault there is liability; for example, where one drives against another by getting on the wrong side of the road in the dark. *Leame v. Bray*, 3 East 593. See also the title LAW OF THE ROAD.

An injurious *accident* raises a presumption of negligence against a carrier; but in *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 583, it is said that the word *accident* must be understood as referring to such happenings as the exercise of proper care by the carrier could not have prevented.

In *Sheldon v. Sherman*, 42 N. Y. 484, 1 Am. Rep. 569, it was held that the owner of logs, which without his fault were carried by high water down a stream and deposited on the lands of another, was liable for the damage done to such lands; but the court rested his liability upon the fact that he reclaimed the logs, saying that if he had abandoned them there would have been no liability.

ACCIDENT (IN EQUITY).

I. DEFINITION, 277.

II. ORIGIN AND RATIONALE OF THE EQUITABLE JURISDICTION, 278

III. IN WHAT CASES EQUITY WILL INTERPOSE, 279.

1. *Forfeitures and Penalties*, 279.
2. *Judgments*, 280.
3. *Powers*, 281.
4. *Confusion of Boundaries*, 282.
5. *Lost Instruments*, 282.
6. *Other Instances*, 282.

IV. IN WHAT CASES EQUITY WILL NOT INTERPOSE, 282.

1. *General Principles*, 282.
2. *Contracts*, 283.
3. *Lost Records*, 283.

CROSS-REFERENCES.

For matters of PROCEDURE, see the following titles in the ENCYCLOPEDIA OF PLEADING AND PRACTICE: BILLS TO IMPEACH DECREES AND JUDGMENTS; FRAUD; MISTAKE.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ACCOUNTS; ACT OF GOD; CONDITIONS; CONTRACTS; EQUITY; FORFEITURES; FRAUD; JUDGMENTS AND DECREES; LOST PAPERS; MISTAKE; MORTGAGES; POWERS; RECORDS; REFORMATION OF INSTRUMENTS; SURPRISE.

I. DEFINITION—Popular Sense.—In its popular sense the term "accident" signifies an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature exclusively, or an event resulting undesignedly and unexpectedly from human agency alone, or an event resulting from the joint operation of both of the foregoing agencies.¹

In Equity.—Some writers on equity jurisprudence have not attempted to define the term "accident" in its equitable signification; others have made the attempt, with more or less success; all of them confess to the difficulty of arriving at a definition which will at once embrace all the elements requisite to the equitable idea and exclude all others.² Nevertheless the following, by a modern author, appears to be both comprehensive and accurate: "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right, or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain."³

1. *Morris v. Platt*, 32 Conn. 75.

2. In 1 *Spence Eq. Jur.*, p. 628, it is said that every attempt to define "accident" in

its judicial acceptation, even in modern times, has failed.

3. 2 *Pom. Eq. Jur.* (2d ed.), § 823. This

Distinguished from Mistake.—Accident differs from mistake in that the latter always supposes the operation of the will of the agent in producing the event, although that will is caused by erroneous impressions on the mind.¹

Accident—Surprise.—The terms "accident" and "surprise," though not strictly synonymous, have, as employed in legal parlance, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his detriment, without fault or negligence of his own, and against which ordinary prudence could not have guarded.²

Scope of Article.—This article will be confined to a treatment of the subject accident as constituting a head of equity jurisdiction. The term in its other relations will be defined and discussed elsewhere in this work, under titles referred to in the note below.³

II. ORIGIN AND RATIONALE OF THE EQUITABLE JURISDICTION.—The jurisdiction of chancery to afford relief in cases of accident is very ancient and perhaps coeval with its existence.⁴

definition was adopted in *Kopper v. Dyer*, 59 Vt. 482, 59 Am. Rep. 742; *Herbert v. Herbert*, 49 N. J. Eq. 70; *Lott v. Kaiser*, 61 Tex. 669; *Gottlieb v. Stranahan* (Brooklyn City Ct.), 19 N. Y. Supp. 161.

Other Definitions.—In *Jeremy Eq. Jur.*, bk. 3, pt. 2, p. 358, the term in this connection is described as "an occurrence in relation to a contract, which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law." Mr. Story takes exception to this definition as being too narrow, in that accidents relievable in equity may arise in connection with subjects other than contracts; and as being further defective because it does not exclude instances of unexpected events and occurrences resulting from the negligence or misconduct of the party seeking relief. That learned author suggests the following: "By the term 'accident' is here intended not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party." 1 *Story Eq. Jur.* (13th ed.), p. 84. This definition was adopted by the court in *Alexander v. Bailey*, 2 Lea (Tenn.) 639; *Bostwick v. Stiles*, 35 Conn. 198; *Simpson v. Montgomery*, 25 Ark. 370, 99 Am. Dec. 228. But Mr. Pomeroy objects to it as giving the popular rather than the technical idea of the term, and also as comprehending cases which are not accidents, but mistakes. See 2 *Pom. Eq. Jur.* (2d ed.), § 823, note. And in the justness of this objection Rowell, J., for the court in *Kopper v. Dyer*, 59 Vt. 482, 59 Am. Rep. 742, concurs.

Lord Chancellor Cowper in *Bath v. Sherwin*, 10 Mod. 3, said: "By accident is meant, when a case is distinguished from others of the like nature by unusual circumstances." But this is so very loose and inaccurate as to be of no practical value. See *Simpson v. Montgomery*, 25 Ark. 373, 99 Am. Dec. 228.

In *Smith's Man. Eq. Jur.* 36, "accident" is spoken of as "an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct." And this defini-

tion is adopted in *Bispham's Princ. of Eq.*, p. 229.

Georgia Code.—In the code of *Georgia* it is said: "An accident relievable in equity is such an occurrence, not the result of negligence or misconduct of the party seeking relief in relation to a contract, as was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over another in a court of law." *Georgia Code* 1882, § 3112.

Avoiding Effect of Deed in Terms Absolute.—In *Lott v. Kaiser*, 61 Tex. 667, a father conveyed land to his minor children by a deed purporting to have been made in consideration of natural love and affection, and to convey *in presenti*, containing no reservation or exception whatever. The grantor attempted to show by parol evidence that he intended the deed to take effect at his death; that he signed it with the intention of remaining in possession; and that the only object of making it was to protect the property conveyed against the claims of his wife in the event of his death. It was held that the legal effect of the instrument could not be so controlled; that such a claim of accident in the execution of the deed could not avail; its execution was not an accident, for the accident that will afford ground for relief in such a case must be an unknown and unexpected event occurring externally to the grantor, and of which his own agency is not the proximate cause.

1. Cent. Dict. See the title MISTAKE.

2. *McGuire v. Drew*, 83 Cal. 225.

3. **In Other Connections.**—For definitions and treatment of the term in other connections, see the following titles: ACCIDENT; ACCIDENT INSURANCE; BILLS OF LADING; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; COLLISIONS (IN MARITIME LAW); COMPARATIVE NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; ELECTRIC RAILWAYS; ELEVATED RAILWAYS; ELEVATORS; EMPLOYERS' LIABILITY INSURANCE; EXPLOSIONS; FELLOW SERVANTS; IMPUTED NEGLIGENCE; INJURIES TO ANIMALS; INJURIES TO CHILDREN; MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILWAYS.

4. See *East India Co. v. Boddam*, 9 Ves. Jr. 464; *Bohart v. Chamberlain*, 99 Mo. 631.

Accident was a circumstance on which relief might have been obtained under the Roman system of jurisprudence, on the ground of natural justice.¹

Essentials.—The aid of equity may not, however, be successfully invoked in every case of accident. In order that the jurisdiction may be maintained, two conditions must concur: first, the suitor must be, in good conscience, entitled to the relief; second, there must be the impossibility of obtaining suitable relief in a court of law.² But when these two circumstances exist, equity will restore the rights which have been lost by accident.³

Subsequent Acquisition of Jurisdiction by Courts of Law.—It should be observed that when the jurisdiction of chancery has once rightfully attached to a given subject matter, on account of the original denial by courts of law of a suitable remedy, it is not affected by a subsequent assumption of jurisdiction by such courts, nor because authority to grant relief has been conferred upon them by legislative enactment.⁴

III. IN WHAT CASES EQUITY WILL INTERPOSE—1. Forfeitures and Penalties.—Originally, the jurisdiction of chancery to relieve against forfeitures and penalties arose in cases where default was attributable to accident; but subsequently it was enlarged, and now embraces all cases of default from whatsoever cause arising, and irrespective of the question of accident. The treatment here will be confined to cases of accidental forfeitures; the subject of forfeitures generally will be discussed elsewhere in this work.⁵

General Rule.—It may be stated as a general rule, that if a party is prevented by unavoidable accident, and without his fault or negligence, from a literal execution of his agreement, and thereby a penalty or forfeiture is incurred, chancery will relieve therefrom, upon the terms of his making compensation, if necessary, or of doing everything else in his power to satisfy the equitable claims of the other party; and this although the agreement is not entirely pecuniary, and is not one measured by pecuniary compensation.⁶

Accidental Default of Mortgagor.—When a mortgagor, without neglect or fault, is prevented by accident from paying an instalment at the time specified in a decree of foreclosure, equity will afford relief, but on terms that he satisfy the equitable rights of the other party.⁷ In one instance, where the mortgagor

1. 1 Spence Eq. Jur. p. 628.

2. In 2 Black. Com. 431 it is stated: "Many accidents are also supplied in a court of law; as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies."

3. To correct and relieve against accidents and mistakes is one of the principal objects and most ordinary duties of courts of equity. *Simpson v. Montgomery*, 25 Ark. 370, 99 Am. Dec. 228. See the cases cited in the succeeding sections.

4. *Bohart v. Chamberlain*, 99 Mo. 622; *People v. Houghtaling*, 7 Cal. 348; *Case v. Fishback*, 10 B. Mon. (Ky.) 40.

5. See the title FORFEITURES.

6. **Relief against Accidental Forfeitures.**—*Eaton v. Lyon*, 3 Ves. Jr. 693; *Hill v. Barclay*, 18 Ves. Jr. 56; *Bargent v. Thomson*, 4 Giff. 473; *Jones v. Creswicke*, 9 Sim. 304; *Rolfe v. Harris*, 2 Price Rep. 207; *Wheeler v. Connecticut Mut. L. Ins. Co.*, 82 N. Y. 548, 37 Am. Rep. 594; *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 431, 8 Am. Dec. 353; *Hancock v. Carlton*, 6 Gray (Mass.) 39; *Atkins v. Rison*, 25 Ark. 138; *Doty v. Whittlesey*, 1 Root (Conn.) 310; *Crane v. Hanks*, 1 Root (Conn.) 468, 2 Pom. Eq. Jur. (2d ed.), § 833.

Forfeiture of Estate Conditioned for Maintenance of Grantee.—In *Henry v. Tupper*, 29 Vt. 358, it was held that equity may relieve against the forfeiture of an estate conditioned for the maintenance and support of the grantee when the forfeiture is accidental and unintentional and not attended with irreparable injury; but that it rests in the sound discretion of the court when relief shall be granted in such cases.

7. *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742. Here the mortgagor had taken means to obtain the money for redeeming the premises which made it reasonably certain that he would succeed; but he did not, by reason of the failure of the party promising the money to meet him at the appointed time; and as the result of this unexpected occurrence, of which his agency was not the cause, he was delayed until after banking hours and was thereby prevented from sending the money to the clerk of the court in season for payment within the time named by the decree. It was held that this was an accident, and that the mortgagor was entitled to redeem.

In *Bostwick v. Stiles*, 35 Conn. 195, which is in all essential respects like the foregoing case, a similar conclusion was reached.

Failure to Redeem Land—False Return of

was prevented by accident from reaching the place of the foreclosure sale until after the sale was completed, the court ordered a resale, but on terms.¹

2. Judgments—General Rule.—Any fact which clearly proves it to be against good conscience to execute a judgment, and of which the injured party might have availed himself at law but was prevented from so doing by accident, without any fault or negligence on his part, will justify an application to a court of chancery, which will enjoin further action on the judgment, or set it aside so that a new trial may be had upon the merits.²

No Relief in Case of Negligence—Rule Inflexible.—The rule is absolutely inflexible that it must appear that the omission of the complainant to avail himself of the defense at law was unmixed with any negligence in himself or his agents.³

Illness of Counsel.—In one instance where the failure to defend the suit was due to the absence of the complainant's counsel, occasioned by illness, and in consequence his property was sacrificed, equity interposed and set aside the sale.⁴

Sheriff.—Where a party failed to redeem land in time because he was misled by the records of the court, upon which was spread the date of sale as taken from the sheriff's false return, this stating a date subsequent to the proper one, it was held that he could not be thus deprived of his right of redemption provided he tendered the proper amount within the requisite time from the original entry, although the record was subsequently changed so as to show the proper date, he being ignorant of the alteration until too late. *Alexander v. Bailey*, 2 Lea (Tenn.) 636.

1. *Adams v. Haskell*, 10 Wis. 123. In this case the accident was the breaking down of the vehicle containing the mortgagor's agent, while on the way to the sale. The court said: "This was an unavoidable accident, for which no one connected with this case was probably responsible. So there was really no objection to confirming the sale. But the circuit court, upon application, thought proper to order a resale upon the conditions named in the order. This was a very sound exercise of discretion, under the circumstances, and we think the terms imposed reasonable and just."

2. *United States v. Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 335.

Alabama.—*Watt v. Cobb*, 32 Ala. 530; *Taliaferro v. Montgomery Branch Bank*, 23 Ala. 755; *M'Grew v. Tombeckbee Bank*, 5 Port. (Ala.) 547; *French v. Garner*, 7 Port. (Ala.) 549; *Perrine v. Carlisle*, 19 Ala. 686; *Lee v. Insurance Bank*, 2 Ala. 21; *Stinnett v. Mobile Branch Bank*, 9 Ala. 120; *Foster v. State Bank*, 17 Ala. 672; *Powell v. Stewart*, 17 Ala. 719.

Maryland.—*Darling v. Baltimore*, 51 Md. 1.

New Hampshire.—*Hibbard v. Eastman*, 47 N. H. 507, 92 Am. Dec. 467; *Robinson v. Wheeler*, 51 N. H. 384; *Craft v. Thompson*, 51 N. H. 536.

New Jersey.—*Cairo, etc., R. Co. v. Titus*, 27 N. J. Eq. 102; *Herbert v. Herbert*, 49 N. J. Eq. 70.

New York.—*New York, etc., R. Co. v. Haws*, 56 N. Y. 175; *Foster v. Wood*, 6 Johns. Ch. (N. Y.) 90; *Lansing v. Eddy*, 1 Johns. Ch. (N. Y.) 49.

Virginia.—*Mason v. Nelson*, 11 Leigh (Va.) 234; *Mosby v. Haskins*, 4 Hen. & M. (Va.) 427; *Holland v. Trotter*, 22 Gratt. (Va.) 136.

West Virginia.—*Shields v. McClung*, 6 W. Va. 79; *Alford v. Moore*, 15 W. Va. 597; *Smith v. McLain*, 11 W. Va. 654.

Wisconsin.—*Stowell v. Eldred*, 26 Wis. 504; *Barber v. Rukeyser*, 39 Wis. 590.

Appeal from Probate of Will.—In *Burbeck v. Little*, 50 Vt. 713, a petition under Gen. Stat. Vermont, c. 38, § 5, for allowance of an appeal from the probate of a will, alleged that the petitioner was the niece and one of the heirs at law of the testator; that by reason of "the accident" of residing out of the state she did not hear of the testator's death, nor of the probate of his will, until after the time for appeal from the probate had elapsed, although notice of probate was duly published. On demurrer to the petition it was held that there was no accident within the meaning of the statute, and the petition could not be maintained.

3. *Richmond Enquirer Co. v. Robinson*, 24 Gratt. (Va.) 548; *Thomason v. Fannin*, 54 Ga. 367.

In *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732, it was said that the rule is stern and inflexible, that a party cannot ask for relief in equity on the ground that he has failed to make a legal defense at law, even where the judgment at law is manifestly wrong, unless he was prevented from doing so by fraud or accident, unmixed with any fraud or negligence in himself or agent.

And the court in *Meem v. Rucker*, 10 Gratt. (Va.) 509, states the general rule as follows:

"Now, that a party to whom a day and an opportunity have been allowed to make his defense against a demand set up against him in the court of law, but who has wholly failed to avail himself of them, will not be entertained in the court of chancery on a bill seeking relief against the judgment which has been rendered against him in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason, founded in fraud, accident, surprise, or some adventitious circumstance beyond the control of the party, be shown why the defense was not made in that court, is a proposition which has been so repeatedly affirmed that it has become a principle and maxim of equity as well settled as any other whatever."

4. *Brown v. Elliott*, 17 N. J. Eq. 353.

3. Powers—Non-execution.—Equity assumes no jurisdiction in the case of the non-execution of a mere naked power, resulting from accident.¹

Powers Coupled with a Trust.—This rule, however, does not apply to powers coupled with a trust; where powers of this character are required to be executed by the trustee in favor of certain persons, and they fail of execution by accident, equity will afford suitable relief.²

Defective Execution.—In case of defective execution on account of accident, or in case of an agreement to execute, which is looked upon as a sort of defective execution, equity will, under some circumstances, interpose and decree a complete execution.³

The Defects Remedied.—The defects that will be corrected are such as occur in matters of form, as, for example, the want of a signature, seal, witnesses, and the like, and not such as are of the essence of the power.⁴

To Whom Relief Granted.—This equitable jurisdiction will be exercised only in favor of persons who are in a moral sense entitled to relief, and where there are no countervailing equities;⁵ as, for instance, in favor of purchasers,⁶ creditors,⁷ wives, legitimate children,⁸ and charities;⁹ but not in behalf of husbands,¹⁰ illegitimate children,¹¹ remote relations,¹² strangers,¹³ or the donee himself.¹⁴

Confined to Powers Created by Private Individuals.—These principles apply only to powers created by private persons, and do not extend to those created by statute; the defective execution of powers of this latter kind cannot be helped by courts of equity.¹⁵

1. *England.*—*Crossling v. Crossling*, 2 Cox Ch. 396; *Brown v. Higgs*, 8 Ves. Jr. 570; *Holmes v. Coghill*, 12 Ves. Jr. 214; *Tollet v. Tollet*, 2 P. Wms. 489; *Coventry v. Coventry*, 2 P. Wms. 222; *Bull v. Vardy*, 1 Ves. Jr. 272.

United States.—*American, etc., Mortgage Co. v. Walker*, 31 Fed. Rep. 103; *Fontain v. Ravenel*, 17 How. (U. S.) 369.

Alabama.—*Mitchell v. Denson*, 29 Ala. 327, 65 Am. Dec. 403.

Florida.—*Lines v. Darden*, 5 Fla. 51.

Iowa.—*Wilkinson v. Getty*, 13 Iowa 157.

Maryland.—*Howard v. Carpenter*, 11 Md. 259.

New Hampshire.—*Johnson v. Cushing*, 15 N. H. 299, 41 Am. Dec. 694.

New Jersey.—*Lippincott v. Stokes*, 6 N. J. Eq. 122.

North Carolina.—*Harrison v. Battle*, 1 Dev. & B. Eq. (N. Car.) 215.

2. *Harding v. Glyn*, 1 Atk. 469; *Brown v. Higgs*, 8 Ves. Jr. 561; *Gibbs v. Marsh*, 2 Met. (Mass.) 243. See also the cases cited in the note immediately preceding. And see, generally, the title **POWERS**.

Mr. Greenleaf, in his addition to ch. 18, tit. 32, vol. 4, of Cruise's Digest, says: "When the power is in the nature of a trust, which it is the duty of the donee to execute, he is considered by a court of equity as a trustee for the exercise of it; and it will not permit his negligence, accident or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute."

3. See the cases cited throughout this section.

4. *Tollet v. Tollet*, 2 P. Wms. 489; *Morse v. Martin*, 34 Beav. 500; *American, etc., Mortgage Co. v. Walker*, 31 Fed. Rep. 103;

Freeman v. Eacho, 79 Va. 43. See also the title **POWERS**.

5. *American, etc., Mortgage Co. v. Walker*, 31 Fed. Rep. 103; 1 Story Eq. Jur. (13th ed.), p. 101.

6. *Purchasers.*—*Fothergill v. Fothergill*, Freem. Ch. 257; *Sergeson v. Sealey*, 2 Atk. 214; *Wade v. Paget*, 1 Bro. C. C. 363; *Jackson v. Jackson*, 4 Bro. C. C. 462; *Schenck v. Englewood*, 3 Edw. (N. Y.) 175; *Beatty v. Clark*, 20 Cal. 11; *Thorp v. McCullum*, 6 Ill. 615.

And purchasers will be held to embrace lessees. *Doe v. Weller*, 7 T. R. 478; *Shannon v. Bradstreet*, 1 S. & L. 52.

7. *Creditors.*—*Wilkes v. Holmes*, 9 Mod. 485; *Thompson v. Towne*, 2 Vern. 319; *Fleming v. Buchanan*, 3 De G., M. & G. 976; *Mayer v. McCune*, 59 How. Pr. (N. Y. C. Pl.) 78; *Porter v. Turner*, 3 S. & R. (Pa.) 108.

8. *Wives and Legitimate Children.*—*Hervey v. Hervey*, 1 Atk. 567; *Kettle v. Townsend*, 1 Salk. 187; *Tollet v. Tollet*, 2 P. Wms. 489; *Affleck v. Affleck*, 3 Sm. & Giff. 394; *Proby v. Landor*, 28 Beav. 504; *Dennison v. Goehring*, 7 Pa. St. 175, 47 Am. Dec. 305.

9. *Charities.*—*Atty.-Gen. v. Tancred*, 1 Eden 14; *Innes v. Sayer*, 7 Hare 377, affirmed on appeal, 3 M. & G. 606; *Pepper's Will*, 1 Pars. Eq. Cas. (Pa.) 436.

10. *Husbands.*—*Watt v. Watt*, 3 Ves. Jr. 244; *Hughes v. Wells*, 9 Hare 749.

11. *Illegitimate Children.*—*Tudor v. Anson*, 2 Ves. 582.

12. *Remote Relations.*—*Goodwyn v. Goodwyn*, 1 Ves. 228; *Goring v. Nash*, 3 Atk. 189; *Strode v. Russel*, 2 Vern. 621; *Tudor v. Anson*, 2 Ves. 582.

13. *Strangers.*—*Smith v. Ashton*, 2 Freem. 309; *Sergeson v. Sealey*, 2 Atk. 415.

14. *Donee of the Power.*—*Ellison v. Ellison*, 6 Ves. Jr. 656.

15. *Darlington v. Pulteney*, Cowp. 267; *Mc-*

4. Confusion of Boundaries.—Another instance of the exercise of the equitable jurisdiction, partly referable to the occasion of accident, is where confusion exists relative to the boundaries between adjoining estates.¹ And in case of a rent charge where, on account of such confusion, the remedy by distress therefor is defeated, equity will grant relief.²

5. Lost Instruments.—One of the most familiar instances of equitable interference on the ground of accident is where bonds or other instruments giving legal rights have been lost.³ As this subject will be treated exhaustively elsewhere in this work, further reference here is unnecessary.⁴

6. Other Instances.—There are certain other cases in which this extraordinary jurisdiction will be exercised, and which are referable to the occasion of accident.

Administration of Estates—Deficiency of Assets.—If an executor or administrator pays debts, legacies, or distributive shares upon the supposition that the assets are adequate to meet all demands, and it turns out that they are inadequate, he may obtain relief in equity, as otherwise he would innocently suffer from what the law regards as an accident.⁵

Bills and Notes—Accidental Omission of Indorsement.—Where, upon the transfer of a bill of exchange or promissory note, an indorsement thereof is intended, but is accidentally omitted, the transferee, or, in the event of his death, his executor or administrator, may be compelled in equity to make the indorsement.⁶

Failure of Contract of Apprenticeship—Bankruptcy of Master.—Where a minor is bound out as apprentice, and a large premium is paid to the master, who becomes bankrupt in the course of the apprenticeship, equity will interpose and apportion the premium, upon the ground of the failure of the contract by reason of accident.⁷

Annuity Secured by Public Stock—Reduction of Latter by Statute.—Where an annuity is directed by a will to be secured by public stock, and an investment therein is made, sufficient at the time, but subsequently rendered insufficient by an act of parliament in reference to the stock, equity will decree the deficiency to be made up by the residuary legatees, on the ground of accident.⁸

IV. IN WHAT CASES EQUITY WILL NOT INTERPOSE—**1. General Principles—Equal Equities.**—Relief from the consequences of accident is never given when the party against whom it is asked has an equity equal to or greater than that of the party seeking it.⁹

Negligence.—And the same is true when the accident is the result of the negligence or fault of the party invoking the aid of the court.¹⁰

Bryde v. Wilkinson, 29 Ala. 662; *Smith v. Bowes*, 38 Md. 463.

1. *Wetherbee v. Dunn*, 36 Cal. 255; *Beatty v. Dixon*, 56 Cal. 619. See also the title **BOUNDARIES**.

2. *Leeds v. Powell*, 1 Ves. 171. See also the title **BOUNDARIES**.

3. See *East India Co. v. Boddam*, 9 Ves. Jr. 466; *Kemp v. Pryor*, 7 Ves. Jr. 237; *Bloomley v. Holland*, 7 Ves. Jr. 19; *Atkinson v. Leonard*, 3 Bro. C. C. 218; *Bohart v. Chamberlain*, 99 Mo. 622; *Hickman v. Painter*, 11 W. Va. 386.

4. When a bond is burnt or cancelled by accident there is an appropriate case for equitable relief. *Skip v. Huey*, 3 Atk. 93.

5. See the title **LOST PAPERS**.

6. *Edwards v. Freeman*, 2 P. Wms. 447; *Johnson v. Johnson*, 3 B. & P. 162. See also *Pooley v. Ray*, 1 P. Wms. 355; *Jones v. Lewis*, 2 Ves. 240; *Orr v. Kaines*, 2 Ves. 194. And see, generally, the titles **EXECUTORS AND ADMINISTRATORS**; **LEGACIES AND DEVISES**.

6. *Watkins v. Maule*, 2 J. & W. 243. See also the title **REFORMATION OF INSTRUMENTS**.

7. *Hale v. Webb*, 2 Bro. Ch. 78, 1 Story Eq. Jur. (13th ed.), p. 99. See, generally, the titles **APPRENTICE**; **CONTRACTS**.

8. *Davies v. Wattier*, 1 Sim. & Stu. 463; *May v. Bennett*, 1 Russ. 370; 1 Story Eq. Jur. (13th ed.) 100. See, generally, the title **ANNUITIES**.

9. 1 Fonblanque's Eq., bk. 1, c. 4, § 25, and notes; 2 Fonblanque's Eq., bk. 2, c. 6, § 2, and notes. And see *Malden v. Merrill*, 2 Atk. 8.

Bona Fide Purchasers.—It is a general rule that courts of equity will not interfere to grant relief against a bona fide purchaser for a valuable consideration, without notice, on the ground of accident, as he has an equal equity to the protection of the court. *Ligon v. Rogers*, 12 Ga. 292.

10. *Ex p. Greenway*, 6 Ves. Jr. 812; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Sedam v. Williams*, 4 McLean (U. S.)

Mere Expectancy.—Again, equity will not interpose at the instance of one whose claim is not a vested right, but a mere expectancy. To illustrate: If a testator is prevented by accident from making a will in favor of a certain person, equity cannot relieve against the disappointment, as its jurisdiction does not extend to accidents which prevent voluntary dispositions of estates.¹

2. Contracts.—In matters of express contract, the fact that the party has been prevented by accident from discharging the obligations created, or that he has been without fault, or that he has been accidentally prevented from deriving the full benefit of the contract on his side, constitutes no ground for equitable interposition.² The reason is this: the party was free to guard against such contingencies by his contract, and as he did not so guard against them, the law presumes an intentional general liability.³

An exception to the general rule is found in the case of contracts involving penalties and forfeitures.⁴ Further reference to this subject here is unnecessary, as it will be treated exhaustively under a subsequent title.⁵

3. Lost Records.—Chancery has no jurisdiction to supply or re-establish the records of courts of law which have been destroyed by accident. This power pertains to the court in which the record was made, and is a power inherent in courts of general jurisdiction.⁶

Confirming Title Dependent upon Lost Records.—But equity may confirm a title acquired by virtue of a judicial sale, when the record of the decree and proceedings under which it was had are subsequently lost or destroyed.⁷

51; *U. S. v. Ames*, 99 U. S. 47; *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 566; *Williams v. Craig*, 2 Edw. Ch. (N. Y.) 302; *Barnet v. Passumpsic Turnpike Co.*, 15 Vt. 757; *Up-ham v. Hamill*, 11 R. I. 566, 23 Am. Rep. 525; *Montgomery v. Scott*, 9 S. Car. 20, 30 Am. Rep. 1.

Bond Destroyed by Obligor.—Equity will not grant relief to an obligee in a bond who has destroyed or suppressed the same. *Davis v. Davis*, 6 Ired. Eq. (N. Car.) 418.

Intervention of Incumbrances.—In *Gotthelf v. Stranahan* (Brooklyn City Ct.), 19 N. Y. Supp. 161, the date appointed for the execution of a conveyance of city lots by the vendor, with covenants against incumbrances (9th of February), was postponed several times at the instance of the vendor, in order that he might remove squatters; finally, on the 4th of May he tendered a conveyance with the required covenants, as of the date originally fixed. In the meantime an assessment for improvements had been made against the property. The vendor had known of the likelihood that the assessment would be made, and by his remonstrance might have defeated it. Moreover, by prompt proceedings he

might have removed the squatters, and completed the contract before the assessment was made. It was held that the intervention of the assessment, and the dealings of the parties considered with reference thereto, did not entitle the vendor to relief on the ground of accident.

1. *Whitton v. Russel*, 1 Atk. 448.

2. *Brecknock, etc., Canal Nav. Co. v. Pritchard*, 6 T. R. 750; *Bullock v. Dommitt*, 6 T. R. 650; *Gotthelf v. Stranahan* (Brooklyn City Ct.), 19 N. Y. Supp. 161; *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; *Wheeler v. Connecticut Mut. L. Ins. Co.*, 82 N. Y. 546, 37 Am. Rep. 594, reversing 16 Hun (N. Y.) 317; *Fowler v. Bott*, 6 Mass. 63; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582.

3. 1 Story Eq. Jur. (13th ed.), p. 104.

4. See *supra*, this title, *Forfeitures and Penalties*.

5. See the title ACT OF GOD.

6. *Keen v. Jordan*, 13 Fla. 327; *Welch v. Smith*, 65 Miss. 394; *Clingman v. Hopkie*, 78 Ill. 152. And see the titles LOST PAPERS; RECORDS.

7. *Garrett v. Lynch*, 45 Ala. 204.

ACCIDENT INSURANCE.

By J. W. LUND.

I. DEFINITION, 285.

II. THE APPLICATION, 286.

III. PAYMENT OF PREMIUMS, 287.

1. *In General*, 287.
2. *Payment by Order on Wages*, 289.
3. *Waiver by Agent of Condition as to Payment*, 289.
4. *Estoppel to Deny Payment*, 290.
5. *Forfeiture for Nonpayment*, 290.

IV. FORM, SCOPE, AND GENERAL NATURE OF POLICY, 291.

V. CONSIDERATION OF THE TERMS OF THE POLICY, 291.

1. *Accidents and Injuries Usually Insured against*, 291.
 - a. *Accidental Injuries in General*, 291.
 - b. *External, Violent, and Accidental Means*, 294.
 - c. *Total Disability*, 296.
 - d. *Loss of Certain Members of the Body*, 300.
 - e. *Accidents to Insured in Special Occupations*, 302.
 - (1) *Description of Occupation*, 302.
 - (2) *Occupation Defined*, 303.
 - (3) *Risks Classified by the Company*, 303.
 - f. *Injuries to Passengers by Public or Private Conveyance*, 305.
 - g. *Injuries Received in the Discharge of Duty*, 306.
2. *Accidents and Injuries Usually Excepted*, 306.
 - a. *The General Rule of Construction*, 306.
 - b. *Voluntary Exposure to Unnecessary Danger*, 306.
 - (1) *In General*, 306.
 - (2) *What is a Voluntary Exposure*, 307.
 - c. *Want of Due Diligence*, 310.
 - d. *Walking or Being on Railroad*, 311.
 - e. *Riding on Platform of or Getting on or off a Railroad Car*, 312.
 - f. *Noncompliance with Rules and Regulations of Carrier or Corporation*, 313.
 - g. *Suicide or Self-inflicted Injuries*, 313.
 - h. *Taking Poison*, 314.
 - i. *Inhalation of Gas*, 315.
 - j. *Death Caused by Disease*, 315.
 - k. *Surgical Operation or Medical Treatment*, 318.
 - l. *Intoxication*, 318.
 - m. *Lifting or Over-exertion*, 319.
 - n. *Gymnastic or Athletic Exercise*, 319.
 - o. *Violation of Law*, 319.
 - p. *Assault Provoked by Quarrelling*, 321.
 - q. *Injuries Received while Fighting*, 321.
 - r. *Intentional Injuries*, 322.
3. *Stipulations as to Notice and Preliminary Proof, Time of Instituting Suit, Arbitration*, 323.
 - a. *Notice and Proof of Injury*, 323.
 - (1) *In General*, 323.
 - (2) *Waiver*, 325.
 - b. *Time of Instituting Suit*, 325.
 - c. *Arbitration*, 327.

VI. PROXIMATE CAUSE, 327.**VII. AGENTS, 328.**

1. *Misstatements in Application*, 328.
2. *Power of Agent to Waive Conditions and Forfeitures*, 328.
3. *Knowledge of Agent Imputed to Insurer*, 329.

VIII. EVIDENCE, 330.

1. *Proof of Death by Violent, External, and Accidental Means*, 330.
2. *Presumptions*, 331.
3. *Establishing a Proviso Limiting the Insurer's Liability*, 332.

IX. AMOUNT OF RECOVERY, 332.**CROSS-REFERENCES.**

For matters of *PROCEDURE*, see the title *INSURANCE*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

As to provisions against intoxicants, see the title *ALCOHOLISM, INTEMPERANCE, AND NARCOTICS (IN INSURANCE)*.

As to rights, etc., of beneficiaries, see the title *BENEFICIARIES (IN INSURANCE)*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject see the following titles: *ARBITRATION AND AWARD; BENEVOLENT OR BENEFICIAL ASSOCIATIONS; BY-LAWS; EMPLOYERS' LIABILITY INSURANCE; INSURANCE; LIFE INSURANCE*.

And for other kinds of insurance, see *ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE); BOILER INSURANCE; CREDIT INSURANCE; CYCLONE INSURANCE; DEVIATION (IN MARINE INSURANCE); ELEVATOR INSURANCE; ENDOWMENT INSURANCE; FIDELITY INSURANCE; FIRE INSURANCE; HAIL INSURANCE; LIGHTNING INSURANCE; LLOYDS' ASSOCIATIONS; LIVE-STOCK INSURANCE; MARINE INSURANCE; OVER-INSURANCE; PLATE-GLASS INSURANCE; REINSURANCE; RENT INSURANCE; TITLE INSURANCE; TONTINE INSURANCE*.

I. DEFINITION.—Accident Insurance is an insurance against personal injury, or loss of life, by accident, and, though applied to a particular class of risks, depends upon essentially the same principles as other kinds of insurance. The value of the interest insured is not capable of exact determination after loss, as in the case of fire and marine insurance, but it may be fixed by the parties within such limits as will not make it a wager policy.¹

Distinguished from Casualty Insurance.—The distinguishing feature of accident insurance is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property although occasioned by accident. So far as the latter class of insurance has been developed, it has been with reference to boilers, plate-glass, and perhaps to domestic animals, and injuries to property by street-cars, and is popularly known as Casualty Insurance.²

Field of Accident Insurance Extended.—Accident insurance was originally confined to accidents to the person of the insured, but it has lately been extended to cover contracts of indemnity of the assured against losses by injuries to persons in whom he has an insurable interest, because legally liable for the consequences of the accident.³

1. May on Insurance (3d ed.), §§ 7, 535.

2. See the titles *BOILER INSURANCE; PLATE-GLASS INSURANCE*; and the other kinds of Casualty Insurance.

3. *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404. Here it was held that policies of insurance to indemnify the assured, as owner of a horse, vehicle, or elevator causing accidental personal injuries for which he may be legally liable, against claims for compensation therefor,

or as landlord or tenant for such injuries to persons other than employees or persons injured by elevators, or as a builder or contractor for such injuries to workmen employed by other contractors, and to the public, caused by the assured and his own workmen, but not caused by a subcontractor or his workmen, all cover legitimate varieties of accident insurance, and may lawfully be issued by a foreign insurance company licensed to issue accident policies and

II. THE APPLICATION—Policy Referring to Application.—Where the policy provides that "in consideration of the statement of facts warranted to be true in the application for this policy, and of the payment" of certain sums, the company "hereby insures," etc., the application so referred to in the policy constitutes a part of the contract of insurance.¹ And in such case there can be no recovery if the statements in the application are not true.² And this, regardless of whether the statements were or were not material to the risk, since the agreement of the parties is conclusive and the question of materiality is no longer an open one.³

Application not Made Part of the Contract.—But where the application is not made a part of the contract and the policy contains no warranty of the truth of the statements in the application, both the materiality and the truth of the statements of the assured in applying for the policy are to be determined by the jury; and in an action on the policy a recovery may not be defeated unless such statements, or some of them, are found to be both material and untrue.⁴

Statements Expressing the Applicant's Understanding of the Effect of the Insurance.—Statements in the application expressing the applicant's understanding of what will be the effect of the insurance cannot control the legal construction of the policy subsequently issued and accepted, notwithstanding the application warrants the facts stated therein to be true, and the policy is expressed to be made "in consideration of the warranties made in the application."⁵

Policy Differing from Application.—Where the policy as delivered contains provisions not in the application, and which are not accepted by the applicant, they may be treated as waived by the company, and constituting no part of the insurance contract.⁶

General Rule of Construction.—The contract of insurance is construed liberally in favor of the insured, it being held, usually, that the failure of the applicant to mention a physical infirmity from which he had at a former period suffered, but from which he was at the time of the application free, so that it did not increase his liability to accidental injury, nor contribute in any respect to the injury in question, will not affect the policy.⁷

employers' liability policies, or by any company organized under the *Massachusetts Insurance Act of 1887*, c. 214, § 29, cl. 5; and the fact that a foreign insurance company has issued such policies is not a cause for the revocation of its license. See the title **EMPLOYERS' LIABILITY INSURANCE**.

1. *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376.

2. *Murphey v. American Mut. Acc. Assoc.* (Wis., 1895), 62 N. W. Rep. 1057.

In *Cram v. Equitable Acc. Assoc.*, 58 Hun (N. Y.) 11, the application was by the terms of the certificate subject to the condition "that all the statements and representations contained in the application for this certificate are warranted to be correct and true in all respects. And if this certificate * * * has been * * * obtained through misrepresentation * * * then the same shall be absolutely null and void." The application for the certificate required an answer to the following question: "4th. Occupation? If more than one, name them all"; which was answered, "Oil producer;" and also to the following question: "State the duties required of you under that occupation;" which was answered, "Supervising only." The undisputed evidence was that the insured had a small lease of oil lands upon which he had two or more wells which he managed

and operated himself, doing every part of the work alone which could be done by one man; that he tended his own boilers, ran his own engine, pumped his wells, "pulled" his wells, and made his own repairs, without assistance except upon extraordinary occasions. It was held that the representations made by the insured were incorrect, and that the certificate was, for that reason, void.

3. *New York Fidelity, etc., Co. v. Alpert*, 67 Fed. Rep. 460.

4. *New York Fidelity, etc., Co. v. Alpert*, 67 Fed. Rep. 460.

5. *Accident Ins. Co. v. Crandal*, 120 U. S. 527.

6. *Dailey v. Preferred Masonic Mut. Acc. Assoc.* (Mich., 1894), 60 N. W. Rep. 694, *reversing* (Mich., 1894) 57 N. W. Rep. 184. In this case it was held that where the application contained no restriction as to entering and leaving cars in motion, but the policy excluded such risks, yet expressly made the application a part of the contract, an action might be maintained for an accident caused by such risks.

7. *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376.

Statements as to Bodily or Mental Infirmity.—*An anemic murmur*, indicating no structural defect of the heart, but caused by a tempo-

III. PAYMENT OF PREMIUMS—1. In General.—The same general rules in regard to the payment of premiums, giving notice as to same, etc., which govern other insurance, apply in the case of accident insurance.¹ Ordinarily the

rary weakened condition of the body, is not within the meaning of the term "bodily or mental infirmity" in the application in which the applicant states his freedom from such infirmity. *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

Erysipelas.—In a suit on an accident policy where the petition alleged that the deceased died of erysipelas, resulting from an accidental laceration of the finger, an answer averring that in the contract of insurance the deceased had warranted "that he had never had, and had not then, any bodily or mental infirmity, whereas in truth * * * said deceased had on various occasions prior thereto been afflicted with, and was then subject to and infected with, erysipelas, * * * and that he eventually died of erysipelas," was held to be demurrable as failing to state a defense, because it did not show that erysipelas was an infirmity which increased the risk of death in the event of accident. *Bernays v. U. S. Mutual Acc. Assoc.*, 45 Fed. Rep. 455.

Nearsightedness.—In *Cotten v. Fidelity, etc., Co.*, 41 Fed. Rep. 506, the application contained a warranty that the applicant did not have, neither was subject to, any bodily infirmity. The evidence showed that he was nearsighted. This was held to be not a bodily infirmity within the meaning of the warranty.

Fits.—The insured stated that he was not suffering from any disease which would retard recovery or be aggravated by personal injury; that he never had fits, disorders of the brain, or bodily or mental infirmity which would thereby render him liable to personal injuries. There was evidence that the deceased had been thrown from a horse, striking his head, and had fits. There was also testimony by those who had known him for years, that he was strong and robust, and that they had never known of his having any ailment. It was held that the weight of the evidence was not in favor of misrepresentations as to his physical condition. *Brink v. Guaranty Mut. Acc. Assoc.* (Supreme Ct.), 28 N. Y. St. Rep. 921.

Former Insanity.—The defendant insured M. against accidents. M. had been a canvasser for the defendant, and the president had cautioned him not to insure insane persons. M. had been insane, but had been pronounced cured. He did not disclose this fact upon his application for insurance, but stated that there were no circumstances rendering him peculiarly liable to accident. It was held that the conversation with the president had no bearing upon the application, and that if the deceased did not conceal any facts which in his own mind were material in making the application the policy was not void. *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410.

Statements as to Occupation.—The application stated that the insured was a "livery stable proprietor not working." It was shown that he employed men to do the work, but sometimes harnessed and drove the horses him-

self. It was held that the statements sufficiently apprised the defendant of the character of his duties, and that if anything more definite was required it was the defendant's duty to ascertain the facts by proper inquiries. *Brink v. Guaranty Mut. Acc. Assoc.* (Supreme Ct.), 28 N. Y. St. Rep. 921.

In *Murphey v. American Mut. Acc. Assoc.* (Wis., 1895), 62 N. W. Rep. 1057, the policy was conditioned upon the truthfulness of the representations in the application. On the issue as to whether the plaintiff at the time of the application was a carpenter, he testified that at the time of the application he was "cutting cordwood," that afterward he was "framing timbers—framing]sets and caps." Several witnesses, without being contradicted, testified that he was not a carpenter. It was held that a finding of the jury that the plaintiff was a carpenter should be set aside as against the evidence.

In *Perrins v. Marine, etc., Ins. Soc.*, 2 El. & El. 317, 105 E. C. L. 316, the insured described himself as "A. B., Esq." He was, in fact, an ironmonger. It was held that the policy was not thereby avoided. This was upon the ground that the statement was simply imperfect, and not untrue.

Statement as to Other Insurance.—In *Craig v. Imperial Union Acc. Assoc. Co.*, 1 Scot. L. T. R. 646, the insured being asked, "Have you ever been insured with other companies?" answered that he was insured in The Railway Passenger Co., but concealed the fact that he was also insured with The General Accident Corporation. There was no evidence that he acted fraudulently. It was held that the fact undisclosed had no bearing on the risk, and therefore did not affect the contract.

Statement as to Marriage.—In *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376, the facts in the application were warranted to be true, and the application contained the following: "Write policy payable, in case of death by accident under its provisions, to Mrs. Fred. Martin, whose relation to me is that of wife." The insured was a single man. The statement was held to be neither a warranty nor a material representation.

But see *Smith v. Baltimore, etc., R. Co.* (Md., 1895), 32 Atl. Rep. 181. Here the application provided that the truth of answers to questions should be a condition precedent to the payment of benefits, and that the beneficiaries whom the insured could name were limited to wife and children if married, and father and mother if single. The deceased named as his beneficiary a person whom he falsely alleged to be his wife. It was held on demurrer in an action by the child of a former wife of the deceased, who at the time of his taking the policy had been divorced, that there could be no recovery, on the ground that the applicant's misstatement defeated the right of anybody to recover.

1. See *Simpson v. Accidental Death Ins. Co.*, 2 C. B. N. S. 257, 89 E. C. L. 256; also

premiums are payable in instalments, and the policies provide that there shall be no recovery thereon for injuries which are received during any insurance-period for which the premium has not been actually paid.¹

When Policy Takes Effect.—Where the application, expressly made a part of the policy, provides that the company shall not be liable for injuries occurring before the "receipt and acceptance" of the application and fee, the insurance is not operative until acceptance, and the company is not estopped to deny liability for injuries received by the applicant prior thereto, by having received the application and retained the fee.²

Inconsistency between Application and Policy.—But where the application states that the applicant will be entitled to no benefits "until after the receipt and acceptance of this application and the membership fee and the amount of one assessment" by a designated officer, and the policy provides for the payment of a certain sum upon its delivery, and a further sum, but without specifying when the latter is payable, the policy takes effect upon the delivery thereof and the payment of the sum called for by the policy upon delivery.³

Default in Premium Falling Due after the Accident.—Where the policy provides for indemnity if the death of the insured occurs within ninety days after accident, and from the effects thereof, and death does so occur within the time limited, the circumstance that before the death of the insured his policy expired because of default in paying an assessment falling due after the accident does not relieve the company from liability, since its liability attached immediately upon the occurrence of the injury.⁴

Premium Sent by Mail.—The question whether an assessment, claimed to have been remitted to the company by post, was in fact received by it prior to the injury of the assured, is one for the jury to determine.⁵

the title *INSURANCE*, and the various kinds of insurance under their specific titles.

Notice.—Where, according to the certificate of membership in an association operating on the assessment plan, members were entitled to one month, after notice of the assessment, to pay the same, and on the envelope containing the certificate was indorsed "first assessment payable February 1st," the failure to pay before that date an assessment made January 1st, and of which the member had received no notice, was held not to forfeit the certificate. *Ball v. North Western Mut. Acc. Assoc.*, 56 Minn. 414.

Where the by-laws of a mutual benefit association provided for the forfeiture of membership in the event of the failure of the member to pay any assessment "within thirty days from the date of the notice thereof," a notice which was mailed so as to reach the insured November 30th, and which demanded payment on or before December 28th, was held not sufficient to sustain a forfeiture. *U. S. Mutual Acc. Assoc., etc., v. Mueller*, 151 Ill. 254.

1. *Simpson v. Accidental Death Ins. Co.*, 2 C. B. N. S. 257, 89 E. C. L. 256. See *infra*, this title, *Payment by Order on Wages*.

2. "**Receipt and Acceptance**" of Application.—*Coker v. Atlas Acc. Ins. Co.* (Tex. Civ. App., 1895), 31 S. W. Rep. 703. In this case it was expressly stated in the application that the company would not be liable for any bodily injury happening prior to the receipt and acceptance of the application and the membership fee by the general agent in Boston. The application had been given to the agent in Texas April 2d. The injury was

received April 5th. Across the face of the application was written the following, "accepted April 8th," which was the same date as the issuance of the policy. Insured died April 12th. The pleading of the plaintiff did not allege that it was accepted at any other date, but it was argumentatively stated that the application was received on April 5th and not rejected. It was held that this pleading was not sufficient to overcome the effect of the written acceptance set out in the plea as a bar thereto, and the agreement on the part of the assured that the liability of the company should not extend to any injury prior to the date of such acceptance.

Oral Agreement for Present Insurance—Wisconsin.—Under R. S. *Wisconsin*, § 1979, an oral agreement for present insurance made by the agent of an accident insurance company is binding upon the latter, although the application signed by the person to be insured contained (unknown to the applicant) a provision that the company should not be liable for any injury happening prior to the receipt and acceptance of the application and membership fee by the secretary and general manager, and the policy subsequently issued bore date two days later than the oral agreement. *Mathers v. Union Mut. Acc. Assoc.*, 78 Wis. 588.

3. *Bushaw v. Women's Mut. Ins., etc., Co.* (Supreme Ct.), 8 N. Y. Supp. 423.

4. *Burkheiser v. Mutual Acc. Assoc.*, 61 Fed. Rep. 816.

5. *National Masonic Acc. Assoc. v. Burr* (Neb., 1895), 62 N. W. Rep. 466. See also the title *Presumptions*.

2. Payment by Order on Wages.—It is customary for companies insuring railway and other corporation employees to take orders from the insured on his employer to pay the premiums as they fall due, the amount of the same to be deducted from his wages. In such cases it is generally held that the insurer must notify the insured of the nonpayment of his order before he may insist upon the forfeiture of the policy.¹

A provision, in a policy issued to a railroad employee, that the insured shall leave in the hands of a designated official of the road the instalments of premium as agreed in an order of the insured on such official to retain the instalments out of his wages, is complied with by the insured leaving the instalments in the hands of the designated official without seeing that he turns them over to the company.² In one instance where the company failed to present the order for payment before the death of the insured, although several months had intervened, it was held estopped to set up the defense of nonpayment of the premium.³

3. Waiver by Agent of Condition as to Payment.—The company may be bound by the waiver, on the part of its general agent, of the conditions of the policy as to payment of premiums.⁴

1. *Eury v. Insurance Co.*, 89 Tenn. 427; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141. In this latter case it was held that the payment of premiums will be presumed to have been made out of a fund provided and assigned for that purpose until notice of nonpayment is given to the insured.

Where the company waives a cash payment of the premium and accepts in lieu thereof an order for the same, given by the insured on a third person, and gives a receipt for the amount, it cannot defeat a recovery on the policy and insist upon a forfeiture as for nonpayment of the premium without having given the insured notice of the nonpayment of the order. *National Ben. Assoc. v. Jackson*, 114 Ill. 533. The court here distinguishes the case from one where the insured gives his promissory note for the premium which he fails to pay at maturity, and where the policy provides for forfeiture for nonpayment of the note.

Payment of Premium by Order on Employer—No Wages Earned.—In *Bane v. Travelers' Ins. Co.*, 85 Ky. 677, the company issued to the plaintiff an accident policy for one year from January 10th. In payment of the premiums plaintiff gave an order on his employer for twenty dollars, payable in instalments of five dollars each, to be deducted from his wages for the months of January, February, March, and April. The drawee of the order did not accept it, but paid the January and February instalments. He did not pay those of the two months succeeding, the plaintiff not working during that time. On the first of May the plaintiff resumed work, and on the 10th of the same month there was due him more than ten dollars; and on the 28th of the same month he met with the accident for which the action on the policy was brought. The company did not demand the balance of the order from the drawee, nor notify the plaintiff of its nonpayment, nor return or offer to return it, nor notify the plaintiff that the contract was at an end. The policy by its terms divided the twelve months into four periods, of two, two,

three, and five months, respectively, and provided that each of the four instalments of the order should apply to the payment of the premium for a single period, and that no liability should be incurred by reason of an accident occurring within a period for which the instalment should not have been actually paid. It was held that the action, under the circumstances, could not be maintained. To the same effect is *McMahon v. Travelers' Ins. Co.*, 77 Iowa 229.

2. *Fidelity, etc., Co. v. Johnson* (Miss., 1895), 17 So. Rep. 2.

3. *Cotten v. Fidelity, etc., Co.*, 41 Fed. Rep. 506.

4. **Waiver by General Agent.**—*Standard Acc. Ins. Co. v. Friedenthal*, 1 Colo. App. 5. In this case the person who delivered the policy having the apparent authority of a general agent, and therefore being such as to third persons, the insurer was held bound by his waiver as to the condition of payment of premiums. See also *Mathers v. Union Mut. Acc. Assoc.*, 78 Wis. 588.

Waiver by Soliciting and Collecting Agent.—In *Kerlin v. National Acc. Assoc.* (Ind., 1893), 35 N. E. Rep. 39, it is held that an agent of an insurance company with authority to solicit applications and collect premiums has authority to waive a provision in the policy calling for payment of premiums in quarterly instalments, and to accept payment of the whole annual premium in advance. Here the insured tendered the collection agent the full amount of his annual premium, and the agent accepted only a part thereof and promised to pay the company the residue in satisfaction of a debt owing by him to the insured. It was held that the company was bound by the agent's waiver of the cash payment, since the insured, who acted in entire good faith, had a right to rely on the agent's representation that the transaction constituted payment in full of the premium.

But in *Cronkhite v. Accident Ins. Co. of North America*, 35 Fed. Rep. 26, it is said that while authority to give credit and to change the terms of the policy belongs to

4. Estoppel to Deny Payment—By Language of Policy.—The company may be estopped by reason of the terms of the policy to deny that the premiums have been paid.¹

By Acknowledgment of Payment in Policy.—And it has been held, on grounds of public policy, that the company will be estopped to prove, for the purpose of avoiding the contract of insurance, that the premium, acknowledged in the policy to have been paid, was not in fact paid.²

5. Forfeiture for Nonpayment.—The clause providing for forfeiture for nonpayment of premiums is inserted in the policy for the benefit of the insured and may be waived by him; and courts will find a waiver upon slight evidence when the equity of the claim made is, under the contract, in favor of the insured.³

the general agent having power to complete the contract, it does not extend to a mere subagent or soliciting agent who is charged merely with the matter of collecting premiums or soliciting insurance. The facts in this case were as follows: A obtained an accident policy, the general agent giving him until November 1st, following, to pay the premium. At that date, in company with B, who was a soliciting agent for the company, and who had conducted the negotiations with A and was authorized to collect the premium, A went to the general agent's office to make the payment, but was informed by the person who had acted as general agent at the time of the issuance of the policy that he was no longer such agent, and that his successor was absent. Thereupon A and B went out, and the latter promised the former that he would return in the afternoon and himself pay the amount of the premium and look to him for reimbursement. He did call at the office several times during the afternoon, but was unable to find the general agent, so the premium was not paid. It was held, in an action on the policy, that A had not exercised sufficient diligence to avoid a forfeiture for nonpayment of the premium.

1. When Insurer Estopped to Deny Payment as against the Beneficiary.—*Kline v. National Ben. Assoc.*, 111 Ind. 462, 60 Am. Rep. 703. In this case it was held that where both the policy of insurance, which provides that it is incontestable except on the ground of fraud, and the application state, the one by express words and the other by a clear implication, that the consideration has been paid, the insurer is estopped to deny payment as against the beneficiary, and the policy is enforceable by the latter, although part of the premium was not in fact paid, but instead orders were given therefor by the insured on his employer, who at his request refused to pay them, and notwithstanding the orders stipulated that if they were not paid the insured's right would be thereby forfeited. See also *Wright v. Mutual Ben. L. Assoc.*, 43 Hun (N. Y.) 61; *Wood v. Dwarrior*, 11 Exch. 493; *Wheaton v. Hardisty*, 8 El. & Bl. 232, 92 E. C. L. 231.

2. Provident L. Ins. Co. v. Fennell, 49 Ill. 180; *Teutonia L. Ins. Co. v. Anderson*, 77 Ill. 386; *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354.

Payment of Indemnity—Not Conclusive of Payment of Premium.—In *Melin v. Accident Ins.*

Co. of North America, 70 Wis. 579, the facts were these: A policy for one year was issued to a brakeman, who gave an order on the railroad company by which he was employed, for the premiums, aggregating thirty dollars, payable in four equal instalments. The policy provided that in the event of any injury to the insured before the actual payment of the first instalment, then the sum of all unpaid instalments called for by said order should be deducted from the amount due for such injury, and the order should thereupon be cancelled. Each instalment was to pay the premium for a definite insurance period, the periods being two, two, three, and five months, respectively. There was to be no liability by reason of any injury occurring in any insurance period for which the premium had not been actually paid. Before the payment of the first instalment the insured was injured, and the company paid him \$22.50 in cash and credited the first instalment of \$7.50 as paid. Nothing was ever paid on the order of the railroad company. Just before the expiration of the year the insured was killed. In an action on the policy it was held that the cash payment to the insured on account of his injury, to which under the policy he was not entitled unless the instalments of premium had been paid, did not raise a conclusive presumption that all such instalments had in fact been paid.

3. Waiver of Forfeiture.—*Lyon v. Travelers' Ins. Co.*, 55 Mich. 141.

An insurance company will not be permitted to insist upon a forfeiture if by any agreement, either express or implied by the course of its conduct, it induces the insured honestly to believe that the premiums will be received after the appointed day. *Sweetser v. Odd Fellows Mut. Aid Assoc.*, 117 Ind. 97; *Painter v. Industrial L. Assoc.*, 131 Ind. 69.

In *Equitable Acc. Ins. Co. v. Van Etten*, 40 Ill. App. 232, the policy was issued in consideration of promissory notes given by the appellee for the premium; and the policy was conditioned that it should be void if any such note due before the happening of the accident was not paid when due; the last of such notes (the others being then paid) was due and unpaid seven months before the accident. The notes were on their face payable at the office of the company at Chicago. From the evidence it appeared that such notes were more frequently in fact paid by

IV. FORM, SCOPE, AND GENERAL NATURE OF POLICY.—The ordinary accident policy provides for an indemnity of a fixed sum per week in case of accidental injury, for twenty-six weeks, and a fixed sum in case of death within ninety days after the accident.¹

The more recent policies also provide for a fixed sum in case of loss of sight, hands, or feet, which was a provision formerly more generally inserted in English policies.

Where an insurance company is authorized to insure against disabilities to persons by sickness or disease or other bodily infirmity it may issue general accident policies. One who loses a leg or arm, or is otherwise disabled, whether temporarily or permanently, by external or violent means, is one suffering from an imperfection, and is to that extent disabled by a bodily infirmity.²

As applied to liability insurance the policies cover injuries for which the insured may be responsible under the Employers' Liability Acts, generally called "Employers' Liability Policy," or injuries for which the insured may be legally liable either to employees or to the public.³

In the absence of a statutory provision requiring the contracts of insurance to be in writing they may be parol.⁴

Accordingly the policy may be reformed so as to conform to the nature of the understanding between the parties where it does not express the contract between the parties as they understood it.⁵

V. CONSIDERATION OF THE TERMS OF THE POLICY—1. **Accidents and Injuries Usually Insured against**—*a. ACCIDENTAL INJURIES IN GENERAL*—**Accident Defined.**—An accident, according to the generally received meaning of the term, is defined as the happening of an event without the aid and design of a person, and which is unforeseen,⁶ and in this sense the word is to be understood, in the ab-

being sent to the places where the insured were employed, or elsewhere by casual meetings between agents of the company and the insured, and that the company, if the notes were not paid when due, still treated them and the policies as in force by sending notices to the assured, and also sending the notes in the hands of agents to collect them. The testimony of the appellee was that the agent of the company told him that he would collect at the place of business of the appellee, and that the other three notes for premiums on the policy were in fact so paid. The only part of this testimony disputed by the appellants was that, as to one of the three notes, it was paid by deduction from a former claim of the appellee. In fact the note in question was in the hands of an agent for collection probably before it was due. He did not present it, but laid it away and forgot it, and no notice was given to the appellee by anybody of anything calling his attention to the matter. It was held that under the circumstances the appellant could not insist upon a forfeiture.

1. For a standard form of accident policy, see Richards on Insurance (2d ed.), p. 598, Appendix.

See Dawson v. Accident Ins. Co., 38 Mo. App. 355, for a policy which insured as an accident indemnity policy simply, and provided no indemnity in case of instant death.

2. Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167.

3. Employers' Liability Assur. Co. v. Merrill, 155 Mass. 404.

4. In Rhodes v. Railway Pass. Ins. Co., 5 Lans. (N. Y.) 71, the plaintiff met the defendant's agent in the street and gave him 50 cents premium for a day's insurance. The agent promised to make out the policy. It was held that the plaintiff could maintain an action on the contract after loss.

5. Frank v. Pacific Mut. L. Ins. Co. (Neb., 1895), 62 N. W. Rep. 454. In this case the defendant's agent issued a ticket to plaintiff stating verbally that one third of the amount of the policy would be paid in case of the loss of a foot. The ticket did not contain this provision. It was held that the policy could be reformed to the agreement as mutually understood. In Henderson v. Travelers' Ins. Co., 65 Fed. Rep. 438, the insured asked for a policy which would cover intentional injuries inflicted by another, and the policy was issued with the exception against liability for such injuries, and was reformed after loss. See *infra*, this title, *Agents*.

Ultra Vires Contract.—Where an insurance company, which under its charter can insure only against accidents to travelers, issues a general accident policy, the contract is *ultra vires*, and the remedy of the insured is in disaffirmance of the contract and for an accounting. Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167. See, generally, the title *ULTRA VIRES*.

6. Paul v. Travelers' Ins. Co., 112 N. Y. 472, 8 Am. St. Rep. 758.

Accidental is that which happens without design or expectation; it is defined as "the happening of an event without the design and aid of a person, and which

sence of plain unequivocal exceptions and provisions, in a policy insuring against injury or death caused by accidental means.¹

If a result is such as follows from ordinary means voluntarily employed and in a not unusual or unexpected way, it cannot be called a result effected by accidental means.² But if in the act which precedes the injury something

is unforeseen." This definition excludes the idea of design, and makes the event wholly involuntary. The opposite of accident is design, volition, intent. *Williams v. U. S. Mutual Acc. Assoc.* (Supreme Ct.), 14 N. Y. Supp. 728, 38 N. Y. St. Rep. 378.

An accident is an event that takes place without one's foresight or expectation; an event which proceeds from unknown causes and therefore not expected; a chance, casualty, contingency. Accidental signifies happening by chance or unexpectedly; taking place not according to the usual course of things; casual, fortuitous. *North American L., etc., Acc. Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410.

An accident is an event happening without any human agency, or, if happening through human agency, an event which under the circumstances is unusual and not expected to the person to whom it happens. *McGlinchey v. Fidelity, etc., Co.*, 80 Me. 251, 6 Am. St. Rep. 190.

An accident is that which takes place without one's foresight or expectation. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205; *Equitable Acc. Ins. Co. v. Osborn*, 95 Ala. 201; *Ripley v. Railway Pass. Assur. Co.* (U. S. C. C.), 2 *Bigelow Life & Acc. Ins. Cas.* 738; *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 315; *Supreme Council, etc., v. Garrigus*, 104 Ind. 140, 54 Am. Rep. 293.

Some violence, casualty, or *vis major* is necessarily involved in the term "accident." *Sinclair v. Maritime Pass. Assur. Co.*, 3 El. & El. 478, 107 E. C. L. 476.

For a review of the various definitions of the term "accident," see *Lovelace v. Travelers' Protective Assoc.* (Mo., 1894), 28 S. W. Rep. 877. See also *Fenwick v. Schmalz*, L. R. 3 C. P. 313; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 23 Am. St. Rep. 455; *Duncan v. Preferred Mut. Acc. Assoc.* (Super. Ct.), 13 N. Y. Supp. 620; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157.

Death by Accident has been defined to be death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things. *North American L., etc., Ins. Co. v. Burroughs*, 69 Pa. St. 51, 8 Am. Rep. 212; *Bacon v. U. S. Mut. Acc. Assoc.*, 44 Hun (N. Y.) 607.

1. *U. S. Mut. Acc. Assoc. v. Barry*, 131 U. S. 121; *Ripley v. Railway Pass. Assur. Co.* (U. S. C. C.), 2 *Bigelow's Ins. Cas.* 738, *affirmed in* 16 Wall. (U. S.) 336; *Richards v. Trav. Ins. Co.*, 89 Cal. 170, *citing* 1 Am. & Eng. Encyc. of Law (1st ed.) 87; *Supreme Council, etc. v. Garrigus*, 104 Ind. 140; *Lovelace v. Trav. Protective Assoc.* (Mo., 1894), 28 S. W. Rep. 877; *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 315; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157.

In *Lovelace v. Travelers' Protective Assoc.* (Mo., 1894), 28 S. W. Rep. 877, it was held that the word "accident" in a policy of accident insurance was to be interpreted so as to give effect to the intention of the parties as expressed by the language they had used, and the term being no further limited than by its use in contradistinction to "death from natural causes," it was to be given its usual, natural, and popular meaning.

2. *U. S. Mut. Acc. Assoc. v. Barry*, 131 U. S. 100.

Injury Resulting from Swinging Indian Clubs.

—Where death was alleged to have occurred by reason of injury sustained from exercising with Indian clubs, it was held that if the deceased used the clubs for exercise, and, in the ordinary way of taking such exercise, without the occurrence of any unusual circumstance interfering with such use, or causing any unforeseen, accidental, or involuntary movement of the body, and in the use of the clubs in this manner there occurred the rupture of a blood-vessel, then the cause of the injury was not accidental; on the other hand, if there occurred any unforeseen accident, or involuntary movement of the body of the deceased which brought about in connection with the use of the clubs the injury, or if there occurred any unforeseen or unexpected circumstance which interfered with or obstructed the usual course of the exercise, and thereby was produced an involuntary movement, strain, or wrenching of the body by means of which the injury was caused, then the means might be said to be accidental. *McCarthy v. Travelers' Ins. Co.* (U. S., 1879), 7 Rep. 486.

Jumping from a Train.—Where a person was injured internally by jumping in great haste from a railroad train at a station and running a considerable distance, which action was not necessary to his safety, but was voluntarily undertaken to effect an important object which required haste, the injury cannot be said to be caused by accidental means within the meaning of the policy. *Southard v. Railway Pass. Assur. Co.*, 34 Conn. 574.

Sunstroke.—Sunstroke or heat prostration contracted in the course of one's ordinary business is not an accidental injury within the terms of a policy insuring against bodily injury sustained through "external, violent, and accidental means," but expressly excepting "any diseases or bodily infirmity." *Dozier v. Fidelity, etc., Co.*, 46 Fed. Rep. 446.

In *Sinclair v. Maritime Pass. Assur. Co.*, 3 El. & El. 478, 107 E. C. L. 476, the policy assured against "any personal injury from or by reason or in consequence of, any accident which should happen to him, or upon any ocean, sea, river, or lake." The assured was the master of a ship, and in the course

unforeseen, unexpected, and unusual occurs which produces the injury, then the injury has resulted through accidental means.¹

of his voyage arrived on the southwest coast of India, and in the usual course of his vocation suffered sunstroke, from the effects of which he died. It was held that his death must be considered as having resulted from a natural cause, and not from accident within the meaning of the policy. The policy did not contain the words "external, violent," and yet the chief justice held that the term "accident," as used in the policy, involved necessarily some violence, casualty, or *vis major*. He said: "We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus, by way of illustration, if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that in one sense disease or death, through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection one man escapes, another succumbs. Yet diseases thus arising have always been considered not as accidental, but as proceeding from natural causes. In the present instance the disease called 'sunstroke,' although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected, and so died."

Unforeseen Result of Ordinary Occupation.—Where it appeared that the deceased, who had just risen from bed and was in the act of putting on his stockings, died suddenly, and that the cause of death was pressure upon the heart, resulting from the fact that the colon of the deceased had fallen out of its place and become folded, it was held that the death was not accidental within the meaning of a policy insuring against "bodily injury caused by violent, accidental, external, and visible means." *Clidero v. Scottish Acc.*

Ins. Co., 29 Scot. L. Rep. 303. Lord Adams, in delivering the judgment, said: "A person may do certain acts, the result of which may produce unforeseen consequences and may produce what is commonly called accidental death; but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now, if that is so, where does the question of accident come in here? There is no evidence * * * that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently a most unfortunate and unexpected result happened—the man's death."

1. *U. S. Mutual Acc. Assoc. v. Barry*, 131 U. S. 100.

Thus the following injuries have been held to have resulted through accidental means:

Disease Caused by Accident.—Strains caused by stooping or lifting. *Hamlyn v. Crown Accidental Ins. Co.* (1893), 1 Q. B. 750; *Martin v. Travelers' Ins. Co.*, 1 F. & F. 505; *Owen v. Travelers' Ins. Co.* (Ind.), 12 Ins. L. J. 75; *Reynolds v. Equitable Acc. Assoc.*, 49 Hun (N. Y.) 605, 59 Hun (N. Y.) 13; *Gale v. Mutual Aid, etc., Assoc.*, 66 Hun (N. Y.) 600.

Peritonitis caused while using a pitchfork. *North American L., etc., Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212; or by a fall, *Barry v. U. S. Mutual Acc. Assoc.*, 23 Fed. Rep. 712; 131 U. S. 100; *Freeman v. Mercantile Mut. Acc. Assoc.*, 156 Mass. 351.

Death from hernia caused by a fall, *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122, 112 E. C. L. 122; 2 *Bigelow Ins. Cas.* 649; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296; or from pneumonia resulting from weakened condition caused by accidental injury. *Isitt v. Railway Pass. Assur. Co.*, 22 Q. B. Div. 504; *Peck v. Equitable Acc. Assoc.*, 52 Hun (N. Y.) 255.

Tetanus caused by an accidental cut. *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 178.

Blood poison or erysipelas resulting from a fall or cut accidentally received. *Martin v. Equitable Acc. Assoc.*, 61 Hun (N. Y.) 467; *Accident Ins. Co. v. Young*, 20 Duval (Montreal) 280.

Fever following a fall and wound. *Standard L., etc., Ins. Co. v. Thomas* (Ky., 1891), 17 S. W. Rep. 275.

Bright's disease following a fall. *Cross v. Ry. Acc. Ins. Co.* (N. P., 1871), cited in *Bliss on Life Insurance* (1st ed.) 71.

Rupture of the tympanum of the ear caused by diving. *Rodey v. Travelers' Ins. Co.*, 3 N. Mex. 316. See *infra*, this title, *Accidents and Injuries Usually Excepted*.

Accident Caused by Disease.—An injury resulting from an attack of disease, as vertigo or fits, is a ground for recovery under an accident policy. *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945.

Negligence—Intention.—The definition does not exclude an injury caused in part by the negligence of the insured,¹ nor injuries inflicted on the insured intentionally by another where the injury is not the result of misconduct or participation of the insured party.²

b. EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS.—Accident policies usually restrict the liability of the insured to injuries effected through external, violent, and accidental means. This provision is construed beneficially for the insured. The term "external" refers to the means of the injury and not to the injury itself,³ and the fact that an injury is accidental and unnatural imports

7 C. C. A. 581; *Reynolds v. Accidental Ins. Co.*, 22 L. T. N. S. 820, 18 W. R. 1141; *Wingspear v. Accident Ins. Co.*, 6 Q. B. Div. 42, 42 L. T. N. S. 900; *Lawrence v. Accidental Ins. Co.*, 7 Q. B. Div. 216.

See *infra*, this title, *Accidents and Injuries Usually Excepted*.

Death by Fright.—Death by fright, caused by a horse running away, is an accidental injury within the meaning of the policy. *McGlinchey v. Fidelity, etc., Co.*, 80 Me. 251, 6 Am. St. Rep. 190.

Drowning.—So death by drowning. *Trew v. Railway Pass. Assur. Co.*, 5 H. & N. 211, 6 H. & N. 839, 7 Jur. N. S. 878; *Wingspear v. Accident Ins. Co.*, 6 Q. B. Div. 42; *Reynolds v. Accidental Ins. Co.*, 18 W. R. 1141; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945; *Supreme Council v. Boyle* (Ind., 1894), 37 N. E. Rep. 1105; *Couadeau v. American Acc. Co.* (Ky., 1894), 25 S. W. Rep. 6; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Tucker v. Mutual Ben. Life Co.*, 50 Hun (N. Y.) 50; *Wehle v. U. S. Mutual Acc. Assoc.*, 11 Misc. Rep. (N. Y. Super. Ct.) 36; *Knickerbocker Casualty Ins. Co. v. Jordan*, 7 Cinc. L. Bull. (Ohio) 71; *McDonald v. Refugee Assur. Co.* (Scotland), 27 Scot. L. R. 764, 17 Sess. Cas. (Scot.) 955.

Asphyxiation.—So asphyxiation by gas in the atmosphere. *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758; *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79; *U. S. Mutual Acc. Assoc. v. Newman*, 84 Va. 52.

Somnambulism.—So falling from a window or car while walking in sleep. *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13, 46 Am. Rep. 618.

Poison.—So taking poison by mistake. *Healey v. Mutual Acc. Assoc.*, 133 Ill. 556, 23 Am. St. Rep. 637, reversing 35 Ill. App. 17.

As to taking poison when there is a special provision in the policy excepting death by poison, see *infra*, this title, *Accidents and Injuries Usually Excepted*.

Suicide while Insane.—So death by the insured's hanging himself while insane. *Accident Ins. Co. v. Crandal*, 120 U. S. 527.

Stepping off Cars.—So stepping off a train of cars and falling through a concealed hole in a bridge. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205.

Stumbling under a Railroad Train.—So stumbling and falling under a railroad train. *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201.

Fighting.—So death resulting from a fight in which the insured was the aggressor, though ignorant that his opponent was

armed. *Lovelace v. Travelers' Protective Assoc.* (Mo., 1894), 28 S. W. Rep. 877.

Sting of Insect.—So death caused by the sting of a venomous insect. *Preferred Mut. Acc. Assoc. v. Beidleman*, 1 Monaghan (Pa.) 481.

1. *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157.

There is nothing in the definition of the word "accident" which excludes negligence of the insured party as one of the elements contributing to produce the result. An accident may be an unusual result of a known cause and, therefore, unexpected to the parties. *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572.

2. *Accident Ins. Co. of North America v. Bennett*, 90 Tenn. 256, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 88, 89; *Supreme Council, etc., v. Garrigus*, 104 Ind. 133.

Intentional Injury.—Where another intentionally injures a person, the injury not being the result of misconduct or the participation of the injured party, but being unforeseen, it is as to him accidental, although inflicted intentionally by the other party. *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484; *Phelan v. Trav. Ins. Co.*, 38 Mo. App. 640; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 23 Am. St. Rep. 455, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 87; *Ripley v. Railway Pass. Assur. Co.*, 2 Bigelow Ins. Cas. 738; *Jones v. U. S. Mut. Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 89; *Robinson v. U. S. Mut. Acc. Assoc.*, 68 Fed. Rep. 825; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Gresham v. Equitable Acc. Ins. Co.*, 87 Ga. 497, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 87; *Insurance Co. v. Bennett*, 90 Tenn. 256.

Insured Hanged by Mob.—It was accordingly held to be an accident where insured was hanged by a mob. *Fidelity, etc., Co. v. Johnson* (Miss., 1895), 17 So. Rep. 2.

Express Provision Requiring Care.—Where there is an express provision requiring the insured to use due care and diligence for personal safety, the negligence of insured will defeat recovery. See *infra*, this title, *Accidents and Injuries Usually Excepted*.

3. In *American Acc. Co. v. Reigart*, 94 Ky. 547, the insured lost his life by eating a piece of beefsteak that in the attempt to swallow accidentally passed into his windpipe, choking him to death in a few minutes. It was held that death was caused by external, violent, and accidental means within the mean-

an external and violent agency as its cause.¹

External or Visible Sign of Injury.—Akin to the provision that the injury must be the effect of external, violent, and accidental means, is the exception often inserted in accident policies that the insurance shall not extend to injuries of which there is no external or visible sign. This provision has reference only to cases of bodily injury which do not result in death.² There may be ex-

ing of the policy. The court, by Pryor, J., said: "It was not designed that there should be such external violence, as a fall, a kick, or a blow, on the person, as would cause death or an injury, before the liability of the company should arise. This language was inserted in the contract to protect the company against hidden or secret diseases resulting in injury where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accidents, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes, and that were liable to occur at any time from natural causes. * * * It is plain, we think, that the means or that which caused the injury should be external, and not that the injury should have been external."

A Suicide while Insane is an injury effected through external means. *Crandal v. Accident Ins. Co.*, 27 Fed. Rep. 40, 120 U. S. 527. See also *infra*, this title, *Accidents and Injuries Usually Excepted*, subd. *Internal Injuries*.

1. In *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, it appeared that the insured was found dead in his bed in his room at a hotel. The gas had, in some way, been turned on; the atmosphere was filled with it, and death was caused by breathing the atmosphere. It was held that death was occasioned by external and violent means within the meaning of the policy, the court saying: "That a death is the result of accident, or is unnatural, imports an external and violent agency as cause." This case overrules in part *Hill v. Hartford Acc. Ins. Co.*, 22 Hun (N. Y.) 187, where it was held that the death of a physician resulting from drinking, by mistake, water from a goblet in which there was poison was not effected through external and violent means. See also *Trew v. Railway Pass. Assur. Co.*, 6 H. & N. 839; *Winspear v. Accident Ins. Co.*, 6 Q. B. Div. 42, 29 Moake Rep. 488; *Eggenberger v. Guarantee Mut. Acc. Assoc.*, 41 Fed. Rep. 172; *Healey v. Mutual Acc. Assoc.*, 133 Ill. 556, 23 Am. St. Rep. 637; *McGlinchey v. Fidelity, etc., Co.*, 80 Me. 251, 6 Am. St. Rep. 190; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 47 Am. Rep. 410; *Tucker v. Mutual Ben. Life Co.*, 50 Hun (N. Y.) 53; *Whehle v. U. S. Mutual Acc. Assoc.*, 11 Misc. Rep. (N. Y. Super. Ct.) 41; *U. S. Mutual Acc. Assoc. v. Newman*, 84 Va. 52.

Pollock v. U. S. Mutual Acc. Assoc., 102 Pa. St. 230, 48 Am. Rep. 204 (*distinguished* in *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 93), and *Bayless v. Travelers' Ins. Co.*, 14 Blatchf. (U. S.) 144, where death by accidental poisoning was held not due to external

and violent means, are opposed to the weight of authority. For further illustrations of the interpretation of the words as to external, violent, and accidental means, see *infra*, this title, *Accidents and Injuries Usually Excepted*, subds. *Poison, Inhalation of Gas, Disease, Lifting or Overexertion*.

Violent, Accidental, External, and Visible Means.—The plaintiff effected an insurance with defendants against "any bodily injury caused by violent, accidental, external, and visible means." The policy contained a proviso excepting, among other things, injuries arising from "natural disease or weakness, or exhaustion consequent upon disease." In stooping to pick up a marble dropped by a child the plaintiff dislocated the cartilage of his knee. Before the accident the plaintiff had not suffered from any weakness of the knee or knee-joint. It was held that the plaintiff was entitled to recover. *Hamlyn v. Crown Accidental Ins. Co.* (1893), 1 Q. B. 750.

In discussing the meaning of the requirement that injury must arise from a violent, accidental, external, and visible cause, *Lopes, L. J.*, says: "In stooping to pick up the marble the plaintiff used some extra exertion and some extra physical force, and I think that the expression 'violent' is satisfied by the facts which attended the injury. The cause of the injury was accidental in the sense that the injury was a casualty and unforeseen and unexpected. Then comes the word 'external,' and in construing that word it is important to bear in mind the other part of the policy which deals with matters internal. Looking at the contrast between matters external and matters internal, it is suggested that the resistance of the floor supplies the external cause. I think a more obvious cause is the act of reaching after the marble and the wrench which accompanied that act. That stooping and reaching after the marble was certainly not an internal cause, but was, in my opinion, an external cause within the policy. Once admit that there is an external cause, it is plain that it was a visible one, and that condition also of the policy is satisfied."

2. *Eggenberger v. Guarantee Mut. Acc. Assoc.*, 41 Fed. Rep. 172; *McGlinchey v. Fidelity, etc., Ins. Co.*, 80 Me. 251, 6 Am. St. Rep. 190; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Paul v. Travelers' Ins. Co.*, 45 Hun (N. Y.) 313, 112 N. Y. 452, 8 Am. St. Rep. 758.

In *McGlinchey v. Fidelity, etc., Co.*, 80 Me. 251, 6 Am. St. Rep. 190, *Peters, C. J.*, said: "The policy declares that the insurance shall not extend to bodily injuries unless the external sign of the injury is visible, 'nor to any death caused' in certain ways

ternal signs of a wholly internal injury,¹ and it has been held that the sign of an injury is visible within the meaning of the policy if it is apparent to the touch, though not perceptible to the eye.²

c. **TOTAL DISABILITY.**—All accident policies contain provisions whereby the insured becomes entitled to a certain indemnity in case of "total disability;" and the members of benefit societies usually become entitled to the whole or a part of the benefit in a like case.

Total Disability a Relative Term.—What amounts to a total disability is, in general, a relative matter and depends largely upon the occupation and employment in which the person insured is engaged.³ But the phrase "total disability" is usually found in policies of insurance associated with limiting words of some kind, and the question therefore becomes largely one of the construction of the language of the policy. The most usual phrases found in the policies will now be examined, but it will be found that, even where the language of the policies is substantially similar, the courts are not in accord as to what is to be included under the term total disability.

To Prosecute One's Usual Employment.—The phrase "totally disabled from the prosecution of one's usual employment," in an accident insurance policy, has been held to mean wholly disabled from doing substantially all kinds of one's accustomed labor to some extent. A disability that simply prevents the insured doing as much in a day's work as before is not total, but one that prevents his doing certain portions of his accustomed work is total, although there are other portions that he is able to perform.⁴

named. There are reasons for the condition applying to a surviving claimant. He has unusual chances for feigning an internal injury, if disposed to defraud the insurer. But no such protection is required where the accident causes death. The dead body is external and visible sign enough that an injury was received."

1. In *Barry v. U. S. Mutual Acc. Assoc.*, 23 Fed. Rep. 712, affirmed in 131 U. S. 100, Dyer, J., instructed the jury upon this point as follows: "There must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. * * * Visible signs of injury, within the meaning of this policy, are not to be confined to broken limbs, or bruises on the surface of the body; there may be other external indications or evidences which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see; complaint of internal soreness is not such a sign, for that you can not see; but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting and retching, or bloody or unnatural discharges from the bowels; if, in short, it sends forth to the observation of the eye, in the struggle of nature, any sign of the injury,—then those are external and visible signs, provided they are the direct results of the injury."

Effects Not at Once Apparent.—Where the policy excepts "injuries of which there is no visible external mark upon the body of the insured," a recovery may be had for injuries which, although not immediately apparent, are visible soon after the accident and as a consequence of the injury. *Pennington v. Pacific Mut. L. Ins. Co.*, 85 Iowa 468.

2. *Gale v. Mutual Aid, etc., Assoc.*, 66 Hun (N. Y.) 600.

3. *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546; *McMahon v. Supreme Council*, 54 Mo. App. 468; *Wolcott v. United L., etc., Ins. Assoc.*, 55 Hun (N. Y.) 98; *Hutchinson v. Supreme Tent, etc.*, 68 Hun (N. Y.) 355.

In *Wolcott v. United L., etc., Ins. Assoc.*, 55 Hun (N. Y.) 98, the court, upon the question of total disability, said: "Total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged. One can readily understand how a person who labors with his hands would be totally disabled only when he cannot labor at all. But the same rule would not apply to the case of a professional man whose duties require the activity of the brain, which is not necessarily impaired by serious physical injury. If a person engaged in the general practice of medicine and surgery is unable to go about his business, enter his office, and make calls upon any of his patients, but is confined to the bed, as in this instance, and enabled only to exercise his mind on occasional applications to him for advice, he may be said to be totally disabled within the meaning of the provisions of this policy."

4. **Instances — Farmer.**—*Sawyer v. U. S. Casualty Co.* (Mass., 1868), 8 Am. L. Reg. N. S. 233. In this case a farmer was allowed to recover as for a total disability, because he was unable to do the ordinary and customary work on the farm, although he was able to milk a little, and do some light work in the barn.

Solicitor and Registrar of County Court.—To the same effect is *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546, where the insured was a solicitor and registrar of a county court, and was held to be "wholly disabled from following his usual occupation" by a severe-

To Prosecute Any Occupation whereby the Insured can Obtain a Livelihood.—In some instances the policy, while providing for indemnity when the insured is "per-

ly sprained ankle which confined him to his bedroom for several weeks.

Medical Practitioner.—In *Wolcott v. United L., etc., Ins. Assoc.*, 55 Hun (N. Y.) 98, the circumstances were these: In the month of July, 1888, the plaintiff met with an accident by which his hip was injured, without fault on his part, and was totally disabled for a period of at least two weeks. At the end of this time, supposing himself recovered and able to resume his duties, which were those of a medical practitioner having in charge a general practice, he applied to the defendant for payment and stated his claim to be for two weeks at twenty-five dollars a week. This sum was paid him and a receipt was signed by him for the amount, but it was stated in the handwriting of the plaintiff, added to the printed form, to be up to date only. It turned out afterward, upon evidence which was uncontradicted, that the injuries sustained in July again prostrated him, and he was confined to his room and bed for a further period of four weeks, and was unable to go upon his rounds or to visit any patient. He did, however, during this time, as well as during the two weeks of his confinement, occasionally permit a patient to come to his bedside, when he would make some examination, and at times reached for or received certain medicines in his room which he advised to be administered, but never, so far as the evidence showed, did he leave his bed during this time. His attending physician was very strenuous in enforcing his advice that he should remain in bed. The question was, whether the plaintiff was totally disabled during the four weeks from the 13th of September to the 11th of October, 1888. The receipt which he gave did not preclude him from claiming for such subsequent total disability, which he did not apprehend at the time of the first payment. It was held that the foregoing facts did not preclude him from claiming, during the continuance of such subsequent four weeks' disability, the sum specified in the policy.

Iceman.—In *Neafie v. Manufacturers' Acc. Indemnity Co.* (Supreme Ct.), 28 N. Y. St. Rep. 55, the plaintiff was insured by a policy in which he was described as "by profession, occupation or employment, an iceman (proprietor)." The plaintiff at times helped in delivering ice, and while thus engaged received an injury which disabled him from engaging in the delivery of ice, although he was able to be about and give general directions to persons who took his place as iceman during the period of disability. It was held that the plaintiff was totally disabled within the meaning of the policy.

Switchman.—In *Hutchinson v. Supreme Tent, etc.*, 68 Hun (N. Y.) 355, the facts were these: A member of a benefit association, who was a railroad switchman, lost all the fingers of one hand in coupling cars. The constitution of the association provided that "a member who, by reason of a disability

incurred after admission to endowment membership, becomes wholly unable to direct or perform the kind of business or labor which he has always followed and by which alone he can thereafter earn a livelihood, shall be deemed entitled to disability benefits," which are stated to be "annually one tenth part of the sum for which his endowment certificate is issued." It was held, under this provision, that as the evidence showed that the plaintiff was totally disabled from performing the duties of a railroad switchman, and that for many years he had been engaged in that kind of labor, the verdict in his favor should be for the amount of the first installment of one tenth of his endowment falling due, with interest thereon from the commencement of the action.

Laborer—Wearing Truss.—In *McMahon v. Supreme Council*, 54 Mo. App. 468, upon the question whether the insured, a laborer whose usual occupation was digging cellars, was totally disabled from following his usual occupation by reason of an extensive hernia, which possibly might have been to some extent relieved by wearing a truss, the court said: "In determining the liability in such a case, the courts must consider both the mental and the physical capabilities of the assured, otherwise such a benefit certificate would be a delusion and a snare. The plaintiff's evidence tended to prove that in the fall of 1889 he became disabled as the result of hernia; that he was operated on three times without securing any relief; that his occupation was that of a day-laborer—engaged in digging cellars; that the rupture was of such a character as to unfit him for performing manual labor, and that he had been unable during the four years preceding the trial to earn a livelihood. His physical condition was well established by the testimony of three reputable physicians, all of whom concurred in the opinion that the plaintiff was permanently incapacitated to perform such labor as required lifting or unusual exertion. They were also of opinion that this rupture was so large that a truss could not be worn without great danger of serious injury, and that, even though the hernia could be reduced and held in place by a truss, the plaintiff could not perform labor which required much exertion. This evidence tended to prove that the plaintiff was totally and permanently incapacitated to follow his usual avocation, for the use of a pick, spade, or shovel certainly requires unusual exertion."

Permanent Disability—To Prosecute One's Usual or Some Other Occupation.—Under a provision that if a member becomes "permanently disabled from following his usual or some other occupation," he shall be entitled to a certain indemnity, it has been held that a member who is disabled from following his usual occupation is entitled to the benefit, although he may not be disabled from following some other occupation. *Neill v. Order of United Friends* (Supreme Ct.), 28 N. Y. Supp.

manently disabled from following his or her usual or other occupation," at the same time defines the disability which shall entitle the insured to recover as one which shall "permanently prevent the member from following any occupation whereby he or she can obtain a livelihood." In such cases it has been held that there can be no recovery if the insured can earn a living at any other occupation, although incapacitated for his own profession.¹ But the question whether the insured is disabled from prosecuting some other occupation is to be determined by a consideration of his education, experience, age, and natural ability.²

To Transact Any and Every Kind of Business Pertaining to One's Occupation.—The courts are not unanimous in the construction of the provision just stated. In the majority of cases the clause has received a strict construction, legal effect being given to the whole language employed, it being held that the insured is not disabled within the meaning of the policy so long as he is capable of performing any kind of business pertaining to his employment.³ But in one instance

928. In this case *Brown, P.J.*, in delivering judgment, said: "The defendant reads this sentence as if 'or' was 'and,' and 'some other' 'all other.' It cannot be so construed. The word 'or' creates two cases in which the member may become entitled to the benefit fund. Who would be included in the second class of cases we need not now determine. When a member, who is permanently disabled from following some occupation other than his usual occupation asserts a claim to the fund, the expression 'some other occupation' will be construed and given its proper place in the contract. It is sufficient, for the present occasion, that the plaintiff is unable to follow his usual occupation. That fact brings his case within the contract. Under either reading, therefore, of the condition of the contract in question, the plaintiff's case, as made by the evidence, falls within it. He has lost a limb, which is a permanent disability. The loss renders him unable to follow his usual occupation, and its loss was by reason of an accident which happened while engaged in following his usual occupation."

1. *Barber*.—*Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721. In this case the insured, a barber, received an injury which prevented him from following his occupation, but he opened a restaurant and thereby made a living. And the court held, on demurrer to an answer averring such facts, that the circumstance that the insured was obtaining a living from his business as a restaurant keeper was a good defense to the action, although the plaintiff was disabled from following his occupation as barber. It was contended in this case that the words "or other occupation" meant "or other like occupation," and that the fact that the insured was earning a living in a totally dissimilar occupation was no bar to a recovery. But the court said that there was no room for the application of the rule of *ejusdem generis*.

2. *McMahon v. Supreme Council*, 54 Mo. App. 468. In this case the plaintiff, a laborer whose usual occupation was digging cellars, was insured under a policy of the kind described in the text, and the court, after

determining that he was so injured as to be totally disabled from following his usual occupation, proceeded as follows: "In determining whether the plaintiff was disabled to such an extent as to prevent him from pursuing some other avocation in which he could earn a livelihood, his former occupation, his education and business experience, his natural abilities, and his age must be considered. The plaintiff's evidence bearing on this branch of the case tended to show that the plaintiff was fifty-eight years old; that he was enfeebled and weakened by sickness to such an extent that he could walk only a few blocks at a time; that he could neither read nor write; that he was naturally weak-minded, and exceedingly ignorant,—all of which had a tendency to prove that he was incapable of earning a livelihood in any of the pursuits suggested by the defendant. We therefore conclude that the court committed no error in submitting the case to the jury."

3. *Attorney-at-Law*.—In *U. S. Mutual Acc. Assoc. v. Millard*, 43 Ill. App. 148, while the policy was in force the insured, an attorney, fell and cut the thumb of his right hand on a chair, and for about twenty-six weeks was unable to use that hand. The evidence was that after the injury and during the time that indemnity was claimed under the policy the plaintiff was at his office during office hours and attending to professional business, advising clients, accepting employment as attorney, commencing suits, and he did not remember to have refused during that time to accept employment as an attorney on account of the injury. And in reply to the question as to what extent he was disabled, the plaintiff stated: "Simply to the extent of not being able to use my hand; that is all." The injury to the hand was severe, and plaintiff suffered much pain. It was held that the plaintiff could not recover, the injury being so slight as not to seriously interfere with the prosecution of his profession.

Merchant.—In *Saveland v. Fidelity, etc., Co.*, 67 Wis. 174, 58 Am. Rep. 863, the insured, a merchant, received an injury to his ankle which rendered it necessary for him to go about his business in a buggy, and in

it has been held that it is not incumbent upon the plaintiff to prove that the injury wholly disabled him from the doing of any and every kind of act necessary to be done in the prosecution of his business, but it is sufficient if he proves that his injury was of such a character and to such an extent that he was not able to do all the substantial acts necessary to be done in the prosecution of his business.¹

this way, even, he was able to attend to a small portion of his business only. On appeal, it was held that it was error on the part of the court to instruct the jury that the defendant was to pay the amount agreed, if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent."

Leather-cutter and Merchant.—Where the insured was described as having the two-fold occupation of leather-cutter and merchant, it was held that in order to entitle him to indemnity he must be wholly disabled from the prosecution of any and every kind of business pertaining to the occupation under which he was insured; that is, the two-fold occupation of leather-cutter and merchant. *Ford v. U. S. Mutual Acc. Rel. Co.*, 148 Mass. 153.

Manufacturer.—In *Gracey v. People's Mut. Acc. Ins. Assoc.*, 21 Pittsb. L. J. 25, the insured was classed as a manufacturer. He received a fall on the ice, breaking his arm, necessitating the carrying of it in a sling. The injury and pain were such as to prevent him from lying in bed, and the only sleep he obtained for several weeks was in a chair. He was able to go to his factory and give a few general orders, but was not able to remain any length of time. The court held that he was not wholly "disabled from the prosecution of any and every kind of business pertaining to his occupation," within the meaning of the policy.

Retired Gentleman.—Where the party assured was described in the policy as a "retired gentleman," and had in fact no occupation, except to amuse himself, and received an injury while operating a buzz-saw at a wagon-manufacturing company's shop, of which he was a stockholder and director, and in consequence thereof was obliged to carry his arm in a sling and was deprived of its use to a greater or less extent during several months, he was denied a recovery, as he was not totally disabled and prevented from the prosecution of any and every kind of business pertaining to the occupation under which he received membership. *Knapp v. Preferred Mut. Acc. Assoc.*, 53 Hun (N. Y.) 84.

Disability to Transact Any Business Includes Disability to Transact a Particular Business.—Where the defendant by its policy insured the plaintiff "under classification preferred (being a capitalist by occupation) * * * against loss of time * * * resulting from bodily injuries * * * which shall, independ-

ently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated," it was held that the policy did not class the plaintiff as a capitalist, but simply insured him in a preferred class because he was a capitalist by occupation; that the policy, in order to entitle the plaintiff to recover, required that he be totally disabled from transacting any business pertaining to the occupation of capitalist; but that under the circumstances of the case it was not necessary to determine what kinds of business pertain to a capitalist, since the evidence showed, without conflict, that the plaintiff was totally disabled from transacting any business whatever, and as the whole must include the parts, that he was disabled from transacting any business as a capitalist. *Bean v. Travelers' Ins. Co.*, 94 Cal. 581.

1. Billiard-saloon Keeper.—*Young v. Travelers' Ins. Co.*, 80 Me. 244. In this case the occupation under which the plaintiff was insured was that of a billiard-saloon keeper. He admitted that he could do some acts necessary to be done in the business of billiard-saloon keeper, but claimed, and introduced evidence tending to prove, that he was wholly disabled from doing many of the material acts necessary to be done in that business. The trial court instructed the jury as follows: "Now the reasonable construction which must be put upon the language here used is, that it must have meant that if the plaintiff was so disabled as to be incapable of doing any and every kind of business pertaining to his occupation as a billiard-saloon keeper, then he would be wholly disabled from the prosecution of every kind of business pertaining to such occupation and entitled to the stipulated compensation. Otherwise, if he was not so disabled, he would not be entitled; and therefore, gentlemen, I instruct you as matter of law that the meaning of the language here used is, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation as billiard-saloon keeper, but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business, and any and every kind of business pertaining to his occupation." And the appellate court, in holding that there was no error in this instruction, said: "The presiding justice might have gone farther and instructed the jury that to entitle the plaintiff to recover, it was not required to prove that his injury disabled him to such an extent that he had no physical ability to do what

To Transact Any and All Kinds of Business.—Under a provision for an indemnity where the insured is "totally disabled and prevented from the transaction of all kinds of business" there can be no recovery when the insured is totally disabled in his own occupation merely, provided he is able to engage in some other pursuit.¹

Total Inability to Labor.—Where the provision is to grant indemnity to the members of a relief association during "total inability to labor," and the insured is unable to earn a livelihood at the particular labor in which he was engaged at the time of the injury, but is capable of making as much or more money at some other employment, he may not recover.²

Total Loss of Business Time.—Under a policy providing for payment of a certain sum for the "total loss of such business time as may result" from the injury, reference is had to the loss of business time in the particular occupation of the insured, and not to the whole range of business pursuits.³

d. LOSS OF CERTAIN MEMBERS OF THE BODY—In General—Permanent and Partial Disablement.—In this connection the accident policies usually provide for indemnity in two classes of injuries. One class embraces injuries resulting in the loss of both hands or both feet, or the loss of a hand and a foot, or the complete and irrecoverable loss of sight in both eyes, and is called "permanent total disablement;" the other class embraces injuries resulting in the loss of one hand or one foot, or the complete and irrecoverable loss of sight in one eye, and is called "permanent partial disablement."

No Recovery for Temporary Disability.—When the contract of insurance provides for liability in case only of a total or partial but permanent disability, no liability exists if the disability is but temporary.⁴

was necessary to be done in the prosecution of his business, but that it was sufficient if he satisfied them that his injury was of such a character and to such an extent that common care and prudence required him to desist from his labors and rest so long as it was reasonably necessary to effectuate a speedy cure, so that a competent and skillful physician called to treat him would direct him so to do." See also *Sawyer v. U. S. Casualty Co.* (Mass., 1868), 8 Am. L. Reg., N. S. 233; *Neafie v. Manufacturers' Acc. Indemnity Co.*, 55 Hun (N. Y.) 111; *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546.

1. *Carpenter.*—*Lyon v. Railway Pass. Assur. Co.*, 46 Iowa 631.

One Injury Aggravated by Subsequent Injury.

—Where it appears that after the accident insured against, the assured was for a time able to labor, but became totally disabled some days later on receiving additional injuries which aggravated the first injury, the assured is not totally disabled and prevented from all kinds of business on account of the injury insured against. But if it should appear that, from the nature of the original injury, the assured would at some time become totally incapable of labor by reason of it, it would seem that the happening of the second injury would not deprive him of the right to recover. *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. (N. Y.) 71.

Loss of All the Fingers.—It has been held that ordinarily the loss of all the fingers of one hand does not constitute total disability within the meaning of the provision in question. *Hutchinson v. Supreme Tent*; etc., 68 Hun (N. Y.) 355.

2. *Baltimore, etc., Rel. Assoc. v. Post*, 122

Pa. St. 579, 9 Am. St. Rep. 147. In this case *Paxson, J.*, for the court said: "This was a relief association, not an accident insurance company. Its object was to relieve its members during the time when they were unable to work by reason of injury or sickness. Hence, if a member was injured in such a way that he could no longer earn a livelihood at the particular labor in which he was employed at the time of the accident, yet was capable of earning as much or more money in some other employment, it certainly was not the object of the association as expressed by its charter and by-laws that he should remain idle and draw benefits all his life."

3. *Pennington v. Pacific Mut. L. Ins. Co.*, 85 Iowa 468.

4. **No Liability for Disability Merely Temporary.**—*Hollobaugh v. People's Ins. Assoc.*, 138 Pa. St. 595. In this case the certificate of membership stipulated for the payment of certain relief in the event of accidental injuries to the party, permanently disabling him totally or partially, and the maximum number of weeks during which relief would be allowed for each. Indorsed on the certificate was a clause that payment of weekly relief for periods scheduled should be in full satisfaction of all claims, whether the injuries were totally or partially disabling; the schedule specifying certain injuries with a period of relief for each, and stating that injuries not specified would be adjusted on their merits. It was held that the stipulation in the indorsement must be construed as applying to such injuries only as were within the terms of the contract found in the body of the certificate, and as the whole in-

Feet and Hands.—It has been contended on behalf of the insurance companies that the provisions in regard to the "loss" of the hands and feet must be understood to imply an actual amputation or physical severance of those members from the body. But this view has not met with favor from the courts; it being held that to entitle the insured to recover, physical severance is unnecessary, but it is sufficient if he has been deprived entirely of the use of the feet and hands as members of the body. And there can scarcely be any doubt as to the soundness of this view, for if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body.¹

Loss by Severance.—Many of the companies have altered their policies so as to read, "the loss of feet or hands by severance" thereof, but this provision has been held to be intended to refer to the manner rather than to the exact physical extent of the injury.²

strument provided for liability only in the event of a total or partial, but at the same time permanent, disability, no liability existed for disability which was temporary merely.

1. Paralysis of Both Legs.—In *Sheanon v. Pacific Mut. L. Ins. Co.*, 77 Wis. 618, 20 Am. St. Rep. 151, the plaintiff was shot in the back while attempting to escape from a saloon quarrel commenced by other parties and in which he had no part. The ball pierced his spine and produced an immediate and total paralysis of the lower part of his body, entirely destroying the use of both feet. In holding that the insured had suffered "the loss of two entire feet" within the meaning of the policy the court said: "To our minds, the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body, and if their use is actually destroyed so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. * * * The expression 'loss of feet' would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet' within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language as here used to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body."

Hand No Longer Useful as Such.—In *Lord v. American Mut. Acc. Assoc.* (Wis., 1894), 61 N. W. Rep. 293, it was contended that there was no such thing as the loss of the hand unless the injury was such as to require the amputation of the hand above the wrist. The court, in negating this contention, said: "That would be too much of a refinement upon language for practical purposes. The hand was for use, and if it was injured so as to become useless as a hand, then the

defendant became liable for its loss under the contract."

Pennsylvania—Strict Construction of Policy.—

In one instance where the source of the difficulty did not lie in the foot or leg, but in another part of the body, to wit, the back, and the foot itself was not lost or injured, and might be used constantly by means of an artificial device, such as a plaster jacket, which prevented the injury in the other part of the body from affecting the use of the foot, though without this appliance the foot was useless, it was held that there could be no recovery as for loss of a foot. *Stevens v. People's Mut. Acc. Ins. Assoc.*, 150 Pa. St. 132. In the opinion in this case there are some expressions, *obiter*, however, which seem to conflict with views expressed in the cases above cited.

2. Severance of Hand.—Where the plaintiff was insured under a policy providing for an indemnity for the "loss or severance of one entire hand," and the evidence showed that the fingers and heads of all the metacarpal bones of one of the plaintiff's hands had been taken off with a planer; that of the twenty-seven bones composing the skeleton of the hand thirteen bones were entirely gone and parts of five more; and the plaintiff testified that he had lost the use of the injured member as a hand, it was held that the plaintiff was entitled to recover under the provision of the policy above given. *Sneck v. Travelers' Ins. Co.* (Supreme Ct.), 34 N. Y. Supp. 545. The court in this case proceeded upon the ground that the provisions of the policy should be strictly construed as against the insurer, and that the specification in the policy as to the loss of an entire hand by severance was intended to refer to the manner rather than to the exact physical extent of the injury. This case virtually *overrules* the decision of the court in the same case upon a former trial. See *Sneck v. Travelers' Ins. Co.* (Supreme Ct.), 30 N. Y. Supp. 881.

In *Lord v. American Mut. Acc. Assoc.* (Wis., 1894), 61 N. W. Rep. 293, the question whether the tearing off of three fingers wholly and a part of the other, and cutting the hand and destroying the joint of the thumb, was "the loss of one hand, causing immediate, continuous, and total disability" of the same within the meaning of the con

Eyes.—When the policy provides for payment in the event of "the total and permanent loss of the sight of both eyes," and the insured has lost the sight of one eye before the insurance is effected, and this fact is known to the general agent of the company, he is entitled to recover upon sustaining the loss of the remaining eye. The principle is this: under such a clause, it is the loss of sight that is insured against, and this is just as complete in the case stated as though both eyes were lost during the currency of the policy; and the knowledge of the agent of the fact that the insured had only one eye is imputable to the principal.¹

e. ACCIDENTS TO INSURED IN SPECIAL OCCUPATIONS—(1) Description of Occupation.—The policy usually insures a person under a special occupation, described either in the application or in the certificate.²

Change of Occupation.—The insurer cannot avoid the policy on the ground that insured has changed his occupation from that under which the insurance was granted, unless there is an express proviso to that effect.³

Provisions against Other or More Hazardous Occupations.—The policy usually provides, however, that the insurance shall not cover injuries received in any occupation other than that under which the policy is issued,⁴ or that it shall not cover injuries received in certain specified occupations,⁵ or that if injury is received in an occupation classed as more hazardous than the one under which it is issued, the benefit shall be proportionally less.⁶ Such a provision is a competent limitation of the policy.⁷ In construing the description of the occupation, the

tract of insurance, was held to be one for the jury. And the jury found that such loss of the hand was entire.

1. *Humphreys v. National Benefit Assoc.*, 139 Pa. St. 264.

In *Bawden v. London, etc., Assur. Co.* (1892), 2 Q. B. 534, by the terms of the policy the company agreed to pay to the insured five hundred pounds on permanent total disablement, and half of that sum on permanent partial disablement; the policy stating that by permanent total disablement was meant, among other things, "the complete and irrecoverable loss of sight of both eyes," and by permanent partial disablement was meant, among other things, "the complete and irrecoverable loss of sight in one eye." At the time the plaintiff signed the proposal for the insurance he had lost the sight of one eye, a fact of which the defendant's agent was aware, although he did not communicate it to the defendant. The assured, during the life of the policy, sustained an accident which resulted in the complete loss of sight in his remaining eye, so that he became permanently blind. It was held that it must be taken, first, that the assured had sustained a complete loss of sight to both eyes within the meaning of the policy; secondly, the knowledge of the agent was, under the circumstances, the knowledge of the principal, and that the latter was liable on the policy for the full amount, namely, five hundred pounds.

2. Statements of Occupation Generally Warranties.—The statements of the insured with regard to his occupation are generally, by the terms of the policy, made warranties, so that a misrepresentation in this regard avoids the instrument. See *Perrins v. Marine, etc., Ins. Soc.*, 2 El. & El. 317, 105 E. C. L. 316; *Moore v. Citizens' Mut. L. Ins. Co.* (Supreme Ct.), 26 N. Y. Supp. 1014.

Occupation Stated Truly but Imperfectly.—But if the statement of occupation, though imperfect, is true so far as it goes, the policy is not avoided. Thus, where one stated himself to be an "esquire," when in fact he was such, a policy which contained the proviso "that if any statement contained in the proposal be untrue, or if this policy has been obtained through any misrepresentation, concealment, or untrue averment whatsoever, then this policy shall be void," was held not to be rendered void by the failure of the insured to state that he also carried on the business of an ironmonger. *Perrins v. Marine, etc., Ins. Soc.*, 2 El. & El. 317, 105 E. C. L. 316.

And it seems that where the statements of the insured as to his occupation and the duties which it requires of him sufficiently apprise the insurer of their character, it is enough; and if anything more definite is required, it is the duty of the insurer to ascertain the facts by proper inquiries. *Brink v. Guaranty Mut. Acc. Assoc.* (Supreme Ct.), 7 N. Y. Supp. 847.

3. In *Provident L. Ins. Co. v. Fennell*, 49 Ill. 180, where the insured was a switchman while the contract was made and was a brakeman when killed, it was held that in the absence of special provision the insurer could not avoid the policy on this account. See also *Provident L. Ins., etc., Co. v. Martin*, 32 Md. 310.

4. See *Knapp v. Preferred Mut. Acc. Assoc.*, 53 Hun (N. Y.) 84.

5. See *Tucker v. Mutual Ben. L. Co.*, 50 Hun (N. Y.) 50.

6. See *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376.

7. So an answer alleging that insured has changed his occupation from a brakeman on a passenger train to that of a brakeman on a construction train, and that the risk has been changed within the provisions of the policy,

technical use of a word having an ordinary and accepted meaning, if not known to the insurer, is not binding on him.¹

(2) *Occupation Defined—Refers to Profession, not Acts.*—The term "occupation" has reference to the vocation, profession, or calling in which the insured is engaged for his profit, and does not preclude him from the performance of acts and duties which are simply incidents connected with the daily life of men in any occupation.²

Change of Occupation Question for Jury.—The question whether the insured has changed his occupation within the provision of the policy is properly left to the jury under instructions.³

(3) *Risks Classified by the Company—Injuries Received in More Hazardous Occupation.*—Where the insurer classifies risks according to the occupation of the insured,

is a good defense, and a demurrer thereto will be overruled. *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376. In this case the court, by Howard, J., said: "It is competent for the parties to provide in the policy of insurance that a forbidden hazard shall make the policy void or that the amount of the insurance in case of an increased hazard shall be diminished in proportion; and in case the policy itself does not name the forbidden or increased hazards, it will be for the jury to determine whether such a change in the risk has taken place and in what degree the risk has been increased."

1. *Spare Conductor.*—In *Aldrich v. Mercantile Mut. Acc. Assoc.*, 149 Mass. 457, where insured was described as a "spare conductor," and evidence was offered that on the road on which insured was employed, a "spare conductor" performed the duties of all the trainmen except the engineer, and that the insured was injured while employed as a brakeman, it was held that the word "spare" having an ordinary meaning of "supernumerary," and not denoting that the insured performed any duties except those of a conductor, and the technical use of the word not having been communicated to the insurance company, such a technical use of the word could not be shown, and that the company was liable only for the amount which a brakeman could have recovered.

2. *National Acc. Soc. v. Taylor*, 42 Ill. App. 97.

Single Acts not Change of Occupation—Merchant Injured while Hunting.—Where the insured was described as a merchant and was accidentally killed while hunting, as a recreation, it was held that the act of hunting did not constitute the occupation of hunting. *Union Mut. Acc. Assoc. v. Frohard*, 134 Ill. 228, 23 Am. St. Rep. 664, affirming 33 Ill. App. 178.

Agricultural Superintendent Acting as Policeman.—The insured does not change his occupation from that of an agricultural superintendent by acting temporarily as a superintendent of police at a state fair. *Travelers' Preferred Acc. Assoc. v. Kelsey*, 46 Ill. App. 371.

Supervising Farmer Building Bridge.—Where the insured was described as a supervising farmer, it was held that this description did not mean that he did no manual labor

whatever, and that he had not changed his occupation to that of a bridge-builder by building a bridge on his own land, and that by driving posts with a sledge he had not changed his occupation to that of a pile-driver. *National Acc. Soc. Co. v. Taylor*, 42 Ill. App. 97.

Earthenware Manufacturer Pitching Hay.—Where the insured was described as an earthenware manufacturer and received an injury while pitching hay on a visit to a farmer, it was held that his occupation was not changed by the act. *North American L., etc., Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212.

Teacher Constructing Building.—Where the insured was described as a teacher and an injury was received while superintending the construction of a building on his own land, it was held that he had not changed his occupation to that of a builder. *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371.

Farmer Rescuing a Shipwrecked Crew.—The act of going to the rescue of a shipwrecked crew does not change the occupation of insured from that of a farmer to a wrecker. *Tucker v. Mutual Ben. L. Co.*, 50 Hun (N. Y.) 50.

3. An insurance company classified its risks with reference to employment; persons insured under class A, which included "merchants," being entitled to a much larger indemnity than those insured under class E, which embraced "grocers delivering goods." The insured stated in his application that he was a "merchant proper." He received the injury which resulted in his death while standing in his wagon receiving freight at a railway depot. The company contended that the recovery should be restricted to the indemnity under class E. It was held that the court properly left to the jury whether the plaintiff was a grocer delivering goods, with the instruction that a grocer delivering goods as expressed in the policy was one who was engaged as a dealer in groceries and habitually delivered in person goods sold to his customers. An occasional delivery by himself, the rule being that delivery was made by others, would not bring him within class E. *Hall v. American Masonic Acc. Assoc.*, 86 Wis. 518.

Change of Occupation means engaging in another employment as a usual business. *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371.

and the policy contains a proviso against responsibility for injury received while performing an act pertaining to an occupation classed as more hazardous than that under which the policy is issued, the distinction between acts and occupation is not obliterated,¹ and it must appear that the insured was injured while doing an act peculiarly embraced in the less favored class to bring him within the exception.²

Exposure Not Incident to Occupation.—When the policy contains a proviso that it shall be void as to all accidents in any employment or exposure not incident to the risk taken, the insured cannot recover if injured in the performance of an act totally foreign to the occupation under which he was insured.³

Occupation must be Classed.—If the proviso is that no recovery shall be had for an injury in an occupation classed as more hazardous, the occupation must be one classified by the company to except it under this clause.⁴

Classification of Agent Binding on Insurer.—The classification of a risk as being in a preferred class made by the insurer's agent, with full knowledge of the facts, is binding upon the insurer.⁵

General Classification No Waiver of Express Exception.—By classifying an occupation as one which will be taken as an increased hazard, the insurer does not waive an express exception of a risk incident to such an increased hazard in a policy insuring a less dangerous occupation.⁶

1. In *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371, a policy contained a proviso by which injuries were excluded from compensation if "received in any employment or by any exposure either more hazardous in itself or classed by the company as more hazardous" than that under which the policy was issued to the insured. The court, by Beasley, C. J., in construing this provision, said: "These terms literally rendered require that the insured to come within their effect must, at the time of the injury, be in an employment more dangerous than his own. The language has respect to employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression 'other exposure,' but looking at the body of the policy we find these terms used in the sense of the risks arising from a business or occupation."

2. **Engineer Chopping Wood.**—The insured was classed as a stationary engineer, and was injured while chopping wood, the latter occupation being classed as a less favorable risk than that of a stationary engineer. The certificate provided that if the insured was injured in the performance of an occupation more hazardous than that under which the certificate was issued, he could in no event recover more than the indemnity of the class in which such more hazardous occupation was classified. It was held, under this clause, that it should have been submitted to the jury whether the insured was fatally injured while performing an act peculiarly embraced in the occupation of a wood-chopper, and not in that of a stationary engineer. *Engenberger v. Guarantee Mut. Acc. Assoc.*, 41 Fed. Rep. 172.

Proprietor of Ice Business Delivering Ice.—The insured was described as an "iceman (proprietor)." The proprietor of an ice business could be insured at twenty dollars a week; a deliverer of ice could be insured at only fifteen dollars a week. The insured

received the injuries while engaged in the actual delivery of ice to a customer. It was held that the expression "iceman (proprietor)" covered not merely a proprietor who conducted a general ice business from his offices, but also the iceman or a man who might be a deliverer of ice, and who was at the same time the owner or proprietor of such business. *Neafe v. Manufacturers' Acc. Indemnity Co.*, 55 Hun (N. Y.) 111.

3. **Retired Gentleman Operating Buzz-saw.**—Where the description of employment was that the insured was a "retired gentleman," and the certificate contained a proviso that it was to be wholly void as to all accidents occurring in any occupation, profession, or employment, or exposure not named, or incident to the occupation under which he received membership, and it appeared that the insured was injured while operating a buzz-saw for amusement, it was held that a motion for a nonsuit should have been allowed, as such an exposure was not incident to the occupation of a retired gentleman. *Knapp v. Preferred Mut. Acc. Assoc.*, 53 Hun (N. Y.) 84.

4. Where the plaintiff was insured as "a jobber and contractor," and was injured while working as a farm laborer, it was held under a clause reducing the indemnity if the insured was injured in any occupation classed as more hazardous than the one specified, that the occupation of a farm laborer not being classed at all, the company could not, after the accident, class "farm laborer" as entitled to less indemnity than "contractors." *Bushaw v. Women's Mut. Ins., etc., Assoc.* (Supreme Ct.), 8 N. Y. Supp. 428. See also *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704; *Union Mut. Acc. Assoc. v. Frohard*, 134 Ill. 228, 23 Am. St. Rep. 664.

5. *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704; *New York Acc. Ins. Co. v. Clayton*, 19 U. S. App. 304, 59 Fed. Rep. 559.

6. Where the policy provided that if the

f. INJURIES TO PASSENGERS BY PUBLIC OR PRIVATE CONVEYANCE.—Accident policies are often issued against accidents while traveling in public or private conveyances for the transportation of passengers. Such a policy covers injuries received while in the actual prosecution of a journey, whether the insured was at the time in a conveyance for transportation of passengers or not.

Injury Received while Changing Conveyance.—It has accordingly been held that where the insured was injured by a defect in the way while walking from a steamer to a railway train in the course of his journey, he was within the protection of a clause covering risks "while traveling by public or private conveyance for the transportation of passengers."¹ If the insured was injured on a railway in the course of his journey, the injury is covered by the policy, although it occurred in attempting to board a moving train² or omnibus.³ An insurance against railway accident while traveling on any line of railway covers an accident caused by slipping on the steps while changing cars.⁴

Walking Not Included in Private Conveyance.—Where the insured had left a steamer and was finishing his journey to his home on foot, and was waylaid by highwaymen, the court said that the reasonable meaning of private conveyance could not include walking.⁵

Person on Train for Other Purpose than Travel.—The insured is not a passenger in a public conveyance provided by a common carrier if he is in the train for a purpose other than travel,⁶ nor can the insured be considered a passenger

insured was injured in any occupation classed by the company as more dangerous, the indemnity should be at the rate fixed for the increased hazard, but by special proviso the company was exempt from liability in case the insured was injured while trying to get upon a moving train, and it appeared that the insured was injured while so doing, it was contended that he could recover the amount which would be payable to one whose duty it was to get on or off moving trains. But it was held that the clause providing for a reduction of recovery in the case of more hazardous occupations did not render the company liable to pay the insured the amount which would have been paid to a man whose business it was to get on or off moving trains, that the insured had not changed his occupation, and that such a construction as that contended for would render of no effect the clause exempting the company from liability for injuries received while entering a moving train. *Miller v. Travelers' Ins. Co.*, 39 Minn. 548.

1. *Northup v. Railway Pass. Assur. Co.*, 43 N. Y. 516, reversing 2 Lans. (N. Y.) 166. The decision in this case is criticised in 7 Am. Law Rev. 605.

2. Where the policy insured against "injuries received while actually traveling in a public conveyance provided by common carriers for the transportation of passengers," and the train stopped at a station and the insured left the train, which started up while he was off, and in attempting to get on again he was injured, it was held that if the insured were traveling beyond the station, he could leave the train at the station and return to it again. He was not bound within the policy to remain thereon all the time, and he might recover for an injury received in attempting to get on or off. *Tooley v. Railway Pass. Assur. Co.*, 3 Biss. (U. S.) 399.

3. Where the plaintiff was trying to jump on an omnibus while in motion, it was held that he could recover under an accident policy against injuries while traveling by private or public conveyance for the transportation of passengers. *Champlin v. Railway Pass. Assur. Co.*, 6 Lans. (N. Y.) 71.

4. *Theobald v. Railway Pass. Assur. Co.*, 10 Exch. 45, 26 Eng. L. & Eq. 436.

5. *Ripley v. Railway Pass. Ins. Co.* (U. S. C. C.), 2 Bigelow Ins. Cas. 738, affirmed in 16 Wall. (U. S.) 336.

6. A policy insured the plaintiff "as passenger in a public conveyance provided by common carrier within the limits of the United States." The insured going to Chicago stopped at L., intending to take a later train to Chicago. He had left the train, had gone to speak to the engineer, and was returning to the platform of the station, when he was injured in trying to cross the platform of the car after the train had started. It was held that the insured had ceased to be a passenger when the accident happened and could not recover. *Hendricks v. Employers' Liability Assur. Corp.*, 62 Fed. Rep. 893.

Railroad Engineer.—An engineer killed on a railroad locomotive had previously purchased a ticket issued by the railway passenger assurance company, which, by its terms, insured against death "caused by accidents while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives upon the policy, the proof showed that the defendant was selling two classes of tickets, one known as "travelers' risk," the other as the "general accident," the latter being sold for the highest price; that deceased purchased the latter; that at the time of the purchase the defendant's agent knew him to be an engineer

while stopping over at a point upon his route.¹

g. INJURIES RECEIVED IN THE DISCHARGE OF DUTY—Railroad Employees.—The question has arisen whether an employee of a railroad company going home from his day's work is within the terms of a policy insuring him against injuries received in the discharge of duty. Where an insured under such a policy was injured while leaving the yard of the company after quitting work for the day, it was held that he was within the protection of its terms.² But it has been held that one going home from work on a train of the company was not within the benefit of an exception in a policy allowing railroad employees, while in the performance of duty, to stand upon the platform of moving cars.³

2. Accidents and Injuries Usually Excepted—*a. GENERAL RULE OF CONSTRUCTION—Construed Most Strongly against Insurer.*—The usual exceptions in an insurance policy are in the nature of conditions as to the subsequent conduct of the insured, and are construed most strongly against the insurer. The conditions having been framed by the insurer are to be construed strongly against those for whose benefit they are reserved.⁴ This principle is especially applicable in construing clauses creating a forfeiture or relating to matters subsequent to the attaching of the liability, such as notice, demand, etc.⁵

b. VOLUNTARY EXPOSURE TO UNNECESSARY DANGER—(1) In General—Usual Form of Modern Policy.—The modern insurance policy contains a proviso intended to cover cases where the insured assumes the risk of accident. This is usually in the form of a clause providing that "no claim shall be valid where death or injury may have happened in consequence of voluntary exposure to unnecessary danger or perilous adventure. The certificate holder is required to show us due diligence for personal safety and protection."⁶

and had no instructions not to sell to railroad employees. It was held that the deceased was insured against all accidents without regard to the capacity in which he was acting, that the ticket was intended to cover the accident by which he met his death, and that the defendant was liable. *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221.

1. Where insurance was against accidental injury, subject to the condition that the insured was protected only against the hazard of travel as passenger in a public conveyance provided by a common carrier in the United States, and the insured was a drover who had gone to San Antonio to ship cattle and was injured by falling from a hayloft in a barn, and the agent of the company had represented that the policy covered the entire trip, it was held that the assured was not a passenger at the time of the accident, and that the representation of the agent could not control the expressed contract, which was exact; that the limitation of the insurance to accidents while traveling, etc., was not inconsistent with the general contract and did not raise any ambiguity. *Fidelity, etc., Co. v. Teter* (Ind., 1894), 36 N. E. Rep. 283. As to the representations of agents, see *infra*, this title, *Agents*.

2. A member of an association designed for the relief of those injured by accident while in the discharge of duty was going home a few minutes after quitting work and was killed in crossing the railroad tracks before he had left the company's yards. It was held that a recovery could be had under the policy; that the indispensable act of going from his work before he had gotten from the

tracks of the cars and out of the premises of the company was in discharge of his duties within the intention of the organization. *Kinney v. Baltimore, etc., Employees' Rel. Assoc.*, 35 W. Va. 385.

3. *Hull v. Equitable Acc. Assoc.*, 41 Minn. 231.

4. *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Travelers' Preferred Acc. Assoc. v. Kelsey*, 46 Ill. App. 371; *Healey v. Mutual Acc. Assoc.*, 133 Ill. 556, 23 Am. St. Rep. 637; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296; *Equitable Acc. Ins. Co. v. Osborne*, 90 Ala. 201; *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221. For the principles which the courts will apply to the construction of an insurance policy, see *American Accident Assoc. v. Reigart*, 94 Ky. 547.

In *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453, Lord Justice Lindley said: "In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty."

5. *Cooper v. U. S. Mutual Acc. Assoc.*, 57 Hun (N. Y.) 407; *Wehle v. U. S. Mut. Acc. Assoc.* (Super. Ct.), 31 N. Y. Supp. 865; and *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376.

6. The form of the clause varies but slight-

Effect of Negligence where Such Provision Not Inserted.—Where the policy does not contain this exception the later cases are uniform in holding that negligence of the insured will not defeat an action on the policy.¹ This construction is based upon the fact that the contract is one of indemnity, and that one object which the insured has in view in effecting insurance is protection against casualties occurring from this cause,² and also upon the analogy of decisions in other branches of insurance where companies have been held liable for losses occurring through the negligence of the policy-holder.³ The earlier cases holding that negligence of the insured would defeat an action on the policy would probably not be followed to-day.⁴

(2) **What is a Voluntary Exposure—Implies Conscious Intentional Exposure.**—The words "voluntary exposure" as used in an accident policy imply conscious intentional exposure—something which one is willing to take the risk of.⁵ It must appear that the act, in order to come within the exception, was one which reasonable and ordinary prudence would pronounce dangerous,⁶ and that the

ly in any of the policies, though in England the words "obvious risk" are frequently used instead of "unnecessary danger." See *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 433; *Lovell v. Accident Ins. Co.*, 3 Ins. L. J. 877.

1. *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310, 2 Bigelow L. & Acc. Ins. Rep. 40; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149; *Wilson v. Northwestern Mut. Acc. Assoc.*, 53 Minn. 470; *Champlin v. Railway Pass. Assur. Co.*, 6 Lans. (N. Y.) 71, 3 Bigelow L. & Acc. Ins. Rep. 736; *Hoffman v. Travelers' Ins. Co.* (N. Y., 1871), 7 Am. L. Rev. 594; *Spruill v. North Carolina Mut. L. Ins. Co.*, 1 Jones (N. Car.) 126; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157, 1 Bigelow L. & Acc. Ins. Rep. 731.

2. By taking a policy of insurance against accidents one naturally understands that he is to be indemnified against accidents resulting in whole or part through his own inadvertence. *Champlin v. Railway Pass. Assur. Co.*, 6 Lans. (N. Y.) 71; *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149. Great negligence will not necessarily defeat a fire policy. *Johnson v. Berkshire Mut. F. Ins. Co.*, 4 Allen (Mass.) 388. See also *supra*, this title, *Accidents and Injuries Usually Insured Against—Accidental Injuries in General*.

3. *Shaw v. Robberds*, 6 Ad. & El. 75, 33 E. C. L. 12; *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149; *Johnson v. Berkshire Mut. F. Ins. Co.*, 4 Allen (Mass.) 388; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713, 41 Am. Dec. 661; *Champlin v. Railway Pass. Assur. Co.*, 6 Lans. (N. Y.) 71, 3 Bigelow L. & Acc. Ins. Rep. 736; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 478, 55 Am. Dec. 360; *Breasted v. Farmers' L. & T. Co.*, 8 N. Y. 209, 59 Am. Dec. 482; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35, 35 Am. Rep. 589.

4. In *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush (Ky.) 535, the insured was held to be prevented from recovering on an accident policy for an injury caused by his own negligence in having his arm project from the window of a moving car.

5. *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149.

6. *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945; *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201; *Jones v. U. S. Mutual Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485; *Bean v. Employers' Liability Assur. Corp.*, 50 Mo. App. 459; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205.

In *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945, an instruction to the jury in the following terms was approved: The voluntary exposure within the meaning of the policy "is not such exposure as men usually are going to take, such as is incident to the ordinary habits and customs of life; such an exposure as that does not come within the range of a defense. An exposure, in order to have been a contributing cause and so defeat the plaintiff's right to recovery in this case, must be something beyond the ordinary, or a wanton, a piece of gross, carelessness, as we would term such in our designation of a person's conduct in the usual walks of life."

"**Exposure to Obvious Risk of Injury.**"—In interpreting a clause of an accident insurance policy which prohibited "exposure of the insured to obvious risk of injury," Lord Justice Lindley, in *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453, said: "It is to be observed that the words are very general. There is no such word as 'wilful' or 'reckless,' or 'careless,' and to ascertain the true meaning of the exception, the whole document must be studied and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory. * * * Without attempting to paraphrase the language so as to meet all cases, it is, we think, plain that two classes of accidents are excluded from the risks insured against, viz.: (1) accidents which arise from an exposure by the insured to risk of injury, which risk is obvious to him at the time he exposes himself to it; (2) accidents which arise from an exposure by the insured to risk of injury,

accident was a consequence thereof.¹ It is consequently not every act of negligence which will defeat a recovery under such a provision,² and in general the question whether the conduct of the insured is such as to preclude a recovery is for the jury under all the circumstances of the case.³ But where the circumstances have clearly shown a voluntary exposure to danger, the courts have directed a verdict or granted a nonsuit.⁴

which risk would be obvious to him at the time if he were paying reasonable attention to what he was doing."

1. *Jones v. U. S. Mutual Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485.

2. *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157; *Follis v. U. S. Mutual Acc. Assoc.* (Iowa, 1895), 52 N. W. Rep. 807. See *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453.

In *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216, it was, however, declared by Wallace, J., that negligence and voluntary exposure to unnecessary danger were equivalent terms; but the decision went no farther than to hold that if it was apparent that the insured was guilty of great negligence, so that there could be no justification for his act in the mind of any prudent man, he was not entitled to recovery.

Burden of Proof on Defendant.—The plaintiff in an action on an insurance policy has not the burden of establishing the absence of voluntary exposure to unnecessary danger. *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149; *Meadows v. Pacific L. Ins. Co.* (Mo., 1895), 31 S. W. Rep. 578.

Nor the absence of "due diligence for personal safety and protection." *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572. See *Sutherland v. Standard L., etc., Ins. Co.* (Iowa, 1893), 54 N. W. Rep. 453.

3. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 544; *Tooley v. Railway Pass. Assur. Co.*, 3 Biss. (U. S.) 399; *Cotten v. Fidelity, etc., Co.*, 41 Fed. Rep. 506; *Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 342; *Jones v. U. S. Mutual Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310; *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371; *Duncan v. Preferred Mut. Acc. Assoc.* (Super. Ct.), 13 N. Y. Supp. 620; *Guldenkirch v. U. S. Mutual Acc. Assoc.* (City Ct.), 5 N. Y. Supp. 423.

4. *Hoffman v. Travelers' Ins. Co.* (N. Y., 1871), *Baltimore Underwriter*, Jan. 30, 1873, 7 Am. L. Rev. 594; *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453.

Circumstances which Show Voluntary Exposure—Letting One's Self from Window by Bedticking.—Where the insured fell and was killed while attempting to let himself, by means of a piece of bedticking, from a window fifteen feet above a brick sidewalk, in order to elude police officers who were at the door, it was held that this was clearly a voluntary exposure to unnecessary danger. *Shaffer v. Travelers' Ins. Co.* (Ill., 1889), 22 N. E. Rep. 589.

Traveling on Railroad Track at Night.—Where the insured was run down and killed

while traveling home on a dark night on a railroad trestle where there were other ways of travel, it was held that he was voluntarily exposing himself to unnecessary danger. *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 12 Am. St. Rep. 270; *Lovell v. Accident Ins. Co.*, 3 Ins. L. J. 877.

So where the insured was traveling home at night upon a railway trestle, upon the side of which there was no railing and where the ties were ten or fifteen inches apart, and was killed by falling from the trestle. *Follis v. U. S. Mutual Acc. Assoc.* (Iowa, 1895), 62 N. W. Rep. 807.

So where the insured was trying to drive a horse and buggy on the private grounds of a railroad on a dark night, at a place where there was a network of tracks. *Neill v. Travelers' Ins. Co.*, 31 U. C. C. P. 394, 7 Ont. App. 570, 12 Duval (Montreal) 55.

So where the insured was killed while running along the track to meet and board a train at night and was struck by an engine approaching from behind. *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316.

Falling Asleep on Railroad Track.—Where the insured fell asleep in a railroad yard with his arm across the rail, it was held that the negligence of the insured precluded a recovery. *Standard L., etc., Ins. Co. v. Langston* (Ark., 1895), 30 S. W. Rep. 427.

Going on Track in Front of Approaching Engine.—The fact that the insured sat down upon a railroad track when an engine moving toward him was only twenty-five feet away, was held to be so clearly a case of voluntary exposure as to necessitate a dismissal of the complaint. *Williams v. U. S. Mut. Acc. Assoc.*, 133 N. Y. 366, reversing 14 N. Y. Supp. 728.

Driving in Race so as to Bring on Collision.—The United States Supreme Court has intimated that when one driver in a horse-race observed that another driver was ahead of him, his persistence in so running his horse as to bring about a collision was a wilful exposure to danger within the meaning of the policy. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531.

Alighting from a Car while in Motion.—It has been held that jumping from a train after it has started is a voluntary exposure to unnecessary danger. *Smith v. Preferred Mut. Acc. Assoc.* (Mich., 1895), 62 N. W. Rep. 990. But see *Badenfeld v. Massachusetts Mut. Acc. Assoc.*, 154 Mass. 77.

Crossing in Front of Approaching Train.—It is an exposure to an obvious risk, within the meaning of an insurance policy, for one possessing ordinary faculties of sight and hearing to attempt to cross the railroad track in front of an approaching train. *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453.

Climbing over Stationary Cars, without look-

Voluntary Act and Voluntary Exposure Distinguished.—A clear distinction exists between a voluntary act and a voluntary exposure to danger. A hidden danger may exist, yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure. The act may be voluntary, yet the exposure involuntary.¹

Voluntary Exposure to Necessary Danger.—Under a policy which prohibits a voluntary exposure to unnecessary danger there may be an exposure to danger which is necessary, as where there is a chance to rescue a person in peril, and this is not within the terms of the exception.²

ing to see whether they are attached to an engine or not, precludes a recovery for injuries received while making the attempt. *Bean v. Employers' Liability Assur. Co.*, 50 Mo. App. 459.

Circumstances which do Not Show Voluntary Exposure—Crossing Railroad Tracks.—It is not such voluntary exposure as to defeat a recovery under this clause, to cross railroad tracks in order to pass over a street through which the track runs. *Wright v. Sun Mut. L. Ins. Co.*, 29 U. C. C. P. 221.

So crossing a railroad track at a point where many others crossed daily, although forbidden by the company, and though an umbrella carried by the insured obstructed his view of a detached car which was moving toward him and by which he was struck and killed. *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149; *Duncan v. Preferred Mut. Acc. Assoc. (Super. Ct.)*, 13 N. Y. Supp. 620.

Running beside Moving Train.—The death of one who while running to meet an incoming train and receive the mail bag stumbled and fell against the engine, was held not to be within the exception. *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201.

Walking on Sidewalk on Railroad Bridge.—One does not voluntarily expose himself to unnecessary danger where he walks on a railroad bridge where there is a plank walk five feet wide extending along the entire length of the bridge, guarded by railing, which walk was constantly used by footmen crossing the street. *Follis v. U. S. Mutual Acc. Assoc. (Iowa, 1895)*, 62 N. W. Rep. 807.

Bathing in Deep Water.—It is not within this exception for the insured to go bathing in deep water. *Knickerbocker Casualty Ins. Co. v. Jordan*, 7 Cinc. L. Bull. (Ohio) 71.

Speaking to Woman on Street.—Where the insured spoke to a woman on the street and was knocked down and killed by her escort, it was held that there was no voluntary exposure to unnecessary danger. *Mair v. Railway Pass. Assur. Co.*, 37 L. T. N. S. 356.

Insured Killed while Fighting.—Where the insured was killed in a quarrel and while carrying a concealed weapon, it was contended that, his acts being unnecessary, the case came within the exception; but it was held that there was no voluntary exposure to unnecessary danger. *Jones v. U. S. Mutual Acc. Assoc. (Iowa, 1894)*, 61 N. W. Rep. 485.

Riding on Platform of Car.—It has been held not to be a voluntary exposure for a passenger to leave the interior of a car in order to ride on the platform because he was over-

come from heat or suffering from nausea. *Marx v. Travelers' Ins. Co.*, 39 Fed. Rep. 321. The court in this case said: "That the deceased was in a dangerous position on the platform as distinguished from the body of the car, in which, as a passenger, he was entitled to ride, is clear enough; but whether in going on the platform there was a voluntary exposure to unnecessary danger cannot be ascertained except with knowledge of all the circumstances which influenced his conduct. If he was overcome by the heat of the car, or affected with nausea, which impelled him to seek the open air, it cannot be said that there was a voluntary exposure or that the danger was unnecessarily incurred." See *Pratt v. Travelers' Ins. Co. (N. Y., 1871)*, 7 Am. L. Rev. 595; *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13, 46 Am. Rep. 618.

So riding on the platform of a street car. *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa 505.

On the other hand, it has been held that the policy was avoided where the insured was killed by falling from the platform while attempting to pass from one car to another of a train moving at full speed. *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216.

See also *infra*, this title, *Accidents while Riding on the Platform of a Railway Car.*

1. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205; *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201.

Cleaning Gun Not Known to be Loaded.—It has accordingly been held that where the insured was killed while cleaning a gun which he did not know was loaded, there was not a voluntary exposure to unnecessary danger. *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167.

Stepping from Train at Night on Railroad Bridge.—The insured stepped off a railroad train when it came to a stop on a drawbridge at night, fell through a concealed hole in the bridge, and was killed; it appeared that other passengers were alighting at the time, that the bridge with the exception of the hole through which the insured fell was safe, and that the insured stepped from the train in the presence of a brakeman with a lantern, who gave no warning as to danger. It was held that although the insured by a voluntary act exposed himself to a hidden danger, there was no voluntary exposure to danger within the exception of the policy. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205.

2. *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149.

c. **WANT OF DUE DILIGENCE.**—A stipulation for due diligence on the part of the insured for his personal safety requires only such care as prudent persons are accustomed habitually to use, and does not negative a recovery for every accident to which want of care on the part of the insured may have contributed.¹

Does Not Include Contemplated Risks—Risks Impliedly Assumed.—The clause prohibiting a recovery in case of voluntarily assumed risks has no application to dangers which, in view of the surrounding circumstances and the situation of the parties, would have been naturally contemplated by them, as where the occupation of the assured was of an extra hazardous character, in which accidents were to be expected.²

Going to the Rescue of a Shipwrecked Crew is not an exposure to unnecessary danger. *Tucker v. Mutual Ben. Life Co.*, 50 Hun (N. Y.) 50. See *Williams v. U. S. Mut. Acc. Assoc.* (Supreme Ct.), 38 N. Y. St. Rep. 378, 133 N. Y. 366.

1. In *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149, the court, by Allen, J., in reference to a provision that the certificate holder is required to use all due diligence for personal safety and protection, said: "This phrase is very general, and certainly it does not mean that the assured must guarantee himself against accidents, nor do we think it means that he shall not recover for any accident to which some want of care on his part may have contributed. He is not required to use all possible diligence, but only all due diligence. Due diligence or care is sometimes said to be reasonable diligence or care, and reasonable care is sometimes said to be the ordinary care of prudent persons. It is not a precise term, but a relative one. In an accident policy it would not be reasonable to hold that this clause requires of the assured a higher degree of diligence than prudent persons are accustomed habitually to use. Under such a construction few persons would care to have an accident policy. The due diligence required is not inconsistent with inadvertence, nor with running such risks as prudent and cautious persons habitually run."

Going on Scaffold on House in Course of Erection.—Where the policy required the insured to use all due diligence for his personal safety, the court declined to hold as a matter of law that the stipulation had been violated because the insured, who was having a barn built, climbed up to the second story to inspect the work, though he was heavily clad in two overcoats and was said to be an awkward man, and there stepped upon a joist which, owing to a concealed defect, broke, and he fell to the ground and was killed. *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371.

Boarding a Moving Train.—Where one who was insured under a policy requiring "due diligence for self-protection," attempted to get on board of a train which was moving slowly, either on the forward platform of the rear car or between two cars, and was crushed between the wheels, it was left to the jury to say whether the insured had used that degree of caution and diligence which a prudent man would use under the circumstances. *Tooley v. Railway Pass. Assur. Co.*, 3 Biss.

(U. S.) 399. See *Travelers' Preferred Acc. Assoc. v. Stone*, 50 Ill. App. 222.

But where the insured under a policy requiring due diligence for personal safety was killed by an engine at whose signal he had first stepped off the track and then deliberately stepped on when the locomotive had almost reached him, it was held that the defendant was entitled to a nonsuit. *Hoffman v. Travelers' L. Ins. Co.* (N. Y., 1871), 7 Am. L. Rev. 594.

2. *Wilson v. Northwestern Mut. Acc. Assoc.*, 53 Minn. 470.

Illustrations—Brick Mason on Swinging Scaffold.—Where the insured was a brick mason, it was held that recovery would not be defeated by the fact that he was injured while working on an insecure swinging ladder. *Wilson v. Northwestern Mut. Acc. Assoc.*, 53 Minn. 470.

Switchman Handling Broken Cars.—The insured was killed while handling broken cars in the discharge of his regular duty as a yard switchman or a yard brakeman, and it was held that his death arose not from voluntary exposure to unnecessary danger, but from an accident for which the contracting parties intended the association should be liable. *National Ben. Assoc. v. Jackson*, 114 Ill. 533. See *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434.

Engineer Passing from Tender to Car.—Where a locomotive engineer, while backing his engine down grade at a speed of about eight miles an hour, attempted to pass from the tender to the car attached in front, for the purpose of checking speed, and in such attempt slipped between the car and the tender and was crushed to death, it was held that there was no breach of the clause prohibiting exposure to unnecessary risks. *Providence L. Ins., etc., Co. v. Martin*, 32 Md. 310.

Cattle-dealer Boarding Train.—Where a cattle-dealer, insured under an accident policy which permitted him to attend his cattle in transit on the cars, was injured while attempting to board a moving train, the court held that he was entitled under the policy to attend to cattle on the cars in the custom of prudent cattle-men, and that evidence of such custom was admissible. *Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 342. In delivering the opinion of the court in this case *Caldwell, J.*, said: "Plaintiff had a right, if it was not his duty, to incur all the risk and danger incident to caring for and looking after his cattle in the cars while en-

Express Exceptions of Incidental Risk.—Though this principle is applied in cases where the issue of negligence is involved, it will be construed more strictly where there is a proviso excepting risks; but the exception of a risk incident to the employment of the insured and which is known to the insured will not be allowed to defeat the policy.¹ If, however, the exception can stand and not defeat the policy, it will be upheld,² and there can be no recovery where the insured has been guilty of the want of due care in the performance of customary duties.³

d. WALKING OR BEING ON RAILROAD.—An exception in a policy in case of injury or death received while walking or being on the road-bed of a steam railroad is intended to guard against accidents caused by moving trains, and not against all accidents which happen to occur on the track.⁴ It includes

route to their destination, in the time and manner customary among reasonably prudent and careful shippers, and such risks and dangers, no matter how great, do not constitute any violation of the provisions of the policy requiring the plaintiff to use due diligence for his personal safety and protection; nor is the incurring of such risks and dangers a voluntary exposure to unnecessary danger within the meaning of that clause in the policy."

1. Conductor Injured while Leaving Moving Train.—Where an accident policy was issued to one who was described in the application as "a passenger conductor," and the application was expressly made a part of the contract, it was held that the insurer could not resist a recovery upon the ground that the insured was injured while leaving a moving train, and that the policy expressly excepted the hazard of "attempting to enter or leave moving conveyances using steam as a motive power." *Dailey v. Preferred Masonic Mut. Acc. Assoc.* (Mich., 1894), 57 N. W. Rep. 184. In this case the court said: "We are also satisfied from the application and the information which that gave to the defendant company that accidents of this kind are of the risks intended to be insured against. The sole business of the deceased was in running passenger trains, and this was plainly stated in the application. It is common knowledge that conductors of passenger trains on all railroads must, from the very nature of their business, not only enter but leave their trains before they come to a full stop; it is common knowledge that conductors of passenger trains have full charge of their trains; they give the signal to start, and after the train starts they get on board; at stations when the train pulls up and before it stops the conductor alights upon the platform. This may be a dangerous practice, but it is among the risks which the passenger conductor assumes when he enters upon such employment, and so general is this knowledge that the defendant company when it took and approved the application must have had knowledge of it." Upon a rehearing this case was reversed upon a different point not affecting the doctrine just stated. See *Dailey v. Preferred Masonic Mut. Acc. Assoc.* (Mich., 1894), 60 N. W. Rep. 691.

Railroad Superintendent.—A proviso except-

ing injuries while getting on or off moving trains does not apply in the case of a railway superintendent whose duties require him to get on and off moving trains, of which fact the insurer had knowledge. *Accident Ins. Co. v. McFee*, 7 Montreal Q. B. 255.

2. Where the insured was described as a cattle dealer or broker, not a tender, it was held that an exception against injuries received while entering or trying to enter a moving steam vehicle, or while riding in a conveyance not provided for the transportation of passengers, was a competent provision of the policy; and that where the evidence showed that the injuries were sustained in this way it was error to refuse to instruct that the plaintiff could not recover; the question being whether the injuries were within the contract of the parties, and not whether plaintiff was conducting himself in a prudent manner. *Travelers' Ins. Co. v. Snowden* (Neb., 1895), 63 N. W. Rep. 392. But see *Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 345.

3. Due Care in Performing Customary Duties.—Where the plea alleged that the insured was chargeable with want of due care and diligence for his personal safety, and the replication thereto alleged that "said insured was a railroad switchman, was insured as such, and met the accident which caused his death while in the discharge of his customary duties as such switchman," it was held that the replication was demurrable and insufficient because, although the policy covered injuries resulting from the dangers incident to the service, it did not cover injuries resulting from negligence or want of due care in the performance of customary duties. *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434.

4. Where the insured was injured by stepping off a railroad train at night when it had come to a stop at a drawbridge, and falling through a concealed hole therein, it was held that the injury was not within the exception. *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205. In explaining the exception in this case the court, by Mercur, C. J., said: "The language of the exception clearly implies two thoughts: one, that the insured must not be on the road-bed or bridge for any length of time; the other, that the prohibition is not to guard against injury

only cases where the accident happens through the insured voluntarily and intentionally being or walking upon the road-bed, and not where he is there by force of accident or involuntarily.¹ The mere fact that the insured was injured while crossing the railroad track does not under this clause prevent a recovery,² but the exception applies where one is needlessly walking along the tracks or road-bed instead of upon a parallel walk provided for passengers.³

Meaning of Road-bed.—The word "road-bed" in this connection is used with regard to the way in which railroads are usually constructed, but it does not include parts of either the foundation or superstructure whereon a prudent person might be without danger from passing trains.⁴

c. RIDING ON PLATFORM OF OR GETTING ON OR OFF A RAILROAD CAR.—Where the policy contains a proviso excluding liability for injuries or death happening while the insured is standing or riding or being on the platform of, or entering or leaving, a moving steam vehicle, the condition is valid and protects the insurer in case of accident so happening.⁵

resulting from a defective road-bed or defective railway bridge, but against the danger of injury from trains passing thereon."

1. Where the insured while running beside the track stumbled and fell thereon and was injured, it was held that the exception did not apply. The court said: "A fair and reasonable construction of the phrase in question is voluntarily and intentionally being or walking on the railway road-bed, not being there by force of accident and involuntarily for a mere comparative moment of time." *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201.

2. *Duncan v. Preferred Mut. Acc. Assoc.* (Super. Ct.), 36 N. Y. St. Rep. 928; *Dougherty v. Pacific Mut. L. Ins. Co.*, 154 Pa. St. 385; *Wright v. Sun Mut. L. Ins. Co.*, 29 U. C. C. P. 231. See *supra*, this title, *Voluntary Exposure to Unnecessary Danger*.

3. Where the insured is killed while walking on the road-bed between the tracks of a railroad, when parallel to it is a sidewalk which he could have used, the exception applies, and the fact that many other people use the road-bed in the same manner is immaterial. *Piper v. Mercantile Mut. Acc. Assoc.*, 161 Mass. 589.

4. *Standard L., etc., Ins. Co. v. Langston* (Ark., 1895), 30 S. W. Rep. 427; *Meadows v. Pacific Mut. L. Ins. Co.* (Mo., 1895), 31 S. W. Rep. 578. See *Follis v. U. S. Mutual Acc. Assoc.* (Iowa, 1895), 62 N. W. Rep. 807.

Ends of Extraordinarily Long Ties.—In *Standard L., etc., Ins. Co. v. Langston* (Ark., 1895), 30 S. W. Rep. 427, the court, by Battle, J., in construing the meaning of the word "road-bed" within the exception in an accident policy, said: "The word 'road-bed,' when used in reference to railways, has a well-understood meaning. It is the bed or foundation on which the superstructure of the railway rests, and the superstructure is the sleepers or ties, rails, and fastenings. This, of course, includes the side tracks which form a part of the railway. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 413; *San Francisco v. Central Pac. R. Co.*, 63 Cal. 469, 49 Am. Rep. 98; *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 34; *Cass County v. Chicago, etc., R. Co.*, 25 Neb.

353. In this sense it was doubtless used in the policy sued on in this case, but in using it in this sense it is presumed that the parties had reference to the manner in which railroads are usually constructed, and did not include in its meaning the ends of ties of unusual and extraordinary length and extending to a place where there can be no possible collision with trains, and where persons standing or sitting would be beyond the reach of injury by passing trains. * * * Whether the appellee was on the road-bed in the sense so used was a question of fact for the jury to decide, if there was any room for doubt about it."

Wide Space between Tracks.—A space between railroad tracks of the width of ten feet and formed of well-beaten, level, and smoothly trodden cinders, is not a part of the road-bed within a policy of accident insurance which provides that it does not extend to accidents on a railroad bridge, trestle, or road-bed. *Meadows v. Pacific L. Ins. Co.* (Mo., 1895), 31 S. W. Rep. 578.

5. *Hull v. Equitable Acc. Assoc.*, 41 Minn. 231; *Miller v. Travelers' Ins. Co.*, 39 Minn. 548. See *Sawtelle v. Railway Pass. Assur. Co.*, 15 Blatchf. (U. S.) 216.

Being on Platform.—Where the insured was traveling upon a railroad car, went out upon the platform while the train was in motion, intending to get off when it should stop, for the purpose of crossing over by a switch to another track, and was thrown off and killed, it was held that the case was within the exception as to injuries resulting from being upon the platform of moving cars, and that the insurer was not liable. *Hull v. Equitable Acc. Assoc.*, 41 Minn. 231.

Getting on Moving Train.—Where the insured, under a policy excepting injuries while trying to enter a moving steam vehicle, was killed while attempting to get on a railroad train which was in motion, it was held that the exception applied and that the company was not liable. *Miller v. Travelers' Ins. Co.*, 39 Minn. 548.

Evidence.—Where the insured was killed by a train on which he had been a passenger, his body having been found a few feet from a station at which the train stopped, it

Exception as to Railroad Employees.—The policy frequently provides that this proviso shall not extend to railroad employees.¹ In determining who is a railroad employee, regard must be had rather to the character of the employment than to the person of the employer.²

f. NONCOMPLIANCE WITH RULES AND REGULATIONS OF CARRIER OR CORPORATION.—A proviso in accident policies sometimes excepts injuries received when the insured was violating the rules and regulations of a common carrier or corporation. It has been held that it must be shown that the rule was one which was known to the policy-holder and in force at the time of its alleged violation.³ But where the insured is the employee of the corporation, it is his duty to inform himself of its rules, and it is immaterial whether in point of fact he knew of the rule violated or not.⁴ Where the injury was received while the insured was violating a known rule of a carrier, the insurer was held by such a clause to be relieved of liability.⁵

g. SUICIDE OR SELF-INFLICTED INJURIES—Usual Proviso in Policies.—A proviso is usually inserted in policies to the effect that the insurance shall not be extended to death caused by "suicide or self-inflicted injuries."

Refers to Voluntary Conscious Act.—The question presented under such a clause in an accident policy is in all respects the same as when the question arises under a policy of life insurance. Accordingly, in courts where the established doctrine in life insurance is that suicide while insane is not within the exception against suicide in a life policy, it has been held that self-destruction by a person *non compos mentis* is not within a similar exception in an accident policy.⁶ In jurisdictions where a suicide while insane is considered as avoiding a

was held that as the burden of showing that the accident was within the exception was upon the defendants, it could not be said that his death was due to getting on or off a moving train, and that the question was one for the jury. *Anthony v. Mercantile Mut. Acc. Assoc.*, 162 Mass. 354.

Jumping on or off a Moving Car, unless Result of Design.—Where the policy excepted injuries caused by jumping on or off moving cars, unless the claimant should establish that the injuries were caused by external, violent, and accidental means, not the result of design, and the evidence showed that the insured while attempting to board a moving car lost his balance and fell from the train, and that his left hand was run over and mashed, it was held that the exception in the policy did not prevent a recovery; that the words meant that jumping on the train was excused if the means of the injury was not the result of design, and in this case neither the means nor the injury was the result of design. *Travelers' Preferred Acc. Assoc. v. Stone*, 50 Ill. App. 222.

1. The same rule applies in the absence of a special exception as to railroad employees. *Dailey v. Preferred Masonic Mut. Acc. Assoc.* (Mich., 1894), 57 N. W. Rep. 184; *Accident Ins. Co. v. McFee*, 7 Montreal Q. B. 255. See also *supra*, this title, *Voluntary Exposure to Unnecessary Danger*.

2. *Cotten v. Fidelity, etc., Co.*, 41 Fed. Rep. 506. In this case the insured was a baggage checker, employed by a transfer company, and not by the railroad; his business required him to meet and board incoming trains, and check baggage to other railroad lines, and to residences in the city. It was held that he was a railroad employee within the meaning of the exception.

3. *Marx v. Travelers' Ins. Co.*, 39 Fed. Rep. 321. In this case it was held that where it appeared that the rule of a common carrier, a violation of which was alleged, was not at all observed; that it was violated by all passengers on the road who were so inclined, and often at the invitation of the trainmen—it could not be said that it was in fact a rule of the company in force. The court in its opinion expressed a doubt whether, when under the policy certain limitations were imposed upon policy-holders as to entering or trying to enter or leave a moving conveyance using steam as a motive power, or walking or being on a railroad bridge or road-bed, another limitation could be added under the general designation of a rule of the corporation. "Will any one say," remarked Hallett, J., "that on sea and land, at home and abroad, a policy-holder must constantly consider whether he is within all the rules of all the corporations, public and private, which he may in any way encounter?"

4. *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434. But in this case it was held that this exception to the insurer's liability was a matter of affirmative defense, and where it was not pleaded by the insurer it was not error for the court to exclude evidence offered to establish the existence of the rule which it was proposed to show had been violated by the insured in such sort that the violation contributed to his death.

5. *Bon v. Railway Pass. Assur. Co.*, 56 Iowa 64, 41 Am. Rep. 127. See *Pratt v. Travelers' Ins. Co.*, 8 Alb. L. J. 88.

6. *Accident Ins. Co. v. Crandal*, 120 U. S. 527; *Blackstone v. Standard L., etc., Ins. Co.*, 74 Mich. 592. See the title *LIFE INSURANCE*. In *Accident Ins. Co. v. Crandal*, 120 U. S. 527, Gray, J., said: "The decisions upon the

life policy containing a proviso against suicide,¹ a similar interpretation would probably hold in accident policies.

Self-inflicted Injuries.—The same construction governs a clause against "self-inflicted injuries" as against suicide, for the former can no more be predicated of an insane person than the latter.²

h. TAKING POISON.—The policy frequently exempts injury or death "from taking poison." The authorities are not in accord whether this exception extends to all cases of poison, whether accidental or intentional.³

effect of a policy of life insurance which provides that it shall be void if the insured 'shall die by suicide,' or 'shall die by his own hand,' go far towards determining this question." And it was accordingly held upon an examination of those authorities that an accident policy containing the proviso that "this insurance shall not extend to death * * * by suicide," covered a death by hanging one's self while insane.

A similar result was reached by a similar course of reasoning in *Blackstone v. Standard L., etc., Ins. Co.*, 74 Mich. 592. In this case, before examining the authorities upon the disputed point, Long, J., summed up the result of the authorities as to the distinction between voluntary suicide and accidental death as follows: "Upon the question of a voluntary suicide intentionally committed by a sane man in the possession of his faculties, knowing how to adapt means to ends, and conscious of the immorality of the act, there is no difference of opinion, and all the authorities agree that self-destruction is within the exemption; and all authorities likewise agree that an accidental death, as by taking poison by mistake, or shooting one's self with a pistol supposing it not to be loaded, or falling from a building, or death happening in any way by the unintended act of the party dying, is not within the exemption." See also, as to accidental death, *Pierce v. Travelers' L. Ins. Co.*, 34 Wis. 396; *Mutual L. Ins. Co. v. Laurence*, 8 Ill. App. 488.

Missouri Statute.—It is provided by § 5855 of the *Missouri Rev. Stats.*, that suicide in cases of life insurance shall be no defense, unless the insured contemplated suicide when he took out the policy, and any stipulation to the contrary in the policy is void. See *Kellar v. Travelers' Ins. Co.*, 24 Ins. L. J. 396.

Suicide—Sane or Insane.—As to the effect of a provision in the policy that the contract is to be void in the case of suicide, sane or insane, by the insured, see the title *LIFE INSURANCE*. See also *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 303, 12 Am. St. Rep. 484.

1. *Borradaile v. Hunter*, 5 M. & G. 639, 44 E. C. L. 335; *Dean v. American Mut. L. Ins. Co.*, 4 Allen (Mass.) 96; *Cooper v. Massachusetts Mut. L. Ins. Co.*, 102 Mass. 227, 3 Am. Rep. 451. See the title *LIFE INSURANCE*.

But it seems, even in these jurisdictions, that if the death is inflicted in the madness of delirium and is not the result of the will and intention, although perverted, the exception does not apply. *Clift v. Schwabe*, 3 C. B. 437, 54 E. C. L. 437, per Alderson, B.; *Cooper v. Massachusetts Mut. L. Ins. Co.*, 102 Mass. 227, 3 Am. Rep. 451.

Nor does insane suicide avoid a policy which contains no exception as to suicide or self-inflicted injuries, although perhaps a voluntary suicide might have such an effect, upon the grounds of public policy. *Horn v. Anglo-Australian, etc., L. Ins. Co.*, 7 Jur. N. S. 673.

2. *Accident Ins. Co. v. Crandal*, 120 U. S. 532. See *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 304, 12 Am. St. Rep. 484; and *infra*, this title, *Intentional Injuries*.

3. Some authorities hold that this exemption extends to all cases of poisoning, whether accidental or not. *Pollock v. U. S. Mutual Acc. Assoc.*, 102 Pa. St. 230, 48 Am. Rep. 204; *Hill v. Hartford Acc. Ins. Co.*, 22 Hun (N. Y.) 187; *Cole v. Accidental Ins. Co.*, 61 L. T. N. S. 227.

Illustrations of Accidental Poisoning.—In *Cole v. Accidental Ins. Co.*, 61 L. T. N. S. 227, the insured took poison by mistake for medicine which he was in the habit of taking.

In *Hill v. Hartford Acc. Ins. Co.*, 22 Hun (N. Y.) 187, the insured, a physician, mixed some poison with water in a goblet, and afterward mistaking the mixture for water drank it, and subsequently died. It was held that the beneficiary could not recover, because the death did not proceed from an external, violent, and accidental injury, and because the policy contained an exception as to death by poisoning. This case was *overruled*, as to the first of the two grounds upon which the court proceeded, in *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, but its force as an authority upon the second ground seems not to have been disturbed.

In *Pollock v. U. S. Mut. Acc. Assoc.*, 102 Pa. St. 230, 48 Am. Rep. 204, the insured by mistake drank "oil of birch" for "milk of birch," and it was held that there could be no recovery under a policy containing the exception as to death from poison. In this case *Mercur, C.J.*, said: "To remove all doubt as to the liability of the association to the plaintiff in this case, the certificate further declares the benefits under it shall not extend to any death or disability which may have been caused 'by the taking of poison.' It is not necessary that the poison be taken with an intent to produce death, in order to defeat a claim flowing from the right of membership. If the poison be innocently taken and without any knowledge of the injurious effect which it was likely to produce, and did produce, so far as the person taking it is concerned, the effect may be said to be accidental."

The Contrary Doctrine has, however, been laid down. Thus, in *Healey v. Mutual Acc. Assoc.*, 133 Ill. 556, 23 Am. St. Rep. 637, the

What is Poison.—It has been held that death by asphyxiation from the inhalation of gas is not a death from taking poison.¹ Whether an injury from the sting of a venomous insect is an injury from poison, has been left to the jury under an instruction from the court distinguishing venom from poison.²

i. INHALATION OF GAS.—Where the policy excepts death from the inhalation of gas, it has been held that all deaths from this cause are covered, whether the inhalation was intentional or not, since if this exception were intended to cover only the cases of accidental inhalation it would seem to be superfluous, as deaths by intentional inhalation of gas are excepted in the policy against suicide.³ But, on the other hand, it has been held that this exception refers only to deliberate conscious acts.⁴

j. DEATH CAUSED BY DISEASE.—Accident policies usually contain a clause which differs considerably in the various policies in its wording, the purpose of which clause is to relieve the insured from responsibility in case of the death or disability of the insured from disease. The effect of such an exception depends of necessity upon the terms of the policy, and resolves itself largely into a question of construction.

Where Disease Not Proximate Cause of Death.—The tendency of the courts, under the settled rules of construction applicable to insurance contracts, is to interpret the clause in a manner favorable to the insured, and where the accident can be considered as the proximate cause of death, although disease may have been present as a secondary cause,⁵ or where the death is the reasonable and natural consequence of the injury, although disease may have supervened,⁶ the

declaration alleged that the insured died from an overdose of chloral. The policy by which the deceased was insured provided for liability in case of death through external, violent, and accidental means, and there was a proviso excepting responsibility for death by the taking of poison. Upon a general demurrer, it was held that the death as set forth in the declaration was caused by external, violent, and accidental means, and the demurrer was overruled. But in the opinion of the court there is no allusion to or consideration of the effect of the proviso in the policy as to death by poison, further than is implied in the fact that Pollock *v. U. S. Mutual Acc. Assoc.*, 102 Pa. St. 230, 48 Am. Rep. 204, is *disapproved*. Healey *v. Mutual Acc. Assoc.*, 133 Ill. 556, 23 Am. St. Rep. 637, was *followed* in Mutual Acc. Assoc. *v. Tuggle*, 39 Ill. App. 509, where the point was distinctly made. This case was *reversed* upon another point in 138 Ill. 428.

In Bayless *v. Travelers' Ins. Co.*, 14 Blatchf. (U. S.) 143, it was held that there could be no recovery where, a specified dose of opium having been prescribed to the insured by his physician to allay nervousness, by inadvertence the patient took more opium than he intended, and death ensued.

1. Paul *v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758; Pickett *v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79; U. S. Mutual Acc. Assoc. *v. Newman*, 84 Va. 52.

In U. S. Mutual Acc. Assoc. *v. Newman*, 84 Va. 52, where the insured died by inhaling carbonic oxide and coal gas, it was left to the jury to say whether carbonic oxide was poisonous, and whether the insured died from the poisonous effects thereof or from the effects of suffocation produced by other elements of coal gas with which the oxide was combined.

2. Preferred Mut. Acc. Assoc. *v. Beidleman*, 1 Monaghan (Pa.) 481.

3. Richardson *v. Travelers' Ins. Co.*, 46 Fed. Rep. 843.

4. Paul *v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758; Pickett *v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79. See Cole *v. Accidental Ins. Co.*, 61 L. T. N. S. 227.

"Death from Anything Accidentally Taken or Inhaling Gas."—Where the policy excepts "death or disablement arising from anything accidentally taken, administered, or inhaled, the contact of poisonous substances, inhaling gas, or any surgical operation," it would seem that unintentional as well as deliberate inhalation of gas is excepted. Menneiley *v. Employers' Liability Assur. Corp.*, 72 Hun (N. Y.) 477.

5. See Lawrence *v. Accidental Ins. Co.*, 7 Q. B. Div. 216; Prader *v. National Masonic Acc. Assoc.* (Iowa, 1895), 63 N. W. Rep. 601; Freeman *v. Mercantile Mut. Acc. Assoc.*, 156 Mass. 351; Wehle *v. U. S. Mutual Acc. Assoc.*, 11 Misc. Rep. (N. Y. Super. Ct.) 41; Hall *v. American Masonic Acc. Assoc.*, 86 Wis. 518, and the cases cited in the following notes to this section.

6. **Disease the Reasonable and Natural Consequence of Accident.**—The insured under a policy against death from the effects of injury caused by accident fell and dislocated his shoulder. He was at once put to bed, and died in less than a month from the date of the accident, having been all the time confined to his bedroom. In a case stated in a reference pursuant to the Railway Passengers' Companies' Act (27 and 28 Vict., c. 125) the umpire found that the assured died from pneumonia caused by cold, but that he would not have died when he did had not it been for the accident, that as a consequence of the accident he was rendered restless, unable

policy is not avoided unless the exception plainly includes such case. Policies excepting "death or disability in consequence of disease,"¹ or "injury happening directly or indirectly in consequence of disease, or caused wholly or in part by disease,"² or "injury caused by or arising from natural dis-

to wear his clothing, weak, and unusually susceptible to cold, and that his catching cold and the fatal effects thereof were due to the condition of health to which he had been reduced by the accident. It was held that the death of the assured was due to the effects of injury caused by accident within the meaning of the policy. *Isitt v. Railway Pass. Assur. Co.*, 22 Q. B. Div. 504.

Embolism or Thrombus—Evidence.—Where it appeared that the insured upon a certain day broke his arm, that upon the same day the fracture was reduced, that upon the following day he was taken ill quite suddenly with severe pain in his chest and lungs, from which he was relieved and was convalescent for a week or ten days, when he was again attacked in a similar manner and died within less than three weeks from the happening of the accident, and the evidence introduced by the plaintiff tended to show that the cause of his death was embolism or thrombus, which was the direct result of his arm being broken, while the evidence of the defendant tended to show that the death was caused by pneumonia, it was held that the evidence was sufficient to justify the trial court in finding that the fracture of the plaintiff's arm was the sole and proximate cause of his death. *Peck v. Equitable Acc. Assoc.*, 52 Hun (N. Y.) 255.

1. Peritonitis Following a Fall.—Where a policy was conditioned not to extend "to any case in which death or disability occurs in consequence of disease, * * * nor to any case except where the injury is the proximate cause of the disability or death," and it appeared that the insured died of peritonitis induced by a fall; that he had previously had the same disease and was, in consequence, more liable to a recurrence thereof, the court charged the jury that upon the question whether peritonitis, if that caused his death, was to be deemed a disease and the proximate cause of death, within the meaning of the policy, depended the question whether or not before the time of the fall and at the time of the fall he had then the disease. If he had, then, although the disease was aggravated and made fatal by the fall, he could not recover; but if, owing to existing lesions caused by the disease, he not having the disease at the time, peritonitis was started, the defendant was answerable, although if there had been a normal state of things the fall would not have occasioned such a result. It was held that this ruling gave an interpretation to the language of the policy which was in accordance with the apparent intention of the parties, and which made the contract a beneficial provision for the beneficiaries named in it. *Freeman v. Mercantile Mut. Acc. Assoc.*, 156 Mass. 351.

Tetanus.—Where the policy excepted "death resulting wholly or in part from

disease," and in consequence of a pistol wound the insured took lockjaw or tetanus and died, it was held that the insurer was liable if the wound was the proximate cause of the death. *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 178.

2. Blood-poisoning Consequent on Wound.—Where a policy provided that its benefits should not extend to "bodily injury happening directly or indirectly in consequence of any disease, * * * death or disability caused wholly or in part by bodily infirmities or disease, or to any case except where the injury was the proximate and sole cause of the disability or death," and it appeared that the deceased received an injury to a finger upon his right hand, that blood-poisoning ensued and caused his death, that previously he had received an injury on his left hand which inflamed and suppurated, and that it was possible that poisonous matter from the old wound might, at or near the time of the accident to the finger, have been communicated to it and caused such blood-poisoning, it was held that it was a question for the jury to determine whether the injury to the finger was within the terms of the policy and the sole and proximate cause of death. *Martin v. Equitable Acc. Assoc.*, 61 Hun (N. Y.) 467.

Erysipelas Caused by Fall.—Where deceased was insured under a policy containing the same provision, and in consequence of an accidental wound took erysipelas and died, the erysipelas resulting solely from an external injury, it was held that the external injury was the proximate or sole cause of the death within the meaning of the policy. *Accident Ins. Co. v. Young*, 20 Duval (Montreal) 280. In delivering judgment in this case *Patterson, J.*, said: "As soon as we abandon the notion that other diseases, such as the diseases of the lungs or kidneys, of which traces were found, produced or aided in producing the erysipelas, the reference to 'bodily infirmities or disease existing prior or subsequent to the date of this contract' becomes inapplicable to the case. * * * The proviso in the policy distinguishes between death from an injury as a direct consequence, and death from bodily infirmities and disease not caused by the injury. The latter cause of death gives no claim under the policy; the former, which is designated the proximate cause, gives a claim." See the same case, *Young v. Accident Ins. Co.*, 6 Montreal Super. Ct. 4.

Duodenitis Caused by a Jump.—Under a similar policy it has been held that duodenitis produced by a jump and resulting in the death of the insured entitles the beneficiary to recover. *Barry v. U. S. Mutual Acc. Assoc.*, 23 Fed. Rep. 712, 131 U. S. 100.

Ruptured Blood-vessel Followed by Abscess—Proximate Cause.—Where it appeared that one who was insured under an accident policy

case,"¹ have received interpretations in accord with the above principles; yet where the death is directly due to disease and not to accident, the exception protects the insurer.²

burst a blood-vessel while exercising with Indian clubs, it was held, under a clause in the policy which provided that insurance should not extend to death caused wholly or in part by disease, nor to any case except where the injury was the proximate and sole cause of death, that if the deceased sustained injury by the rupture of a blood-vessel in his lungs, and that necessarily produced inflammation, and that necessarily produced a disordered condition of the injured organ, which was in consequence followed by the formation of abscesses and the accumulation of injurious substances or matter in the lungs, and so there resulted a diseased state of the lungs, whereby they could no longer perform their functions, and in consequence the insured died; that is, if all these results followed the injury as its necessary consequence, and would not have taken place if it had not been for the injury, then the injury could be said to be the proximate cause of death. But if an independent disease supervened upon the injury, one not necessarily produced by the injury, or if the alleged injury merely brought into activity a then existing though slumbering disease, and the death of the deceased was caused wholly or in part by such disease, then it could not be said that the injury was the sole and proximate cause of the death. *McCarthy v. Travelers' Ins. Co.*, 8 Biss. (U. S.) 362.

1. Accident Consequent on Epileptic Fit.—Where W. was insured under a policy excepting "injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease," and it appeared that while crossing a stream he was seized with an epileptic fit, and fell into the stream and was drowned while suffering from the fit, it was held that the accident was within the policy, and not within the exception. *Wingspear v. Accident Ins. Co.*, 6 Q. B. Div. 42. In this case Coleridge, J., said: "I am of opinion that those words in the proviso mean what they say, and that they point to an injury caused by natural disease, as if for instance in the present case epilepsy had really been the cause of death."

To the same effect is *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945. See *North American L., etc., Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212.

2. Malignant Pustule is a disease, and where one insured under an accident policy excepting disease dies from such malignant pustule contracted by contact with putrid animal matter, the insurer is not liable. *Bacon v. U. S. Mutual Acc. Assoc.*, 123 N. Y. 304, 20 Am. St. Rep. 748. In delivering the opinion of the court Peckham, J., said: "The definition given by the physicians for the plaintiff, as to the difficulty being a pathological condition of the body, is *** much too refined for common acceptance. It seems to me clear that the meaning of the words used in the policy covers

just such a case, and that the parties never intended that a cause of death which to all outward appearances, and to the world in general, was a disease, should be converted into a pathological condition of the body caused by an accident."

Fatty Degeneration of the Heart and Brain.—Where the assured while pursuing his business as a traveling salesman sustained a heavy fall, striking and injuring his forehead, and the evidence disclosed no cause for the fall, but the assured while standing threw up his hands and fell to the floor, and an autopsy revealed an advanced stage of fatty degeneration of the brain and heart, it was held that the cause of death was not the accident insured against, and that there could be no recovery under a policy whereby insurance was expressly withheld from any "bodily injury happening directly or indirectly in consequence of disease," etc. *Sharpe v. Commercial Travelers' Mut. Acc. Assoc. (Ind., 1894)*, 37 N. E. Rep. 353.

Death from Epilepsy in Bath.—Where the evidence showed that the insured was found dead in a plunge-bath, in almost a standing position; that there was an abrasion between his eyes, and a bruise on one side of his head; and his physician testified that he was subject to epileptic fits, and that the entrance into the bath in the then condition of the insured would be likely to result in an epileptic fit, and that the blow that caused the abrasion and bruise was not sufficient to have caused death—it was held, under the exception in the policy that insurance should not extend to injury happening directly or indirectly in consequence of disease, or which might have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the contract, that in view of all the circumstances of the case there was evidence that the deceased came to his death through other causes than external, violent, and accidental means, and that there could be no recovery. *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322.

Death from Disease "Accelerated by Accident."—Where the policy excepted death or injury arising from disease, "although accelerated by accident," and it appeared that the insured had suffered from kidney disease, but had not been troubled therewith for a considerable time, and after an accident the disease returned and the insured died within three months, it was held that the insurer was not liable, as the death was within the exception as to disease accelerated by accident. *Anderson v. Scottish Acc. Ins. Co.*, 27 Scot. L. R. 20; *McKechnie's Trustees v. Scottish Acc. Ins. Co.*, 17 Sess. Cas. (Scotland) 6.

Temporary Fainting Spell Not Disease.—In *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945, the United States Court of Appeals for the Sixth Circuit, in

Exceptions to Special Diseases.—Where responsibility as to certain specified diseases is excluded by the policy, the insurer has been held still responsible where the disease is the direct, immediate, and natural consequence of the accident,¹ or where the accident is the true cause of death or injury and the disease but the occasion.²

k. SURGICAL OPERATION OR MEDICAL TREATMENT.—Policies commonly contain an exception that insurance shall not extend to any death or disability which may have been caused wholly or in part by surgical operation or medical treatment for disease. This exception has been held not to exclude cases where the surgical operation was necessary as the natural and fairly to be expected consequence of the accidental wound or injury.³ But where the insured, while suffering from disease, dies through a mistake in medical treatment, as from taking an overdose, this has been held to be within the exception, and not covered by the policy.⁴

l. INTOXICATION.—Where the policy excepts death or injury happening while the insured was intoxicated, or in consequence of his having been under the influence of intoxicating liquors, the exception applies to prevent a recovery whether the condition of the insured was the cause of the injury or not.⁵

considering whether, if the insured fell into a stream and was drowned during a fit of vertigo or faintness, an exception as to "disease or bodily infirmities" applied, said: "In a broad generic sense any temporary trouble by reason of which a man loses consciousness is a disease. It is a condition of the body not normal, and produced by the imperfect working of some function; but as the imperfect working is not permanent, and the body returns at once, or in a short period of time, to its normal condition, it does not rise to the dignity of a disease. A fainting spell produced by indigestion or by lack of proper food for a number of hours, or from any other cause which would not indicate any disease in the body but would show a mere temporary disturbance or enfeeblement, would not come within the meaning of the words 'disease and bodily infirmity' as used in this policy."

Insanity is not included in the words "bodily infirmities or disease." *Accident Ins. Co. v. Crandal*, 120 U. S. 532.

1. Hernia.—Where the insured died from hernia, the direct consequence of an accident, the insurer was held liable, although this was one of the diseases excepted by name in the policy. *Travelers' Ins. Co. v. Murray*, 16 Colo. 296.

So where by one of the conditions of a policy of insurance against accidental death or injury it was provided that the policy insured against cuts, stabs, concussions, etc., etc., "when accidentally occurring from material and external cause where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations," and then followed this exception: "but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury,"—it was held that death from hernia caused solely and directly

by external violence, followed by a surgical operation performed for the purpose of relieving the patient, is not within the above exception. *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122, 112 E. C. L. 122.

Erysipelas.—But where the excepting clause, the same in other respects as that just quoted, contained instead of the words "any other disease or cause arising," the words "any other disease or secondary cause or causes arising," it was held that the insurer was not liable in case of the death of the insured by erysipelas following immediately and directly from an accidental wound. *Smith v. Accident Ins. Co.*, L. R., 5 Exch. 302.

2. Accident Occasioned by Fits.—Where the policy provided against accidental injuries, the direct or sole cause of death, but excepted "death arising from fits * * * or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury," and it appeared that the insured while at a railway station was seized with a fit and fell forward off the platform across the railway, when an engine passed over his body and killed him, it was held that the death of the insured was caused by an accident within the meaning of the policy, and that the insurers were liable, the only question being whether death was due to the accident or to the fit. *Lawrence v. Accidental Ins. Co.*, 7 Q. B. Div. 216.

3. Travelers' Ins. Co. v. Murray, 16 Colo. 296.

4. Bayless v. Travelers' Ins. Co., 14 Blatchf. (U. S.) 145. In this case the insured while ill had opium prescribed by his attending physician. He accidentally took an overdose, in consequence of which he died.

5. Shader v. Railway Pass. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65, 5 Thomp. & C. (N. Y.) 643; *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434.

It seems that the clause covers injuries

The phrase "under the influence of intoxicating liquors" means such influence as disturbs the quiet, equitable action of a man's faculties,¹ and has been said to be equivalent in this connection to the word "intoxicated."²

Evidence of Intoxication.—Evidence that the insured was intoxicated when last seen alive, his body having been found after the expiration of some weeks, is not evidence of intoxication at the time of the injury.³ Nor is testimony of a physician who attended the insured at a hospital, that he smelled liquor in the insured's breath, admissible, when it is uncertain how long a time elapsed between the injury and the time when he reached the hospital.⁴ The question of intoxication seems to be for the jury.⁵

m. LIFTING OR OVER-EXERTION.—When the exception is that no claim shall be made where injury is caused by lifting or over-exertion, the lifting or over-exertion which is intended by this exception is such as is voluntary and deliberate, and not that exertion put forth in an emergency, as where the insured was lifting a heavy post which slipped unexpectedly and subjected him to a very severe strain.⁶

n. GYMNASTIC OR ATHLETIC EXERCISE.—A proviso against liability for injuries caused by taking part in any gymnastics does not exempt the company from liability where insured was drowned while bathing.⁷

o. VIOLATION OF LAW.—Accident insurance policies usually contain a provision whereby the insurance is not to extend to injuries caused by, or while, or in consequence of, violating the law.⁸

Causal Connection between Violation and Injury.—The authorities agree that in

received by the insured in consequence of his having previously been under the influence of liquor. *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434.

Death in Consequence of Drunkenness.—Death or injury happening while the insured is under the influence of liquors means death or injury causing death, and covers a case where the insured is sober when he dies. *Mair v. Railway Pass. Assur. Co.*, 37 L. T. N. S. 356.

1. *Mair v. Railway Pass. Assur. Co.*, 37 L. T. N. S. 356. To be under the influence of intoxicating liquors within the meaning of an accident policy, the insured must have drunk enough to disturb the action of the physical and mental faculties so that they are no longer in their natural or normal condition. *Shader v. Railway Pass. Assur. Co.*, 5 Thomp. & C. (N. Y.) 643.

2. *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434.

Intoxication is a synonym of "inebriety," "drunkenness"—implying or evidenced by undue and abnormal excitation of the passions and feelings, or the impairment of the capacity to think and act correctly and efficiently. *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434.

Where there was evidence that the deceased left home sober with two friends, and they drank from a quart bottle of whiskey, of which some was left when they returned; that the deceased then drank two glasses of wine, and soon after was injured by slipping into a hole, and it appeared that those in whose company he was considered him sober, it was held that the evidence did not show that the deceased was injured while under the influence of intoxicating liquors. *Prader v. National Masonic Acc. Assoc.* (Iowa, 1895), 63 N. W. Rep. 601.

3. *Coudeau v. American Accident Co.* (Ky., 1894), 25 S. W. Rep. 6.

4. *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa 505.

5. *Follis v. U. S. Mutual Acc. Assoc.* (Iowa, 1895), 62 N. W. Rep. 807.

6. *Reynolds v. Equitable Acc. Assoc.* (Supreme Ct.), 17 N. Y. St. Rep. 337. But see *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 303, 12 Am. St. Rep. 484.

The strain caused by lifting a heavy burden may be an injury from "external and material cause." See *Martin v. Travelers' Ins. Co.*, 1 F. & F. 505; *Pennington v. Pacific Mut. L. Ins. Co.*, 85 Iowa 468.

7. *Knickerbocker Casualty Ins. Co. v. Jordan*, 7 Cinc. L. Bull. (Ohio) 71.

8. **Must be Violation of Criminal Law.**—It is generally laid down that the unlawful act committed must be criminal, and not a mere violation of a civil right, or the infraction of a law not criminal. *Insurance Co. v. Bennett*, 90 Tenn. 256. See *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 422; *Adams v. Cowles*, 95 Mo. 506.

But the contrary has been held so far as it relates to the violation of a positive rule of civil law, which proximately leads to the injury when it is such an act as increases the risk and naturally leads to the injury. *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478.

Illustration—Fornication.—The fact that at the time the insured was killed by a pistol-shot through the heart he was living with a woman in a state of fornication, there being no proof that the fornication was of such notoriety as to constitute a violation of the criminal laws, does not bring the case within the exception. *Insurance Co. v. Bennett*, 90 Tenn. 256.

order to bring the case within this exception there must be a causal connection between violation of law and injury received.¹ Where the policy excepts injuries "caused by" violation of law, it seems that the violation of law must be the proximate cause of the accident.² But where the policy excludes liability for injuries received while engaged in or in consequence of an unlawful act, although the causal connection must exist even when the accident happens while the insured is actually committing an unlawful act, yet it is sufficient that the violation of law is a conditional or remote cause of the injury.³

1. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531; *National Ben. Assoc. v. Bowman*, 110 Ind. 355; *Jones v. U. S. Mutual Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485; *Utter v. Travelers' Ins. Co.*, 65 Mich. 553, 8 Am. St. Rep. 913; *Insurance Co. v. Bennett*, 90 Tenn. 257; *Duran v. Standard L., etc.*, Ins. Co., 63 Vt. 437.

The same construction prevails as to similar clauses in life-insurance policies. *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; *Hatch v. Mutual L. Ins. Co.*, 120 Mass. 550, 21 Am. Rep. 541; *Murray v. New York L. Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658.

2. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531.

Circumstances Forming One Continuous Transaction — Horse-racing. — Where the insured was killed while driving in a horse-race, in consequence of a collision, in a state where horse-racing was a misdemeanor, the jury found that when the sulky of the deceased came into collision with the sulky of G. the deceased jumped to the ground and was clear from the sulky, harness, and reins, upright and uninjured, and spoke to his horse to stop, and then started forward to get hold of the lines to stop him, and in that attempt was killed. It was held that the death of the insured was due to a violation of law, and there could be no recovery; that the leap from the sulky, and securing the lines, and the subsequent fall and injury to the insured were so close and immediate in relation to his racing, and all so manifestly a part of one continuous transaction, that it could not be said that there was any new influence subsequent to the violation of law to which the disaster should be attributed. *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531. In delivering the opinion of the court in this case Miller, J., said: "The company in protecting themselves against accident or death caused by violation of law acted upon a wise and prudent estimate of the dangers to the person generally connected with such violation. * * * It was against this general species of danger attending nearly all infractions of the law that the company sought to protect itself by the clause of the policy in question, and of this class was the reckless driving of Gilmore."

3. *National Benefit Assoc. v. Bowman*, 110 Ind. 355; *Insurance Co. v. Bennett*, 90 Tenn. 256; *Duran v. Standard L., etc.*, Ins. Co., 63 Vt. 437.

"While Engaged in or in Consequence of Unlawful Act" — **Meaning of the Phrase.** — In *Insurance Co. v. Bennett*, 90 Tenn. 256, the court, by Snodgrass, J., said: "The provision of

the policy excluding liability for injury received by the insured while committing an unlawful act refers to such injury as may happen as the necessary or natural consequences of the act—as its probable and to be anticipated consequences, and the reference to injuries received 'in consequence of any unlawful act' is to those injuries which rise out of or flow naturally from the act committed as its effect or resulting consequence."

In *Duran v. Standard L., etc.*, Ins. Co., 63 Vt. 437, the court, by Thompson, J., said, in reference to this provision in an accident insurance policy: "The provision quoted from the policy excluded liability from any injury of which a violation of law was the cause or the condition producing it. It also expressly provides exemption from liability where violation of law is either the proximate or remote cause or condition producing the injury."

Violation of Sabbath Law. — In accordance with these principles it has been held that the insured could not recover for injury received by slipping upon a frozen, ploughed field, across which he was returning home from a combined hunting and visiting expedition, for that he was in violation of law, both as to hunting and traveling on the Sabbath. *Duran v. Standard L., etc.*, Ins. Co., 63 Vt. 437.

Where, however, the insured, who had been hunting on Sunday, was killed by an accident which happened at a house to which he had gone some hours after he had stopped hunting, and some miles from the place where he had been engaged in this occupation, it was held that the connection between the violation of law and the accident was too remote to prevent a recovery. *Prader v. National Masonic Acc. Assoc.* (Iowa, 1895), 63 N. W. Rep. 601.

Intoxication in Public Highway. — The fact that at the time of the accident, through which the plaintiff was injured, he was in a public highway, in a public place, in a state of intoxication, contrary to the criminal statute, does not show any causative connection between the act which constituted the violation of law and the injury, and consequently an answer alleging such fact is bad. *National Benefit Assoc. v. Bowman*, 110 Ind. 355.

Deserter Shot in Attempt to Arrest Him. — Where the insured, a deserter from the United States army, was shot and killed by a deputy sheriff, at a house where the officer went to arrest him, and the evidence was conflicting as to whether the officer knew the insured and demanded his surrender and shot him in self-defense, or whether the shooting was reckless and the officer did not

While Violating the Law.—Where the policy merely excepts injuries received while violating the law, the exception has been held not to apply unless the insured was at the instant of receiving the injury in the act of violating the law.¹

Proof beyond Reasonable Doubt Not Required.—Proof of the criminal act beyond a reasonable doubt is not required in order to warrant a verdict and decision in support of the exception. A preponderance of evidence, as in other civil cases, is sufficient.²

p. ASSAULT PROVOKED BY QUARRELLING.—Where the policy excludes liability for death from assault provoked by quarrelling, it has been held that the death of the insured does not fall within the exception unless it occurred as the result of a quarrel provoked by himself, and of such a serious nature that he might reasonably have expected that anger would be aroused and violence inflicted. It is not every trivial dispute that is a quarrel within the meaning of this clause.³

q. INJURIES RECEIVED WHILE FIGHTING.—Where the policy excepts injuries received while fighting, it has been held that this exception covers only fighting caused wholly or in part by the insured as the wrongdoer, and not an unprovoked or unwilling conflict in which the insured takes part in self-defense.⁴ But cases are found giving the exception an interpretation more favorable to the insurer.⁵

know the deceased, it was held that it could not be declared as a matter of law that the insured was engaged in an unlawful act, or was shot in consequence thereof, and that this was a question for the jury. *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913.

Insured Shot when Leaving Bawdy-house.—Where it appeared that the insured was shot after leaving a house of ill-fame, where he had been for an immoral purpose, and while carrying concealed weapons in violation of law, the insurer is liable unless the shooting was in a legal sense caused by the visit to the bawdy-house or by the carrying of concealed weapons. *Jones v. U. S. Mutual Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485.

1. Where the insured, in pursuance of a prearranged plot to rob the state treasury, entered that institution, drew a revolver upon the treasurer and demanded and received certain moneys from him, and was shot by a watchman while making his escape from the building, it was held that his death did not take place while violating the law; upon the ground that his act in obtaining money had been accomplished, and that he was merely escaping from the building when he was shot. *Griffin v. Western Mut. Ben. Assoc.*, 20 Neb. 620, 57 Am. Rep. 848. This decision may be doubted as hardly in accord with the weight of authority, especially when it is considered that at the time the insured was killed he was in the act of carrying away property which he had obtained by robbery.

2. *New York Acc. Ins. Co. v. Clayton*, 19 U. S. App. 304, citing *U. S. v. Shapleigh*, 12 U. S. App. 26; *Welch v. Jugenheimer*, 56 Iowa 11, 41 Am. Rep. 77; *Ætna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587, 21 Am. Rep. 223; *Hoffman v. Western Marine, etc., Ins. Co.*, 1 La. Ann. 216; *Knowles v. Scribner*, 57 Me. 495; *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Schmidt v. New York Union Mut.*

F. Ins. Co., 1 Gray (Mass.) 529; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239; *Folsom v. Brawn*, 25 N. H. 114; *Matthews v. Huntley*, 9 N. H. 146; *Young v. Edwards*, 72 Pa. St. 257; *Bradish v. Bliss*, 35 Vt. 326; *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 31.

3. *Insurance Co. v. Bennett*, 90 Tenn. 256.
4. *Gresham v. Equitable Acc. Ins. Co.*, 87 Ga. 497. In this case it was held that where the insured and his antagonist willingly engaged in a personal encounter and the insured was killed, the insurer was not liable. *Bleckley, C. J.*, delivering the opinion of the court, said: "It is not every fight in or from which a mortal injury might be received by the insured, which could be regarded as the cause of the injury or of death resulting therefrom. A faultless and unwilling conflict by the insured, one which he neither provoked nor invited, one which he did not accept when formally or informally tendered, one in which he was forced to engage for self-defense alone and from which he withdrew, or endeavored in good faith to withdraw, when his defense was accomplished, ought not to and would not be treated as a causative fight on his part within the meaning and intent of the policy, but would be regarded as right and proper resistance to aggressive or offensive violence. To protect his life from destruction or his person from injury might be as much a matter of duty to the insurance company as of interest to himself."

Where the insured, who was unarmed, was shot while engaging in an altercation, it was held that his death was accidental, and not within the exception against death from duelling or fighting. *Robinson v. U. S. Mutual Acc. Assoc.*, 68 Fed. Rep. 825.

5. The fact that the insured engaged in a fight, though he himself was not the assault-

7. **INTENTIONAL INJURIES.**—It has been seen that, in the absence of special provisions in the policy, injuries inflicted on the insured intentionally by other parties have been generally held to be accidental, and to render the insurer liable.¹ Most policies, however, contain an exception in case of intentional injuries inflicted by the insured or by any other person.

Intentional Injury Inflicted by Another.—An intentional injury inflicted by another person is an injury which such other person intentionally inflicts, whether the insured intends to have it inflicted or draws it upon himself;² but the intention must be directed against the insured, and not against another or against a class of individuals.³ And it has been held that where death ensues from the injury, it is necessary that the person inflicting the injury should have had the intent to kill.⁴

Death Inflicted by Insane Person.—It seems that the fact that the insured was killed by an insane person does not avoid the policy, since death so inflicted cannot be said to be intentional.⁵ But in order to render an injury intentional, by reason of the insanity of the person who inflicts it, there must be such a diseased and deranged condition of the mind as to render the person incapable of distinguishing between right and wrong in relation to the particular act with which he is charged.⁶ The burden is upon one seeking to recover upon the policy to establish insanity, as taking the case out of the exception as to intentional injury.⁷

Intentional Injuries Inflicted by Insured.—Where the policy excepts death from

ing party, brings his injury clearly within the meaning of the terms of the policy as excluding injuries so received from its operation and insurance as being caused by fighting. *U. S. Mutual Acc. Assoc. v. Millard*, 43 Ill. App. 148.

1. See *supra*, this title, *Accidental Injuries in General*.

2. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Fischer v. Travelers' Ins. Co.*, 77 Cal. 246; *Travelers' Ins. Co. v. McCarthy*, 15 Colo. 351, 22 Am. St. Rep. 410; *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484; *American Acc. Co. v. Carson* (Ky., 1895), 30 S. W. Rep. 879; *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640; *DeGraw v. National Acc. Society*, 51 Hun (N. Y.) 142.

3. *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913.

In *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484, the court, by Bennett, J., said: "We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured, and not to such injuries as the insured may receive at the hands of third persons who are attempting to do mischief generally, or who are attempting to injure any particular individual, other than the insured, or class of individuals, or any kind of property; for in such cases it cannot be said that the injuring was intentionally aimed directly and individually at the insured."

In *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913, Morse, J., speaking for the court, said: "It seems to me that the design intended by the terms of the policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act."

Evidence of Intention—Threat.—The fact that the person by whom the insured is alleged to have been killed armed himself a short time before the killing, and stated that he was going home, and that if he found the insured he was going to kill him, is admissible as tending to show both that he killed the insured and that he did it intentionally. *Standard L., etc., Ins. Co. v. Askew* (Tex. Civ. App., 1895), 32 S. W. Rep. 31.

4. *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 23 Am. St. Rep. 455. See *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913.

5. *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338; *Travelers' Ins. Co. v. Houston*, 3 Tex. App. Civ. Cas., § 429.

Aliter where the insured provokes a fight with an insane person. *Gresham v. Equitable Acc. Ins. Co.*, 87 Ga. 497.

6. *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338; *Travelers' Ins. Co. v. Houston*, 3 Tex. App. Civ. Cas., § 429.

In *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338, the court laid down the test stated in the text, citing *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651, and considered that the question of insanity in this connection was to be determined by the same rule as in criminal law, and that an irresistible insane impulse was not sufficient.

7. *Travelers' Ins. Co. v. Houston*, 3 Tex. App. Civ. Cas., § 429.

Record of Criminal Conviction.—Where the plaintiff offers evidence tending to show that the person who is alleged to have inflicted the intentional injuries was not mentally responsible, the defendant cannot, for the purpose of refuting the evidence, introduce the record of the criminal conviction of such person for the assault upon the insured. *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338.

intentional injuries inflicted by the insured, the condition is broken if the insured intentionally injures himself by the infliction of bodily wounds from which he dies.¹

3. Stipulations as to Notice and Preliminary Proof, Time of Instituting Suit, Arbitration.—*a. NOTICE AND PROOF OF INJURY.*—(1) *In General.*—Condition Precedent.—Most of the policies provide that notice of the injury, on account of which indemnity is claimed, together with full particulars of the same, shall be given to the company within a specified time, and compliance with this provision is generally regarded as a condition precedent to the enforcement of the policy.²

When Compliance Impossible.—At the same time, where the circumstances of the accident were such as to render it impossible to comply with the condition, giving the notice within a reasonable time after it became possible to do so has been held sufficient.³ And where by the terms of the policy the beneficiary was required to give notice of the death within ten days after the accident causing it, and death did not occur within that time, the condition was held to be unreasonable and invalid.⁴

Notice in Case of Disability.—*No Disablement at the Time, but Death ensues.*—And where the policy stipulated for notice only in the event of disability, it was held that notice was not called for where the accident did not disable the insured at the time from working, although it afterwards resulted in death.⁵

Immediate Notice.—In some of the policies it is stipulated that immediate notice of the injury shall be given. The word "immediate" in such cases is not to be construed literally, but the notice must be given within a reasonable time, according to the circumstances of the particular case.⁶

1. *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 304, 12 Am. St. Rep. 484. See *supra*, this title, *Suicide or Self-inflicted Injuries*.

2. *Martin v. Equitable Acc. Assoc.* (Supreme Ct.), 16 N. Y. Supp. 279; *Gamble v. Accident Assur. Co.*, 4 Ir. R. C. L. 204; *Patton v. Employers' Liability Assur. Co.*, 20 L. R. Ir. 93; *Cawley v. National Employers' Assoc.*, 1 C. & E. 597. See also *Victorian Stevedoring, etc., Co. v. Australian Acc., etc., Ins. Co.*, 29 Vict. L. R. 139; *Cassel v. Lancashire, etc., Ins. Co.*, 1 Times L. R. 495.

In *Heywood v. Maine Mut. Acc. Assoc.*, 85 Me. 289, it was held that a policy providing that failure to give notice of the injury for the period of ten days after it is received will bar all claim under the policy, is valid; and when such stipulation is neither complied with nor waived there can be no recovery on the policy.

But in *Stoneham v. Ocean, etc., General Acc. Ins. Co.*, 19 Q. B. Div. 237, the provision as to notice was construed to be not a condition precedent to recovery.

3. *Tripp v. Provident Fund Soc.*, 3 Misc. Rep. (N. Y. Super. Ct.) 445, *affirmed* in 140 N. Y. 23. In this case the provision in regard to notice was as follows: "Notice of any accidental injury for which claim is to be made under this certificate shall be given in writing, addressed to the president of the society at New York, stating the full name, occupation, and address of the injured member with full particulars of the accident and injury, and failure to give such written notice within ten days from the date of either injury or death shall invalidate any and all claims under this certificate." The insured's place of business was in Park Place, New York City,

and he was killed August 22, 1891, in what is known as the Park Place disaster. His body was taken from the ruins on the morning of August 25th following. Notice of the injury and death in the form required as above was served the second day of September following. It was held that as a notification on August 22d was an impossible thing under the circumstances, the legal effect of the condition was that notice served within ten days after August 25th was within the time required, and the service made on September 2d, entitled the plaintiff to recovery. See also *Manufacturers' Acc. Indemnity Co. v. Fletcher*, 5 Ohio Cir. Ct. Rep. 633.

4. **Unreasonable Condition.**—*Hoffman v. Manufacturers' Acc. Indemnity Co.*, 56 Mo. App. 301.

5. *McFarland v. U. S. Mutual Acc. Assoc.*, 124 Mo. 204.

6. **"Immediate" Notice Means Reasonable Notice.**—*Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460. In this case, notice given six days after the alleged injury, which happened in the city where the policy was issued and where the company had a resident agent, was held to be too late, no excuse being shown for the delay.

In *McFarland v. U. S. Mutual Acc. Assoc.*, 124 Mo. 204, it was held that, under a policy requiring immediate notice of the death of the insured and providing that it should be given by letter, notice given within ten days after the death was held sufficient. In this case the court said: "The condition requires that immediate written notice shall be given. The word 'immediate' cannot be construed literally without in many cases causing a forfeiture. It is frequently impossible, under the cir-

And What is a Reasonable Time under all the facts and circumstances of the case is a question for the jury, unless the delay has been so great that the court may rule it as a question of law.¹

Examination of Body.—A provision in the policy that the medical adviser of the company shall be allowed to examine the person or body of the insured, in respect to any alleged injury or cause of death, when and as often as he may require on behalf of the company, and in the event of any *post-mortem* examination by or on the part of the insured's representatives or beneficiaries, the company shall be afforded opportunity to attend and participate, merely gives the right to scrutinize and inspect the body before burial, and does not authorize an exhumation or dissection of the body against the wishes of the surviving relatives.²

Dissecting Body.—Nor will the circumstance that the policy does not extend to accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by disease, give the company the right to dissect the body in the hope of finding some trace of disease which might, under the provision stated, exempt it from liability.³

Notice to Agent—Misstatement of Date—Estoppel.—Where the agent of the company, upon receiving from the insured verbal notice of the accident and the claim

cumstances of the accident or death, to give immediate notice. This condition subsequent must be liberally construed in favor of the beneficiary. So it has been uniformly held that this and similar words should be construed to mean within a reasonable time."

In *People's Mut. Acc. Assoc. v. Smith*, 126 Pa. St. 317, a person, insured under a policy requiring immediate notice, whose eye was injured on September 4th, though the injury was not considered dangerous until some days afterward, was held, under the facts and circumstances of the case, to have complied with the provision as to notice by notifying the company on October 1st.

In *Kentzler v. American Mut. Acc. Assoc.*, 88 Wis. 589, the policy stipulated that, in the event of injury or death, notice of the claim should be given to the company immediately after the accident, and positive proof of death should be furnished within six months thereafter. The insured, a tugboat engineer, disappeared on November 9, 1892, and his body was found in the water near the boat on April 19th of the following year, and notice of death was given the 26th of the following month, and the proofs on the 12th of July following. This was held to be a reasonable compliance with the requirement.

Notice "as Soon as Possible."—The expression "as soon as possible," in connection with giving notice, is not to be taken literally, but means with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case. *Provident L. Ins., etc., Co. v. Baum*, 29 Ind. 236; *Provident L. Ins., etc., Co. v. Martin*, 32 Md. 310.

1. **When Question for Jury and When for the Court.**—*People's Mut. Acc. Assoc. v. Smith*, 126 Pa. St. 317; *Provident L. Ins., etc., Co. v. Martin*, 32 Md. 310; *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa 631.

In *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1, the policy provided that failure to give immediate written notice to the company

at its home office should invalidate the policy. The beneficiary called at the office of the local agent to notify him of the injury on account of which the claim was made, and left word with his clerk, whereupon the agent notified the home office in writing. The home office thereupon had the case inquired into by its agent, and its physician attended the *post-mortem* examination of the insured. The notice to the local agent was given in May, and although the accident occurred in March it did not until April appear to be serious. It was held to be proper to submit to the jury the question whether written notice had been given within a reasonable time.

Compare *Accident Ins. Co. of North America v. Young*, 20 Duval (Montreal) 281, overruling 6 Montreal Super. Ct. 3.

In *McFarland v. U. S. Mutual Acc. Assoc.* (Mo., 1894), 27 S. W. Rep. 436, it was held that where the only dispute as to the facts showing whether reasonable notice of the insured's death has been given to the company as required by the terms of the policy, is whether a letter containing the notice was sent, it is a question for the jury whether the notice was sent and for the court whether it was reasonable; and the fact that the letter was mailed, duly stamped, and addressed, is evidence that the person to whom it was sent received it.

2. *Wehle v. U. S. Mutual Acc. Assoc.*, 11 Misc. Rep. (N. Y. Super. Ct.) 36.

In *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. Rep. 873, there was a similar provision in the policy. No request was made for an examination until some weeks after the insured was buried, when a request was made, not to the beneficiary, but to the widow of the insured, which was refused. It was held that this constituted no defense to an action by the beneficiary. See also *Ballantine v. Employers' Ins. Co.* (Scot. Ct. of Sess., 1894), 31 Scot. L. R. 230.

3. *Wehle v. U. S. Mutual Acc. Assoc.*, 11 Misc. Rep. (N. Y. Super. Ct.) 36

for indemnity, undertakes to make out the necessary notice and proofs, and therein misstates the date of the accident, the company may not take advantage of such misstatement if the proofs are signed by the insured without any improper motive, and by the advice of the agent.¹

Indemnity Payable at Designated Place—Effect upon Place of Notice.—A provision that any claim for indemnity is payable at the company's office in a certain city, or (at the company's option) at the general agency through which the policy was issued, is not a requirement that notice and proofs of loss shall be made at the city named.²

(2) **Waiver—Failure to Give Notice.**—Waiver by the company of the condition in regard to the time of serving notice and proofs of the injury may be made by acts and conduct indicating an intention to waive such condition, occurring subsequent to the breach thereof, although there is no new consideration, and although there be no technical estoppel.³

Refusal of Agent to Recognize Claim.—The refusal by a general agent to recognize the insured's claim to indemnity constitutes a waiver of compliance with the conditions as to preliminary notice and proof.⁴

Irregularities in Notice—Retaining Notice and Proofs without Objection.—The receipt and retention by the company of informal notice and proofs, without objection, or demand for further or more definite notice and proofs, constitutes a waiver of objections as to their regularity.⁵

Acting upon Verbal Notice—Waiver of Written Notice.—Where the company, after verbal notice of the injury, sends its medical director to examine the condition of the injury, it must be considered to have waived the requirements of written notice.⁶

b. TIME OF INSTITUTING SUIT.—The policies generally provide that no suit in law or equity shall be maintained thereon unless the same is instituted within a specified time after the happening of the alleged injury—usually one year; and also that suit may not be instituted until the expiration of a certain period, usually ninety days, after the claimant has furnished proof of the injury as pointed out in the policy. It is undoubtedly competent for the parties to thus limit the time for bringing suit.⁷

1. *Young v. Travelers' Ins. Co.*, 80 Me. 244.

2. *Pennington v. Pacific, etc., Ins. Co.* (Iowa, 1892), 52 N. W. Rep. 482.

3. *Reynolds v. Equitable Acc. Assoc.* (Supreme Ct.), 17 N. Y. St. Rep. 337; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23. In this latter case it was held that the company waived the condition requiring notice within ten days after the injury, by retaining, without objection, a notice of the accidental death of the insured, given more than ten days after that event, and a subsequent notice from the administrator of the insured; by furnishing necessary blanks for proofs of loss; by retaining, without objection, the proofs made in compliance with the terms of the policy; and by afterward calling for and receiving additional information.

Refusing to Pay Policy on Other Grounds.—Where, on receiving proofs of the injury, the company examined the same, and refused to pay the policy on other grounds than the omission to give the required notice, the condition in regard to notice was deemed waived. *Unthank v. Travelers' Ins. Co.*, 4 Biss. (U. S.) 357. See also *Sheanon v. Pacific Mut. L. Ins. Co.*, 83 Wis. 507.

Compare *Accident Ins. Co. of North America v. Young*, 20 Duval (Montreal) 281, overruling 6 Montreal Super. Ct. 3.

4. *Travelers' Ins. Co. v. Harvey*, 82 Va. 949. In this case it was further held that a clause in the policy denying the right of the insured to claim "a waiver by reason of any acts of any agent, unless such waiver is specially authorized in writing over the signature of the president or secretary of the company," does not include those conditions that are to be performed after a loss occurs, such as giving notice and proofs.

A reply by the general active officer of a mutual benefit association, to the request of a member for blanks in order to make notice and proofs of his injury and disability, that it would be useless for the member to do so, as his claim would be rejected, constitutes a waiver on the part of the association of the member's obligation to present notice and proofs. *Hutchinson v. Supreme Tent, etc.*, 68 Hun (N. Y.) 355.

5. *Brink v. Guaranty Mut. Acc. Assoc.* (Supreme Ct.), 28 N. Y. St. Rep. 921; *Bushaw v. Women's Mut. Ins., etc., Co.* (Supreme Ct.), 8 N. Y. Supp. 423. See also *Trippe v. Provident Fund Society*, 140 N. Y. 23.

6. *Martin v. Equitable Acc. Assoc.*, 61 Hun (N. Y.) 467. See also *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1; *Sheanon v. Pacific Mut. L. Ins. Co.*, 83 Wis. 507.

7. In *Law v. New England Mut. Acc. As-*

When the Time Begins to Run.—This limitation in the policy against death resulting from accident is held to begin to run from the death of the insured, and not from the time when the right of action accrues.¹ This ruling is in accordance with the decisions in some of the states upon similar limitations in other kinds of insurance.² In other jurisdictions, while the question has not arisen in regard to accident insurance, yet it is held in other classes of insurance that under a policy limiting the time for bringing an action upon it and requiring the performance of conditions precedent, which must occupy a portion of that time, the limitation does not commence to run until the right of action accrues.³

When the Time Begins to Run against Beneficiary in Case of Death of Insured.—And it is held that in case the insured dies from the injury, the beneficiary has the full time from that event in which to bring suit, without regard to the time of the original injury, as until then such party has suffered no injury within the meaning of the policy, and therefore has no right of action.⁴

soc., 94 Mich. 266, where the policy provided that no suit should be brought or arbitration required to recover any sum unless commenced within one year after the injury, and more than five months elapsed after the insured was fully advised that the company refused to pay or arbitrate the claim before the expiration of the year, it was held that a suit thereafter brought was barred by the limitation, unless it had been waived by the company. The court cites *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 189; *Gould v. Dwelling-house Ins. Co.*, 90 Mich. 302; *Voorheis v. People's Mut. Ben. Soc.*, 91 Mich. 469; *Steele v. German Ins. Co.*, 93 Mich. 81.

1. *McFarland v. Railway Officials, etc.*, Acc. Assoc. (Wyoming, 1894), 38 Pac. Rep. 347. Compare note 4 below.

2. See the titles FIRE INSURANCE; INSURANCE; LIFE INSURANCE.

3. See *Barber v. Fire, etc., Ins. Co.*, 16 W. Va. 658, 37 Am. Rep. 800; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407; *Matt v. Iowa Mut. Aid Assoc.*, 81 Iowa 135; *McConnell v. Iowa Mut. Aid Assoc.*, 79 Iowa 757; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Hong Sling v. Royal Ins. Co.*, 8 Utah 135; *Hay v. Star F. Ins. Co.*, 77 N. Y. 235; *Sun Ins. Co. v. Jones*, 54 Ark. 376. Also the titles FIRE INSURANCE; INSURANCE; LIFE INSURANCE.

Mutual Insurance—When Cause of Action Complete.—In *Mutual Acc., etc., Assoc. v. Kayser*, 14 W. N. C. (Pa.) 86, the policy in a mutual insurance company covenanted to pay the assured in case of injury by accident a stipulated sum for every week he might be disabled from following his usual occupation, not exceeding ten weeks. A by-law of the association provided that if any suit was brought "after the expiration of six months next after the loss shall have occurred, the lapse of time shall be deemed conclusive against the validity of the claim." The assured sustained an accident which for more than ten weeks disabled him from working. This suit was instituted more than six months after the date of the accident, and less than six months after the expiration of ten weeks after the accident. An instruction that the limitation of six months named in the by-law did not begin to run until the cause of ac-

tion was complete, which was not until the expiration of ten weeks after the happening of the accident, and that the action therefore was brought within six months after the loss occurred within the meaning of the by-law, was sustained. In this case it was further held that in a mutual insurance company the policy constitutes an agreement between the parties, and a by-law in force at the time of the policy limiting the right of action to six months after the loss occurs is not a bar to a member's suit upon his policy brought for that period, unless such by-law is made a part of the policy.

4. **Death of Insured—Time in which Beneficiary must Bring Suit.**—*Cooper v. U. S. Mutual Acc. Assoc.*, 132 N. Y. 334. In this case provisions were made in the policy for two different persons who, upon the happening of the events named, would have a right of action against the company. One provision was in favor of the insured, who was entitled to recover during his lifetime the amount provided for his disability resulting from the accidental injury sustained; the other was in favor of his wife, which was for the injuries which she would suffer by reason of his death resulting from such accident. The court said: "The injury received by Cooper did not injure the plaintiff or give her a right of action until death ensued. So far as she is concerned the infliction of the wound is but the beginning, and the death is the completion, of the injury. Her suit must be 'commenced within one year from the time of the alleged accidental injury'; in other words, within one year from the time of the injury to her, which was the death of her husband as the result of the accident. As to Cooper, he suffered from the date of the wound. His right of indemnity dates from that event, and it is possible that his right to maintain an action would not continue after the expiration of a year from that date. But as to the plaintiff, it appears to us that the construction already indicated was intended and should be given to the certificate. As thus construed the various clauses of the contract are rendered harmonious, and the different beneficiaries thereunder are given the same period of limitation

Failure to Cite Defendant until Expiration of Time Specified.—In one instance the action was held to be seasonably brought where the petition was filed and a non-resident notice served on the defendant within the time limited by the policy for bringing the action, although citation was not served upon the defendant's agent until after the expiration of such time.¹

c. ARBITRATION.—Where the policy stipulates for the payment of a certain sum in the event of injury, and contains a proviso that "no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been first referred to arbitration" in the manner pointed out, such arbitration is not a condition precedent to a right of action upon the policy.² But it seems that if the promise is to pay not a definitely stated amount, but the amount which may be awarded by the arbitrators, then the provision for arbitration will be a condition precedent to the right to bring an action for an injury within the policy.³

VI. PROXIMATE CAUSE.—It has been held uniformly and independently of special provisions inserted in the policy, that an accident, in order to entitle the insured to recovery for injuries resulting therefrom, must be the proximate cause of such injuries.⁴ The question of proximate cause has usually arisen

within which to bring actions to establish their claims."

In the lower court (*Cooper v. U. S. Mutual Acc. Assoc.*, 57 Hun (N. Y.) 407) it was held that the words "the time of the alleged injury" meant when the proofs were accepted and the claim in a condition to be sued, and that the beneficiary had twelve months to bring suit after the right of action was complete. It will be observed that the view of the lower court is directly opposed to that taken by the court in the case in note 1 immediately preceding.

1. *Standard L., etc., Ins. Co. v. Askew* (Tex. Civ. App., 1895), 32 S. W. Rep. 31.

2. When Submission to Arbitration Not Condition Precedent.—*Badenfeld v. Massachusetts Mut. Acc. Assoc.*, 154 Mass. 77. Here the court said: "The promise is not to pay the award, but to pay the sum named, and the proviso does not make the award a condition precedent to the promise to pay, but a mode of enforcing that promise. It is well settled that such an agreement is no bar to an action on the promise." *Citing Reed v. Washington F., etc., Ins. Co.*, 138 Mass. 572.

In *Kinney v. Baltimore, etc., Employees' Rel. Assoc.*, 35 W. Va. 385, it was held that a provision in an insurance contract that all differences arising under it should be submitted to arbitrators thereafter to be chosen would not prevent a party from maintaining a suit in the first instance in a court to enforce his rights under the policy. See also *Smith v. Preferred Masonic Mut. Acc. Assoc.*, 51 Fed. Rep. 520; *Whitney v. National Masonic Acc. Assoc.*, 52 Minn. 378; *Prader v. National Masonic Acc. Assoc.* (Iowa, 1895), 63 N. W. Rep. 60r.

Mutual Benefit Societies.—As to the power of mutual benefit societies to limit the right of members to sue, see *Bauer v. Samson Lodge Knights of Pythias*, 102 Ind. 262; *McMahon v. Supreme Council*, 54 Mo. App. 468; and the title **BENEFICIAL OR BENEVOLENT ASSOCIATIONS**, where the subject will be fully discussed.

3. When Submission to Arbitration a Condition Precedent.—*Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782, 101 E. C. L. 782. In this case there was a condition indorsed on the policy, that in the event of differences of opinion as to the amount of compensation payable in any case the question should be referred to arbitration in the manner pointed out in the condition, and the award made on such arbitration was to be taken as a final settlement of the question and might be made a rule of court. It was held that a reference to arbitration in the manner prescribed was rendered a condition precedent to bringing an action for an injury within the policy. The court cites and relies upon *Scott v. Avery*, 5 H. L. Cas. 811.

See, generally, the title **ARBITRATION AND AWARD**.

4. Suicide of Person Insane from Accident.—Where after an accident the insured became insane, and while in that state took his own life, it has been held that the accident and the death were too remotely connected to allow of a recovery under a policy of accident insurance. *Harris v. Travelers' Ins. Co.*, 8 Alb. L. J. 86.

So under a policy of life insurance it has been held that death taking place under the same circumstances was due not to accident, but to suicide. *Streeter v. Western Union Mut. L., etc., Soc.*, 65 Mich. 199, 8 Am. St. Rep. 882.

Death Following Accidental Runaway.—In *McGlinchey v. Fidelity, etc., Co.*, 80 Me. 251, 6 Am. St. Rep. 190, the circumstances of the death of the insured were these: The insured was driving in a carriage along the principal thoroughfare of the place of his residence, when his horse became frightened at an unsightly object on the street and suddenly began to run, first jumping to the side of the way and nearly colliding with other teams, and ran a considerable distance before he was brought under control. There was no collision, nor was the carriage upset or any one thrown therefrom, but immediately

in cases where the accident was complicated with disease, or under clauses exempting the insurer from liability in certain specified cases, and the authorities have already been considered under their appropriate heads.¹

VII. AGENTS—1. Misstatements in Application.—Where the agent of an insurance company authorized to procure applications, either by his direction or his direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the insured.² And a stipulation that the agent shall be considered in filling out the application as the agent of the insured will not relieve the company or change the rule.³

2. Power of Agent to Waive Conditions and Forfeitures.—Within the apparent scope of his authority, the acts and assurances of the agent of an insurance company are the acts and assurances of the company;⁴ consequently, where the agent makes misrepresentations to the applicant for insurance, as to the scope of the policy, or the risks covered by it, it has been held that the com-

afterwards the insured experienced great sickness and pain, and going directly to his house, died in about an hour from the moment of the accident. He was in good health on that morning before the accident, and there was no suggestion that he was not a person of generally sound and strong constitution. The court, by Peters, C.J., said: "We think, on these facts, that the common judgment of men would instinctively declare, irrespective of the refinements that are often indulged in over primary and secondary causes, that here was a plain accident causing death, and that the company should pay the sum promised in the policy."

1. See *supra*, this title, *Death Caused by Disease; Accidental Injuries in General*.

2. **Agent's Misstatements in Application.**—The principle of the text has been applied where the insured stated truthfully the amount of compensation which he received from his employer, and the agent misstated this amount in filling out the application. *Howe v. Provident Fund Soc.*, 7 Ind. App. 586; where the agent misstated the age of the applicant, *Brink v. Guaranty Mut. Acc. Assoc.* (Supreme Ct.), 28 N. Y. St. Rep. 921; where the agent, with knowledge of the facts, misstated the occupation of the applicant, *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704; 58 Fed. Rep. 342; *New York Acc. Ins. Co. v. Clayton*, 19 U. S. App. 304; *Bushaw v. Women's Mut. Ins., etc., Co.* (Supreme Ct.), 8 N. Y. Supp. 423. See *Perrins v. Marine, etc., Travelers' Ins. Co.*, 2 El. & El. 324, 105 E. C. L. 324; and where the agent, with the knowledge of the secretary of the insurance company, inserted in the application a false statement that the applicant had no other insurance. *Dailey v. Preferred Masonic Mut. Acc. Assoc.* (Mich., 1894), 57 N. W. Rep. 184.

Knowledge by Agent of False Statement of Applicant.—Where the local agent of an insurance company has actual knowledge of the falsity of a statement made by the insured in his application, and forwards the application upon which the policy is issued, the knowledge of the agent is the knowledge of the company, and the false statements will not avoid the contract. *Follette v. Mutual Acc.*

Assoc., 110 N. Car. 377, *citing* *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa 308; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422; *Hornthal v. Western Ins. Co.*, 88 N. Car. 73; *Dupree v. Virginia Home Ins. Co.*, 92 N. Car. 417, 93 N. Car. 240; *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 513, 4 Am. Rep. 647; *Mullin v. Vermont Mut. F. Ins. Co.*, 58 Vt. 113; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361. See also *Keystone Mut. Ben. Assoc. v. Jones*, 72 Md. 363.

On the other hand it has been held that where an untrue statement was inserted in the application for membership in a benefit accident association, by the agent of the association, at the request of the applicant, it would be sufficient ground to defeat an action upon the certificate. *Wilde v. Preferred Mut. Acc. Assoc.* (Supreme Ct.), 14 N. Y. St. Rep. 365, *citing* *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Mowry v. Rosendale*, 74 N. Y. 360; *Flynn v. Equitable L. Assur. Soc.*, 9 N. Y. Wkly. Dig. 324.

Agents of Mutual Benefit Association.—The courts in general repudiate any distinction as to the effect of misstatements of agents in case of the agents of mutual benefit societies. *Howe v. Provident Fund Society*, 7 Ind. App. 586. See *Kausal v. Minnesota Farmers' Mut. F. Ins. Assoc.*, 31 Minn. 17, 47 Am. Rep. 776; *Russell v. Detroit Mut. F. Ins. Co.*, 80 Mich. 407.

View that Policy cannot be Modified by Extrinsic Evidence.—The view that in an action at law upon an insurance policy, the rights of the parties must be determined by the contract of insurance, which cannot be altered or modified by extrinsic evidence of a different agreement to be established from the actual knowledge of the insurer or its agents, has been maintained. See *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, where the authorities are extensively collected and examined. See also the title *INSURANCE*.

3. *Howe v. Provident Fund Soc.*, 7 Ind. App. 586; *Bushaw v. Women's Mut. Ins., etc., Co.* (Supreme Ct.), 8 N. Y. Supp. 423. See *Kausal v. Minnesota Farmers' Mut. F. Ins. Assoc.*, 31 Minn. 17, 47 Am. Rep. 776.

4. *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704.

pany will be estopped to deny such representations;¹ but the authorities are not in accord as to the circumstances which demand an application of this principle.²

3. Knowledge of Agent Imputed to Insurer.—The knowledge of the agent is the knowledge of the insurer, hence the latter cannot avoid a policy upon the ground that the risk was taken in ignorance of material facts not referred thereto, if these facts were known to its agent.³

1. *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704; *New York Acc. Ins. Co. v. Clayton*, 19 U. S. App. 304; *Henderson v. Travelers' Ins. Co.*, 65 Fed. Rep. 438; *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221.

A representation of a general agent of an insurance company, that the risk included intentional injuries inflicted on the insured, waives a contrary proviso in the policy. *Henderson v. Travelers' Ins. Co.*, 65 Fed. Rep. 438.

2. For a full discussion of the powers of insurance agents to waive conditions and forfeitures, see the title *INSURANCE*. The different views of the courts are illustrated by the following cases.

Proviso in Policy Limiting the Agent's Authority.—Where the policy stated that it would not cover accidents received while under the influence of intoxicating liquor, and also stated that no agent had power to alter or waive any of its terms or conditions, and the agent reported to the insured that the policy would cover an accident received while intoxicated, it was held that the expressed restriction in the policy was proper, and would be supported. *Cook v. Standard L., etc., Ins. Co.*, 84 Mich. 12. In this case the court followed *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, where it is declared that "when the policy of insurance contains an express limitation upon the power of the agent, such agent has no legal right to contract, as agent of the company, with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped by accepting the policy from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy."

But where, although such a stipulation as to the power of agents is inserted in the policy, yet, owing to the particular circumstances of the case, certain terms of the policy may be properly susceptible of another than their apparent meaning, the stipulation will not prevent the agent from waiving or altering such terms as between the insured and the company.

As to the power of agents to waive stipulations inserted in policies with regard to notice and proof of injury, see *supra*, this title, *Stipulations as to Notice and Preliminary Proof of Injury, Time of Instituting Suit, Arbitration*. As to the power of agents to waive conditions as to payment, see *supra*, this title, *Payment of Premiums*.

Power of Agent Held Not to Extend to Abrogate Plain Provision of Policy.—Where the policy insured the holder while traveling on a public

conveyance, and the agent told the applicant that the policy covered all risks during his trip, whether upon a conveyance or not, it was held that there could be no recovery where the insured was injured while stopping over at a town upon his route; that where the policy was perfectly plain and unambiguous in its terms, and where there was no evidence of fraud or concealment, the representations of the agent would not affect the contract. *Fidelity, etc., Co. v. Teter*, 136 Ind. 672.

Method of Waiver Provided in Policy.—Where the policy provided that nothing less than a distinct specific agreement, indorsed upon or attached to it, should be considered as a waiver of any printed or written condition or restriction contained in it, it was held that a local agent of the insurer could not waive any of the provisions of the policy, except in the manner thus provided for. *Enos v. Sun-Ins. Co.*, 67 Cal. 621.

Waiver of Provisions of Charter.—An incorporated insurance company is the creature of its charter, and where the charter gives it power to contract and prescribes the form and mode of making such contract, the company must observe the form or mode prescribed, or the contract will be void; and in such case it is not within the power of the officer or agent of the company to waive a strict compliance with the requirements of its charter. *Leonard v. American Ins. Co.*, 97 Ind. 299.

Company Estopped from Denying Authority of Agent.—Where a circular issued by an insurance company represents without qualification that the company issues policies providing for certain payments in the event of special injuries, the company by the circular represents that the agent has authority to issue a policy as described in the circular, and cannot, in case of such injuries, deny his authority to do so. *Frank v. Pacific Mut. L. Ins. Co. (Neb., 1895)*, 62 N. W. Rep. 454.

Where the insurer has placed the agent in a position to deliver a completed policy to the insured, who did not know that the company required all contracts to be referred to the home office, the insurer cannot avoid the policy on the ground that the contract was not submitted to the home office for ratification. *American Employers' Liability Ins. Co. v. Barr*, 68 Fed. Rep. 873.

3. See *supra*, this section, as to the insurance company being bound by the misstatements of its agent, even when there is an attempt in the policy to make the agent the representative of the insured. See also the title *INSURANCE*.

Total Loss of Sight—Knowledge of Agent that Insured had Lost an Eye.—Where the agent

VIII. EVIDENCE—1. Proof of Death by Violent, External, and Accidental Means.

—Under a policy insuring the holder against death or injury by external, violent, and accidental means, and providing that the insurance shall not extend to any case of death or injury unless the claimant shall establish that the death or injury was occasioned by "external violence and accidental means," it is incumbent upon the plaintiff under the policy to show that the death or injury of the insured was the result not only of external violence, but of accidental means.¹

Direct and Positive Proof.—A proviso in a policy that the claimant shall establish "by direct and positive proof" that death or personal injury was caused by external violence and accidental means, does not, where the insured has been found dead, require the facts and circumstances of his death to be proved by eye-witnesses, nor does such a provision exclude circumstantial and presumptive evidence.²

with knowledge insures a one-eyed man against total loss of the sight of both eyes, the company is liable if the insured loses the sight of his remaining eye. *Humphreys v. National Ben. Assoc.*, 139 Pa. St. 264; *Bawden v. London, etc., Assur. Co.*, 61 L. J. R. 792, (1892) 2 Q. B. 534.

1. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322; *Trew v. Railway Pass. Ins. Co.*, 5 H. & N. 211.

Several Equally Reasonable Theories of Death.—Where the circumstances are consistent with several equally reasonable theories, some pointing to accidental death, and some pointing to death from design or natural causes, a case is not made out for the jury until there is some proof offered tending to establish one of such theories. *Merrett v. Preferred Masonic Mut. Acc. Assoc.*, 98 Mich. 338.

Where there is Sufficient Evidence to warrant a finding that death was due to accidental and not to some other cause, as, for instance, disease, a verdict in favor of the beneficiary will not, of course, be disturbed. So where there was evidence that the insured died from the effects of a fall, although there was testimony tending to show that typhoid fever might have occasioned the death. *Standard L., etc., Ins. Co. v. Thomas* (Ky., 1891), 17 S. W. Rep. 275.

So where the death might have resulted from the effects of a fall, although it was contended that the cause of death was softening of the brain. *Hall v. American Masonic Acc. Assoc.*, 86 Wis. 518.

So where death was found by the jury to have resulted from sudden strain, although there were no external marks of the injury. *Owen v. Travelers' Ins. Co.* (Ind.), 12 Ins. L. J. 75.

2. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 800; *Peck v. Equitable Acc. Assoc.*, 52 Hun (N. Y.) 255; *Reynolds v. Equitable Acc. Assoc.* (Supreme Ct.), 1 N. Y. Supp. 738.

In *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 800 the court, by Bleckley, C. J., in construing this provision of an accident policy, said: "In one sense, all oral evidence is direct. * * * If we take the policy as meaning by the use of the terms 'direct and positive'

this much and no more, it can be easily reconciled with the rules of law on the subject of evidence. But the more general, and with us the established, use of the terms 'direct evidence' gives to them a different and more restricted meaning." The learned judge then gave the accepted definitions of direct and circumstantial evidence, citing 1 Stark. Ev. 15, and the Code of Georgia, § 3748, and proceeded: "It is manifest that if it was the purpose of the insurance company to exact by contract direct evidence of death and accident, in the sense contemplated by Starkie and our code as above quoted, then the rule laid down by the policy is in conflict with that established by law—a conflict which must be reconciled by adherence to the law and repudiation of this article in the policy."

Unknown Cause Incapable of Direct and Positive Proof.—In *Wright v. Sun Mut. L. Ins. Co.*, 29 U. C. C. P. 221, the court, in construing a provision in a policy of insurance preventing a recovery "where the cause or manner of the accident is unknown or incapable of direct and positive proof," said: "The true meaning of this clause appears from the context: * * * 'the insurance shall not be held to extend to mysterious disappearances, nor to any case of death or disability, the nature, cause, or manner of which is unknown or incapable of direct and positive proof.' We think it would be a perversion of the true meaning of this clause to hold that where the immediate cause of death is indisputable and evidenced by outward violence, caused by a train running over the body, and an accident *prima facie* within the direct meaning of the insurance, it can be any objection that no human eye witnessed the precise manner in which the deceased fell into or got into the cattle-guard. A large proportion of accidental deaths occur under such circumstances that evidence is wanting as to the precise manner in which the deceased met his fate. Where the visible injuries plainly account for death, it can hardly be necessary to explain step by step how it happened." See also *Accident Ins. Co. v. Bennett*, 90 Tenn. 256.

Direct and Positive Proof of Design.—A clause in an accident policy requiring direct and positive proof that death or injury was not the result of design, either on the part of

Declarations of the Insured as to Accident and Physical Condition.—Upon the question whether the death of the insured was accidental, his declarations at the time of the accident explaining the nature of the facts and forming part of the *res gestæ* are admissible,¹ but such declarations made some time after the injury and not part of the *res gestæ* cannot be admitted.² Where a vested interest passes to the beneficiary under the policy, statements of the insured as to his physical condition made after the issue of the policy are not admissible, since he is not a party in interest, and he cannot destroy or affect the vested interest of the beneficiary by his unsworn statements.³

Evidence of Physician.—The insurer cannot introduce the testimony of the physician of the insured as to his condition, whether the physician's information has been gained by observation or from statements of the insured, such information being generally a privileged communication under our statutes.⁴

2. Presumptions—Against Suicide.—Where the insured is found dead under such circumstances that death may have been due to suicide or to accident, the presumption is against suicide and in favor of accident.⁵ But it has been held that the circumstances of the case may overcome the presumption.⁶

the insured or any other person, cannot be allowed to govern the courts, which will not permit the course of justice upon trials before them to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trials. Parties may contract in relation to a condition precedent before bringing suit, or in relation to anything going to the remedy, but not to the right of recovery itself. *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913.

Proof Satisfactory to Directors of Insurance Company.—Where one of the conditions in the deed of settlement of an insurance company, which by the terms of the policy was incorporated in it, provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the company should be furnished by the claimant, of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim, it was held that this provision must be understood to mean such evidence or information as the directors might reasonably, not such as they might unreasonably and capriciously, require. *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782, 101 E. C. L. 782.

1. *Ten Broeck v. Travelers' Ins. Co.* (Supreme Ct.), 6 N. Y. St. Rep. 100, 116 N. Y. 663; *Hall v. American Masonic Acc. Assoc.*, 86 Wis. 518; *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397.

2. *Equitable Mut. Acc. Assoc. v. McCluskey*, 1 Colo. App. 473.

3. *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282; *Swift v. Massachusetts Mut. L. Ins. Co.*, 63 N. Y. 186. See also title INSURANCE.

But it has been held that a different rule applies where the insured is a member of a mutual benefit society, for in that case the beneficiary has no vested interest in the policy or certificate. *Steinhausen v. Preferred Mut. Acc. Assoc.*, 59 Hun (N. Y.) 336.

4. *Prader v. National Masonic Acc. Assoc.* (Iowa, 1895), 63 N. W. Rep. 601.

But it has been held that statements made by the deceased to his physician, upon which

the physician forms an opinion and write as prescription, are competent to prove what was the actual cause of illness and death, though the symptoms are such as might have been produced either by disease or accident, and such statements may be brought out by the defendant on cross-examination of the physician, a witness for the plaintiff. *Travelers' Ins. Co. v. Dabbert*, 2 Cinc. Super. Ct. Rep. (Ohio) 98.

Report of Physician Inadmissible.—The written report of a physician who examined the insured in behalf of the insurer at the time of the accident is not admissible as competent proof of the plaintiff's condition. *McMahon v. Supreme Council*, 54 Mo. App. 468.

5. *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 802; *Travelers' Ins. Co. v. Nitterhouse* (Ind. App., 1894), 38 N. E. Rep. 1110; *Couadeau v. American Acc. Co.*, 95 Ky. 280; *Meadows v. Pacific Mut. L. Ins. Co.* (Mo., 1895), 31 S. W. Rep. 578; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; *Peck v. Equitable Acc. Assoc.*, 52 Hun (N. Y.) 255; *Whitlatch v. Fidelity, etc., Co.*, 71 Hun (N. Y.) 148; *Washburn v. National Acc. Soc.* (Supreme Ct.), 10 N. Y. Supp. 366; *Knickerbocker, etc., Ins. Co. v. Jordan*, 7 Cinc. L. Bull. (Ohio) 71; *Warner v. U. S. Mutual Acc. Assoc.* (Utah), 22 Ins. L. J. 704; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 Am. St. Rep. 184. See *Connecticut Mut. L. Ins. Co. v. Aken*, 150 U. S. 468; *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 276; *Walcott v. Metropolitan L. Ins. Co.*, 64 Vt. 228; *Wehle v. U. S. Mutual Acc. Assoc.* (Super. Ct.), 31 N. Y. Supp. 865.

Drowning.—Where the insured is found dead in the water, the presumption is in favor of death by drowning. *Supreme Council v. Boyle*, 10 Ind. App. 301.

6. Where the insured went to bed as usual at night, and the next morning his body was found in a cistern three or four feet from a path and six or eight feet from the house, the opening to which was only fifteen by twenty inches, the court held that the presumption against suicide was overcome by

Against Intentional Injury.—The presumption is against the insured having come to his death by injuries intentionally inflicted upon him.¹

3. Establishing a Proviso Limiting the Insurer's Liability.—Where the plaintiff has shown that death resulted from violent, external, and accidental means, the defendant must allege and prove the facts necessary to bring the case within the exception limiting the general liability of the company. This is true, whether the exception is incorporated in the general insurance clause by reference, or whether it is simply a condition printed on the back of the policy.²

IX. AMOUNT OF RECOVERY.—**Loss of Time and Profit.**—Where the agreement is to pay a stated sum in the event of death, and a proportionate part thereof in the case of personal injury, the assured is entitled to recover for only the personal expense and pain occasioned to him by the injury, and not for the loss of time or profit caused thereby.³

Money Value of Time.—But where the insurance is a sum certain, provided the insured shall "recover no more than the money value of his time," the indemnity covers all loss by the injury, including the value of his time outside of his regular employment.⁴

Weekly Indemnity.—Under a policy stipulating for a certain sum in the case of injuries occasioning death within ninety days from the accident, and for a weekly sum for a certain period "for any single accident by which the assured shall sustain any personal injury which shall not be fatal," the weekly indemnity is due for injury by an accident which does not occasion death within the time specified, although it is finally fatal.⁵

the circumstances. *Johns v. Northwestern Mut. Rel. Assoc.* (Wis., 1895), 63 N. W. Rep. 276. See also *Merrett v. Preferred Masonic Mut. Acc. Assoc.*, 98 Mich. 338.

1. *Accident Ins. Co. v. Bennett*, 90 Tenn. 256; *Jones v. U. S. Mutual Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485.

2. *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434; *Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *National Ben. Assoc. v. Bowman*, 110 Ind. 355; *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa 505; *Couadeau v. American Acc. Co.*, 95 Ky. 280; *Anthony v. Mercantile Mut. Acc. Assoc.*, 162 Mass. 354; *Badenfeld v. Massachusetts Mut. Acc. Assoc.*, 154 Mass. 77; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Keene v. New England Mut. Acc. Assoc.*, 161 Mass. 149; *Meadows v. Pacific Mut. L. Ins. Co.* (Mo., 1895), 31 S. W. Rep. 578; *Gildenkirch v. U. S. Mutual Acc. Assoc.* (Brooklyn City Ct.), 5 N. Y. Supp. 428; *Dougherty v. Pacific Mut. L. Ins. Co.*, 154 Pa. St. 385; *Cronkrite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 Am. St. Rep. 184; *Jones v. U. S. Mutual Acc. Assoc.* (Iowa, 1894), 61 N. W. Rep. 485; *Travelers' Ins. Co. v. Nitterhouse* (Ind. App., 1894), 38 N. E. Rep. 1110.

Where the defendant has made out a *prima facie* defense under such a proviso, the burden of disproving it is upon the plaintiff. *Travellers' Ins. Co. v. Houston*, 3 Tex. App. Civ. Cas., § 429; *Anthony v. Mercantile Mut. Acc. Assoc.*, 162 Mass. 354.

Exercise of Due Care.—Where the policy contains a proviso to the effect that the insured must exercise due care for his own protection, it is incumbent on the insurer to prove the lack of due care, and the burden is not shifted by the fact that the body of the insured is found mangled upon a railroad

track after the train has passed, on a dark night, where there was no evidence as to how the accident occurred. *Meadows v. Pacific Mut. L. Ins. Co.* (Mo., 1895), 31 S. W. Rep. 578. See *Anthony v. Mercantile Mut. Acc. Assoc.*, 162 Mass. 354.

Records of Coroners' Inquests.—Where the policy provides that proof of death should contain, in case of a coroner's inquest upon the body of the deceased, a copy of the verdict and all the evidence on which the verdict was based, the plaintiff may offer as evidence the verdict so furnished as proof of the performance of the conditions of the policy. *Mutual L. Ins. Co. v. Laurence*, 8 Ill. App. 492.

Record of Criminal Court Inadmissible.—Where the plaintiff has met a defense on the part of the insurance company, that the insured came to his death by injuries intentionally inflicted upon him, by evidence of the fact that the person alleged to have inflicted such injuries was insane, the defendant cannot introduce the record of the criminal conviction of such person in order to establish his sanity. *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338.

The fact that the assailant of the insured has been acquitted on a charge of manslaughter does not show that the insured was in fault, and that he attacked his opponent, so as to bring the case within an exception against injuries caused by fighting. *Robinson v. U. S. Mutual Acc. Assoc.*, 68 Fed. Rep. 825.

3. *Theobald v. Railway Pass. Assur. Co.*, 26 Eng. Law & Eq. 432.

4. *Bean v. Travelers' Ins. Co.*, 94 Cal. 581.

5. *Perry v. Provident L. Ins., etc., Co.*, 103 Mass. 242.

Weekly Indemnity—Instant Death.—But a policy which provides merely that the insured shall be indemnified in a certain sum per week against loss of time during the period of disability to work, not exceeding a certain number of weeks, does not entitle the administrator of the insured to recover any indemnity in the case of an accident causing instant death.¹

Income Erroneously Stated.—A stipulation, in an application for mutual accident indemnity, that the benefits to which the applicant shall become entitled shall be regulated and paid in the same ratio that his weekly income bears to the amount of weekly indemnity insured, is binding on the insured, although the agent, by false statements as to his income, put him in a higher class, paying larger premiums.²

Final Proofs Submitted before Expiration of Period of Disability.—Under a policy requiring proof of the claim to be filed within seven months after the injury, and allowing a recovery for a period of disability not exceeding twenty-six consecutive weeks, where final proof of the claim is made before the expiration of the latter period, the insured may not recover for any time not covered by the proof.³

ACCOMMODATING.—By using the words "accommodating terms" in a contract the parties must have intended that the purchase money, or some part of it, should be permitted to remain in the vendee's hands, as if a loan for his convenience.⁴

1. *Dawson v. Accident Ins. Co. of North America*, 38 Mo. App. 355. Here the court said: "The policy is on its face not a death policy, but a mere indemnity policy; and where the insured is immediately killed, there is nothing upon which it can operate."

2. *Howe v. Provident Fund Soc.*, 7 Ind. App. 586.

3. *Bickford v. Travelers' Ins. Co. (Vt.)*, 1895, 32 Atl. Rep. 230.

4. The plaintiff agreed to sell, and the defendant to purchase, a brig, and the terms were to be *accommodating*. The court said: "There being no evidence that the words 'terms *accommodating*' have, by usage, ac-

quired any distinct technical meaning, they must be regarded as having been used by the parties in the sense which is ordinarily ascribed to them in business transactions. 'In mercantile language,' says Webster's Dictionary, '*accommodation* is used for a loan of money, which is often of great convenience.' The parties, therefore, must have intended that the purchase money, or some part of it, should be permitted to remain in the defendant's hands, as if a loan for his convenience. The *accommodation* was not only intended to be reasonable, but for the benefit of the defendant." *Rice v. McLarren*, 42 Me. 163.

ACCOMMODATION PAPER.

By L. P. McGEHEE.

I. DEFINITIONS, 335.

1. *Accommodation Paper*, 335.
2. *Accommodation Party*, 336.

II. NATURE AND ESSENTIALS OF ACCOMMODATION PAPER, 336.

1. *Generally*, 336.
2. *Consideration*, 336.
 - a. *General Principles*, 336.
 - b. *Cross Bills or Notes*, 338.
3. *Party Accommodated*, 339.
4. *Inception of the Contract*, 340.
 - a. *Inoperative until Negotiated*, 340.
 - b. *Revocation*, 340.
 - (1) *Generally*, 340.
 - (2) *By Death*, 341.
5. *Place of the Contract*, 342.
6. *Parol Evidence to Prove Character of Instrument*, 343.
7. *How Far Affected by Statute of Frauds*, 344.

III. ACCOMMODATION PAPER OF PARTICULAR PARTIES, 345.

1. *Partners*, 345.
2. *Corporations*, 348.
3. *Agents*, 349.
4. *Married Women*, 350.

IV. RIGHTS AND LIABILITIES OF PARTIES TO ACCOMMODATION PAPER, 350

1. *General Obligations of Parties*, 350.
2. *Position of Party Accommodated*, 350.
3. *Rights of Accommodation Party after Payment*, 351.
 - a. *Against Party Accommodated*, 351.
 - (1) *Indemnity—Generally*, 351.
 - (2) *Accommodation Makers and Acceptors*, 352.
 - (3) *Accommodation Indorsers*, 354.
 - (4) *Right to Costs and Expenses*, 355.
 - b. *Right of Accommodation Indorser against Prior Parties*, 356.
4. *Successive Accommodation Parties*, 356.
 - a. *Rights and Liabilities Generally*, 356.
 - b. *When Cosureties—Contribution*, 357.
5. *Holders of Accommodation Paper*, 360.
 - a. *Rights of Bona Fide Holders*, 360.
 - (1) *General Statement*, 360.
 - (2) *Transferee before Maturity*, 360.
 - (a) *Generally*, 360.
 - (b) *Contrast with Business Paper*, 361.
 - (3) *Transferee after Maturity*, 362.
 - (a) *Generally*, 362.
 - (b) *Purchaser from Holder for Value*, 362.
 - (c) *Transferee from Accommodated Party after Maturity*, 363.
 - (aa) *English Rule*, 363.
 - (bb) *United States Rule*, 364.
 - b. *Who is Bona Fide Holder*, 365.
 - (1) *General Rule*, 365.
 - (2) *Pledgee*, 365.
 - (a) *For Antecedent Debt*, 365.
 - (b) *Of Diverted Paper*, 366.

- c. *When Chargeable with Notice of Accommodation Character of Instrument*, 367.
- d. *Burden of Proof*, 368.
- e. *Amount of Recovery against Accommodation Acceptor or Maker*, 369.

V. ACCOMMODATION PARTY AS SURETY, 371.

- 1. *As between the Party Accommodated and the Accommodation Party*, 371.
 - a. *Generally*, 371.
 - b. *Subrogation to Creditor's Securities*, 371.
 - c. *Subrogation to Defenses against Holder*, 373.
- 2. *As to Third Parties*, 374.
 - a. *Holders without Notice*, 374.
 - b. *Holders with Notice*, 374.
 - (1) *Generally*, 374.
 - (2) *Discharge by Dealings with Principal*, 375.
 - (a) *English Doctrine*, 375.
 - (aa) *At Law*, 375.
 - (bb) *In Equity*, 376.
 - (b) *United States Authorities*, 376.
 - (3) *Discharge by Breach of Condition*, 379.
 - (a) *Generally*, 379.
 - (b) *Diversion*, 379.
 - (aa) *Use of Accommodation Paper Generally*, 379.
 - (bb) *What Amounts to a Diversion*, 380.
 - (cc) *Effect of Diversion*, 383.

VI. PRESENTMENT AND NOTICE, 385.

VII. EXTINGUISHMENT, 386.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *NEGOTIABLE INSTRUMENTS*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ALTERATION OF INSTRUMENTS*; *BILLS AND NOTES*; *CERTIFICATES OF DEPOSIT*; *CHECKS*; *COLLATERAL SECURITY*; *CONFLICT OF LAWS*; *CONTRIBUTION*; *PLEDGE*; *SUBROGATION*; *SURETYSHIP*; *USURY*.

I. DEFINITIONS—1. Accommodation Paper.—Accommodation paper is a bill of exchange or promissory note to which the acceptor, drawer, maker, or indorser, as the case may be, has put his name without consideration, for the purpose of accommodating by a loan of his credit some other person who is to provide for the bill or note when it falls due.¹

1. *Jefferson County v. Burlington, etc.*, R. Co., 66 Iowa 385; *Singer v. Dickneite*, 51 Mo. App. 249; *Pollard v. Huff* (Neb., 1895), 63 N. W. Rep. 58; *Peoria Mfg. Co. v. Huff* (Neb., 1895), 63 N. W. Rep. 121; *Byles on Bills* *131, *412; *Daniel on Neg. Ins.*, § 189; 2 *Randolph Commercial Paper*, § 472.

Other Definitions.—In *Carpenter v. Republic Nat. Bank*, 106 Pa. St. 170, Clark, J., defined accommodation paper as follows: "Accommodation paper is such as is made, accepted, or indorsed by one party for the benefit of another without consideration; it represents a loan of credit."

In *Altoona Second Nat. Bank v. Dunn*, 151 Pa. St. 228, it seems to be considered that no paper can be called accommodation paper in the strictest sense, unless it is a loan of credit without restriction as to the manner of its use. In delivering the opinion of the court, Heydrick, J., said: "The next question is as to the character of the note. If it were an accommodation note, that is to say,

commercial paper given without value to enable the party to whom it was given to use it for his own benefit without restriction as to the manner in which it should be used, there is no question that it could have been pledged as collateral security."

Sealed Notes.—Where suit was brought against the accommodation indorser of a sealed instrument and the only defense was want of consideration, it was held that, conceding that a sealed note was not by strict commercial law a negotiable instrument, yet the court was right in directing a verdict for the plaintiff. *Farrar v. New York Bank*, 90 Ga. 331. In this case Bleckley, C.J., said: "The pleas in the record set up no defense except the want of consideration, and yet, while declaring the instrument to be an accommodation paper, they do not deny that the accommodation was extended by the plaintiff and realized by the person intended to be accommodated. If it be true that nothing but strictly commercial paper, negotiable

Term Used in Narrower Sense.—The phrase "accommodation paper" is also used in a narrower sense, including only bills accepted or notes made for accommodation.¹

2. Accommodation Party.—The term "accommodation party" is always used in the sense corresponding to the wider meaning of accommodation paper. An accommodation party is a person who has signed as drawer, acceptor, maker, or indorser, without receiving value and for the purpose of lending his name to some other person as a means of credit.²

II. NATURE AND ESSENTIALS OF ACCOMMODATION PAPER—1. **Generally.**—An accommodation bill or note must be in the nature of a loan of credit without consideration by the accommodation party to the party accommodated, who may or may not be a party to the instrument.

2. Consideration—*a.* **GENERAL PRINCIPLES**—**Absence of Consideration not Sufficient.**—There must be an absence of consideration between the party accommodated and the accommodation party, but absence of consideration in itself is not enough to make a bill or note accommodation paper.³

Must be a Loan of Credit.—The instrument must be loaned or signed by one party for the purpose of procuring credit for the other, generally or for a specific purpose, in order that it may be strictly accommodation paper.⁴

by the law merchant, can be accommodation paper, or used as such, the defense ought to prevail; but we can discover no obstacle in the nature of things to the use of any class of paper whatever as a means of accommodation. When one man pledges his credit for the benefit of another without receiving any part of the consideration himself, whatever be the form of instrument by which he makes the pledge, the paper has all the necessary elements, so far, at least, as consideration is concerned, which any accommodation paper requires."

1. In *Miller v. Larned*, 103 Ill. 562, Scott, J., said: "A recognized definition of accommodation paper is, either a negotiable or non-negotiable bill or note made by one who puts his name thereto without consideration, with the intention of lending his credit to the party accommodated." The true analogy is between a note made and a bill accepted for accommodation. (See the title **BILLS AND NOTES**.) And this definition would seem to be misleading as applied to bills, in that it implies apparently that a bill must be drawn by an accommodation party in order to be accommodation paper.

In *Benjamin's Chalmers' Dig. of Bills and Notes*, art. 90, an accommodation bill is defined to be "a bill whereof the acceptor (that is, the principal debtor on the instrument) is substantially a mere surety for some other person who may or may not be a party thereto."

In *Scott v. Lifford*, 1 Campb. 246, by an arrangement between the plaintiffs and one Agar, who was indebted to them, Agar was given further time to pay his debt upon the deposit with the plaintiffs as security of a bill drawn by the defendant in favor of the plaintiffs and accepted by Agar. Lord Ellenborough held that the bill was not to be considered as an accommodation bill, there having been a consideration as between the payee and the acceptor. See also *Shirley v. Fel-lows*, 9 Port. (Ala.) 304.

2. *British N. A. Bank v. Ellis*, 6 Sawy. (U. S.) 96; *Devereaux v. Phillips*, 97 Mich. 104; *Peoria Mfg. Co. v. Huff* (Neb., 1895), 63 N. W. Rep. 121; *Newbold v. Boraef*, 155 Pa. St. 227; *Bills of Exchange Act* (45 and 46 Vict., c. 61), § 28 (1); 1 *Parsons Bills and Notes* 184; *Benj. Chalm. Dig. Bills and Notes*, art. 90; 2 *Rand. on Commercial Paper*, § 472.

3. **Bill Drawn Subject to State of Accounts.**—Where A drew a bill upon B, to whom he had been sending goods for sale, and B accepted the bill, neither party knowing the state of accounts between them, and it turned out that A at the time was indebted to B, the court held that this was not to be considered an accommodation bill, and consequently there was no implied contract of indemnity for costs. *Bagnall v. Andrews*, 7 Bing. 217, 20 E. C. L. 107. See also *Farmers', etc., Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200.

Bill of Commission Merchant in Favor of One Shipping in Drawer's Name.—Where the plaintiff shipped wheat to the defendant's commission merchants, in the defendant's name by his consent, and the defendant notified the commission merchants of the shipment without reference to the plaintiff, and after the sale of the wheat shipped the commission merchants rendered an account of sales to the defendant, placing the proceeds to the defendant's credit, a bill drawn by the defendant upon the commission merchants in favor of the plaintiff for the amount was held to be not accommodation paper. *Singer v. Dickneite*, 51 Mo. App. 245.

Bill Accepted in Consideration of Goods to be Shipped.—Where one accepts a bill in consideration of goods to be shipped to him by the drawer, although the goods are never shipped, such person is not an accommodation acceptor. *Cameron v. Chappell*, 24 Wend. (N. Y.) 94.

4. *Capital City State Bank v. Des Moines Cotton Mill Co.*, 84 Iowa 561; *Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310; *Pollard v.*

Accommodation Party Holding Security or Interested in Proceeds.—It does not affect the rights of the parties, or prevent the paper from being accommodation paper, that the accommodation party has taken security for the loan of his credit,¹ or even that he has an interest in the proceeds of the paper.²

Credit to Party Accommodated as Consideration.—After the instrument containing the accommodation signatures has been negotiated, the credit given to the accommodated party upon the instrument is sufficient consideration to bind the accommodation party.³

Consideration for Accommodation Indorser after Delivery.—But where one becomes an accommodation indorser after delivery, there must, in general, be a new consideration known to the indorser in order to bind him.⁴

Huff (Neb., 1895), 63 N. W. Rep. 58; Appleton v. Donaldson, 3 Pa. St. 381; Lord v. Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Lenheim v. Wilmarding, 55 Pa. St. 73; Mosser v. Criswell, 150 Pa. St. 409; Fant v. Miller, 17 Gratt. (Va.) 47.

That accommodation paper is a loan of credit *prima facie*, without restriction as to the manner in which it shall be used, see *infra*, this title, *Diversions: Use of Accommodation Paper Generally*.

In the older books the fact that accommodation paper was in the nature of a loan of credit seems not to have been so clearly appreciated. See Bailey on Bills, 2 Am. ed. 458.

Mr. Justice Byles (Wood's Byles on Bills *412) notices and corrects the popular use of the term as paper accepted or indorsed without any consideration.

1. Miller v. Larned, 103 Ill. 562. See Cornwall v. Gould, 4 Pick. (Mass.) 444; Beach v. Fulton Bank, 3 Wend. (N. Y.) 573; Montgomery County Bank v. Walker, 9 S. & R. (Pa.) 229; Allston v. Allston, 2 Hill (S. Car.) 362; May v. Boisseau, 8 Leigh (Va.) 185.

2. Richards v. Simms, 1 Dev. & B. (N. Car.) 48; Youngs v. Ball, 9 Watts (Pa.) 139. See also Gillespie v. Campbell, 39 Fed. Rep. 724.

3. *United States*.—U. S. Bank v. Weisiger, 2 Pet. (U. S.) 331; Offutt v. Hall, 1 Cranch (C. C.) 572; Patton v. Violet, 1 Cranch (C. C.) 463, 5 Cranch (U. S.) 142; Yeaton v. Alexandria Bank, 5 Cranch (U. S.) 49.

Alabama.—Dunbar v. Smith, 66 Ala. 490. *Arkansas*.—Harrell v. Tenant, 30 Ark. 684; Rockafellow v. Peay, 40 Ark. 69.

California.—Westphal v. Nevills, 92 Cal. 545.

Georgia.—Farrar v. New York Bank, 90 Ga. 331.

Illinois.—Dawson v. Tolman, 37 Ill. App. 134; Diversy v. Loeb, 22 Ill. 394; Heintz v. Cahu, 29 Ill. 308.

Iowa.—Brenner v. Gundershiemer, 14 Iowa 82.

Maine.—Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 310.

Massachusetts.—Kenworthy v. Sawyer, 125 Mass. 28; Black River Sav. Bank v. Edwards, 10 Gray (Mass.) 387; Robertson v. Rowell, 158 Mass. 94.

Mississippi.—Hawkins v. Neal, 60 Miss. 256.

New York.—Grant v. Ellicott, 7 Wend. (N. Y.) 228; Mechanics', etc., Bank v. Livingston,

6 Misc. Rep. (N. Y. C. Pl.) 81; Spencer v. Ballou, 18 N. Y. 327; Gates v. Williams, 9 Misc. Rep. (N. Y. C. Pl.) 176.

North Carolina.—Hatcher v. McMorine, 3 Dev. (N. Car.) 228.

Tennessee.—Marr v. Johnson, 9 Yerg. (Tenn.) 1.

See also the title SURETYSHIP.

No Credit Obtained upon the Instrument.—Where one joins with the debtor in the execution of a promissory note payable to the creditor, to be delivered to the payee as collateral security for the original debt, and there is no extension of time to the debtor, nor other consideration moving to him, the accommodation maker is not liable, since the note is without consideration; but a valid contemporary promise by the debtor to indemnify the accommodation maker is a sufficient consideration to support the note as to him. Rutledge v. Townsend, 38 Ala. 706.

Liability on Old Note Supports Renewal Accommodation Note.—An accommodation party's liability upon one note is a sufficient consideration to support, as to him, a new note to which he becomes a party in order to take up the first note. Spencer v. Ballou, 18 N. Y. 327. See also Lucas v. Pitney, 27 N. J. L. 221.

4. Pratt v. Hedden, 121 Mass. 116; Robertson v. Rowell, 158 Mass. 94. See Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519; Platt v. Snipes, 43 Ark. 21; Leverone v. Hildreth, 80 Cal. 139; Cassell v. Morrison, 8 Ill. App. 175. See also the title SURETYSHIP.

Accommodation Maker Signing after Execution and Delivery.—As a general rule, one who adds his signature to a promissory note after its execution and delivery is not bound unless there is a new consideration. Yet where a loan is made upon the consideration that the borrower will execute the note and procure the signature of another party to it as joint maker, with the understanding that the note shall not be considered as delivered until signed by such other party, and his signature is procured several days afterwards, the party so adding his signature is bound by the note without the necessity of a new consideration notwithstanding he had no prior knowledge or agreement respecting the loan previously made. Winders v. Sperry, 96 Cal. 194.

Benefit to Accommodated Party Sufficient.—Here, as where the accommodation party signs before delivery, an advantage accruing to the party accommodated is a consid-

b. CROSS BILLS OR NOTES—Not Accommodation Paper.—Cross bills or notes, that is, bills or notes exchanged for mutual convenience, are not accommodation paper, since each is a consideration for the other.¹

Payment Gives Right of Action.—When one of the parties to such an exchange of notes has paid his own note, he may maintain an action against the other party upon the note of the latter, although he holds it still unused.²

No Suretyship.—But there is no relation of suretyship between the parties, and each is the primary debtor upon his own paper.³

eration sufficient to bind the accommodation party. *Anderson v. Norvill*, 10 Ill. App. 240.

1. *England.*—*Rolfe v. Caslon*, 2 H. Bl. 570; *Cardwell v. Martin*, 9 East 190; *Cowley v. Dunlop*, 7 T. R. 565; *Buckler v. Buttivant*, 3 East 72; *Rose v. Sims*, 1 B. & Ad. 521, 20 E. C. L. 437.

Illinois.—*Union Trust Co. v. Rigdon*, 93 Ill. 459.

Indiana.—*Farber v. National Forge, etc., Co.* (Ind., 1894), 39 N. E. Rep. 249, citing 2 AM. AND ENG. ENCYC. OF LAW (1st ed.) 363.

Louisiana.—*Crescent City Bank v. Hernandez*, 25 La. Ann. 43.

Maine.—*Dockray v. Dunn*, 37 Me. 443.

Maryland.—*Williams v. Banks*, 11 Md. 198.

Massachusetts.—*Higginson v. Gray*, 6 Met. (Mass.) 212; *Eaton v. Carey*, 10 Pick. (Mass.) 211; *Whittier v. Eager*, 1 Allen (Mass.) 499; *Backus v. Spaulding*, 116 Mass. 418.

New York.—*Cohu v. Husson*, 113 N. Y. 662, 14 Daly (N. Y.) 200, 57 N. Y. Super. Ct. 238; *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Wooster v. Jenkins*, 3 Den. (N. Y.) 187; *Rice v. Mather*, 3 Wend. (N. Y.) 62; *Cobb v. Titus*, 10 N. Y. 198; *Newman v. Frost*, 52 N. Y. 422; *Leslie v. Bassett*, 129 N. Y. 523; *Mickles v. Colvin*, 4 Barb. (N. Y.) 304; *State Bank v. Smith*, 85 Hun (N. Y.) 201.

Ohio.—*Rankin v. Knight*, 1 Cinc. Super. Ct. Rep. (Ohio) 515.

Intention Controlling.—A mutual exchange of notes will amount to a sufficient consideration for the note so given, but to do so it must appear that it was the intention of the parties to make a mutual exchange of paper, and whether such was their design will depend upon the particular circumstances of each case. *Williams v. Banks*, 11 Md. 198.

Note Exchanged Proving Worthless.—The fact that one of the notes exchanged proves worthless will not alter the rule. *Rice v. Grange*, 131 N. Y. 149.

Bills Paid for in Bills of the Purchaser.—Where one buys bills of exchange upon a foreign country, giving in exchange therefor bills drawn by himself upon a firm of which he is a member, the purchaser is a holder for value. *In re London, etc., Bank*, L. R. 9 Ch. 686. See *Adams v. Soule*, 33 Vt. 538.

Usury.—Where A and B exchange notes for the purpose of raising money, and A obtains the note of B to be discounted at a premium exceeding the lawful rate of interest, such transaction is not usurious, and cannot be set up in bar of a recovery in an action by the purchaser of the note against B, the maker. *Rice v. Mather*, 3 Wend. (N. Y.) 62.

2. *Cohu v. Husson*, 14 Daly (N. Y.) 200, 113 N. Y. 662.

Payment without Liability.—Where one party to such an exchange of notes pays his own note, when by reason of the fraudulent misappropriation thereof by the other party to the exchange, to which fraudulent misapplication the holder was a party, he had a good defense thereto, it seems that the payment having been made without a legal liability does not give him the right to recover against the other party. *Mix v. Muzzy*, 28 Conn. 186.

No Recovery until Payment.—One party to such an exchange of notes or checks has no right of action against the other party on the note or check of the latter until he has paid his own note or check. *Burdsall v. Chrisfield*, 1 Disney (Ohio) 51.

Agreement with Regard to Payment.—When it is agreed between the two parties to the exchange that the drafts given by the first party shall not be paid until those given by the second party are paid, one who takes the drafts of the first party with full knowledge of the agreement cannot recover. *Dunning v. Pratt*, 4 Duer (N. Y.) 331.

3. **No Implied Contract of Indemnity.**—There is no implied contract of indemnity in such a case, as there is in the case of accommodation paper. So where one of the parties to an exchange of notes has paid his own note and made payments upon the note of the other party, he cannot recover of the latter the amount so paid. *Wooster v. Jenkins*, 3 Den. (N. Y.) 187. In this case *Bronson, C.J.*, said: "It is urged that as between the original parties cross notes or acceptances should be regarded as accommodation, in contradistinction to business securities. But the rule is settled the other way. Each party may prove the debt against the other under a commission of bankruptcy. And although one party sells the note or bill at a greater discount than seven per centum, the purchaser will acquire a good title. It is true that so long as the securities are in the hands of the original parties they will balance each other; but it will be by way of set-off, and not on the ground that they are invalid. If a party lend his note or acceptance, and take a counter security of the same kind, by way of indemnity merely, the lent note or bill will not have inception as a valid security until it passes into the hands of a bona fide holder. But I do not consider this a transaction of that kind. Neither firm took the notes of the other by way of indemnity merely. But the notes on both sides were made to be negotiated and used as valid securities."

3. Party Accommodated—Who is—Incidental Benefit.—The accommodated party is he to whom the credit of the accommodation party is loaned, but the fact that one derives some incidental benefit from the paper will not make it accommodation paper as to him.¹

Need not be Party to Instrument.—An instrument signed, accepted, or indorsed by one for the accommodation of another is accommodation paper although the party for whose accommodation it was signed is not himself a party to the instrument.²

Indorsement for Accommodation of Two.—An accommodation indorsement or signature may be for the accommodation of more than one of the parties to the instrument, as, for example, for the accommodation of both drawer and payee.³

At Whose Request.—But the fact that one signs a note for the accommodation of his comaker at the request of a third person will not establish the relation of accommodation and accommodated parties between the accommodation maker and such third person,⁴ nor is paper which one makes for the benefit of

Party Paying His Own Note not Entitled to Subrogation.—Where A and B exchange their notes for their mutual accommodation, and A at the maturity of his note pays it to a party who has discounted it upon the indorsement of B, A in making such payment does not act as a surety of B, and is not entitled to be subrogated to securities held by the party who discounted the instrument for B to indemnify him for the liability thereby assumed. *Stickney v. Mohler*, 19 Md. 490.

1. Mere Incidental Benefit.—C makes his promissory note at the request of and for the benefit of F to take up an old note made by F and indorsed by M; F does not become a party to the new note, but M indorsed it for the accommodation of F. The relation of accommodation and accommodated parties does not exist as between M and C, and M may maintain an action upon the instrument against C. *Mosser v. Criswell*, 150 Pa. St. 409. In this case, in delivering the opinion of the court, Mitchell, J., said: "The debt for which this note was given was unquestionably Feight's, and it was incumbent on him to pay the note, though he was not party to it. When it fell due and Feight was unable to pay it, plaintiff being an indorser would have been liable to be called on by the bank for payment; and therefore to have the money raised on a new note made by defendant was in a certain popular sense an accommodation, that is, a convenience, to the plaintiff—just as it is a convenience to a creditor who wants his money but cannot get it from his debtor in cash, to get payment by a note on which he can raise the money temporarily, though at the risk of an indorsement which he may ultimately have to pay. But this is very far from what the law means by accommodation paper."

Where A and B are cosureties on a bill for the drawer, and A takes up the bill and receives thereafter a note signed by the drawer and indorsed by B for one half the amount of the bill, the note is not made for A's accommodation, but the drawer and B being liable, one to indemnify A and the other as a cosurety with him to contribution, the bill is for value, and A may recover thereon against B. *Hatcher v. McMorine*, 3 Dev. (N. Car.) 228.

2. *Benj. Chalm. Dig. Bills and Notes*, art. 92; *Miller v. Larned*, 103 Ill. 562. See *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Powers v. French*, 1 Hun (N. Y.) 582; *Messmore v. Meyer*, 56 N. J. L. 31; *Gunnis v. Weigley*, 114 Pa. St. 191; *Mosser v. Criswell*, 150 Pa. St. 409.

3. *Farrar v. Gregg*, 1 Rich. (S. Car.) 378.

Accommodation Note for A and B Delivered by A to B as Negotiable Paper.—A was indebted to B upon a note; B agreed to take C's note in payment thereof; A procured C to make his note payable to B; C believing that the note was for the accommodation of A and B. C delivered the note to A, who delivered it to B. It was held that B accepted the note for his own accommodation, and could maintain no action thereon. The court reasoned thus: If the note had any validity it must have obtained it either by the delivery from C to A or from A to B; and if it came into legal existence by C's delivering it to A, A must be considered B's agent to accept delivery, and so B was bound by its delivery as accommodation paper for himself; and if A's delivery to B gave it existence, A in delivering it was acting as an agent of C with authority to deliver it to B only as accommodation paper for B's benefit, and as a special agent he could not bind his principal beyond his real authority. *Messmore v. Meyer*, 56 N. J. L. 31. The reasoning of this case seems hardly satisfactory. If the principles of agency are applicable at all, which seems doubtful, it is not apparent why A, acting as B's agent to receive delivery, is able to bind his principal in excess of his powers, while if acting as C's agent to make delivery, C is not bound if he goes beyond his authority.

4. Person Requesting Signature for Another not Accommodation Party.—Where it appears that E signed for the accommodation of P at the request of J, the law will not in the absence of evidence imply a promise by J to indemnify E, and if J subsequently acquires the note he may enforce it against E. *Lockwood v. Twitchell*, 146 Mass. 623.

Where it appeared that a stranger indorsed a note at the request of the payee, receiving from him a consideration for so doing, the payee supposing that the indorser was as-

another, without the request or knowledge of the latter, accommodation paper.¹

May Become Holder for Value.—The party accommodated may by agreement between the parties, founded upon a good consideration, become entitled to hold the instrument as a valid security.²

4. Inception of the Contract—*a.* **INOPERATIVE UNTIL NEGOTIATED.**—No obligation whatever attaches to an undelivered bill or note, and accommodation paper, although complete in form and signed by all the proper parties, creates no liability and is of no validity until it is negotiated and has passed into the hands of a holder for value.³

b. **REVOCATION**—(1) *Generally.*—It follows from the fact that accommodation paper is operative only when negotiated, that until negotiation an accommodation party may revoke the instrument,⁴ and no one who takes with

suming the liability of a surety for the maker, and the indorser having previously agreed to indorse the note of the maker to be delivered to the payee; and where it is a reasonable inference from the indorser's language at the time he placed his signature upon the instrument that he understood that he was becoming surety for the maker, a verdict for the payee in an action against the indorser upon the instrument is supported by the evidence. *Lafin v. Pomeroy*, 11 Conn. 440.

Indorser for Accommodation of Accommodation Indorser.—Where it appeared that the plaintiff, for a consideration paid to him by the makers of a note, indorsed the note for their accommodation and undertook to raise the money on it, and that, being unable to discount the note without further indorsement, the plaintiff procured the defendant to indorse the note for him, the plaintiff is as to the defendant the accommodated party, and cannot, after taking up the instrument, recover from the defendant a contributory share of the amount paid. *Martin v. Marshall*, 60 Vt. 321.

1. Party Accommodated must Request Signature or Promise Indemnity.—Where a married woman, in 1879, voluntarily gave her note for the amount of a claim against her husband, without any request on his part that she should become surety for him and without any consideration either by way of transfer of the claim to her or otherwise, and in an action upon the note there was no allegation or finding that she had any separate estate, it was held that want of consideration was a good defense, although the plaintiff was a *bona fide* purchaser for value, and although by the terms of the instrument it was held a charge on her separate estate. *Linderman v. Farquharson*, 101 N. Y. 435.

In order to establish that a third person is liable to indemnify an indorser who has been compelled to pay the instrument, it must appear that the latter signed at the request of such third person or that such third person agreed to indemnify him. *Cornwall v. Gould*, 4 Pick. (Mass.) 444. See *Gates v. Williams*, 9 Misc. Rep. (N. Y. C. Pl.) 176.

2. *Norton v. Downer*, 33 Vt. 26; *Coggeshall v. Ruggles*, 62 Ill. 401. See *Parker v. Lewis*, 39 Tex. 394.

3. England.—*Arden v. Watkins*, 3 East 322; *Willis v. Freeman*, 12 East 656; *Downes v. Richardson*, 5 B. & Ald. 674.

Alabama.—*Connerly v. Planters', etc., Ins. Co.*, 66 Ala. 442.

Indiana.—*Hoffman v. Butler*, 105 Ind. 371.

Kentucky.—*Thompson v. Poston*, 1 Duv. (Ky.) 389.

Maine.—*Tufts v. Shepherd*, 49 Me. 312.

Massachusetts.—*Robertson v. Rowell*, 158 Mass. 94.

Minnesota.—*Second Nat. Bank v. Howe*, 40 Minn. 390.

Missouri.—*Macy v. Kendall*, 33 Mo. 164.

New York.—*Jones v. Hake*, 2 Johns. Cas. (N. Y.) 60; *Wilkie v. Roosevelt*, 3 Johns. Cas. (N. Y.) 66; *Marvin v. McCullum*, 20 Johns. (N. Y.) 288; *Smith v. Wyckoff*, 3 Sandf. Ch. (N. Y.) 77; *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573; *Douglass v. Wilkinson*, 17 Wend. (N. Y.) 431; *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Peck v. Burwell* (Supreme Ct.), 1 N. Y. Supp. 33; *Dowden v. Calvin* (C. Pl.), 2 N. Y. Supp. 161.

North Carolina.—*Norfolk Nat. Bank v. Griffin*, 107 N. Car. 173.

Tennessee.—*Tennessee Bank v. Johnson*, 1 Swan (Tenn.) 232.

Virginia.—*Whitworth v. Adams*, 5 Rand. (Va.) 333.

Note Indorsed for only Part of its Value.—A makes and signs a promissory note for twenty-five hundred dollars and requests B to indorse it for his accommodation; B refuses to indorse for the whole amount, but does indorse it for seven hundred and fifty dollars as follows: "Mr. O. pay on within seven hundred and fifty dollars." It was then procured to be discounted for the latter sum. It was held that the note was in legal effect a note for seven hundred and fifty dollars, inasmuch as being accommodation paper it was of no validity or value until negotiated, and it first acquired validity by being discounted as a note for seven hundred and fifty dollars. *Douglass v. Wilkinson*, 17 Wend. (N. Y.) 431.

4. Revocable by Accommodation Party until Negotiated.—This principle applies to all accommodation parties, *Tennessee Bank v. Johnson*, 1 Swan (Tenn.) 233; thus, to accommodation makers, *Second Nat. Bank v. Howe*, 40 Minn. 390, citing 2 AM. AND ENG. ENCYC. OF LAW (1st ed.) 365; *Norvell v. Hudgins*, 4 Muni. (Va.) 496; and to accommodation indorsers, *Skidling v. Warren*, 10 Johns. (N. Y.) 270; *Dogan v. Dubois*, 2 Rich. Eq. (S. Car.) 85; *Tennessee Bank v. Johnson*, 1 Swan (Tenn.) 217; *May v. Bois-*

knowledge of such a revocation acquires any right against the revoking party.¹ Such a revocation is accomplished by giving notice to the parties concerned,² and this notice may be verbal.³

(2) *By Death*.—The death of the accommodation party before the instrument has been issued is a revocation, and a party who afterwards takes the instrument with knowledge of its accommodation character cannot recover against the estate of the deceased accommodation party,⁴ although he took the paper in ignorance of the accommodation party's death.⁵ But it is other-

seau, 8 Leigh (Va.) 193; *Berkeley v. Tinsley*, 88 Va. 1001.

Revocation of Prior Accommodation Indorsers Releases Subsequent Ones.—The revocation before negotiation of an antecedent accommodation indorser releases from liability a subsequent accommodation indorser, although the revocation of such antecedent indorser was without the knowledge of the subsequent indorser, and one who takes the instrument with notice of the revocation is a *mala fide* holder as to the subsequent parties. *Tennessee Bank v. Johnson*, 1 Swan (Tenn.) 234.

Security Given to Accommodation Party.—It does not change the right of the accommodation party to revoke, that he has taken security for the use of his name. *May v. Boisseau*, 8 Leigh (Va.) 164.

Revocation after Pledge.—Although the paper has been pledged for a certain sum, an accommodation indorser, while of course remaining liable for the amount advanced, may revoke his indorsement and prevent the discount of the instrument. *Berkeley v. Tinsley*, 88 Va. 1001.

Revocation Withdrawn through False Representations.—Where the accommodation maker of a promissory note gave a sufficient notice of revocation to the vice-president of the bank at which, by agreement, the note was to be discounted, but was induced by the false and fraudulent representations of the vice-president as to the financial standing and solvency of the payee, the accommodated party, to withdraw his revocation, it was held that the bank subsequently receiving the note from the payee was responsible for the loss resulting to the accommodation maker. *Second Nat. Bank v. Howe*, 40 Minn. 390.

Agreement to Accept for Accommodation Binding.—In *Ilsley v. Jones*, 12 Gray (Mass.) 260, it is declared, in the opinion delivered *per curiam*, that a failure to accept a draft for accommodation, where the drawee had promised the drawer to accept, would render the drawee liable for damages to the drawer although the bill was still in the hands of the latter, and the damages would be measured by the inconvenience and loss occasioned to the drawer. The expression was, however, a mere *dictum*, for the court declared that there was no evidence that the promise to accept in the case before it was for accommodation. It would seem that, according to the principle that an accommodation signature may be revoked before negotiation, there could be no action for damages in such a case. See *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458.

1. *Skidling v. Warren*, 10 Johns. (N. Y.)

270; *Dogan v. Dubois*, 2 Rich. Eq. (S. Car.) 85; *Norvell v. Hudgins*, 4 Munf. (Va.) 496.

Innocent Indorsee.—But when the accommodation maker of a note upon the insolvency of the accommodated party, the payee of the note, directed the latter to return and not to use it, and the payee promised but failed to do so, and negotiated the instrument to an innocent indorsee, the latter was held entitled to recover. *Hart v. U. S. Trust Co.*, 118 Pa. St. 565.

2. In the following cases the revoking accommodation party gave notice to the bank at which the note was to be discounted. *Second Nat. Bank v. Howe*, 40 Minn. 390; *Dogan v. Dubois*, 2 Rich. Eq. (S. Car.) 85; *Tennessee Bank v. Johnson*, 1 Swan (Tenn.) 238.

In *May v. Boisseau*, 8 Leigh (Va.) 164, notice was given to the bank and likewise to the party holding the instrument, and its possession was demanded from him. See *Norvell v. Hudgins*, 4 Munf. (Va.) 496.

3. *Tennessee Bank v. Johnson*, 1 Swan (Tenn.) 233.

4. *Hatch v. Searles*, 2 Sm. & G. 147; *Smith v. Wyckoff*, 3 Sandf. Ch. (N. Y.) 77; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11. But see *Williams v. Bosson*, 11 Ohio 62, where it was held that the death of one of the members of the firm which had accepted a bill for the accommodation of the drawer, although such death occurred while the bill was still unused in the hands of the party accommodated, did not affect the validity of a subsequent transfer of the paper, inasmuch as the bill "received its form and validity before his death, and no act of any member of the firm was necessary to add anything to it."

Bills on Which Advances have been Made.—Bills delivered after the death of the drawer, to a person who had made advances upon their faith to the drawer while the drawer had them in his possession for the purpose of raising money, may be enforced against the drawer's representatives. *Perry v. Crammond*, 1 Wash. (U. S.) 100.

5. **Death of Accommodation Indorser Prevents Recovery when Holders Knew of the Accommodation.**—An action was brought upon a bill of exchange indorsed by L., the defendant's intestate. The bill, complete except as to date and time of payment, was indorsed by L. to R. H. & Co. for their accommodation. L. died while the bill was still in the hands of R. H. & Co. unnegotiated; subsequently, R. H. & Co. presented the instrument still containing the blanks as to date and time of payment to the plaintiffs, who filled the blanks and discounted it in ignorance of L.'s death and relying upon the indorsement. It was held that L.'s death was a revocation of

wise where one takes an accommodation note in good faith without knowledge of its accommodation character, although informed of the death of the maker.¹

5. Place of the Contract.—Since an accommodation bill or note becomes operative upon negotiation only, and is not until such negotiation a binding contract, it results that the *lex loci contractus* when applied to such instruments is the law of the place where they are first negotiated, and not the law of the place where the accommodation signatures are actually written.²

Usury.—Thus the question whether accommodation paper is usurious or otherwise is to be tested by the law of the state in which it is actually negotiated.³ But it has been held that where such paper expressly points out a place of performance for the contract the law of the place so pointed out will govern rather than the law of the place of negotiation, in the absence of evidence that it was intended to be used elsewhere.⁴

R. H. & Co.'s authority to negotiate the instrument, that the plaintiffs were chargeable with knowledge of the accommodation character of the paper, and that they could not recover. *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11.

1. *Clark v. Thayer*, 105 Mass. 216.

In this case the court based its decision upon the ground that the plaintiff was a *bona fide* holder for value without notice of the fact that the note was accommodation paper, and that knowledge of the death of the maker did not affect him with notice of any invalidity in the note. See *Snaith v. Mingay*, 1 M. & S. 87.

2. Indorsement.—Where bills or notes are indorsed for accommodation in one state and negotiated in another, the law of the latter state controls the contract of indorsement. *Mott v. Wright*, 4 Biss. (U. S.) 53; *Stubbs v. Colt*, 30 Fed. Rep. 417; *Stanford v. Pruet*, 27 Ga. 243; *Gay v. Rainey*, 89 Ill. 221; *Young v. Harris*, 14 B. Mon. (Ky.) 447; *Lawrence v. Bassett*, 5 Allen (Mass.) 140; *Cook v. Litchfield*, 5 Sandf. (N. Y.) 330, 9 N. Y. 285; *Connor v. Donnell*, 55 Tex. 167.

Acceptance.—The same rule prevails as to the contract of acceptance. *Tilden v. Blair*, 21 Wall. (U. S.) 241; *Gallaudet v. Sykes*, 1 McArthur (D. C.) 489.

Where an accommodation note is signed in *Virginia*, and transmitted to the payees in *Maryland* where blanks are filled up and the note negotiated for value, it is a *Maryland* and not a *Virginia* contract. *Fant v. Miller*, 17 Gratt. (Va.) 47.

3. *Tilden v. Blair*, 21 Wall. (U. S.) 241; *Davis v. Clemson*, 6 McLean (U. S.) 622; *In re Conrad*, 8 Phila. (Pa.) 147, 6 Fed. Cas., p. 333, No. 3126; *Providence County Sav. Bank v. Frost*, 8 Ben. (U. S.) 203, 14 Blatchf. (U. S.) 233. See also the titles *CONFLICT OF LAWS*; *USURY*.

Illustrations.—A resident of Chicago drew a bill on a resident of New York, and the latter accepted for the accommodation of the former, and by the acceptance made the draft payable in New York. It was returned to Chicago, where it was negotiated. It was held that it was an *Illinois* contract, and was to be tested by the usury laws of that state. The court said that the controlling fact was that it was negotiated in *Illinois* and was expressly sent to Chicago for that purpose,

that naming New York as the place of payment was doubtless for the convenience of the acceptor, and to facilitate negotiation. *Tilden v. Blair*, 21 Wall. (U. S.) 241.

Where a resident of *Ohio* drew and indorsed certain bills for the accommodation of a resident of *New York*, and sent them to the latter place, where they were negotiated, it was held that the law of the latter state must govern, and that being usurious within those laws the instruments were void. *Davis v. Clemson*, 6 McLean (U. S.) 622.

Where a resident of Philadelphia made certain promissory notes for the accommodation of a person residing in the same place, and the latter procured such notes to be discounted at usurious rates of interest in New York, it was held that the effect of the transaction must be determined by the usury laws of *New York*. *In re Conrad*, 8 Phila. (Pa.) 147, 6 Fed. Cas., p. 333, No. 3126.

4. *Jewell v. Wright*, 30 N. Y. 259; *Dickinson v. Edwards*, 77 N. Y. 573; *Wayne County Sav. Bank v. Low*, 81 N. Y. 566.

In *Jewell v. Wright*, 30 N. Y. 259, W. made a promissory note to the order of D., dated and payable at Lockport, N. Y. D. indorsed it for T. for his accommodation, and delivered it to T. at Lockport. T. took it to *Connecticut* and negotiated it there. It was held that the law of the place of performance, *New York*, must control. This case was doubted by the Supreme Court of New York, but was followed in *New York Nat. Bank v. Morris*, 1 Hun (N. Y.) 680, and was considered and repudiated by the Superior Court of Buffalo, in *Bowen v. Bradley*, 9 Abb. Pr. N. S. (N. Y., Buffalo Super. Ct.) 395, and by the New York Court of Common Pleas in *Wayne County Sav. Bank v. Low*, 6 Abb. N. Cas. (N. Y. C. Pl.) 77. But in *Dickinson v. Edwards*, 77 N. Y. 573, the Court of Appeals affirmed it upon great consideration, overruling the two cases last cited. Subsequently in *Wayne County Sav. Bank v. Low*, 81 N. Y. 566, the principle of *Jewell v. Wright*, 30 N. Y. 259, and of *Dickinson v. Edwards*, 77 N. Y. 573, was again affirmed, and reconciled with the cases cited in the last note *supra*. The Court of Appeals, by Rapallo, J., said: "That case [*Dickinson v. Edwards*, 77 N. Y. 573], as well as *Jewell v. Wright*, 30 N. Y. 259, was distinguished from *Tilden v. Blair*, 21 Wall. (U. S.) 241, expressly upon the ground that

6. Parol Evidence to Prove Character of Instrument.—Parol evidence, by the weight of authority, is admissible in general to show the real relation between the parties to a bill or note, and that the actual liability of the parties among themselves is not that which appears upon the face of the instrument; and this is upon the ground that the fact of suretyship is collateral to the written instrument, and does not contradict or vary it.¹ Thus it may be shown that of persons apparently equally liable as comakers or codrawers of a bill or note one is in fact a principal and the other a surety,² or it may be shown

in *Tilden v. Blair*, although the acceptance was made payable in New York by the acceptors, who were residents of New York, yet after having accepted in New York they returned the acceptance to the drawer in Illinois, for the purpose and with the intention that it should be negotiated by him in that state. And this court says, in its opinion in *Dickinson v. Edwards*, 77 N. Y. 573, that that was the controlling fact in *Tilden v. Blair*, and that the ruling consideration was the intention of the acceptors that the draft should be used in Illinois, while in *Jewell v. Wright*, and in the case then before the court, there was nothing to show an intent on the part of the maker of the note to give authority to deal with it otherwise than as the law of this state would allow. The case of *Georgia Bank v. Lewin*, 45 Barb. (N. Y.) 340, and other cases are distinguished from *Jewell v. Wright* on the same ground, and it may safely be said that the case of *Dickinson v. Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this state, and that in the absence of such proof it must be governed by the law of the place of payment."

1. *Ward v. Stout*, 32 Ill. 399; *Guild v. Butler*, 127 Mass. 386; *Hubbard v. Gurney*, 64 N. Y. 457; *Oldham v. Broom*, 28 Ohio St. 41; *Otis v. Von Storch*, 15 R. I. 41. See also the title SURETYSHIP, and *infra*, this title, *Accommodation Party as Surety; As to Third Parties*.

That parol evidence is admissible to show suretyship between successive accommodation parties, see *infra*, this title, *Successive Accommodation Parties*.

To Show Who is the Accommodation Party.—Parol or extrinsic evidence is admissible upon the question for whose accommodation a certain instrument was made. *Bucyrus Steam Shovel, etc., Co. v. Meyer*, 70 Hun (N. Y.) 371. See *Case v. Spaulding*, 24 Conn. 578; *Dale v. Gear*, 38 Conn. 15, 39 Conn. 89; *Lafin v. Pomeroy*, 11 Conn. 440; *Patten v. Pearson*, 55 Me. 39; *Kulenkamp v. Groff*, 71 Mich. 675; *Bliss v. Plummer* (Mich., 1894), 61 N. W. Rep. 263; *Pray v. Rhodes*, 42 Minn. 93; *Trego v. Lowrey*, 8 Neb. 238; *Messmore v. Meyer*, 56 N. J. L. 31; *Yale v. Dart* (C. Pl.), 19 N. Y. Supp. 389; *Pearl v. Radnziner*, 10 Misc. Rep. (N. Y. City Ct.) 45.

Conversation at and before Acceptance.—In an action by the payee against the acceptor of certain drafts, the defendant set up as a defense that his acceptance was for the plaintiff's accommodation, and, it appearing that the plaintiff received the draft from the maker as collateral security for an antecedent

debt, it was held that the defendant could prove conversations between himself and the maker of the draft at and before the time of the acceptance and going to show the conditions of the acceptance, although the plaintiff was not present at such conversations. *Yale v. Dart* (C. Pl.), 19 N. Y. Supp. 389; *Wyckoff v. Wilson* (City Ct.), 9 N. Y. Supp. 628.

To Prove Irregular Indorser an Accommodation Party.—In *New York* a person indorsing a bill or note before its delivery is presumed to have intended to become liable as second indorser, and he is not liable upon the instrument to the payee, who is supposed to be the first indorser; but it is competent to rebut this presumption by parol proof that the indorsement was made to give the maker credit with the payee. *Coulter v. Richmond*, 59 N. Y. 478; *Moore v. Cross*, 19 N. Y. 227; *Bornstein v. Kauffman*, 4 Misc. Rep. (N. Y. C. Pl.) 83; *Wyckoff v. Wilson* (C. Pl.), 36 N. Y. St. Rep. 35; *Phelps v. Vischer*, 50 N. Y. 69; *Bacon v. Burnham*, 37 N. Y. 614; *Gates v. Williams*, 9 Misc. Rep. (N. Y. C. Pl.) 176. So in *Wisconsin*: *Cady v. Shepard*, 12 Wis. 639.

To Prove Agreement Altering Accommodation Character of Instrument.—Where the defendant made a promissory note payable to the plaintiff for the latter's accommodation, the plaintiff may prove that subsequently for a good consideration the parties agreed by parol to sustain the same relation to each other as was imported by the terms of the note, and such subsequent agreement being proved, the plaintiff is entitled to recover of the defendant upon the note. *Norton v. Downer*, 33 Vt. 26. See *Coggeshall v. Ruggles*, 62 Ill. 401; *Scott v. Parker* (City Ct.), 25 N. Y. St. Rep. 865.

2. *United States*.—*Goldsmith v. Holmes* (U. S. C. C. Oregon), 1 L. R. A. 816.

Alabama.—*Branch Bank v. James*, 9 Ala. 949; *Summerhill v. Tapp*, 52 Ala. 227.

California.—*McPherson v. Weston*, 85 Cal. 90.

Connecticut.—*Orvis v. Newell*, 17 Conn. 97.

Florida.—*Bowen v. Darby*, 14 Fla. 202.

Georgia.—*Perry v. Hodnett*, 38 Ga. 103.

Illinois.—*Kennedy v. Evans*, 31 Ill. 258; *Ward v. Stout*, 32 Ill. 399.

Indiana.—*Dickerson v. Ripley County*, 6 Ind. 128; *Alley v. Gavin*, 40 Ind. 446; *Schulz v. Klenk*, 49 Ind. 212; *Houck v. Graham*, 106 Ind. 195; *Porter v. Waltz*, 108 Ind. 40.

Iowa.—*Kelly v. Gillespie*, 12 Iowa 55.

Louisiana.—*Jones v. Fleming*, 15 La. Ann. 522.

Maine.—*Mariner's Bank v. Abbott*, 28 Me. 280; *Cummings v. Little*, 45 Me. 183.

that a person who is apparently liable only secondarily upon the instrument is in fact the principal debtor.¹ But it has been held that where one contracts expressly as "principal" he cannot show that he was merely a surety.²

7. How Far Affected by Statute of Frauds.—The question here to be discussed is how far an accommodation acceptor or indorser is within the benefit of the fourth section of the statute of frauds, providing that a special promise to answer for the debt, default, or miscarriage of another must be in writing, signed, etc. If the undertaking of an accommodation party is within this provision, a verbal promise to accept or to indorse for accommodation will not be binding upon the promisor, and the undertaking, when in writing, must conform to the local statute of frauds, as in expressing the consideration of the promise.

Verbal Promise to Indorse or Accept.—It has been held that a verbal promise to

Massachusetts.—*Carpenter v. King*, 9 Met. (Mass.) 511; *Harris v. Brooks*, 21 Pick. (Mass.) 195; *Horne v. Bodwell*, 5 Gray (Mass.) 457.

Missouri.—*Garrett v. Ferguson*, 9 Mo. 125; *Noll v. Oberhellmann*, 20 Mo. App. 336; *English v. Seibert*, 49 Mo. App. 563.

New Hampshire.—*Whitehouse v. Hanson*, 42 N. H. 9; *Maynard v. Fellows*, 43 N. H. 255; *Howard v. Fletcher*, 59 N. H. 151.

New York.—*Hubbard v. Gurney*, 64 N. Y. 458; *Peck v. Burwell* (Supreme Ct.), 1 N. Y. Supp. 33.

Ohio.—*Oldham v. Broom*, 28 Ohio St. 41.

Rhode Island.—*Otis v. Von Storch*, 15 R. I. 41.

South Carolina.—*Wayne v. Kirby*, 2 Bailey (S. Car.) 551.

Tennessee.—*Fowler v. Alexander*, 1 Heisk. (Tenn.) 425.

Vermont.—*Wilson v. Green*, 25 Vt. 450; *Riley v. Gregg*, 16 Wis. 666. And see *infra*, this title, *Accommodation Party as Surety: As to Third Parties*.

1. *Schultz v. Noble*, 77 Cal. 79; *Canadian Bank v. Coumbe*, 47 Mich. 358; *Guild v. Butler*, 127 Mass. 386; *Meggett v. Baum*, 57 Miss. 22; *Shelton v. Hurd*, 7 R. I. 403. See also *Webster v. Mitchell*, 22 Fed. Rep. 869; *Neal v. Wilson*, 79 Ga. 736; *Hull v. Peer*, 27 Ill. 312; *Stephens v. Monongahela Nat. Bank*, 38 Pa. St. 157. See also *infra*, this title, *Suretyship*.

Contra.—But it has been held that parol evidence is not admissible, at least at law, to show that the parties are not all equally liable as makers. *Bull v. Allen*, 19 Conn. 101 (but see *Daggett v. Whiting*, 35 Conn. 366); *Yates v. Donaldson*, 5 Md. 389; *Hendrickson v. Hutchinson*, 29 N. J. L. 180.

California.—In *California* it was formerly held that a comaker could not show that in fact he was an accommodation maker, and so a mere surety. *And v. Magruder*, 10 Cal. 282; *Shriver v. Lovejoy*, 32 Cal. 574; *Damon v. Pardow*, 34 Cal. 278.

But under the civil code of *California*, § 2832, the real relations of the parties may be shown, except as against persons who have acted on the faith of the position of the parties as apparent upon the instrument. *Harlan v. Ely*, 35 Cal. 340; *Chafoin v. Rich*, 77 Cal. 476; *Cohen v. Goux*, 48 Cal. 97; *Schultz v. Noble*, 77 Cal. 79.

Relation of Comakers and Parties Successively

Liable Distinguished.—Cases are found making a distinction as to the admissibility of parol evidence to prove the relation between comakers and parties who are successively liable.

In *Farmers', etc., Bank v. Rathbone*, 26 Vt. 19, *Isham, J.*, said: "On this subject it is important to observe a material distinction between joint and several promissory notes or obligations, and bills of exchange or notes on which the parties have assumed only successive liabilities. In the former case as between the makers and the holders, who at the time received the note with notice of the circumstances under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting its specific provisions, but as consistent with its terms; and the right of contribution arising out of that relation exists between them. 2 Am. Lead. Cas. 289, 303. But the drawer and acceptor and indorsers of a bill or note have not assumed a joint and several liability; neither are they strictly sureties; but are liable to each other, in the order of their becoming parties: and when the action is on the bill or instrument creating such successive liabilities, by an indorsee for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive liabilities into a joint and several obligation, or placing them in the relation of principal and surety. The testimony clearly contradicts the express provision of the bill, and materially changes its legal effect."

But it has been held that in a suit between indorsers for contribution parol evidence is admissible to show that the defendant signed at the request of the plaintiff and with the intention of becoming surety for him. *Martin v. Marshall*, 60 Vt. 321.

2. One Contracting as "Principal."—Where one is in relation to another in fact a surety, yet if he contracts expressly as principal upon the face of the instrument he is not entitled to any of the rights of a surety. *Sprigg v. Mt. Pleasant Bank*, 10 Pet. (U. S.) 257; *McMillan v. Parkell*, 64 Mo. 286; *Heath v. Derry Bank*, 44 N. H. 174; *Claremont Bank v. Wood*, 10 Vt. 582. See *Branch Bank v. James*, 9 Ala. 949, and compare *Harris v. Brooks*, 21 Pick. (Mass.) 195.

accept for accommodation is binding in favor of one who takes the paper on the faith thereof, although he took with knowledge of its accommodation character.¹ But, on the other hand, it has been held that such a promise is within the statute, and therefore void.² A verbal promise to indorse for accommodation is in effect a promise to answer for the debt of another, and so is within the statute.³

Written Acceptance or Indorsement for Accommodation.—It has been held that an acceptance given for accommodation for the debt of the drawer is not within the statute of frauds, but is a new and independent promise if a consideration therefor flows to the drawer;⁴ for such a consideration is sufficient to support the promise of the accommodation party;⁵ but this doctrine does not apply before the bill has been negotiated and while it remains in the hands of the party accommodated.⁶ The same doctrine has been applied to accommodation indorsers.⁷

III. ACCOMMODATION PAPER OF PARTICULAR PARTIES—1. Partners—One Partner Has no Power to Issue.—It is no part of the business of a mercantile firm to accept, make, or indorse bills or notes as a firm for third persons. There is, therefore, no implied authority for a partner to execute accommodation paper in the name of the copartnership, and an accommodation bill or note accepted, made, or indorsed by one member of a firm cannot be enforced against the firm by one who took it with knowledge of the accommodation character of the firm's signature, unless all the partners assented thereto.⁸

1. *Townsley v. Sumrall*, 2 Pet. (U. S.) 170.

Bank Checks.—The rule in *Townsley v. Sumrall*, 2 Pet. (U. S.) 170, has been held not to apply to a parol promise to accept for accommodation a bank check, and such a promise is within the statute of frauds. *Morse v. Massachusetts Nat. Bank*, 1 Holmes (U. S.) 209.

Verbal Acceptances—Generally.—Upon the question as to whether a verbal acceptance is in general within the statute of frauds, and whether that statute is applicable to commercial paper, see the titles **BILLS AND NOTES; FRAUDS, STATUTE OF.**

2. *Wakefield v. Greenhood*, 29 Cal. 597; *Williams v. Caldwell*, 4 S. Car. 100; *Carville v. Crane*, 5 Hill (N. Y.) 484, 40 Am. Dec. 364. See *Pike v. Irwin*, 1 Sandf. (N. Y.) 14; *Curtis v. Brown*, 5 Cush. (Mass.) 488.

In *Pillans v. Van Mierop*, 3 Burr. 1668, there is a *dictum* by Lord Mansfield which has been cited as showing that that great jurist took the view that a verbal promise to accept for accommodation was within the statute. The point involved in the case was merely a question whether a parol promise to accept is binding, and the words of Lord Mansfield would seem to show that whatever his view with regard to a simple promise to accept for another, yet where such a promise had been acted upon, and the principle of estoppel could be invoked, the promise would be valid.

3. *Gallagher v. Brunel*, 6 Cow. (N. Y.) 346; *Carville v. Crane*, 5 Hill (N. Y.) 484, 40 Am. Dec. 364; *Taylor v. Drake*, 4 Strobh. (S. Car.) 431, 53 Am. Dec. 680. See *Mallet v. Bateman*, L. R. 1 C. P. 163.

Contra.—In *Pennsylvania* it has been held that an accommodation indorsement is not within the statute of frauds. *Shaffer v. Danville Bank*, 1 W. N. C. (Pa.) 244.

4. But where there is no consideration flow-

ing to the drawer, such an acceptance must, where the statute of frauds so requires, express a consideration. *Dunbar v. Smith*, 66 Ala. 490.

5. See *supra*, this title, *Nature and Essentials of Accommodation Paper.*

6. *Hood v. Robbins*, 98 Ala. 484.

7. *Hood v. Robbins*, 98 Ala. 484.

8. *United States*.—*Fort Madison Bank v. Alden*, 129 U. S. 381; *Presbrey v. Thomas*, 1 D. C. App. 171; *Columbus City Bank v. Beach*, 1 Blatchf. (U. S.) 438.

California.—*Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251.

Connecticut.—*New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574.

Illinois.—*Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217.

Indiana.—*Beach v. State Bank*, 2 Ind. 488.

Kentucky.—*Chenoweth v. Chamberlin*, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145; *Wagnon v. Clay*, 1 A. K. Marsh. (Ky.) 257.

Louisiana.—*Vredenburg v. Lagan*, 28 La. Ann. 941.

Maine.—*Darling v. March*, 22 Me. 184; *Rollins v. Stevens*, 31 Me. 454.

Michigan.—*Heffron v. Hanaford*, 40 Mich. 305; *Moynahan v. Hanaford*, 42 Mich. 329.

Minnesota.—*Van Dyke v. Seelye*, 49 Minn. 557; *Osborne v. Stone*, 30 Minn. 25.

Mississippi.—*Andrews v. Planters' Bank*, 7 Smed. & M. (Miss.) 192, 45 Am. Dec. 300; *Sylvestein v. Atkinson*, 45 Miss. 81; *Bloom v. Helm*, 53 Miss. 21.

New Hampshire.—*Kidder v. Paige*, 48 N. H. 380.

New York.—*Foot v. Sabin*, 19 Johns. (N. Y.) 154; *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.) 119; *Lavery v. Burr*, 1 Wend. (N. Y.) 529; *Rochester Bank v. Bowen*, 7 Wend. (N. Y.) 158; *Boyd v. Plumb*, 7 Wend. (N. Y.) 309; *Joyce v. Williams*, 14 Wend. (N. Y.) 141; *Wilson v. Williams*, 14 Wend. (N. Y.)

Burden of Proof.—The burden of proof is upon the party who takes the part-

146; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466, 15 Wend. (N. Y.) 364; *Austin v. Vandermark*, 4 Hill (N. Y.) 259; *Fielden v. Lahrens*, 9 Bosw. (N. Y.) 436, 2 Abb. App. Dec. (N. Y.) 111; *Atlantic State Bank v. Savery*, 18 Hun (N. Y.) 36, 82 N. Y. 291.

North Carolina.—*Long v. Carter*, 3 Ired. (N. Car.) 238.

Ohio.—*Gano v. Samuel*, 14 Ohio 592.

Pennsylvania.—*Bowman v. Cecil Bank*, 3 Grant's Cas. (Pa.) 33; *Shaaber v. Bushong*, 105 Pa. St. 514. See *McQuewans v. Hamlin*, 35 Pa. St. 517.

Tennessee.—*Berryhill v. M'Kee*, 1 Humph. (Tenn.) 31; *Whaley v. Moody*, 2 Humph. (Tenn.) 495; *Tennessee Bank v. Saffarrans*, 3 Humph. (Tenn.) 597; *Scott v. Bandy*, 2 Head (Tenn.) 197.

Canada.—*Harris v. McLeod*, 14 U. C. Q. B. 164; *Wilson v. Brown*, 6 Ont. App. 415; *Federal Bank v. Northwood*, 7 Ont. Rep. 389.

See *Smyth v. Strader*, 4 How. (U. S.) 404; *Mayberry v. Bainton*, 2 Harr. (Del.) 24; *Selden v. Commerce Bank*, 3 Minn. 166; *Osborne v. Thompson*, 35 Minn. 229; *Langan v. Hewett*, 13 Smed. & M. (Miss.) 122; *Sutton v. Irwine*, 12 S. & R. (Pa.) 13; *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; *Avery v. Rowell*, 59 Wis. 82; *In re Irving*, 17 Nat. Bankr. Reg. 22; *Stewart v. Parker*, 18 New Bruns. 223; *Duncan v. Lowndes*, 3 Campb. 478; *Brettel v. Williams*, 4 Exch. 623; *Code of Georgia* (1882), § 1914.

Partnership Note in Payment of Individual Debt.—This rule applies especially against one who takes a bill or note, accepted, made, or indorsed by one partner in the name of the firm, for the individual debt of the partner who signs the paper; and one who acquires partnership paper from one partner for his individual debt is chargeable with notice that the firm's signature is without value and fraudulent as to the other partner.

Alabama.—*Maudlin v. Mobile Branch Bank*, 2 Ala. 502; *Hibbler v. DeForest*, 6 Ala. 92; *Lang v. Waring*, 17 Ala. 145; *Tyree v. Lyon*, 67 Ala. 1; *Rolston v. Click*, 1 Stew. (Ala.) 526.

Connecticut.—*Mix v. Muzzy*, 28 Conn. 186.

Georgia.—*Miller v. Hines*, 15 Ga. 197.

Illinois.—*Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217; *Davis v. Blackwell*, 5 Ill. App. 32.

Iowa.—*Whitmore v. Adams*, 17 Iowa 567.

Massachusetts.—*Sweetser v. French*, 2 Cush. (Mass.) 311; *Chazournes v. Edwards*, 3 Pick. (Mass.) 5; *Butterfield v. Hemsley*, 12 Gray (Mass.) 226; *Commonwealth Nat. Bank v. Law*, 127 Mass. 72; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *National Security Bank v. McDonald*, 127 Mass. 82; *Central Nat. Bank v. Frye*, 148 Mass. 498.

New York.—*Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Wilson v. Williams*, 14 Wend. (N. Y.) 146, 28 Am. Dec. 518; *Elliott v. Dudley*, 19 Barb. (N. Y.) 326.

North Carolina.—*Cotton v. Evans*, 1 Dev. & B. Eq. (N. Car.) 284; *Weed v. Richardson*,

2 Dev. & B. (N. Car.) 535; *Hartness v. Wallace*, 106 N. Car. 427.

Pennsylvania.—*Bell v. Faber*, 1 Grant's Cas. (Pa.) 31; *King v. Faber*, 22 Pa. St. 21; *Kaiser v. Fendrick*, 98 Pa. St. 528; *Dickson v. Primrose*, 2 Miles (Pa.) 366.

Rhode Island.—*Windham County Bank v. Kendall*, 7 R. I. 77.

Tennessee.—*Scott v. Bandy*, 2 Head (Tenn.) 197.

Vermont.—*Huntington v. Lyman*, 1 D. Chip. (Vt.) 438, 12 Am. Dec. 716.

West Virginia.—*Tompkins v. Woodyard*, 5 W. Va. 216.

Partner Individually Liable.—A partner who so executes firm paper without the consent of his copartner is personally liable upon the paper in the same manner and to the same extent as if he signed his individual name thereto. *Silvers v. Foster*, 9 Kan. 44. See *Columbus City Bank v. Beach*, 1 Blatchf. (U. S.) 438.

Partner Liable to Firm.—The partner who misuses the firm credit by accepting accommodation paper is liable to the partnership for resulting loss. *Smith v. Loring*, 2 Ohio 440.

What Amounts to Notice of Character of Paper.—Other circumstances, besides taking partnership paper for the individual debt of the partner, will charge the transferee with knowledge of the character of the firm's signature. If the face of the paper itself shows that the firm executes not as principal, but as a surety or guarantor for some other person, the person who takes it has actual notice. *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217.

As to when the appearance of the paper is sufficient to charge a party with presumptive notice of its character, see *infra*, this title, *Holders of Accommodation Paper: When Chargeable with Notice of Accommodation Character of Instrument*.

K. procured a certain note, signed by G., payable to his own order, of which note K. was second indorsee, to be discounted at the S. Bank, depositing as collateral with the bank a note of M. & Co. made and signed by one of the members of that firm without the knowledge of his partner. This note K. received as security for the G. note. It was of the same date and amount as the G. note, and there was upon its back a memorandum signed by K. to the effect that the note was held by him as security for the G. note. The S. bank had no knowledge of the dealings between K. and M. & Co. In an action by the bank against M. & Co. upon the firm note it was held that the plaintiff was chargeable with knowledge that the paper was given as security merely, from the face of the two notes and from the memorandum upon the firm note. *National Security Bank v. McDonald*, 127 Mass. 82.

A debtor gave his creditor notes of a third party, which the creditor discounted on his own indorsement, but had to take up when they fell due. The debtor then gave the creditor other notes of the same person, but

nership paper with such knowledge, to show that all the members of the firm consented to the act of him who affixed the firm's signature.¹

with the name of a firm to which the maker belonged written across the back. It was held that the parties must be supposed to have had the previous debt in view, and that the creditor had therefore notice that the firm name was a mere accommodation. *Moynahan v. Hanaford*, 42 Mich. 329.

1. *United States*.—*Presbrey v. Thomas*, 1 D. C. App. 171.

Alabama.—*Maudlin v. Mobile Branch Bank*, 2 Ala. 502; *Hibbler v. DeForest*, 6 Ala. 92; *Rolston v. Click*, 1 Stew. (Ala.) 526; *Tyree v. Lyon*, 67 Ala. 1.

California.—*Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251.

Connecticut.—*New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574.

Georgia.—*Miller v. Hines*, 15 Ga. 197.

Maine.—*Darling v. March*, 22 Me. 184.

New Hampshire.—*Kidder v. Page*, 48 N. H. 380.

Massachusetts.—*National Security Bank v. McDonald*, 127 Mass. 82.

Minnesota.—*Selden v. Commerce Bank*, 3 Minn. 166; *Van Dyke v. Seelye*, 49 Minn. 557.

Mississippi.—*Andrews v. Planters' Bank*, 7 Smed. & M. (Miss.) 192, 45 Am. Dec. 300. But compare *Sylverstein v. Atkinson*, 45 Miss. 81.

New York.—*Butler v. Stocking*, 8 N. Y. 408; *Foot v. Sabin*, 19 Johns. (N. Y.) 154; *Schermerhorn v. Schermerhorn*, 1 Wend. (N. Y.) 119; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Boyd v. Plumb*, 7 Wend. (N. Y.) 309; *Joyce v. Williams*, 14 Wend. (N. Y.) 141; *Wilson v. Williams*, 14 Wend. (N. Y.) 146, 28 Am. Dec. 518.

Pennsylvania.—*Bowman v. Cecil Bank*, 3 Grant's Cas. (Pa.) 33; *Kaiser v. Fendrick*, 98 Pa. St. 528.

Vermont.—*Huntington v. Lyman*, 1 D. Chip. (Vt.) 438, 12 Am. Dec. 716; *Jones v. Booth*, 10 Vt. 268.

West Virginia.—*Tompkins v. Woodyard*, 5 W. Va. 216.

But compare with the foregoing cases *Henderson v. Carveth*, 16 U. C. Q. B. 324.

In *Andrews v. Planters' Bank*, 7 Smed. & M. (Miss.) 192, 45 Am. Dec. 300, it was held that the burden of proof was upon the holder. See also *Bloom v. Helm*, 53 Miss. 21. But in *Sylverstein v. Atkinson*, 45 Miss. 81, it was held that whenever the name of a commercial partnership is upon negotiable paper the firm is *prima facie* bound, and it devolves upon the member contesting his liability to show the facts which exonerate him. The facts of the case, however, show that there was nothing about the appearance of the note in suit to show that the partnership, one of the makers of the note, signed as surety for the other maker, and the plaintiff appears to have been a *bona fide* holder without notice.

English Rule.—The *English* rule as to the burden of proof is the same as that stated in the text and supported by the *United States* authorities. *Leverson v. Lane*, 13 C. B. N.

S. 278, 106 E. C. L. 278; *Ex p. Bonbonus*, 8 Ves. Jr. 540; *Frankland v. M'Gusty*, 1 Knapp 274; *Shirreff v. Wilkes*, 1 East 48; *Green v. Deakin*, 2 Stark. 347; *Ex p. Goulding*, 2 G. & J. 118.

A *dictum* of Lord Ellenborough in *Ridley v. Taylor*, 13 East 175, threw some doubt upon the question as to the burden of proof, and it appears to have misled Mr. Chitty (*Bills and Notes*, 13 Am. ed. 48), and induced some of the courts of this country to declare that the *English* and *United States* rules were different. *Laverty v. Burr*, 1 Wend. (N. Y.) 529, *per Sutherland, J.*; *Hibbler v. DeForest*, 6 Ala. 92, *per Goldthwaite, J.*; *Henderson v. Carveth*, 16 U. C. Q. B. 327. But in *Leverson v. Lane*, 13 C. B. N. S. 278, 106 E. C. L. 278, the question was fully examined, the *dictum* of Lord Ellenborough *overruled*, and the rule stated to the same effect as in the text.

Consent—How Proved—General Rule.—Consent may be established by positive proof, or inferred from prior or subsequent acts of the partner whom it is sought to charge. *Beach v. State Bank*, 2 Ind. 488; *Butler v. Stocking*, 8 N. Y. 408.

Evidence of subsequent assent must be strong and satisfactory. Slight and unconvincing circumstances will not be sufficient. *Wilson v. Williams*, 14 Wend. (N. Y.) 146, 28 Am. Dec. 518.

Silence.—Mere silence of a nonconsenting partner, after having acquired the knowledge of the existence of such a note, is not of itself assent. *Tyree v. Lyon*, 67 Ala. 1; *Reubin v. Cohen*, 48 Cal. 545; *Van Dyke v. Seelye*, 49 Minn. 557; *Elliott v. Dudley*, 19 Barb. (N. Y.) 326.

It is not sufficient to prove assent, that the partner whom it sought to bind was present and heard the arrangement between his copartner and the party accommodated, as an accommodation indorsement by the firm's assent cannot be inferred, but must be proved. *Mercein v. Andrus*, 10 Wend. (N. Y.) 461.

Waiver of Notice.—Waiver of notice, indorsed upon the note by a nonconsenting partner, is not a ratification of the note. *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217.

Accepting Security.—Where the nonconsenting partner accepted a mortgage to secure the firm from liability on the note guaranteed in the firm name by his copartner, a ratification may be inferred. *Clark v. Hyman*, 55 Iowa 14, 39 Am. Rep. 160.

Course of Business.—The holder of a note indorsed by a firm, between which and the maker there have been frequent interchanges of accommodation upon bills and notes for a long time, has a right to presume the assent of all the partners. *Darling v. March*, 22 Me. 184. See *Tennessee Bank v. Saffarrans*, 3 Humph. (Tenn.) 597; *Scott v. Bandy*, 2 Head (Tenn.) 197. But see *Early v. Reed*, 6 Hill (N. Y.) 12.

Ratification Ineffectual as against Existing

Bona Fide Purchaser.—But, since every member of a mercantile firm has the power to accept, make, draw, or indorse business paper for partnership purposes, a *bona fide* holder for value without notice has the right to presume that the firm name was signed in the usual course of the partnership business (if it is not apparently out of the scope of such business), and to hold the firm liable upon its signature, although such signature proves in fact to have been affixed by one partner by way of accommodation merely.¹

2. Corporations—No Implied Power to Execute Accommodation Paper.—A corporation has no power to bind itself by becoming an acceptor, maker, or indorser of accommodation paper for the benefit of other persons or corporations,² even though a consideration is received for the loan of its credit upon the paper.³ And since the corporation itself has no such power, of course it cannot authorize its officers to bind it by making or indorsing such paper.⁴

Partnership Creditors.—The ratification by the firm, of the unauthorized act of one partner in signing the contract of suretyship, is ineffectual against existing partnership creditors, being in effect an adoption by the firm of the debts of one partner. *Kidder v. Page*, 48 N. H. 380.

1. *United States*.—*Columbus City Bank v. Beach*, 1 Blatchf. (U. S.) 438; *Presbrey v. Thomas*, 1 D. C. App. 171.

Alabama.—*Mauldin v. Mobile Branch Bank*, 2 Ala. 502; *Hibbler v. DeForest*, 6 Ala. 92.

Connecticut.—*New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574.

Georgia.—*Freeman v. Ross*, 15 Ga. 252.

Illinois.—*Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217.

Indiana.—*Beach v. State Bank*, 2 Ind. 488.

Maine.—*Redlon v. Churchill*, 73 Me. 146, 40 Am. Rep. 345.

Maryland.—*Hopkins v. Boyd*, 11 Md. 107.

Massachusetts.—*Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Stimson v. Whitney*, 130 Mass. 591.

Minnesota.—*Van Dyke v. Seelye*, 49 Minn. 557.

Mississippi.—*Silverstein v. Atkinson*, 45 Miss. 81; *Bloom v. Helm*, 53 Miss. 21.

Missouri.—*Edwards v. Thomas*, 66 Mo. 468; *Potter v. Dillon*, 7 Mo. 228, 37 Am. Dec. 185.

New York.—*Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458; *Austin v. Vandermark*, 4 Hill (N. Y.) 259; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Atlantic State Bank v. Savery*, 18 Hun (N. Y.) 36, 82 N. Y. 291.

Ohio.—*Gano v. Samuel*, 14 Ohio 592.

Rhode Island.—*Parker v. Burgess*, 5 R. I. 277.

South Carolina.—*Howes v. Dunton*, 1 Bailey (S. Car.) 146, 19 Am. Dec. 663; *Flemming v. Prescott*, 3 Rich. (S. Car.) 307, 45 Am. Dec. 766.

Tennessee.—*Whaley v. Moody*, 2 Humph. (Tenn.) 495.

See *Michigan Ins. Bank v. Eldred*, 9 Wall. (U. S.) 544; *Lemoine v. North America Bank*, 3 Dill. (U. S.) 44.

Holder may Take Renewal Note with Knowledge.—If the holder acquires good title to the firm note as an innocent indorsee, he may take renewal notes of the firm from one part-

ner, and may hold the partnership liable upon such renewal notes, although at the time he took them he had knowledge that the original note was without authority. *Hopkins v. Boyd*, 11 Md. 107.

2. *United States*.—*Commerce Nat. Bank v. Atkinson*, 55 Fed. Rep. 465; *Ex p. Estabrook*, 2 Lowell (U. S.) 547.

California.—*Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

Connecticut.—*Etna Nat. Bank v. Charter Oak L. Ins. Co.*, 50 Conn. 167; *Webster v. Howe Machine Co.*, 54 Conn. 394.

Indiana.—*Smead v. Indianapolis, etc., R. Co.*, 11 Ind. 104.

Maryland.—*Savage Mfg. Co. v. Worthington*, 1 Gill (Md.) 284.

Missouri.—*Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299.

New Jersey.—*Republic Nat. Bank v. Young*, 41 N. J. Eq. 531.

New York.—*Genesee Bank v. Patchin Bank*, 13 N. Y. 309, 19 N. Y. 312; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23; *Morford v. Farmers' Bank*, 26 Barb. (N. Y.) 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 19 How. Pr. (N. Y. Supreme Ct.) 51.

Repeated Assumption or Exercise by a Corporation of the power to become an accommodation party does not make such an exercise of power valid. *Webster v. Howe Machine Co.*, 54 Conn. 394.

Indorsement "for Value Received."—An indorsement by a corporation expressed to be "for value received" is not to be deemed an accommodation indorsement. *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, 41 Barb. (N. Y.) 9.

3. *National Park Bank v. German-American Warehousing Co.*, 116 N. Y. 281.

4. *Webster v. Howe Machine Co.*, 54 Conn. 394; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23; *Farmers', etc., Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275. See *Commerce Nat. Bank v. Atkinson*, 55 Fed. Rep. 465.

Power to Execute Business Paper does not Imply Power to Execute Accommodation Paper.—Even if a corporation has power to become an accommodation party to bills and notes, the fact that its agent is permitted to sign and indorse the corporation name upon business paper does not empower him to sign or

Bona Fide Purchaser.—But as the general power to make and indorse commercial paper is among the implied powers of private corporations, the innocent purchaser for value of commercial paper, signed or indorsed by a corporation, has a right to presume that it is paper made in the usual course of business and binding upon the corporation, and he can, therefore, recover upon a bill or note signed by a corporation to accommodate some other party.¹

Notice of Accommodation Character.—The form of the instrument may, however, show that it is accommodation paper. And it has been held that one who in good faith discounts for value, before acceptance, a bill drawn upon a corporation, does so upon the credit of the drawer or indorser, and though the corporation afterwards accepts it, if the acceptance is for the accommodation of the drawer the corporation is not liable thereon.²

3. Agents.—A general power to indorse or make commercial paper on behalf of his principal does not give an agent power to bind his principal by indorsing or issuing accommodation paper.³

indorse accommodation paper. *Etna Nat. Bank v. Charter Oak L. Ins. Co.*, 50 Conn. 167; *McLellan v. Detroit File Works*, 56 Mich. 579.

Corporation Formed from Partnership—Renewal Notes.—Where a corporation is organized from a partnership, notes given by an officer of the corporation in renewal of partnership notes are presumptively accommodation notes given to take up the notes of third parties, and the holders of the partnership notes who receive the corporation notes in renewal are chargeable with notice, and cannot recover, unless they show express authority in the officer who signs the notes. *McLellan v. Detroit File Works*, 56 Mich. 579.

Cashier of Bank.—The cashier of a bank is not as such presumed to have the power to bind it as an accommodation indorser upon his individual note, and the payee who fails to prove that the cashier had authority to make the indorsement cannot recover against the bank. *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557.

A cashier has, in general, no power as such to accept or indorse bills and notes for accommodation. *Blair v. Mansfield First Nat. Bank*, 2 Flipp. (U. S.) 111; *Farmers', etc., Nat. Bank v. Troy City Bank*, Dougl. (Mich.) 457.

1. *United States.—Ex p. Estabrook*, 2 Lowell (U. S.) 547.

Connecticut.—*Webster v. Howe Machine Co.*, 54 Conn. 394.

Massachusetts.—*Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57.

Missouri.—*Bremen Sav. Bank v. Branch-Crookes Saw Co.*, 104 Mo. 425; *Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 4 Mo. App. 276, 2 Mo. App. 299.

New Jersey.—*Republic Nat. Bank v. Young*, 41 N. J. Eq. 531.

New York.—*Genesee Bank v. Patchin Bank*, 19 N. Y. 312, 13 N. Y. 309; *Mechanics' Banking Assoc. v. New York, etc., White Lead Co.*, 23 How. Pr. (N. Y. Supreme Ct.) 74, 35 N. Y. 505; *Morford v. Farmers' Bank*, 26 Barb. (N. Y.) 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 19 How. Pr. (N. Y. Supreme Ct.) 51.

Holder of Checks Certified for Accommodation.—Where a bank certifies a check without funds, for the accommodation of the drawer, a *bona fide* holder may enforce its payment. *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125.

Holder Receiving Accommodation Paper from Corporation's Agent.—If an agent duly authorized to sign "all notes and business paper" of a corporation gives accommodation notes in the name of the company, the corporation, notwithstanding the want of authority of the agent, is liable to a holder in good faith for value before maturity, and such holder cannot recover damages against the agent for his unauthorized issue. *Bird v. Daggett*, 97 Mass. 494.

Accommodation Paper Executed in Violation of Express Statute.—It seems that accommodation notes executed by a corporation in violation of an express statute are void even in the hands of an innocent purchaser. See *Root v. Godard*, 3 McLean (U. S.) 102; *Hayden v. Davis*, 3 McLean (U. S.) 276.

But although by statute it is unlawful for a corporation to appropriate its funds for any purpose not stated in its articles, its accommodation paper is not void in the hands of a *bona fide* holder for value, unless such paper is expressly declared void by statute. *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. Rep. 191. See the title *ULTRA VIRES*, and *infra*, this title, *Holders of Accommodation Paper: When Chargeable with Notice of Accommodation Character of Instrument*.

2. *Farmers', etc., Nat. Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275. But see *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458.

3. *Wallace v. Mobile Branch Bank*, 1 Ala. 565; *Etna Nat. Bank v. Charter Oak L. Ins. Co.*, 50 Conn. 167; *McLellan v. Detroit File Works*, 56 Mich. 579; *German Nat. Bank v. Studley*, 1 Mo. App. 260; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *Kingsley v. State Bank*, 3 Yerg. (Tenn.) 107. See *Haynes v. Foster*, 2 C. & M. 237. See also the title *AGENCY: BILLS AND NOTES*.

Agent Signing Renewal Accommodation Notes.—Where an agent, empowered to make and

4. **Married Women.**—A married woman, by the common law, could not make, accept, or indorse commercial paper, nor become a surety for her husband or for another.¹ In the statutes of some of the states, wherein a married woman is given power to contract, it is expressly provided that she shall not become an accommodation party to commercial paper.² In other states a married woman is bound by her accommodation indorsement.³

IV. RIGHTS AND LIABILITIES OF PARTIES TO ACCOMMODATION PAPER—1. **General Obligations of Parties.**—The strict obligations of parties to commercial paper are modified to a certain extent in the case of accommodation parties.

Accommodated Party.—The accommodated party undertakes, impliedly if not expressly, first, that he will provide for the bill or note at its maturity; and second, that he will indemnify the accommodation party in case the latter is compelled to take up the paper.⁴

Accommodation Party.—The accommodation party, on the other hand, by his signature, first, confers a power or authority upon the party accommodated to bind him, the accommodation party, in favor of third persons by the issue of the paper;⁵ and second, when the paper has been negotiated, he becomes bound to the indorsee or holder in accordance with the rules of commercial law and the position of his name upon the instrument,⁶ from the date of the instrument.⁷

2. **Position of Party Accommodated—No Right of Action.**—The party for whose benefit accommodation paper has been made acquires no right against the

indorse promissory notes for his principal, indorses a promissory note with the assent of his principal for the purpose of taking up paper upon which the principal is already liable as accommodation maker or indorser, the principal will be bound. *German Nat. Bank v. Studley*, 1 Mo. App. 260.

Bona Fide Holder.—The principal may be bound to a bona fide holder without notice. *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Bird v. Daggett*, 97 Mass. 494; *Edwards v. Thomas*, 66 Mo. 468; *Bank of Commerce v. Cohen* (Supreme Ct.), 26 N. Y. St. Rep. 637.

1. See *Willard v. Eastman*, 15 Gray (Mass.) 328, 77 Am. Dec. 366. See also the titles **BILLS AND NOTES**; **MARRIED WOMEN**; **SURETYSHIP**.

Separate Property.—As to bills and notes charged upon her separate estate, see the title **SEPARATE PROPERTY OF MARRIED WOMEN**.

2. *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 156.

3. *Kenworthy v. Sawyer*, 125 Mass. 28; *Bowery Nat. Bank v. Sniffen*, 54 Hun (N. Y.) 395; *Queens County Bank v. Leavitt*, 56 Hun (N. Y.) 426.

Married Woman Bound to Accommodation Indorser.—A married woman is liable to an accommodation indorser of her note who has been compelled to take up the instrument at maturity. *Scott v. Otis*, 25 Hun (N. Y.) 33.

4. *Reynolds v. Doyle*, 1 M. & G. 753, 39 E. C. L. 638; *Sleigh v. Sleigh*, 5 Exch. 514; *Jefferson County v. Burlington, etc., R. Co.*, 66 Iowa 385; *Lockwood v. Twitchell*, 146 Mass. 623.

Express Promise to Indemnify.—Where there is an express promise to indemnify the accommodation party, he may still sue upon the promise implied in law, and if there is

anything in the written promise to contradict the implication of the latter, the defendant may show it, *Gibbs v. Bryant*, 1 Pick. (Mass.) 118.

When Contract of Indemnity Takes Effect.—The contract of indemnity takes effect from the date of the accommodation party's contract, and the debt of the accommodated party is contracted at that time. *Byers v. Franklin Coal Co.*, 106 Mass. 131.

5. *Smith v. Wyckoff*, 3 Sandf. Ch. (N. Y.) 77; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11. See *Williams v. Banks*, 11 Md. 198. See also *supra*, this title, *Inception of the Contract*.

Promise to Accept for Accommodation.—It has been said that a promise to accept for accommodation merely, renders the promisor liable to the promisee who has drawn a bill upon the strength of the promise, even though it remains unnegotiated in his hands. *Ilsey v. Jones*, 12 Gray (Mass.) 260. But this may be doubted. See *supra*, this title, *Inoperative until Negotiated*.

6. See *infra*, this title, *Successive Accommodation Parties*; *Holders*; *Presentment and Notice*.

Guarantee Capacity of Prior Parties.—An accommodation indorser, like the indorser of ordinary business paper, guarantees the capacity of prior parties to contract. *Edmunds v. Rose*, 51 N. J. L. 547.

7. *Williams v. Banks*, 11 Md. 198.

Accommodation Party Within Statute of Fraudulent Conveyances.—A voluntary conveyance made by an accommodation party to a bill or note is fraudulent as to the holders of the instrument. *Pashby v. Mandigo*, 42 Mich. 172; *Primrose v. Browning*, 56 Ga. 369.

So also if made while the instrument was still unnegotiated. *Williams v. Banks*, 11 Md. 198. See the title **FRAUDULENT SALES AND CONVEYANCES**.

accommodation party,¹ since as between them there is no consideration, a fact which is always a defense to a suit upon negotiable paper between the immediate parties.²

Accommodation Instrument Given to a Partner.—Where a bill or note has been made, accepted, or indorsed for the benefit of one of the members of a firm, the firm, although purchasers for value before maturity, cannot maintain an action thereon against the accommodation party, because the position of the firm can be no better than that of the partner who is the accommodated party.³

3. Rights of Accommodation Party after Payment.—*a. AGAINST PARTY ACCOMMODATED.*—(1) *Indemnity—Generally.*—When the accommodation party has been compelled to pay the instrument, the party accommodated becomes, in consequence of the implied contract of indemnity, a debtor of the accommodation party, and the latter has a right of action against the former.⁴ But this

1. *England.*—Thompson v. Clublely, 1 M. & W. 212.

Alabama.—Hood v. Robbins, 98 Ala. 484.

Arkansas.—Platt v. Snipes, 43 Ark. 21.

California.—Coghlin v. May, 17 Cal. 515.

Connecticut.—Case v. Spaulding, 24 Conn. 578; Dale v. Gear, 38 Conn. 15, 9 Am. Rep. 353.

Iowa.—Sherman v. Elder, 12 Iowa 433; Larned v. Ogilby, 20 Iowa 410.

Louisiana.—Whitwell v. Crehore, 8 La. 540, 28 Am. Dec. 141.

Maine.—Patten v. Pearson, 55 Me. 39.

Massachusetts.—Corlies v. Howe, 11 Gray (Mass.) 125, 71 Am. Dec. 693; Kellogg v. Barton, 12 Allen (Mass.) 527; Woods v. Woods, 127 Mass. 150; Lockwood v. Twitchell, 146 Mass. 623.

Michigan.—Kulenkamp v. Groff, 71 Mich. 675.

Minnesota.—Pray v. Rhodes, 42 Minn. 93.

Nebraska.—Trego v. Lowrey, 8 Neb. 238.

New Jersey.—Messmore v. Meyer, 56 N. J. L. 31.

New York.—Yale v. Dart (C. Pl.), 46 N. Y. St. Rep. 675.

Ohio.—Simms v. Field, 1 Cleve. L. Rep. (Ohio) 337.

Texas.—Parker v. Lewis, 39 Tex. 394; Lewis v. Parker, 33 Tex. 121.

Washington.—Weeks v. Bussell, 8 Wash. 440.

Illustrations.—Where the drawee of a bill accepts at the request of the drawer for the accommodation of the payee, the payee cannot recover in an action against the acceptor. Thompson v. Clublely, 1 M. & W. 212.

Where one of two makers of a note signs the instrument for the accommodation of the payee, the latter cannot recover upon the note, although there was a consideration as to the other maker. Weeks v. Bussell, 8 Wash. 440.

Draft Accepted with the Intention of Accommodating Plaintiff.—Where it appeared that the defendant, sued as the acceptor of a certain draft, had accepted with the intention of accommodating the payee, the plaintiff in the action, and the payee had afterwards received the draft as collateral security for an antecedent debt, it was held that the plaintiff was not a *bona fide* holder for value; that he took subject to the equities which might be asserted by the defendant, and that he was

not entitled to recover. Yale v. Dart (C. Pl.), 19 N. Y. Supp. 389; Messmore v. Meyer, 56 N. J. L. 31.

Accommodation Paper as to Part.—Where the drawee, when a bill for £19. 5s. was presented to him for acceptance, agreed to accept for £10, but upon being urged by the payee accepted for the whole sum, for the accommodation of the payee, and at maturity paid £10 upon the bill, it was held in a suit by the payee against the acceptor that the former was not entitled to recover, since as between them it was an acceptance for £10 only. Darnell v. Williams, 2 Stark. 166, 3 E. C. L. 361.

Burden of Proof.—The burden is upon the maker sued upon a note to establish that he signed for the accommodation of the suing holder. Weill v. Trosclair, 42 La. Ann. 171; Crosbie v. Leary, 6 Bosw. (N. Y.) 312; Bower v. Hastings, 36 Pa. St. 285.

2. See the title **BILLS AND NOTES.**

3. Sparrow v. Chisman, 9 B. & C. 241, 17 E. C. L. 366; Quinn v. Fuller, 7 Cush. (Mass.) 224. See Richmond v. Heapy, 1 Stark. 202, 2 E. C. L. 83; Cochran v. Hume, 19 D. C. 517; Hart v. Palmer, 12 Wend. (N. Y.) 523.

Firm Affected with Notice of Partner.—In Quinn v. Fuller, 7 Cush. (Mass.) 224, Dewey, J., said: "As one of the parties, who must have been a plaintiff if the action had been brought for the firm, is shown to have no right to recover, his coplaintiff and partner is affected with notice of the want of consideration and want of equity * * *, and the action wholly fails."

4. Nelson v. Richardson, 4 Sneed (Tenn.) 307.

Payment by Accommodation Acceptor before Maturity.—Payment before maturity by a drawee who has accepted for the accommodation of the drawer is a payment in disregard of the terms of the accommodated party's contract of indemnity, for he contracts to indemnify only in case he fails to meet the obligation at maturity, and, as the consideration of the instrument may be shown between the acceptor and the drawer, the accommodation party who has paid the bill before maturity may be defeated in an action against the maker by proof that the consideration has failed. Stark v. Alford, 49 Tex. 277.

Accommodation Party Paying without Notice.—As to the right of an accommodation party

relation does not arise until payment has been actually made;¹ and the statute of limitations begins to run from that date.²

(2) *Accommodation Makers and Acceptors*.—Where the accommodation party is the acceptor of a bill of exchange, or the maker of a promissory note his right to be saved harmless after payment cannot be worked out by an action upon the instrument, since in such a case payment by him extinguishes the security, but he may bring an action against the party accommodated directly upon his implied contract to indemnify.³

to recover upon a bill which he has paid without notice, see *infra*, this title, *Presentment and Notice*.

Right to Recover Defeated by Fraud.—Where it appears that the person to whom the accommodation party paid the instrument was not himself entitled to receive payment by reason of the fact that he was not a *bona fide* holder for value; or where, although the person to whom payment was made was a *bona fide* holder, the accommodation party making payment is himself a party to fraud in the procurement of the instrument, the accommodation party's right to recover an indemnity of the party accommodated is defeated. *Erie Boot, etc., Co. v. Eichenlaub*, 127 Pa. St. 164.

Where, however, the accommodation party signed in good faith without knowledge of fraud, he may recover after payment, though he paid with knowledge. *Beckwith v. Webber*, 78 Mich. 390.

1. *Taylor v. Higgins*, 3 East 169; *Chilton v. Whiffin*, 3 Wils. 13; *Jefferson County v. Burlington, etc., R. Co.*, 66 Iowa 385; *Groning v. Krumbhaar*, 13 La. 402; *Shannon v. Langhorn*, 9 La. Ann. 526; *Todd v. Shouse*, 14 La. Ann. 428; *Porter v. Sandidge*, 32 La. Ann. 449; *Wheeler v. Young*, 143 Mass. 143; *Henderson v. Thornton*, 37 Miss. 448, 75 Am. Dec. 70; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Suydam v. Combs*, 15 N. J. L. 133; *Planters' Bank v. Douglass*, 4 Head (Tenn.) 699.

Accommodation Party not Holder until Payment.—In *Van Duzer v. Howe*, 21 N. Y. 531, Denio, J., said: "In inquiring at what stage of a transaction respecting a negotiable bill or note it became operative as commercial paper, successive indorsements are not necessarily regarded as separate transfers of the paper, but the inquiry is, in whose hands it first became available in a sense which would enable that party to maintain an action upon it against the prior parties. One who indorses for the accommodation of a prior party does not thereby become the holder of the bill, nor can he maintain an action upon it until he has taken it up by paying the amount to a subsequent purchaser."

Attachment Issued by Accommodation Party.—An attachment issued by accommodation acceptors against the drawer of a bill before they have been obliged to pay it, is invalid, and is not rendered valid by a subsequent payment of the instrument. *Read v. Ware*, 2 La. Ann. 498; *Todd v. Shouse*, 14 La. Ann. 428; *Henderson v. Thornton*, 37 Miss. 448, 75 Am. Dec. 70. See, generally, the title ATTACHMENT.

Evidence of Payment.—The fact that the bill is in the accommodation acceptors' hands is not proof of payment, for the instrument may never have been in circulation, but the fact of possession by the acceptor, coupled with proof that the instrument has been in circulation, raises a presumption of payment, and the same presumption is raised by a receipt upon the back of the bill, proved to be in the handwriting of a person entitled to demand payment upon it. *Pfiel v. Vanbatenberg*, 2 Campb. 439. See *Landrum v. Brookshire*, 1 Stew. (Ala.) 252; *Allen v. Mathews*, 1 Stew. (Ala.) 273.

2. *Reynolds v. Doyle*, 1 M. & G. 753, 39 E. C. L. 638; *Thayer v. Daniels*, 110 Mass. 345; *Wheeler v. Young*, 143 Mass. 143.

In *Texas* it has been held that the action by an accommodation acceptor who has paid the bill is grounded upon the instrument, and that the statute of limitations applicable is that of contracts in writing, and that where the bill is payable upon demand, the time begins to run from the date of the bill. *Sublett v. McKinney*, 19 Tex. 438.

3. **Accommodation Acceptor**.—*England*.—*Reynolds v. Doyle*, 1 M. & G. 753, 39 E. C. L. 638; *Asprey v. Levy*, 16 M. & W. 851.

Indiana.—*Dickerson v. Turner*, 15 Ind. 4.
Kentucky.—*Turner v. Browder*, 5 Bush (Ky.) 216.

Louisiana.—*Soery v. Friend*, 12 La. Ann. 559; *Martin v. Muncy*, 40 La. Ann. 190; *Porter v. Sandidge*, 32 La. Ann. 449.

Massachusetts.—*Byers v. Franklin Coal Co.*, 106 Mass. 131.

New York.—*Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380; *Griffith v. Reed*, 21 Wend. (N. Y.) 502; 34 Am. Dec. 267; *Suydam v. Westfall*, 4 Hill (N. Y.) 211, 2 Den. (N. Y.) 205; *Wing v. Terry*, 5 Hill (N. Y.) 160; *Wright v. Garlinghouse*, 27 Barb. (N. Y.) 474, 26 N. Y. 539; *Pomeroy v. Tanner*, 70 N. Y. 552.

Pennsylvania.—*De Barry v. Withers*, 44 Pa. St. 356.

Tennessee.—*Nelson v. Richardson*, 4 Sneed (Tenn.) 307; *Planters' Bank v. Douglass*, 2 Head (Tenn.) 699; *Irby v. Brigham*, 9 Humph. (Tenn.) 750.

See also *Kirkman v. Benham*, 28 Ala. 501; *Tift v. Carlton*, 73 Ga. 145.

Accommodation Maker.—*Wheeler v. Young*, 143 Mass. 143.

The accommodation maker of a note, who has been obliged to pay the instrument, may recover the amount in an action for money paid, against the estate of the accommodated party after the decease of the latter. *Bliss v. Plummer* (Mich., 1894), 61 N. W. Rep. 263.

Surety Drawers.—The promise to indemnify is implied from one who signs a bill as a mere surety, to the same extent as from the drawer who is in fact the principal, and this although the relations of the parties are known to the accommodation acceptor.¹ But in *New York* it is held that where the surety drawer signs the instrument "as surety" the accommodation acceptor cannot look to him for reimbursement.²

Where the accommodation maker of a promissory note for the benefit of the payee discounts the instrument, whether the maker could or could not sustain an action against him directly upon his indorsement, the latter is in good conscience bound to pay or to provide for the payment of the debt. *Owens v. Miller*, 29 Md. 158.

Acceptor *supra* Protest.—An acceptor *supra* protest who takes up and pays the bill for the honor of the drawer may recover against the accommodation acceptor of the bill. *Ex p. Wackerbarth*, 5 Ves. Jr. 574; *In re Overend*, L. R. 6 Eq. 344 (*overruling Ex p. Lambert*, 13 Ves. Jr. 179). See *Mertens v. Winnington*, 1 Esp. 113; *Benedict v. De Groot*, 1 Abb. App. Dec. (N. Y.) 125.

But *Ex p. Lambert*, 13 Ves. Jr. 179, has been followed in some courts in this country, and it has been held that where a third party takes up an overdue bill for the honor of the drawer he releases the accommodation acceptor. *McDowell v. Cook*, 6 Smed. & M. (Miss.) 420, 45 Am. Dec. 289; *Gazzam v. Armstrong*, 3 Dana (Ky.) 554.

Acceptor's Right of Action Founded on Subrogation.—In *Sublett v. McKinney*, 19 Tex. 438, it was maintained that the accommodation acceptor's right to sue the drawer after payment is founded not upon an implied contract of indemnity, but upon subrogation to the rights of the holder whom he has paid. In delivering the opinion of the court Wheeler, J., said: "The doctrine that the plaintiff must sue upon the implied contract is, to say the least, quite technical, and is confined in its application to courts which recognize the distinctions of forms of action. Our law does not recognize these distinctions, but the plaintiff must sue upon his case; and the writing certainly constitutes a very material and essential part of that case. The mere fact of payment does not raise a promise by implication. No promise to indemnify is implied, except it be upon request, and that request in this case is in writing: so the writing is the foundation of the promise; and, discarding technical niceties, it may be said to be the ground of the action. It gives rise to the promise which, in compliance with the request, springs out of and is grounded upon it. An accommodation acceptor who has been obliged to pay the bill, though primarily liable to the payee, as between himself and the drawer, is entitled to be regarded in the light of a surety, and has equal claims upon the aid of a court of equity to enforce his rights against the maker, with any other surety who has paid the debt of his principal. It is the doctrine of the civil law, and it was the doctrine of the Court of Chancery in *England* in the time of Lord Hardwicke, that the surety is en-

titled, upon payment of the debt of the principal, not only to have the full benefit of all the collateral securities, both of an equitable and legal nature, which the creditor has taken as additional pledge for his debt, but he is entitled to be substituted, as to the very debt itself, to the creditor, and to have it assigned to him." But compare *Stark v. Alford*, 49 Tex. 277.

Production of Bill.—Where the acceptor is prepared to prove the admission, by the drawer, of the fact essential to make out his right of recovery, it seems that the production of proof of the drawing of the bill would altogether dispense with it, since the bill is not the foundation of the action, and is merely evidence. *Irby v. Brigham*, 9 Humph. (Tenn.) 750. But compare *Sublett v. McKinney*, 19 Tex. 438.

Interest.—The acceptor can recover, upon his implied contract of indemnity, only legal and not conventional interest. *Martin v. Muncy*, 40 La. Ann. 190. See *Stanley v. McElrath*, 86 Cal. 449.

Bill by Executor, Accepted for Accommodation.—A bill of exchange, drawn by G. S., with the addition of the words "executor of S. S.," is the personal contract of the drawer; and an accommodation acceptor who pays the bill has no claim against the estate. *Kirkman v. Benham*, 28 Ala. 501.

Action against Accommodation Drawer.—Where an acceptor without funds, who has paid the bill at maturity, brings an action against the drawer to recover the amount expended, it is no defense to the drawer that he drew the bill for the accommodation of the payee, and that it was understood between himself and the acceptors that the payee was to provide for the draft; but the drawer is responsible to the acceptor, as he would have been to the holder whom the acceptor has paid. *Soery v. Friend*, 12 La. Ann. 579.

1. *Dickerson v. Turner*, 15 Ind. 4; *Nelson v. Richardson*, 4 Sneed (Tenn.) 307. See *Swilley v. Lyon*, 18 Ala. 552; *Church v. Swope*, 38 Ohio St. 493. But compare *Turner v. Browder*, 5 Bush (Ky.) 216.

2. *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267; *Suydam v. Westfall*, 4 Hill (N. Y.) 211, 2 Den. (N. Y.) 205; *Wing v. Terry*, 5 Hill (N. Y.) 160; *Wright v. Garlinghouse*, 27 Barb. (N. Y.) 474, 26 N. Y. 539.

New York.—In *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267, the defendant signed as "surety," and it was held that the plaintiff, an acceptor for accommodation who had paid the bill, could not look to him for indemnity.

In *Wing v. Terry*, 5 Hill (N. Y.) 160, it was held that the rule established in *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec.

(3) *Accommodation Indorsers—Right of Action.*—The accommodation indorser who has paid an instrument is entitled to bring an action against the party accommodated, either upon the instrument or for money paid.¹

267, would apply even though there were an express promise on the part of the surety drawer to indemnify, and such express promise was held void under the statute of frauds. It seems doubtful, however, whether this case is not impliedly *overruled* by *Suydam v. Westfall*, 2 Den. (N. Y.) 205, and the interpretation given to that case in *Wright v. Garlinghouse*, 26 N. Y. 539.

In *Suydam v. Westfall*, 4 Hill (N. Y.) 211, 2 Den. (N. Y.) 205, one W. appeared upon certain bills as a drawer. In truth he signed merely as a surety for the other drawers, but his relation as surety did not appear upon the instrument, although it was known to the acceptor. W.'s name was added at the request of the acceptor, who, it appears, annexed that condition to his agreement to accept. It was held in the Supreme Court, *Suydam v. Westfall*, 4 Hill (N. Y.) 211, that the doctrine of *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267, applied, and that the acceptor could not look to W. The Court for the Correction of Errors, however, reversed the decision of the Supreme Court, and held that under the circumstances W. was responsible to the acceptor. *Suydam v. Westfall*, 2 Den. (N. Y.) 205.

The reasons stated upon pronouncing the opinion in this case are apparently broad enough to overturn *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267, although that case was not formally *overruled*.

In *Wright v. Garlinghouse*, 27 Barb. (N. Y.) 474, the Supreme Court, considering *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267, to have been *overruled* by *Suydam v. Westfall*, 2 Den. (N. Y.) 205, held that where J. had signed a bill as "surety," and the plaintiff without J.'s knowledge had signed as "surety for the above surety," the plaintiff who had reimbursed the accommodation acceptors and had been paid by them, could recover from J. the amount so paid. The Court of Appeals, however, in *Wright v. Garlinghouse*, 26 N. Y. 539, *reversed* the decision of the Supreme Court, holding that under the decision in *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267, J. was not liable to reimburse the acceptors, and consequently that he was not liable to the plaintiff. *Griffith v. Reed*, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267, was declared to be a binding precedent in similar cases, that is, apparently, where the surety drawer signs expressly as surety; and *Suydam v. Westfall*, 2 Den. (N. Y.) 205, was distinguished upon the facts of that case, as stated above.

1. *Brown v. American Wheel Co.*, 46 Fed. Rep. 733; *Stanley v. McElrath*, 86 Cal. 449; *Rodman v. Denison*, 21 Conn. 407; *Hoffman v. Butler*, 105 Ind. 372; *Lewis v. Williams*, 4 Bush (Ky.) 678; *Pinney v. McGregory*, 102 Mass. 186; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Barker v. Parker*, 10 Gray (Mass.) 339; *Bliss v. Plummer* (Mich., 1894), 61 N. W.

Rep. 263; *Fenn v. Dugdale*, 40 Mo. 63; *Flint v. Schomberg*, 1 Hilt. (N. Y.) 532; *Robertson v. Williams*, 5 Munf. (Va.) 381.

No Action in Assumpsit.—It is held in *Pennsylvania* that where an accommodation indorser has paid the instrument at maturity he must sue upon the note and not in assumpsit. *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344.

Part Payment by Accommodation Indorser.—Where the accommodation indorser makes only a part payment upon the instrument, his right of recovery is upon the implied contract of indemnity only, and not upon the instrument. *Sleigh v. Sleigh*, 5 Exch. 514.

Accommodation Indorser not Compelled to Resort to Collaterals.—An accommodation indorser who has taken security from the accommodated party for his indemnity is not compelled to resort to the security when he has paid the instrument, but may sue upon the implied promise to indemnify, unless it has been agreed that he shall look only to the security. *Cornwall v. Gould*, 4 Pick. (Mass.) 444.

See *infra*, this title, *Accommodation Party as Surety*; *Subrogation to Creditor's Securities*.

Takes Free from Counter Claim.—Where A. indorses a note for the accommodation of the maker, and is obliged to pay it at maturity to the bank which has discounted it, he succeeds to the rights of the bank although he took the instrument when overdue, and may recover of the maker, although the latter has a set-off which he might have asserted against the payee of the note in an action brought by the payee, and although the state of affairs between the maker and the payee was known to A. when he indorsed. *Barker v. Parker*, 10 Gray (Mass.) 339; *Flint v. Schomberg*, 1 Hilt. (N. Y.) 532.

Payment after Maturity, by Third Party.—G. made a promissory note payable to D.; at the request of the plaintiff, who was not a party to the instrument, O. indorsed the note and procured it to be discounted at a certain bank. Upon the failure of G. to pay the note at maturity, the plaintiff, considering himself honorably bound to O., paid and took it up from the bank. It was held that the plaintiff acquired all the rights of the bank, which was the *bona fide* holder of the note, and that he could enforce it against the defendants,—the maker and first indorser. *Benedict v. DeGroot*, 1 Abb. App. Dec. (N. Y.) 125.

Accommodation Indorsement for Partner—Recovery against Firm.—Where it appeared that C. indorsed a note made by T. H., who was a member of the firm of H. C. & Co.; that C.'s indorsement was for the accommodation of T. H.; that said note was then indorsed by F. H., another member of said firm, and lastly by the firm of H. C. & Co.; that the note was then discounted for the benefit of the firm; and that C., after the maturity and dishonor of the note, was compelled to take up the instrument,—it was held, in an action by C.

Amount of Recovery—Indemnity Merely.—As to the amount of recovery in such an action the authorities are not in accord. Some cases hold that the accommodation indorser is entitled to recover only such an amount as will indemnify him for the loss which he has suffered by reason of making payment, inasmuch as his relation to the party accommodated is as between themselves that of a surety.¹

Face Value of Instrument.—But it is held that the accommodation indorser taking up a promissory note from a *bona fide* holder succeeds to all the rights of the latter against the maker of the note, the party accommodated, and may recover the face of the note although he gave only part value for it.²

(4) **Right to Costs and Expenses—Costs.**—The right of an accommodation acceptor to be indemnified by the drawer extends not only to the amount of the bill, but also to the costs of an action brought against the acceptor thereon and defended by him.³ But costs cannot be recovered where there was evidently no defense to the bill, unless the defense was authorized by the party accommodated.⁴ And in order to recover costs in any case the acceptor must have actually loaned his credit to the other party; it is not sufficient that he was an acceptor without consideration.⁵ The maker or indorser of an accommodation note has been held entitled to costs upon the same principle.⁶

Expenses Incurred in Consequence of Default.—The accommodation party's right to indemnity entitles him to call upon the party accommodated, for all reasonable expenses legitimately incurred in consequence of the latter's default, or for his own protection.⁷

against the firm, that he was entitled to recover the amount so paid, although at the time of his indorsement he had no knowledge whether the note was to be used for partnership purposes or not; but that, had the firm not received the proceeds of the instrument, C. would not have been entitled to recover. *Cochran v. Hume*, 19 D. C. 517.

Accommodation Guarantor.—The accommodation guarantor of a note, who has been compelled to pay the same upon default of his principal, is entitled to be indemnified by the principal, and the guarantor is subrogated to all the rights of the holder to whom he makes payment. *Babcock v. Blanchard*, 86 Ill. 165.

1. *Nolte v. Creditors*, 7 Martin N. S. (La.) 9; *Dorsey v. Creditors*, 7 Martin N. S. (La.) 499; *Pace v. Robertson*, 65 N. Car. 550; *Barnett v. Cecil*, 21 Gratt. (Va.) 95; *Burton v. Slaughter*, 26 Gratt. (Va.) 914. See *Lyon v. Robertson*, 50 Ala. 74; *Bethune v. McCrary*, 8 Ga. 114; *Leeke v. Hancock*, 76 Cal. 127; *Lewis v. Williams*, 4 Bush (Ky.) 678.

Accommodation Indorser not Responsible for Misapplication by Another Indorser.—Where there are two accommodation indorsers upon a note, and one of them receives from the maker the amount of the instrument but fails to apply it, the other indorser who has been compelled to pay may recover of the maker the amount so paid by him on the judgment obtained upon the note. *Meek v. Black*, 4 Stew. & P. (Ala.) 374.

2. B indorsed A's promissory note payable to B's order for A's accommodation, and A negotiated it to C for full value before maturity. After the maturity of the instrument, B, having been informed by A that he could not pay the note, took it up,

paying C therefor half the amount thereof. It was held that B could recover the full amount of the note as payee in an action against the maker. *Fowler v. Strickland*, 107 Mass. 552. See also *Beckwith v. Webber*, 78 Mich. 390; *Flint v. Schomberg*, 1 Hilt. (N. Y.) 532. Compare, however, *Tucker v. Jenckes*, 5 Allen (Mass.) 330.

3. *Jones v. Brooke*, 4 Taunt. 464; *Stratton v. Mathews*, 3 Exch. 48. See *Bleaden v. Charles*, 5 M. & P. 14; *Connely v. Bourq*, 16 La. Ann. 108.

4. *Beech v. Jones*, 5 C. B. 696, 57 E. C. L. 696; *Roach v. Thompson*, M. & M. 487.

Implied Request.—The request to defend need not be expressed, an implied request being sufficient. *Garrard v. Cottrell*, 10 Q. B. 679, 59 E. C. L. 679.

5. *Bagnall v. Andrews*, 7 Bing. 217, 20 E. C. L. 107; *Dawson v. Morgan*, 9 B. & C. 618, 17 E. C. L. 457; *Wood's Byles on Bills* *412.

6. *Baker v. Martin*, 3 Barb. (N. Y.) 634; *Hubbly v. Brown*, 16 Johns. (N. Y.) 70.

As to when a surety can recover costs generally, see the title SURETYSHIP.

7. M. being an accommodation indorser upon the notes of T. who had died insolvent, by giving security to the holders for their payment obtained authority from them to commence actions in their names for the purpose of collecting the notes out of the estate of T., and in prosecuting the actions he incurred necessary and reasonable costs and expenses over and above the costs allowed in the judgments. In an action to marshal and distribute the assets of the estate, it was held that M. was entitled to be allowed such costs and expenses. *Thompson v. Taylor*, 72 N. Y. 32, 11 Hun (N. Y.) 274.

b. RIGHT OF ACCOMMODATION INDORSER AGAINST PRIOR PARTIES.—An accommodation indorser who has been obliged to meet the obligation at its maturity has the full rights of a *bona fide* holder for value of commercial paper, against all prior parties to the instrument other than the party accommodated.¹

4. Successive Accommodation Parties.—**a. RIGHTS AND LIABILITIES GENERALLY—Liable in Order of Names.**—It is the established rule that the parties to ordinary commercial paper negotiated for value in the regular course of business are liable to each other in succession as their names appear upon the instrument, the acceptor of a bill or the maker of a note being the principal debtor, and the indorsers being liable severally in the order in which their names are written.² The same rule applies, in the absence of special agreement, to successive accommodation parties, and a subsequent accommodation indorser who has been compelled to meet the obligation may maintain an action upon the instrument against any prior accommodation party and recover the whole amount paid,³ although he knew that the latter's

1. *Houle v. Baxter*, 3 East 177; *Beckwith v. Webber*, 78 Mich. 390.

Accommodation Party Subrogated to Rights of Holder on Payment.—In *Beckwith v. Webber*, 78 Mich. 390, the plaintiff indorsed a certificate of deposit for the accommodation of one T. in whose favor it was issued. The certificate was given in part payment for a forged check, but the plaintiff when he indorsed acted in good faith and without knowledge of the original fraud. The certificate was protested, and the plaintiff paid it with knowledge of its fraudulent inception, and brought suit against the bank which issued it. It was held that the plaintiff was entitled to recover; that upon his indorsement made in good faith he assumed the liability of an indorser of commercial paper, and that upon payment he was subrogated to all the rights of the bank cashing the paper, against the drawers and prior indorsers of the paper; that the status of the plaintiff when he made the indorsement, and the equities which then controlled and protected his rights, continued until he was fully reimbursed for the payment made, unaffected by after-acquired knowledge concerning the fraud.

Accommodation Party Taking up Note at Less than its Face Value.—An accommodation indorser who at maturity takes up a note from a holder, paying less than its face value therefor, can recover from its prior indorser only the amount which he has actually paid, and if the accommodation indorser after maturity reissues the note his transferee succeeds only to his rights. *Bethune v. McCrary*, 8 Ga. 114. See *supra*, this title, *Rights of Accommodation Party after Payment; Against Party Accommodated; Accommodation Indorsers.*

2. See the title **BILLS AND NOTES.**

Comakers, Codrawers.—The liability to each other of comakers or codrawers on bills and notes, some of whom are principals and others sureties as between themselves, applies more appropriately to the matter of suretyship as applied to bills and notes generally. See the titles **BILLS AND NOTES; SURETYSHIP.**

Irregular Indorsers.—Where several persons

write their names upon the back of a note or bill before delivery, for the accommodation of the drawer, they are to be considered as cosureties, and in the absence of special agreement are not liable to one another as prior and subsequent indorsers. *Camp v. Simmons*, 62 Ga. 73, 64 Ga. 726; *Brady v. Reynolds*, 13 Cal. 31.

3. *England.*—See *Macdonald v. Whitfield*, L. R. 8 App. Cas. 733.

Canada.—*Fisken v. Meehan*, 40 U. C. Q. B. 146; *Ianson v. Paxton*, 23 U. C. C. P. 439, reversing 22 U. C. C. P. 505.

United States.—*McCarty v. Roots*, 21 How. (U. S.) 432; *McDonald v. Magruder*, 3 Pet. (U. S.) 470, reversing 3 Cranch (C. C.) 298; *Gillespie v. Campbell*, 39 Fed. Rep. 724; *Pomeroy v. Clark*, 1 McArthur (D. C.) 606; *Mason v. Mason*, 3 Cranch (C. C.) 648, 4 Cranch (C. C.) 401; *Robinson v. Kilbreth*, 1 Bond (U. S.) 592.

Alabama.—*Moody v. Findley*, 43 Ala. 167; *Abercrombie v. Conner*, 10 Ala. 293; *Stodder v. Cardwell*, 20 Ala. 223 (*distinguishing* *Meek v. Black*, 4 Stew. & P. (Ala.) 374); *Brahan v. Ragland*, 3 Stew. (Ala.) 247.

Connecticut.—*Talcott v. Cogswell*, 3 Day (Conn.) 512; *Post v. Tradesmen's Bank*, 28 Conn. 420; *Kirschner v. Conklin*, 40 Conn. 77.

Georgia.—*Stiles v. Eastman*, 1 Ga. 205.

Indiana.—*Core v. Wilson*, 40 Ind. 204; *Armstrong v. Horshman* (Ind.), 6 Cent. L. J. 176.

Kentucky.—*Eldridge v. Duncan*, 1 B. Mon. (Ky.) 101; *Hixon v. Reed*, 2 Litt. (Ky.) 174; *Smith v. Bacon*, 3 J. J. Marsh. (Ky.) 312; *Denton v. Lytle*, 4 Bush (Ky.) 597.

Louisiana.—*Newman v. Goza*, 2 La. Ann. 642; *Stone v. Vincent*, 6 Martin N. S. (La.) 518; *Weir v. Cox*, 7 Martin N. S. (La.) 368; *Connely v. Bourg*, 16 La. Ann. 108.

Maine.—*Smith v. Morrill*, 54 Me. 48; *Coolidge v. Wiggan*, 62 Me. 568; *Wescott v. Stevens*, 85 Me. 325.

Maryland.—*Wood v. Repold*, 3 Har. & J. (Md.) 125; *Rhinehart v. Schall*, 69 Md. 352.

Massachusetts.—*Woodward v. Severance*, 7 Allen (Mass.) 340; *Howe v. Merrill*, 5 Cush. (Mass.) 80; *Church v. Barlow*, 9 Pick. (Mass.)

signature was given for accommodation merely.¹

Reason for the Rule.—The reason for the rule holding accommodation parties liable in the order of their names is, that each indorser is presumed to have indorsed upon the faith of all prior signatures, and consequently he is entitled to hold the prior parties responsible.²

b. WHEN COSURETIES — CONTRIBUTION.—It follows that successive accommodation parties, acceptor and indorser, maker and indorser, or successive indorsers, are not to be considered as cosureties, and therefore they are not entitled to contribution among themselves unless they specially agree that they are to be bound jointly and not severally,³ but where such an agree-

547; *Barker v. Parker*, 10 Gray (Mass.) 339; *Shaw v. Knox*, 98 Mass. 214; *Moore v. Cushing*, 162 Mass. 594.

Michigan.—*McGurk v. Huggett*, 56 Mich. 187.

Missouri.—*McCune v. Belt*, 45 Mo. 174.

Nevada.—*Heintzelman v. L'Amoureux*, 3 Nev. 377.

New Hampshire.—*Johnson v. Crane*, 16 N. H. 68.

New Jersey.—*Laubach v. Pursell*, 35 N. J. L. 434.

New York.—*Brown v. Mott*, 7 Johns. (N. Y.) 361; *Dygart v. Gros*, 9 Barb. (N. Y.) 506; *Kelly v. Burroughs*, 102 N. Y. 93; *Palmer v. Field*, 76 Hun (N. Y.) 229; *Watson v. Shuttleworth*, 53 Barb. (N. Y.) 357.

Pennsylvania.—*Youngs v. Ball*, 9 Watts (Pa.) 139. See *Allison v. Purdy*, 6 Pa. St. 501.

South Carolina.—*Cathcart v. Gibson*, 1 Rich. (S. Car.) 10.

Tennessee.—*Marr v. Johnson*, 9 Yerg. (Tenn.) 1.

Virginia.—*U. S. Bank v. Beirne*, 1 Gratt. (Va.) 265, 42 Am. Dec. 551; *Hogue v. Davis*, 8 Gratt. (Va.) 4; *Robertson v. Williams*, 5 Munf. (Va.) 381.

In *California* it seems that it is only when there is a special agreement between a prior and subsequent accommodation indorser that the former is liable to the latter as an actual indorser for value. *Leeke v. Hancock*, 76 Cal. 127; *Machado v. Fernandez*, 74 Cal. 362.

Indorser Bona Fide Holder after Payment.—An accommodation indorser who pays the note at its maturity to the bank where it was discounted, and gets possession of it, is a bona fide holder for value, and may recover the amount of the note from the accommodation maker thereof. *Rhinehart v. Schall*, 69 Md. 352.

Indorser may Assign.—The accommodation indorser taking up such a paper may assign it as collateral security for a pre-existing debt. *McCarty v. Roots*, 21 How. (U. S.) 432.

Indorser Receiving Part of Proceeds.—The fact that the last accommodation indorser receives part of the proceeds of the note when discounted, in payment of a debt due to him by the maker, will not change the relation of liability between the indorsers. *Youngs v. Ball*, 9 Watts (Pa.) 139; *Gillespie v. Campbell*, 39 Fed. Rep. 724.

Cannot Maintain Assumpsit.—An accommodation indorser cannot sue an accommodation maker upon an implied contract to indemnify,

since as between them there is no such contract implied. *Cornwall v. Gould*, 4 Pick. (Mass.) 444.

Accommodation Acceptor and Drawer.—An accommodation acceptor may, after taking up the bill, hold the accommodation drawer responsible, for the acceptor succeeds to the rights of the holder to whom he has made payment. *Loery v. Friend*, 12 La. Ann. 579.

I. Gillespie v. Campbell, 39 Fed. Rep. 724; *Kirschner v. Conklin*, 40 Conn. 77.

Agreement between Accommodation Indorsers that One will Protect Notes.—Where one of two accommodation indorsers upon a note indorses under an agreement by the other indorser to pay or protect the notes out of funds due and to become due to the makers of the instrument, the latter indorser, after payment, cannot bring an action against the former indorser. *Hawley v. McCredy*, 54 Cal. 388.

Where there are two indorsers upon a note for the accommodation of the drawer, and the drawer provides the second indorser with means to pay the note, but this is without the knowledge of the first indorser, the drawer and second indorser may subsequently agree to appropriate the means to another purpose. But if the second indorser has promised the first that the means provided shall be used to satisfy the note, and thereby lured him into inaction, the promise creates an equity which will support an action by the first indorser. *Price v. Trusdell*, 28 N. J. Eq. 200.

2. M'Donald v. Magruder, 3 Pet. (U. S.) 470; *Gillespie v. Campbell*, 39 Fed. Rep. 724; *Stiles v. Eastman*, 1 Ga. 205; *Newman v. Goza*, 2 La. Ann. 642; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1. And see generally the cases cited in the last two notes above.

3. United States.—*McCarty v. Roots*, 21 How. (U. S.) 432; *Law v. Stewart*, 3 Cranch (C. C.) 411; *Robinson v. Kilbreth*, 1 Bond (U. S.) 592; *Gillespie v. Campbell*, 39 Fed. Rep. 724.

Alabama.—*Sherrod v. Rhodes*, 5 Ala. 683; *Spence v. Barclay*, 8 Ala. 581; *Moody v. Findley*, 43 Ala. 167.

Georgia.—*Stiles v. Eastman*, 1 Ga. 205.

Indiana.—*Wilson v. Stanton*, 6 Blackf. (Ind.) 507; *Dunn v. Sparks*, 7 Ind. 490.

Maryland.—*Wood v. Repold*, 3 Har. & J. (Md.) 125.

Massachusetts.—*Clapp v. Rice*, 13 Gray (Mass.) 403, 74 Am. Dec. 639.

Michigan.—*McGurk v. Huggett*, 56 Mich. 187; *Farwell v. Ensign*, 66 Mich. 600.

ment exists, contribution may be enforced.¹ And the agreement may be proved by parol,² or may be evidenced by the circumstances of the case.³

Missouri.—McNeilly v. Patchin, 23 Mo. 40, 66 Am. Dec. 651; Dunn v. Wade, 23 Mo. 207; McCune v. Belt, 45 Mo. 174; Stillwell v. How, 46 Mo. 589; Hillegas v. Stephenson, 75 Mo. 118, 42 Am. Rep. 393; Druhe v. Christy, 10 Mo. App. 566.

New York.—Easterly v. Barber, 66 N. Y. 433; Kelly v. Burroughs, 102 N. Y. 93; Pfluger v. Wilshusen (C. Pl.), 17 N. Y. Supp. 516.

Oregon.—Cogswell v. Hayden, 5 Oregon 22. *South Carolina*.—Aiken v. Barkley, 2 Spears (S. Car.) 748, 42 Am. Dec. 397; State Bank v. McWillie, 4 McCord (S. Car.) 438; Simons v. Hort, 3 Brev. (S. Car.) 452.

Virginia.—Farmers' Bank v. Vanmeter, 4 Rand. (Va.) 553; U. S. Bank v. Beirne, 1 Gratt. (Va.) 234, 42 Am. Dec. 551; Hogue v. Davis, 8 Gratt. (Va.) 4.

Canada.—Ianson v. Paxton, 23 U. C. C. P. 439, reversing 22 U. C. C. P. 505.

When Accommodation Indorsers Have Each Made Part Payment to the holder at maturity, the subsequent indorser, since they are not cosureties, may recover of the prior indorser the proportion so paid by him. Johnson v. Crane, 16 N. H. 68.

Not Entitled to Contribution.—Where the first of two accommodation indorsers upon a note pays it, he is not entitled to recover a moiety from the other indorser. Aiken v. Barkley, 2 Spears (S. Car.) 748, 42 Am. Dec. 397; Druhe v. Christy, 10 Mo. App. 566.

1. Reynolds v. Wheeler, 10 C. B. N. S. 561, 100 E. C. L. 561; Phillips v. Preston, 5 How. (U. S.) 278; Murre v. Chittenden, 56 Ind. 462; Edelen v. White, 6 Bush (Ky.) 408; Weston v. Chamberlin, 7 Cush. (Mass.) 404; Farwell v. Ensign, 66 Mich. 600; Dunn v. Wade, 23 Mo. 207; Paul v. Rider, 58 N. H. 119; Easterly v. Barber, 66 N. Y. 433, 3 Thomp. & C. (N. Y.) 421; Love v. Wall, 1 Hawks (N. Car.) 313. And see additional authorities in the note following.

Burden of Proof.—The burden of proving such an agreement is upon the prior indorser who seeks the benefit of it. Hogue v. Davis, 8 Gratt. (Va.) 4.

Subsequent Agreement Requires Consideration.—An understanding that the successive indorsers are cosureties, entered into subsequently to the time of making the indorsements, especially after the liability of the parties has become fixed by judgment, is in the nature of a new contract, and in the absence of a new consideration will not support an action for contribution by a prior against a subsequent indorser. Druhe v. Christy, 10 Mo. App. 566; Pfluger v. Wilshusen (C. Pl.), 17 N. Y. Supp. 516. See Dygert v. Gros, 9 Barb. (N. Y.) 506.

Securities Given between Cosureties.—Where the indorsers of the notes of a corporation enter into an agreement to share the liability thereon as cosureties, and each executes to a trustee a mortgage as security for the provisions of his agreement, the holders of outstanding notes of the corpora-

tion are not entitled, upon the corporation becoming insolvent, to enforce the mortgages for their own benefit, inasmuch as the trust was created not for the benefit of the creditors, but solely for that of the parties to the agreement; and as it imposes no primary liability upon the latter, no liability whatever arises upon the mortgages until the company fails to pay the note at maturity and one of the parties to the agreement pays a portion of such note and another party thereto fails to pay his equal share or fails to repay the party so paying his aliquot part of any payment made. Seward v. Huntington, 94 N. Y. 104; Hampton v. Phipps, 108 U. S. 260.

2. Macdonald v. Whitfield, L. R. 8 App. Cas. 733; Phillips v. Preston, 5 How. (U. S.) 278; Rhodes v. Sherrod, 9 Ala. 63; Weston v. Chamberlin, 7 Cush. (Mass.) 404; Clapp v. Rice, 13 Gray (Mass.) 403, 74 Am. Dec. 639; Paul v. Rider, 58 N. H. 119; Easterly v. Barber, 3 Thomp. & C. (N. Y.) 421, 66 N. Y. 433; Love v. Wall, 1 Hawks (N. Car.) 313; Kelley v. Few, 18 Ohio 441; Ross v. Espy, 66 Pa. St. 481, 5 Am. Rep. 394; Aiken v. Barkley, 2 Spears (S. Car.) 748, 42 Am. Dec. 397.

In *New Jersey* a contrary doctrine prevails, and a parol agreement for a joint liability cannot be shown. Johnson v. Ramsey, 43 N. J. L. 279, 39 Am. Rep. 580, overruling Johnson v. Martinus, 9 N. J. L. 144, 17 Am. Dec. 464.

3. **Circumstances Showing Joint Liability**.—The fact that two indorsers paid in moieties a note which they had indorsed for the maker's accommodation, and that three years elapsed before the subsequent indorser brought suit to recover the money paid by him, furnishes sufficient evidence that the indorsement by both was joint, and each having paid what in that case each would be compellable to pay, no recovery can be had by the subsequent against the prior indorser. Talcott v. Cogswell, 3 Day (Conn.) 512. See Denton v. Lytle, 4 Bush (Ky.) 597.

P. made a promissory note payable to C.; F. indorsed for P.'s accommodation; C. then indorsed above F. for P.'s accommodation; at maturity C. paid the note and brought action against F. thereon. It was held that the defendant was liable as accommodation promisor and not as indorser, that the object of the parties was to become sureties for P., and that P. and C. were to be considered as cosureties, and that the plaintiff was entitled to recover of the defendant one half of the sum he had paid, deducting whatever sum he had received or could realize on certain mortgages held by him on property of P. as security for P.'s liability to him. Currier v. Fellows, 27 N. H. 366. But compare Clapp v. Rice, 13 Gray (Mass.) 403, 74 Am. Dec. 639.

The maker of a promissory note applied separately to three of his friends to indorse it for his accommodation; each promised to indorse if the others would do so; nothing was

Contrary Doctrine.—The contrary doctrine that successive indorsers for accommodation are cosureties obtains to a limited extent in *North Carolina*,¹ *Ohio*,²

said about the order of indorsement, nor was there any understanding about sharing the liability further than was implied in their understanding that the note was to have the triple indorsement to complete the transaction, and in the condition made by each that he would sign only if the others did so; the note was sent around to them to be signed severally as they happened to be found, without any design as to precedence of signatures. It was held that upon these facts the jury was justified in finding that the indorsement was joint, and that upon payment the three were liable to contribute as cosureties. *Hagerthy v. Phillips*, 83 Me. 336. See *Macdonald v. Whitfield*, L. R. 8 App. Cas. 733.

Circumstances Insufficient to Show Joint Liability.—Where the defendant had indorsed several notes for the accommodation of the same party, the fact that the names of the parties in the several notes were not always the same was held to raise no presumption that the obligation was joint and not several. *Palmer v. Field*, 76 Hun (N. Y.) 229.

The fact that A indorsed a bill for the accommodation of the drawer at the request of B, another accommodation indorser, does not make A and B joint indorsers. *Shaw v. Knox*, 98 Mass. 214.

Taking a joint judgment by several accommodation indorsers of a promissory note, from the makers, for the indemnity of the indorsers, will not have the effect of creating an implied agreement for a joint liability. *Dygart v. Gros*, 9 Barb. (N. Y.) 506.

English Rule.—In *England* it has been decided that while the liability among themselves of successive indorsers is *prima facie* that implied in the order of their names, yet where several persons become accommodation indorsers upon a note, in pursuance of an agreement between themselves that they will mutually become sureties for the maker of the note, the presumption is that they are equally liable and are entitled to contribution among themselves. *Macdonald v. Whitfield*, L. R. 8 App. Cas. 733. In this case Lord Watson, in delivering the opinion of the Privy Council, referred to the cases of *M'Donald v. Magruder*, 3 Pet. (U. S.) 470, and *Ianson v. Paxton*, 23 U. C. C. P. 439, and disapproved the rule laid down in them and generally received in the *United States*, that accommodation indorsers will be liable in the order of their names unless it has been specially stipulated that they are to be liable as cosureties. See also *Reynolds v. Wheeler*, 10 C. B. N. S. 561, 100 E. C. L. 561.

1. *North Carolina*.—*Daniel v. McRae*, 2 Hawks (N. Car.) 590, 11 Am. Dec. 787; *Smith v. Smith*, 1 Dev. Eq. (N. Car.) 173; *Gomez v. Lazarus*, 1 Dev. Eq. (N. Car.) 205; *Hatcher v. McMorine*, 3 Dev. (N. Car.) 228; *Richards v. Simms*, 1 Dev. & B. (N. Car.) 48; *Dawson v. Pettway*, 4 Dev. & B. (N. Car.) 396.

It has been laid down that indorsers upon accommodation paper for the benefit of a

third person, where there is no specific agreement between them, are to be considered as cosureties. So that where A and B became, at different times, indorsers on a note made for C, on which the latter, by discounting it at a bank, received the money, it was held that B, against whom the bank recovered, was entitled to call upon a prior indorser for only one half. *Daniel v. McRae*, 2 Hawks (N. Car.) 590, 11 Am. Dec. 787. See also *Hatcher v. McMorine*, 3 Dev. (N. Car.) 228.

In *Smith v. Smith*, 1 Dev. Eq. (N. Car.) 173, it was held that the rule of cosuretyship established in *Daniel v. McRae* did not, in the absence of special agreement, extend to a surety maker and accommodation indorser.

In *Gomez v. Lazarus*, 1 Dev. Eq. (N. Car.) 205, it was held that where there was no agreement between an accommodation acceptor and an accommodation indorser to change the order of their liability appearing on the face of the transaction, the acceptor stands prior in liability to the indorser, and cannot call upon the latter for contribution.

In *Richards v. Simms*, 1 Dev. & B. (N. Car.) 48, *Daniel v. McRae*, 2 Hawks (N. Car.) 590, 11 Am. Dec. 787, was followed; but the court declared that although, upon the principle of *stare decisis*, the judges all regarded that decision as binding, yet were the question *res integra* the court was unanimously of the opinion that the principle laid down in that case should not be sanctioned.

In *Dawson v. Pettway*, 4 Dev. & B. (N. Car.) 396, it was held that the accommodation indorser of a single bill could not be considered a cosurety with one who signs the instrument as co-obligor with the principal. In this case Gaston, J., reviewed all the preceding cases, and stated the limitations of the rule established in *Daniel v. McRae*, 2 Hawks (N. Car.) 590, 11 Am. Dec. 787, as follows: That case "lays down a rule from which, whether originally right or wrong, we cannot depart without violence to the understanding and practice of the community, which have conformed to it; but it is a rule confined to prior and subsequent indorsers upon accommodation paper. It does not establish, nor was it intended nor has it been understood to establish, the like rule as between the maker and indorser, or the acceptor and indorser, or others liable in different characters, upon such paper. And to introduce it among these would be to violate principles, to produce confusion, and to contradict the general usages of the commercial world."

2. *Ohio*.—*Douglas v. Waddle*, 1 Ohio 413, 13 Am. Dec. 630; *Williams v. Bosson*, 11 Ohio 67; *Kelley v. Few*, 18 Ohio 441; *Barnet v. Young*, 29 Ohio St. 7.

In *Douglas v. Waddle*, 1 Ohio 413, 13 Am. Dec. 630, it was held that the accommodation indorsers of promissory notes are cosureties.

In *Williams v. Bosson*, 11 Ohio 67, the court refused to extend the rule to accommo-

and possibly in *Vermont*,¹ and it is the rule established by statute in *Georgia*,² and appears to prevail, in the absence of special agreement, in *California*.³

Accommodation Indorser and Surety Maker.—The same rule as to the absence of cosuretyship where there is no express agreement as to joint liability applies between an accommodation indorser and the surety maker of a note.⁴

5. Holders of Accommodation Paper—*a. RIGHTS OF BONA FIDE HOLDERS*—(1) *General Statement.*—When accommodation paper has passed in the regular course of business into the hands of a *bona fide* holder for value, it acquires all the properties of business paper; that is, paper which, as between the original parties, is founded upon a valuable consideration.⁵

(2) *Transferee before Maturity*—(a) *Generally.*—It follows, therefore, that one who has in good faith taken an accommodation bill or note before maturity, for value and in the regular course of business, may enforce it against prior accommodation parties, whether acceptors, drawers, makers, or indorsers, although he knew when he received the instrument that it was accommodation paper.⁶

dation indorsers of a bill of exchange, holding such indorsers to be liable to each other in the order in which they became parties to the instrument.

In *Barnet v. Young*, 29 Ohio St. 7, it was held that the accommodation drawers and the accommodation acceptors of a bill for the benefit of the payee are not cosureties, nor liable to contribution. In this case the court, by Gilmore, J., after citing *Douglas v. Waddle*, 1 Ohio 413, 13 Am. Dec. 630, and *Williams v. Bosson*, 11 Ohio 62, said: "It is to be regretted that the general rules of the commercial law are not applicable alike to, both classes of business paper in this state and that a difference in the mere form of the instrument used should operate a difference in the rights and liabilities of accommodation parties thereto as between themselves. Still, the distinction is clearly established in the cases above cited, and it would be unwise now to attempt to break it down."

1. *Vermont.*—*Pitkin v. Flanagan*, 23 Vt. 160, 56 Am. Dec. 61, lays down the rule that successive accommodation indorsers are to be treated as cosureties; but this case would seem to have been *overruled* by the doctrines laid down in the subsequent cases. *Farmers', etc., Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. Dec. 345; *Briggs v. Boyd*, 37 Vt. 534.

2. *Georgia.*—*Freeman v. Cherry*, 46 Ga. 14; *Hull v. Myers*, 90 Ga. 674.

In *Stiles v. Eastman*, 1 Ga. 205, it was held that accommodation indorsers are not cosureties, nor liable to contribute. By section 2123 of the *Georgia Code of 1868* (section 2151 of the present code) it was enacted that "the form of the contract is immaterial, provided the fact of suretyship exists; hence an accommodation indorser is considered merely as a surety." And it was held in *Freeman v. Cherry*, 46 Ga. 14, followed in *Hull v. Myers*, 90 Ga. 674, that this provision was intended to change the rule of law announced in *Stiles v. Eastman*, 1 Ga. 205, and that it rendered cosureties liable to contribution.

3. *California.*—*Machado v. Fernandez*, 74 Cal. 362; *Leeke v. Hancock*, 76 Cal. 127.

4. *Core v. Wilson*, 40 Ind. 204; *Nurre v. Chittenden*, 56 Ind. 462; *Phillips v. Plato*, 42 Hun (N. Y.) 189.

5. *Connerly v. Planters', etc., Ins. Co.*, 66 Ala. 432.

6. *England.*—*Smith v. Knox*, 3 Esp. 46; *Charles v. Marsden*, 1 Taunt. 224; *Stein v. Yglesias*, 3 Dowl. 252; *Sturtevant v. Ford*, 4 M. & G. 101, 43 E. C. L. 61; *Hunter v. Wilson*, 4 Exch. 489; *Millis v. Barber*, 1 M. & W. 425; *Bank of Ireland v. Beresford*, 6 Dow. 237; *Percival v. Frampton*, 2 C. M. & R. 180; *Carruthers v. West*, 11 Q. B. 143, 63 E. C. L. 143.

United States.—*Yeaton v. Alexandria Bank*, 5 Cranch (U. S.) 49; *Violett v. Patton*, 5 Cranch (U. S.) 142; *U. S. Bank v. Weisiger*, 2 Pet. (U. S.) 331; *British N. A. Bank v. Ellis*, 6 Sawy. (U. S.) 96; *Union Bank v. Crine*, 33 Fed. Rep. 809; *Armstrong v. Scott*, 36 Fed. Rep. 63; *Molson v. Hawley*, 1 Blatchf. (U. S.) 409; *Perry v. Crammond*, 1 Wash. (U. S.) 108.

Alabama.—*Connerly v. Planters', etc., Ins. Co.*, 66 Ala. 432; *First Nat. Bank v. Dawson*, 78 Ala. 67; *Marks v. First Nat. Bank*, 79 Ala. 550.

California.—*Leeke v. Hancock*, 76 Cal. 127. *Illinois.*—*Best v. Nokomis Nat. Bank*, 76 Ill. 608; *Cronise v. Kellogg*, 20 Ill. 11; *Diversity v. Loeb*, 22 Ill. 394; *Miller v. Larned*, 103 Ill. 562; *Waite v. Kalurisky*, 22 Ill. App. 382; *Holmes v. Bemis*, 25 Ill. App. 232; *Dawson v. Tolman*, 37 Ill. App. 134; *Hodges v. Nash*, 43 Ill. App. 638.

Indiana.—*Niles v. Porter*, 6 Blackf. (Ind.) 44; *Spurgin v. McPheeters*, 42 Ind. 527; *Marsh v. Low*, 55 Ind. 271.

Iowa.—*Iowa College v. Hill*, 12 Iowa 462; *Brenner v. Gundershiemer*, 14 Iowa 82; *Washington Bank v. Krum*, 15 Iowa 53; *Jones v. Berryhill*, 25 Iowa 290; *Winters v. Home Ins. Co.*, 30 Iowa 172; *Capital City State Bank v. Des Moines Cotton-mill Co.*, 84 Iowa 561.

Kentucky.—*Clay v. Johnson*, 6 T. B. Mon. (Ky.) 649; *Smith v. Bacon*, 3 J. J. Marsh. (Ky.) 312; *Hunt v. Armstrong*, 5 B. Mon. (Ky.) 399.

Louisiana.—*Weir v. Cox*, 7 Martin N. S.

(b) **Contrast with Business Paper.**—The rule above stated as to the rights of holders of accommodation paper may be expressed in a different form as fol-

(La.) 368; *Union Bank v. Morgan*, 2 La. Ann. 418; *Matthews v. Rutherford*, 7 La. Ann. 225; *Smith v. Adams*, 14 La. Ann. 411; *Crane v. Trudeau*, 19 La. Ann. 307; *Weill v. Trosclair*, 42 La. Ann. 171.

Maine.—*Bramhall v. Beckett*, 31 Me. 205; *Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310.

Maryland.—*Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts.—*Thompson v. Shepherd*, 12 Met. (Mass.) 311, 46 Am. Dec. 676; *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297; *Cole v. Cushing*, 8 Pick. (Mass.) 48; *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146; *Tucker v. Jenckes*, 5 Allen (Mass.) 330.

Michigan.—*Thatcher v. West River Nat. Bank*, 19 Mich. 196; *Warder v. Gibbs*, 92 Mich. 29.

Minnesota.—*Robinson v. Bartlett*, 11 Minn. 410.

Mississippi.—*Meggett v. Baum*, 57 Miss. 22; *Hawkins v. Neal*, 60 Miss. 256.

Missouri.—*Macy v. Kendall*, 33 Mo. 164; *Miller v. Mellier*, 59 Mo. 388; *Faulkner v. Faulkner*, 73 Mo. 338; *Beveridge v. Richmond*, 14 Mo. App. 405.

New Hampshire.—*Newbury Bank v. Rand*, 38 N. H. 166.

New Jersey.—*Duncan v. Gilbert*, 29 N. J. L. 521.

New York.—*Benedict v. De Groot*, 1 Abb. App. Dec. (N. Y.) 125; *Corbitt v. Miller*, 43 Barb. (N. Y.) 305; *East River Bank v. Butterworth*, 45 Barb. (N. Y.) 476; *Schepp v. Carpenter*, 49 Barb. (N. Y.) 542, 51 N. Y. 602; *Gordon v. Boppe*, 55 N. Y. 665, 7 Alb. L. J. 45; *De Zeng v. Fyfe*, 1 Bosw. (N. Y.) 335; *Robbins v. Richardson*, 2 Bosw. (N. Y.) 248; *Arnson v. Abrahamson*, 16 Daly (N. Y.) 72; *Pierson v. Boyd*, 2 Duer (N. Y.) 33; *Harbeck v. Craft*, 4 Duer (N. Y.) 122; *Seneca County Bank v. Neass*, 5 Den. (N. Y.) 329, 3 N. Y. 442; *Gould v. Segee*, 5 Duer (N. Y.) 260; *Pettigrew v. Chave*, 2 Hilt. (N. Y.) 546; *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501; *Archer v. Shea*, 14 Hun (N. Y.) 493; *Peck v. Burwell* (Supreme Ct.), 1 N. Y. Supp. 33; *Garfield Nat. Bank v. Colwell*, 57 Hun (N. Y.) 169; *Higgins v. O'Donnell*, 68 Hun (N. Y.) 100; *Holland Trust Co. v. Waddell*, 75 Hun (N. Y.) 104; *Brown v. Mott*, 7 Johns. (N. Y.) 361; *Mechanics', etc., Bank v. Livingston*, 6 Misc. Rep. (N. Y. C. Pl.) 81; *Davis v. Dayton*, 7 Misc. Rep. (N. Y. C. Pl.) 488; *Western Nat. Bank v. Flanagan*, 11 Misc. Rep. (N. Y. City Ct.) 445; *Portland First Nat. Bank v. Schuyler*, 39 N. Y. Super. Ct. 440; *Grandin v. LeRoy*, 2 Paige (N. Y.) 509; *Montross v. Clark*, 2 Sandf. (N. Y.) 115; *Lathrop v. Morris*, 5 Sandf. (N. Y.) 7; *Ross v. Whitefield*, 1 Sweeny (N. Y.) 318; *Grant v. Ellicott*, 7 Wend. (N. Y.) 227.

North Carolina.—*Norfolk Nat. Bank v. Griffin*, 107 N. Car. 173; *Hatcher v. McMorine*, 3 Dev. (N. Car.) 228.

Pennsylvania.—*Bonsall v. Bauer*, 2 W. N.

C. (Pa.) 298; *Holmes v. Paul*, 3 Grant's Cas. (Pa.) 299; *White v. Hopkins*, 3 W. & S. (Pa.) 99, 37 Am. Dec. 542; *Lewis v. Hanchman*, 2 Pa. St. 416; *Lord v. Ocean Bank*, 20 Pa. St. 384, 59 Am. Dec. 728; *Work v. Kase*, 34 Pa. St. 138; *Stephens v. Monongahela Nat. Bank*, 88 Pa. St. 157, 32 Am. Rep. 438; *Carpenter v. Republic Nat. Bank*, 106 Pa. St. 170; *Mosser v. Criswell*, 150 Pa. St. 409; *Newbold v. Boraef*, 155 Pa. St. 227; *Gatzmer v. Pierce*, 6 W. N. C. (Pa.) 433.

Rhode Island.—*Wilbur v. Williams*, 16 R. I. 242.

Tennessee.—*Harris v. Bradley*, 7 Yerg. (Tenn.) 310; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1.

Texas.—*Jones v. Primm*, 6 Tex. 170.

Vermont.—*Arnold v. Sprague*, 34 Vt. 402; *Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284.

Virginia.—*Fant v. Miller*, 17 Gratt. (Va.) 48.

Wisconsin.—*Cady v. Shepard*, 12 Wis. 639. See also *supra*, this title, *Successive Accommodation Parties*.

Want of Consideration no Defense, except against Accommodated Parties.—In *British N. A. Bank v. Ellis*, 6 Sawy. (U. S.) 96, *Deady, D. J.*, said: "A party who makes or indorses a note without consideration, and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and cannot make the defense of a want of consideration against any one except the accommodated party. The note is supposed to be taken by third persons upon the credit given to him, and he is expected to pay it. * * * It would not be inconsistent with this defense if the defendants indorsed these notes without consideration for the accommodation of the makers or payee or its indorsee, and, therefore, they may be liable thereon, notwithstanding such want of consideration. The plea, to be a good defense, must meet this phase of the case by denying directly that the defendants were accommodation indorsers, or by stating facts inconsistent therewith."

Accommodation Guarantor.—A guarantor of a promissory note for the accommodation of the holder is liable, under the *Iowa* statute, to the same extent as an accommodation indorser to a third person to whom the note has in good faith, for a valuable consideration, been transferred, though at the time of taking the note such person had knowledge of the fact that such indorsement or guaranty was without consideration. *Jones v. Berryhill*, 25 Iowa 290.

Payee of Note or Bill.—The rule protects the payee of a promissory note or bill of exchange taking it with knowledge that it is accommodation paper as between prior parties. *Spurgin v. McPheeters*, 42 Ind. 527; *Israel v. Ayer*, 2 S. Car. 344.

The Fact that the Accommodation was Procured by Fraudulent Representations does not affect the rights of an innocent holder against the accommodation party. *Humphrey v. Clark*, 27 Conn. 383; *Von Windisch v. Klaus*,

lows: The accommodation party, when sued by a subsequent *bona fide* holder for value who took the paper with knowledge of the real relation to it of such accommodation party, cannot set up as a defense the want of consideration as to himself. Thus expressed, a distinction between accommodation paper and ordinary business paper becomes apparent. The general rule with regard to commercial paper is, that the defendant sued thereon may defend on the ground of want of consideration not only against immediate parties, but against remote parties, who took with knowledge that it was open to this defense.¹ But the party for whose accommodation a bill or note has been drawn, accepted, made, or indorsed, and against whom the defense of want of consideration would be complete, may pass to his transferee for value with knowledge of the nature of the instrument, a perfect title.²

(3) *Transferee after Maturity*.—(a) *Generally*.—As a general rule the transferee of overdue commercial paper takes it subject to the equities which attach to the instrument, and succeeds only to the title of his transferor. Thus, where the failure or want of consideration could have been shown as against the transferor it may be shown against his transferee who took the paper after maturity.³ How far this general rule is applicable to the rights of a transferee of overdue accommodation paper, is a matter upon which the courts are not in accord.

(b) *Purchaser from Holder for Value*.—There is no doubt that if he who holds accommodation paper at maturity can recover thereon, then his right of recovery may be thereafter transferred to another.⁴ The conflict of authority

46 Conn. 435; Beckhaus v. Commercial Nat. Bank (Pa., 1888), 12 Atl. Rep. 72; Third Nat. Bank v. McCann, 11 W. N. C. (Pa.) 480; Jones v. Primm, 6 Tex. 170.

Understanding that the Maker is not Liable.—Where, at the time the note is discounted, there is a distinct understanding between the maker and the payee, which is stated to the discounting bank, that the maker should incur no liability, he will not be held liable to the bank which has discounted the note. Such paper is not mere accommodation paper, and is, under the circumstances, unenforceable against the maker. Garfield Nat. Bank v. Colwell, 57 Hun (N. Y.) 169; Daggett v. Whiting, 35 Conn. 366. See Corcoran v. Hodges, 2 Cranch (C. C.) 452; Thompson v. Galloway, 5 W. N. C. (Pa.) 383.

But, by what seems to be the better doctrine, such a defense on the part of the acceptor of a bill, or the maker of a note, could not be proved when lying in parol, on the ground that it would violate the rule that parol evidence is inadmissible to vary the terms of a written contract. Davis v. Randall, 115 Mass. 547, 15 Am. Rep. 146; Wright v. Morse, 9 Gray (Mass.) 337, 69 Am. Dec. 291; Abrey v. Crux, L. R. 5 C. P. 37. See Cowles v. Townsend, 31 Ala. 133.

Understanding must be Known to Bank.—Where the defense of an agreement that a particular party should not be liable upon the instrument is admissible, it must appear that the holder had knowledge thereof. Thus, allegations in an answer by the maker of a promissory note, that the note was an accommodation note given to the payee at the request of the bank by which it was discounted, and that the note was given on the distinct understanding that the payee should take it up at maturity, but not stating that such un-

derstanding was had with the bank, or that the bank engaged with the maker that he should not incur any liability on the note, do not constitute a defense in an action brought by the bank against the maker. Higgins v. O'Donnell, 68 Hun (N. Y.) 100.

1. See the title **BILLS AND NOTES**.

2. This is but a corollary to the proposition for which numerous authorities have just been cited. The distinction here noted between business paper and accommodation paper will be found clearly stated in Weill v. Trosclair, 42 La. Ann. 171. See also Lord v. Ocean Bank, 20 Pa. St. 386, 59 Am. Dec. 728; Winters v. Home Ins. Co., 30 Iowa 172; British N. A. Bank v. Ellis, 6 Sawy. (U. S.) 96.

3. See the title **BILLS AND NOTES**.

4. Howell v. Crane, 12 La. Ann. 126, 68 Am. Dec. 765; Pacific Bank v. Mitchell, 9 Met. (Mass.) 297; Thompson v. Shepherd, 12 Met. (Mass.) 311, 46 Am. Dec. 676; Chester v. Dow, 41 N. Y. 279; Gould v. Segee, 5 Duer (N. Y.) 260; Hubbard v. Farrington (Supreme Ct.), 5 N. Y. Supp. 103; Wilson v. Mechanics' Sav. Bank, 45 Pa. St. 488; Riegel v. Cunningham, 9 Phila. (Pa.) 177; Cottrell v. Watkins, 89 Va. 801. See Carruthers v. West, 11 Q. B. 143, 63 E. C. L. 143; Sleigh v. Sleigh, 5 Exch. 514; Woodman v. Churchill, 52 Me. 58; Blenn v. Lyford, 70 Me. 149.

Recovery not Dependent on Accommodation Character of Paper.—In Chester v. Dow, 41 N. Y. 279, Woodruff, J., said: "If the note be not paid at maturity, the contract [with the accommodation indorser] is broken, and if he who then holds it can recover thereon, then his right of recovery may be transferred to another; and the recovery of the latter will be, not because the accommodation indorser undertook that the note should be paid to

begins where the paper not yet negotiated by the accommodated party is in his hands at maturity, and is afterwards issued by him.¹

(c) **Transferee from Accommodated Party after Maturity**—(aa) **ENGLISH RULE**—**Way Enforce Instrument**.—It is a well-established rule in *England*, and in some of the states of the Union, that a transferee of accommodation paper after maturity acquires greater rights than his transferor, and, if he is a holder for value, may enforce the paper against the accommodation party, although he received it with notice from the party accommodated.²

him, or should be paid at some date after it was due, but because a valid cause of action existing in favor of the holder at maturity has been transferred to him."

Limitation of Right.—In such cases it seems that the transferee can recover no more upon the paper than his transferor could have recovered. *Dubuque First Nat. Bank v. Werst*, 52 Iowa 684.

1. A materially different question arises when an accommodation bill once negotiated before maturity is afterwards paid and taken up by the party accommodated, and reissued by him when overdue. See *infra*, this title, *Extinguishment*.

2. *England*.—*Charles v. Marsden*, 1 Taunt. 224; *Sturtevant v. Ford*, 4 M. & G. 101, 43 E. C. L. 61; *Stein v. Yglesias*, 1 C. M. & R. 565; *In re Overend*, L. R. 6 Eq. 358; *Caruthers v. West*, 11 Q. B. 143, 63 E. C. L. 143. See *Bosanquet v. Dudman*, 1 Stark. 1, 2 E. C. L. 11; *Atwood v. Crowdie*, 1 Stark. 483, 2 E. C. L. 185; *Watkins v. Maule*, 2 Jac. & W. 244; *Lazarus v. Cowie*, 3 Q. B. 459.

Illinois.—*Miller v. Larned*, 103 Ill. 562.

Maine.—*Salem First Nat. Bank v. Grant*, 71 Me. 374. But see *Cummings v. Little*, 45 Me. 183.

Maryland.—*Renwick v. Williams*, 2 Md. 356.

New Jersey.—*Seyfert v. Edison*, 45 N. J. L. 393.

See also *Warder v. Gibbs*, 92 Mich. 29.

Growth of the Doctrine in England.—In *Tinson v. Francis*, 1 Camb. 19, a *nisi prius* case before Lord Ellenborough in 1807, it was held that the holder of accommodation paper acquired after maturity stands in the same position as the holder of overdue business paper. This decision has been, however, *overruled* by a series of authorities commencing the following year and uniform to this time. See the cases just preceding.

The first of these cases was *Charles v. Marsden*, 1 Taunt. 224, decided in 1808 by the Court of Common Pleas. In this case Sir James Mansfield, C.J., said: "He [the holder] receives the bill from the proper hand which was entitled to have possession of it, the person to whom it was payable. It is not necessarily to be inferred because it was an accommodation bill that there was an agreement not to negotiate it after it became due, but if there was such an agreement it was the defendant's own fault that the bill was outstanding, for, even supposing that the drawer had undertaken to provide for the payment when the bill became due, the acceptor had a right to require that it should be given up." In the same case Lawrence, J., said. "In the present case it is to be sup-

posed that the party persuades a friend to accept a bill for him because he cannot lend him money. Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then, what is the objection to his furnishing the money on it after it is due? for there is no reason why a bill may not be negotiated after it is due unless there was an agreement for the purpose of restraining it."

The authority of *Charles v. Marsden*, 1 Taunt. 224, was followed in *Sturtevant v. Ford*, 4 M. & G. 101, 43 E. C. L. 61, rather, apparently, upon the doctrine of *stare decisis* than from assent to the reasoning of the court therein.

In *In re Overend*, L. R. 6 Eq. 358, the authorities are cited and examined by Malins, V.C., who shows that *Charles v. Marsden*, 1 Taunt. 224, has always been followed. It is sometimes stated that the effect of the cases of *Lazarus v. Cowie*, 3 Q. B. 459, and *Jewell v. Parr*, 13 C. B. 909, 76 E. C. L. 909, 16 C. B. 684, 81 E. C. L. 684, has been to overrule the doctrine of *Charles v. Marsden*. An examination will show that these cases turn upon a different point, and in no way deprive the transferee of overdue accommodation paper of the right to recover thereon.

In *Charles v. Marsden*, 1 Taunt. 224, and the cases which follow it, the question was as to the power of an accommodation party to issue a bill or note after its maturity.

In *Lazarus v. Cowie*, 3 Q. B. 459, and *Jewell v. Parr*, 13 C. B. 909, 76 E. C. L. 909, 16 C. B. 684, 81 E. C. L. 684, the question was as to the power of such a party to reissue after maturity a bill already paid by him. See *infra*, this title, *Extinguishment*.

United States Authorities.—In *Miller v. Larned*, 103 Ill. 562, it was held that where a certain note was made by H. payable to W., for the purpose of enabling S., who was not a party to the instrument, to raise money thereon, the note was accommodation paper, and that S. having pledged the note to raise money, and paid the debt for which the instrument was pledged after the note had become due, might yet pledge the note again for a fresh debt, inasmuch as the rule that as against an assignee of business paper taken after maturity the maker may defend as successfully as against the original payee, * * * does not apply to accommodation paper.

In *Renwick v. Williams*, 2 Md. 356, it was held that one who receives an accommodation bill indorsed by the acceptor to him after maturity, but who had no knowledge of the character of the note when he received it, might recover thereon. The court, though

Agreement not to Negotiate after Maturity.—But if there be an agreement express or implied not to negotiate the instrument after maturity, the transferee after maturity cannot recover, and the accommodation character of the paper is itself evidence for the jury of such an agreement.¹

(bb) **UNITED STATES RULE—Cannot Enforce Instrument.**—The courts of many of the states of the Union have, however, taken a different view of the matter, and have assimilated overdue accommodation paper to overdue business paper. These authorities hold that by the very terms of the instrument the accommodation party lends his credit for a limited time only, that is to say, until the maturity of the instrument; that a person taking the paper after maturity takes with knowledge of this fact; therefore he takes only his transferrer's title, and with no other or greater rights than the transferrer of ordinary business paper in similar circumstances.² The reasoning of these cases seems unanswerable, and the authorities are certainly tending to the doctrine therein announced.³ But, as stated above, in some of the states the *English* doctrine

citing *Charles v. Marsden*, 1 Taunt. 224, and other English authorities, grounded its decision expressly upon the fact that the plaintiff took without notice.

In *Salem First Nat. Bank v. Grant*, 71 Me. 374, it was held that the payee of an accommodation note made for his benefit might transfer it after maturity as collateral security for a loan, and that in such a case the maker would have no defense against the holder without some equity in the maker other than the accommodation character of the paper. But in *Cummings v. Little*, 45 Me. 183, it was stated broadly that the indorsee of a dishonored accommodation note takes it subject to the equities existing between the original parties.

In *Seyfert v. Edison*, 45 N. J. L. 393, the defendant failed to prove that the note was received after maturity, but the court, by Beasley, C.J., said that the fact that the note came to the plaintiff after dishonor would not have helped the defense, since there was nothing in the terms of the agreement under which the payee took this accommodation that prohibited him from its use after the pay day of the instrument.

1. *Parr v. Jewell*, 16 C. B. 684, 81 E. C. L. 684.

Suggestions that this would be a sufficient defense are found in the opinion of Lawrence, J., in *Charles v. Marsden*, 1 Taunt. 224, and in the opinion of Erskine, J., in *Sturtevant v. Ford*, 4 M. & G. 101, 43 E. C. L. 61; *Caruthers v. West*, 11 Q. B. 143, 63 E. C. L. 143, is not in conflict. This case arose upon a demurrer to the plea, and the plea which set up an agreement not to negotiate after maturity was held bad, but only upon the ground that there was nothing therein inconsistent with the plaintiff's being a *bona fide* holder by taking after maturity from one who had become a *bona fide* holder for value before maturity.

2. *Carroll v. Peters*, 1 McGloin (La.) 88; *Chester v. Dow*, 41 N. Y. 279; *Cottrell v. Watkins*, 89 Va. 801.

3. *Alabama*.—*Glasscock v. Smith*, 25 Ala. 474; *Battle v. Weems*, 44 Ala. 105. But see *Connerly v. Planters', etc., Ins. Co.*, 66 Ala. 442.

California.—*Coghlin v. May*, 17 Cal. 515.

Louisiana.—*Carroll v. Peters*, 1 McGloin (La.) 88; *Whitwell v. Crehore*, 3 La. 540, 28 Am. Dec. 141.

Massachusetts.—*Kellogg v. Barton*, 12 Allen (Mass.) 527.

New York.—*Chester v. Dow*, 41 N. Y. 279 (overruling *Brown v. Mott*, 7 Johns. (N. Y.) 361; *Grant v. Ellicott*, 7 Wend. (N. Y.) 227; *Harrington v. Dorr*, 3 Robt. (N. Y.) 275; *East River Bank v. Butterworth*, 45 Barb. (N. Y.) 476; *Corbitt v. Miller*, 43 Barb. (N. Y.) 305); *Hubbard v. Farrington* (Supreme Ct.), 5 N. Y. Supp. 103.

Pennsylvania.—*Bower v. Hastings*, 36 Pa. St. 285; *Hoffman v. Foster*, 43 Pa. St. 137; *Long v. Rhawn*, 75 Pa. St. 128. See *Hart v. U. S. Trust Co.*, 118 Pa. St. 567; *Barnet v. Offerman*, 7 Watts (Pa.) 130.

Rhode Island.—*Bacon v. Harris*, 15 R. I. 599.

Virginia.—*Cottrell v. Watkins*, 89 Va. 801 (disapproving *Davis v. Miller*, 14 Gratt. (Va.) 1).

The same view has apparently been taken in other courts where the question has not been directly adjudicated. See *Wheeler v. Barret*, 20 Mo. 573; *Britton v. Bishop*, 11 Vt. 70.

Alabama.—In *Glasscock v. Smith*, 25 Ala. 474, it is laid down that one taking overdue accommodation paper takes it subject to defense against the accommodation party; and in *Battle v. Weems*, 44 Ala. 105, it was held that where the plaintiff acquired a bill after maturity which had been drawn for the accommodation of the acceptor, and where at the maturity thereof the acceptor was indebted to the drawer in a larger sum than the amount due on the bill, the plaintiff was not entitled to recover.

But in *Connerly v. Planters', etc., Ins. Co.*, 66 Ala. 442, the court seems inclined to revert to the *English* doctrine that, in the absence of agreement, accommodation notes may be negotiated by the party accommodated after maturity. The *English* and old *New York* cases are cited, but no allusion is made to the earlier *Alabama* authorities.

It should be noted, however, that in *Connerly v. Planters', etc., Ins. Co.*, 66 Ala. 442,

favorable to the rights of the transferee after maturity obtains.¹

b. WHO IS BONA FIDE HOLDER—(1) *General Rule*.—In general, the inquiry as to who is a *bona fide* holder of accommodation paper is to be determined by the same rule and upon the same principles as the like question in regard to a holder of ordinary business paper.² But the rights of the pledgee of accommodation paper, taken as collateral security for pre-existing debts, demand separate attention.

(2) *Pledgee*—(a) *For Antecedent Debt*.—One who takes an accommodation bill or note, given without restriction as to the manner of using it, as collateral security for a pre-existing debt, is entitled to the rights of a holder for value to the extent of the debt for which the paper was pledged, or to the face value thereof.³ This has been held even in some states wherein the

there seems to have been no evidence that the accommodation notes in suit were transferred after maturity, so that the remarks of the courts on this subject were apparently unnecessary.

1. See the subdivision immediately preceding.

2. See the title **BILLS AND NOTES**.

Total Want of Consideration.—Of course one who has received accommodation paper from the party accommodated, without any consideration, is not a holder for value and cannot recover. *Millis v. Barber*, 1 M. & W. 425.

S. procured M. to make, and J. to indorse, a promissory note for his, S.'s, accommodation; S. then delivered said note to P., who thereupon handed S. a certain sum of money in his hands belonging to S.; P. sued M. and J. upon the note. It was held that as P. had notice of the purpose for which the note was made and indorsed, and as he parted with nothing upon the faith of the transfer to him, he was not entitled to recover, and that his rights were no greater than those of one who borrows a promissory note, as against the lender. *Powers v. French*, 1 Hun (N. Y.) 582.

Right of Accommodation Party to become Holder.—Undoubtedly an accommodation indorser may become a holder of the instrument by taking it for value from a prior holder before maturity or even after maturity. *Sleigh v. Sleigh*, 5 Exch. 514; *Piney v. McGregory*, 102 Mass. 186; *Fowler v. Strickland*, 107 Mass. 552. See *supra*, this title, *Rights of Accommodation Party after Payment; Accommodation Indorsers; Successive Accommodation Parties*.

It has been doubted whether the accommodation maker of a note discounting it for the payee, the party accommodated, becomes entitled to an action thereon against the payee as his indorsee; but in the absence of fraud he may discount the instrument, and the payee will, in equity, be bound to repay him. *Owens v. Miller*, 29 Md. 144.

Whether Money Advanced upon a Note, a Question for the Jury.—Where a sum is advanced as a balance after the settlement of a prior debt upon several notes, one of which is an accommodation note,—given not to pay an antecedent debt, but to raise money,—it is a proper question for the jury whether any part of the money so advanced, and if so, how much, was advanced upon the accom-

modation note. *Hubbard v. Farrington* (Supreme Ct.), 5 N. Y. Supp. 103.

Facts Sufficient to Show Plaintiff not a Bona Fide Holder.—Where it appeared that the cashier of the plaintiff's bank discounted two bills of exchange for the drawer upon the faith of an acceptance by the defendant; that at the time of making the discount the cashier had notice that the defendant's acceptance was for the accommodation of the drawer, and that the drawer had become insolvent since the date of the acceptance; that at the time of the discount, although the drawer was indebted to the bank in an amount exceeding the value of the notes discounted, he received a large consideration from the bank for the transfer of the paper to it; that there was no proof of any authority given to the cashier to discount paper; and that his act in discounting the notes in suit was not ratified by the directors of the bank until after the defendant had informed the cashier of the equities between himself and the drawer,—it was held that the plaintiff was not a *bona fide* holder and could not recover against the defendant. *Boggs v. Lancaster Bank*, 7 W. & S. (Pa.) 331.

3. *United States*.—*Pugh v. Durfee*, 1 Blatchf. (U. S.) 412.

Connecticut.—*Bridgeport City Bank v. Welch*, 29 Conn. 475; *Dawson v. Goodyear*, 43 Conn. 548.

Illinois.—*Miller v. Larned*, 103 Ill. 562; *Holmes v. Bemis*, 25 Ill. App. 232; *Buchanan v. International Bank*, 78 Ill. 500.

Indiana.—*Ransom v. Turley*, 50 Ind. 273; *Fetters v. Muncie Nat. Bank*, 34 Ind. 251, 7 Am. Rep. 225.

Iowa.—*Washington Bank v. Krum*, 15 Iowa 53.

Louisiana.—*Matthews v. Rutherford*, 7 La. Ann. 225.

Maryland.—*Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts.—*Fisher v. Fisher*, 98 Mass. 303.

Mississippi.—*Fellows v. Harris*, 12 Smed. & M. (Miss.) 462.

New Jersey.—*Duncan v. Gilbert*, 29 N. J. L. 521; *Jackson v. Jersey City First Nat. Bank*, 42 N. J. L. 177.

New York.—*Grocers' Bank v. Penfield*, 69 N. Y. 502, 7 Hun (N. Y.) 279; *Freund v. Importers', etc., Nat. Bank*, 76 N. Y. 352, 12 Hun (N. Y.) 537; *Continental Nat. Bank v.*

mere transfer of negotiable paper as collateral security for an antecedent debt does not render the transferee a holder for value.¹ But other states wherein this doctrine prevails do not regard such a pledgee of accommodation paper as an exception to the general rule.²

(b) *Of Diverted Paper.*—Even those courts which regard the pledgee of accommodation paper as an exception, hold that if the paper has been diverted from its intended purpose and pledged for an antecedent debt, the pledgee is not to be considered as entitled to the privileges of a holder for value, unless some new consideration has passed.³

Townsend, 87 N. Y. 8; Inglis v. Kennedy, 6 Abb. Pr. (N. Y. C. Pl.) 32; East River Bank v. Butterworth, 45 Barb. (N. Y.) 476; Cole v. Saulpaugh, 48 Barb. (N. Y.) 104; De Zeng v. Fyfe, 1 Bosw. (N. Y.) 335; Robbins v. Richardson, 2 Bosw. (N. Y.) 248; Gould v. Segee, 5 Duer (N. Y.) 260; Mechanics', etc., Bank v. Livingston, 6 Misc. Rep. (N. Y. C. Pl.) 81; Weaver v. Farrington, 7 Misc. Rep. (N. Y. C. Pl.) 405; Grandin v. Le Roy, 2 Paige (N. Y.) 509; Harrington v. Dorr, 3 Robt. (N. Y.) 275; Montross v. Clark, 2 Sandf. (N. Y.) 115; Lathrop v. Morris, 5 Sandf. (N. Y.) 7; Rutland Bank v. Buck, 5 Wend. (N. Y.) 66; Grant v. Ellicott, 7 Wend. (N. Y.) 227. See Schepp v. Carpenter, 51 N. Y. 602, 49 Barb. (N. Y.) 542; Agawam Bank v. Strever, 18 N. Y. 502.

Ohio.—Pitts v. Foglesong, 37 Ohio St. 676, 41 Am. Rep. 540.

Pennsylvania.—Twining v. Hunt, 7 W. N. C. (Pa.) 223; Appleton v. Donaldson, 3 Pa. St. 381; Lord v. Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Work v. Kase, 34 Pa. St. 138; Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438; Hart v. U. S. Trust Co., 118 Pa. St. 565; Beckhaus v. Commercial Nat. Bank (Pa., 1888), 12 Atl. Rep. 72; National Union Bank v. Todd, 132 Pa. St. 312.

Tennessee.—Kimbrow v. Lytle, 10 Yerg. (Tenn.) 417, 31 Am. Dec. 585.

Washington.—Peters v. Gay, 9 Wash. 383. See *infra*, this title, *Amount of Recovery against Accommodation Acceptor or Maker.*

Payment of Antecedent Debt.—One who takes an accommodation bill or note, not as collateral security for but in payment of an antecedent debt, is of course a holder for value.

England.—Cook v. Long, 1 C. & M. 510, 41 E. C. L. 279.

United States.—Columbus City Bank v. Beach, 1 Blatchf. (U. S.) 438; Jewett v. Hone, 1 Woods (U. S.) 530; Varum v. Belamy, 4 McLean (U. S.) 87.

Alabama.—Marks v. First Nat. Bank, 79 Ala. 550.

Indiana.—Fetters v. Muncie Nat. Bank, 34 Ind. 251, 7 Am. Rep. 225.

Kentucky.—Frank v. Quast, 86 Ky. 649.

Massachusetts.—Walker v. Sherman, 11 Met. (Mass.) 170; Pierce v. Kittredge, 115 Mass. 374.

New York.—Fish v. Jacobsohn, 2 Abb. App. Dec. (N. Y.) 132; Seneca County Bank v. Neass, 5 Den. (N. Y.) 329, 3 N. Y. 442; Deems v. Crook, 1 Edm. Sel. Cas. (N. Y.) 95; Wheeler v. Allen, 59 How. Pr. (N. Y. C. Pl.) 118;

Mohawk Bank v. Corey, 1 Hill (N. Y.) 513; Boyd v. Cummings, 17 N. Y. 101; Schepp v. Carpenter, 51 N. Y. 602; Graf v. Smith (Supreme Ct.), 16 N. Y. Supp. 892.

Vermont.—Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 129.

New Hampshire.—It seems that the same doctrine prevails in *New Hampshire*. See Clement v. Leverett, 12 N. H. 317; Tucker v. New Hampshire Sav. Bank, 58 N. H. 83, 42 Am. Rep. 580; Paige v. Chapman, 58 N. H. 333.

1. See the cases cited in the last note, *supra*.

Reference is made to the article *BILLS AND NOTES* for a discussion of the position of the different courts upon the question how far an antecedent debt is a valuable consideration for the transfer of commercial paper.

2. Marks v. First Nat. Bank, 79 Ala. 550; McKenzie v. Montgomery Branch Bank, 28 Ala. 606, 65 Am. Dec. 369; Bramhall v. Beckett, 31 Me. 205; Nutter v. Stover, 48 Me. 163. See Thompson v. Poston, 1 Duv. (Ky.) 389.

Alabama.—A pledgee of a bill or note is not to be considered a purchaser for value in this state, although time is granted. Reid v. Mobile Bank, 70 Ala. 199; Miller v. Boykin, 70 Ala. 469. But see Rutledge v. Townsend, 38 Ala. 706.

3. Grocers' Bank v. Penfield, 69 N. Y. 502; Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Ward v. Howard, 88 N. Y. 74; U. S. Nat. Bank v. Ewing, 131 N. Y. 506; New York Bank v. Vanderhorst, 32 N. Y. 553; Moore v. Ryder, 65 N. Y. 438; Beers v. Culver, 1 Hill (N. Y.) 589; Holbrook v. Mix, 1 E. D. Smith (N. Y.) 154; State Nat. Bank v. Coykendall, 58 Hun (N. Y.) 205; Yale v. Dart (C. Pl.), 19 N. Y. Supp. 389; Royer v. Keystone Nat. Bank, 83 Pa. St. 248; Carpenter v. Republic Nat. Bank, 106 Pa. St. 170; Altoona Second Nat. Bank v. Dunn, 151 Pa. St. 228.

What Sufficient Consideration.—The surrender of other collateral security is a sufficient consideration. Park Bank v. Watson, 42 N. Y. 490. See Depeau v. Waddington, 6 Whart. (Pa.) 220, 36 Am. Dec. 216; Goodwin v. Conklin, 85 N. Y. 21. So also is the discontinuance of valid legal proceedings. Boyd v. Cummings, 17 N. Y. 101.

Misapplication.—If one not a party to the bill or note is intrusted with it, indorsed in blank, for the purpose of getting it discounted for the benefit of the maker and payee, and fraudulently appropriates it to his own use by pledging it as security for an existing debt, the maker may set up the want of con-

c. WHEN CHARGEABLE WITH NOTICE OF ACCOMMODATION CHARACTER OF INSTRUMENT—How Far Notice of Accommodation Character Affects Rights.—It has been shown that in general the notice of the fact that the instrument is accommodation paper, or that some of the parties thereto are accommodation parties, does not affect the right of the holder to recover thereon,¹ but this is not always the case. Thus, knowledge of its true character, according to the better doctrine, limits the rights of a transferee after maturity of accommodation paper, and such knowledge may be decisive of the rights to recover upon accommodation paper of a partnership or corporation, or accommodation paper made or indorsed by an agent, or fraudulently put in circulation or diverted from its intended purpose; or in some jurisdictions it may obligate the holder to treat the accommodation party in certain respects as a surety.²

Presumptive Notice.—It is of importance therefore to note that there are certain facts from which notice that the instrument is an accommodation bill or note will be implied.

Indorsed Note in Hands of Maker.—Thus the fact that a promissory note is put into circulation by the maker is notice to the transferee that whatever indorsements were upon the instrument were made for the maker's benefit and not in the ordinary course of business, for in the ordinary course of business the instrument would have passed from the maker to the payee or indorser.³

sideration and the fraudulent diversion as a defense against the holder. *Royer v. Keystone Nat. Bank*, 83 Pa. St. 248; *Carpenter v. Republic Nat. Bank*, 106 Pa. St. 170. See *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142.

Paper Procured by Fraudulent Representations.—The defense that the paper was procured from the maker by fraudulent representations may be set up to defeat a recovery by the pledgee of accommodation paper. *Cummings v. Boyd*, 83 Pa. St. 372; *Maynard v. Philadelphia Sixth Nat. Bank*, 98 Pa. St. 250. See *Tinsdale v. Murray*, 9 Daly (N. Y.) 446; *Hart v. Palmer*, 12 Wend. (N. Y.) 523.

Diverted Paper in Payment of Antecedent Debt.—The rule stated in the text applies in *New York*, even when diverted paper is received in payment of an antecedent debt. *Moore v. Ryder*, 65 N. Y. 438. In this case Earl, C., said: "In case the holder of diverted paper has not parted with any value, or incurred any binding obligation, or changed his position to his detriment on the faith thereof, he cannot recover thereon against the party defrauded or wronged."

1. See *supra*, this title, *Holders of Accommodation Paper*.

2. See this title, *passim*.

3. *United States*.—*West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557; *Lemoine v. North America Bank*, 3 Dill. (U. S.) 44; *National Park Bank v. Remsen*, 43 Fed. Rep. 226.

Alabama.—*Wallace v. Mobile Branch Bank*, 1 Ala. 565; *Saltmarsh v. Planters', etc., Bank*, 14 Ala. 668; *Noble v. Walker*, 32 Ala. 456.

California.—*Hendrie v. Berkowitz*, 37 Cal. 113, 99 Am. Dec. 251.

Connecticut.—*Riddle v. Stevens*, 32 Conn. 387, 87 Am. Dec. 181; *Etna Nat. Bank v. Charter Oak L. Ins. Co.*, 50 Conn. 167.

Louisiana.—*Crane v. Trudeau*, 19 La. Ann. 307.

Michigan.—*Mechanics' Bank v. Barnes*, 86 Mich. 632.

Missouri.—*Marshall v. Cabanne*, 40 Mo. App. 38.

New Jersey.—*Mecutchen v. Kennady*, 27 N. J. L. 230.

New York.—*Fielden v. Lahens*, 9 Bosw. (N. Y.) 436, 2 Abb. App. Dec. (N. Y.) 111; *Powell v. Waters*, 8 Cow. (N. Y.) 688; *Austin v. Vandermark*, 4 Hill (N. Y.) 259; *National Park Bank v. German-American Warehousing Co.*, 116 N. Y. 281; *Brown v. Taber*, 5 Wend. (N. Y.) 566; *Stall v. Catskill Bank*, 18 Wend. (N. Y.) 466.

Ohio.—*Erwin v. Shaffer*, 9 Ohio St. 43.

Pennsylvania.—*Parke v. Smith*, 4 W. & S. (Pa.) 287; *Tanner v. Hall*, 1 Pa. St. 417; *Eckert v. Cameron*, 43 Pa. St. 120; *Mullison's Estate*, 68 Pa. St. 212.

Tennessee.—*Overton v. Hardin*, 6 Coldw. (Tenn.) 375.

But compare with the foregoing cases *Ex p. Estabrook*, 2 Lowell (U. S.) 547; *Wait v. Thayer*, 118 Mass. 473; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Redlon v. Churchill*, 73 Me. 146, 40 Am. Rep. 345.

Successive Indorsers.—The same rule is applicable to successive indorsers, and if a note is presented for discount for his own benefit by any person whose name appears thereon previous to the last indorsement, the transaction on its face imports that the indorsement was for accommodation. *Mauldin v. Mobile Branch Bank*, 2 Ala. 502; *Riverside Bank v. Totten* (Supreme Ct.), 33 N. Y. St. Rep. 845; *Moorehead v. Gilmore*, 77 Pa. St. 118, 18 Am. Rep. 435. See *Perry v. Friend*, 57 Ark. 437; *Atlantic State Bank v. Savery*, 18 Hun (N. Y.) 36. But compare *Atlas Nat. Bank v. Savery*, 127 Mass. 75.

Note on Firm by Partner.—It has been held that the fact that a note made by a partner in favor of his firm is, in the hands of the maker, indorsed by the firm, is not conclusive of the accommodation character of the in-

Bill Negotiated by Acceptor or Drawer.—Upon the same principle a bill of exchange being in the hands of the acceptor is evidence to charge the transferee with notice that it was drawn or indorsed for the accommodation of the acceptor.¹ And the fact that a bill accepted or indorsed is put in circulation by the drawer is notice of its accommodation character.²

Irregular Indorsement.—Where one who indorses a note above the payee is liable as an indorser, one who receives the instrument so indorsed from the payee is chargeable with notice that the irregular indorsement was for the accommodation of the maker.³

d. BURDEN OF PROOF—General Rule.—The general rule in regard to commercial paper is, that when the plaintiff has shown a *prima facie* title he is presumed to be a *bona fide* holder for value, and the burden is upon the defendant to show the contrary.⁴

Not Shifted by Evidence of Accommodation.—The burden of proof is in no way changed when the defendant has shown that the paper sued upon is accommodation paper, and therefore without consideration as between the original parties.⁵

dorsement, but the question of the character of the paper is for the jury. *Wait v. Thayer*, 118 Mass. 473. See *Redlon v. Churchill*, 73 Me. 146.

Note Given by Maker for a Third Person.—Where an indorsed note is given by one of the makers, not for his own benefit, but to take up the note of third parties, the inference does not arise that it is accommodation paper, but the natural presumption is that such maker acts as an agent for the real debtors for whose benefit the old note is to be taken up. *Austin v. Vandermark*, 4 Hill (N. Y.) 259.

1. *Saltmarsh v. Planters', etc., Bank*, 14 Ala. 668; *Carlisle v. Hill*, 16 Ala. 398; *McKenzie v. Montgomery Branch Bank*, 28 Ala. 606, 65 Am. Dec. 369; *Cooper v. McClurkan*, 22 Pa. St. 80.

2. *Noble v. Walker*, 32 Ala. 456; *Bloom v. Helm*, 53 Miss. 21; *Columbus Ins., etc., Co. v. First Nat. Bank (Miss., 1894)*, 15 So. Rep. 138; *Vergennes Bank v. Cameron*, 7 Barb. (N. Y.) 143.

Bill Payable at the House of the Drawer.—The fact that a bill of exchange is made payable at the house of the drawer has been held to charge the holder with notice that it is accommodation paper, since why should the drawer "make the bill payable at his own house, unless he was to provide for it at maturity?" *Sharp v. Bailey*, 9 B. & C. 44, 17 E. C. L. 329.

Possession by One both Drawer and Payee.—Where the same person is both the drawer and the payee of a bill of exchange, possession by him of the instrument after acceptance is no notice that the bill is accommodation paper, since it is in the natural course of business that as payee he should hold the bill. *Columbus Ins., etc., Co. v. First Nat. Bank (Miss., 1894)*, 15 So. Rep. 138. See also *Wait v. Thayer*, 118 Mass. 473; *Chemical Nat. Bank v. Colwell*, 16 Daly (N. Y.) 29.

3. *Commonwealth Nat. Bank v. Law*, 127 Mass. 72. See *Moynahan v. Hanaford*, 42 Mich. 329; *Bowman v. Cecil Bank*, 3 Grant's Cas. (Pa.) 33.

California.—In *California* it has been held

that such an indorsement is *prima facie* for the accommodation of the payee, but it may be shown that the indorser's intention was to become surety or guarantor for the maker. *Clarke v. Smith*, 2 Cal. 605. See *Brady v. Reynolds*, 13 Cal. 31.

As to irregular indorsements generally, see the title **BILLS AND NOTES**.

4. See the title **BILLS AND NOTES**.

5. *Millis v. Barber*, 1 M. & W. 425; *Percival v. Frampton*, 2 C. M. & P. 180; *Whittaker v. Edmunds*, 1 M. & Rob. 366, 1 Ad. & El. 638, 28 E. C. L. 171; *Jacob v. Hungate*, 1 M. & Rob. 445; *Heath v. Sansom*, 2 B. & Ad. 291, 22 E. C. L. 78; dissenting opinion of Parke, J., *Capital City State Bank v. Des Moines Cotton-mill Co.*, 84 Iowa 561; *Duncan v. Gilbert*, 29 N. J. L. 521; *Ross v. Bedell*, 5 Duer (N. Y.) 462; *Harger v. Worrall*, 69 N. Y. 370, 25 Am. Rep. 206; *Knight v. Pugh*, 4 W. & S. (Pa.) 445, 39 Am. Dec. 99.

In *Millis v. Barber*, 1 M. & W. 425, Lord Abinger said: "There is a substantial distinction [between bills given for accommodation only, and cases of fraud], inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill is no evidence of the want of consideration in the holder. If the defendant says: 'I lent my name to the drawer for the purpose of his raising money upon the bill,' the probability is that money was obtained upon the bill. Unless, therefore, the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, so that it has been clandestinely taken away, or has been lost or stolen (in which cases the holder must show that he gave value for it), the *onus probandi* is cast upon the defendant."

Former English Rule.—Formerly the rule was otherwise, and proof by the defendant that a bill was originally without consideration threw the onus upon the plaintiff to prove

Paper Fraudulently Circulated.—But when the defendant has shown, in addition, that the instrument was fraudulently put into circulation, the burden is shifted, and the holder must show that he received the instrument for a good consideration and without notice.¹

Paper Diverted.—According to the better authority, simple diversion does not shift the burden of proof to the holder,² but the rule seems to be otherwise in *New York*.³

c. AMOUNT OF RECOVERY AGAINST ACCOMMODATION ACCEPTOR OR MAKER.—The person paying full value for accommodation paper may recover the full value thereof of the accommodation maker or acceptor, although he took it with knowledge of its true character.⁴ But the courts are not in agreement as to the rights of a holder who has taken paper at less than its face value, or who has upon the security of the paper advanced a sum less than its face value.

Pledges.—It is well settled that where the holder of accommodation paper has received it as security for a debt he can recover thereon in an action against the accommodation maker or acceptor only the amount of the debt for which the instrument was pledged, unless he is accountable to some other person for the surplus.⁵

himself a holder for value. *Thomas v. Newton*, 2 C. & P. 606, 12 E. C. L. 285; *Heath v. Sansom*, 2 B. & Ad. 291, 22 E. C. L. 78; *Bassett v. Dodgin*, 10 Bing. 40, 25 E. C. L. 21. See especially the remarks of Lord Abinger, C.B., in *Simpson v. Clarke*, 2 C. M. & R. 342.

The Holder of a Non-negotiable Note, accepted for the payee's accommodation, must show that he received it for a valuable consideration. *Lee v. Swift*, 1 Den. (N. Y.) 565.

1. *Whitaker v. Edmunds*, 1 Ad. & El. 638, 28 E. C. L. 171; *Duncan v. Scott*, 1 Campb. 100; *Heath v. Sansom*, 2 B. & Ad. 291, 22 E. C. L. 78; *Wallace v. Mobile Branch Bank*, 1 Ala. 565; *Merchants' Exch. Nat. Bank v. New Brunswick Sav. Inst.*, 33 N. J. L. 170; *Wardell v. Howell*, 9 Wend. (N. Y.) 170; *Ives v. Jacobs*, 21 Abb. N. Cas. (N. Y. City Ct.) 151; *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142. See *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191; *Gray v. Kentucky Bank*, 29 Pa. St. 365.

2. *Jacob v. Hungate*, 1 M. & Rob. 445; *First Nat. Bank v. Dawson*, 78 Ala. 67.

Notice of Conditions.—The defendant must show that the holder had knowledge of the restrictions imposed upon paper which has been diverted from its intended purpose. *First Nat. Bank v. Dawson*, 78 Ala. 67; *Stoddard v. Kimball*, 4 Cush. (Mass.) 604; *Lincoln v. Stevens*, 7 Met. (Mass.) 529; *Chicopee Bank v. Chapin*, 8 Met. (Mass.) 40.

3. *Farmers', etc., Nat. Bank v. Noxon*, 45 N. Y. 762; *Schepp v. Carpenter*, 51 N. Y. 602; *Ives v. Jacobs*, 21 Abb. N. Cas. (N. Y. City Ct.) 151; *Wardell v. Howell*, 9 Wend. (N. Y.) 170; *Ross v. Bedell*, 5 Duer (N. Y.) 462; *Nickerson v. Ruger*, 76 N. Y. 279; *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154; *Hubbard v. Farrington* (Supreme Ct.), 22 N. Y. St. Rep. 511. But see *Tradesmen's Nat. Bank v. Ertell* (Supreme Ct.), 31 N. Y. St. Rep. 256; *Mechanics', etc., Bank v. Crow*, 60 N. Y. 85.

4. See *supra*, this title, *Holders of Accommodation Paper*!

5. *England*.—*Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbert*, 2 Stark. 304, 3 E. C. L. 419; *Nash v. Brown* (1817), 2 Ames Cas. Bills and Notes 20; *Simpson v. Clarke*, 2 C. M. & R. 343.

United States.—*Ex p. Kelty*, 1 Lowell (U. S.) 394.

Georgia.—See *Hatcher v. Independence Nat. Bank*, 79 Ga. 547.

Iowa.—*Dubuque First Nat. Bank v. Werst*, 52 Iowa 684.

Louisiana.—*Matthews v. Rutherford*, 7 La. Ann. 225; *Citizens' Bank v. Payne*, 18 La. Ann. 222, 89 Am. Dec. 650.

Massachusetts.—*Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Chicopee Bank v. Chapin*, 8 Met. (Mass.) 40; *Hilton v. Smith*, 5 Gray (Mass.) 400; *Fisher v. Fisher*, 98 Mass. 303.

New Jersey.—*Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175; *Duncan v. Gilbert*, 29 N. J. L. 521.

New York.—*Williams v. Smith*, 2 Hill (N. Y.) 301; *East River Bank v. Butterworth*, 45 Barb. (N. Y.) 476; *Brown v. Mott*, 7 Johns. (N. Y.) 361; *Blydenburgh v. Thayer*, 1 Abb. App. Dec. (N. Y.) 156.

Ohio.—*Handy v. Sibley*, 46 Ohio St. 9.

Rhode Island.—*Atlas Bank v. Doyle*, 9 R. I. 76, 98 Am. Dec. 368.

See also *In re Gomersall*, 1 Ch. Div. 137; *Cromwell v. Sac County*, 96 U. S. 60; *Valette v. Mason*, 1 Ind. 288; *Lay v. Wissman*, 36 Iowa 305; *Bange v. Flint*, 25 Wis. 544.

Where Part Payment of the Debt has been Made.—When part payment of the debt for which the accommodation paper has been pledged has been received by the pledgee he can recover against the accommodation party the only balance unpaid. *Rutledge v. Townsend*, 38 Ala. 706.

Bankruptcy.—When a bill of exchange accepted for the accommodation of the drawer is deposited by him as security for a less sum the holder is entitled to prove for the full

Transferees of Entire Interest.—The rule that the holder's right of recovery against accommodation makers or acceptors is limited to the amount of the consideration which he has given for the instrument is applied in some states to the case of transferees who have purchased the entire interest in the paper for a valuable consideration.¹ But by the better doctrine such a purchaser of accommodation paper is entitled to recover the face value of the instrument, although he gave a less sum therefor.²

amount of the bill, although he cannot recover dividends in excess of the debt due to him by the drawer. *Ex p. Bloxham*, 6 Ves. Jr. 600 (reversing 5 Ves. Jr. 448); *Ex p. Newton*, 16 Ch. Div. 330.

Explanation of the Rule.—In *Stoddard v. Kimball*, 6 Cush. (Mass.) 469, Shaw, C. J., said: "In general, the holder of an indorsed note will be entitled to recover the whole amount of the face of the note, because the presumption of fact, in the absence of counter proof, is, that he gave the full value for it, or that he took it from some other holder for value, to collect the amount, receive a certain part to his own use, and account to the party from whom he took it for the surplus. Having taken it to secure a pre-existing debt, of a less amount, he is a holder for value in his own right, only to the amount of the debt due him. If therefore it appears in proof that the plaintiff is not accountable to any third person for any surplus, then there is no reason why he should recover any more than the balance of the debt, for which he is a *bona fide* holder for value. Here it appears that the plaintiff received this note of the maker, for whose accommodation the defendant indorsed it. It being obvious that the plaintiff can recover nothing as trustee for the party from whom he received it, he is liable over to nobody for the surplus, and therefore can have judgment only for the amount due to himself, for his own use and in his own right, which is so much of the note as may be necessary to satisfy the balance of the debt, for the security of which he received it."

1. *Cook v. Clark*, 4 E. D. Smith (N. Y.) 213; *Holeman v. Hobson*, 8 Humph. (Tenn.) 127. See *Huff v. Wagner*, 63 Barb. (N. Y.) 215; *Holcomb v. Wyckoff*, 35 N. J. L. 35, 10 Am. Rep. 219; *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175; *Petty v. Hannum*, 2 Humph. (Tenn.) 102, 36 Am. Dec. 303.

Rule Applies in Favor of One Indorsing to Accommodate the Payee.—Where a note, valid in its inception and taken by the payee for full value, is indorsed by him, and is subsequently indorsed by a third person for the accommodation of the payee (the holder at that time) without any consideration, and is then sold to the plaintiff at a discount greater than the legal rate, the plaintiff can recover from such accommodation indorser only the amount paid by him for the note, with interest and fees of protest. *Cook v. Clark*, 4 E. D. Smith (N. Y.) 213. But see *Ingalls v. Lee*, 9 Barb. (N. Y.) 647.

Paper Purchased as Business Paper. in reliance on the representation of the parties to the instrument, entitles the purchaser to re-

cover the face value without reference to the consideration paid. *Burrall v. De Groot*, 5 Duer (N. Y.) 379.

Paper Fraudulently Diverted.—Where one has received accommodation paper fraudulently diverted, but without notice, he is limited in his recovery to the value which he has given for the instrument. *Nickerson v. Ruger*, 76 N. Y. 284; *Ives v. Jacobs*, 21 Abb. N. Cas. (N. Y. City Ct.) 151; *Beckhaus v. Commercial Nat. Bank* (Pa., 1888), 12 Atl. Rep. 72. See *Huff v. Wagner*, 63 Barb. (N. Y.) 215.

Huff v. Wagner, 63 Barb. (N. Y.) 215, was a case of notes obtained by false and fraudulent representations, but the court throughout proceeds upon the assumption that the rule applicable in such a case is the same as that applicable in the case of accommodation paper. To establish this, however, the *English* cases cited in the last note *supra* are relied upon without noticing that in those cases the notes sued upon were, in fact, pledged.

2. *Fowler v. Strickland*, 107 Mass. 552; *Moore v. Baird*, 30 Pa. St. 138; *Gaul v. Willis*, 26 Pa. St. 259; *Burpee v. Smoot*, 4 W. N. C. (Pa.) 186. See *Tucker v. Jenckes*, 5 Allen (Mass.) 330; *In re Gomersall*, 1 Ch. Div. 137; *Hunt v. Armstrong*, 5 B. Mon. (Ky.) 399; *Keim v. Penn Tp. Bank*, 1 Pa. St. 36.

Reason of the Rule.—The ground for this view of the law was thus explained by Strong, J., in *Moore v. Baird*, 30 Pa. St. 138: "He who lends his own promissory note for the accommodation of another lends his credit without any restriction as to the manner of its use. As between the maker and the payee there is an available defense, but the maker cannot complain of a subsequent holder when called upon to perform all he has promised. * * * In *Gaul v. Willis*, 26 Pa. St. 259, a suit indeed by the second indorsee against the maker, the holder was allowed to recover against the maker of an accommodation note the entire amount according to its tenor, though the discount at each negotiation had exceeded six per cent. He was regarded as not the less a *bona fide* holder for value, because he purchased for less than upon the face of the note appeared to be due. What has the maker to do with that? He has lent his credit for the sum named in the note. Shall one who has received it as collateral, and is not therefore a holder for value at all, be permitted to recover, and a recovery be denied to him who is a holder for value, but happens to have purchased for less than the face of the paper? Such is not the law."

Usury.—Under the authorities in some

V. ACCOMMODATION PARTY AS SURETY—1. As between the Party Accommodated and the Accommodation Party—*a*. GENERALLY.—As between the party accommodated and the accommodation party, whatever may be the obligations which the latter assumes toward third persons, the relations are those of principal and surety;¹ but this suretyship does not, in the absence of special enactment, enable the accommodation party to avail himself before payment of remedies provided by statute in favor of sureties against their principals.²

b. SUBROGATION TO CREDITOR'S SECURITIES.—It follows from the relation of suretyship that an accommodation party paying the instrument at maturity is entitled to be subrogated to all the rights and securities against the party accommodated, possessed by the holder of the paper who has received payment.³

states such a purchase or accommodation paper would be usurious, and therefore the purchaser would not be a holder for value. See the title USURY.

1. *United States*.—*In re Babcock*, 3 Story (U. S.) 393.

Alabama.—*Brahan v. Ragland*, 3 Stew. (Ala.) 247; *Meek v. Black*, 4 Stew. & P. (Ala.) 374; *Lyon v. Bolling*, 9 Ala. 463; *Lyon v. Robertson*, 50 Ala. 74; *Knighton v. Curry*, 62 Ala. 411.

Louisiana.—*Hereford v. Chase*, 1 Rob. (La.) 212.

Maine.—*Cummings v. Little*, 45 Me. 183.

Mississippi.—*Humphreys v. Vertner*, 1 Freem. Ch. (Miss.) 251.

Missouri.—*Noll v. Oberhellmann*, 20 Mo. App. 336.

New Hampshire.—*Child v. Eureka Powder Works*, 44 N. H. 354; *Parks v. Ingram*, 22 N. H. 292, 55 Am. Dec. 153.

New York.—*Clason v. Morris*, 10 Johns. (N. Y.) 524.

Texas.—*Sublett v. McKinney*, 19 Tex. 438.

See *supra*, this title, *Rights of Accommodation Party after Payment*.

2. **Not Surety for All Purposes.**—It has been decided that an accommodation indorser is not within the provisions of a statute allowing a surety to require the creditor in certain instances to proceed against the principal, or in default thereof to lose his remedy against the surety. *Bates v. Mobile Branch Bank*, 2 Ala. 689; *Bullit v. Thatcher*, 5 How. (Miss.) 689, 37 Am. Dec. 175; *Clark v. Barrett*, 19 Mo. 39; *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316. See *Ross v. Jones*, 22 Wall. (U. S.) 576. But compare *Lacy v. Lofton*, 26 Ind. 324; *Ward v. Stout*, 32 Ill. 399; *Thompson v. Taylor*, 72 N. Y. 32, 11 Hun (N. Y.) 274; *Fowler v. Alexander*, 1 Heisk. (Tenn.) 425; *Van Alstyne v. Sorley*, 32 Tex. 518.

Nor is an accommodation indorser entitled to the benefit of a statute allowing a summary judgment in favor of a surety against the principal on motion. *Stodder v. Cardwell*, 20 Ala. 223.

But under the present Code of *Alabama* accommodation parties to bills of exchange are expressly brought within the benefit of the statute providing for summary judgments against principals or between sureties. *Alabama Code* 1886, § 3149.

And an accommodation indorser has been

held to have the right, which every surety has upon general equitable principles, to come into equity after the debt has matured, and compel the principal to pay and the creditor to receive payment, and he may also in equity compel the creditor to proceed against the principal debtor for the collection of his demand upon giving security and indemnifying the creditor against delay and expenses. *Thompson v. Taylor*, 72 N. Y. 32, 11 Hun (N. Y.) 274.

3. *Toler v. Cushman*, 12 La. Ann. 733; *Cummings v. Little*, 45 Me. 183; *Stevenson v. Austin*, 3 Met. (Mass.) 474; *Humphreys v. Vertner*, 1 Freem. Ch. (Miss.) 251; *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274; *Buffalo First Nat. Bank v. Wood*, 71 N. Y. 405; *Toronto Bank v. Hunter*, 4 Bosw. (N. Y.) 646; *Sublett v. McKinney*, 19 Tex. 438. See *Lenox v. Prout*, 3 Wheat. (U. S.) 520; *McNutt v. Wilcox*, 1 Freem. Ch. (Miss.) 116.

Subrogation of Creditor to Securities of Accommodation Indorser.—The principle of equity that the creditor is entitled to the benefit of all the securities which the principal debtor has given to his sureties for their indemnity, applies generally to securities taken by accommodation indorsers, *Newburgh Nat. Bank v. Bigler*, 83 N. Y. 51, 18 Hun (N. Y.) 400; but it does not apply in favor of the holder of a note as against the accommodation indorsers who have been discharged by the laches of the holder, because the holder can only claim by subrogation, and the indorsers who have not been damaged are under no liability. *Hopewell v. Cumberland Bank*, 10 Leigh (Va.) 214. See *Jones v. Quinpiack Bank*, 29 Conn. 25.

Subrogation to Judgment.—Where judgment has been obtained by the holder against both maker and accommodation indorser of a note, the latter may pay the judgment and become subrogated in equity to the rights of the holder under the judgment against the maker. *Lenox v. Prout*, 3 Wheat. (U. S.) 520.

And where separate judgments have been obtained against maker and indorser, and after execution against the maker has been returned "no property found," and the accommodation indorser has paid the note, he may go into chancery and subject the equitable assets of the maker to the satisfaction of the judgment, or he may resort to equity

Payment Essential.—But the accommodation party is not entitled to subrogation until he has actually paid the instrument.¹

Security Held by Accommodation Party for Indemnity.—A security taken from the party accommodated, by a subsequent accommodation party, to provide for his own indemnity, will not inure to the benefit of a prior accommodation party when he has upon default of the accommodated party paid the instrument.²

to cause conveyances of real estate by the drawer in fraud of his creditors to be set aside. *Lyon v. Bolling*, 9 Ala. 463. See *Brahan v. Ragland*, 3 Stew. (Ala.) 259. So where upon payment the accommodation indorser takes an assignment of a judgment against the maker of the note who is the party accommodated. *Clason v. Morris*, 10 Johns. (N. Y.) 524.

But whatever the remedies of the accommodation party in equity, a court of law has no power to permit an accommodation indorser of a note who has paid the instrument to issue execution against prior parties upon a judgment obtained against the maker and all indorsers. *Ontario Bank v. Walker*, 1 Hill (N. Y.) 652. But compare *Connely v. Bourg*, 16 La. Ann. 108.

1. *Dunlap v. Clements*, 7 Ala. 539; *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274; *Buffalo First Nat. Bank v. Wood*, 71 N. Y. 405; *Mosser v. Criswell*, 150 Pa. St. 409.

Collateral Security in the Hands of Holder no Defense.—A made a note for the accommodation of B in favor of C. At maturity C, having paid the note, sued A. It was no defense to A that C held a mortgage from B to secure the note. *Mosser v. Criswell*, 150 Pa. St. 409; *Lord v. Ocean Bank*, 20 Pa. St. 384, 59 Am. Dec. 728. See *Lee Bank v. Kitching*, 11 Abb. Pr. (N. Y. Super. Ct.) 435; *Brick v. Freehold Nat. Banking Co.*, 37 N. J. L. 307.

Securities Available to Accommodation Party without Payment.—In some jurisdictions, however, the authorities go further in favor of the rights of the accommodation party, holding that when he issued upon the instrument he is entitled to be credited with the amounts of any securities in the hands of the holder taken by the latter from the principal debtor. *Duncan v. North & South Wales Bank*, L. R. 6 Ch. Cas. 1; *Bradford v. Hubbard*, 8 Pick. (Mass.) 155; *Goodwin v. Massachusetts, etc., Loan, etc., Co.*, 152 Mass. 189; *Molson's Bank v. Heilig*, 25 Ont. Rep. 505.

A bill of exchange was accepted by the defendant and indorsed by the plaintiff for the accommodation of the drawer. The latter failed, and made an assignment for the benefit of his creditors before the bill matured. The plaintiff subsequently took up the bill as indorser. The assignment provided for indemnifying the plaintiff against all indorsements made by him on account of the drawer; there were funds in the hands of the assignees to which he could resort for payment. It was held that the plaintiffs could not maintain an action on the bill against the acceptors, but must resort to the funds in the hands of the assignees for payment. *Bradford v. Hubbard*, 8 Pick. (Mass.) 155. In this case *Parker, C. J.*, said: "If the

holder is secured or indemnified by the drawer there is no reason to allow him to recover of the acceptor, and thus drive the acceptor to an action against the drawer.

* * * There is no reason in compelling the defendants to pay the plaintiff in order to release that portion of the funds for other creditors and oblige the defendants to come in among the unpreferred creditors to obtain probably a small part, and perhaps nothing, of their debt so created."

Where the holder of several notes made by A. and indorsed by different parties held a mortgage from A. to secure his general indebtedness, it was held, in an action by the holder against the indorser of one of the notes, that the defendant was entitled to have credited upon the note a *pro rata* share of the security. *Molson's Bank v. Heilig*, 25 Ont. Rep. 503.

Collateral Immediately Available to Holder.—Even in jurisdictions holding the doctrine that securities in the hands of the holder are not available to the accommodation party in general until payment by the latter, it has been held that where the securities are of such a nature that they can be applied by the creditor to the payment of the instrument in exoneration of the accommodation party without the settlement of any dispute—as by merely applying a deposit to the payment of the bill or note—the accommodation party is entitled to have them so applied, the court proceeding upon the principle of avoiding a clearly needless circuitry of action. *Riverside Bank v. Totten* (Supreme Ct.), 33 N. Y. St. Rep. 845; *Koehler v. Farmers', etc., Nat. Bank*, 51 Hun (N. Y.) 418.

Taking Note of Accommodation Party in Payment.—Where a promissory note was secured by a mortgage and was not paid at maturity, and the payee transferred the note and mortgage to an accommodation indorser of the note and received the note of the indorser in full payment, it was held that this was a sufficient payment by the indorser to enable him to foreclose the mortgage against the maker. *Humphreys v. Vertner*, 1 Freem. Ch. (Miss.) 251.

2. *Post v. Tradesmen's Bank*, 28 Conn. 420; *McCune v. Belt*, 45 Mo. 174; *Gomez v. Lazarus*, 1 Dev. Eq. (N. Car.) 205.

Accommodation Indorser may Provide for His Own Indemnity.—In *Gomez v. Lazarus*, 1 Dev. Eq. (N. Car.) 205, *Henderson, C. J.*, said: "The cosurety who attempts at the time, or after the obligation is created, privately to provide for himself from the funds of the common principal, acts contrary to good faith, as he thereby diminishes the funds on which they all rely for their common safety. And, besides, it would tend to weaken his exertions to the end in which all have an interest. But to

for successive accommodation parties are not cosureties.¹

c. SUBROGATION TO DEFENSES AGAINST HOLDER.—It is sometimes stated, as a general principle of the law of suretyship, that the surety may take advantage of any defenses which would be available to his principal, and the same rule has been said in some of the cases to apply to the defenses available to an accommodation indorser upon a bill or note.²

Defenses Strictly Personal.—But this statement is too broad. There are defenses strictly personal which the acceptor or maker might set up in an action against himself, but of which an accommodation indorser could not take advantage.

Want of Capacity in the Maker or Drawer.—Thus the want of capacity of the maker or drawer to enter into the contract is no defense to an accommodation indorser, for his indorsement is a warranty of the capacity of prior parties.³

Defenses Available to the Accommodation Acceptor—Failure of Consideration.—The total or partial failure of the consideration for the transfer of the instrument which could be set up by the maker of a promissory note is available as a defense to an accommodation indorser thereof.⁴

Usury.—An accommodation indorser may avail himself of the defense of usury when the instrument was usuriously discounted by the maker.⁵

Incapacity of Plaintiff to Sue Maker.—Where the holder cannot sue the maker of a note who is the partner of the holder, because the instrument passed between them in a matter which grew out of the partnership relations, the accommodation indorser is entitled to set up this defense in an action by the holder against him upon his indorsement.⁶

Set-off.—How far a surety is entitled to avail himself of a set-off which

extend this to a prior against a posterior surety is connecting together those whose situations are different, and inferring similar rights from dissimilar obligations. It is restricting too much that right of self-preference, of self-security, which all human laws permit, if we do not infringe upon those of others; and it is not considered an infringement of them to procure for ourselves a satisfaction or security for our debts, although we may leave our debtor without the means of satisfying his other creditors, whose debts may be as meritorious as our own."

1. See *supra*, this title, *Successive Accommodation Parties*.

2. *Weimer v. Shelton*, 7 Mo. 237; *Sawyer v. Chambers*, 43 Barb. (N. Y.) 622, 44 Barb. (N. Y.) 42; *Gunnis v. Weigley*, 114 Pa. St. 191. See *Cummings v. Little*, 45 Me. 183.

A More Accurate Statement is that the accommodation party may avail himself of all defenses not personal to the party accommodated to which the latter is entitled. *Johnson v. Marshall*, 4 Rob. (La.) 157.

3. **Coverture.**—The accommodation indorser of the note of a married woman cannot set up the defense of coverture. *Edmunds v. Rose*, 51 N. J. L. 547. See also the title SURETYSHIP.

4. Where a note is given on account of certain goods which the plaintiff agrees to sell to the maker of the note, it is a good defense to the accommodation indorser of the instrument that the goods have not been delivered, or that only a small portion of the goods have been delivered, and that the amount so delivered has been paid for. *Sawyer v. Chambers*, 44 Barb. (N. Y.) 44, 43 Barb. (N. Y.) 622.

Where a note is delivered by A (the party

for whose accommodation it is indorsed) to B, partly in payment of a debt for a smaller amount due from A to B, and partly upon the condition that the excess of the note above the debt shall be adjusted by B's delivering up a certain order for merchandise held by him on C, and for the rest by payments from B to A, and B fails to make the payments according to his agreement, his failure may be taken advantage of by the accommodation indorser when sued upon the note. *Gunnis v. Weigley*, 114 Pa. St. 191.

A ship, forfeited under the laws of the *United States*, having been condemned and sold, was bought by the defendants, acting for her owners. The defendants gave their note for the purchase money to the plaintiff, with an accommodation indorser. The forfeiture being afterwards remitted by law, the defendants refused payment. It was held that no recovery could be had either against the makers or the accommodation indorser of the note. *Brown v. Fort*, 1 Martin (La.) 34.

5. *Weimer v. Shelton*, 7 Mo. 237.

See the title USURY.

Evidence.—In an action against the indorser of a note indorsed for the accommodation of the maker, when the defense is that it was usuriously discounted at its inception, the purchaser, having bought it from a third person after it was so indorsed, may show that the seller, by authority of the indorser, represented it to be business paper, and that it was purchased in reliance upon the truth of such representations. *Benedict v. Caffé*, 5 Duer (N. Y.) 226. See *Ahern v. Goodspeed*, 9 Hun (N. Y.) 263.

6. *Johnson v. Marshall*, 4 Rob. (La.) 157; *Johnson v. Downs*, 3 La. Ann. 590.

might be asserted by his principal, is a question upon which the authorities are not in agreement;¹ and the same conflict of opinions is found as to the right of an accommodation indorser to avail himself of a set-off in favor of the acceptor or maker.²

2. As to Third Parties—*a.* HOLDERS WITHOUT NOTICE.—There is no question that, as to persons who take accommodation paper without knowledge of its true character the accommodation party is bound by his apparent standing upon the face of the instrument and cannot claim the privileges of a surety for the real debtor,³ and in no case does mere knowledge of the accommodation character of the paper prevent the holder from recovering from prior parties according to their position on the instrument.⁴ So far the authorities are agreed, but there is a wide diversity of opinion upon the question whether a holder who takes a bill or note with knowledge that some of the parties thereto have signed merely for accommodation, or who, while the bill is in his hands, acquires this knowledge, must treat such accommodation parties as sureties for the parties accommodated.

***b.* HOLDERS WITH NOTICE—(1) Generally—Mere Inaction.**—Even as to the rights of accommodation parties to be treated as sureties by third persons who have taken the paper with knowledge of its character, certain points are settled, and mere inaction upon the creditor's part will not release an accommodation party.⁵

Holder may Select Whom to Sue.—Nor can the holder be compelled to proceed against the party accommodated in exoneration of the accommodation party, for he has a right to select the persons among the prior parties to the instrument against whom he will proceed.⁶

May Complain only of Affirmative Action.—It is then, in any case, only affirmative action upon the part of the holder, depriving, either presumptively or in fact,⁷ the accommodation party of his rights against the party accommodated, of which the accommodation party may complain, and this only when the action which he claims has released him was taken without his consent,⁸ and volun-

1. See the titles SUBROGATION; SURETYSHIP.

2. **Set-off Held not Available.**—In *New York* the doctrine prevails that a set-off in favor of the principal is not available to the surety, and the same rule governs the rights of an accommodation indorser. *Gillespie v. Torrance*, 25 N. Y. 306.

So in other states it has been held that such a set-off is not available to the transferee of even overdue accommodation paper. *Williams v. Banks*, 11 Md. 198; *Barker v. Parker*, 10 Gray (Mass.) 339. See *Chandler v. Drew*, 6 N. H. 469, 26 Am. Dec. 704; *Flint v. Schomberg*, 1 Hilt. (N. Y.) 532; *Schickle v. Hazard* (Supreme Ct.), 35 N. Y. St. Rep. 264.

Set-off Held Available.—But in some jurisdictions such a set-off is a good defense. *Schwartzkopf v. Hill* (Pa., 1886), 3 Cent. Rep. 913; *McDonald Mfg. Co. v. Moran*, 52 Wis. 203; *Hiner v. Newton*, 30 Wis. 640.

Accommodation Acceptor Fleeing Set-off in Favor of Drawer.—An accommodation acceptor when sued by the holder upon the bill cannot set up a debt due by the holder to the drawer of the draft. *Smith v. Adams*, 14 La. Ann. 411.

3. *Fentum v. Pocock*, 5 Taunt. 192; *Union Bank v. Crine*, 33 Fed. Rep. 809; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Gano v. Heath*, 36 Mich. 441; *Canadian Bank v. Coumbs*, 47 Mich. 358; *Grafton Bank v. Kent*, 4 N. H. 221, 17 Am. Dec. 414; *Hoge v. Lansing*, 35 N. Y. 136;

Nash v. Skinner, 12 Vt. 219, 36 Am. Dec. 338; *Tyler v. Busey*, 3 McArthur (D. C.) 344.

4. See *supra*, this title, *Successive Accommodation Parties; Holders of Accommodation Paper*.

5. *English v. Darley*, 2 B. & P. 61; *English v. Seibert*, 49 Mo. App. 563; *State Bank v. Smith*, 85 Hun (N. Y.) 201. See the title SURETYSHIP; and *infra*, this title, *United States Authorities*.

6. *English v. Darley*, 2 B. & P. 61; *Cronise v. Kellogg*, 20 Ill. 11; *Spencer v. Ballou*, 18 N. Y. 327.

Accommodation Indorser cannot Compel Holder to Resort to Collaterals.—An accommodation indorser cannot require the holder to resort to securities held by the latter as collateral before proceeding upon the indorsement, but he must avail himself of the securities by payment and subrogation. See *supra*, this title, *Subrogation to Securities of Creditor*.

7. The law will presume damage to a surety from certain dealings between the principal and the creditor, although no damage has in fact resulted. See, generally, the title SURETYSHIP.

8. *Canadian Bank v. Coumbs*, 47 Mich. 358; *Guarantee Trust, etc., Co. v. Craig*, 155 Pa. St. 343. See the title SURETYSHIP.

Rights against Accommodation Parties Reserved.—Dealings by the holders of notes indorsed for accommodation, with the makers

tarily upon the part of the holder.¹

(2) *Discharge by Dealings with Principal*—(a) *English Doctrine*—(aa) *AT LAW*.—The *English* rule in courts of law before the common-law procedure act was that the accommodation maker or acceptor, although known to the holder to be such, was to be regarded as the principal debtor, and therefore an extension of time granted to the drawer or indorser for whose benefit the instrument was made or accepted would not discharge the accommodation maker or acceptor.² So a release or composition with the drawer or payee of

of the notes—as by giving time to the makers—do not release the accommodation indorsers, for this is regarded as conditional upon the assent of the latter. *Newburgh Nat. Bank v. Bigler*, 83 N. Y. 66.

1. Defendant, a resident of *New York*, made his promissory note for the accommodation of the payee, a *Massachusetts* corporation, which was indorsed and transferred by the latter to a firm in that state. Said corporation was adjudged to be insolvent by a court of insolvency of said state. Plaintiff, then the holder of the note, with the knowledge that defendant was accommodation maker, proved its claim on said note. The corporation paid into court a percentage upon its indebtedness, as directed by judgment of said court, upon which payment, pursuant to said judgment and laws of said state, it was discharged from all debts proved or provable against it. Plaintiff accepted the percentage, signing a receipt in full of the liability of the corporation. In an action upon the note it was held that while, as between the maker and payee of the note, the latter was principal and the former was surety, the action of the plaintiff was not a voluntary discharge of the principal, nor did it in any way impair the rights of the surety; and so, that plaintiff was entitled to recover the balance. *Springfield Third Nat. Bank v. Hastings*, 134 N. Y. 501, 58 Hun (N. Y.) 531.

2. *Fentum v. Pocock*, 5 Taunt. 192; *Kerrison v. Cooke*, 3 Campb. 362; *Raggett v. Axmore*, 4 Taunt. 730; *Bank of Ireland v. Beresford*, 6 Dow. 234; *Price v. Edmunds*, 10 B. & C. 578, 21 E. C. L. 135; *Yallop v. Ebers*, 1 B. & Ad. 698, 20 E. C. L. 475; *Nichols v. Norris*, 3 B. & Ad. 41, 23 E. C. L. 28; *Manley v. Boycott*, 2 El. & Bl. 46, 75 E. C. L. 461; *Strong v. Foster*, 17 C. B. 201, 84 E. C. L. 201. But compare *Laxton v. Peat*, 2 Campb. 185; *Collott v. Haigh*, 3 Campb. 281; *Adams v. Gregg*, 2 Stark. 531.

Origin of the Doctrine.—The leading case upon this subject is *Fentum v. Pocock*, 5 Taunt. 192. This was an action by an indorsee against the acceptor of a bill drawn by one Beazley. The defense was that the plaintiff had taken a *cognovit* from Beazley, payable at a future date, without defendant's privity or consent; that the defendant was an accommodation acceptor, and that this was known to the plaintiff when he took the *cognovit*. In delivering the opinion of the court Sir James Mansfield, C.J. (not, of course, Lord Mansfield, as stated by Mr. Daniel (see 2 Daniel Negotiable Instr., § 1333), disapproving *Laxton v. Peat*, 2 Campb. 185, and *Collott v. Haigh*, 3 Campb. 281, in

which cases a doctrine favorable to defendant had been laid down by Lord Ellenborough sitting at *nisi prius*, said: "One might find here a very important distinction between this case and the case decided by Lord Ellenborough—namely, that here the person taking the bill did not at the time when he took it know that it was an accommodation bill; and if he did not then know it, what does it signify what came to his knowledge afterwards if he took the bill for a valuable consideration? But it is better not to rest this case upon that foundation, for, as it appears to me, if the holder had known in the clearest manner at the time of his taking the bill that it was merely an accommodation bill, it would make no manner of difference, for he who accepts the bill, whether for value or to serve a friend, makes himself in all respects liable as acceptor, and nothing can discharge him but payment or release."

In *Strong v. Foster*, 17 C. B. 201, 84 E. C. L. 201, Willes, J., said: "A person who signs a note as a principal debtor must in proceedings upon the note undergo all the liabilities of a principal debtor, although as between himself and the party at whose instance he signs it he is in fact a surety only, and that fact was known to the creditor at the time the note was handed over. This is laid down in the treatises on bills, and the cases of *Fentum v. Pocock*, 5 Taunt. 192, and the *Bank of Ireland v. Beresford*, 6 Dow. 234, are referred to. * * * In *Ex p. Glendenning*, Buck. 517, Lord Eldon did express a doubt, founded upon the practice in bankruptcy, that accommodation parties are allowed to prove as sureties against the estates of their principals; but in truth, when you look at the distinction in those cases—that there the proof is not upon the bill or note, but upon the contract to indemnify in consideration of accepting or making it—they will be found to be entirely consistent with *Fentum v. Pocock*, 5 Taunt. 192."

Promise by Acceptor to Pay.—Especially does the doctrine apply where the bill is duly presented to the accommodation acceptor at maturity, and he promises payment. *Kerrison v. Cooke*, 3 Campb. 362.

When an Extension of Time Defense at Law.—It seems that an accommodation maker may raise at law the defense that time has been given to the party accommodated, when he can show that the original contract between the plaintiff and defendant was that of creditor and surety—that is, that he was not only in fact a surety as to the principal, but also that he was accepted as such by the creditor. See *Manley v. Boycott*, 2 El. & Bl. 46, 75 E.

a bill or note did not discharge an accommodation acceptor or maker.¹ But even in the *English* courts of law an extension of time to an acceptor who was the party accommodated released the accommodation drawer.²

(bb) *IN EQUITY*.—In courts of equity, however, the rule is otherwise. There the real relation of the parties to the note or bill determines their rights in all cases where the holder has knowledge of that relation.³ The same rule prevails now in courts of law under statutes empowering such courts to take cognizance of equitable defenses.⁴ Thus, one who has accepted a bill for accommodation merely will be discharged by the holder, with knowledge of the true relation between the parties, giving time to the person who is in fact the principal debtor without the consent of the acceptor, and this though the holder acquires knowledge that the acceptance is for accommodation after the transfer of the instrument to him.⁵

(b) *United States Authorities—Accommodation Indorser Discharged*.—It is generally held that giving time to the maker or acceptor will discharge an accommodation indorser.⁶

C. L. 46; *Strong v. Foster*, 17 C. B. 201, 84 E. C. L. 201; *Bailey v. Edwards*, 4 B. & S. 761, 116 E. C. L. 761.

1. *Maltby v. Carstairs*, 7 B. & C. 735, 14 E. C. L. 113; *Thomas v. Courtnay*, 1 B. & Ald. 1; *Harrison v. Courtauld*, 3 B. & Ad. 36, 23 E. C. L. 25; *Mallett v. Thompson*, 5 Esp. 178. See *Carstairs v. Rolleston*, 5 Taunt. 551.

2. *Hill v. Read*, 1 Dowl. & Ry. N. P. 26.

3. *Davies v. Stainbank*, 6 De G. M. & G. 679; *Oriental Financial Corp. v. Overend*, L. R. 7 Ch. 142; *Maingay v. Lewis*, 5 Ir. R. C. L. 229; *Bristow v. Brown*, 13 Ir. R. C. L. 201. See *In re Goodwin*, 5 Dill. (U. S.) 140.

In *Strong v. Foster*, 17 C. B. 201, 84 E. C. L. 201, the release of the accommodation party by dealings with knowledge with the accommodated party was set up as an equitable defense, and the court seems to be of the opinion that the rule at law and in equity was the same, but the case was decided upon the ground that there was no evidence of suretyship or of such dealing as would discharge the surety. See the comments of Coleridge, J., in *Pooley v. Harradine*, 7 El. & Bl. 431, 90 E. C. L. 431, and of Crompton, J., in *Ewin v. Lancaster*, 6 B. & S. 571, 118 E. C. L. 571.

4. *Greenough v. McClelland*, 6 Jur. N. S. 772, 2 El. & El. 424, 105 E. C. L. 424; *Pooley v. Harradine*, 7 El. & B. 431, 190 E. C. L. 431; *Taylor v. Burgess*, 5 H. & N. 1; *Bailey v. Edwards*, 4 B. & S. 761, 116 E. C. L. 761; *Ewin v. Lancaster*, 6 B. & S. 571, 118 E. C. L. 571.

Notice need not be Express.—Where the defendant was sued as acceptor by the indorsee of a bill of exchange, and pleaded as a defense that he was an accommodation acceptor, and as such surety for P., the indorser of the bill, whereof the plaintiffs had notice; and that the plaintiff had discharged him by giving time to P. by a composition deed; and it appeared that the plaintiffs when they executed the composition deed had various bills of P. in their hands, and knew that some of the parties to such bills were not primarily liable to P. thereon (although they did not know that the defendant was of that number), and entered into the deed, making stipula-

tions with regard to such parties and taking their chances as to who they should turn out to be, it was held that if the effect of the deed was to alter the position of the parties who should turn out to be sureties, it was as wilfully done and as inequitable on the part of the plaintiffs as if they had had express notice, and that the defense was made out. *Bailey v. Edwards*, 4 B. & S. 761, 116 E. C. L. 761.

5. *Oriental Financial Corp. v. Overend*, L. R. 7 Ch. 142; *Ewin v. Lancaster*, 6 Br. & S. 571, 118 E. C. L. 571; *Bailey v. Edwards*, 4 B. & S. 761, 116 E. C. L. 761. See *Duncan v. North & South Wales Bank*, L. R. 6 App. Cas. 1; *Rouse v. Bradford Banking Co.* (1894), App. Cas. 586.

Agreement for Suretyship between Parties Originally Principals.—It seems that where A and B were originally both principal debtors, and afterwards, by agreement known to the holder, A becomes the principal and B the surety, B cannot claim a discharge by reason of an extension of time given to A. *Swire v. Redman*, 1 Q. B. Div. 536.

6. *Giving Time to Maker or Acceptor*.—A general rule regulating the obligations of parties to bills and notes is that the acceptor of a bill, or the maker of a note, is the principal debtor, and that the other parties are sureties. *Clarke v. Devlin*, 3 B. & P. 363; *Perry v. Armstrong*, 39 N. H. 583. See the title *BILLS AND NOTES*.

How far this principle is applicable to discharge an indorser when time has been given to his acceptor or maker, is a matter of dispute. See the title *BILLS AND NOTES*.

But giving time to the maker of a note has been held to release the accommodation indorser. *Hereford v. Chase*, 1 Rob. (La.) 212; *Gustine v. Louisiana Union Bank*, 10 Rob. (La.) 412; *Globe Mut. Ins. Co. v. Carson*, 31 Mo. 218; *Pomeroy v. Tanner*, 70 N. Y. 547; *Myers v. Welles*, 5 Hill (N. Y.) 463.

Accommodation indorsers are to be considered as sureties. *Alley v. Gavin*, 40 Ind. 446.

An accommodation indorser is released where the holder recovers judgment against the maker and issues execution thereon,

Accommodation Acceptor and Maker—Conflict.—But in many states the rule established in *English* courts of law, that an accommodation acceptor or maker, even as to third persons, taking with knowledge of the relation, is not entitled to the privileges of a surety, has been followed.¹ Some courts, on the other hand, have adopted the principle that the real relation of the parties is controlling.²

which is levied, and afterwards releases the levy. *Priest v. Watson*, 75 Mo. 310, 42 Am. Rep. 409.

Mere Forbearance to Sue.—An accommodation indorser or drawer after his liability is once fixed is not discharged by a mere passive neglect on the part of the holder to proceed against the party accommodated. *Summerhill v. Tapp*, 52 Ala. 227; *Ætna Nat. Bank v. Hollister*, 55 Conn. 189; *Kerr v. Baker, Walk.* (Miss.) 140; *Clark v. Barrett*, 19 Mo. 39; *Miller v. Mellier*, 59 Mo. 388; *Osborne v. Lawson*, 26 Mo. App. 556; *Beveridge v. Richmond*, 14 Mo. App. 405; *English v. Seibert*, 49 Mo. App. 563; *Phoenix Mut. L. Ins. Co. v. Landis*, 50 Mo. App. 116; *Trimble v. Thorne*, 16 Johns. (N. Y.) 152, 8 Am. Dec. 302; *State Bank v. Smith*, 85 Hun (N. Y.) 201; *Terrel v. Townsend*, 6 Tex. 149. See *Ross v. Jones*, 22 Wall. (U. S.) 576.

Giving Time to Prior Indorser.—Giving time to a prior indorser, the party accommodated, releases a subsequent accommodation indorser. *Walters v. Swallow*, 6 Whart. (Pa.) 446.

1. **Accommodation Acceptor not Discharged by Indulgence to Drawer.**—An accommodation acceptor is not discharged by time given to the drawer by the holder, with knowledge of the relation. *Cronise v. Kellogg*, 20 Ill. 11; *Anderson v. Anderson*, 4 Dana (Ky.) 352; *Howard Banking Co. v. Welchman*, 6 Bosw. (N. Y.) 280. See *Howlett v. Fitzgibbon (City Ct.)*, 16 N. Y. St. Rep. 804; *White v. Hopkins*, 3 W. & S. (Pa.) 99, 37 Am. Dec. 542; *Van Alstyne v. Sorley*, 32 Tex. 518. Compare *Smith v. Traders' Nat. Bank*, 74 Tex. 457. See *Lambert v. Sandford*, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149. But compare *Lacy v. Lofton*, 26 Ind. 324.

And, *a fortiori*, an accommodation acceptor is not discharged by mere failure to proceed against the drawer and indorser. *Wilson v. Isbell*, 45 Ala. 142.

Accommodation Maker not Discharged by Time to Indorser.—So an accommodation maker of a note is not discharged by an extension of time given with the knowledge of the indorser, the party accommodated. *Clopper v. Union Bank*, 7 Har. & J. (Md.) 92, 16 Am. Dec. 294; *Montgomery County Bank v. Walker*, 9 S. & R. (Pa.) 229, 12 S. & R. (Pa.) 382; *Lewis v. Hanchman*, 2 Pa. St. 416; *Love v. Brown*, 38 Pa. St. 307; *Philadelphia Bank v. Wilson*, 5 Clark (Pa.) 461; *Farmers', etc., Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200. See *Powell v. Waters*, 17 Johns. (N. Y.) 176; *Hansbrough v. Gray*, 3 Gratt. (Va.) 340.

A release to an indorser does not discharge an accommodation maker, especially when the latter consents thereto. *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380.

Time to Indorser no Discharge of Payee.—

Giving time to an indorser will not release the accommodation payee. *Murray v. Judah*, 6 Cow. (N. Y.) 484.

2. **Accommodation Acceptor or Maker Discharged as Surety.**—An accommodation maker or acceptor is discharged by an extension of time granted to the indorser with knowledge of the relationship. *In re Goodwin*, 5 Dill. (U. S.) 140; *Adle v. Metoyer*, 1 La. Ann. 254; *Canadian Bank v. Coumbe*, 47 Mich. 358; *Meggett v. Baum*, 57 Miss. 22; *American Bank v. Baker*, 4 Met. (Mass.) 164; *Westerfelt v. Frech*, 33 N. J. Eq. 451.

An accommodation maker or acceptor is discharged to the extent of securities surrendered by the holder. *Guild v. Butler*, 127 Mass. 386. See *Goodwin v. Massachusetts Loan, etc., Co.*, 152 Mass. 189; *Shelton v. Hurd*, 7 R. I. 403; *Otis v. Von Storch*, 15 R. I. 41; *Smith v. Traders' Nat. Bank*, 74 Tex. 457. But compare *Van Alstyne v. Sorley*, 32 Tex. 518. But not by a simple transfer of the security to a third party. *Wilbur v. Williams*, 16 R. I. 242.

Drawer not Discharged by Release of Accommodation Acceptor.—The release of an accommodation acceptor will not discharge the drawer, since the latter is the real principal. *Sargent v. Appleton*, 6 Mass. 85, 4 Am. Dec. 90; *Watt v. Rice*, 1 La. Ann. 280; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153. See *Collott v. Haigh*, 3 Campb. 281.

Indiana.—The cases in *Indiana* seem irreconcilable. In *Lambert v. Sandford*, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149, it was ruled, following *Fentum v. Pocock*, 5 Taunt. 192, and disapproving *Laxton v. Peat*, 2 Campb. 185, that time given by the holder to the drawer of a bill, with knowledge that it had been accepted for accommodation, would not discharge the drawer. The court would seem in this case to have committed itself definitely to the doctrine that an accommodation party is not a surety as to the subsequent parties.

But in *Lacy v. Lofton*, 26 Ind. 324, the same court held, without a reference to the former case, that the accommodation drawer of a bill is a surety of the payee for whose accommodation he drew the instrument, within the meaning of a statute providing for the remedies of sureties against their principal, and that such a drawer might have the question of suretyship tried in an action upon the instrument, the effect being that the property of the real principal should be exhausted before levying upon that of the surety. This case goes very far in recognizing prior accommodation parties as sureties, and should probably be regarded as overruling *Lambert v. Sandford*, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149.

New York.—The cases cited in the last note

Accommodation Comaker Discharged.—It is certainly the general rule that a maker or drawer who, in fact, is as to his comakers or codrawers but a surety, is relieved by time given to the maker with knowledge of the relation.¹

Different Grounds for the Rule.—Not only are the authorities not in accord upon the subject under discussion, but the reasoning by which the courts have arrived at their various conclusions is involved in considerable confusion.²

show that the common-law courts in *New York* approved the doctrine of *Fentum v. Pocock*, 5 Taunt. 192, and held the defense of suretyship as to the accommodation party inadmissible. Under the Code of Civil Procedure the rule seems different. An accommodation maker is discharged by time given to his comaker. (See cases cited in the following notes.) And it would seem from the reasoning of the Court of Appeals in *Hubbard v. Gurney*, 64 N. Y. 458, that the same rule should be applied, although the parties were successively interested instead of co-ordinately liable. In that case *Church, C. J.*, said: "Under the code, equitable defenses are permitted in actions at law, and this would seem to obviate the difficulty previously supposed to exist both in setting up the defense and in receiving any evidence which in a court of equity is admissible to sustain it." And he proceeds to notice and approve the course of the *English* law courts under similar circumstances. See also *Flour City Nat. Bank v. McKay*, 86 Hun (N. Y.) 15, 33 N. Y. Supp. 365; *Newburgh Nat. Bank v. Bigler*, 83 N. Y. 51; *State Bank v. Smith*, 85 Hun (N. Y.) 201.

1. Accommodation Maker Released by Time to Comaker.—Where a promissory note or bill of exchange is made by two or more persons, one of whom signs for accommodation merely, the latter is released by time given or security released to the former.

Arkansas.—*Vestal v. Knight*, 54 Ark. 97.

California.—*Capital Sav. Bank v. Reel*, 62 Cal. 419.

Florida.—*Bowen v. Darby*, 14 Fla. 202.

Georgia.—*Perry v. Hodnett*, 38 Ga. 103.

Illinois.—*Flynn v. Mudd*, 27 Ill. 323; *Kennedy v. Evans*, 31 Ill. 258; *Ward v. Stout*, 32 Ill. 399.

Indiana.—*Dickerson v. Ripley County*, 6 Ind. 128; *Jarvis v. Hyatt*, 43 Ind. 163; *White v. Whitney*, 51 Ind. 124.

Iowa.—*Kelly v. Gillespie*, 12 Iowa 55, 79 Am. Dec. 516.

Louisiana.—*Jones v. Fleming*, 15 La. Ann. 522.

Maine.—*Lime Rock Bank v. Mallett*, 42 Me. 349.

Massachusetts.—*Horne v. Bodwell*, 5 Gray (Mass.) 457; *Harris v. Brooks*, 21 Pick. (Mass.) 195, 32 Am. Dec. 254.

Michigan.—*Barron v. Cady*, 40 Mich. 259. *Missouri.*—*Noll v. Oberhellmann*, 20 Mo. App. 336; *English v. Seibert*, 49 Mo. App. 563.

New Hampshire.—*Grafton Bank v. Kent*, 4 N. H. 221, 17 Am. Dec. 414; *Fowler v. Brooks*, 13 N. H. 240.

New York.—*Holmes v. Dole*, *Clarke's Ch.* (N. Y.) 71; *Hubbard v. Gurney*, 64 N. Y. 458 (overruling *Campbell v. Tate*, 7 Lans. (N. Y.) 370; and *Benjamin v. Arnold*, 5 Thomp. & C. (N. Y.) 54).

Ohio.—*Steubenville Bank v. Hoge*, 6 Ohio 17.

Rhode Island.—*Otis v. Von Storch*, 15 R. I. 41.

Vermont.—*Peake v. Dorwin*, 25 Vt. 31; *Wilson v. Green*, 25 Vt. 450, 60 Am. Dec. 279.

Wisconsin.—*Riley v. Gregg*, 16 Wis. 666.

But the Defense has been Held Inadmissible in Courts of Law.—*Bull v. Allen*, 19 Conn. 101; *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Anthony v. Fritts*, 45 N. J. L. 1; *Hendrickson v. Hutchinson*, 29 N. J. L. 180; *Farrington v. Gallaway*, 10 Ohio 543; *Stroop v. McKenzie*, 38 Tex. 132.

Surrender of Security.—An accommodation maker is released by the holder releasing securities held by him from the real principal. *Cummings v. Little*, 45 Me. 183.

Time Given without Notice.—There is no release where the creditor gives time to one comaker in ignorance of the relation between the makers. *Gano v. Heath*, 36 Mich. 441.

2. Reason for the Difference between the Rules at Law and in Equity.—An examination of the cases collected in the notes to this and the preceding sections, upon the subject of the difference between the rule at law and that in equity, as to the discharge of an accommodation party by dealings with the party accommodated, will reveal a great amount of confusion and some untenable reasoning on the part of the courts. "The subject," in the words of *Beasley, C. J.*, in *Anthony v. Fritts*, 45 N. J. L. 1, "belongs to the vexed questions of the law, for the decisions relating to the matter are much in conflict."

Theory that the Defense Varies by Parol a Written Contract.—It has frequently been said that the reason why the defense is inadmissible in law is that parol evidence is not allowed to alter a written contract. See remarks of *Crompton, J.*, in *Ewin v. Lancaster*, 6 B. & S. 571, 118 E. C. L. 571. But this objection would be as available a defense in equity as at law, since the rules of evidence are the same in either case, and the ground upon which such a defense is admitted in equity is that parol evidence introduced to show the relations of the parties does not vary the written contract. See *supra*, this title, *Parol Evidence to Prove Character of Instrument*. See 2 Ames' Cases, Bills and Notes, 83, note.

Chief Justice *Beasley*, in *Anthony v. Fritts*, 45 N. J. L. 1, said: "It will be observed that this theory has nothing to do with the question which is so much discussed in the cases on this subject in the courts of this country, whether or not testimony showing that, in point of fact, the party was a surety, although he did not contract as such, is admissible, for the conclusion arrived at proceeds from the hypothesis that, accepting the incident of

(3) *Discharge by Breach of Condition*—(a) *Generally*.—It is a general rule that a surety has a right to choose the terms upon which he will become liable, and to stand strictly upon those terms, so that any failure to comply with the conditions upon which he signs discharges him.¹ This rule is applied to accommodation parties. Thus an accommodation indorser who signs upon condition that the payee to whom the note is to be passed will perform certain acts is released by the payee's failure to comply with the conditions.² This principle, modified to a certain extent by the law merchant, is the basis of the law of diversion which will now be considered.

(b) *Diversion*—(aa) *USE OF ACCOMMODATION PAPER GENERALLY—Prima Facie Unrestricted*.—Accommodation paper is, in general, a loan of the credit of the accommodation party to the party accommodated, to the extent of the value of the note or bill, and this loan of credit is *prima facie* without restriction as to the manner of its use.³ Thus the accommodated party has, in general, authority to

suretyship, such incident, as it does not qualify the contract, has no effect whatever in a court of common law."

Yet cases are found sanctioning the view here combated. As to showing the relation of comakers or codrawers, or admitting that such a relation may be shown between those who are equally liable, expressing the view that it is inadmissible as between parties successively liable, see *supra*, this title, *Parol Evidence to Prove Character of Instrument*.

Defense not Enforceable at Law, because a Mere Equity.—The better view is that the defense is a mere collateral equity, enforceable in courts of chancery, to prevent fraud. Thus, in *Davies v. Stainbank*, 6 De G. M. & G. 679, Lord Justice Turner said: "It is, in the eye of this court, a fraud in a creditor to proceed at law against a surety after he has agreed with the principal debtor to enlarge the time for payment of the debt; and this court relieves against the fraud."

In *Anthony v. Fritts*, 45 N. J. L. 1, C. J. Beasley observed: "This contract being, as respects the defendant, of primary obligation, cannot be converted into one of secondary obligation; but nevertheless, in the view of a court of equity, it was not conscionable for the plaintiff to increase the hardship of the defendant's position, as, in point of fact, he was the surety of the principal debtor. But this right of the surety to have his status respected does not pertain to his contract as an implied incident, but as a mere equity, which it is irregular to enforce in a court of common law, so long as it is important to preserve the distinction between the procedures of a legal and those of an equitable forum."

Defense Admissible at Law.—But the weight of authority in the *United States* refuses to admit that the defense is a strictly equitable one, and regards it as equally admissible in courts of law. Thus, in *Union Bank v. Crine*, 33 Fed. Rep. 809, Shipman, Cir. J., said: "Although the defense upon the alleged facts is borrowed from a court of equity and is, in that sense, an equitable one, I do not regard it as a defense which can be administered only by a court of equity upon the ground that the relief which is sought must be granted by an injunction or by some other remedy which a court of equity only can furnish, or that the

defense contains matter which can be considered only at equity. If the sole defendant is not liable to pay the notes, there is no difficulty in an examination by a court of law, and it is not necessary to resort to the form or mode of relief peculiar to a court of equity. There is quite a large class of cases pertaining to the discharge of sureties, upon the principle of which cases this defense rests, in which courts of law take cognizance of defenses which had their origin in the courts of equity, but which are administered by courts of law, without disregarding inherent distinctions between the two courts." See also *Heath v. Derry Bank*, 44 N. H. 174, where the authorities are extensively collected, and the views of the different courts discriminated.

1. See the title SURETYSHIP.

2. **Discharge of Conditional Accommodation Indorser.**—Where A indorsed B's note to C for the accommodation of B, upon the condition that C would carry out a certain contract by which C agreed to give B the exclusive agency for certain goods for a certain territory, it was held to be a complete release of A that C violated the contract by appointing other agents for the goods within the territory covered by the contract, and, although B himself, if sued upon the note, could set up a breach of the contract only in reduction of damages upon the note, the validity of which would not be affected, yet A's defense is independent, and is not founded upon any principle of subrogation to such defenses as B might have against C. *Fay v. Jenks*, 93 Mich. 130. See also *supra*, this title, *Subrogation to Defenses against Holder*.

It is Otherwise if the condition was not known to the holder of the instrument. *Gage v. Sharp*, 24 Iowa 15.

3. *Miller v. Larned*, 103 Ill. 562; *Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310; *Pollard v. Huff* (Neb., 1895), 63 N. W. Rep. 58; *Tinsdale v. Murray*, 9 Daly (N. Y.) 446; *Seneca County Bank v. Neass*, 5 Den. (N. Y.) 329; *Cole v. Saulpaugh*, 48 Barb. (N. Y.) 104; *Appleton v. Donaldson*, 3 Pa. St. 381; *Lord v. Ocean Bank*, 20 Pa. St. 380, 59 Am. Dec. 728; *Lenheim v. Wilmarding*, 55 Pa. St. 73; *Mosser v. Criswell*, 150 Pa. St. 409; *Fant v. Miller*, 17 Gratt. (Va.) 47. See *supra*, this title, *Holders of Accommodation Paper; Pledgee*.

use the paper in payment of an existing debt, to sell or discount it, or, if more to his interest, to pledge it as collateral security for money advanced at the time, or before advanced, or on a running account between the parties for money advanced before, or at the time, or afterwards.¹

When Use Limited.—But it frequently happens that the accommodation party lends his credit for a certain purpose only, or imposes certain conditions limiting the manner in which his credit may be used.² When paper upon which such conditions have been placed is used or transferred in violation of the limitations placed upon it, it is said in a general way to be diverted, and the misappropriation is called a diversion. More accurately, the terms "divert" and "diversion" are used of only such a misapplication of the paper as, by affecting the rights of the accommodation party, renders the instrument invalid as against him in the hands of a holder with notice.

(66) **WHAT AMOUNTS TO A DIVERSION—Variation in Method of Use Immaterial.**—Where accommodation paper effects the substantial purpose for which it was designed, although the result is not produced in the precise manner contemplated, there is no diversion, unless there is fraud, or unless the interest of the accommodated party is thereby prejudiced.³ Thus it has been held no diversion that a note indorsed to be discounted at a particular bank is discounted elsewhere,⁴

Presumption against Restriction.—The presumption is that there is no restriction upon the use of the paper. *Dawson v. Goodyear*, 43 Conn. 548; *Montross v. Clark*, 2 Sandf. (N. Y.) 115; *Loveridge v. Hill*, 15 N. Y. Wkly. Dig. 190; *Lenheim v. Wilmarding*, 55 Pa. St. 73.

1. *Appleton v. Donaldson*, 3 Pa. St. 381, per Black, C.J. See *supra*, this title, *Holders of Accommodation Paper; Pledgee*.

Accommodation Paper Used as Security for Future Advances.—*Agawam Bank v. Strever*, 18 N. Y. 502; *Myers v. Welles*, 5 Hill (N. Y.) 463; *Spring's Appeal*, 10 Pa. St. 235.

2. As to conditional delivery of negotiable instruments generally, see the title **BILLS AND NOTES**.

3. *Kentucky*.—*Smith v. Moberly*, 10 B. Mon. (Ky.) 266, 52 Am. Dec. 543.

Maine.—*Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310.

Nebraska.—*Morris v. Morton*, 14 Neb. 358.

New Hampshire.—*Newbury Bank v. Rand*, 38 N. H. 166.

New Jersey.—*Duncan v. Gilbert*, 29 N. J. L. 521; *Jackson v. Jersey City First Nat. Bank*, 42 N. J. L. 177.

New York.—*Powell v. Waters*, 17 Johns. (N. Y.) 177; *Utica Bank v. Ganson*, 10 Wend. (N. Y.) 314; *Chenango Bank v. Hyde*, 4 Cow. (N. Y.) 567; *Rutland Bank v. Buck*, 5 Wend. (N. Y.) 66; *Spencer v. Ballou*, 18 N. Y. 327; *Mohawk Bank v. Corey*, 1 Hill (N. Y.) 513; *Zellweger v. Caffé*, 5 Duer (N. Y.) 94; *Purchase v. Mattison*, 2 Robt. (N. Y.) 71; *Montross v. Clark*, 2 Sandf. (N. Y.) 115; *Wheeler v. Allen*, 59 How. Pr. (N. Y. C. Pl.) 118; *New Central Coal Co. v. Cumings* (Supreme Ct.), 21 N. Y. Supp. 17.

Texas.—*Cisco First Nat. Bank v. Wood* (Tex. App., 1894), 28 S. W. Rep. 384.

Interest in Application of Proceeds.—If an accommodation indorser has no interest in the way in which the proceeds are to be used, it is no defense that he was told that the note was to be discounted at a bank, though it was in fact used, and was intended to be used, in

paying an antecedent debt. *Wheeler v. Allen*, 59 How. Pr. (N. Y. C. Pl.) 118. See *Graf v. Smith* (Supreme Ct.), 16 N. Y. Supp. 894; *Quinn v. Hard*, 43 Vt. 375.

In *Tinsdale v. Murray*, 9 Daly (N. Y.) 446, *Van Hoesen, J.*, stated the result of the *New York* cases as follows: "The lender of accommodation paper who has no interest in the use of its proceeds cannot complain that it has been diverted simply because it was not discounted by the person who he was led to believe would cash it, or because it was used in paying an antecedent debt, though the accommodation indorser expected it would be used to raise money. * * * Where the accommodation indorser is interested in the use to be made of the proceeds, it is a diversion of the note to use it in any way which will deprive him of the benefit of those proceeds."

Knowledge Immaterial.—A note indorsed for the accommodation of the maker and intended to be discounted at a particular bank was not discounted (the bank refusing to discount it) by A. It was held that the indorser was liable. *Powell v. Waters*, 17 Johns. (N. Y.) 176. In this case *Spencer, C.J.*, in delivering the opinion of the court, said: "It was entirely immaterial whether the first note was discounted at the bank at Newburgh or elsewhere; it did not alter or increase the responsibility of the indorser. * * * If the plaintiffs knew when they received the note that it was intended to be discounted at the bank of Newburgh, and had been refused, it would not affect them or establish any fraud." See also *Duel v. Spence*, 1 Abb. App. Dec. (N. Y.) 559. But compare *Benjamin v. Rogers*, 126 N. Y. 60, where the court distinguishes *Powell v. Waters*, 17 Johns. (N. Y.) 176, on the ground that there was no evidence that A was acquainted with the circumstances.

4. *Alabama*.—*Planters, etc., Bank v. Blair*, cited 5 Ala. 386; *Thompson v. Armstrong*, 5 Ala. 383.

Indiana.—*Reed v. Trentman*, 53 Ind. 438.

Iowa.—*Laub v. Rudd*, 37 Iowa 617; *Gage v. Sharp*, 24 Iowa 15.

or is used in the payment of a debt, or otherwise for the credit of the maker.¹

Kentucky.—Frank v. Quast, 86 Ky. 649.

Maine.—Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 310.

Mississippi.—Commercial Bank v. Claiborne, 5 How. (Miss.) 301.

Nebraska.—Morris v. Morton, 14 Neb. 358.

New Hampshire.—Perry v. Armstrong, 39 N. H. 583.

New York.—Powell v. Waters, 17 Johns. (N. Y.) 176; Chenango Bank v. Hyde, 4 Cow. (N. Y.) 567; Mohawk Bank v. Corey, 1 Hill (N. Y.) 513; Wheeler v. Allen, 59 How Pr. (N. Y. C. Pl.) 118; Duel v. Spence, 1 Abb. App. Dec. (N. Y.) 559; Montross v. Clark, 2 Sandf. (N. Y.) 118; Rutland Bank v. Buck, 5 Wend. (N. Y.) 66; Utica Bank v. Ganson, 10 Wend. (N. Y.) 314.

North Carolina.—Ray v. Banks, 6 Jones (N. Car.) 118; Parker v. McDowell, 95 N. Car. 219, 59 Am. Rep. 235.

Vermont.—Briggs v. Boyd, 37 Vt. 534; Burlington Bank v. Beach, 1 Aik. (Vt.) 62.

See, however, Brown v. Taber, 5 Wend. (N. Y.) 566; U. S. Nat. Bank v. Ewing, 131 N. Y. 506; Stone v. Vance, 6 Ohio 246; Riley v. Johnson, 8 Ohio 526.

Note "Negotiable and Payable at" a Particular Bank.—The rule applies when the note is made by its terms "negotiable and payable at" a particular bank, although the bank is not the payee. Ray v. Banks, 6 Jones (N. Car.) 118; Parker v. McDowell, 95 N. Car. 219, 59 Am. Rep. 235. See Reed v. Trentman, 53 Ind. 438.

When the Bank is the Payee—Authorities Conflicting.—The cases are not in accord as to the effect of making the bank at which it is intended to discount the paper a payee of the instrument. The weight of authority is to the effect that even in such cases, in the absence of a distinct agreement that the instrument is to be negotiated at the bank and not elsewhere, an action may be maintained against an accommodation indorser by a third person who has received the instrument before due for value. Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 310; Rutland Bank v. Buck, 5 Wend. (N. Y.) 66; Chenango Bank v. Hyde, 4 Cow. (N. Y.) 567; Utica Bank v. Ganson, 10 Wend. (N. Y.) 314; Hunt v. Aldrich, 27 N. H. 31. See Cross v. Rowe, 22 N. H. 77.

Such an action, it has been held, may be maintained in the name of the holder as the payee, or the instrument may be declared upon as payable to the bearer. Hunt v. Aldrich, 27 N. H. 31; Elliot v. Abbot, 12 N. H. 549. Or a suit may be maintained in the name of the bank. Newbury Bank v. Rand, 38 N. H. 166; Chenango Bank v. Hyde, 4 Cow. (N. Y.) 567; Utica Bank v. Ganson, 10 Wend. (N. Y.) 314; Burlington Bank v. Beach, 1 Aik. (Vt.) 62. See Elliot v. Abbot, 12 N. H. 549.

On the other hand, it has been held that where a note is made payable to a bank or is negotiable and payable at a particular bank, payable to the cashier thereof, it carries upon its face clear evidence that it was never intended to become binding or to have a legal inception unless discounted at the bank men-

tioned, and consequently it cannot be transferred to a private individual so as to bind accommodation parties. Farmers', etc., Bank v. Ross, 1 Blackf. (Ind.) 315; Conway v. U. S. Bank, 6 J. J. Marsh. (Ky.) 128; Manufacturers' Bank v. Cole, 39 Me. 188; Prescott v. Brinsley, 6 Cush. (Mass.) 233; Adams Bank v. Jones, 16 Pick. (Mass.) 574; Dewey v. Cochran, 4 Jones (N. Car.) 184; Southerland v. Whitaker, 5 Jones (N. Car.) 5; Clinton Bank v. Ayres, 16 Ohio 282; Knox County Bank v. Lloyd, 18 Ohio St. 353. See Sherwin v. Brigham, 39 Ohio St. 140; Allen v. Ayres, 3 Pick. (Mass.) 298.

In delivering the opinion of the court in Southerland v. Whitaker, 5 Jones (N. Car.) 5, Pearson, J., said: "It was said on the argument: 'Property is frequently sold on time, the purchasers to give notes with sureties negotiable and payable at bank; this is done to meet the requirement of the bank charters, and to enable the seller to realize the money before the notes mature. Can it be that if the bank refuses to discount the note, he has no remedy against the sureties?' There is an obvious distinction between that case and ours. There the note is made payable to the seller; the intent that it is to become a note and have validity from the time it is written; and its being made afterwards negotiable and payable at bank is a collateral circumstance, introduced for the accommodation of the seller and not intended to affect the validity of the note. Here the intention is that the paper shall not be a note or have validity unless it is discounted; in other words, in our case it is made a condition precedent to the existence of the note, and is not a mere collateral circumstance."

Consent of Accommodation Party.—Where the accommodation party consents that the paper be discounted elsewhere, he is bound. Manufacturers' Bank v. Cole, 39 Me. 188.

Surety Holding Accommodation Note for His Own Indemnity.—Where the plaintiff, the accommodation indorser of a draft, agreed to pay the same if the maker would procure for him a note for a certain amount indorsed by the defendant, and the maker procured the defendant to indorse, notifying him that the note was to be discounted at the bank of U., and delivered the note to the plaintiff, who agreed to discount it at the bank of U., but upon the refusal of the bank held the note at maturity, and after the note had been protested sued the defendant, the plaintiff was held not entitled to recover. Kasson v. Smith, 8 Wend. (N. Y.) 437; Allen v. Ayres, 3 Pick. (Mass.) 298. But see Spencer v. Ballou, 18 N. Y. 327.

1. Jackson v. Jersey City First Nat. Bank, 42 N. J. L. 177. See *supra*, this title, *Pledge*.

Note Given for Deposit with Creditor, Used to Raise Money.—Where A, as accommodation maker, signed the note with B to enable B to deposit it with C as security for a certain debt, and B, instead of so depositing it, procured C to indorse it, and then delivered it to D as security for a loan which he applied

Misuse of Proceeds.—And where the paper is given without restriction as to its use, but upon an agreement that the proceeds shall be used in a certain way, it is no diversion that the funds are used in a different way.¹

Liability of Accommodation Party Increased.—But where the liability of the accommodation party is in any way extended by the instrument being perverted from its intended purpose, there is a legal diversion,² as for instance, where one liable upon certain notes which he has indorsed for the maker's accommodation indorses new notes to take up the old, and the new notes are perverted by the maker, who uses them as collateral security for another debt.³

Immaterial Condition of Accommodation Party Binding.—And where it is established that a party who lends his credit to another by an accommodation signature

to his debt to C, it was held in an action by C against A that there was no diversion, and that A was liable. *Morris v. Morton*, 14 Neb. 358.

Instrument Given to Raise Money, Transferred Directly to Creditor.—Where a note was given by the makers to raise money, which was ultimately to be applied to the payment of a certain mortgage, they cannot complain that the note instead of being so used was transferred directly to the mortgagee in satisfaction *pro tanto* of his debt. *Cisco First Nat. Bank v. Wood* (Tex. App., 1894), 28 S. W. Rep. 384. See *Perry v. Armstrong*, 39 N. H. 583.

Where a bill was accepted for the accommodation of the drawers, to enable them by using it as collateral to raise money to pay certain creditors, and the drawers transferred it to the said creditors as security for the debt and for further advances, there was no diversion. *Leach v. Lewis*, 1 McArthur (D. C.) 112.

But see *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620, as to pledging accommodation paper for an amount greater than the debt, for the purpose of securing money for which it was given.

Used as Collateral Security.—It has been held no diversion as against an accommodation party who has no interest in the proceeds of the instrument, that a note given to raise money was used as collateral security for the payment of an existing debt of the party accommodated. *Fetters v. Muncie Nat. Bank*, 34 Ind. 251, 7 Am. Rep. 225; *Newbury Bank v. Rand*, 38 N. H. 166; *Rutland Bank v. Buck*, 5 Wend. (N. Y.) 66; *Chenango Bank v. Hyde*, 4 Cow. (N. Y.) 567; *Purchase v. Mattison*, 6 Duer (N. Y.) 587; *DeZeng v. Fyfe*, 1 Bosw. (N. Y.) 335; *Moore v. Ward*, 1 Hilt. (N. Y.) 337; *Burlington Bank v. Beech*, 1 Aik. (Vt.) 62.

But it is very doubtful whether this would not be held a diversion if the party taking the instrument as collateral was clearly fixed with notice of the limitation attached to the use of the note. *Benjamin v. Rogers*, 126 N. Y. 60; *U. S. Nat. Bank v. Ewing*, 131 N. Y. 506. In some states such a use is held to be a diversion. *Altoona Second Nat. Bank v. Dunn*, 151 Pa. St. 228. See *Royer v. Keystone Nat. Bank*, 83 Pa. St. 248; *Thompson v. Poston*, 1 Duv. (Ky.) 389. See also the last note *supra*.

Pledging a Note Intended for Use as Collateral,

for a larger amount than that agreed on with the accommodation party, is a diversion. *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

1. Misuse of Proceeds.—*Moreland v. Citizens' Sav. Bank* (Ky., 1895), 30 S. W. Rep. 637; *Dunn v. Weston*, 71 Me. 270, 36 Am. Rep. 310; *Brooks v. Hey*, 23 Hun (N. Y.) 372; *Gray v. Kentucky Bank*, 29 Pa. St. 365; *Mishler v. Reed*, 76 Pa. St. 76.

In *Moreland v. Citizens' Sav. Bank* (Ky., 1895), 30 S. W. Rep. 637, Paynter, J., said: "Whenever a bill of exchange is made for accommodation, and the purpose was to raise money by its sale, the one who buys and pays for it cannot be held to look to the application of its proceeds."

Accommodation Acceptance without Restriction.

—Proceeds Belong to Holder.—Where the holder of an accommodation acceptance discounts the instrument, and sends the proceeds to the accommodation acceptor, directing him to apply such proceeds to the payment of a note made by the drawer and indorsed by the holder of the acceptance, the acceptor has no right to apply the funds to a general account due to him from the drawer of the acceptance, for the money is the money of the holder, who has a right to direct its application. *Patty v. Milne*, 16 Wend. (N. Y.) 557, 22 Wend. (N. Y.) 558.

2. Powell v. Waters, 17 Johns. (N. Y.) 176; *Wardell v. Howell*, 9 Wend. (N. Y.) 170; *Hidden v. Bishop*, 5 R. I. 29; *Farmers', etc., Bank v. Hathaway*, 36 Vt. 539.

Where one takes an accommodation note upon the condition that he will use it only to prevent insolvency, and after the insolvency the note is issued by the assignee of the party who has received the note upon the conditions stated, to the plaintiff who has notice of the facts, there is such a diversion as prevents a recovery. *Stewart v. Moore*, 12 Phila. (Pa.) 225.

Burden of Proof.—The burden is upon the plaintiff to show that the defendant has suffered no injury by diversion. *Rochester v. Taylor*, 23 Barb. (N. Y.) 18.

3. Nickerson v. Ruger, 76 N. Y. 279; *Ocean Bank v. Dill*, 39 Barb. (N. Y.) 577; *Wardell v. Howell*, 9 Wend. (N. Y.) 170; *Ives v. Jacobs*, 21 Abb. N. Cas. (N. Y. City Ct.) 151; *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142; *Bowman v. Van Kuren*, 29 Wis. 209, 19 Am. Rep. 554.

has attached a condition limiting its use, however seemingly immaterial such condition may be, any violation thereof will amount to a legal diversion.¹

(cc) EFFECT OF DIVERSION—*Transferee with Notice*.—A transferee of a bill or note who takes it knowing that it has been diverted from the purpose for which it was given cannot maintain an action thereon against the accommodation party.²

1. Farmers', etc., *Bank v. Ross*, 1 Blackf. (Ind.) 315; *Manufacturers' Bank v. Cole*, 39 Me. 188; *Benjamin v. Rogers*, 126 N. Y. 60 (*reversing* 10 N. Y. Supp. 777, *distinguishing* *Powell v. Waters*, 17 Johns. (N. Y.) 177; *Chenango Bank v. Hyde*, 4 Cow. (N. Y.) 567; *Union Bank v. Ganson*, 10 Wend. (N. Y.) 315; *U. S. Nat. Bank v. Ewing*, 131 N. Y. 506; *Southerland v. Whitaker*, 5 Jones (N. Car.) 5; *Clinton Bank v. Ayres*, 16 Ohio 282.

Right to Impose Immaterial Conditions.—In an action upon a joint and several note it appeared that it was signed by the plaintiff's testator solely for the accommodation of C., one of the makers, to enable him to borrow the amount thereof of P. The latter having refused to make the loan, C. applied to the plaintiffs, who took the note with full knowledge of all the circumstances. The note was held to be diverted as to the plaintiff's testator. *Benjamin v. Rogers*, 126 N. Y. 60. In laying down the reason for this decision Earl, J., said: "There can be no doubt that if the plaintiff had taken this note without any notice of the special purpose for which it was made he would have been a *bona fide* holder for value in such a sense that he could recover thereon. But an accommodation maker of a note, or one who becomes surety upon a note, has a right to determine for himself what use shall be made of the note which he signs. He may impose material or immaterial conditions and terms, and no person, as against him, can get title to the note who takes it with full knowledge, in violation of the terms and conditions imposed upon it by him. Here the plaintiff was informed that Calkins had no right, as against the accommodation makers, to negotiate this note to him, and that it was made for the special purpose of borrowing money from the payee therein named. It cannot be said that this limitation was entirely immaterial even. Calkins was a business man, and Crandall may have been willing to sign this note to enable him to raise money to be used in his business, while unwilling to sign it if it was to be used to pay an antecedent debt. There may have been something in his relations with Miss Petit that made it more desirable to him that she should hold the note rather than some other person. He is long since dead, and cannot explain why it was that he was willing to sign the note for the special purpose named, and for no other purpose. Suffice it to say that he did make it for that purpose, and so the plaintiff was notified at the time he took it. As to him, therefore, the note never had any inception, and there can be no recovery against his executor; and we believe that no authority can be found, either in this country or in *England*, where it has been held that a plaintiff can recover under such circumstances."

Agreement to Negotiate the Instrument in a Certain State.—Where one indorsed a note for accommodation upon the express agreement that it was to be used only in *Kentucky*, but it was transferred by the maker to a *New York* bank, there was a legal diversion. *U. S. Nat. Bank v. Ewing*, 131 N. Y. 506, *reversing* *U. S. Nat. Bank v. Ewing* (Supreme Ct.), 14 N. Y. Supp. 662.

Instrument Intended to Pass to a Particular Party.—If a party signs accommodation paper with the understanding that it shall be passed only to a particular individual, it is a diversion to pass the note to any one else. *Beers v. Culver*, 1 Hill (N. Y.) 589; *Perkins v. Ament*, 2 Head (Tenn.) 110; *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329. See *Sherwin v. Brigham*, 39 Ohio St. 137.

See the preceding notes to this section, with regard to instruments intended for discount at a particular bank.

But the fact that a certain person is made payee of the instrument does not of itself establish that it was intended to pass to him alone, *Meeker v. Shanks*, 112 Ind. 207; *Laub v. Rudd*, 37 Iowa 617; *Perkins v. Ament*, 2 Head (Tenn.) 110; nor does the fact that at the time that the accommodation party signed the instrument the party accommodated stated that he wanted to get the note discounted at a particular bank. *Montross v. Clark*, 2 Sandf. (N. Y.) 115.

Paper Negotiated to Party Accommodated.—Where the accommodation party supposed that the plaintiff was to be the accommodated party, the fact that the instrument is negotiated to the plaintiff as collateral security for an antecedent debt constitutes a diversion. *Yale v. Dart* (C. Pl.), 19 N. Y. Supp. 389.

2. *England*.—*Barber v. Richards*, 6 Exch. 63.

Alabama.—*First Nat. Bank v. Dawson*, 78 Ala. 67.

Indiana.—*Cruikshank v. Henry*, 6 Blackf. (Ind.) 19.

Iowa.—*Washington Bank v. Krum*, 15 Iowa 53.

Louisiana.—*Louisiana State Bank v. Senecal*, 11 La. 29.

Massachusetts.—*Chicopee Bank v. Chapin*, 8 Met. (Mass.) 40; *Boutelle v. Wheaton*, 13 Pick. (Mass.) 499; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469.

New York.—Farmers', etc., *Bank v. Noxon*, 45 N. Y. 762; *Moore v. Ryder*, 65 N. Y. 438; *Benjamin v. Rogers*, 126 N. Y. 60; *U. S. Nat. Bank v. Ewing*, 131 N. Y. 506; *Scranton First Nat. Bank v. Wolf* (Supreme Ct.), 21 N. Y. St. Rep. 45; *Ives v. Jacobs*, 21 Abb. N. Cas. (N. Y. City Ct.) 157; *Rochester v. Taylor*, 23 Barb. (N. Y.) 18; *Cardwell v. Hicks*, 37 Barb. (N. Y.) 458; *Ocean Bank v. Dill*, 39 Barb. (N. Y.) 577; *Crandall v. Vickery*, 45 Barb. (N. Y.) 156; *Small v. Smith*, 1 Den. (N. Y.) 583;

And a party misappropriating the instrument is liable to the accommodation party for resulting loss.¹

Transferee without Notice.—One who has received accommodation paper even after it has been diverted from its contemplated purpose, without notice of the diversion, in good faith and for value, is entitled to recover thereon.²

Seneca County Bank v. Neass, 5 Den. (N. Y.) 329; *Noble v. Cornell*, 1 Hilt. (N. Y.) 98; *Denniston v. Bacon*, 10 Johns. (N. Y.) 198; *Brown v. Taber*, 5 Wend. (N. Y.) 566; *Wardell v. Howell*, 9 Wend. (N. Y.) 170.

Pennsylvania.—*Lenheim v. Wilmarding*, 55 Pa. St. 73; *Stewart v. Moore*, 12 Phila. (Pa.) 225.

Rhode Island.—*Hidden v. Bishop*, 5 R. I. 29.
Tennessee.—*Perkins v. Ament*, 2 Head (Tenn.) 110; *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329.

Wisconsin.—*Bowman v. Van Kuren*, 29 Wis. 209, 19 Am. Rep. 554.

One Taking Diverted Paper Releases Accommodation Party.—In *Gilman v. New Orleans*, etc., R. Co., 72 Ala. 581, *Brickell, C. J.*, said: "Whoever takes accommodation paper with knowledge that the terms and conditions upon which the accommodation was given are being violated, whoever participates in the diversion of the paper to other objects or uses than such as were intended when the paper was made, unless fraud is imputed, must be understood to relieve the party giving the accommodation from all liability, whatever liability the party with whom he deals may incur."

Diversion of Bill Discounted at Usurious Interest.—One who discounts an accommodation bill at a usurious rate of interest is not a *bona fide* holder, and is chargeable with notice of a diversion of the paper. *Carlisle v. Hill*, 16 Ala. 398.

Washington—Purchaser with Notice.—The effect of the decision in *Peters v. Gay*, 9 Wash. 383, would seem to be that a purchaser for value before maturity with notice of a diversion may recover upon the instrument, in that state.

1. *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142. See *Bleaden v. Charles*, 7 Bing. 246, 20 E. C. L. 119.

2. *Alabama*.—*First Nat. Bank v. Dawson*, 78 Ala. 67.

Connecticut.—*Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303.

Iowa.—*Washington Bank v. Krum*, 15 Iowa 53.

Kentucky.—*Smith v. Moberly*, 10 B. Mon. (Ky.) 266, 52 Am. Dec. 543; *Frank v. Quast*, 86 Ky. 649.

Louisiana.—*Hutchinson v. Mitchell*, 15 La. Ann. 326.

Maine.—*Nutter v. Stover*, 48 Me. 163.

Maryland.—*Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts.—*Sweetser v. French*, 2 Cush. (Mass.) 309; *Wareham Bank v. Lincoln*, 3 Allen (Mass.) 192.

New York.—*New York Sixth Nat. Bank v. Lorillard Brick Works Co. (Super. Ct.)*, 18 N. Y. Supp. 861; *Nickerson v. Ruger*, 84 N. Y. 675; *Watson v. Cabot Bank*, 5 Sandf. (N.

Y.) 423; *Essex County Bank v. Russell*, 29 N. Y. 673; *Youngs v. Lee*, 12 N. Y. 551; *Moore v. Ryder*, 65 N. Y. 438; *Boyd v. Cummings*, 17 N. Y. 101; *Angelica First Nat. Bank v. Hall*, 44 N. Y. 395; *New York Bank v. Vanderhorst*, 32 N. Y. 563, 1 Robt. (N. Y.) 211; *Platt v. Beebe*, 57 N. Y. 343; *Merchants' Bank v. Comstock*, 55 N. Y. 24; *Stettheimer v. Myer*, 33 Barb. (N. Y.) 216.

South Carolina.—*Witte v. Williams*, 8 S. Car. 290.

Texas.—*Cisco First Nat. Bank v. Wood* (Tex. App., 1894), 28 S. W. Rep. 384.

Vermont.—*Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284; *Dixon v. Dixon*, 31 Vt. 450.

Virginia.—*Robertson v. Williams*, 5 Munf. (Va.) 381.

Wisconsin.—*Bowman v. Van Kuren*, 29 Wis. 209, 19 Am. Dec. 554.

Bank Crediting Person with Proceeds of Accommodation Paper.—The formal discounting of an accommodation note by a bank, and passing the proceeds upon the books of the bank to the credit of the person presenting the instrument, does not make the bank a holder for value as against accommodation parties to diverted paper. *New York Sixth Nat. Bank v. Lorillard Brick Works Co. (Super. Ct.)*, 18 N. Y. Supp. 861; *Platt v. Chapin*, 49 How. Pr. (N. Y. Supreme Ct.) 318. But see *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297; *Buffalo First Nat. Bank v. Wood*, 71 N. Y. 411.

Notice of Diversion Subsequently Obtained.—The pledgee of diverted accommodation paper for an antecedent debt, after having notice of the fraud practised upon the maker in its diversion, cannot by contract with the fraudulent indorser acquire any new rights as against the maker. *Watson v. Cabot Bank*, 5 Sandf. (N. Y.) 423.

Trover for Diverted Accommodation Paper.—It is a general rule that a person who puts in circulation negotiable paper of another and thereby renders that other liable to pay the same to a *bona fide* holder, is guilty of a tort and is liable in an action of trover. *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 134. See also the title TROVER, in ENCYC. OF PLEADING AND PRACTICE.

So the maker of an accommodation note may maintain an action of trover against one who has fraudulently converted the same and thereby rendered him liable thereon. *Decker v. Mathews*, 12 N. Y. 313, 5 Sandf. (N. Y.) 439. See *Evans v. Kymer*, 1 B. & Ad. 528, 20 E. C. L. 437.

And where the accommodation party holds a note which has already served its purpose and become *functus officio*, upon which he may wrongfully render the accommodation party liable, the latter may maintain trover therefor. *Park v. McDaniels*, 37 Vt. 594.

VI. PRESENTMENT AND NOTICE—Accommodation Drawer or Indorser Entitled to Notice.

An accommodation drawer or indorser is entitled to demand the same diligence of the holder as if the instrument had been drawn or indorsed for value. He is therefore entitled to demand and notice.¹

Accommodated Party not Entitled to Notice.—But if the indorser or drawer is the party for whose accommodation the instrument was signed, he is not entitled to notice, because he is not entitled to any remedy over against the prior parties.²

1. *England*.—Cory v. Scott, 3 B. & Ald. 619; *Ex p. Heath*, 2 Ves. & B. 240; Norton v. Pickering, 8 B. & C. 610, 15 E. C. L. 314; Brown v. Maffey, 15 East 216; Sleigh v. Sleigh, 5 Exch. 514; Carter v. Flower, 16 M. & W. 743; Maltass v. Siddle, 6 C. B. N. S. 494, 95 E. C. L. 494; Turner v. Samson, 2 Q. B. Div. 23; Foster v. Parker, 2 C. P. Div. 18.

United States.—French v. Columbia Bank, 4 Cranch (U. S.) 141; Ramdulollday v. Darioux, 4 Wash. (U. S.) 61; Allen v. King, 4 McLean (U. S.) 128; Mackall v. Goszler, 2 Cranch (C. C.) 240.

Alabama.—Shirley v. Fellows, 9 Port. (Ala.) 300; Sherrod v. Rhodes, 5 Ala. 683.

Connecticut.—Buck v. Cotton, 2 Conn. 126, 7 Am. Dec. 251; Holland v. Turner, 10 Conn. 308; East Haddam Bank v. Scovill, 12 Conn. 316.

Kentucky.—Barbaroux v. Waters, 3 Metc. (Ky.) 304; Sebree Deposit Bank v. Moreland (Ky., 1894), 28 S. W. Rep. 153.

Louisiana.—Braux v. LeBlanc, 10 La. Ann. 97; Curry v. Herlong, 11 La. Ann. 634; Weaver v. Marvel, 12 La. Ann. 517; Ball v. Greaud, 14 La. Ann. 303, 74 Am. Dec. 431; Crane v. Trudeau, 19 La. Ann. 307; Field v. New Orleans, etc., Newspaper Co., 21 La. Ann. 24, 99 Am. Dec. 699; Thielman v. Gueble, 32 La. Ann. 260, 36 Am. Dec. 267.

Maine.—Groton v. Dallheim, 6 Me. 476; Rea v. Dorrance, 18 Me. 137.

Massachusetts.—Warder v. Tucker, 7 Mass. 449, 5 Am. Dec. 62.

Missouri.—Bogy v. Keil, 1 Mo. 743; Glasgow v. Copeland, 8 Mo. 269; Merchants' Bank v. Easley, 44 Mo. 286, 100 Am. Dec. 287.

New York.—Jackson v. Richards, 2 Cal. (N. Y.) 343. See Agan v. M'Manus, 11 Johns. (N. Y.) 180.

North Carolina.—Smith v. M'Lean, 2 Term. (N. Car.) 72, 7 Am. Dec. 693; Denny v. Palmer, 5 Ired. (N. Car.) 610.

Ohio.—Miser v. Trovinger, 7 Ohio St. 281.

Pennsylvania.—Richter v. Selin, 8 S. & R. (Pa.) 439.

South Carolina.—Scarborough v. Harris, 1 Bay (S. Car.) 177, 1 Am. Rep. 609.

DeBerd v. Atkinson, 2 H. Bl. 336, followed in Sisson v. Thomlinson, Selw. N. P. 13th ed. 290, which announced a contrary doctrine, has been repeatedly overruled.

Indorser Who Knows that the Drawer is not Entitled to Notice.—In *Virginia* it has been held that where the drawer of a bill has no funds in the hands of the drawee, and has no right to draw upon him, and no reason to suppose that he will accept the bill, and one who has full knowledge of these facts indorses for the accommodation of the drawer, there is so far an element of fraud in the transaction that the case will be taken out of the general

rule and notice to the indorser will be unnecessary. *Farmers' Bank v. Vanmeter*, 4 Rand. (Va.) 553.

Security Held by Indorser.—The accommodation indorser is entitled to notice although he holds ample security to indemnify himself against the loss in consequence of the responsibilities he assumes. *Holland v. Turner*, 10 Conn. 308; *Oswego v. Knowler*, Hill & D. Supp. (N. Y.) 122.

The question of the effect of security taken by the indorser is, however, wider than accommodation paper, and the cases are not in accord. See the title **BILLS AND NOTES**.

Maker or Acceptor Insolvent.—The accommodation drawer or indorser is entitled to due notice although the acceptor or maker is known to be insolvent. *Nicholson v. Gouthit*, 2 H. Bl. 609; *Denny v. Palmer*, 5 Ired. (N. Car.) 610. But see *Morris v. Gardner*, 1 Cranch (C. C.) 213, and, generally, the title **BILLS AND NOTES**.

Accommodation Indorser Paying without Notice.

—The accommodation indorser may at maturity take up the instrument without waiting for demand and notice, and he may then sue the acceptor or maker upon the instrument as holder thereof, for the holder has a right to waive presentment and notice. *Stanley v. McElrath*, 86 Cal. 449; *Pinney v. Gregory*, 102 Mass. 186; *Sleigh v. Sleigh*, 5 Exch. 514. See *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316.

But if he makes only part payment without waiting for demand and notice, his only remedy is for money paid upon the implied contract of indemnity, and as the implied contract of indemnity is that the maker or acceptor will indemnify, if the indorser is compelled to pay upon the maker's or acceptor's default, the indorser cannot recover of the maker or acceptor, since his payment has been voluntary. *Sleigh v. Sleigh*, 5 Exch. 514.

Indorser before Delivery.—It seems that in *Connecticut* a stranger who indorses an instrument before delivery, being liable as a guarantor, is not entitled to notice. *Clark v. Merriam*, 25 Conn. 576. So in *Ohio*. *Castle v. Rickly*, 44 Ohio St. 490, 58 Am. Rep. 839.

Waiver of Notice by Partner.—One partner cannot waive notice so as to bind his copartners in respect to an accommodation indorsement by the firm, inasmuch as in respect to the accommodation indorsement they are not copartners. *Baer v. Leppert*, 12 Hun (N. Y.) 516.

2. *England*.—*Sharp v. Bailey*, 9 B. & C. 44, 17 E. C. L. 329; *Lafitte v. Slater*, 6 Bing. 623, 19 E. C. L. 181; *Fitzgerald v. Williams*, 6 Bing. N. Cas. 68, 37 E. C. L. 281. See *Collott v. Haigh*, 3 Campb. 281.

Demand of Accommodation Drawer or Indorser.—It need hardly be said that the accommodation acceptor of a bill of exchange, or the accommodation maker of a note, cannot claim that demand should be made of the party accommodated, the drawer, or indorser, and notice of the latter's failure to pay be given to him.¹

VII. EXTINGUISHMENT—Payment, when Extinguishment Generally.—It is the general rule that payment, in order to extinguish a bill or note, must be made by the party ultimately liable thereon, and that payment by a drawer or indorser does not defeat or reduce the holder's right of recovery.² The rights of the parties are worked out under this rule by considering the holder who has thus recovered from the acceptor or maker the whole amount of the instrument as a trustee *pro tanto* for the drawer or indorser, from whom he has previously received payment, and who himself has his remedy over against the maker or acceptor.³ These principles are modified in the case of accommodation paper, because the real relation of the parties and their rights *inter se* differ from the rights and relations of parties to ordinary business paper.

Payment by Accommodated Party is Extinguishment.—Payment by the party accommodated, whether drawer or indorser, at or after maturity, is a complete discharge of accommodation paper, and extinguishes the holder's right of action against the maker or acceptor thereon, or the right of the drawer or indorser who has so paid to reissue the instrument.⁴

United States.—French v. Columbia Bank, 4 Cranch (U. S.) 141; Webster v. Mitchell, 22 Fed. Rep. 869. See Washington Bank v. Reynolds, 2 Cranch (C. C.) 289.

Alabama.—Evans v. Norris, 1 Ala. 511; Holman v. Whiting, 19 Ala. 703.

Arkansas.—Harrison v. Trader, 29 Ark. 85; McRae v. Rhodes, 22 Ark. 315.

Connecticut.—Holland v. Turner, 10 Conn. 308.

Iowa.—Iowa City First Nat. Bank v. Ryerson, 23 Iowa 508.

Louisiana.—Nicolet v. Gloyd, 18 La. 417; New Orleans Sav. Bank v. Harper, 12 Rob. (La.) 231, 43 Am. Dec. 226; Gillespie v. Cammack, 3 La. Ann. 248.

Maine.—Torrey v. Foss, 40 Me. 74.

New Jersey.—Blenderman v. Price, 50 N. J. L. 296.

New York.—Hoffman v. Smith, 1 Cai. (N. Y.) 157; Mechanics' Bank v. Griswold, 7 Wend. (N. Y.) 165; Ross v. Bedell, 5 Duer (N. Y.) 462. See Agan v. M'Manus, 11 Johns. (N. Y.) 180.

North Carolina.—Denny v. Palmer, 5 Ired. (N. Car.) 610.

Pennsylvania.—Reid v. Morrison, 2 W. & S. (Pa.) 401.

Tennessee.—See McMean v. Little, 3 Baxt. (Tenn.) 330.

Virginia.—McVeigh v. Old Dominion Bank, 26 Gratt. (Va.) 797.

Special Damage—Burden of Proof.—If the drawer alleges special damage as a result of his not having received notice of the dishonor of the bill by the accommodation acceptor, the burden of proof is upon him to prove special damage. Fitzgerald v. Williams, 6 Bing. N. Cas. 68, 37 E. C. L. 281.

When Accommodated Drawer Entitled to Notice.—It is not enough to relieve the holder from the necessity of giving notice to the drawer that the acceptance was for the latter's accommodation; and if, although the bill was accepted for his accommodation, the

drawer have funds in the hands of the acceptor at maturity, though insufficient to pay the whole amount of the bill, he is entitled to notice of dishonor. Lacoste v. Harper, 3 La. Ann. 385, 48 Am. Dec. 449.

1. Cox v. Mechanics' Sav. Bank, 28 Ga. 529; Hansbrough v. Gray, 3 Gratt. (Va.) 340. But see Connerly v. Planters', etc., Ins. Co., 66 Ala. 432.

2. See the title **BILLS AND NOTES.**

3. See the title **BILLS AND NOTES.**

4. *England.*—Lazarus v. Cowie, 3 Q. B. 459; Jewell v. Parr, 13 C. B. 909, 76 E. C. L. 909, 16 C. B. 684, 81 E. C. L. 684; Ralli v. Dennistoun, 6 Exch. 483; *In re* Oriental Bank, 7 Ch. 102; Cook v. Lister, 32 L. J. C. P. 121, 13 C. B. N. S. 543, 106 E. C. L. 543, 9 Jur. N. S. 823; Sard v. Rhodes, 1 M. & W. 153. See Reynolds v. Blackburn, 7 Ad. & El. 161, 34 E. C. L. 66; Pursord v. Peek, 9 M. & W. 196; Lane v. Ridley, 10 Q. B. 479, 59 E. C. L. 479.

Canada.—Pyper v. McKay, 16 U. C. C. P. 67; Roche v. Kempt, 33 U. C. Q. B. 387.

California.—Schultz v. Noble, 77 Cal. 79; Merrill v. San Diego First Nat. Bank, 94 Cal. 59.

Maine.—Blenn v. Lyford, 70 Me. 149.

New York.—Farmers', etc., Bank v. Sherman, 6 Bosw. (N. Y.) 181.

Pennsylvania.—Love v. Brown, 38 Pa. St. 307.

Virginia.—Cottrell v. Watkins, 89 Va. 80r. But compare with the above Miller v. Larned, 103 Ill. 562.

Reissue.—In Lazarus v. Cowie, 3 Q. B. 459, it was held that where a bill is accepted for the accommodation of the drawer, and is by the latter negotiated before maturity, and paid by him at maturity, and afterwards reissued, such reissue is the issue of a new bill and requires a new stamp. The same point was before the Court of Common Pleas in Jewell v. Parr, 13 C. B. 909, 76 E. C. L. 909; and the case of Lazarus v. Cowie, 3 Q. B. 459, was doubted by Jervis, C.J.

Reason for Rule.—The reason for this is that payment by the accommodated party is payment by the party ultimately liable,¹ and that the theory of trust-

This case was afterwards before the Exchequer Chamber (*Parr v. Jewell*, 16 C. B. 684, 81 E. C. L. 684), and although the decision turned upon another point, it seems from the remarks of the judges in reply to the arguments of the counsel for the defendant in error that the court was inclined to consider a payment by the drawer, under the circumstances, as extinguishing the bill for all purposes. Thus Parke, B., said: "If the bill had been paid by the acceptor there could have been no doubt, and surely the payment by one who, as between themselves, is ultimately liable to pay the bill, must be the same thing."

In *Pyper v. McKay*, 16 U. C. C. P. 67, it was held that where a note had been paid at maturity by the accommodated party and re-issued thereafter, it was invalid. "Payment," said A. Wilson, J., "is one of the equities which attach to an accommodation note after it is due." See *supra*, this title, *Transfer after Maturity*.

Recovery.—A doubt was expressed by Williams, J., in *Cook v. Lister*, 32 L. J. C. P. 121, 13 C. B. N. S. 543, 106 E. C. L. 543, 9 Jur. N. S. 823, whether the general proposition that payment by the accommodation party extinguishes the instrument is correct unless this qualification be added to it,—supposing the holder has notice that the bill was an accommodation bill at the time of payment. He said: "My difficulty consists in seeing how, if the holder of a bill is not aware when he receives the money from the drawer that the bill is an accommodation bill, he can be regarded as having accepted the money in satisfaction of his claim as against the acceptor." But the limitation suggested, even if admitted, would leave the holder but a right to nominal damages. Further on in the same opinion, after noticing that in the case of ordinary business paper the holder may recover the whole amount of the instrument from the acceptor although he has received part payment from the drawer or indorser, it is said: "But a totally different consideration arises where, by reason of its being an accommodation bill, it is impossible to look at the holder, supposing he was allowed to recover the whole amount, as holding that difference as trustee for the drawer. Therefore it seems to me that where it appears that the bill sued on is an accommodation bill, even supposing that the holder had no notice of it at the time he received payment from the drawer, yet that payment must be taken in mitigation of damages, and that the holder can recover no more than the difference between the amount of the bill and that payment."

But it would seem that by the weight of authority payment by the party accommodated completely destroys the holder's right of action, and does not merely reduce it to a right to sue for nominal damages. *Lazarus v. Cowie*, 3 Q. B. 459; *Pyper v. McKay*, 16 U. C. C. P. 67; *Blenn v. Lyford*, 70 Me. 149.

And it has been held that payment by the accommodated party, the payee, extinguishes the note, although the holder had no notice of the relations of the parties. *Merrill v. San Diego First Nat. Bank*, 94 Cal. 59.

The *English* law upon this whole subject is now settled by the Bills of Exchange Act (45 and 46 Vict., c. 61), § 59 (3) of which provides that "where an accommodation bill is paid in due course by the party accommodated, the bill is discharged."

Manner of Payment.—An agreement made with the holder of a note, by one for whose accommodation it was made, to pay in a specific manner, inures, when executed, to the benefit of the holder. *Farmers', etc., Bank v. Sherman*, 6 Bosw. (N. Y.) 181. See *Merrill v. San Diego First Nat. Bank*, 94 Cal. 59.

So an agreement that the note should be considered paid if a general balance of accounts between the holder and the party accommodated turns out in the latter's favor to the amount of the note. *Roche v. Kempt*, 33 U. C. Q. B. 387.

Taking the note of the accommodated party in full satisfaction is a discharge of the accommodation acceptor. *Sard v. Rhodes*, 1 M. & W. 153.

If it is shown upon the trial of an action brought against the accommodation maker of a promissory note that the plaintiff, in consideration of the conveyance to him by the maker and the indorser of the note of other security for the indebtedness to which such note was collateral, agreed with the indorser, for whose benefit the note was made, to surrender the same (of which agreement the accommodation maker had knowledge), but failed to do so, the action is not maintainable against the accommodation maker. *Flour City Nat. Bank v. McKay*, 86 Hun (N. Y.) 15, 33 N. Y. Supp. 365.

Where the holder of a bill of exchange, accepted for the accommodation of the drawer, sent it to a bank for collection, and the bank, when the bill came to maturity, passed the amount thereof to the credit of the holder, it was held that this was not such a payment as would discharge the acceptor, but that the bank succeeded to the right of the holder, and might maintain an action on the bill against the acceptor. *Pacific Bank v. Mitchell*, 9 Met. (Mass.) 297.

Payment before Maturity.—But payment by the party accommodated, before maturity, does not extinguish the instrument. Thus an accommodation note which has once been discounted and afterward taken up by the party accommodated may be transferred to a third party before maturity, discharged of the equities existing between the original parties, notwithstanding the second indorser has, at the time of such transfer, knowledge of the fact that it is accommodation paper and has been once indorsed and taken up. *Washington Bank v. Krum*, 15 Iowa 53.

1. *Lazarus v. Cowie*, 3 Q. B. 459; *Parr v. Jewell*, 16 C. B. 684, 81 E. C. L. 684.

teenship upon which a recovery by the holder in the case of ordinary business paper is supported is not applicable, since when the party accommodated has paid the instrument he has no right of action against the maker or acceptor, and the recovery could not be considered as inuring to his benefit *pro tanto*.¹

Part Payment by Party Accommodated.—Accommodation paper is also extinguished *pro tanto* by a part payment made by the party accommodated.²

ACCOMPANY.—This term is not equivalent to "annexed."³

1. *Cook v. Lister*, 32 L. J. C. P. 121; *Roche v. Kempt*, 33 U. C. Q. B. 387.

2. *Cook v. Lister*, 32 L. J. C. P. 121; *Rutledge v. Townsend*, 38 Ala. 706; *Springfield Third Nat. Bank v. Hastings*, 134 N. Y. 501, 58 Hun (N. Y.) 531; *State Bank v. Smith*, 85 Hun (N. Y.) 201; *Love v. Brown*, 38 Pa. St. 307; *Boggs v. Lancaster Bank*, 7 W. & S. (Pa.) 331. See *Mosser v. Criswell*, 150 Pa. St. 409.

Bankruptcy.—Where the drawer or indorser, the accommodated party, becomes bankrupt, the holder who has received part payment from the accommodation acceptor or maker may prove for the full amount of his debt, but he is entitled to dividends only to the

extent of the difference between what he has actually received and his debt; the surplus he holds as trustee for the accommodation maker or acceptor. *Downing v. Traders' Bank*, 2 Dill. (U. S.) 136. See *In re Howard*, 12 Fed. Cas., p. 625, No. 6750; *In re Baxter*, 2 Fed. Cas., p. 1045, No. 1120. Compare *In re Hicks*, 12 Fed. Cas., p. 113, No. 6456.

3. For example, the *Massachusetts* statutes relating to the extradition of fugitives from justice required that sworn evidence should *accompany* the demand of a governor of another state; and in *Kingsbury's Case*, 106 Mass. 223, it was held that this did not require that the proof should be *annexed* to the requisition.

ACCOMPLICES.

By L. P. McGEHEE.

I. DEFINITION, 389.

II. WHO IS AN ACCOMPLICE, 390.

III. ACCOMPLICE AS WITNESS, 393.

1. Competency, 393.
2. When Admitted as Witness, 397.
3. Credibility, 398.
4. Corroboration, 399.
 - a. At Common Law, 399.
 - b. By Statute, 401.
 - c. When Sufficient, 402.
 - (1) Generally, 402.
 - (2) In Trials for Misdemeanors, 405.
5. Right to Pardon of Accomplice Testifying for Prosecution, 406.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the following titles in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE: ACCESSORY AND THE LIKE*, Vol. I., p. 66; *CRIMINAL PROCEDURE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCESSORY; AIDER AND ABETTOR; CONFESIONS; CONSPIRACY; CRIMINAL LAW; EVIDENCE; RES GESTÆ; WITNESSES*; and the titles where particular crimes are treated.

I. DEFINITION.—An accomplice is strictly defined as one who is associated with others in the commission of a crime, all being principals. But the term is used frequently to include all the participants in a crime, whether as principals or accessories.¹

Misdemeanors.—It is as applicable to the participants in misdemeanors as in felonies.²

1. Bouv. L. Dict. 21; Harris v. State, 7 Lea (Tenn.) 124; House v. State, 16 Tex. App. 25.

Includes All Participants in Crime.—Principals in the second degree are sometimes termed accomplices, but this appellation will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. Foster 341; Russell on Crimes (9th Am. ed.) *49. See also Davidson v. State, 33 Ala. 350; Polk v. State, 36 Ark. 117; Hudspeth v. State, 50 Ark. 544; People v. Kraker, 72 Cal. 459; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; Johnson v. State, 2 Ind. 652; Lindsay v. People, 63 N. Y. 153; State v. Odell, 8 Oregon 33; Barrara v. State, 42 Tex. 263; House v. State, 16 Tex. App. 25; Zollicoffer v. State, 16 Tex. App. 312; Harrison v. State, 17 Tex. App. 442.

Other Definitions.—In People v. Bolanger, 71 Cal. 19, an accomplice is defined (citing Whart. Cr. Ev. 440) as "one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime."

To the same effect are Clapp v. State, 94 Tenn. 186; State v. Roberts, 15 Oregon 197; State v. Light, 17 Oregon 360; State v. Umble, 115 Mo. 461.

In People v. Smith, 28 Hun (N. Y.) 626, an accomplice was defined to be "a person involved either directly or indirectly in the commission of the crime. To render him such he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction."

2. See People v. Smith, 28 Hun (N. Y.) 626; Davidson v. State, 33 Ala. 350; Reg. v. Farler, 8 C. & P. 106, 34 E. C. L. 314; and *infra*,

Use of the Term.—The word is employed principally in the law of evidence, not as denoting any special degree of guilt or any particular connection with the crime committed; but as applying generally to those participants in the crime who are admitted to give evidence against their fellow criminals.¹

II. WHO IS AN ACCOMPLICE—General Test.—The test in general to determine whether a witness is or is not an accomplice is the inquiry: Could the witness himself have been indicted for the offense either as principal or as accessory? ² If he could not be so indicted, he is not an accomplice.³

Persons Morally Guilty, but Not Indictable.—It follows that a participant in an offense, however morally guilty he may be, whose connection with the forbidden transaction does not render him liable to an indictment therefor, is not an accomplice. Thus:

Abortion.—A woman who submits to an operation or who uses means to produce an abortion, is not an accomplice of the person performing the operation or employing or furnishing the means.⁴

Purchasing Articles the Sale of Which is Forbidden.—One purchasing liquor sold in violation of law is not an accomplice of the vendor; ⁵ nor is one who buys lot-

this title, *Corroboration—In Trials for Miscellaneous*.

1. In *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474, Breese, C.J., said: "Another definition of an accomplice is, one of many equally concerned in a felony, the term being generally applied to those who are admitted to give evidence against their fellow criminals for the furtherance of justice which might otherwise be eluded."

In the *Texas Penal Code*, § 79, the term "accomplice" is so defined as to make it the equivalent of accessory before the fact at common law. *Cook v. State*, 14 Tex. App. 101; *Smith v. State*, 13 Tex. App. 507.

But in the law of evidence the word is used in the ordinary accepted sense as defined in the text. *Barrara v. State*, 42 Tex. 260, *Irvin v. State*, 1 Tex. App. 301; *House v. State*, 16 Tex. App. 33.

2. *Bass v. State*, 37 Ala. 469; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319.

The Fact that the Witness is Jointly Indicted with another does not establish that he is an accomplice with that other in the commission of the offense wherewith they stand charged, but the question is one for the jury. *State v. Schlagel*, 19 Iowa 169; *Downard v. Com.* (Ky., 1891), 17 S. W. Rep. 439. See *Craft v. State*, 3 Kan. 478.

The Converse of the Rule laid down in the text seems not to hold. Thus, persons present at and sanctioning a prize fight where one of the combatants is killed are guilty of manslaughter as principals in the second degree, and yet they are not such accomplices as require their evidence to be confirmed if they are called as witnesses against other parties charged with manslaughter. *Rex v. Hargrave*, 5 C. & P. 170, 24 E. C. L. 260.

Seduction.—An indictment for seduction under promise of marriage cannot be sustained upon the uncorroborated testimony of the prosecutrix, for the woman in such a case is a *particeps criminis*. *Polk v. State*, 40 Ark. 484. But see *People v. Powell*, 4 N. Y. Cr. Rep. 586.

Incest.—In a prosecution for incest the female is deemed equally guilty with the

male if she knowingly and willingly unites with him in the commission of the crime, and her testimony ought to be corroborated in order to convict him. *State v. Jarvis*, 18 Oregon 360; *Blanchette v. State*, 29 Tex. App. 47; *Dodson v. State*, 24 Tex. App. 514; *Mercer v. State*, 17 Tex. App. 452; *Freeman v. State*, 11 Tex. App. 92; *Cesar v. State* (Tex. Crim. App., 1895), 29 S. W. Rep. 785; *State v. Dana*, 59 Vt. 614. Otherwise where the female is forced. *Mullinix v. State* (Tex. Crim. App., 1894), 26 S. W. Rep. 504.

Crime against Nature.—Persons who by mutual consent commit the crime against nature are accomplices. *Reg. v. Jellyman*, 8 C. & P. 604, 34 E. C. L. 547.

3. *Com. v. Wood*, 11 Gray (Mass.) 93.

4. *Com. v. Wood*, 11 Gray (Mass.) 85; *Com. v. Boynton*, 116 Mass. 343; *Com. v. Follansbee*, 155 Mass. 274; *State v. Owens*, 22 Minn. 238; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319; *People v. Vedder*, 98 N. Y. 630; *People v. Meyers*, 5 N. Y. Cr. Rep. 120; *State v. Hyer*, 39 N. J. L. 598; *Watson v. State*, 9 Tex. App. 237. But see *People v. Josselyn*, 39 Cal. 393. See also the title ABORTION.

One who accompanies a pregnant woman to a place in order that she may have an operation to produce an abortion performed is not an accomplice. *Com. v. Drake*, 124 Mass. 21.

But the patient submitting to an abortion is in a moral point of view implicated in the transaction, and this is a proper circumstance for the jury to consider in determining her credibility. *Com. v. Wood*, 11 Gray (Mass.) 85; *Com. v. Brown*, 121 Mass. 69; *Watson v. State*, 9 Tex. App. 237.

5. *State v. Teahan*, 50 Conn. 92; *Com. v. Willard*, 22 Pick. (Mass.) 476; *Com. v. Whitcomb*, 12 Gray (Mass.) 126; *Harrington v. State*, 36 Ala. 242; *People v. Smith*, 28 Hun (N. Y.) 626, 92 N. Y. 665.

Sunday Sales.—The same is true of one buying liquor on Sunday in violation of the excise laws. *Page v. State*, 11 Lea (Tenn.) 202; *State v. Baden*, 37 Minn. 212.

In *Com. v. Willard*, 22 Pick. (Mass.) 476

tery tickets an accomplice of him who sells them where their sale is forbidden.¹

Bribery.—Upon a prosecution for giving a bribe, the person bribed is not an accomplice requiring corroboration.²

Criminal Intent.—Criminal intent is a necessary ingredient of crime, and is essential to render one an accomplice.³ It follows that where this element is absent one is not an accomplice. This principle is illustrated in a variety of cases. Thus:

Mere Spectators.—One who is merely present at the commission of a crime, but in no way aids or participates therein, is not an accomplice.⁴

Duress.—A child who participates in a criminal offense under threats and coercion is not an accomplice;⁵ nor is one who, through fear, conceals the commission of a crime.⁶

Shaw, C. J., said: "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed by the counsel, advice, or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se* or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law. All the cases cited in support of the objection of the witness are of this description. * * * A case depending upon a similar principle in our own books is that of *Com. v. Harrington*, 3 Pick. (Mass.) 26, in which it was held that to let a house to another, with an intent that it should be used and occupied for the purposes of prostitution, with the fact that it was so used, was a misdemeanor. The keeping of such a disorderly house has long been considered a high and aggravated offense, criminal in itself, tending to general disorder, breaches of the public peace, and of common nuisance to the community. It is in cases of this character only that the principle has been applied; but we know of no case where an act which, previously to the statute, was lawful or indifferent, is prohibited under a small specific penalty, and where the soliciting or inducing another to do the act, by which he may incur the penalty, is held to be in itself punishable. Such a case perhaps may arise, under peculiar circumstances, in which the principle of law, which in itself is a highly salutary one, will apply; but the court are all of the opinion that it does not apply to the case of one who, by purchasing spirituous liquor of an unlicensed person, does, as far as that act extends, induce that other to sell in violation of the statute."

1. *People v. Emerson*, 6 N. Y. Cr. Rep. 157.
2. *Reg. v. Boyes*, 1 B. & S. 311, 101 E. C. L. 311.

3. *U. S. v. Henry*, 4 Wash. (U. S.) 428.

For criminal intent generally see the title **CRIMINAL LAW**.

A common criminal intent with the perpetrator of the crime is necessary to render one an accessory before the fact, or an aider and abettor. See the titles **ACCESSORY**; **AIDER AND ABETTOR**.

It seems that a common criminal intent is necessary to render persons accomplices in a criminal act. See *Stone v. State*, 3 Tex. App. 675; *Davidson v. State*, 33 Ala. 350.

Breaking Jail.—Under a statute making it an offense to convey into a jail any instruments to enable one imprisoned on a charge of felony to escape, a prisoner within the jail who effected his escape by using the means conveyed into the jail by the defendant, the defendant's purpose being to facilitate the escape of his own brother who was confined therein on a criminal charge, was held not to be an accomplice of the defendant. *Peeler v. State*, 3 Tex. App. 533. See *Ash v. State*, 81 Ala. 76. Compare *Hillman v. State*, 50 Ark. 523.

4. *Allen v. State*, 74 Ga. 769; *Lowery v. State*, 72 Ga. 649.

On a trial for burning a jail a witness testified that on the night of the fire the defendant invited him to go and see him "upset the jail;" that he went and saw the defendant wrench the lock from the jail door and enter, and that the defendant afterwards confessed to him that he had burned the jail. It was held that such witness was not an accomplice. *State v. Reader*, 60 Iowa 527.

One who is a bystander while a murder is being committed, even though he mentally approves of the act, is not an accomplice. *State v. Cox*, 65 Mo. 29.

Mere Knowledge that a Crime is to be Committed and the concealment of such knowledge does not make the party concealing it an accomplice or *particeps criminis*. *State v. Roberts*, 15 Oregon 187; *Noftlinger v. State*, 7 Tex. App. 324; *Rucker v. State*, 7 Tex. App. 550; *Smith v. State*, 23 Tex. App. 357. 59 Am. Rep. 773; *Elizando v. State*, 31 Tex. Crim. Rep. 237; *Alford v. State*, 31 Tex. Crim. Rep. 299; *Tullis v. State*, 41 Tex. 598.

5. *Beal v. State*, 72 Ga. 200.

6. *Melton v. State*, 43 Ark. 367; *Green v. State*, 51 Ark. 189.

But the fear must be inspired by present and immediate danger to life or member. *Burns v. State*, 89 Ga. 527.

Concealment of the fact that a felony has been committed does not render one an ac-

Feigned Accomplices.—A person feigning to be a confederate in order to discover and bring criminals to justice is not an accomplice in crime with them.¹

Innocently Concealing Stolen Property.—One is not an accomplice who innocently assists in concealing stolen property.²

Gaming.—Where persons play together at a gambling game, they have been held to have such a common criminal intent as makes them accomplices of one another;³ but one who is present where gaming is going on and occasionally aids an unskilful player is not an accomplice in the gambling.⁴ And one who plays at a game of tenpins without betting is not an accomplice of others betting at the same game.⁵

complice. *Noftsinger v. State*, 7 Tex. App. 301; *Rucker v. State*, 7 Tex. App. 549.

1. *Rex v. Despard*, 28 How. St. Tr. 346; *State v. Brownlee*, 84 Iowa 473. See the title DETECTIVE.

A Detective who Enters into Communication with criminals without any felonious intent, but for the purpose of discovering and making known their secret designs and crimes, and who acts throughout with this original purpose, is not to be regarded as an accomplice. The question whether he is so acting is one of fact for the jury. *State v. McKean*, 36 Iowa 343, 14 Am. Rep. 530.

If One Pretending by way of Artifice to be an accomplice, but believed by the accused to be a real accomplice, performs, at the instance of the owner of the goods, acts amounting to larceny, the pretended accomplice represents the owner as to such acts, and not the accused, although the accused may have concurred in such acts and thought he prompted them. Such acts cannot be imputed to the accused as legally criminal, inasmuch as they really proceed from the joint will of the owner and the accomplice, and not from the joint will of the accused and the accomplice. *Williams v. State*, 55 Ga. 391.

A Person Buying Lottery Tickets for the purpose of detecting and punishing the vendor where their sale is prohibited is not an accomplice. *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128, 1 N. Y. Crim. Rep. 495, 29 Hun (N. Y.) 461.

The Same is True of One Feigning Complicity in a larceny, *People v. Barric*, 49 Cal. 342; *People v. Bolanger*, 71 Cal. 17; and of one acting in concert with the police by purchasing counterfeit coin from one having such coin in his possession with intent to pass the same, *People v. Farrell*, 30 Cal. 316; also of one purchasing intoxicating liquors unlawfully sold, in order to obtain evidence, *Com. v. Downing*, 4 Gray (Mass.) 29; *Com. v. Graves*, 97 Mass. 114.

2. *People v. Ricker*, 7 N. Y. Crim. Rep. 19. See *Robbins v. State* (Tex. Crim. App., 1894), 28 S. W. Rep. 473; *Dill v. State* (Tex. Crim. App., 1894), 28 S. W. Rep. 950.

3. **Gaming.**—*Davidson v. State*, 33 Ala. 350; *Bird v. State*, 36 Ala. 279; *State v. Quarles*, 13 Ark. 307; *State v. Light*, 17 Oregon 358. But see *Stone v. State*, 3 Tex. App. 675.

In *Davidson v. State*, 33 Ala. 350, one who played with the defendant as an adversary at a certain game of cards called "poker" was held to be an accomplice of the defendant. Here *Walker, J.*, said: "Our argu-

ment does not involve the position that adversaries in fact are accomplices in law. Antagonists in playing cards are not adversaries, as to the thing which constitutes the offense. * * * There is a perfect agreement among the players that each shall perform his part, and the strife between them is which shall do it most skilfully. If a community of purpose be necessary to constitute one an accomplice, our position is still maintainable. It would be absurd to contend that any other common object than to commit the offense was necessary to make one an accomplice with the accused. Those who play together at a game of cards have a common object to play at the game, and that is the offense. They have diverse objects to play with the greatest skill, and that does not constitute the offense. * * * They concur in the purpose to violate the law. They do not concur in the object to be accomplished by the violation. The offense is complete before it is known who will be the winner."

In *Stone v. State*, 3 Tex. App. 675, persons playing together at pool were held not to be accomplices. In this case *Ector, P. J.*, said: "When several persons bet at a game of faro, pool, or monte, each is guilty of betting at a gaming-table or bank, exhibited for the purpose of gaming; not as principals and accomplices to each other, but as several, not joint, offenders. There is not that oneness of intent and oneness of offense between them to make them principals. No one of them is aiding or assisting another by acts or encouraging by words in the commission of the offense. Each acts independently for himself against the others, and without concert mediately or immediately with the other betters. An indictment charging them as joint, and not separate, offenders would be bad. The parties to the game of pool may change, and yet it not affect the defendants. Each one, as he takes part in the game and bets money on it, is guilty of a separate offense."

One who, though not actually playing, is in partnership with one of the players in his winnings or losses, and advances money to him to be used in betting, is an accomplice with those playing the game. *English v. State*, 35 Ala. 428.

4. *Smith v. State*, 37 Ala. 472.

5. *Bass v. State*, 37 Ala. 469.

But the dealer of a game of "stud poker" is an accomplice of those who bet money or value at such game. *State v. Light*, 17 Oregon 358.

Accessory after the Fact.—The authorities are not in accord as to whether an accessory after the fact is or is not an accomplice within the rule that the testimony of an accomplice should be corroborated.¹

Question for Jury.—If there is evidence tending to show that a witness is an accomplice, the question whether he is an accomplice or not must be submitted to the jury as a question of fact.² If, however, the prosecution admits that the witness is an accomplice, that admission is binding upon it and is conclusive for the purposes of the trial.³

III. ACCOMPLICE AS WITNESS—1. **Competency.**—Notwithstanding the common-law rule that persons interested in an inquiry were inadmissible as witnesses, an accomplice has never been regarded, as such, as incompetent; but his testimony may be received either against his associates in crime⁴ or in

1. **Accessory After Fact as Accomplice.**—The definition of an accomplice as given in standard text-books and generally approved by the courts includes an accessory after the fact. See *supra*, this title, *Definition*.

One who, with full knowledge that a crime has been committed, harbors the criminal, is an accomplice in his crime. *Polk v. State*, 36 Ark. 117. See *Chitister v. State* (Tex. Crim. App., 1894), 28 S. W. Rep. 683; *Chumley v. State*, 28 Tex. App. 87.

Contra.—Authorities are found, on the other hand, holding that an accessory after the fact is not an accomplice within the rule requiring the testimony of an accomplice to be corroborated. *Lowery v. State*, 72 Ga. 649; *Allen v. State*, 74 Ga. 769; *State v. Umble*, 115 Mo. 452; *People v. Chadwick*, 7 Utah 134.

A Receiver of Stolen Goods is an accessory of the thief who stole them. *Rex v. Moores*, 7 C. & P. 270, 32 E. C. L. 507; *Rex v. Wells*, M. & M. 326, 22 E. C. L. 324; *Reg. v. Robinson*, 4 F. & F. 43; *Reg. v. Pratt*, 4 F. & F. 315; *Roberts v. State*, 55 Ga. 220. But see *State v. Hayden*, 45 Iowa 11.

In *Tennessee* it has been held that the receiver of stolen goods is guilty of a substantive offense, and is not an accomplice of the thief, within the meaning of a statute requiring the corroboration of accomplices. *Harris v. State*, 7 Lea (Tenn.) 124.

2. *Alabama.*—*Washington v. State*, 58 Ala. 355.

Arkansas.—*Melton v. State*, 43 Ark. 367.

California.—*People v. Curlee*, 53 Cal. 607; *People v. Sansome*, 98 Cal. 235.

Georgia.—*Beal v. State*, 72 Ga. 200; *Bernhard v. State*, 76 Ga. 613.

Iowa.—*State v. McKean*, 36 Iowa 343, 14 Am. Rep. 530.

Massachusetts.—*Com. v. Elliot*, 110 Mass. 104; *Com. v. Ford*, 111 Mass. 394; *Com. v. Glover*, 111 Mass. 395.

Minnesota.—*State v. Lawlor*, 28 Minn. 216.

New York.—*People v. Hooghkerk*, 96 N. Y. 163; *People v. Ricker*, 7 N. Y. Cr. Rep. 19.

See also *Williams v. State* (Tex. Crim. App., 1894), 25 S. W. Rep. 629; *Elizando v. State*, 31 Tex. Crim. Rep. 237; *Zollicoffer v. State*, 16 Tex. App. 312; *Dill v. State* (Tex. Crim. App., 1894), 28 S. W. Rep. 950; *Delavan v. State* (Tex. Crim. App., 1895), 29 S. W. Rep. 385.

Compare, however, *State v. Lee*, 29 S. Car. 113.

In *People v. Curlee*, 53 Cal. 604, the court said: "At the trial the court, of its own motion, charged the jury that 'there is no evidence in this case tending to show that the witness Brown was an accomplice in the commission of the offense with which the defendant is charged.' This took wholly from the jury the question whether or not he was an accomplice, and the instruction was erroneous, if there was any evidence, however slight, tending to prove his complicity; and, as we have seen, there was evidence tending, in some degree at least, to establish that fact. Under section 1111 of the Penal Code the defendant could not have been convicted on the testimony of an accomplice, unless he was corroborated by other evidence, as therein provided, and the court should have submitted to the jury, under proper instructions, the question whether or not he was an accomplice. It may have been a question of vital consequence to the defendant, and we cannot say that he was not prejudiced by the ruling of the court."

Proof beyond Reasonable Doubt Not Required.

—It is error to instruct the jury that one is not to be regarded as an accomplice unless proved to be so beyond a reasonable doubt. Whether the witness is to be regarded as an accomplice requiring corroboration, is a question to be determined by the jury, and this question does not depend at all upon the strength or weight of his testimony, but solely upon its tendency, if true, to connect him with the offense of which he testifies. *Com. v. Ford*, 111 Mass. 394.

But the jury should be reasonably satisfied, before rejecting the evidence of a witness for want of corroboration, that he is an accomplice. *Ross v. State*, 74 Ala. 532; *Childress v. State*, 86 Ala. 77; *Hines v. State*, 27 Tex. App. 104.

Form of Instruction.—The court should instruct the jury that the witness is an accomplice if he did certain things, or omitted to do certain things, if the acts done or omitted in law made him an accomplice; an instruction that if the witness is an accessory he is an accomplice is not sufficient. *Armstrong v. State* (Tex. Crim. App., 1894), 26 S. W. Rep. 829.

3. *Com. v. Desmond*, 5 Gray (Mass.) 80; *Barrara v. State*, 42 Tex. 260.

4. *England.*—1 Hale P. C. 303; *Tongue's*

their behalf.¹

Promise of Reward.—An accomplice is not rendered incompetent for the prosecution because he testifies under an express or implied promise of pardon, or of a discontinuance of the proceedings against him.²

Joint Indictment—Infamy.—But an accomplice may become incompetent by

Case, Kel. 17; Rockwood's Case, 4 St. Tr. 681; Rex v. Long, 6 C. & P. 179, 25 E. C. L. 343; Laver's Case, 19 How. St. Tr. 377.

United States.—U. S. v. One Distillery, 2 Bond (U. S.) 399; U. S. v. Harries, 2 Bond (U. S.) 311; U. S. v. Smith, 2 Bond (U. S.) 323; Steinham v. U. S., 2 Paine (U. S.) 168.

Arkansas.—McKenzie v. State, 24 Ark. 636; Casey v. State, 37 Ark. 67.

California.—People v. Garnett, 29 Cal. 622; People v. Ames, 39 Cal. 403; People v. Melvane, 39 Cal. 614.

Colorado.—Solander v. People, 2 Colo. 48.

Florida.—Sumpter v. State, 11 Fla. 247; Keech v. State, 15 Fla. 591.

Georgia.—Phillips v. State, 34 Ga. 502; Parsons v. State, 43 Ga. 197.

Illinois.—Gray v. People, 26 Ill. 344, Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

Indiana.—Johnson v. State, 2 Ind. 652; Dawley v. State, 4 Ind. 128; Stocking v. State, 7 Ind. 326; Ayers v. State, 88 Ind. 275.

Iowa.—State v. Pepper, 11 Iowa 347; State v. Schlagel, 19 Iowa 169; State v. Thornton, 26 Iowa 79; State v. Dietz, 67 Iowa 220.

Louisiana.—State v. Cook, 20 La. Ann. 145; State v. Russell, 33 La. Ann. 135; State v. Crowley, 33 La. Ann. 782.

Massachusetts.—Com. v. Savory, 10 Cush. (Mass.) 535; Com. v. Bosworth, 22 Pick. (Mass.) 397.

Montana.—Territory v. Corbett, 3 Mont. 50.

New York.—People v. Whipple, 9 Cow. (N. Y.) 707; People v. Dyle, 21 N. Y. 578; People v. Haynes, 55 Barb. (N. Y.) 450, 38 Hcw. Pr. (N. Y.) 369; Lindsay v. New York, 63 N. Y. 143.

Ohio.—Noland v. State, 19 Ohio 131.

Tennessee.—Kinchelow v. State, 5 Humph. (Tenn.) 9; Lucre v. State, 7 Baxt. (Tenn.) 148.

Texas.—Bruton v. State, 21 Tex. 337; Lopez v. State, 34 Tex. 133.

Vermont.—State v. Howard, 32 Vt. 38c; State v. Potter, 42 Vt. 495.

Virginia.—Brown v. Com., 2 Leigh (Va.) 760; Oliver v. Com., 77 Va. 590.

Witness Guilty as Principal.—The fact that the witness is the principal, and the defendant is but an accessory, will not change the rule. Wild's Case, 1 Leach C. C. 17, note (a); Keech v. State, 15 Fla. 591; State v. Russell, 33 La. Ann. 135; Lindsay v. People, 63 N. Y. 143; Noland v. State, 19 Ohio 131.

The principal felon is a competent witness on the part of the state on the trial of an indictment for receiving stolen property. State v. Copenburg, 2 Strobb. (S. Car.) 273.

Civil Cases.—In civil cases where the commission of a crime is one of the issues of fact, a *particeps criminis* is a competent wit-

ness. Sinclair v. Jackson, 47 Me. 102, 74 Am. Dec. 476; Heward v. Shipley, 4 East 180. See also Bush v. Ralling, Sayer 289.

In an action for divorce a *particeps criminis* is a competent witness. Moulton v. Moulton, 13 Me. 110; Brown v. Brown, 5 Mass. 320.

And so in a criminal prosecution for adultery. State v. Colby, 51 Vt. 291, *overruling* State v. Annice, N. Chip. (Vt.) 9.

1. 2 Hale P. C. 280, *citing* Rex v. Bilmore, 2 Rolle Abr. 685 Pl. 3; 1 Roscoe Criminal Ev. (8th Am. ed.) *132; 3 Russ. on Cr. (9th Am. ed.) *611.

An Accomplice who is Not Indicted is a competent witness for the defendant. McKenzie v. State, 24 Ark. 636; Brown v. State, 24 Ark. 620; Casey v. State, 37 Ark. 67; Sumpter v. State, 11 Fla. 247.

Separate Indictment.—The fact that the witness is separately indicted for the same offense with which the prisoner stands charged does not render him incompetent as a witness for the prisoner, U. S. v. Henry, 4 Wash. (U. S.) 428; U. S. v. Hanway, 2 Wall. Jr. (U. S.) 139; McKenzie v. State, 24 Ark. 636; Foster v. State, 45 Ark. 328; or against the prisoner, State v. Umble, 115 Mo. 452. But *compare*, as to the first proposition, Anderson v. State, 27 Tex. App. 177, 11 Am. St. Rep. 189; Parker v. State (Tex. Crim. App., 1894), 24 S. W. Rep. 901; Freeman v. State (Tex. Crim. App., 1894), 28 S. W. Rep. 471.

Where two prisoners are separately indicted for the same offense and both are tried together, they are competent for each other. U. S. v. Hunter, 1 Cranch (C. C.) 446.

But *compare* State v. Blennerhassett, Walk. (Miss.) 7. See also *infra*, this section, as to defendants jointly indicted.

2. 1 Hale P. C. 303; Hawkins P. C., b. 2, c. 46, § 135; Phillips Ev. (5th Am. ed.) *596; 1 Roscoe Cr. Ev. (8th Am. ed.) *132; Tongue's Case, Kel. 17, 3 Russ. on Cr. (9th ed.) *596; Laver's Case, 19 How. St. Tr. 373; Vaughan v. State, 57 Ark. 1; Craft v. State, 3 Kan. 478.

It is no objection to the competency of a witness that he may be entitled to a reward upon the conviction of the prisoner. U. S. v. Wilson, 1 Baldw. (U. S.) 90; Fraser's Case, 1 M'Nally 61-63.

A Contrary View was taken by Lord Hale: "If a reward be promised a prisoner for giving his evidence before he gives it, this, if proved, disables his testimony, and so, for my own part, I have always thought that if a person have a promise of pardon if he gives evidence against one of his own confederates this disables his testimony if it be proved upon him." 2 Hale P. C. 280. See also State v. Miller, 100 Mo. 606.

reason of the fact that he is indicted and tried jointly with his confederates,¹

1. Some confusion exists among the authorities as to the competency at common law of persons jointly indicted to testify for one another or for the prosecution.

When Tried Jointly.—It is settled that where two or more persons are jointly indicted and tried together, one is not a competent witness either for or against the other. *Reg. v. Lyons*, 9 C. & P. 555, 38 E. C. L. 224; *Reg. v. Payne*, L. R. 1 C. C. R. 349; 1 *Moak Rep.* 396; *Edgerton v. Com.*, 7 *Bush (Ky.)* 142. See *Oliver v. Com.*, 77 *Va.* 590. Otherwise by statute. See *Com. v. Brown*, 130 *Mass.* 279; *State v. Rose*, Phil. (N. Car.) 406; *Conway v. State*, 118 *Ind.* 482; *State v. Barrows*, 76 *Me.* 401, 49 *Am. Rep.* 629.

When Tried Separately—Competency for State.—Where two persons are jointly indicted, the rule established by the weight of authority is that one is a competent witness against the other, though not convicted or acquitted or otherwise discharged, if they are separately tried.

England.—*Winsor v. Reg.*, L. R. 1 Q. B. 390.

United States.—*Benson v. U. S.*, 146 *U. S.* 325.

Alabama.—*Marler v. State*, 67 *Ala.* 55; *Henderson v. State*, 70 *Ala.* 23, 45 *Am. Rep.* 72.

Florida.—*Adams v. State*, 28 *Fla.* 511; *Keech v. State*, 15 *Fla.* 591.

Kansas.—*State v. Bogue*, 52 *Kan.* 79.

Louisiana.—*State v. Mason*, 38 *La. Ann.* 476; *State v. Hamilton*, 35 *La. Ann.* 1043; *State v. Prudhomme*, 25 *La. Ann.* 522.

Maine.—*State v. Barrows*, 76 *Me.* 401, 49 *Am. Rep.* 629.

Mississippi.—*George v. State*, 39 *Miss.* 570. *Nebraska.*—*Carroll v. State*, 5 *Neb.* 31.

New Jersey.—*State v. Brien*, 32 *N. J. L.* 414; *Noyes v. State*, 41 *N. J. L.* 418; *Hunter v. State*, 40 *N. J. L.* 495.

New York.—*Wixson v. People*, 5 *Park. Cr. Rep. (N. Y.)* 119, *disapproving* *People v. Donnelly*, 2 *Park. Cr. Rep. (N. Y.)* 182; *Taylor v. People*, 12 *Hun (N. Y.)* 212.

Ohio.—*Noland v. State*, 19 *Ohio* 131; *Brown v. State*, 18 *Ohio St.* 509.

Virginia.—*Oliver v. Com.*, 77 *Va.* 590; *Smith v. Com.*, 90 *Va.* 759.

Washington.—*Edwards v. State*, 2 *Wash.* 291.

On the Other Hand, it has been held that one jointly indicted with another is not competent as a witness against the latter, although they are not put upon trial together, until he is discharged from the indictment or is convicted. *State v. Mooney*, 1 *Yerg. (Tenn.)* 431; *State v. Chyo Chiagk*, 92 *Mo.* 395. See *Edgerton v. Com.*, 7 *Bush (Ky.)* 142.

When two defendants were jointly indicted and tried for a felony and one was convicted and sentenced, while a mistrial was entered as to the other, the convicted defendant was held to be a competent witness against the other on a second trial. *South v. State*, 86 *Ala.* 617.

How Witnesses Rendered Admissible for State.—However the question of competency of

codefendants in behalf of the state in criminal cases stands, the best practice is to insure the admissibility of the evidence of the party whom it is desired to use as a witness, in one of the following ways:

First, the accomplice whose testimony is to be used is omitted from the indictment. This was the practice in Lord Hale's time, because an indictment "doth weaken and disparage his testimony, but possibly not wholly take away his testimony." 1 *Hale P. C.* 305. See 1 *Phill. Ev. (5th Am. ed.)* *108.

Second, if the accomplice was jointly indicted, his acquittal may be procured before the trial of his confederates. This is the ordinary *English* practice. 3 *Russ. Cr. (9th Am. ed.)* *626; *Rex v. Fraser*, 1 *M'Nally* 56; *Rex v. Rowland*, R. & M. 401; *Reg. v. Owen*, 9 C. & P. 83, 38 E. C. L. 44; *Reg. v. Payne*, L. R. 1 C. C. R. 349, 1 *Moak Rep.* 396; *Henderson v. State*, 70 *Ala.* 23, 45 *Am. Rep.* 72; *State v. Graham*, 41 *N. J. L.* 15, 32 *Am. Rep.* 174. Or, if the circumstances permitted (the crime not being an infamous one), the plea of guilty was taken and sentence was passed. *Reg. v. Lyons*, 9 C. & P. 555, 38 E. C. L. 224; *Winsor v. Reg.*, 6 B. & S. 178, 118 E. C. L. 178; *Reg. v. Payne*, L. R. 1 C. C. R. 349, 1 *Moak Rep.* 396; *State v. Graham*, 41 *N. J. L.* 15, 32 *Am. Rep.* 174. Where the disqualification for infamy no longer exists, this course is always practicable. See *Woodley v. State (Ala., 1894)*, 15 *So. Rep.* 82c.

Third, a *nolle prosequi* is entered as to the defendant whom it is desired to examine. This is the ordinary practice in the *United States*. *Phill. Ev. (5th Am. ed.)* *64; *Henderson v. State*, 70 *Ala.* 23, 45 *Am. Rep.* 72; *State v. Quarles*, 13 *Ark.* 307; *McKenzie v. State*, 24 *Ark.* 636; *State v. Banks*, 40 *La. Ann.* 736; *State v. Clump*, 16 *Mo.* 385; *State v. Beauchleigh*, 92 *Mo.* 490; *State v. Phipps*, 76 *N. Car.* 203; *State v. Lyon*, 81 *N. Car.* 600, 31 *Am. Rep.* 518; *Camron v. State*, 32 *Tex. Crim. Rep.* 180.

In *California*, by statute, the court may upon application of the district attorney direct any defendant to be discharged from the indictment in order that he may be a witness for the people. *People v. Bruzzo*, 24 *Cal.* 41.

Similar statutes prevail in other states. *Edwards v. State*, 2 *Wash.* 291; *McGinnis v. State (Wyoming, 1893)*, 31 *Pac. Rep.* 978.

Tried Separately—Competency for One Another.—Where two persons are jointly indicted for the same offense, one is not a competent witness for the other while the indictment is pending against him, although separately tried.

England.—*Rex v. Lafone*, 5 *Esp.* 155.

United States.—*U. S. v. Reid*, 12 *How. (U. S.)* 361.

Arkansas.—*Moss v. State*, 17 *Ark.* 327, 65 *Am. Dec.* 433; *Collier v. State*, 20 *Ark.* 37; *Brown v. State*, 24 *Ark.* 620; *McKenzie v. State*, 24 *Ark.* 636; *Foster v. State*, 45 *Ark.* 328.

Florida.—Ballard v. State, 31 Fla. 266.
Kentucky.—Adwell v. Com., 17 B. Mon. (Ky.) 310; Chandler v. Com., 1 Bush (Ky.) 41.
Maine.—State v. Jones, 51 Me. 125.
Massachusetts.—Com. v. Marsh, 10 Pick. (Mass.) 57.
Michigan.—People v. Van Alstine, 57 Mich. 69.
Missouri.—State v. Roberts, 15 Mo. 28; State v. Edwards, 19 Mo. 674; State v. Martin, 74 Mo. 547.
New Hampshire.—State v. Young, 39 N. H. 283.
New York.—Wixson v. People, 5 Park. Cr. Rep. (N. Y.) 119; People v. Bill, 10 Johns. (N. Y.) 95; People v. Williams, 19 Wend. (N. Y.) 377; McIntyre v. People, 9 N. Y. 38, 1 Park. Cr. Rep. (N. Y.) 371.
North Carolina.—State v. Bruner, 65 N. Car. 499; State v. Smith, 2 Ired. (N. Car.) 402; State v. Mills, 2 Dev. (N. Car.) 420.
Pennsylvania.—Kehoe v. Com., 85 Pa. St. 127; Shay v. Com., 36 Pa. St. 305.
South Carolina.—State v. Alexander, 2 Mill (S. Car.) 171.
Tennessee.—State v. Mooney, 1 Yerg. (Tenn.) 431.
Texas.—Anderson v. State, 27 Tex. App. 177, 11 Am. St. Rep. 187; Williams v. State, 4 Tex. App. 5; Huebner v. State, 3 Tex. App. 458; Lyles v. State, 41 Tex. 173, 19 Am. Rep. 38.
Virginia.—Campbell v. Com., 2 Va. Cas. 314.

In some of these cases *dicta* are to be found to the effect that the same rule is applicable when witnesses are called in behalf of the state. But upon this point see this note, *supra*. So after a plea of *nolo contendere* by one defendant not followed by judgment. State v. Young, 39 N. H. 283.

A Defendant who has Pleaded Guilty is admissible for his codefendant without sentence. Rex v. Fletcher, 1 Stra. 633; Reg. v. George, C. & M. 111, 41 E. C. L. 66; Reg. v. Gallagher, 13 Cox C. C. 61, 13 Moak Rep. 416; State v. Russell, 33 La. Ann. 135; State v. Jones, 51 Me. 125; Com. v. Smith, 12 Met. (Mass.) 238; Strawhern v. State, 37 Miss. 422; Lee v. State, 51 Miss. 566. But see Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72; State v. Bruner, 65 N. Car. 499; Kehoe v. Com., 85 Pa. St. 127.

So after a separate trial and a verdict of guilty, but before judgment, an accomplice is an admissible witness for his confederate in crime. Delozier v. State, 1 Head (Tenn.) 45.

In Rex v. Lafone, 5 Esp. 155, on a joint indictment against several for a misdemeanor, a defendant who had suffered judgment by default was held by Lord Ellenborough not to be a competent witness for the other defendants. But this case has been doubted by leading text writers, 1 Phil. Evi. (5th Am. ed.) *65; 3 Russ. on Crimes (9th Am. ed.) *612; 1 Bennett & Heard Leading Crim. Cas. 126, note by Mr. Heard to the case of Com. v. Marsh; and is said by the court in State v. Brien, 32 N. J. L. 415, to be "now universally admitted to be erroneous."

Where the disqualification for infamy no longer exists, one jointly indicted with another for a robbery is, while under sentence for the crime, a competent witness for his associate. State v. Loney, 82 Mo. 82; State v. Minor, 117 Mo. 302; Woodley v. State (Ala., 1894), 15 So. Rep. 820. See also the title INFAMY.

Where, when all the evidence is in, it appears that there is no evidence to inculcate a defendant, or where one has been made a defendant for the express purpose of excluding his testimony, if nothing is proved against him, he may have his case separately submitted to the jury in order to be rendered competent as a witness for his codefendant, but whether his case shall be so submitted is within the discretion of the court.

England.—Rex v. Bedder, 1 Sid. 237; Rex v. Davis, 3 Keb. 136.

Alabama.—Brister v. State, 26 Ala. 107; Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72.

Connecticut.—State v. Shaw, 1 Root (Conn.) 134.

Florida.—Adams v. State, 28 Fla. 534.

Louisiana.—State v. Gustave, 27 La. Ann. 395.

Maine.—State v. Jones, 51 Me. 125.

Massachusetts.—Com. v. Eastman, 1 Cush. (Mass.) 218, 48 Am. Dec. 596.

Missouri.—State v. Roberts, 15 Mo. 28; State v. Underwood, 57 Mo. 40.

New Hampshire.—State v. Bean, 36 N. H. 122.

New York.—People v. Bill, 10 Johns. (N. Y.) 95.

Rhode Island.—Anthony v. State, 2 R. I. 305; State v. O'Brien, 7 R. I. 336.

South Carolina.—State v. M'Lendon, 5 Strobb. (S. Car.) 85.

Texas.—Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; Bybee v. State, 36 Tex. 366.

Wyoming.—McGinnis v. State (Wyoming, 1893), 31 Pac. Rep. 978.

But compare State v. Carr, 1 N. J. L. 1.

Statutory Changes.—In some jurisdictions one jointly indicted with another but not put upon his trial at the same time is, by statute, admissible as a witness for his codefendant. People v. Newberry, 20 Cal. 439; People v. Labra, 5 Cal. 183; Everett v. State, 6 Ind. 495; Sloan v. State, 9 Ind. 565; Hunt v. State, 10 Ind. 69; State v. Chyo Chiagk, 92 Mo. 395 (*distinguishing* State v. Martin, 74 Mo. 547); Poteete v. State, 9 Baxt. (Tenn.) 261, 40 Am. Rep. 90; Lazier v. Com., 10 Gratt. (Va.) 708; McGinnis v. State (Wyoming, 1893), 31 Pac. Rep. 978. See Benson v. U. S., 146 U. S. 325; State v. Rose, Phil. (N. Car.) 406; McGruder v. State, 71 Ga. 864.

But the accomplice must request to become a witness. People v. Van Alstine, 57 Mich. 69; Harris v. State, 78 Ala. 482. The same rule has been held to prevail in the absence of statute. Jones v. State, 1 Ga. 610. See State v. Brien, 32 N. J. L. 414; Garrett v. State, 6 Mo. 1 (*overruled* in State v. Roberts, 15 Mo. 28).

In other states, by statute, where defendants jointly indicted are tried together each is competent for the other. State v. Gigher, 23 Iowa 318; State v. Stewart, 51 Iowa 312;

or by reason of conviction and sentence for an infamous crime.¹

2. When Admitted as Witness—Reason for Admission.—The rule allowing the admission of accomplices to testify is supported by public policy and necessity, since it is scarcely possible to detect conspiracies and many worse offenses without the information of those who are implicated in the crime.²

Discretion of Court or Prosecuting Officer.—But as the testimony of a *particeps criminis* is regarded as tainted, and the admission of such a witness is equitably conditioned upon the immunity of a guilty party, an accomplice will not be allowed as a matter of course to give testimony, and it is only when, in the discretion of the court or the prosecuting officer of the state,³ the testimony of a

State v. Nash, 7 Iowa 347, 10 Iowa 81. See State v. Rose, Phil. (N. Car.) 406.

In *Kentucky* one defendant is admissible for another, unless the indictment charges a conspiracy, and even then unless there is such evidence as with reasonable certainty establishes the existence of the conspiracy. Laughlin v. Com., 13 Bush (Ky.) 261; Christian v. Com., 13 Bush (Ky.) 264; Jeffries v. Com., 84 Ky. 237; Wright v. Com., 85 Ky. 123.

1. See the title INFAMY.

2. Hawk. P. C., b. 2, c. 46, § 94; 1 Phill. Ev. (5th Am. ed.) *107; 1 Roscoe Cr. Ev. (8th Am. ed.) *130; U. S. v. Lancaster, 2 McLean (U. S.) 431; U. S. v. Troax, 3 McLean (U. S.) 224; Marler v. State, 67 Ala. 55, 68 Ala. 580; Gray v. People, 26 Ill. 344; Earll v. People, 73 Ill. 329.

In Charnock's Case, 12 How. St. Tr. 1454, Lord Holt said: "Conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves; and the evidence of accomplices has been always good proof in all ages; and they are the most proper witnesses; for, otherwise, it is hardly possible, if not altogether impossible, to have full proof of such secret contrivances."

In *People v. Whipple*, 9 Cow. (N. Y.) 707, Duer, J., said: "The evidence of accomplices has at all times been admitted either from a principle of public policy or from judicial necessity, or from both. They are, no doubt, requisite as witnesses in particular cases, but it has been well observed that in a regular system of administrative justice they are liable to great objections. 'The law,' says one of the ablest and most useful modern writers upon criminal jurisprudence, 'confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate. Chitty's Cr. Law 769.'"

3. The Method of Introducing an Accomplice is, in general, as has been stated, by omission to indict, *nolle prosequi*, or severance of trial. As to the power of the prosecuting officer with or without the direction of the court to enter a *nolle prosequi*, or sever the trial of

codefendants, see the titles DISTRICT ATTORNEYS; CRIMINAL PROCEDURE; NOLLE PROSEQUI.

The English Courts do not admit an accomplice as a matter of course, even though he has been admitted to testify before the committing magistrate. The usual practice is, that a motion is made to the court by the prosecuting counsel for his admission, and the court in view of all the circumstances admits or disallows the evidence as will best promote the ends of public justice. 3 Russ. on Cr. (9th Am. ed.) *598; 1 Roscoe Cr. Ev. (8th Am. ed.) *131; 1 Phill. Ev. (5th Am. ed. by Cowen and Hill) *108; Reg. v. Sparks, 1 F. & F. 388.

"This application is usually made before the bill is taken before the grand jury, and if the application is granted the accomplice is not included in the indictment; but where he has been included with his confederates in a joint indictment, he may still be used as a witness with the consent of the court." 3 Russ. Cr. (9th Am. ed.) *599.

In cases of this kind the court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the counsel for the prosecution to determine whether he will have a prisoner acquitted before the trial commences, to enable him to call such prisoner as a witness against the other prisoners. Reg. v. Owen, 9 C. & P. 83, 38 E. C. L. 44. See also *Rex v. Rowland*, R. & M. 401.

Authorities in the United States—Discretionary with Court.—The English practice of applying to court for permission to introduce the accomplice as a witness, seems to have been followed by some of the American courts. U. S. v. Hinz, 35 Fed. Rep. 272; State v. Graham, 41 N. J. L. 15, 32 Am. Rep. 174; *People v. Whipple*, 9 Cow. (N. Y.) 707; *Wight v. Rindskopf*, 43 Wis. 344. See *Henderson v. State*, 70 Ala. 23, 45 Am. Rep. 72; Ala. Crim. Code (1886), § 4477.

In *Ray v. State*, 1 Greene (Iowa) 316, the court, by Kinney, J., said: "We think the safer practice is not to permit an accomplice to be brought into court as a witness without an order from the court for that purpose, and that the application ought to show, 1. That there is no other witness by whom the offense can be proved. 2. That the witness is not more guilty than the person on trial; and, 3. That the testimony can be substantially corroborated."

But under the statutory provisions in force

particeps criminis is necessary to bring the guilty to justice, that he will be admitted as a witness for the prosecution.¹

3. Credibility—At Common Law, Question for Jury.—The credibility of an accomplice is, at common law, a question for the jury, as is that of any other witness.²

Evidence to be Received with Caution.—Such evidence, however, coming as it does from a polluted source, should be received with great caution and closely and doubtfully examined, and it is proper for the court to so instruct the jury,³

in *Iowa* the doctrine of this case is not now the law in that state. *State v. Hudson*, 50 *Iowa* 157.

Other authorities hold that while the permission of the court is necessary no formal order is required. *Lindsay v. People*, 63 *N. Y.* 143. In this case Allen, J., said: "Accomplices may in all cases, by permission of the court, be used by the government as witnesses in bringing their associates to punishment. * * * There is no practice in this state requiring a previous application or a formal order of the court to permit an accomplice to become a witness for the state." See also *Taylor v. People*, 12 *Hun* (N. Y.) 212; *State v. Hudson*, 50 *Iowa* 157; *Fleming v. State*, 28 *Tex. App.* 234; *Camron v. State*, 32 *Tex. Crim. Rep.* 180.

Discretionary with Prosecuting Officer.—In other states the admission of accomplices lies entirely within the discretion of the prosecuting officer. *Runnels v. State*, 28 *Ark.* 121.

In the *Whiskey Cases*, 99 *U. S.* 594, Clifford, J., said: Accomplices "everywhere are competent witnesses if they see fit voluntarily to appear and testify; but the course of proceedings in the courts of many of the states is quite different from that just described, the rule being that the court will not advise the attorney-general how he shall conduct a criminal prosecution. Consequently, it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the state. Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge." See also *1 Bish. New Cr. Proc.* 1161, subd. 4.

1. 3 Russ. on Cr. (9th Am. ed.) *599; *1 Roscoe Cr. Ev.* (8th Am. ed.) *131.

Testimony must be Essential.—The court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus, where several prisoners were committed as principals and several as receivers, but no corroboration could be given as to the receivers against whom the evidence of the accomplice was required, Gurney, B., refused to permit one of the principals to be-

come a witness. *Rex v. Mellor*, Stafford Summer Ass. 1833.

So in *Reg. v. Saunders*, Worcester Spring Ass. 1842, on a motion to admit an accomplice, Patterson, J., said: "I doubt whether I shall allow him to be a witness, if you want him for the purpose of identification, and there is no corroboration, that will not do."

And in *Reg. v. Salt*, Stafford Spring Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness. *3 Russ. Cr. Ev.* (9th Am. ed.) *598, note (x).

Where one prisoner pleaded guilty and an application was made to admit him as a witness against the other, Hill, J., directed the witnesses who were relied upon to corroborate him to be called first, and if their evidence was sufficiently strong, then the accomplice might be examined. *Reg. v. Sparks*, 1 *F. & F.* 388.

Only One Accomplice Admitted in General—When More Admitted.—It is not customary to admit more than one accomplice. *Barnesley Rioters Case*, 1 *Lew.* 5. But under peculiar circumstances more than one may be admitted, *Rex v. Noakes*, 5 *C. & P.* 326, 24 *E. C. L.* 342; especially where they testify to different facts, no one of them being able to prove the whole, *Scott's Case*, 2 *Lew.* 36.

Principal Admitted against Accessory.—In proper cases a principal will be admitted to testify against an accessory. *Wild's Case*, 1 *Leach C. C.* 17, note (a); *Lindsay v. People*, 63 *N. Y.* 143, 5 *Hun* (N. Y.) 104; *Barrara v. State*, 42 *Tex.* 260; *3 Russ. on Cr.* *597, note (t).

In *People v. Whipple*, 9 *Cow.* (N. Y.) 707, the court, while admitting that if it appeared that the principal was in fact but the instrument of the accessory before the fact the former might be admitted to testify against the latter, held that it would be an abuse of the discretion vested in it to admit a principal already convicted and shown to be more guilty than the accessory to testify against the latter. See also *Ray v. State*, 1 *Greene* (Iowa) 316.

2. State v. Wolcott, 21 *Conn.* 272; *Craft v. State*, 3 *Kan.* 479; *State v. Banks*, 40 *La. Ann.* 736; *State v. Litchfield*, 58 *Me.* 270; *Hamilton v. People*, 29 *Mich.* 173; *People v. Hare*, 57 *Mich.* 505; *White v. State*, 52 *Miss.* 216; *Fitzcox v. State*, 52 *Miss.* 923; *People v. Haynes*, 55 *Barb.* (N. Y.) 453; *People v. Costello*, 1 *Den.* (N. Y.) 83; *State v. Brown*, 3 *Strobh.* (S. Car.) 508.

3. United States.—*U. S. v. Ybanez*, 53 *Fed. Rep.* 536; *U. S. v. Harries*, 2 *Bond* (U. S.) 311.

California.—*People v. Bonney*, 98 *Cal.* 278. *Colorado.*—*Solander v. People*, 2 *Colo.* 48; *Wisdom v. People*, 11 *Colo.* 170.

except in jurisdictions where the court has no authority to give any instructions on the weight of evidence.¹

Testifying under Promise of Leniency.—The fact that an accomplice testifies under a promise of leniency makes strongly against his credibility, and may always be shown for the purpose of weakening the force of the testimony.²

Full Cross-examination should be Allowed.—A liberal and full cross-examination for the purpose of testing the truth of an accomplice's statements should be allowed.³

4. Corroboration—*a.* AT COMMON LAW.—Since at common law the credibility of an accomplice is a question solely for the jury, the accused may be legally convicted upon the unsupported testimony of a confederate in crime.⁴

Connecticut.—State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Illinois.—Earl v. People, 73 Ill. 329.

Indiana.—Stocking v. State, 7 Ind. 326; Johnson v. State, 65 Ind. 269.

Kansas.—State v. Kellerman, 14 Kan. 135.

Louisiana.—State v. Banks, 40 La. Ann. 736.

Massachusetts.—Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. v. Chase, 147 Mass. 599.

Michigan.—People v. Hare, 57 Mich. 505.

Mississippi.—George v. State, 39 Miss. 570; White v. State, 52 Miss. 216; Fitzcox v. State, 52 Miss. 923.

Missouri.—State v. Jones, 64 Mo. 391; State v. Reavis, 71 Mo. 419; State v. Harkins, 100 Mo. 666; State v. Minor, 117 Mo. 302; State v. Dawson (Mo., 1894), 27 S. W. Rep. 1104; State v. Crab, 121 Mo. 554.

Nebraska.—Long v. State, 23 Neb. 33.

New York.—People v. Haynes, 55 Barb. (N. Y.) 453; People v. Costello, 1 Den. (N. Y.) 83; Haskins v. People, 16 N. Y. 344; People v. Dyle, 21 N. Y. 578; Wixson v. People, 5 Park. Cr. Rep. (N. Y.) 120.

North Carolina.—State v. Miller, 97 N. Car. 484; State v. Barber, 113 N. Car. 711.

Vermont.—State v. Dana, 59 Vt. 614.

Wisconsin.—Ingalls v. State, 48 Wis. 647.

The Court may Comment upon the Nature of Such Testimony and point out the various grounds of suspicion which attach to it; call the jury's attention to the situation and temptation under which the witness may be placed, and explain the motives by which he may be actuated, etc.; but it should not instruct the jury that they are bound to believe or disbelieve him in any particular. *George v. State*, 39 Miss. 570; *People v. Hare*, 57 Mich. 505; *State v. Hing*, 16 Nev. 307.

When Introduced for Defendant.—Where an accomplice is introduced as a witness by the defendant, an instruction to the jury that the testimony of an accomplice ought to be viewed with distrust is error, inasmuch as it tends to discredit a witness for the defendant, and is within a constitutional prohibition as to charging juries with respect to matters of fact. *People v. O'Brien*, 96 Cal. 171. See *People v. Bonney*, 98 Cal. 278.

1. *State v. Betsall*, 11 W. Va. 703; *State v. Thompson*, 21 W. Va. 757; *State v. Miller*, 24 W. Va. 807. Compare *Brown v. Com.*, 2 Leigh (Va.) 769.

2. *Tongue's Case*, Kel. 18; *Vaughan v. State*, 57 Ark. 1; *Craft v. State*, 3 Kan. 479; *People*

v. Hare, 57 Mich. 505; *Barrara v. State*, 42 Tex. 260; *State v. Burpee* (Vt., 1892), 25 Atl. Rep. 964; *Black v. State*, 59 Wis. 471. See *Gill v. State*, 59 Ark. 422.

It is error for the court to refuse to allow the cross-examination of an accomplice in regard to his expectation of relief from further prosecution in the event of a conviction of the prisoner. *People v. Christy*, 65 Hun (N. Y.) 349; *Allen v. State*, 10 Ohio St. 287; *People v. Langtree*, 64 Cal. 256. See *State v. Kent* (N. Dak., 1895), 62 N. W. Rep. 631.

3. *Marler v. State*, 68 Ala. 580; *State v. Kent* (N. Dak., 1895), 62 N. W. Rep. 631, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 78; *Lee v. State*, 21 Ohio St. 151.

When the evidence of an accomplice is corroborated, he occupies the same attitude as any other witness so far as the methods of contradicting or impeaching him are concerned. *Craft v. Com.*, 81 Ky. 250, 50 Am. Rep. 160. See *Hudspeth v. State*, 50 Ark. 544.

Claiming Privilege.—When an accomplice goes on the stand and testifies for the government, he cannot on cross-examination shield himself from making a full disclosure of his connection with the offense which is being investigated, on the ground that such testimony will tend to criminate him. *Com. v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *Pitcher v. People*, 16 Mich. 142; *Foster v. People*, 18 Mich. 266. See *State v. Condry*, 5 Jones (N. Car.) 418.

But he cannot be compelled to answer as to other crimes. See *infra*, this title, *Right to Pardon of Accomplice Testifying for Prosecution*.

4. *England.*—*Rex v. Atwood*, 1 Leach C. C. 464; *Rex v. Durham*, 1 Leach C. C. 478; *Rex v. Dawber*, 3 Stark. 34; *Rex v. Jones*, 2 Campb. 133; *Reg. v. Andrews*, 1 Cox C. C. 183; *Rex v. Hastings*, 7 C. & P. 152, 32 E. C. L. 475; *Rex v. Jarvis*, 2 M. & Rob. 40; *Rex v. Webb*, 6 C. & P. 595, 25 E. C. L. 556; *Reg. v. Avery*, 1 Cox C. C. 206; *Rex v. Addis*, 6 C. & P. 388, 25 E. C. L. 452; *Rex v. Rudd*, Cowp. 336; *Reg. v. Stubbs*, Dears. C. C. 555, 33 Eng. L. & Eq. 551; *Sayer's Case*, 16 How. St. Tr. 158; *Murphy's Case*, 19 How. St. Tr. 702; *Watson's Case*, 32 How. St. Tr. 583; *Cato Street Conspiracy*, 33 How. St. Tr. 689.

United States.—*U. S. v. Flemming*, 18 Fed. Rep. 907; *U. S. v. Neversen*, 1 Mackey (D. C.) 152; *U. S. v. Bicksler*, 1 Mackey (D. C.) 341.

The great caution, however, which is necessary in weighing the testimony of such witnesses has led the courts to the uniform practice of advising the jury not to convict the prisoner upon the testimony of an accomplice unless it is corroborated in some material part.¹ But there is no positive rule of law re-

Colorado.—*Solander v. People*, 2 Colo. 48; *Wisdom v. People*, 11 Colo. 170.

Connecticut.—*State v. Wolcott*, 21 Conn. 272; *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State v. Williamson*, 42 Conn. 261.

Florida.—*Jenkins v. State*, 31 Fla. 196; *Bacon v. State*, 22 Fla. 51.

Illinois.—*Earll v. People*, 73 Ill. 329; *Colins v. People*, 98 Ill. 584, 38 Am. Rep. 104.

Indiana.—*Dawley v. State*, 4 Ind. 128; *Stocking v. State*, 7 Ind. 326; *Ulmer v. State*, 14 Ind. 52; *Johnson v. State*, 65 Ind. 269; *Ayers v. State*, 88 Ind. 275.

Kansas.—*State v. Patterson*, 52 Kan. 335.

Louisiana.—*State v. Bayonne*, 23 La. Ann. 78; *State v. Prudhomme*, 25 La. Ann. 522; *State v. Russell*, 33 La. Ann. 135; *State v. Mason*, 38 La. Ann. 476.

Maine.—*State v. Litchfield*, 58 Me. 270; *State v. Cunningham*, 31 Me. 355.

Massachusetts.—*Com. v. Bosworth*, 22 Pick. (Mass.) 397; *Com. v. Larrabee*, 99 Mass. 413; *Com. v. Scott*, 123 Mass. 237, 25 Am. Rep. 81; *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391.

Michigan.—*People v. O'Brien*, 60 Mich. 8; *People v. Gallagher*, 75 Mich. 512.

Mississippi.—*White v. State*, 52 Miss. 216; *Fitzcox v. State*, 52 Miss. 923.

Missouri.—*State v. Minor*, 117 Mo. 302; *State v. Crab*, 121 Mo. 554; *State v. Watson*, 31 Mo. 361; *State v. Harkins*, 100 Mo. 666; *State v. Jackson*, 106 Mo. 174; *State v. Dawson* (Mo., 1894), 27 S. W. Rep. 1104.

Nebraska.—*Lamb v. State*, 40 Neb. 312; *Olive v. State*, 11 Neb. 1; *Long v. State*, 23 Neb. 33.

New Jersey.—*State v. Hyer*, 39 N. J. L. 598.

New Mexico.—*Territory v. Kinney*, 3 N. Mex. 97.

New York.—*People v. Costello*, 1 Den. (N. Y.) 83; *Wixson v. People*, 5 Park. Cr. Rep. (N. Y.) 120; *Haskins v. People*, 16 N. Y. 344; *People v. Dyle*, 21 N. Y. 578; *People v. Davis*, 21 Wend. (N. Y.) 309; *People v. Haynes*, 55 Barb. (N. Y.) 453.

North Carolina.—*State v. Haney*, 2 Dev. & B. (N. Car.) 390; *State v. Hardin*, 2 Dev. & B. (N. Car.) 407; *State v. Holland*, 83 N. Car. 624, 35 Am. Rep. 587; *State v. Miller*, 97 N. Car. 484; *State v. Barber*, 113 N. Car. 711.

Ohio.—*Allen v. State*, 10 Ohio St. 287.

Pennsylvania.—*Watson v. Com.*, 95 Pa. St. 424.

South Carolina.—*State v. Prater*, 26 S. Car. 198, 613.

Vermont.—*State v. Dana*, 59 Vt. 614; *State v. Potter*, 42 Vt. 495.

Virginia.—*Brown v. Com.*, 2 Leigh (Va.) 769; *Woods v. Com.*, 86 Va. 929.

West Virginia.—*State v. Betsall*, 11 W. Va. 703; *State v. Thompson*, 21 W. Va. 757.

Wisconsin.—*Ingalls v. State*, 48 Wis. 647; *Mercer v. Wright*, 3 Wis. 647.

Contra.—In some cases it seems to have

been held, without statute, that corroboration is necessary to a conviction. *Robison v. State*, 16 Lea (Tenn.) 146; *Hall v. State*, 3 Lea (Tenn.) 564; *Clapp v. State*, 94 Tenn. 186. See *Edwards v. State*, 2 Wash. 291, where it was held that the testimony of an accomplice, uncorroborated in material matters, is insufficient to authorize a conviction, except in those cases where, from all the circumstances, the honest judgment is satisfied of guilt beyond a reasonable doubt; and a verdict of guilt founded upon the evidence of an accomplice was reversed.

Exception—Perjury.—Upon an indictment for subornation of perjury it was held that it was not competent for the jury to convict the defendant upon the uncorroborated testimony of an accomplice, where it appeared that the jury must find from the accomplice's own testimony, before they could convict the defendant, that such accomplice had corruptly committed perjury; this case was held to be an exception to the general rule that a conviction upon the uncorroborated testimony of an accomplice is valid. *People v. Evans*, 40 N. Y. 1.

1. *England*.—*Rex v. Wilkes*, 7 C. & P. 272, 32 E. C. L. 507; *Rex v. Barnard*, 1 C. & P. 88, 11 E. C. L. 324; *Rex v. Jones*, 2 Campb. 131; *Rex v. Atwood*, 1 Leach C. C. 464; *Rex v. Addis*, 6 C. & P. 388, 25 E. C. L. 452; *Rex v. Noakes*, 5 C. & P. 326, 24 E. C. L. 342; *Reg. v. Farler*, 8 C. & P. 106, 34 E. C. L. 314; *Reg. v. Boyes*, 1 B. & S. 311, 101 E. C. L. 311; *Reg. v. Gallagher*, 15 Cox C. C. 292; *Reg. v. Dunn*, 5 Cox C. C. 507.

United States.—*U. S. v. Neversen*, 1 Mackey (D. C.) 152; *U. S. v. Bicksler*, 1 Mackey (D. C.) 341; *U. S. v. Kessler*, 1 Baldw. (U. S.) 22; *U. S. v. Troax*, 3 McLean (U. S.) 224; *U. S. v. Sykes*, 58 Fed. Rep. 1004.

Illinois.—*Collins v. People*, 98 Ill. 584, 38 Am. Rep. 105.

Iowa.—*Ray v. State*, 1 Greene (Iowa) 316.

Kansas.—*State v. Patterson*, 52 Kan. 335.

Massachusetts.—*Com. v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668; *Com. v. Brooks*, 9 Gray (Mass.) 299.

Missouri.—*State v. Watson*, 31 Mo. 361; *State v. Dawson* (Mo., 1894), 27 S. W. Rep. 1104.

Nebraska.—*Olive v. State*, 11 Neb. 1.

North Carolina.—*State v. Hardin*, 2 Dev. & B. (N. Car.) 407.

North Dakota.—*State v. Kent* (N. Dak., 1895), 62 N. W. Rep. 631, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 76.

Ohio.—*Allen v. State*, 10 Ohio St. 287.

Pennsylvania.—*Watson v. Com.*, 95 Pa. St. 424.

Wisconsin.—*Ingalls v. State*, 48 Wis. 647; *Mack v. State*, 48 Wis. 286; *Black v. State*, 59 Wis. 471.

It is error in the court to charge the jury that the evidence of an accomplice is corroborated by the testimony of another witness.

quiring such an instruction, and its omission is consequently not reversible error.¹

When Corroborative Evidence may be Introduced.—Where a witness is confessedly an accomplice, his testimony may be corroborated by other evidence before his credibility is attacked.²

b. BY STATUTE.—The principle embodied in the instructions usually given to juries at common law, that the testimony of an accomplice requires corroboration, has, in many jurisdictions, been enacted into a positive rule of law, and it is provided by statute that a conviction cannot be had upon the testimony of an accomplice unless that testimony is corroborated by other evidence in some material matter tending directly to connect the prisoner with the crime charged.³ Where it appears from the evidence that a witness for the prosecu-

Whether it is corroborated or not is a question for the jury. *Noland v. State*, 19 Ohio 131; *State v. Robinson*, 35 S. Car. 340. But see *Burney v. State*, 87 Ala. 80.

1. *Reg. v. Boyes*, 1 B. & S. 311, 101 E. C. L. 311; *State v. Banks*, 40 La. Ann. 736; *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391; *Com. v. Chase*, 147 Mass. 599; *Cheatham v. State*, 67 Miss. 335; *Black v. State*, 59 Wis. 471. See also *Rex v. Jones*, 2 Campb. 132; *Rex v. Durham*, 1 Leach C. C. 478; *State v. Potter*, 42 Vt. 495; *Ingalls v. State*, 48 Wis. 647. See also Joy on the Evidence of Accomplices, an elaborate essay by the late chief baron of the Court of Exchequer in Ireland, investigating the origin and force of the rule in the English courts.

Rule of Practice which should be Observed.—In *Reg. v. Farler*, 8 C. & P. 106, 34 E. C. L. 314, Lord Abinger, C.B., said: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance."

In *State v. Jones*, 64 Mo. 391, Henry, J., after citing 1 Greenl. Ev., § 380, said: "It being the law, as Mr. Greenleaf in the above paragraph states, that one may be convicted of a felony on the uncorroborated testimony of an accomplice, makes it the more necessary that juries should be properly cautioned by the court in regard to such testimony."

In *State v. Prudhomme*, 25 La. Ann. 522, the court, by Ludeling, C.J., said: "The rule requiring the judge to charge the jury that the testimony of an accomplice needs confirmation is rather a rule of practice than a rule of law." See *Reg. v. Stubbs*, 7 Cox C. C. 20, 33 Eng. L. & Eq. 551.

In Giving This Instruction the judge does not withdraw the case from the jury by positive direction, but only advises them not to give credit to such unsupported testimony. 1 *Taylor on Ev.*, § 967; *U. S. v. Sykes*, 58 Fed. Rep. 1000.

Evidence Not Corroborative Submitted as Such.—If evidence is submitted to the jury as corroborative which is not legally such, the error may be revised by a bill of exceptions. *Com. v. Larrabee*, 99 Mass. 413. See *Edwards v. State*, 2 Wash. 291.

Where there is no Corroborating Evidence it

is discretionary with the trial court whether to direct an acquittal or not. *Black v. State*, 59 Wis. 471.

2. Corroboration Introduced before Witness Attacked.—When a witness in the commencement of his testimony states himself to be an accomplice of the accused, evidence to corroborate his testimony may be introduced before he is attacked, such evidence being considered as substantially given in reply. *State v. Twitty*, 2 Hawks. (N. Car.) 449; *People v. Vane*, 12 Wend. (N. Y.) 78; *State v. Callahan* (La., 1895), 17 So. Rep. 50.

3. Alabama.—*Marler v. State*, 67 Ala. 55; *Lumpkin v. State*, 68 Ala. 56; *Burney v. State*, 87 Ala. 80.

Arizona.—*Territory v. Neligh* (Arizona, 1886), 10 Pac. Rep. 367.

Arkansas.—*Vaughan v. State*, 58 Ark. 353; *Polk v. State*, 40 Ark. 484, 48 Am. Rep. 17; *Gill v. State*, 59 Ark. 422.

California.—*People v. Clough*, 73 Cal. 348; *People v. Strybe* (Cal., 1894), 36 Pac. Rep. 3; *People v. Larsen* (Cal., 1893), 34 Pac. Rep. 514; *People v. Ames*, 39 Cal. 403; *People v. Melvane*, 39 Cal. 614; *People v. Smith*, 98 Cal. 218; *People v. Cloonan*, 50 Cal. 449.

Georgia.—*Childers v. State*, 52 Ga. 106; *Middleton v. State*, 52 Ga. 527; *Bernhard v. State*, 76 Ga. 613.

Iowa.—*Johnson v. State*, 4 Greene (Iowa) 65; *State v. Upton*, 5 Iowa 465; *State v. Schlagel*, 19 Iowa 169; *State v. Van Winkle*, 80 Iowa 15.

Kentucky.—*Craft v. Com.*, 80 Ky. 349; *Smith v. Com.* (Ky., 1891), 17 S. W. Rep. 182; *Bowling v. Com.*, 79 Ky. 604.

Minnesota.—*State v. Quinlan*, 40 Minn. 55; *State v. Lawlor*, 28 Minn. 216; *State v. Brin*, 30 Minn. 522.

New York.—*People v. Ryland*, 28 Hun (N. Y.) 568; *People v. Courtney*, 28 Hun (N. Y.) 589; *People v. Williams*, 29 Hun (N. Y.) 522; *People v. Bosworth*, 64 Hun (N. Y.) 75; *People v. O'Neil*, 109 N. Y. 251, affirming 48 Hun (N. Y.) 36.

North Dakota.—*State v. Kent* (N. Dak., 1895), 62 N. W. Rep. 631.

Oregon.—*State v. Odell*, 8 Oregon 30; *State v. Jarvis*, 18 Oregon 360.

Pennsylvania.—*Cox v. Com.*, 125 Pa. St. 94.

South Dakota.—*State v. Hicks* (S. Dak., 1894), 60 N. W. Rep. 66.

Texas.—*Irvin v. State*, 1 Tex. App. 301; *Hauck v. State*, 1 Tex. App. 361; *Hassel-*

tion is an accomplice of the defendant, it is, under these statutes, the duty of the court to instruct the jury as to the weight of his testimony.¹

c. WHEN SUFFICIENT—(1) *Generally—Not Necessary upon Every Fact.*—It is not necessary that an accomplice be corroborated upon every fact to which he swears, for if this were required there would be no necessity for calling him as a witness.²

Need Not be Direct.—Neither is it necessary that he be corroborated by the direct testimony of other witnesses. Circumstantial evidence is sufficient if it is material and tends to connect the prisoner with the crime charged.³

meyer v. State, 1 Tex. App. 701; *Nourse v. State*, 2 Tex. App. 316; *Davis v. State*, 2 Tex. App. 588; *Roach v. State*, 4 Tex. App. 46; *Miller v. State*, 4 Tex. App. 251; *Sweat v. State*, 4 Tex. App. 624; *Tooney v. State*, 5 Tex. App. 193; *Brown v. State*, 6 Tex. App. 313; *Roguemore v. State*, 28 Tex. App. 55; *Lockhart v. State*, 29 Tex. App. 35; *Powell v. State*, 15 Tex. App. 441; *Dunn v. State*, 15 Tex. App. 560; *Clark v. State* (Tex. App., 1891), 17 S. W. Rep. 1089; *Buchanan v. State* (Tex. Crim. App., 1894), 24 S. W. Rep. 895; *Sanders v. State* (Tex. Crim. App., 1895), 29 S. W. Rep. 777; *Stouard v. State*, 27 Tex. App. 1; *Blanchette v. State*, 29 Tex. App. 46; *Lopez v. State*, 34 Tex. 133; *Bybee v. State*, 36 Tex. 366; *Wright v. State*, 43 Tex. 170; *Barrara v. State*, 42 Tex. 260.

Utah.—*People v. Chadwick*, 7 Utah 134.

Wyoming.—*McNealley v. State* (Wyoming, 1894), 36 Pac. Rep. 824.

Whether there is Any Corroborating Evidence under statutes of this character seems to be a question for the court, but it is for the jury to weigh and determine the effect of such evidence and its sufficiency. *State v. Miller*, 65 Iowa 60; *State v. Van Winkle*, 80 Iowa 15; *State v. Dietz*, 67 Iowa 220; *Lockett v. State*, 63 Ala. 5; *People v. Kunz*, 73 Cal. 313. See *State v. Robinson*, 35 S. Car. 340.

United States Courts.—The courts of the *United States*, sitting in a state the statutes whereof forbid a conviction upon the uncorroborated testimony of an accomplice, and where the defendant is a citizen of such state, will instruct the jury that they cannot convict upon such testimony. *U. S. v. Van Leuven*, 65 Fed. Rep. 78.

1. *Wicks v. State*, 28 Tex. App. 448; *Stone v. State*, 22 Tex. App. 185; *Hines v. State*, 27 Tex. App. 104.

But where the Prosecution does Not Rely Wholly on the testimony of an accomplice to connect the accused with the offense, it is not incumbent on the court, without request, to instruct the jury touching corroboration. *Robinson v. State*, 84 Ga. 674.

One Testifying under Promise of Leniency.—One jointly indicted with a defendant on trial, who testifies upon a condition that all prosecutions concerning the affair of which he is called to testify be dismissed, is considered an accomplice; and although the witness in his testimony denies the fact of his guilt, the defendant in such a case is entitled to have the instruction given to the jury, that they shall not convict upon the unsupported testimony of such accomplice. *Barrara v. State*, 42 Tex. 260.

Accomplice Introduced for Defendant.—Where the defendant introduces an accomplice in his own behalf, it is error for the court to give an instruction that if the state relies for conviction in any measure upon the testimony of the accomplice, the jury are to discredit it to the extent of requiring its corroboration unless the court tells the jury that the same rule does not apply to such witness where his testimony is in favor of the defendant. *Joseph v. State* (Tex. Crim. App., 1895), 30 S. W. Rep. 1067. See *People v. O'Brien*, 96 Cal. 171.

2. *Reg. v. Gallagher*, 15 Cox C. C. 291; *U. S. v. Reeves*, 38 Fed. Rep. 404; *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Ybanez*, 53 Fed. Rep. 540; *U. S. v. Howell*, 56 Fed. Rep. 21; *Montgomery v. State*, 40 Ala. 684; *Lumpkin v. State*, 68 Ala. 56; *Marler v. State*, 67 Ala. 55; *People v. Kunz*, 73 Cal. 313; *State v. Hennessy*, 55 Iowa 299; *Craft v. State*, 3 Kan. 479; *People v. Ogle*, 104 N. Y. 511; *State v. Hicks* (S. Dak., 1894), 60 N. W. Rep. 66.

It is not error for the court to refuse an instruction to the effect that no conviction can be had upon the testimony of an accomplice, unless the crime and the defendant's guilt are proved by other evidence. *Hudspeth v. State*, 50 Ark. 544.

If the jury are satisfied that an accomplice speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be ground for their believing that he also speaks the truth in other parts as to which there may be no confirmation. *State v. Schlager*, 19 Iowa 169; *State v. Allen*, 57 Iowa 431; *Com. v. Bosworth*, 22 Pick. (Mass.) 397.

3. *Arkansas*.—*Fort v. State*, 52 Ark. 180, 20 Am. St. Rep. 1639.

California.—*People v. Grundell*, 75 Cal. 305.

Georgia.—*Pritchett v. State*, 92 Ga. 33.

Iowa.—*State v. Stanley*, 48 Iowa 221; *State v. Russell* (Iowa, 1894), 58 N. W. Rep. 890.

Kentucky.—*Murray v. Com.* (Ky., 1894), 28 S. W. Rep. 480.

Massachusetts.—*Com. v. Drake*, 124 Mass. 21.

Missouri.—*State v. Jackson*, 106 Mo. 174.

New York.—*People v. Kerr* (Oyer & T. Ct.), 6 N. Y. Supp. 674; *People v. Elliott*, 106 N. Y. 288; *People v. Wiley* (Supreme Ct.), 20 N. Y. Supp. 445; *People v. Christian*, 78 Hun (N. Y.) 28.

Oregon.—*State v. Townsend*, 19 Oregon 213.

Pennsylvania.—*Hester v. Com.*, 85 Pa. St. 139.

Must be upon Material Point and Connect Prisoner with Crime.—It is necessary that the corroborating evidence should be upon some part of the testimony which is material to the issue.¹ It must also tend to show that the defendant committed the crime charged in the indictment; for it is not a sufficient corroboration to prove that the offense was in fact committed in the manner described by the accomplice,² unless proof of the *corpus delicti* necessarily involves the

South Carolina.—State v. Ford, 3 Strobb. (S. Car.) 517, note; State v. Smalls, 11 S. Car. 262.

Texas.—Morrow v. State (Tex. Crim. App., 1894), 26 S. W. Rep. 395; Ceasar v. State (Tex. Crim. App., 1895), 29 S. W. Rep. 785.

Such circumstances as the constant and easy access of the defendant to the place whence goods are charged to have been stolen, his presence thereabouts when the goods are missed, the fact that he drove a single dray there, and that such a dray was seen being unloaded about the break of day where the stolen goods were found, may properly be weighed by the jury as corroborating evidence. Roberts v. State, 55 Ga. 220. See also State v. Brin, 30 Minn. 522; State v. Wart, 51 Iowa 587.

1. State v. Callahan (La., 1895), 17 So. Rep. 50; Com. v. Bosworth, 22 Pick. (Mass.) 397; Com. v. Scott, 123 Mass. 238, 25 Am. Rep. 81; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. v. Chase, 147 Mass. 599; Watson v. Com., 95 Pa. St. 424. See Marler v. State, 68 Ala. 580; Edwards v. State, 2 Wash. 291.

In Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81, Morton, J., said: "If it can be held that this rule of practice [to instruct the jury that the testimony of an accomplice requires corroboration], because of its uniformity, has acquired the force of a rule of law, still there is not the same uniformity in the practice as to the kind of corroboration required. * * * In Com. v. Bosworth, 22 Pick. (Mass.) 397, the court say, as to the kind of corroboration required: * * * 'We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue.' In that case the evidence, held to be corroborative, confirmed the accomplice as to a fact which did not tend to connect the defendant with the crime. Since this decision it has been usual to instruct the jury in substantial compliance with the rule stated therein, though the practice of different judges in the exercise of their discretion has varied. Com. v. Brooks, 9 Gray (Mass.) 299; Com. v. Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668; Com. v. O'Brien, 12 Allen (Mass.) 183; Com. v. Larrabee, 99 Mass. 413; Com. v. Elliott, 110 Mass. 104; Com. v. Snow, 111 Mass. 411. See also Reg. v. Stubbs, Dears. C. C. 555, 7 Cox C. C. 48; State v. Wolcott, 21 Conn. 272." See also State v. Maney, 54 Conn. 178.

But in order to render it prudent to convict upon the testimony of an accomplice, the evidence should tend to connect the defendant with the commission of the crime. Com. v. Hayes, 140 Mass. 366. See the following note.

Corroboration as to Collateral Facts.—An accomplice having testified that, in pursuance

of an agreement between himself and the accused, he killed the deceased and immediately thereafter went to the house of a sister of the deceased, corroborative testimony of the fact that he did go to the house of the deceased's sister after the commission of the homicide is inadmissible, it being a collateral fact which, apart from the accomplice's testimony, in no way tended to connect the accused with the crime. Marler v. State, 68 Ala. 580.

2. *England.*—Kelsey's Case, 2 Lew. 45; Reg. v. Mullins, 3 Cox C. C. 526; Reg. v. Stubbs, 7 Cox C. C. 20, 33 Eng. L. & Eq. 551; Reg. v. Robinson, 4 F. & F. 43; Rex v. Addis, 6 C. & P. 388, 25 E. C. L. 452; Rex v. Webb, 6 C. & P. 595, 25 E. C. L. 556; Rex v. Wilkes, 7 C. & P. 272, 32 E. C. L. 507; Reg. v. Farler, 8 C. & P. 106, 34 E. C. L. 314; Reg. v. Dyke, 8 C. & P. 261, 34 E. C. L. 381.

Alabama.—Smith v. State, 59 Ala. 104; Lumpkin v. State, 68 Ala. 56; Lockett v. State, 63 Ala. 5; Marler v. State, 67 Ala. 55; Ross v. State, 74 Ala. 532; Burney v. State, 87 Ala. 80.

Arkansas.—Vaughan v. State, 58 Ark. 353.

California.—People v. Clough, 73 Cal. 348; People v. Cloonan, 50 Cal. 449; People v. Thompson, 50 Cal. 480; People v. McLean, 84 Cal. 480; People v. Smith, 98 Cal. 218.

Connecticut.—State v. Wolcott, 21 Conn. 272.

Georgia.—Childers v. State, 52 Ga. 106; Middleton v. State, 52 Ga. 527; Blois v. State, 92 Ga. 584.

Iowa.—State v. Schlagel, 19 Iowa 169; State v. Allen, 57 Iowa 431; State v. Russell (Iowa, 1894), 58 N. W. Rep. 890; State v. Thornton, 26 Iowa 79.

Kentucky.—Smith v. Com. (Ky., 1891), 17 S. W. Rep. 182.

Massachusetts.—See Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. v. Hayes, 140 Mass. 366.

Minnesota.—State v. Lawlor, 28 Minn. 216.

Mississippi.—Hughes v. State, 58 Miss. 355.

Missouri.—State v. Chyo Chiagk, 92 Mo. 395; State v. Walker, 98 Mo. 109; State v. Miller, 100 Mo. 606.

New York.—People v. Elliott, 106 N. Y. 288; People v. White, 62 Hun (N. Y.) 114; People v. Bosworth, 64 Hun (N. Y.) 75; People v. Plath, 100 N. Y. 590, 53 Am. Rep. 236; People v. Everhardt, 104 N. Y. 591; People v. Ogle, 104 N. Y. 511.

North Dakota.—State v. Kent (N. Dak., 1895), 62 N. W. Rep. 631.

Oregon.—State v. Odell, 8 Oregon 30; State v. Jarvis, 18 Oregon 360.

Pennsylvania.—Hester v. Com., 85 Pa. St. 139; Watson v. Com., 95 Pa. St. 424; Cox v. Com., 125 Pa. St. 94.

South Dakota.—State v. Hicks (S. Dak., 1894), 60 N. W. Rep. 66.

Tennessee.—Robison v. State, 16 Lea (Tenn.) 146; Clapp v. State, 94 Tenn. 186.

Texas.—Zollicoffer v. State, 16 Tex. App. 312; Harrison v. State, 17 Tex. App. 442; Tisdale v. State, 17 Tex. App. 444; Conway v. State (Tex. Crim. App., 1894), 26 S. W. Rep. 401; Coleman v. State, 44 Tex. 109.

Vermont.—State v. Howard, 32 Vt. 403.

Corroboration must Affect Identity of Prisoner.

—In Reg. v. Farler, 8 C. & P. 106, 34 E. C. L. 314, Lord Abinger instructed the jury as follows: "In my opinion * * * corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons, that is really no corroboration at all. If a man was to break open a house and put a knife to your throat and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat and did steal the property. It would not at all tend to show that the party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the house of the landlord. Now, look at his evidence. If they were seen together under circumstances that were extraordinary and where the prisoner was not likely to be unless there were concert, it might be something; but he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there, and he left when they were shutting up the house. Therefore it is perfectly natural that he should have been there and left when he did. The single circumstance is that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week, and there the case ends against him. All the rest depends upon the evidence of the accomplice. The danger is that when a man is fixed and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence."

There are Some Expressions to the Contrary in earlier cases; but it seems that all those cases really decide that there is no rule of law preventing the conviction of a prisoner upon the unsupported testimony of an accomplice. Rex v. Jones, 2 Campb. 132; Rex v. Dawber, 3 Stark. 34; Rex v. Hastings, 7 C. & P. 152, 32 E. C. L. 475.

Need Not Refer to Particular Statement.—If the corroboration tends to connect the defendant with the commission of the offense, it need not refer to any statement or fact testified to by the accomplice. Malachi v. State, 89 Ala. 134, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 78; Ross v. State, 74 Ala. 532; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391.

A Confession by the Accused, supported by evidence of the *corpus delicti*, sufficiently corroborates the evidence of an accomplice.

Snoddy v. State, 75 Ala. 23; Schaefer v. State, 93 Ga. 177; Schoenfeldt v. State, 30 Tex. App. 695. See also People v. Cleveland, 49 Cal. 578; People v. Zimmerman (Cal.), 3 West Coast Rep. 59; Partee v. State, 67 Ga. 570; Territory v. Mahaffey, 3 Mont. 112; People v. Jaehne, 103 N. Y. 182; Anderson v. State (Tex. Crim. App., 1895), 31 S. W. Rep. 673.

Suspicious Lies having been Told by the Accused about the crime is not a fact sufficient to corroborate the testimony of an accomplice. People v. Koenig, 99 Cal. 574; Buchanan v. State (Tex. Crim. App., 1894), 24 S. W. Rep. 895.

Contradictory Statements made by the defendant as to his whereabouts at the time of the crime, together with evidence which shows that he tried to get his accomplice to leave the country, are sufficient corroborating evidence. People v. McLean, 84 Cal. 480.

Possession of Coat of Murdered Man.—The fact that the coat of a murdered man was found in the possession of the person accused of killing him is proper corroborating evidence, although the accomplice testified only to the killing, and not to the taking of the coat. Malachi v. State, 89 Ala. 134.

Flight.—The fact of flight by a person accused or suspected of crime is of some probative force, as tending to corroborate an accomplice. Ross v. State, 74 Ala. 532.

Prisoner Seen in Neighborhood.—The fact that the prisoner was seen in the neighborhood about the time the crime was committed is not sufficient to corroborate the testimony of an accomplice. Reg. v. Farler, 8 C. & P. 106, 34 E. C. L. 314; State v. Odell, 8 Oregon 30. But see Ross v. State, 74 Ala. 532; State v. Townsend, 19 Oregon 213. Unless the defense is an *alibi*. Territory v. Kinney (N. Mex.), 1 West Coast Rep. 801.

Possession of Stolen Property.—The possession of stolen goods not satisfactorily accounted for is sufficient corroborating evidence. Reg. v. Birkett, 8 C. & P. 732, 34 E. C. L. 608; People v. Grundell, 75 Cal. 301; Boswell v. State, 92 Ga. 581; Pritchett v. State, 92 Ga. 33; Roberts v. State, 80 Ga. 772; Morrow v. State (Tex. Crim. App., 1894), 26 S. W. Rep. 395; Jernigan v. State, 10 Tex. App. 546. See also Smith v. State, 59 Ala. 104; Ford v. State, 70 Ga. 722.

But it is no confirmation of a thief that stolen property was found on the premises of the person charged as receiver, for the thief may have placed the goods there himself. Reg. v. Pratt, 4 F. & F. 315; Reg. v. Robinson, 4 F. & F. 43.

When Several Prisoners are Charged, it is not sufficient that the accomplice should be confirmed as to one or more of the prisoners, to justify a conviction of those prisoners with respect to whom there is no confirmation. Reg. v. Stubbs, 7 Cox C. C. 20, 33 Eng. L. & Eq. 551; Reg. v. Jenkins, 1 Cox C. C. 177; Rex v. Moores, 7 C. & P. 270, 32 E. C. L. 507; Rex v. Wells, M. & M. 326, 22 E. C. L. 324; Rex v. Field, Dick. Q. S. 520; Hall v. State, 3 Lea (Tenn.) 561.

In Com. v. Holmes, 127 Mass. 431, 34 Am. Rep. 391, Gray, C. J., said: "In 1829,

defendant's connection with the crime.¹

One Accomplice Corroborating Another.—The practice requiring corroboration of the testimony of one accomplice applies when two or more are called to testify, because one accomplice cannot corroborate another.²

Whether Wife may Corroborate.—It has been held that the wife of an accomplice cannot corroborate him,³ but by the weight of authority in the *United States* the wife of an accomplice is a competent witness to corroborate his testimony.⁴

(2) *In Trials for Misdemeanors.*—It was at one time contended that the practice of requiring confirmation did not extend to cases of misdemeanors,⁵ but it has been said that there is no sound reason for such distinction, and if it ever prevailed it no longer exists,⁶ though the amount of corroboration required may depend to some extent on the nature of the circumstances of the crime and the degree of moral obliquity to be presumed from its commission.⁷

Civil Actions.—The rule, however, does not apply in civil actions growing out of conspiracies to commit fraud.⁸

Actions for Penalties and Forfeitures.—Nor is the rule applicable in actions to

where the testimony of an accomplice was confirmed as to an accessory but not as to the principal, Mr. Justice Littleale directed an acquittal of both. *Rex v. Wells, M. & M.* 326, 22 E. C. L. 324. And for the past fifty years it has been the usual practice of English judges at *nisi prius* to advise the jury that the corroboration of the testimony of an accomplice ought to be of facts going to prove the guilt of the defendant, and that corroboration as to the guilt of one defendant only would not justify the conviction of another." *Citing Vaughan, B., in Rex v. Field, Dick. Q. S. 520; Patterson, J., in Rex v. Addis, 6 C. & P. 388, 25 E. C. L. 452, and in Kelsey's Case, 2 Lew. 45; Williams, J., in Rex v. Webb, 6 C. & P. 595, 25 E. C. L. 556; Alderson, B., in Rex v. Moores, 7 C. & P. 270, 32 E. C. L. 507, in Rex v. Wilkes, 7 C. & P. 272, 32 E. C. L. 507, in Rex v. Fletcher, 2 Lew. 45, note, and in Reg. v. Farler, 8 C. & P. 106, 34 E. C. L. 314; Gurney, B., in Reg. v. Dyke, 8 C. & P. 261, 34 E. C. L. 381; Jervis, C.J., Parke, B., and Cresswell, J., in Reg. v. Stubbs, 7 Cox C. C. 48, Dears. C. C. 555.*

1. *People v. Jaehne*, 103 N. Y. 182; *People v. O'Neil*, 109 N. Y. 251.

2. *Rex v. Noakes*, 5 C. & P. 326, 24 E. C. L. 342; *Reg. v. Stubbs, Dears. C. C. 555*, 7 Cox C. C. 48; *Reg. v. Mullins*, 3 Cox C. C. 526; *Reg. v. Magill, Ir. Cir. R. 418; Johnson v. State*, 92 Ga. 577; *Johnson v. State*, 4 Greene (Iowa) 65; *State v. Brownlee*, 84 Iowa 476; *Gonzales v. State*, 9 Tex. App. 374. See *U. S. v. Van Leuven*, 65 Fed. Rep. 78.

In *Texas* it has been held that where two or more accomplices testify against the accused, the court should instruct the jury that one accomplice cannot corroborate another. *Harrison v. State*, 17 Tex. App. 442; *McConnell v. State* (Tex. App., 1892), 18 S. W. Rep. 645; *Whitlow v. State* (Tex. App., 1892), 18 S. W. Rep. 865.

Separate Statements Made without Collusion.—Where three confederates in crime make separate statements without any knowledge or collusion *inter se*, and the three statements

are in all respects identical, it was held that proof of this fact was sufficient corroboration of one of them who appeared as a witness for the prosecution. *U. S. v. Lancaster*, 44 Fed. Rep. 896.

3. *Rex v. Neal*, 7 C. & P. 168, 32 E. C. L. 481.

4. *Woods v. State*, 76 Ala. 35; *Edmonson v. State*, 51 Ark. 115; *State v. Moore*, 25 Iowa 128, 95 Am. Dec. 776; *State v. McIntyre*, 58 Iowa 572; *Haskins v. People*, 16 N. Y. 344; *Dill v. State*, 1 Tex. App. 278. See *Adams v. State*, 28 Fla. 511; *Askea v. State*, 75 Ga. 356; *U. S. v. Horn*, 5 Blatchf. (U. S.) 102.

5. *Gibbs, Atty.-Gen., in Rex v. Jones*, 31 How. St. Tr. 315; *Truss v. State*, 13 Lea (Tenn.) 311.

6. 2 Phill. Ev. 112; 1 Taylor Ev., § 966; both citing *Reg. v. Farler*, 8 C. & P. 106, 34 E. C. L. 314, where Lord Abinger required corroborating evidence to support the testimony of an accomplice in a trial for a misdemeanor. To the same effect are *U. S. v. Smith*, 2 Bond (U. S.) 323; *State v. Davis*, 38 Ark. 581.

Georgia—Corroboration in Misdemeanors not Necessary.—In *Georgia* it is provided by statute that no conviction of a felony can be had upon the unsupported testimony of an accomplice, but it is held in that state that the uncorroborated testimony of an accomplice is sufficient to convict of a misdemeanor, the statutory provision not applying to such cases. *Parsons v. State*, 43 Ga. 197; *Crisson v. State*, 51 Ga. 597; *Askea v. State*, 75 Ga. 356; *Porter v. State*, 76 Ga. 659; *Rountree v. State*, 88 Ga. 457.

Alabama.—In *Alabama*, by statute, no corroboration is required in the case of misdemeanors. *Moses v. State*, 58 Ala. 117; *Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752.

But such a law is within a constitutional prohibition as to *ex post facto* laws, and cannot be applied to misdemeanors committed prior to its passage. *Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752.

7. *Rex v. Jarvis*, 2 M. & Rob. 40; *Rex v. Cramp*, 14 Cox C. C. 390; *U. S. v. Harries*, 2 Bond (U. S.) 311.

8. *Kalckhoff v. Zoehrlaut*, 43 Wis. 373.

recover penalties and forfeitures suffered by reason of the commission of misdemeanors,¹ though in such cases the credibility of witnesses may be seriously impaired by their known complicity with the parties from whom the forfeitures are sought to be recovered.²

5. Right to Pardon of Accomplice Testifying for Prosecution.—When an accomplice is examined in behalf of the prosecution, and fully and fairly discloses the guilt of himself and his associates, a promise is implied, as generally regarded, that he will not be punished for the offense.³ In such cases the prosecuting officer may decline to institute proceedings against him, or may discontinue them if already begun.⁴ If this course is not pursued, but the accomplice is tried and convicted, he is equitably entitled to a pardon.⁵ This practice grew up as a substitute for the ancient doctrine of approvement.⁶

1. *M'Clory v. Wright*, 10 Ir. C. L. R. 514; *Magee v. Mack*, 11 Ir. L. R. N. S. 429.

2. *U. S. v. One Distillery*, 2 Bond (U. S.) 399.

3. 2 Stark. Ev. 15; 1 Phill. Ev. (5th Am. ed.) 107; *Rex v. Rudd*, Cowp. 331; *Whiskey Cases*, 99 U. S. 594; *U. S. v. Hinz*, 35 Fed. Rep. 272; *Long v. State*, 86 Ala. 36; *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174; *People v. Whipple*, 9 Cow. (N. Y.) 707; *State v. Lyon*, 81 N. Car. 600, 31 Am. Rep. 518; *Camron v. State*, 32 Tex. Crim. Rep. 180.

In *Virginia*, an accomplice testifying for the commonwealth, though fully and fairly disclosing his own guilt and that of his associates, is not equitably entitled to a pardon. *Com. v. Dabney*, 1 Rob. (Va.) 754.

4. As to the power of the prosecuting officer to act with or without the consent of the court, and the effect of such a proceeding, see *supra*, this title, *When Admitted as Witness*, and the cross-references there given.

5. *Whiskey Cases*, 99 U. S. 594; and see the following notes.

In *England*, and it would seem generally wherever the pardoning power can act before conviction, the accomplice may become entitled to a pardon as a matter of right. Thus:

Proclamation Promising a Conditional Pardon.—The king by special proclamation sometimes promised pardon to accomplices upon condition that they would furnish evidence to convict their associates in crime. Accomplices coming within the provisions of such a proclamation were said, by Lord Mansfield, to have a right to a pardon. *Rex v. Rudd*, Cowp. 331.

But where a prisoner under sentence for murder pleaded, upon being asked why sentence should not be pronounced against him, such a proclamation, and that he had given such information and thereby entitled himself to a pardon, Lord Denman held that he was only entitled to have time granted to him to apply to the pardoning power, and he explained the remark of Lord Mansfield in *Rex v. Rudd*, Cowp. 331, as follows: "The counsel for the prisoner, Garside, has contended that by the terms of the proclamation which has been referred to he has a legal right to the benefits of a pardon, and a passage has been cited in support of this proposition from a judgment of Lord Mansfield in

Rex v. Rudd, Cowp. 331. But it is clear that in that part of his judgment Lord Mansfield does not speak of legal rights in the strict sense of such rights as would constitute a defense to an indictment, or an answer to the question whether an execution should not be awarded, for, after enumerating the 'three ways in law and practice which give accomplices the right to a pardon,' he adds, 'in all these cases the court will bail them in order to give an opportunity of applying for a pardon.' The application to the court, therefore, in that case is only that the party may be bailed for the purpose of investing himself with a legal right which he did not before possess." *Rex v. Garside*, 2 Ad. & El. 266, 29 E. C. L. 84.

Statute Holding out Pardon.—There was another case which gave an accomplice a right to a pardon, namely, that of persons within statutes creating offenses, or regulating penalties, and holding out the promise of immunity to accomplices who should bring their associates to justice. *Rex v. Rudd*, Cowp. 331; 1 Chitty Cr. Law (5th Am. ed.) *766.

6. *Rex v. Rudd*, Cowp. 331; *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174.

Approvement.—The old law of approvement is thus explained by Beasley, C.J., in *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174: "The course in pursuing this old form was for the culprit, indicted for treason or felony, to confess the truth of the charge, and, upon being sworn, to reveal all the treasons and felonies within his knowledge, and to enter before a coroner his appeal against all his partners in crime who were within the realm. The criminal thus confessing was called the approver, or, in Latin, *probator*, and the person implicated was styled the appellee. By this confession and appeal the approver put it in the discretion of the court either to give judgment and award execution against him, or to respite him until the conviction of his partners in guilt; and if it was deemed advisable to admit him as an approver, and then if, upon being sworn, he made a full and true disclosure and also convicted the appellee, either by his oath or on wager of battle, the king, *ex merito justitia*, pardoned him 'as to his life.' This practice, with its conditions that the appellee could claim a trial by battle, and that grace to the approver should be dependent on his conviction of his associate

Right Equitable Only.—The accomplice's right not to be prosecuted, or to a pardon, is equitable only, and is conditioned upon his making a full and fair disclosure of his own guilt and that of his associates, and if he violates this condition he may be tried and convicted on his own confession.¹

Not a Bar to Indictment.—He cannot plead the facts in bar of an indictment, nor avail himself of them by motion to dismiss the prosecution.²

Immunity does not Extend to Other Crimes.—The implied promise of pardon to the accomplice does not extend to other crimes committed by him.³

in crime, was plainly at variance with modern sentiments and habits, and the consequence was that it passed out of use; but as the purpose it served was of value to juridical administration, it was inevitable in the ordinary development of the law that some equivalent should take its place."

For further details of the law of approvement see *Whiskey Cases*, 99 U. S. 594; *Rex v. Rudd*, Cowp. 331; 2 Hale P. C. 226; 4 Bl. Com. 330.

1. *Moore's Case*, 2 Lew. 37; *Rex v. Gillis*, 11 Cox C. C. 69; *Whiskey Cases*, 99 U. S. 594; U. S. v. Hinz, 35 Fed. Rep. 272; *Long v. State*, 86 Ala. 37; *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; *State v. Lyon*, 81 N. Car. 600, 31 Am. Rep. 518; *State v. Moran*, 15 Oregon 262; 1 Roscoe Cr. Ev. (8th Am. ed.) *136, citing *Rex v. Burley*; *Reg. v. Holtham*, Stafford Spring Ass. 1843; *Rex v. Stokes*, Stafford Spring Ass. 1837. See *Alderman v. People*, 4 Mich. 423, 69 Am. Dec. 321.

The Refusal of the Accomplice to Testify before the Trial Jury, notwithstanding his having testified before the grand jury, forfeits all rights to immunity or clemency, and subjects him to trial and conviction; and he is not entitled to a continuance of the case to allow him to apply to the pardoning power for a pardon before conviction. U. S. v. Hinz, 35 Fed. Rep. 272. See *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; *State v. Moran*, 15 Oregon 262.

2. *Rex v. Rudd*, Cowp. 331; *Whiskey Cases*, 99 U. S. 594; *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174; *State v. Lyon*, 81 N. Car. 600, 31 Am. Rep. 518; 1 Roscoe Cr. Ev. (8th Am. ed.) *135; 3 Russ. Cr. Ev. (9th Am. ed.) *598. But see *Camron v. State*, 32 Tex. Crim. Rep. 180.

But he has a claim for a judicial recommendation for pardon, which cannot be withheld without violating an established rule of practice. See the authorities just cited.

Where the Pardoning Power can Act before Conviction, if the district attorney upon the accomplice's being indicted with the same crime should fail to enter a *nolle prosequi*, the court will continue the cause until a pardon can be applied for. U. S. v. Lee, 4 McLean (U. S.) 103; *Whiskey Cases*, 99 U. S. 594. See *Rex v. Rudd*, Cowp. 331. But compare *Com. v. Dabney*, 1 Rob. (Va.) 754.

But where the Pardoning Power cannot Act until after Conviction of the prisoner, the closest approximation to this practice is to put the accomplice on trial, and, upon his conviction, for the court to recommend him to executive clemency. *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174. See *State v. Lyon*, 81 N. Car. 600, 31 Am. Rep. 518.

Mr. Bishop has suggested that in such a case the prisoner be permitted to plead guilty, under an arrangement with the prosecuting officer that he may retract his plea and plead one to the merits if his application for a pardon prove unsuccessful. *Bishop's Crim. Proc.*, § 1006, note.

But this suggestion is disapproved by the court in *State v. Lyon*, 81 N. Car. 600, 31 Am. Rep. 518.

The mere fact that one defendant has been examined as a witness against another defendant on trial for the same crime, and that he has disclosed his own and his associate's guilt, no promise or inducement being held out to him, gives him not even an equitable right to clemency. *Long v. State*, 86 Ala. 36. See *Com. v. Brown*, 103 Mass. 422; *Com. v. Denehy*, 103 Mass. 424, note; *Com. v. Woodside*, 105 Mass. 594; *Com. v. Plummer*, 147 Mass. 601.

In *Texas* the doctrine stated in the text does not prevail, and it is there held that an agreement to turn state's evidence is a good plea to an indictment for the same offense, and entitles the prisoner to a discharge. *Hardin v. State*, 12 Tex. App. 186; *Bowden v. State*, 1 Tex. App. 144; *Camron v. State*, 32 Tex. Crim. Rep. 180, *disapproving* *Holmes v. State*, 20 Tex. App. 509.

In *Scotland* the privilege of the accomplice who testifies for the prosecution is absolute. 2 Alison's Crim. Law of Scotland 453.

3. *Rex v. Lee*, R. & R. C. C. 361; *Rex v. Brunton*, R. & R. C. C. 454.

Cross-examination as to Other Offenses.—In respect to such an offense, therefore, he is not bound to answer on his cross-examination. *West's Case* (O. B. Sessions 1821), 1 Phill. Ev. (5th Am. ed.) *108; *Pitcher v. People*, 16 Mich. 142.

But if an accomplice in one crime be also indicted for another crime, and the fact be within the knowledge of the court, he will not, as a rule, be admitted as a witness. *Anonymous*, 2 C. & P. 411, 12 E. C. L. 194.

ACCORD AND SATISFACTION.

By W. O. SKELTON.

- I. DEFINITION AND GENERAL PRINCIPLES, 408.
- II. THE AGREEMENT OF ACCORD, 409.
 - 1. *Subject Matter of the Accord*, 409.
 - 2. *Form of the Accord*, 411.
 - 3. *Consideration of the Accord*, 412.
 - a. *Generally*, 412.
 - b. *Part Payment of Liquidated Debt or Demand*, 413.
 - (1) *Common-law Rule*, 413.
 - (2) *Variant Mode of Payment*, 415.
 - (a) *Generally*, 415.
 - (b) *Payment at Earlier Date or Different Place*, 416.
 - (c) *Payment by a Stranger*, 416.
 - (d) *Payment by Negotiable Note of Debtor*, 416.
 - (e) *Payment by Note of Third Person*, 417.
 - (f) *Payment in Property*, 417.
 - (g) *Giving Additional Security*, 418.
 - c. *Unliquidated or Contingent Demand*, 419.
- III. THE EXECUTION OF THE ACCORD—SATISFACTION, 420.
 - 1. *Generally*, 420.
 - 2. *Promise Accepted in Satisfaction*, 423.
 - 3. *Who may Execute the Accord*, 426.
 - 4. *Presumption from Lapse of Time*, 427.
- IV. JOINT PARTIES, 427.
- V. EFFECT OF FRAUD, IGNORANCE, OR MISTAKE, 428.

CROSS-REFERENCES.

For matters of PROCEDURE see 1 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 73.
For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ARBITRATION AND AWARD; BILLS AND NOTES; COMPOSITION WITH CREDITORS; CONTRACT; NOVATION; PARTNERSHIP; PAYMENT; RECEIPT; RELEASE; RESCISSION; SETTLEMENT.

I. DEFINITION AND GENERAL PRINCIPLES—Definition.—Accord and satisfaction is a method of discharge of a contract, or cause of action arising either in contract or tort, consisting in the substitution of an agreement between the parties in satisfaction of such contract or cause of action, and an execution of that agreement.¹

1. An attempt has been made to make the definition given in the text wide enough to embrace the recognized usages of the term "accord and satisfaction" both in the field of contract and in the field of tort. The current definitions will be found too narrow. Thus:

Defined as a **Method of Discharge of Contract**.—Accord and satisfaction is an agreement in the case of a contract where the creditor agrees to accept some other thing in lieu of that

which is contracted or promised to be done. *Way v. Russell*, 33 Fed. Rep. 7.

Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of a former one, and an execution of the latter agreement. *Pulliam v. Taylor*, 50 Miss. 257; 2 Pars. Contr. (8th ed.) 799. These definitions exclude accord and satisfaction as a defense in an action *ex delicto*, for in such cases it is a substitute, not for a pre-

Effect—Rescission.—The effect of accord and satisfaction so long as it stands is to extinguish the debt or claim for which it is substituted, but the accord and satisfaction may be rescinded by subsequent agreement, and the debt or claim restored to its original status.¹

Relations to Other Titles.—Accord and satisfaction, when it consists in the substitution for a former contract of another contract which, without performance, is accepted in satisfaction of the old contract, is a novation.² When one by an instrument under seal discharges a right of action which he has against another, the instrument is technically a release, and the principles of accord and satisfaction no longer in strictness apply.³ When effected by the delivery and acceptance of negotiable instruments, accord and satisfaction becomes involved with both payment and novation; the rules in regard to payment by such instruments will be appropriately treated under those titles.⁴

II. THE AGREEMENT OF ACCORD—1. **Subject Matter of the Accord.**—The demand or cause of action in bar of which the accord and satisfaction is pleaded must relate to rights touching the person or personal property, or chattels real, not freehold estates in land.⁵ It must not be an illegal obligation or claim.⁶ It need not be an unliquidated demand, or a claim for damages merely.⁷ So

ceding agreement, but for a right arising from a tortious act.

Other Definitions.—Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account. 3 Bl. Com. 5; *Mitchell v. Hawley*, 4 Den. (N. Y.) 418, 47 Am. Dec. 260; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285; *Sieber v. Amunson*, 78 Wis. 682.

An accord and satisfaction may be briefly defined as the settlement of a dispute for the satisfaction of a claim, by an executed agreement between the party injuring and the party injured; or, to give a definition indicating more definitely its peculiar nature, it is something of legal value, to which the creditor before had no right, received in full satisfaction of the debt, without regard to the magnitude of the satisfaction. *Bull v. Bull*, 43 Conn. 462, citing 1 Smith Lead. Cas. (10th Am. ed.) 558.

These definitions predicate a party injuring and a party injured, that is, a cause of action already existing; but where a less sum is paid before due and is accepted in satisfaction, it is a good accord and satisfaction, *Pinnel's Case*, 5 Coke 117a; although at the time of the transaction there is no cause of action.

1. *Heavenrich v. Steele* (Minn., 1894), 58 N. W. Rep. 982.

2. 2 Whart. Contr., § 904. See the title *NOVATION*.

3. See the title *RELEASE*.

4. See the titles *PAYMENT*; *NOVATION*.

Payment Means Properly the full satisfaction of a debt by money, not by an exchange or compromise, or an accord and satisfaction. *Manice v. Hudson River R. Co.*, 3 Duer (N. Y.) 426.

5. *Peytoe's Case*, 9 Coke 79b.

Freehold Title to Lands.—"It is a maxim in law, that a freehold title to lands can never be barred by a collateral satisfaction; a maxim originating partly in the reverend esteem in which the common law holds a freehold, and partly in the consideration that to allow a

freehold to be so barred would trench upon that fundamental principle of landed property, that no freehold shall be passed from one to another save by livery of seisin." 4 Minor's Inst. (2d ed.), p. 143.

6. An agreement to pay money by way of compromise will be *nudum pactum*, if there is no foundation for the claim or demand compromised. *Emery v. Royal*, 117 Ind. 299.

Illegal Sale of Liquors.—If a purchaser of intoxicating liquors, sold in violation of law, in settling mutual accounts with the seller credits him with the price of the same and receiving from him the balance found due after the allowance gives him a receipt in full settlement, such payment and receipt will not have the effect of an accord and satisfaction to bar an action to recover the sum so credited. *Walan v. Kerby*, 99 Mass. 1.

7. **Need Not be Unliquidated Demand or Claim for Damages Merely.**—Where the plaintiff brought an action of *ejectione firmæ*, and the defendant pleaded accord and satisfaction, it was held upon a demurrer by the plaintiff that the accord and satisfaction was a good plea. *Peytoe's Case*, 9 Coke 77b.

In this case the plaintiff "did much rely upon two rules put in the case in 7 E. 6, between Andrew and Boughey, 1 Dyer 75; one, That in all cases where nothing but amends shall be recovered in damages, there a concord with execution thereof is a good plea. But in this case of *ejectione firmæ*, *aliquid amplius et magis dignum* shall be recovered than damages, *sc.* the term. The other rule put is, In all actions grounded upon a wrong, as trespass, conspiracy, maintenance, and the like, where nothing in certainty is demanded, nor to be recovered but damages, concord is a good plea. But in this case the action is brought for the recovery of the possession of a house and lands demised in certain." The reason for the decision that the plea was good in this action was that "in all actions which suppose the wrong to be done *vi et armis*, there accord is a good plea. * * * And it appeareth that this case is not like to an action of waste against a lessee for

an accord and satisfaction is a good plea in an action of false imprisonment, libel, or assault.¹ Where a payment is made and accepted in full satisfaction for injuries received, it is a good accord and satisfaction, if the terms are understood fully, notwithstanding the injuries are serious and permanent, and latent and undiscovered when the settlement is made.² So a payment made and received in full satisfaction for injury done to property is valid and binding as an accord and satisfaction.³

years, nor to the writ of *quare ejecit infra terminum*, which is *quare ei de forceat*, etc., without *vi et armis*, and yet, forasmuch as in these also but a chattel shall be recovered, accord is a good plea. * * * And it was resolved that the said rule in 7 E. 6 was consonant to the law, *sc.* that where nothing but amends is to be recovered in damages, there an accord is a good plea, but the same doth not oppose that although a chattel real or personal are also to be recovered, that accord shall be no plea; for in detinue of charters concerning land in fee, or freehold, the charters themselves shall be recovered, and yet in such case accord is a good plea, as it is holden in 7 E. 4, 23: the same law of detinue of a horse or other personal goods. And the other rule is also true, but, as the first, the same implieth not the negative, for where certainty is to be recovered, accord also is a good plea, as in the case of detinue of charters. In an action of debt upon a lease for years there is a certainty demanded, and yet accord is a good plea, as it is holden in 47 E. 3, 24; 10 H. 7, 24; 2 R. 3, Debt, 100."

1. **False Imprisonment—Libel—Assault.**—*Foster v. Trull*, 12 Johns. (N. Y.) 456; *Vedder v. Vedder*, 1 Den. (N. Y.) 257; *Boosey v. Wood*, 3 H. & C. 484; *Cock v. Honychurch*, T. Raym. 203, 2 Keb. 690; *Carter v. Wormald*, 1 Exch. 86; *Phillips v. Kelly*, 29 Ala. 628; *Peace v. Stennet*, 4 J. J. Marsh. (Ky.) 449.

2. **Rideal v. Great Western R. Co.**, 1 F. & F. 706.

Personal Injuries.—Where the plaintiff, after an injury sustained in his person from the tort of the defendant, agrees with the defendant, or his agents, that in satisfaction of such injury the defendant should pay the expenses incurred by the plaintiff by reason of his injury, and should furnish him with a free conveyance to his point of destination, and the defendant performs his part of the agreement, the plaintiff cannot recover further damages for the tort. *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138; *Coon v. Knap*, 8 N. Y. 402, 59 Am. Dec. 502; *Ludington v. Miller*, 38 N. Y. Super. Ct. 478.

But where the plaintiff after being injured by a railroad accident, not supposing that he had received any serious injuries, accepted from the railroad a trifling sum in compensation for damage to his clothes, it was held that the receipt of this sum could not be set up as an accord and satisfaction for a patent and severe injury to the brain or spine. *Roberts v. Eastern Counties R. Co.*, 1 F. & F. 460. But see *Hayes v. East Tennessee, etc., R. Co.*, 89 Ga. 264.

Presumption.—Where there is no express agreement that the amount paid shall be in

satisfaction either in whole or in part of the cause of action, the presumption is that it was intended by the parties as a full recompense for the injury, and to operate as an accord and satisfaction barring a subsequent action to recover damages for the same injury. *Hinkle v. Minneapolis, etc., R. Co.*, 31 Minn. 434, 15 Am. & Eng. R. Cas. 391.

Accord and Satisfaction with Deceased Bars Action by the Legal Representatives.—Where, by statute, the personal representatives of a person whose death was due to injuries received by the wrongful acts of another are given a right of action to recover damages for such wrongful acts, it has been held that an accord and satisfaction between the wrongdoer and the deceased, in the lifetime of the latter, bars an action by the representatives. *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555; *Dibble v. New York, etc., R. Co.*, 25 Barb. (N. Y.) 183; *Littlewood v. New York, etc., R. Co.*, 47 N. Y. Super. Ct. 547, 89 N. Y. 24; *Fowlkes v. Nashville, etc., R. Co.*, 5 Baxt. (Tenn.) 663. See *South, etc., Alabama R. Co. v. Sullivan*, 59 Ala. 272.

3. **Damage to Property.**—A woman accepted fifty-five dollars in full payment and satisfaction of any claim against a railroad company, for damages to certain city lots by reason of the construction of said railroad; and subsequently the grade of the lots was raised five feet, to the great damage of said lots. It was held that she could not recover any further damages. *Kansas City, etc., R. Co. v. Hicks*, 30 Kan. 289. See also *St. Louis, etc., R. Co. v. Hurst*, 25 Ill. App. 98, 181.

The plaintiff owned property over the coal mine of the defendant. By reason of the defendant's working the mine the plaintiff was damaged, and he commenced suit against the defendant. An agreement was reached between them by which the action was stayed by the defendant paying for all damages done, repairing the same to the satisfaction of a surveyor, and paying all costs. The plaintiff claimed that after this agreement his property became useless by the sinking of the land, which resulted from the same acts that caused the original damage. It was held that no new cause of action arose from the subsequent damage, and that the agreement and its performance created a bar to the action. *Nicklin v. Williams*, 10 Exch. 259.

Upon a Disputed Claim for Damages for not making repairs, one party finally paid a certain sum to the other, who thereupon said that "all his claim was settled." This was held to be a satisfaction. *Neary v. Bostwick*, 2 Hilt. (N. Y.) 514.

Upon an asserted claim for damages, unliquidated in amount, resulting from alleged negligent destruction of property, the claim

2. Form of the Accord.—An accord and satisfaction need not in general be in writing; and since, in order to be valid, it must be executed, it is not, although it concerns some interest in lands, within the statute of frauds.¹ From purely formal considerations arose certain ancient rules with regard to the effect of accord and satisfaction when pleaded to demands arising from contracts of record or under seal. Thus:

Covenant.—An accord and satisfaction made before breach of covenant is not a bar to an action for a subsequent breach, and it is immaterial whether the agreement is to pay at a specified time or is dependent on a condition.²

being made in good faith, and upon grounds reasonably inducing the belief that it is enforceable, an agreement on the one side to pay a specified amount, less than the alleged value of the property, and an agreement on the other side to accept the same in full satisfaction, constitute a valid and binding contract. *Neibles v. Minneapolis, etc., R. Co.*, 37 Minn. 151.

1. *Lavery v. Turley*, 6 H. & N. 239; *Massey v. Johnson*, 1 Exch. 241. See title **FRAUDS, STATUTE OF.**

An oral agreement if executed may be pleaded to an action on a prior written agreement. *Payne v. Barnett*, 2 A. K. Marsh. (Ky.) 312.

But it has been stated that accord and satisfaction is not a good plea unless the accord be of as high a nature as the obligation. *M'Cormick v. Oliver*, 7 Yerg. (Tenn.) 24. See, however, *infra*, this section.

2. *Spence v. Healey*, 8 Exch. 668, 20 Eng. L. & Eq. 476; *Berwick v. Oswald*, 1 El. & Bl. 295, 72 E. C. L. 295, 16 Eng. L. & Eq. 236; *Snow v. Franklin*, 1 Lutw. 358; *Alden v. Blague*, Cro. Jac. 99; *Cumber v. Wane*, 1 Stra. 426, 1 Smith's Lead. Cas. *357; *Noyes v. Hopgood*, Cro. Jac. 649; *Neal v. Sheaffield*, Cro. Jac. 254; *Oliver v. Lease*, Cro. Car. 86; *Kaye v. Wagborne*, 1 Taunt. 428; *Harper v. Hampton*, 1 Har. & J. (Md.) 673; *Herzog v. Sawyer*, 61 Md. 344; *Cabe v. Jameson*, 10 Ired. (N. Car.) 193; *Smith v. Brown*, 3 Hawks (N. Car.) 580; *Mitchell v. Hawley*, 4 Den. (N. Y.) 414, 47 Am. Dec. 260; *Garvey v. Jarvis*, 54 Barb. (N. Y.) 179; *Esmond v. Van Benshoten*, 12 Barb. (N. Y.) 376. But see *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. Rep. 793; *Reichel v. Jeffrey*, 9 Wash. 250.

The Reason for This was the common-law rule that an obligation under seal could only be discharged by an instrument of equal dignity. *Blake's Case*, 6 Coke 436; *Preston v. Christmas*, 2 Wils. 86; *Levy v. Very*, 12 Ark. 148; *State Bank v. Littlejohn*, 1 Dev. & B. (N. Car.) 563. See also *Ligon v. Dunn*, 6 Ired. (N. Car.) 133.

How Far Recognized at Present.—How far the distinction or rule stated in the text would be accepted at the present day, may be doubtful. In *Steeds v. Steeds*, 22 Q. B. Div. 537, Willes, J., said: "It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under

seal." And it was held, in this case, that in equity delivery and acceptance of goods would operate as a satisfaction of the bond for the payment of money. Where at least equitable defenses are allowed in an action at law, such a satisfaction will be held a good defense. See *Clerk v. Laurie*, 1 H. & N. 458; *Mostyn v. West Mostyn Coal, etc., Co.*, 1 C. P. Div. 145; *Barelli v. O'Conner*, 6 Ala. 617; *Savage v. Blanchard*, 148 Mass. 348; *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. Rep. 793; *Lawrence v. Barker*, 9 Daly (N. Y.) 140; *Webb v. Hewitt*, 3 Kay & J. 438.

Distinction between Bond with a Condition, and Covenant.—"If the debt arises by the performance or breach of the condition [in a bond], and not by virtue of the bond, accord and satisfaction is a good plea in discharge of the condition, and must be so pleaded. *Neal v. Sheaffield*, Cro. Jac. 254, Yelv. 192. See also *Anonymous*, Cro. Eliz. 46. For 'though the bond is under seal, the condition is of a thing resting in evidence only, and may be compared to a matter *in pais*.' *West v. Blakeway*, 2 M. & G. 751, 40 E. C. L. 609. Thus payment and acceptance (*Drake v. Mitchell*, 3 East 251) of a less sum before the day, or at a different place, in satisfaction, may be pleaded in bar to the sum due by the condition; for parcel of the debt, before the day, or at a different place, may be more beneficial to the obligee than the whole at the day. And so of the gift of a horse, hawk, or robe, for the value of the satisfaction is not material. *Pinnel's Case*, 5 Coke 117a. * * * And note the distinction between covenant, and bond with a condition, in this respect; for in the case of a covenant the whole matter is under the seal of the party, and accord and satisfaction is no answer to an action before breach, but in a bond with a condition it is not so." 1 Selw. N. P. (13th Eng. ed.) p. 497.

See also, as to the discharge of a bond or a covenant by the substitution of a parol agreement, the title **NOVATION**.

As to the effect of release in such cases see the title **RELEASE**.

In *Strang v. Holmes*, 7 Cow. (N. Y.) 224, it was held, after an examination of the early English authorities, that the distinction taken in those cases between a plea in satisfaction of the obligation and one in discharge of the condition, or money due, did not apply where the defendant, instead of pleading accord and satisfaction, specially set it up by notice under the general issue *non est factum*. And it was also held that under a statute similar to that of 4 & 5 Anne, c. 16, limiting the

Judgment.—At common law there could be no satisfaction in discharge of a judgment or decree, except by matter of record, and accord and satisfaction could not be pleaded as a defense to an action upon a judgment.¹ But under modern statutes allowing payment to be pleaded to bar the recovery of a debt of record, it has been held that the rule no longer applies, and accord and satisfaction is a good plea.²

3. Consideration of the Accord.—*a. GENERALLY.*—Must be of Benefit to the Creditor.—The agreement of accord must be founded upon a valuable consideration—a benefit, or possibility of benefit, accruing to the creditor or person relinquishing a demand or cause of action,³ or a detriment to the other party.⁴

Must be Legal.—The consideration must not be illegal, nor contrary to public policy.⁵

recovery upon a bond with a condition to the principal and interest, it makes no difference whether the accord and satisfaction take place before or after the bond becomes due, because the condition of the bond, as well after as before forfeiture, is the amount due upon it.

1. *Lutterford v. LeMayre*, Cro. Jac. 579; *Riley v. Riley*, 20 N. J. L. 114; *Mitchell v. Hawley*, 4 Den. (N. Y.) 414, 47 Am. Dec. 260; *Garvey v. Jarvis*, 54 Barb. (N. Y.) 179.

Writ of Error.—It has been held that accord and satisfaction may be pleaded in bar of a writ of error. *Salmon v. Pixlee*, 2 Day (Conn.) 242. But see *Clowes v. Dickenson*, 8 Cow. (N. Y.) 328; *Potter v. Smith*, 14 Johns. (N. Y.) 444.

2. *Boffinger v. Tuyes*, 120 U. S. 205; *Savage v. Everman*, 70 Pa. St. 315, 10 Am. Rep. 676. See *Jones v. Ransom*, 3 Ind. 327; *McCullough v. Franklin Coal Co.*, 21 Md. 256; *Reid v. Hibbard*, 6 Wis. 175.

Judgment of Another State.—Accord and satisfaction is a good plea to an action of debt on the record of a recovery in another state. *Hardwick v. King*, 1 Stew. (Ala.) 312.

3. *England.*—*Pinnel's Case*, 5 Coke 117a; *Foakes v. Beer*, L. R. 9 App. Cas. 605, 54 L. J. Q. B. 130; *Bidder v. Bridges*, 37 Ch. Div. 406; *Curlewis v. Clark*, 3 Exch. 375; *White v. Bluett*, 2 C. L. R. 301, 23 L. J. Exch. 36; *Greenwood v. Lidbetter*, 12 Price 183.

United States.—*Clark v. Bowen*, 22 How. (U. S.) 270.

Alabama.—*Logan v. Austin*, 1 Stew. (Ala.) 476.

Connecticut.—*Warren v. Skinner*, 20 Conn. 559.

Indiana.—*Rusk v. Gray*, 83 Ind. 589.

Iowa.—*Works v. Hershey*, 35 Iowa 340; *Merry v. Allen*, 39 Iowa 235.

Kentucky.—*Davis v. Noaks*, 3 J. J. Marsh. (Ky.) 494; *Bullen v. McGillicuddy*, 2 Dana (Ky.) 90.

Maine.—*Hinckley v. Arey*, 27 Me. 362; *White v. Jordan*, 27 Me. 370.

Maryland.—*Hardey v. Coe*, 5 Gill (Md.) 189; *Maddux v. Bevan*, 39 Md. 485.

Massachusetts.—*Tuckerman v. Newhall*, 17 Mass. 583; *Smith v. Bartholomew*, 1 Met. (Mass.) 276, 25 Am. Dec. 365.

Minnesota.—*Sage v. Valentine*, 23 Minn. 102; *Marion v. Heimbach* (Minn., 1895), 64 N. W. Rep. 386.

New Hampshire.—*Watson v. Elliott*, 57 N. H. 511.

New Jersey.—*Daniels v. Hatch*, 21 N. J. L. 391, 47 Am. Dec. 169.

South Carolina.—*Eve v. Mosely*, 2 Strobb. (S. Car.) 203.

Restoring Property Wrongfully Taken.—Restoring to the injured party his chattels or land of which he has been wrongfully dispossessed by the defendant is no consideration to support a promise by the injured person to the defendant not to sue him for these injuries. *Keller v. Neal*, 2 Watts (Pa.) 424. See *Griffiths v. Owen*, 13 M. & W. 58.

Note of Infant.—Where the creditor accepts from the debtor the note of a third person in full discharge, and the third person in an action against him on the note successfully defends on the ground of infancy, there is no accord and satisfaction. *Wentworth v. Wentworth*, 5 N. H. 410.

Discontinuance of Cross Actions.—An agreement by two, each having an action for false imprisonment pending against the other, to discontinue their respective actions and an actual discontinuance accordingly, is a good accord and satisfaction. *Foster v. Trull*, 12 Johns. (N. Y.) 456; *Vedder v. Vedder*, 1 Den. (N. Y.) 257. See also *Boosey v. Wood*, 3 H. & C. 484.

Equitable Value.—Although it has been held that the thing given in satisfaction must have a distinct value at law, and, therefore, that the release of equities of redemption could not be a satisfaction for want of such value, *Preston v. Christmas*, 2 Wils. 86; yet it cannot be doubted that if the satisfaction be actual and for a real value in fact, either at law or in equity, it will be sufficient, 2 Pars. Contr. (8th ed.) 805. See *Thrall v. Waller*, 13 Vt. 234, 37 Am. Dec. 592; *Bailey v. Cowles*, 86 Ill. 333.

4. *Hinckley v. Arey*, 27 Me. 362.

Adequacy of Consideration.—The general principles of contract apply, and courts will not inquire into the adequacy of the consideration. *Union Bank v. Geary*, 5 Pet. (U. S.) 114; *Reed v. Bartlett*, 19 Pick. (Mass.) 273; *Fisher v. May*, 2 Bibb (Ky.) 449, 5 Am. Dec. 626. See *Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95.

5. *White v. Bluett*, 2 C. L. R. 301, 22 L. J. Exch. 36; *Maness v. Henry*, 96 Ala. 454; *Smith v. Grable*, 14 Iowa 429; *Gordon v. Mitchell*, 68 Ga. 11; *Green v. Frank*, 63 Ga.

b. PART PAYMENT OF LIQUIDATED DEBT OR DEMAND—(1) Common law Rule.—The question of consideration with regard to accord and satisfaction has arisen most frequently in the consideration of the effect of part payment of a liquidated or unliquidated debt or claim.

Part Payment No Satisfaction.—The payment of a less sum at the time and place where a greater liquidated and undisputed sum is due was held at common law never to be a satisfaction of the greater sum, even though accepted as such, because there was no consideration for giving up the rest.¹ Nor, upon

78; *Rogers v. Ball*, 54 Ga. 15. See also *Foster v. Dawber*, 20 L. J. Exch. 385, 6 Exch. 839; *Richmond, etc., R. Co. v. Walker*, 92 Ga. 485; *Davidson v. Burke*, 143 Ill. 139; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109; *Wentworth v. Wentworth*, 5 N. H. 410; *Springfield F. & M. Ins. Co. v. Hull*, 51 Ohio St. 270; *Lesson v. Massachusetts Ben. Assoc.*, 3 Misc. Rep. (N. Y. Super. Ct.) 415; *Landon v. Hutton*, 50 N. J. Eq. 500.

Marriage Brokers Contract.—In *Johnson v. Hunt*, 81 Ky. 321, a contract made by an aged man with his grandson that if the latter would aid the grandfather in inducing a young woman to marry him, write letters to her, and use his influence with her to marry the grandfather, the latter would deliver to the grandson a note that he had against him for five thousand dollars, was held to be against public policy and void.

Agreement Not to Prosecute.—The plaintiff was confined in a jail by a justice of the peace, on a warrant sworn out by the prosecutor, and was afterwards released. He then sued the justice of the peace for assault and false imprisonment. The defendant pleaded that the plaintiff was imprisoned by him on a criminal charge, and released with his consent by an agreement between the plaintiff and the prosecutor in full satisfaction of the assault and imprisonment, and the discharge was accepted by the plaintiff in full satisfaction. The plea was held bad, because the satisfaction was not legal. *Edgecombe v. Rodd*, 5 East 294. See also *Keeler v. Neal*, 2 Watts (Pa.) 424.

The consideration of a note given in order to have a prosecution for bastardy dropped is good, although the maker be innocent of the charge. *Moon v. Martin*, 122 Ind. 211. *Compare Emery v. Royal*, 117 Ind. 299. But see *Springfield F. & M. Ins. Co. v. Hull*, 51 Ohio St. 270; *Barber v. State*, 24 Md. 383.

1. *England.*—2 Th. Co. Litt. 67; Bac. Abr., "Accord" (A); *Thomas v. Heathorn*, 2 B. & C. 477, 9 E. C. L. 152; *Down v. Hatcher*, 10 Ad. & El. 121, 37 E. C. L. 69; *Fitch v. Sutton*, 5 East 230; *Adams v. Tapling*, 4 Mod. 88; *Mitchell v. Cragg*, 10 M. & W. 367; *Pinnel's Case*, 5 Coke 117; *Worthington v. Wigley*, 3 Bing. N. Cas. 454, 32 E. C. L. 201; *Cumber v. Wane*, 1 Stra. 426; *Greenwood v. Lidbetter*, 12 Price 183, 1 Smith Lead. Cas. 221; *Foakes v. Beer*, 54 L. J. Q. B. Div. 130, L. R. 9 App. Cas. 605.

United States.—*Henderson v. Moore*, 5 Cranch (U. S.) 11; *Ramsdell & Smith's Case*, 2 Ct. Cl. 508.

Alabama.—*Brassell v. Williams*, 51 Ala. 349; *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159.

Arkansas.—*Cavaness v. Ross*, 33 Ark. 572.

California.—*Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102.

Connecticut.—*Warren v. Skinner*, 20 Conn. 559; *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402.

Florida.—*Spann v. Baltzell*, 1 Fla. 338, 46 Am. Dec. 346.

Iowa.—*Sullivan v. Finn*, 4 Greene (Iowa) 544.

Kansas.—*St. Louis, etc., R. Co. v. Davis*, 35 Kan. 464.

Kentucky.—*Vance v. Lukenbill*, 9 B. Mon. (Ky.) 249; *Jones v. Bullitt*, 2 Litt. (Ky.) 49.

Maine.—*Austin v. Smith*, 39 Me. 203; *White v. Jordan*, 27 Me. 370; *Hinckley v. Arey*, 27 Me. 362; *Bailey v. Day*, 26 Me. 88; *Bird v. Smith*, 34 Me. 63, 56 Am. Dec. 635.

Maryland.—*Geiser v. Kershner*, 4 Gill & J. (Md.) 305, 23 Am. Dec. 566; *Hardey v. Coe*, 5 Gill (Md.) 189.

Massachusetts.—*Curran v. Rummell*, 118 Mass. 482; *Clifton v. Litchfield*, 106 Mass. 34; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Walan v. Kerby*, 99 Mass. 1; *Lathrop v. Paige*, 129 Mass. 19; *Twitchell v. Shaw*, 10 Cush. (Mass.) 48, 57 Am. Dec. 80; *Tuttle v. Tuttle*, 12 Met. (Mass.) 554, 46 Am. Dec. 701; *Donohue v. Woodbury*, 6 Cush. (Mass.) 148, 52 Am. Dec. 777; *Howe v. Mackay*, 5 Pick. (Mass.) 44; *Makepeace v. Harvard College*, 10 Pick. (Mass.) 298; *Smith v. Bartholomew*, 1 Met. (Mass.) 276, 25 Am. Dec. 365.

Michigan.—*Leeson v. Anderson*, 99 Mich. 247.

Minnesota.—*Scase v. Gillette-Herzog Mfg. Co.*, 55 Minn. 349.

New Hampshire.—*Blanchard v. Noyes*, 3 N. H. 518.

New Jersey.—*Line v. Nelson*, 38 N. J. L. 358; *Daniels v. Hatch*, 21 N. J. L. 391, 47 Am. Dec. 169; *Murphy v. Kastner*, 50 N. J. Eq. 214.

New York.—*Watkinson v. Inglesby*, 5 Johns. (N. Y.) 386; *Dederick v. Leman*, 9 Johns. (N. Y.) 333; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380; *Robbins v. Alexander*, 11 How. Pr. (N. Y. Supreme Ct.) 100; *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 353; *Acker v. Phoenix*, 4 Paige (N. Y.) 308; *Brooks v. Moore*, 67 Barb. (N. Y.) 394; *Geary v. Page*, 9 Bosw. (N. Y.) 290; *Harrison v. Close*, 2 Johns. (N. Y.) 450, 3 Am. Dec. 444; *Johnson v. Brannan*, 5 Johns. (N. Y.) 270; *Russell v. Lytle*, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537; *Inman v. Griswold*, 1 Cow. (N. Y.) 199; *Allen v. Roosevelt*, 14 Wend. (N. Y.) 100; *Beardsley v. Davis*, 52 Barb. (N. Y.) 159; *Bunge v. Koop*, 5 Robt. (N. Y.) 1; *Bliss v. Schwartz*, 64 Barb. (N. Y.) 215; *Von Gerhard v. Lighte*, 13 Abb. Pt. (N. Y. C. Pl.) 102; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546.

the same principles, is the payment of a less sum after a debt is due a valid

North Carolina.—*Bryan v. Foy*, 69 N. Car. 45; *Hayes v. Davidson*, 70 N. Car. 573; *Mitchell v. Sawyer*, 71 N. Car. 70; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 433.

Pennsylvania.—*Martin v. Frantz*, 127 Pa. St. 389, 14 Am. St. Rep. 859.

Rhode Island.—*Rose v. Daniels*, 8 R. I. 381.

South Carolina.—*Eve v. Mosely*, 2 Strobb. (S. Car.) 203.

Texas.—*Bowdon v. Robinson*, 4 Tex. Civ. App. 626.

Vermont.—*Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578; *Miller v. Holden*, 18 Vt. 337; *Rising v. Cummings*, 47 Vt. 345; *Wheeler v. Wheeler*, 11 Vt. 60.

Virginia.—*Lee v. Harlow*, 75 Va. 25; *Smith v. Phillips*, 77 Va. 550; *Seymour v. Goodrich*, 80 Va. 304; *Smith v. Chilton*, 84 Va. 840.

Wisconsin.—*Hooker v. Hyde*, 61 Wis. 204. Compare *Pepper v. Aiken*, 2 Bush (Ky.) 251; *Ricketts v. Hall*, 2 Bush (Ky.) 249; *Haris v. Story*, 2 E. D. Smith (N. Y.) 363.

Origin of Common-law Rule.—The common-law rule that a part payment is not a satisfaction for a liquidated debt was first laid down in *Pinnel's Case*, 5 Coke 117a. And although in that case the rule was but a dictum of the court of common pleas, it has since been universally recognized by courts and text-writers. See upon the origin and history of the rule the very able opinion of Lord Blackburn in *Foakes v. Beer*, L. R. 9 App. Cas. 605, 54 L. J. Q. B. 130.

Comments on Common-law Rule.—It is said that "this rule of the common law is not founded on natural justice, nor can it be supported upon any other than technical grounds. An agreement to accept a barrel of flour in satisfaction of a debt of \$1000 is valid, and if the flour is delivered the debt is satisfied. But an agreement to accept \$999 in satisfaction of the debt is unavailing, and obligation to pay the dollar unimpaired." Report (1865) of Commissioners of Civil Code of New York 219.

"It is enough to say that the English common law stands committed to the absurd paradox that a debt of one hundred pounds may be perfectly well discharged by the creditor's acceptance of a peppercorn at the same time and place at which the one hundred pounds are payable, or of ten shillings at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of ninety-nine pounds in money at the same time and place a good discharge, although modern decisions have confined the absurdity within the narrowest possible limits." Pollock's Principles of Contract (1st Am. from 2d Eng. ed.) 165. See also *Johnson v. Brannan*, 5 Johns. (N. Y.) 272; *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Brooks v. White*, 2 Met. (Mass.) 283, 77 Am. Dec. 95.

A Parol Release of a Judgment for less than the amount due is invalid, although indorsed on the execution. *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274. But see *Gunn v. McAden*, 2 Ired. Eq. (N. Car.) 79; *Bull v. Bull*, 43 Conn. 455.

Receipt of Principal.—Where the amount of the payment exceeds the principal and only falls short slightly in the calculation of interest, the accord and satisfaction has been held to be valid. *Johnson v. Brannan*, 5 Johns. (N. Y.) 268.

Where the creditor has received the principal debt, as such, in full, he cannot thereafter maintain an action for interest. *Tenth Nat. Bank v. New York*, 4 Hun (N. Y.) 429. See *Tuttle v. Tuttle*, 12 Met. (Mass.) 551, 46 Am. Dec. 701.

But it has been held that the common-law rule applies even though the creditor has received full payment of the principal of the debt. *Foakes v. Beer*, L. R. 9 App. Cas. 605, 54 L. J. Q. B. 130.

Payment of Costs.—The plaintiff agreed to release the defendant from the claim in suit on payment of costs. The defendant thereupon paid the costs. Such payment is a bar to the suit and a good accord and satisfaction. *Baum v. Buntyn*, 62 Miss. 110.

Release of Mortgage.—Where there was an agreement for a release of a mortgage, and payment of a sum less than the mortgage debt, it was held that under the circumstances this was no accord and satisfaction. *Lankton v. Stewart*, 27 Minn. 346.

A Bill Alleging an Acceptance of a Less Sum in satisfaction of a larger sum will be bad after verdict. *Down v. Hatcher*, 10 Ad. & El. 121, 37 E. C. L. 69, L. R. 2 P. & D. 292, 3 Jur. 651.

Insolvency of the Debtor.—The fact that the debtor is insolvent at the time when his creditor promises to accept from him a less sum than is due in full satisfaction of the debt does not affect the question of the consideration of such promise. *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159. See also *Fellows v. Stevens*, 24 Wend. (N. Y.) 294. But see *Gunn v. McAden*, 2 Ired. Eq. (N. Car.) 79; also *Bull v. Bull*, 43 Conn. 455.

Receipt under Protest.—Receiving part payment under protest, though tendered in full, will not establish accord and satisfaction. *People v. Cortland County*, 40 How. Pr. (N. Y. Supreme Ct.) 53.

Rule Changed by Statutes in Some States.—This rule of common law has been changed in some of the states by enacting statutes somewhat similar to the *Virginia* statute, which reads: "Part performance of an obligation, promise, or understanding, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise, or undertaking." *Virginia Code* (1887), § 2885. See *Dakota Comp. Laws* 1887, § 3486; *California Code*, § 1524; *Georgia Code* (1882), § 2881.

Maine Rule.—In *Maine* it is provided that any payment less than the amount actually due, which has been received in full payment, will bar further action on the original claim. *Weymouth v. Babcock*, 42 Me. 42; *Austin v. Smith*, 39 Me. 203. Both parties, however, must concur in the agreement.

accord and satisfaction.¹ But this rule applies only when the claim thus settled is liquidated and undisputed.²

Release.—A release under seal, either with or without part payment, takes the case out of the rule just stated.³

Receipt.—A receipt in full when the whole amount has not been paid is not conclusive, and will not prevent the recovery of the balance due.⁴

(2) *Variant Mode of Payment*—(a) **Generally.**—Where, by a mode or time of payment, variant from that provided for in the contract, a new benefit is or may be conferred upon the creditor, or burden imposed upon the debtor, a new consideration arises out of the transaction and gives validity to the agreement of the creditor.⁵

This provision does not apply to a part payment with an agreement that the debtor shall have "his own time to pay the balance." *Mayo v. Stevens*, 61 Me. 562.

Georgia Rule.—In *Georgia* a part payment bars further action, if the accord and satisfaction is actually executed; but not when only a part of the amount agreed upon has been paid. *Rogers v. Ball*, 54 Ga. 15; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494; *Troutman v. Lucas*, 63 Ga. 466.

1. *Foakes v. Beer*, L. R. 9 App. Cas. 605, 54 L. J. Q. B. 130; *Johnson v. Brannan*, 5 Johns. (N. Y.) 269; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380.

2. **England.**—*Longridge v. Dorville*, 5 B. & Ald. 117, 7 E. C. L. 43; *Wilkinson v. Byers*, 1 Ad. & El. 106, 28 E. C. L. 48; *Reynolds v. Pinhowe*, Cro. Eliz. 429; *Atlee v. Backhouse*, 3 M. & W. 651.

Alabama.—*Webster v. Wyser*, 1 Stew. (Ala.) 184.

California.—*Coles v. Soulsby*, 21 Cal. 47.

Illinois.—*Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626.

Iowa.—*Works v. Hershey*, 35 Iowa 340.

Maryland.—*Harper v. Hampton*, 1 Har. & J. (Md.) 673; *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Massachusetts.—*Tuttle v. Tuttle*, 12 Met. (Mass.) 551, 46 Am. Dec. 701.

Mississippi.—*McCall v. Nave*, 52 Miss. 494.

New York.—*Palmerton v. Huxford*, 4 Den. (N. Y.) 166; *Booth v. Smith*, 3 Wend. (N. Y.) 66.

Vermont.—*McDaniels v. Lapham*, 21 Vt. 222.

3. *Harrison v. Close*, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 353; *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Pinnel's Case*, 5 Coke 117a. See the title **RELEASE**.

4. *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Miller v. Coates*, 66 N. Y. 610; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 346; *Harriman v. Harriman*, 12 Gray (Mass.) 341. But see *Pepper v. Aiken*, 2 Bush (Ky.) 251. See also the titles **RECEIPT**; **PAYMENT**.

5. **Alabama.**—*Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159.

Connecticut.—*Blinn v. Chester*, 5 Day (Conn.) 359; *Mitchell v. Wheaton*, 46 Conn. 316, 33 Am. Rep. 24; *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402; *Warren v. Skinner*, 20 Conn. 559.

Illinois.—*Higgins v. Halligan*, 46 Ill. 173; *Bailey v. Cowles*, 86 Ill. 333.

Iowa.—*Hall v. Smith*, 15 Iowa 584.

Kentucky.—*Vance v. Lukenbill*, 9 B. Mon. (Ky.) 249.

Massachusetts.—*Curran v. Rummell*, 118 Mass. 482; *Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95.

Minnesota.—*Schmidt v. Ludwig*, 26 Minn. 86.

New Hampshire.—*Watson v. Elliott*, 57 N. H. 513.

New Jersey.—*Daniels v. Hatch*, 21 N. J. L. 391, 47 Am. Dec. 169.

New York.—*Douglass v. White*, 3 Barb. Ch. (N. Y.) 621; *Brooks v. Moore*, 67 Barb. (N. Y.) 394; *Taylor v. Nussbaum*, 2 Duer (N. Y.) 302; *Bowe v. Gano*, 9 Hun (N. Y.) 6.

North Carolina.—*Mitchell v. Sawyer*, 71 N. Car. 70; *Hayes v. Davidson*, 70 N. Car. 573.

Payment in Services.—An agreement by a creditor to release a portion of his debt, in consideration that the debtor, who is insolvent, will apply the yearly proceeds of his personal labor in payment of the residue, is valid. *Merchants' Bank v. Davis*, 3 Ga. 112. See also *Molyneaux v. Collier*, 13 Ga. 407.

When Defendant Pays Part and also Surrenders Claims.—The defendant was sued for two thousand dollars, and agreed to pay one thousand five hundred dollars and costs, and to give up his claim to some collaterals held by the plaintiff. He carried out his agreement, and the plaintiff gave a receipt in full of notes, agreements, and claims of all kinds, it being understood that all suits were thereby discontinued. This was held to be a good accord and satisfaction, and barred an action on the balance of the debt. *Pardee v. Wood*, 8 Hun (N. Y.) 584.

If, in addition to an agreement to pay part of a debt in lieu of the whole, the debtor gives anything which may be considered a benefit to the creditor, and the creditor accepts it as a satisfaction of the whole, it is a good discharge of any further liability. *Douglass v. White*, 3 Barb. Ch. (N. Y.) 621.

Discharge from Surety.—Procuring a written agreement from one probably liable on the default of the defendant, that he will take no advantage of the discharge of the defendant, is a good consideration to make part payment a satisfaction. *Booth v. Campbell*, 15 Md. 569.

Additional Security.—When additional security is added to the smaller sum, the promise to accept this sum is valid and binding. *Keeler v. Salisbury*, 33 N. Y. 648.

Mutual Promises.—When an unperformed

(b) **Payment at Earlier Date or Different Place.**—Payment in part at an earlier date or at a different place from that agreed upon is a good satisfaction if so received.¹

(c) **Payment by a Stranger.**—Payment by a stranger, of less than the debt, if accepted in full discharge is a good accord and satisfaction of the whole debt.²

(d) **Payment by Negotiable Note of Debtor.**—Accord and satisfaction founded upon the receipt by the creditor of a negotiable note of the debtor, although for a less amount than the debt, has been held valid.³

accord, having a new consideration by reason of mutual promises, is pleaded, it will be binding upon the parties, and an action will lie for a breach of it. *Billings v. Vanderbeck*, 23 Barb. (N. Y.) 546. See *infra*, this title, *Execution of the Accord*.

When the Defendant Pays Part and Agrees Not to Go into Bankruptcy.—Where the defendant being indebted to the plaintiff, and having an intention to petition in bankruptcy, proposed a compromise through the plaintiff's own attorney, and where the plaintiff agreed to receive a certain portion of the debt in full settlement, which portion the defendant accordingly paid over to the attorney, who notified the plaintiff that he had received the amount for him, to which he made no objection, and the defendant in consequence took no further steps to become a bankrupt, it was held that the payment to the attorney was in effect a payment to the plaintiff, and that the defendant's abandoning his intention of becoming a bankrupt was a sufficient consideration for receiving a part of the debt in settlement of the whole. *Hinckley v. Arey*, 27 Me. 362.

Paying Part of Debt and also Costs.—In an action on a liquidated debt of two hundred and ninety-nine dollars the creditor orally agreed to accept one hundred and fifty dollars in full, if the debtor paid the costs and expenses. The one hundred and fifty dollars was paid, and the debtor subsequently paid the costs. The last payment made a sufficient additional consideration, and the transaction was a good accord and satisfaction. *Mitchell v. Wheaton*, 46 Conn. 315, 33 Am. Rep. 24.

Assigning Contract.—When the answer sets forth that a certain contract is assigned to the plaintiff in full satisfaction and payment of a certain note sued on, it is immaterial how much is due on the contract. *Luke v. Johnnycake*, 9 Kan. 511.

1. *England.*—*Pinnel's Case*, 5 Coke 117a.

Arkansas.—*Levy v. Very*, 12 Ark. 148.

Connecticut.—*Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402.

Iowa.—*Boyd v. Moats*, 75 Iowa 151.

Kentucky.—*Jones v. Bullitt*, 2 Litt. (Ky.) 49; *Fenwick v. Phillips*, 3 Metc. (Ky.) 87; *Williams v. Langford*, 15 B. Mon. (Ky.) 566; *Ricketts v. Hall*, 2 Bush (Ky.) 249.

Massachusetts.—*Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95; *Bowker v. Childs*, 3 Allen (Mass.) 434; *Barry v. Goodrich*, 98 Mass. 335.

Minnesota.—*Schweider v. Lang*, 29 Minn. 254, 43 Am. Rep. 202.

Mississippi.—*Jones v. Perkins*, 29 Miss. 141.

North Carolina.—*Smith v. Brown*, 3 Hawks (N. Car.) 580.

Virginia.—*Robertson v. Campbell*, 2 Call (Va.) 421.

Wisconsin.—*Reid v. Hibbard*, 6 Wis. 192.

The Mere Offer of a Judgment Creditor to accept a less amount in satisfaction of the judgment, if the offer is not accepted by the debtor, will not be a sufficient accord and satisfaction to bar the recovery of the full amount of the judgment. *Bird v. Smith*, 34 Me. 63, 56 Am. Dec. 635.

Part Payment in Different State.—The contract was made to pay two thousand dollars in Mississippi, but the creditor agreed to accept fifteen hundred dollars in full satisfaction if paid in New York. It was held that this was a sufficient consideration to bind the payee if the tender of payment in New York was made before the withdrawal of the proposition reached Mississippi. *Jones v. Perkins*, 29 Miss. 139.

2. *Clark v. Abbott*, 53 Minn. 88. See also *Stagg v. Alexander*, 55 Barb. (N. Y.) 70.

3. **Payment by Check or Note.**—Taking a check or receipt for a smaller sum than the amount due on promissory notes in payment and satisfaction of the notes is not necessarily an attempt to discharge a larger sum by payment of a smaller; the notes being salable, like any other personal property. *Rockwell v. Taylor*, 41 Conn. 55.

Where the defendant was indebted to the plaintiff for £125 7s. 9d. for goods sold and delivered, and gave to the plaintiff a check for £100 payable on demand, which the plaintiff accepted in satisfaction, it was held to be a good accord and satisfaction, because paid by check and not in cash. *Goddard v. O'Brien*, 9 Q. B. Div. 37.

So part payment by a negotiable note. *Sibree v. Tripp*, 15 M. & W. 23, *overruling* *Cumber v. Wane*, 1 Stra. 426, 1 Smith Lead. Cas. 357. See *Foakes v. Beer*, L. R. 9 App. Cas. 605, 54 L. J. Q. B. 130. But compare *Commonwealth Bank v. Letcher*, 3 J. J. Marsh. (Ky.) 196.

These cases proceed upon the ground that the negotiability of the instrument given in satisfaction makes it in fact a different thing from a mere part payment in money, and more advantageous to the creditor than the original debt, which was not negotiable. See *Bidder v. Bridges*, 37 Ch. Div. 406.

Where the holder of a promissory note surrenders it to the maker and takes one of less amount in satisfaction until the full discharge, no action can be maintained for the unpaid portion. The surrender is equivalent to a release under seal. *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292.

But taking a less amount than that which is due without surrendering the note is not

(e) **Payment by Note of Third Person.**—The note of a third person for a less amount than due, given and received in payment of the whole, is a good satisfaction.¹

(f) **Payment in Property.**—A money debt may be satisfied by payment in property if so accepted, whatever the value of such property may be,² or by

satisfaction. *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Silvers v. Reynolds*, 17 N. J. L. 275.

The receipt of a check which is dishonored and proves worthless is not a valid satisfaction. *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass. 422.

The Effect of Payment by bills, notes, and other negotiable securities will be fully treated under the title *PAYMENT*, to which the reader is referred.

1. *England.*—*Steinman v. Magnus*, 11 East 390; *Lewis v. Jones*, 4 B. & C. 506, 10 E. C. L. 393.

Alabama.—*Sanders v. Decatur Branch Bank*, 13 Ala. 353; *Brassell v. Williams*, 51 Ala. 349.

Indiana.—*Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256.

Kentucky.—*Letcher v. Commonwealth Bank*, 1 Dana (Ky.) 82.

Maine.—*Varney v. Conery*, 77 Me. 527; *Lee v. Oppenheimer*, 32 Me. 253.

Massachusetts.—*Goodnow v. Smith*, 18 Pick. (Mass.) 414, 29 Am. Dec. 600; *Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95; *Guild v. Butler*, 127 Mass. 386.

New York.—*Webb v. Goldsmith*, 2 Duer (N. Y.) 413; *Roberts v. Brandies*, 44 Hun (N. Y.) 468; *Frisbie v. Larned*, 21 Wend. (N. Y.) 450; *Booth v. Smith*, 3 Wend. (N. Y.) 66; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; *Stagg v. Alexander*, 55 Barb. (N. Y.) 70; *Conkling v. King*, 10 Barb. (N. Y.) 375; *Bliss v. Schwartz*, 64 Barb. (N. Y.) 215, 7 Lans. (N. Y.) 186; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546; *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Babcock v. Bonnell*, 80 N. Y. 244.

North Carolina.—*Currie v. Kennedy*, 78 N. Car. 91.

West Virginia.—*Dryden v. Stephens*, 19 W. Va. 1.

Note to Creditor Unindorsed by Debtor.—But it has been held that if the note of a third person, payable to the creditor, is given in payment of a debt, yet is not indorsed by the debtor, it does not extinguish the debt, but is considered to be only collateral security. *Hunter v. Moul*, 98 Pa. St. 13, 42 Am. Rep. 610.

Condition of Parties must be Rendered Better.—The giving and receiving of one obligation, in lieu of another, the parties to which, or some of them, are different, may be pleaded as an accord and satisfaction. But to render it available the condition of one or both parties must be rendered better. *Bullen v. McGillicuddy*, 2 Dana (Ky.) 90; *Mehan v. Thompson*, 71 Me. 492.

Where the creditor receives a note of a third person in full discharge of a debtor's note, he will not be allowed to prove, on a suit upon the debtor's note, that the debtor verbally agreed to make a further payment on it. *Kellogg v. Richards*, 14 Wend. (N. Y.) 116.

Express Agreement Not Necessary.—When the notes of a third person are accepted by the creditor, an understanding that they were accepted in full discharge is sufficient, and it is not necessary to show an express agreement to that effect. *Ralston v. Aultman* (Tex. Civ. App., 1894), 26 S. W. Rep. 746.

When Stranger is Insolvent.—When the plaintiff accepts a note of a third party in full satisfaction of the debt of the defendant, such acceptance is valid, even though the party is insolvent, if this fact is unknown at the time of settlement. *Cadens v. Teasdale*, 53 Vt. 469, 38 Am. Rep. 697.

Note of Infant.—An agreement of accord founded upon the acceptance of the negotiable note of an infant, although executed, is not valid as a satisfaction. *Wentworth v. Wentworth*, 5 N. H. 410.

Judgment Debt.—The note of a third party for the full amount of a judgment debt, given and accepted in payment thereof, extinguishes it. *Sanders v. Decatur Branch Bank*, 13 Ala. 353; *Jones v. Ransom*, 3 Ind. 327; *Booth v. Smith*, 3 Wend. (N. Y.) 66; *State Bank v. Fletcher*, 5 Wend. (N. Y.) 85.

The note of a stranger received in satisfaction of a judgment will, if paid, be a satisfaction, though of less amount than the judgment. *Sanders v. Decatur Branch Bank*, 13 Ala. 353; *Frisbie v. Larned*, 21 Wend. (N. Y.) 450; *Webb v. Goldsmith*, 2 Duer (N. Y.) 413; *Booth v. Smith*, 3 Wend. (N. Y.) 66. See also *supra*, this title, *Form of the Accord*.

2. *England.*—*Andrew v. Boughey*, 1 Dyer 75a; *Pinnel's Case*, 5 Coke 117. And see *Sibree v. Tripp*, 15 M. & W. 23.

Alabama.—*Brassell v. Williams*, 51 Ala. 349.

Connecticut.—*Bull v. Bull*, 43 Conn. 455; *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402. See *Blinn v. Chester*, 5 Day (Conn.) 359.

Illinois.—*Neal v. Handley*, 116 Ill. 418, 56 Am. Rep. 784.

Kentucky.—*Fisher v. May*, 2 Bibb (Ky.) 449, 5 Am. Dec. 626; *Jones v. Bullitt*, 2 Litt. (Ky.) 49; *Peace v. Stennet*, 4 J. J. Marsh. (Ky.) 450.

Massachusetts.—*Brooks v. White*, 2 Met. (Mass.) 285, 37 Am. Dec. 95.

New York.—*Strang v. Holmes*, 7 Cow. (N. Y.) 224; *Bliss v. Schwartz*, 64 Barb. (N. Y.) 215; *Douglass v. White*, 3 Barb. Ch. (N. Y.) 621.

North Carolina.—See *Smitherman v. Smith*, 3 Dev. & B. (N. Car.) 89.

Vermont.—*Bryant v. Gale*, 5 Vt. 416; *Ridlon v. Davis*, 51 Vt. 457.

In *Pinnel's Case*, 5 Coke 117a, it was resolved that the gift of a horse, hawk, or robe, etc., in satisfaction, is good. For it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction.

an assignment of property.¹

Creditor Retaining Property.—If the creditor lawfully acquires the debtor's property, and it is agreed that he may retain it in satisfaction of the debt, this will be an accord and satisfaction.²

Debtor Relinquishing Property.—An agreement that the debtor shall relinquish property in satisfaction of a debt is not valid, unless it is also agreed at what time it shall be relinquished.³

Must be no Agreement for Price.—It is, however, only when property is received in satisfaction without any price being agreed upon at which it is to be estimated between the parties, that it becomes a valid accord and satisfaction. But when the debtor delivers to his creditor, and the creditor receives, the property at a price agreed upon by them, and the amount thus paid is less than the debt, this is not accord and satisfaction, notwithstanding the creditor agrees to take it as full payment of the debt.⁴

(g) Giving Additional Security.—It is the general rule that giving further security for part of a debt, or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction.⁵

1. *Watkinson v. Inglesby*, 5 Johns. (N. Y.) 386; *Eaton v. Lincoln*, 13 Mass. 424.

2. *Jones v. Sawkins*, 5 C. B. 142, 57 E. C. L. 142.

Delivery of Personal Property.—An undertaking on the part of the plaintiff to pay all the defendant's debts, and a delivery by the latter to him of specified personal property in consideration thereof, constitutes an accord and satisfaction. *McCreary v. McCreary*, 5 Gill & J. (Md.) 147.

Acceptance of Deed.—In the absence of fraud, an acceptance by the creditor of a stranger's deed of all his title in specified land may be a good consideration to sustain an agreement to take a part for the whole debt, even though the title fails. *Reed v. Bartlett*, 19 Pick. (Mass.) 273.

Conveyance of Lands.—A debtor, by a deed reciting his indebtedness to the grantee, in consideration of the premises and of tendollars conveyed to him certain land in fee. It was held that the transaction was, upon its face, a satisfaction of the debt. *Eckford v. DeKay*, 26 Wend. (N. Y.) 29.

Equity of Redemption.—When a creditor accepts from a debtor, in full payment of a writing obligatory, the right of redemption of the debtor to certain property, such acceptance is a good accord and satisfaction. *Bailey v. Cowles*, 86 Ill. 333.

Creditor's Failure to Make Examination.—It constitutes a good accord and satisfaction, that a creditor agrees to take certain property of his debtor in satisfaction of his debt, upon the faith of the representations of the debtor as to its condition, and that he actually takes it under such agreement after he has had an opportunity to test the truth of the representations. *Williams v. Phelps*, 16 Wis. 83.

Revenue Officers must Receive Money.—It is not a good accord and satisfaction, however, to pay a debt upon a revenue bond by the delivery and acceptance of property. Collectors of revenue must receive money. *Martin v. U. S.*, 4 T. B. Mon. (Ky.) 486.

Payment of Judgment.—It is a good accord and satisfaction by the agreement of parties when one hundred bushels of oats are given

and received in settlement of an amount due on a judgment. *Dimmick v. Sexton*, 125 Pa. St. 334.

3. *Pence v. Smock*, 2 Blackf. (Ind.) 315; *State Bank v. Littlejohn*, 1 Dev. & B. (N. Car.) 565.

4. *Howard v. Norton*, 65 Barb. (N. Y.) 161.

5. *England.*—*Sibree v. Tripp*, 15 M. & W. 23; *Welby v. Drake*, 1 C. & P. 557, 11 E. C. L. 467; *Henderson v. Stobart*, 5 Exch. 99.

United States.—*Loudon v. Taxing Dist.*, 104 U. S. 771; *Maze v. Miller*, 1 Wash. (U. S.) 328.

Arkansas.—*Pope v. Tunstall*, 2 Ark. 209.
Colorado.—*Whitsett v. Clayton*, 5 Colo. 476.
Illinois.—*Post v. Springfield First Nat. Bank*, 138 Ill. 559, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 101.

Maryland.—*Glenn v. Smith*, 2 Gill & J. (Md.) 494, 20 Am. Dec. 452.

Massachusetts.—*Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95; *Goodnow v. Smith*, 18 Pick. (Mass.) 414, 29 Am. Dec. 600.

Minnesota.—*Mason v. Campbell*, 27 Minn. 54.

Mississippi.—*Pulliam v. Taylor*, 50 Miss. 251.

New Hampshire.—*Colburn v. Gould*, 1 N. H. 279.

New York.—*Seaman v. Haskins*, 2 Johns. Cas. (N. Y.) 195; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; *Keeler v. Salisbury*, 27 Barb. (N. Y.) 485; *Le Page v. McCrea*, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; *Nevins v. Bepierries*, 1 Edm. Sel. Cas. (N. Y.) 196; *Pardee v. Wood*, 8 Hun (N. Y.) 584; *Bolsen v. Arnold*, 10 How. Pr. (N. Y. Supreme Ct.) 529; *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Strong v. Dean*, 55 Barb. (N. Y.) 337; *Jaffray v. Davis*, 124 N. Y. 164.

North Carolina.—*Gunn v. McAden*, 2 Ired. Eq. (N. Car.) 79; *Gordon v. Price*, 10 Ired. (N. Car.) 385.

Pennsylvania.—*McIntyre v. Kennedy*, 29 Pa. St. 454.

South Carolina.—*Gibbes v. Greenville, etc.*, R. Co., 15 S. Car. 224.

But the acceptance of a new security for an existing debt does not operate as a payment unless so intended by the parties.¹

c. **UNLIQUIDATED OR CONTINGENT DEMAND.**—If the debt or claim is disputed or contingent at the time of payment, the payment, when accepted, of a part of the whole debt, is a good satisfaction.² Where the claim settled

Note Signed by Debtor and His Wife.—If a creditor receives from his debtor, in satisfaction of his claim, a note for a less sum, signed by the debtor and his wife, which all the parties at the time suppose is binding upon her, and such note is afterward paid out of her separate property, it will constitute a valid discharge of the original debt. *Bowker v. Harris*, 30 Vt. 424.

Indorsed by Stranger.—So is a note for less amount than the debt, indorsed by a third party, a good accord and satisfaction. *Varney v. Conery*, 77 Me. 527.

Pledge of Dower Right.—Where a promise by a debtor to pay a smaller sum than that which is due to extinguish an existing debt is reinforced by the debtor's giving, as additional security, a mortgage of real estate in which his wife joins, the pledge of her inchoate right of dower for such payment is sufficient to make it a valid accord and satisfaction. *Keeler v. Salisbury*, 33 N. Y. 648.

Mortgage to Secure Part of Debt.—But where a debtor, merely for the purpose of securing a part of the note and not by way of substitution, gives a mortgage on his own estate alone, it is a mere accord without satisfaction, and does not extinguish the debt. *Platts v. Walrath*, Hill & D. Supp. (N. Y.) 59.

Acceptance by a Creditor, of a Note of the Debtor for half the debt, with two securities, in full satisfaction—the note being paid—is a good accord and satisfaction for the whole debt. *Mason v. Campbell*, 27 Minn. 54. See also *Colburn v. Gould*, 1 N. H. 279.

Notes of Stranger with Debtor as Indorser.—A lessor sued the lessee on a sealed lease. The lessee testified that he delivered to the lessor the notes of a third party with the lessee's indorsement. The lessor verbally agreed to accept them in payment of the rent due and to fall due under the lease. This was held to be an accord and satisfaction not only for a past, but for a future, breach of the covenant to pay rent. *Lawrence v. Barker*, 9 Daly (N. Y.) 140. See *Booth v. Smith*, 3 Wend. (N. Y.) 66; *Frisbie v. Larned*, 21 Wend. (N. Y.) 450; *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366.

Giving Smaller Notes.—Where a creditor requested a debtor to give new notes for small sums in place of the old debt, so that he might sue before a justice, and the debtor did as requested, it was held that the giving of the new notes under such circumstances constituted a sufficient consideration and canceled the old debt. *In re Dixon*, 2 McCrary (U. S.) 556.

Relinquishment of Part and Security for Remainder.—It is a valid agreement when a creditor agrees to relinquish a portion of his debt if the debtor will secure the residue, the debtor being in failing circumstances. *Gunn v. McAden*, 2 Ired. Eq. (N. Car.) 79. See

also *Bull v. Bull*, 43 Conn. 455. But see *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294.

Delivery of Execution.—The delivery by the debtor to the creditor, of an execution against third parties, in favor of the debtor, for a sum larger than the debt, and its acceptance by the creditor in pursuance of an agreement of accord, is a good accord and satisfaction, because the creditor obtains a security of a third person and a large sum thrown into the bargain. *Thatcher v. Dudley*, 2 Root (Conn.) 169.

Understanding that Third Parties shall Assign Property.—Where one party furnished another with money and accepted a note therefor, with the understanding that the payor should procure third parties to assign to himself certain liens on lands claimed by the payee, which liens the payor should hold for the benefit of the payee in satisfaction of the note, such agreement was held to amount to an accord and satisfaction, and to constitute a payment of the note. *Treadwell v. Himmelmann*, 50 Cal. 9.

Draft upon a Third Person.—When a draft upon a third person is offered by the debtor, and accepted in full satisfaction by the creditor, who thereupon surrenders the evidence of indebtedness, and the draft is duly paid, it amounts to a good accord and satisfaction. *Stagg v. Alexander*, 55 Barb. (N. Y.) 70. Compare *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass. 422; *Wentworth v. Wentworth*, 5 N. H. 410.

Eastern Draft.—The acceptance of an Eastern draft may be good as an accord and satisfaction of a judgment, though for less than the amount thereof. *Reid v. Hibbard*, 6 Wis. 175.

1. *Kammerer's Appeal*, 102 Pa. St. 558.

So an assignment of property by deed to secure debts with a power of sale on giving six months' notice, will not be a valid satisfaction, but only a collateral security. *Emes v. Widdowson*, 4 C. & P. 151, 19 E. C. L. 316; *Jones v. Fennimore*, 1 Greene (Iowa) 134; *Stone v. Miller*, 16 Pa. St. 450.

2. *United States*.—*U. S. v. Childs*, 12 Wall. (U. S.) 232.

Colorado.—*Berdell v. Bissell*, 6 Colo. 162; *Union Pac. R. Co. v. Anderson*, 11 Colo. 293.

Connecticut.—*Ford v. Hubinger*, 64 Conn. 129; *Warren v. Skinner*, 20 Conn. 559; *Potter v. Douglass*, 44 Conn. 541.

Florida.—*Sanford v. Abrams*, 24 Fla. 181. *Georgia*.—*Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494.

Illinois.—*Capital City Mut. F. Ins. Co. v. Detwiler*, 23 Ill. App. 656.

Indiana.—*Ogborn v. Hoffman*, 52 Ind. 439; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249.

is not a money demand, or, if so, is unliquidated, or, if liquidated, is doubtful in fact or in law, any sum, however small, given and received in satisfaction of the demand, however large, will legally satisfy it.¹

III. THE EXECUTION OF THE ACCORD—SATISFACTION—1. Generally.—An accord in order to discharge a contract or cause of action must be executed,² and

Iowa.—Wapello County *v.* Sinnaman, 1 Greene (Iowa) 413; Cool *v.* Stone, 4 Iowa 219; Brick *v.* Plymouth County, 63 Iowa 462.

Kentucky.—Bryant *v.* Proctor, 14 B. Mon. (Ky.) 362; Ricketts *v.* Hall, 2 Bush (Ky.) 249.

Maryland.—Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Massachusetts.—Alvord *v.* Marsh, 12 Allen (Mass.) 606; Donohue *v.* Woodbury, 6 Cush. (Mass.) 151, 52 Am. Dec. 777; Simmons *v.* Almy, 103 Mass. 33; Easton *v.* Easton, 112 Mass. 443; Stimpson *v.* Poole, 141 Mass. 502.

Minnesota.—Hinkle *v.* Minneapolis, etc., R. Co., 31 Minn. 434.

Mississippi.—McCall *v.* Nave, 52 Miss. 494.

Missouri.—Helling *v.* United Order of Honor, 29 Mo. App. 309; Perkins *v.* Headley, 49 Mo. App. 556.

Nebraska.—Slade *v.* Swedeburg Elevator Co., 39 Neb. 600.

New Hampshire.—Watson *v.* Elliott, 57 N. H. 511.

New York.—Hammond *v.* Christie, 5 Robt. (N. Y.) 160; Jaffray *v.* Davis, 48 Hun (N. Y.) 500; Hills *v.* Sommer, 53 Hun (N. Y.) 392; Howard *v.* Norton, 65 Barb. (N. Y.) 161; Pierce *v.* Pierce, 25 Barb. (N. Y.) 243; Brooks *v.* Moore, 67 Barb. (N. Y.) 393; Powell *v.* Jones, 44 Barb. (N. Y.) 521; Palmerton *v.* Huxford, 4 Den. (N. Y.) 166; Taylor *v.* Nussbaum, 2 Duer (N. Y.) 302; Neary *v.* Bostwick, 2 Hilt. (N. Y.) 514; Fuller *v.* Kemp, 138 N. Y. 231.

North Carolina.—Mathis *v.* Bryson, 4 Jones (N. Car.) 508.

Vermont.—McDaniels *v.* Lapham, 21 Vt. 222; Childs *v.* Milville Mut. M. & F. Ins. Co., 56 Vt. 609.

Wisconsin.—Harris *v.* Kennedy, 48 Wis. 500.

Where by statute an action was precluded for the balance of a debt, when an amount, however small, had been paid in full discharge of the debt, it was held that the statute applied only to a case where both parties agreed that the money was paid and received in discharge, and not to a part payment with an agreement that the debtor should have his "own time to pay the balance." Mayo *v.* Stevens, 61 Me. 562. Compare Fulton *v.* Monona County, 47 Iowa 622; Wilson *v.* Palo Alto County, 65 Iowa 18.

Where there is a disputed claim for a large unliquidated amount, and the debtor offers a certain amount and attaches a condition that if accepted it shall operate as a full settlement, an acceptance will be deemed an accord and satisfaction. Berdell *v.* Bissell, 6 Colo. 162.

Payment to Third Party.—An agreement to pay a third party a part of a disputed claim in satisfaction of the whole is supported by a sufficient consideration. Mitchell *v.* Knight, 7 Ohio Cir. Ct. Rep. 204.

1. Bull *v.* Bull, 43 Conn. 455.

When Notes are Given up.—Payment of less than the face of several promissory notes, a portion of which are not due, is a good satisfaction of all of them, if upon the receipt and acceptance of the money by the holder, the notes are given up to the maker. Bowker *v.* Childs, 3 Allen (Mass.) 434. So also by a parol agreement executed on canceling the instrument, which is the evidence of the debt. Silvers *v.* Reynolds, 17 N. J. L. 275.

2. *England.*—Balston *v.* Baxter, Cro. Eliz. 304; Rayne *v.* Orton, Cro. Eliz. 305; Richards & Bartlett's Case, 1 Leon. 19; Peytoe's Case, 9 Coke 79b; Bree *v.* Saylor, 2 Keb. 332; Hall *v.* Seabright, 2 Keb. 534; Brown *v.* Wade, 2 Keb. 851; Allen *v.* Harris, 1 Ld. Raym. 122; Lynn *v.* Bruce, 2 H. Bl. 317; Heathcote *v.* Crookshanks, 2 T. R. 24; Bayley *v.* Homan, 3 Bing. N. Cas. 915, 32 E. C. L. 379; Reeves *v.* Hearne, 1 M. & W. 325; Barclay *v.* Bank of New South Wales, L. R. 5 App. Cas. 374.

United States.—U. S. *v.* Clarke, Hempst. (U. S.) 315; Clark *v.* Bowen, 22 How. (U. S.) 270; Latapee *v.* Pecholier, 2 Wash. (U. S.) 180.

Arkansas.—Pope *v.* Tunstall, 2 Ark. 209; Ballard *v.* Noaks, 2 Ark. 45.

California.—Holton *v.* Noble, 83 Cal. 7; Simmons *v.* Hamilton, 56 Cal. 493.

Connecticut.—Williams *v.* Stanton, 1 Root (Conn.) 426; Scutt's Appeal, 43 Conn. 109; Francis *v.* Deming, 59 Conn. 108.

Florida.—Sanford *v.* Abrams, 24 Fla. 181.

Indiana.—Woodruff *v.* Dobbins, 7 Blackf. (Ind.) 582; Jackson *v.* Olmstead, 87 Ind. 92; Hancock *v.* Yaden, 121 Ind. 366, 16 Am. St. Rep. 396.

Iowa.—Hall *v.* Smith, 10 Iowa 48; Ogilvie *v.* Hallam, 58 Iowa 714; Woodward *v.* Willard, 33 Iowa 542; Frentress *v.* Markle, 2 Greene (Iowa) 553.

Kentucky.—Bryant *v.* Proctor, 14 B. Mon. (Ky.) 362; M'Kean *v.* Read, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318.

Maine.—Cushing *v.* Wyman, 44 Me. 121; Mansur *v.* Keaton, 46 Me. 346; Bragg *v.* Pierce, 53 Me. 65; Young *v.* Jones, 64 Me. 563, 18 Am. Rep. 279; White *v.* Gray, 68 Me. 579; Burgess *v.* Denison Paper Mfg. Co., 79 Me. 266.

Maryland.—Flack *v.* Garland, 8 Md. 191; Geiser *v.* Kerchner, 4 Gill & J. (Md.) 305, 23 Am. Dec. 566.

Massachusetts.—Bigelow *v.* Baldwin, 1 Gray (Mass.) 245; Herrmann *v.* Orcutt, 152 Mass. 405.

Minnesota.—Cannon River Mfg. Assoc. *v.* Rogers, 46 Minn. 376.

Mississippi.—Barnes *v.* Lloyd, 1 How. (Miss.) 584.

Missouri.—Peterson *v.* Wheeler, 45 Mo. 369.

New Hampshire.—Watson *v.* Elliott, 57 N. H. 511; Woodward *v.* Miles, 24 N. H. 293.

this execution of the accord is the satisfaction.¹ Satisfaction consists in the actual performance by one party of the agreement of accord, and the acceptance by the other party of such performance in full satisfaction of the original cause of action or contract.²

New York.—Anderson v. Highland Turnpike, 16 Johns. (N. Y.) 86; Hawley v. Foote, 19 Wend. (N. Y.) 517; Brooklyn Bank v. De Grauw, 23 Wend. (N. Y.) 342; Daniels v. Hallenbeck, 19 Wend. (N. Y.) 408; Russell v. Lytle, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537; Watkinson v. Inglesby, 5 Johns. (N. Y.) 386; Geary v. Page, 9 Bosw. (N. Y.) 300; Tilton v. Alcott, 16 Barb. (N. Y.) 598; Mitchell v. Hawley, 4 Den. (N. Y.) 414, 47 Am. Dec. 260; Day v. Roth, 18 N. Y. 448; Noe v. Christie, 51 N. Y. 272; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Person v. Civer, 29 How. Pr. (N. Y. Supreme Ct.) 432; Dolson v. Arnold, 10 How. Pr. (N. Y. Supreme Ct.) 530; Brennan v. Ostrander, 50 N. Y. Super. Ct. 426.

See also Coit v. Houston, 3 Johns. Cas. (N. Y.) 243; Frost v. Johnson, 8 Ohio 393; Hearn v. Kiehl, 38 Pa. St. 149, 80 Am. Dec. 472; Schilling v. Durst, 42 Pa. St. 126; Hosler v. Hursh, 151 Pa. St. 415, quoting 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 94, 95; Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Pettis v. Ray, 12 R. I. 344; Overton v. Conner, 50 Tex. 113; Rising v. Cummings, 47 Vt. 345; Piper v. Kingsbury, 48 Vt. 480; Palmer v. Yager, 20 Wis. 91; Sieber v. Amunson, 78 Wis. 683.

A Full, Perfect, and Complete Satisfaction is required to make good the plea of accord and satisfaction. Jones v. Fennimore, 1 Greene (Iowa) 146; Clark v. Dinsmore, 5 N. H. 136.

"Every accord ought to be full, complete, and perfect, for if divers things are to be performed by accord, the performance of part is not sufficient, but all ought to be performed, and therewith agreeth 17 E. 4, 2; 6 H. 7, 10; Plow. Com. 5." Peyton's Case, 9 Coke 79b. See Cock v. Honychurch, T. Raym. 203, 2 Keb. 690; Francis v. Crywell, 5 B. & Ald. 886.

The Creditor's Offer to Accept Less than the amount of the judgment will not, unaccepted by the debtor, be a sufficient accord and satisfaction to bar the recovery of the full amount of the judgment. Bird v. Smith, 34 Me. 63, 16 Am. Dec. 635. But see Matthews v. Merrick, 4 Md. Ch. 364.

Agreement of a Debtor to Deliver His Notes.—When an agreement is made by a debtor to deliver, in full satisfaction of a larger sum due, his notes or money for a less sum, even though there is a consideration for the agreement, it must, in order to operate as a discharge, be fully and fairly performed in all its parts both in time and amount. Memphis v. Brown, 1 Flipp. (U. S.) 188. See Harding v. Commercial Loan Co., 84 Ill. 251; Robertson v. Campbell, 2 Call (Va.) 421.

Condition Precedent.—Accord and satisfaction as to a condition precedent is equivalent to a performance. Richards v. Carl, 1 Blackf. (Ind.) 313.

Agreement to Credit upon Executory Contract.

—An agreement by which two persons agree to treat the amount due from one to the other upon a certain contract, as a part payment upon a subsequent executory contract between them under which their relations as debtor and creditor are reversed, is an accord and satisfaction, and bars a recovery upon the preceding contract. Peck v. Davis, 19 Pick. (Mass.) 490.

Discharge in Consideration of Delivery of Deed.

—An agreement between creditor and debtor that the former will give a discharge of the debt in return for a deed of certain lands belonging to the latter is executed by the receipt of the deed, and will be good as an accord and satisfaction. Eaton v. Lincoln, 13 Mass. 424.

Guardian.—Acceptance by a ward, after he is of age, of promissory notes which the guardian had not collected and was therefore liable to pay, is not a good plea to an action on the guardian's bond unless they are collected. Com. v. Miller, 5 T. B. Mon. (Ky.) 205.

Stockholder Withdrawing according to By-laws.—Where a stockholder in a building association, under a resolution of the association permitting borrowers to withdraw on the payment of a stipulated amount, the stock to be then "withdrawn and canceled," withdrew, paying off his returns and stock, which stock was then marked on the books as "canceled and withdrawn," it was held that the company could not afterward recover for dues which subsequently accrued thereon. After an acceptance of the terms of the resolution and the payment by the debtor of the sums found thereby to be due, the new contract was executed, and the case of accord and satisfaction made out. Miller v. Second Jefferson Bldg. Assoc., 50 Pa. St. 32.

1. Burgess v. Denison Paper Mfg. Co., 79 Me. 266.

2. **Acceptance of the execution of the accord** is a *sine qua non* of a good plea of accord and satisfaction. Drake v. Mitchell, 3 East 251; Sinard v. Patterson, 3 Blackf. (Ind.) 353; Peace v. Stennet, 4 J. J. Marsh. (Ky.) 450; Johnson v. Hunt, 81 Ky. 321; Young v. Jones, 64 Me. 563, 18 Am. Rep. 279; Clifton v. Litchfield, 106 Mass. 34; Washburn v. Winslow, 16 Minn. 33; Barnes v. Lloyd, 1 How. (Miss.) 584; Watson v. Elliott, 57 N. H. 511.

To constitute a good defense of accord and satisfaction of a debt by the giving of a note, it must appear that the note was both given and received as satisfaction. Maze v. Miller, 1 Wash. (U. S.) 328; State Bank v. Littlejohn, 1 Dev. & B. (N. Car.) 566; Jones v. Fennimore, 1 Greene (Iowa) 146; Brenner v. Herr, 8 Pa. St. 106.

Where the defendant alleged in his affidavit of defense an agreement to receive in satisfaction a smaller sum of money at a time

Accord without Satisfaction.—It follows from these principles that an accord without satisfaction is invalid.¹

sooner than the debt fell due, and a tender to the counsel of the creditor, without alleging an acceptance by either the creditor or counsel, it was held that there was no execution of the accord and satisfaction, and that the defense failed. *Hearn v. Kiehl*, 38 Pa. St. 147, 80 Am. Dec. 472.

Acceptance Implies Act of Will.—Acceptance in satisfaction demands an act of the will in addition to the actual reception of the thing agreed upon. *Hardman v. Bellhouse*, 9 M. & W. 596. See *Jacobs v. Day*, 5 Misc. Rep. (N. Y. C. Pl.) 410, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 94.

It depends upon the intention of the parties, and is a question of fact for the jury. *Schemerhorn v. Loines*, 7 Johns. (N. Y.) 311; *Porter v. Talcott*, 1 Cow. (N. Y.) 359; *Hart v. Boller*, 15 S. & R. (Pa.) 162, 16 Am. Dec. 536; *Mason v. Wickersham*, 4 W. & S. (Pa.) 100; *Jones v. Shawhan*, 4 W. & S. (Pa.) 257.

Saying "It is not enough, but there will be no trouble," at a time of receiving payment, is not an acceptance in full satisfaction. *Wiley v. Warden*, 27 Vt. 655.

Satisfaction of Entire Demand.—An accord and satisfaction must be a satisfaction of the entire debt or demand. *Line v. Nelson*, 58 N. J. L. 362; *Fenwick v. Phillips*, 3 Metc. (Ky.) 87; *Bliss v. Swartz*, 7 Lans. (N. Y.) 186, 64 Barb. (N. Y.) 215; *Bryan v. Foy*, 69 N. Car. 45; *Murphy v. Kastner*, 50 N. J. Eq. 214.

The entry in a suit that the costs are to be paid by the defendant is no evidence for the jury of an accord and satisfaction. *Bond v. McNider*, 3 Ired. (N. Car.) 440; *Carter v. Wilson*, 2 Dev. & B. (N. Car.) 276.

Receipt.—A receipt in full is evidence of an accord and satisfaction, but not so a receipt not expressed to be in full. *McCullen v. Hood*, 3 Dev. (N. Car.) 219.

A contractor's acceptance of a check which purports to be an award, and giving a receipt "for amount awarded by the commandant as damages arising out of the contract," constitutes a good accord and satisfaction. *Murphy's Case*, 14 Ct. Cl. 508. See also *Hemingway v. Stansell*, 106 U. S. 399.

A Release Given by the Creditor's Agent, but not purporting to have been made by the creditor, although invalid as a release, is competent as evidence of an agreement which, ratified by the subsequent conduct of the creditor in accepting with knowledge its fruits in whole or in part, may amount to an accord and satisfaction. *Evans v. Wells*, 22 Wend. (N. Y.) 324.

Conditional Acceptance.—Where an offer of an accord is made upon the condition that it is to be taken in full of demands, the party to whom it is made has no alternative but to refuse it or accept it upon such condition, and if he takes it, no protest or declaration made by him at the time can affect the case. *Bull v. Bull*, 43 Conn. 455; *Berdell v. Bissell*, 6 Colo. 162; *Deutmann v. Kilpatrick*, 46 Mo. App. 624; *Fuller v. Kemp*, 138 N. Y. 231; *Preston v. Grant*, 34 Vt. 201.

The Case would be Different if the debtor assented to the creditor receiving it upon his own terms. *Pottlitzer v. Wesson*, 8 Ind. App. 472; *Potter v. Douglass*, 44 Conn. 541; *Nas-soiy v. Tomlinson*, 65 Hun (N. Y.) 491.

In Order to Make Such an Acceptance Binding as an accord and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and that the offer be accompanied with such acts and declarations as amount to a condition that if the money is accepted it must be accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition.

United States.—*Baird v. U. S.*, 96 U. S. 430; *McKeen v. Morse*, 1 U. S. App. 7.

Arkansas.—*Springfield, etc., R. Co. v. Allen*, 46 Ark. 217.

Massachusetts.—*Donohue v. Woodbury*, 6 Cush. (Mass.) 150, 52 Am. Dec. 777; *Barry v. Goodrich*, 98 Mass. 335.

New York.—*Fuller v. Kemp*, 138 N. Y. 231.

Vermont.—*McDaniels v. Lapham*, 21 Vt. 222; *Preston v. Grant*, 34 Vt. 201; *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551.

Wisconsin.—*Sicotte v. Barber*, 83 Wis. 431.

And see *Geary v. Page*, 9 Bosw. (N. Y.) 290; *Bratt v. Scott*, 63 Hun (N. Y.) 632, 18 N. Y. Supp. 507; *Beardsley v. Davis*, 52 Barb. (N. Y.) 159; *Tompkins v. Hill*, 145 Mass. 379; *Chamber of Commerce v. Knowlton*, 42 Minn. 229.

Where a debtor sent to his creditor a statement of the accounts between them, with a note for the apparent balance and a letter explaining some of the items, and ending as follows: "Trusting you will find this correct and satisfactory," and the creditor retained the note and wrote to the debtor, giving his views of the items in controversy, it was held that the transaction did not amount to an accord and satisfaction, since there was no act or declaration accompanying the giving of the note which amounted to a condition that if it was accepted it was to be taken in satisfaction of the claim. *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551.

1. **England.**—*Parker v. Ramsbottom*, 3 B. & C. 257, 10 E. C. L. 69; *Hall v. Flockton*, 20 L. J. Q. B. 201.

United States.—*Maze v. Miller*, 1 Wash. (U. S.) 328.

Arkansas.—*Reynolds v. Reynolds*, 55 Ark. 369.

California.—*Hogan v. Burns* (Cal., 1893), 33 Pac. Rep. 631; *Simmons v. Oullahan*, 75 Cal. 508; *Holton v. Noble*, 83 Cal. 7.

Georgia.—*Brunswick, etc., R. Co. v. Clem*, 80 Ga. 534; *Chamblee v. Davie*, 88 Ga. 205.

Iowa.—*Bradley v. Palen*, 78 Iowa 126.

Massachusetts.—*Clifton v. Litchfield*, 106 Mass. 34.

Minnesota.—*Cannon River Mfg. Co. v. Rogers*, 46 Minn. 376.

Mississippi.—*Barnes v. Lloyd*, 1 How. (Miss.) 585; *Yazoo, etc., R. Co. v. Fulton*, 71

Tender of Performance.—Equally unavailing is a mere tender of complete performance, even though it is accompanied by part performance.¹

2. Promise Accepted in Satisfaction.—It is an apparent rather than a real exception to the rule requiring the accord to be executed, that where a promise or new contract is itself accepted in satisfaction of the contract or claim, there the accord and satisfaction is good without performance;² but it must appear

Miss. 385, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 94.

Missouri.—Giboney v. German Ins. Co., 48 Mo. App. 185.

New York.—Brennan v. Ostrander, 50 N. Y. Super. Ct. 426; Clark v. Rowling, Hill & D. Supp. (N. Y.) 105; Bump v. Phoenix, 6 Hill (N. Y.) 310; Campbell v. Hurd, 74 Hun (N. Y.) 235.

Pennsylvania.—Kerr v. O'Connor, 63 Pa. St. 341; Braunn v. Keally, 146 Pa. St. 519.

Texas.—Gulf, etc., R. Co. v. Gordon, 70 Tex. 80.

Vermont.—Rising v. Cummings, 47 Vt. 345.

Washington.—Rogers v. Spokane, 9 Wash. 168.

Wisconsin.—Palmer v. Yager, 20 Wis. 91; Sieber v. Amunson, 78 Wis. 683; Ball v. McGeoch, 81 Wis. 172, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 94.

1. *England.*—Peytoe's Case, 9 Coke 796; Rayne v. Orton, Cro. Eliz. 305; Shepard v. Lewis, T. Jones 6.

Arkansas.—Coblentz v. Wheeler, etc., Mfg. Co., 40 Ark. 180.

Georgia.—Molyneux v. Collier, 17 Ga. 46.

Illinois.—Simmons v. Clark, 56 Ill. 96.

Louisiana.—Schultz v. Morgan, 27 La. Ann. 616.

Maine.—Cushing v. Wyman, 44 Me. 121.

Maryland.—Flack v. Garland, 8 Md. 191.

Massachusetts.—Clifton v. Litchfield, 106 Mass. 34.

New Hampshire.—Clark v. Dinsmore, 5 N. H. 136.

New York.—Dolsen v. Arnold, 10 How. Pr. (N. Y. Supreme Ct.) 530; Tilton v. Alcott, 16 Barb. (N. Y.) 598; Osborn v. Robbins, 37 Barb. (N. Y.) 483; Crane v. Maynard, 12 Wend. (N. Y.) 408; Hawley v. Foote, 19 Wend. (N. Y.) 517; Daniels v. Hallenbeck, 19 Wend. (N. Y.) 408; Brooklyn Bank v. De Grauw, 23 Wend. (N. Y.) 342; Noe v. Christie, 51 N. Y. 270; Watkinson v. Inglesby, 5 Johns. (N. Y.) 386; Day v. Roth, 18 N. Y. 448; Russell v. Lytle, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537.

North Carolina.—State Bank v. Littlejohn, 1 Dev. & B. (N. Car.) 563.

Ohio.—Frost v. Johnson, 8 Ohio 393.

Pennsylvania.—Hearn v. Kiehl, 38 Pa. St. 149, 80 Am. Dec. 472; Blackburn v. Ormsby, 41 Pa. St. 97; Hosler v. Hursch, 151 Pa. St. 422, *quoting* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 94, 95.

Rhode Island.—Pettis v. Ray, 12 R. I. 344.

South Carolina.—Smith v. Keels, 15 Rich. (S. Car.) 318.

If the creditor wrongfully refuses to accept performance according to the accord, the debtor's remedy is a separate action on the agreement. *White v. Gray*, 68 Me. 579.

2. *England.*—Evans v. Powis, 1 Exch. 601;

Reeves v. Hearne, 1 M. & W. 326; *Buttidgeig v. Booker*, 9 C. B. 689; *Edwards v. Hancher*, 1 C. P. Div. 119; *Sard v. Rhodes*, 1 M. & W. 153; *Drake v. Mitchell*, 3 East 251.

Colorado.—Guldager v. Rockwell, 14 Colo. 459.

Connecticut.—Goodrich v. Stanley, 24 Conn. 613.

Florida.—Sanford v. Abrams, 24 Fla. 181; McLane v. Piaggio, 24 Fla. 71; Fuller v. Fuller, 23 Fla. 236.

Georgia.—Molyneaux v. Collier, 13 Ga. 406; Brunswick, etc., R. Co. v. Clem, 80 Ga. 534.

Illinois.—Simmons v. Clark, 56 Ill. 96; Knowles v. Knowles, 128 Ill. 110; Phoenix Ins. Co. v. Van Allen, 29 Ill. App. 149.

Indiana.—Moon v. Martin, 122 Ind. 211.

Iowa.—Hall v. Smith, 10 Iowa 45, 15 Iowa 584; Potts v. Polk County, 80 Iowa 401.

Kentucky.—Peace v. Stennet, 4 J. J. Marsh. (Ky.) 450.

Maine.—White v. Gray, 68 Me. 579.

Michigan.—Averill v. Wood, 78 Mich. 342.

Mississippi.—Whitney v. Cook, 53 Miss. 551; Yazoo, etc., R. Co. v. Fulton, 71 Miss. 385, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 94.

Missouri.—Todd v. Terry, 26 Mo. App. 598; Reisenleiter v. Evangelische, etc., Kirche, 29 Mo. App. 291.

New Mexico.—Frick v. Joseph, 2 N. Mex. 138.

New York.—Wahl v. Barnum, 116 N. Y. 87; Billings v. Vanderbeek, 23 Barb. (N. Y.) 546; Zoebisch v. Von Minden, 120 N. Y. 406; Oregon Pac. R. Co. v. Forrest, 128 N. Y. 83.

Texas.—Gulf, etc., R. Co. v. Harriett, 80 Tex. 73; Gulf, etc., R. Co. v. Gordon, 70 Tex. 80.

Vermont.—Bryant v. Gale, 5 Vt. 416; Babcock v. Hawkins, 23 Vt. 561.

See also *Brenner v. Herr*, 8 Pa. St. 106; *Fort v. Barnett*, 23 Tex. 460.

Right of Action Suspended.—An executory agreement of accord, founded upon a valuable consideration, may, although not executed, operate to suspend a right of action in accordance with its provisions. *Stracy v. Bank of England*, 6 Bing. 754, 19 E. C. L. 225; *Lewis v. Lyster*, 2 C. M. & R. 704; *Griffiths v. Owen*, 13 M. & W. 63; *Kearslake v. Morgan*, 5 T. R. 513. See also *Billings v. Vanderbeek*, 23 Barb. (N. Y.) 546; *Molyneaux v. Collier*, 13 Ga. 406; *Frick v. Joseph*, 2 N. Mex. 138; *Blackburn v. Ormsby*, 41 Pa. St. 97; *Kerr v. O'Connor*, 63 Pa. St. 341; *Bryant v. Gale*, 5 Vt. 416; *Alexander v. Strong*, 9 M. & W. 733.

As to the effect of payment by a note or bill, see the title PAYMENT.

A Verbal Agreement between the holder and the maker of a note to accept in full satisfaction the payment of a smaller sum at an earlier

that the plaintiff accepted the agreement alone in satisfaction and discharge of his cause of action.¹

Conflicting Authorities.—While the great weight of authority is uniform in requiring that the accord be executed, cases are found supporting a less stringent rule holding tender in certain cases to be sufficient, although the promise was not in itself accepted in satisfaction.² Thus it has been held that where the

day is binding, and an action lies against the holder for breach of such agreement. *Schweider v. Lang*, 29 Minn. 254, 43 Am. Rep. 202.

Bond Satisfied by Judgment.—A judgment may be a satisfaction of a bond if accepted as such. *Seaman v. Haskins*, 2 Johns. Cas. (N. Y.) 195. See *Frisbie v. Larned*, 21 Wend. (N. Y.) 450.

What Constitutes New Consideration.—If by a subsequent executory simple contract, made and accepted in satisfaction of a simple contract debt or cause of action, increased liabilities are undertaken by the defendant, if an additional sum of money is agreed to be paid or additional acts and duties to be performed, for the nonperformance of which an action will lie against the defendant, or if a surrender or exchange of securities has been agreed upon, or an apportionment of property and debts, this new contract, with the remedies thereupon, will constitute a good accord and satisfaction. *Comyns's Dig.*, tit. Accord, (B. 4); *Creager v. Link*, 7 Md. 259.

When New Promise is Performed.—But even a promise, which would not itself be a satisfaction, may, if it be fully performed, at the right time and in the right way (not merely tendered), become a satisfaction. *Comyns's Dig.*, tit. Accord, (B. 4); *Payne v. Barnet*, 2 A. K. Marsh. (Ky.) 312.

When New Promise is Executory and Not Binding.—If the new promise is executory, and it is not binding, it is no satisfaction until it be executed; and although it is to be performed on a future day certain, the promisee may have his original action before the new promise becomes due. *Comyns's Dig.*, tit. Accord, (B. 4).

1. *Hall v. Flocton*, 16 Q. B. 1039, 4 Eng. L. & Eq. 185.

Giving and receiving an obligation in satisfaction of another, the parties to which, or some of them, are different, may be pleaded in accord and satisfaction. *Bullen v. McGillicuddy*, 2 Dana (Ky.) 90; *Bruce v. Bruce*, 4 Dana (Ky.) 530.

When it is manifest that performance was contemplated by the parties, the mere promise to perform is not satisfaction. *Yazoo, etc., R. Co. v. Fulton*, 71 Miss. 385, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 94.

When Execution of Promise Unnecessary.—In *Babcock v. Hawkins*, 23 Vt. 561, Redfield, J., in delivering the opinion of the court, said: "We think it must be regarded as fully settled, that an agreement upon sufficient consideration, fully executed, so as to have operated in the minds of the parties as a full satisfaction and settlement of a pre-existing contract or account between the parties, is to be regarded as a valid settlement, whether the new contract be ever paid or not; and that the party is bound to sue upon the new con-

tract, if such were the agreement of the parties. This is certainly the common understanding of the matter. It is reasonable, and we think it is in accordance with the strictest principles of technical law. 1. There is no want of consideration in any such case, where one contract is substituted for another, and especially so where the amount due upon the former contract or account is matter of dispute. The liquidating a disputed claim is always a sufficient consideration for a new promise. *Holcomb v. Stimpson*, 8 Vt. 141. 2. The accord is sufficiently executed, when all is done which the party agrees to accept in satisfaction of the pre-existing obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose. This may be done by surrender of the former securities, by release or receipt in full, or in any other mode. All that is requisite is, that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the pre-existing liability, in the present tense. That is shown in the present case by executing a receipt in full, the same as if the old contract had been upon note or bill, and the papers had been surrendered. 3. In every case where one security or contract is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action in case of failure to perform must be upon the substituted contract. And in the present case, as it is obvious to us that the plaintiffs agreed to accept the note, and the defendant's promise to pay the costs, in full satisfaction, and in the place of the former liability, the defendant remained liable only upon the new contract. 4. In all cases where the party intends to retain his former remedy, he will neither surrender nor release it; and whether the party shall be permitted to sue upon his original contract is matter of intention always; unless the new contract be of a higher grade of contract, in which case it will always merge the former contract, notwithstanding the agreement of the debtor to still remain liable upon the original contract."

2. The earliest reported case to depart from the strict rule of the common law as to execution seems to have been *Case v. Barber*, T. Raym. 450, decided in the Court of King's Bench in 1681. In that case the defendant's counsel is reported to have alleged that "though in *Peytoe's Case*, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed (9 Coke 796; 3 Cro. 46, pl. 2), yet of late it hath been held that upon mutual promises an action lies; and consequently, there being equal

accord is executory, but supported by a valuable consideration and with the date fixed for its execution, and the debtor performs his part of the agreement and makes tender, the accord and satisfaction is good although the creditor refuses to accept.¹ It has also been held that where the failure to perform an executory accord is due entirely to the fault of one of the parties thereto, such party cannot avail himself of the fact that the accord was not fully executed.²

remedy on both sides, an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance; to which the court agreed, for the reason of the law being changed, the law is thereby changed, and anciently remedy was not given for mutual promises, which now is given; and for this reason, Mich. 18, Car. B. R. *Palmer v. Lawson*." The decision of the case, however, turned upon the absence of consideration and the statute of frauds.

In *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243, it appeared that, A. being indebted to D. upon a promissory note, it was agreed in writing between them that A. should deliver to B. coal of a certain quality, at a stipulated price, to an amount equal to the amount of the note, but no time or place was fixed for delivery. A., having large quantities of coal of the requisite quality in his coal yard, at different times tendered B. the coal in satisfaction of the note. B. made no objection to the place or mode of delivery, but said at one time that he would send and take the coal, and at another that he was not ready to receive it, and finally neglected to take it. In an action afterwards brought by B. against A. on the note it was held that the agreement for the delivery of the coal was valid, and that the tender on the part of A. was equivalent to performance, so as to bar the plaintiff's action, and might be pleaded by way of accord and satisfaction. Thompson, J., in delivering his opinion in this case, cited *Case v. Barber*, T. Raym. 450, with approval.

In *Tilton v. Alcott*, 16 Barb. (N. Y.) 598, *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243, is distinguished, and the dictum of Thompson, J., founded upon the case of *Case v. Barber*, is overruled. In delivering the opinion of the court Johnson, J., said: "In a very early case (*Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243) Thompson, J., laid down the rule that the agreement by way of accord, in order to be effectual as a bar, 'must be executed and satisfied with a recompense in fact, or with an action or other remedy to execute it and recover compensation;' but the decision in that case was placed by all the other judges upon the ground that the new agreement had been substantially performed, which fact had been settled by the verdict of the jury, and Thompson, J., places his opinion in part upon the same ground."

In *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491, Andrews, J., speaking for the court, said: "The doctrine which has sometimes been asserted, that mutual promises which give a right of action may operate and are good as an accord and satisfaction of a prior obligation, must, in this state, be taken with the qualification that the intent was to accept

the new promise as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then until performance there is not complete accord, and the original obligation remains in force;" citing *Tilton v. Alcott*, 16 Barb. (N. Y.) 598, and other *New York* cases.

1. *Whitsett v. Clayton*, 5 Colo. 476. See also *Foster v. Collins*, 6 Heisk. (Tenn.) 1.

In *Whitsett v. Clayton*, 5 Colo. 476, the court cited and relied upon *Bradley v. Gregory*, 2 Campb. 383; *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243; *Jenness v. Lane*, 26 Me. 475; *Heirn v. Carron*, 11 Smed. & M. (Miss.) 361, 49 Am. Dec. 65; *Jones v. Perkins*, 29 Miss. 142; *Christie v. Craigie*, 20 Pa. St. 430; *Bradshaw v. Davis*, 12 Tex. 336; *Babcock v. Hawkins*, 23 Vt. 561; *Latapee v. Pecholier*, 2 Wash. (U. S.) 180; *Story on Contr.*, § 982b; *Add. Contr.* 325, 326.

An examination of these authorities shows that the doctrine laid down by the court is not firmly established. *Babcock v. Hawkins*, 23 Vt. 561; *Christie v. Craigie*, 20 Pa. St. 430; *Jones v. Perkins*, 29 Miss. 142, merely affirm the doctrine already considered, that where the promise itself is received in satisfaction of the accord no execution is necessary. In *Latapee v. Pecholier*, 2 Wash. (U. S.) 180, which was a *nisi prius* case, the question was not before the court, for Washington, J., instructed the jury that the defendant had not shown either an actual or technical performance on his part. In *Heirn v. Carron*, 11 Smed. & M. (Miss.) 361, 49 Am. Dec. 65, it was decided that an accord with tender of satisfaction and refusal is equivalent to satisfaction. The court cites in support of this doctrine, *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243; *Allen v. Harris*, 1 Ld. Raym. 122; *Lynn v. Bruce*, 2 H. Bl. 317; *Peytoe's Case*, 9 Coke 80. The first of these cases must be regarded, as has been seen, as being overruled, and the other cases cited are in direct opposition to the doctrine announced. *Jenness v. Lane*, 26 Me. 475, tends to support the doctrine for which it is cited, but it is to be noted that the supreme court of *Maine* has in later cases declared that tender without acceptance is not good as an accord and satisfaction. *White v. Gray*, 68 Me. 579. *Bradshaw v. Davis*, 12 Tex. 336, is a case on all fours with *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243, and proceeds avowedly upon the authority of that decision.

2. Where it appeared that the plaintiff had made a contract with the defendant to deliver certain quantities of lumber to him upon certain specified terms, but that he failed to deliver the lumber as agreed, that the parties thereupon entered upon a second agreement by which the plaintiff was to deliver

Mutual Promises.—It has been held that an accord with mutual promises to perform is good, although unperformed when the action is brought, for the reason that the party has a remedy to compel the performance.¹

3. Who may Execute the Accord.—The authorities are divided upon the question whether performance must be by the debtor or his agent, not by a stranger, as it has been said that the creditor is not bound to receive performance at the hands of a third party.² But when the stranger acts as the debtor's agent, or the creditor accepts the payment in discharge of the debtor's liability, it will be a good satisfaction.³ Plea of accord and satisfaction is bad

lumber within a given time, that at the end of that time a large portion of the lumber was still undelivered, and that the defendant refused to proceed further in the execution of the second agreement, it was held that the plaintiff could not recover upon the original contract; that the failure to execute the accord agreement being entirely due to the plaintiff, the defendant was in a position to decline further proceedings thereunder. *Cary v. McIntyre*, 7 Colo. 173.

Where by the terms of the accord agreement the creditor was to have the privilege of electing between its performance by the conveyance of certain property or the payment of one hundred dollars in cash by the debtor, and the creditor never made this election, and the defendant was in constant readiness to do either, it was held that, the failure to make the accord a full satisfaction being the fault of the plaintiff, the defendant was not precluded from the benefit of this defense. *Tucker v. Edwards*, 7 Colo. 209.

1. *Case v. Barber*, T. Raym. 450; *Comyns's Dig.*, tit. Accord, (B. 4); *Wentworth v. Bullen*, 9 B. & C. 840, 17 E. C. L. 503. See *Billings v. Vanderbeck*, 23 Barb. (N. Y.) 546; *Thurber v. Sprague*, 17 R. I. 634.

2. *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 302; *Clow v. Borst*, 6 Johns. (N. Y.) 37; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408. See also, as to payments or novation by a stranger, the titles NOVATION; PAYMENT.

It is said, in *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 302, that accord and satisfaction by a stranger can be pleaded in equity.

A stranger voluntarily paying the amount due to the creditor does not acquire by such payment any right of action against the debtor; neither does such voluntary payment bar the creditor's right of action against the debtor. *Brown v. Chesterville*, 63 Me. 241.

Where the defendant accepted a bill of exchange drawn by the creditor, and the indorsee afterward brought suit against the defendant, who pleaded that the creditor delivered property to the plaintiff in full satisfaction of the debt, and that the plaintiff held the bill and brought suit against the will and consent of the creditor, it was held that the plea was no bar to the plaintiff's right to recover against the defendant on the bill. *Jones v. Broadhurst*, 9 C. B. 173, 67 E. C. L. 173.

Draft on Stranger for Part of Debt.—Where a debtor offers his creditor a draft on a stranger for fifty per cent of the debt in full payment of his indebtedness, and the draft is so accepted and is paid, and the creditor sur-

renders the evidence of indebtedness, there is a good accord and satisfaction. *Stagg v. Alexander*, 55 Barb. (N. Y.) 70.

Payment by Surety on Appeal Bond.—After a decree in the appellate court, the surety on an appeal bond pays a certain amount and takes a receipt stating that the money paid is in "full satisfaction of the decree rendered against" the surety. Such payment constitutes a good accord and satisfaction, and parol evidence cannot be adduced to show any agreement that the receipt was given on condition that no one else should appeal. *Boffinger v. Tuyes*, 120 U. S. 198.

Authorities Discussed.—In *Snyder v. Pharo*, 25 Fed. Rep. 398, it was held that satisfaction of a debt by the hands of a stranger is good when made by the authority of or subsequently ratified by the defendant, and that a subsequent ratification by pleading accord and satisfaction would be sufficient. In this case *Wales, J.*, after citing *Grymes v. Blofield*, Cro. Eliz. 541, and *Jones v. Broadhurst*, 9 C. B. 173, 67 E. C. L. 173, proceeded: "None of the later English decisions adhere with any strictness to the rule, and it is quite evident from an examination of them that a plea of satisfaction by a stranger, when properly averred, would be held good. *Belshaw v. Bush*, 11 C. B. 191, 73 E. C. L. 191; *Goodwin v. Cremer*, 18 Q. B. 757, 83 E. C. L. 757; *Kemp v. Balls*, 10 Exch. 607; *Simpson v. Eggington*, 10 Exch. 845. The rule continued to be applied and enforced in this country apparently without consideration or inquiry of its justice or authority, notably in *Clow v. Borst*, 6 Johns. (N. Y.) 37; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408; *Bleakley v. White*, 4 Paige (N. Y.) 655; and as late as 1873, in *Atlantic Dock Co. v. New York*, 53 N. Y. 66. But its unsoundness and inequity were so fully exposed by *Bartley, C. J.*, in *Leavitt v. Morrow*, 6 Ohio St. 72, as to leave no justification for the further recognition of its authority. * * * The same subject is discussed in the notes to *Cumber v. Wane*, 1 Smith Lead. Cas. 357, and to *Vadakin v. Soper*, 2 Am. Lead. Cas. 163, in which the learned editors concur that the rule has been virtually abrogated."

3. *Belshaw v. Bush*, 11 C. B. 191, 73 E. C. L. 191; *Simpson v. Eggington*, 10 Exch. 845; *Snyder v. Pharo*, 25 Fed. Rep. 398; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Wilks v. Slaughter*, 49 Ark. 235; *Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; *Booth v. Smith*, 3 Wend. (N. Y.) 66; *Rusk v. Soutter*, 67 Barb. (N. Y.) 371; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Britton*

unless the payments of the stranger are alleged to have been made for and on account of the debt, or to have been ratified by the defendant.¹

4. Presumption from Lapse of Time.—It has been held that a lapse of twenty years after actual damage suffered from the breach of a covenant furnishes a presumption which, if not rebutted, will sustain the plea of accord and satisfaction.²

IV. JOINT PARTIES—Joint Debtors.—An accord and satisfaction with one of several co-obligors or codebtors, whether they are bound jointly or jointly and severally, discharges all, but to have this effect there must be a technical release under seal.³ The effect of a release, however, according to the more

v. Lewis, 8 Rich. Eq. (S. Car.) 271; *Bennett v. Hill*, 14 R. I. 322; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390.

1. *James v. Isaacs*, 12 C. B. 791, 74 E. C. L. 791; *Kemp v. Balls*, 10 Exch. 607; *Webster v. Wyser*, 1 Stew. (Ala.) 184.

Accord and satisfaction with a person acting without authority as administrator or executor of a deceased person, becomes valid on his subsequently receiving letters testamentary or of administration. *Vroom v. Van Horne*, 10 Paige (N. Y.) 549, 42 Am. Dec. 94; *Priest v. Watkins*, 2 Hill (N. Y.) 225, 38 Am. Dec. 584.

Injuries to Property in Hands of Bailee.—A right of action by the owner of a chattel for injuries to it in the possession of the bailee is not barred by a settlement between the owner and the bailee. *Rindge v. Coleraine*, 11 Gray (Mass.) 157.

Settlement between Mortgagor and Insurer.—Where the plaintiff held a mortgage upon certain real estate, which contained a covenant on the part of the mortgagor to keep the buildings insured for the benefit of its holder, and pursuant to this covenant the owner of the fee procured from defendant a policy of insurance on the buildings, by the terms of which any loss was made payable to the plaintiff "as his mortgage interest may appear," it was held that a settlement for a loss within the policy made between the owner and the defendant, without the knowledge or consent of the plaintiff, was no bar to a recovery by the plaintiff against the defendant. *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 106.

2. *Jenkins v. Hopkins*, 9 Pick. (Mass.) 543.

But the lapse of twenty years from the time of making a contract to be performed *in futuro* is not of itself evidence of a new contract, averred to have been performed and pleaded as an accord and satisfaction of the original contract. *Siboni v. Kirkman*, 1 M. & W. 418, Tyr. & Gr. 777.

See generally, as to the presumption of discharge or of payment from the lapse of time, the titles LIMITATIONS OF ACTIONS; PAYMENT; PRESUMPTIONS.

3. *England.*—*Lacy v. Kynaston*, 1 Ld. Raym. 690, 12 Mod. 551; *Clayton v. Kynaston*, 2 Salk. 574; *Smith v. Lovell*, 10 C. B. 6, 70 E. C. L. 6.

United States.—*U. S. v. Thompson*, Gilp. (U. S.) 614; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1.

Alabama.—*Elliott v. Holbrook*, 33 Ala. 659; *Johnson v. Collins*, 20 Ala. 435.

Arkansas.—*Vandever v. Clark*, 16 Ark. 331.

California.—*Armstrong v. Hayward*, 6 Cal. 183.

Maine.—*Walker v. McCulloch*, 4 Me. 421; *Lunt v. Stevens*, 24 Me. 534; *Drinkwater v. Jordan*, 46 Me. 432; *Bradford v. Prescott*, 85 Me. 482.

Maryland.—*Booth v. Campbell*, 15 Md. 569.

Massachusetts.—*Pond v. Williams*, 1 Gray (Mass.) 630; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475; *American Bank v. Doolittle*, 14 Pick. (Mass.) 123; *Shaw v. Pratt*, 22 Pick. (Mass.) 305; *Ward v. Johnson*, 13 Mass. 148; *Tuckerman v. Newhall*, 17 Mass. 581; *Stimpson v. Poole*, 141 Mass. 502.

Missouri.—*McAllister v. Dennin*, 27 Mo. 40.

New Hampshire.—*Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584.

New Jersey.—*Line v. Nelson*, 38 N. J. L. 358.

New York.—*Cornell v. Masten*, 35 Barb. (N. Y.) 157; *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207; *Strang v. Holmes*, 7 Cow. (N. Y.) 224; *Frink v. Green*, 5 Barb. (N. Y.) 455.

Pennsylvania.—*Burson v. Kincaid*, 3 P. & W. (Pa.) 57.

A Release Not under Seal has been held to have the same effect if the instrument showed a consideration. *Milliken v. Brown*, 1 Rawle (Pa.) 391; *Heckman v. Manning*, 4 Colo. 543. See *Paddleford v. Thacher*, 48 Vt. 574; *Clifton v. Foster* (Tex. Civ. App., 1892), 20 S. W. Rep. 1005.

Composition of a Suit Brought against One Joint Debtor does not discharge the other debtor, and is no defense to the latter in a subsequent suit instituted against him. *Waters v. Smith*, 2 B. & Ad. 889, 22 E. C. L. 205.

But where suit has been brought against two joint debtors, and the creditor accepts satisfaction from one and drops the action, it seems that he cannot afterwards sue the other. *Dufresne v. Hutchinson*, 3 Taunt. 117.

A Judgment by Cognovit against one of the makers of a joint and several promissory note, and a levy of part under a *fi. fa.*, is no discharge of the other. *Ayrey v. Davenport*, 2 N. R. 474. See the title RELEASE for a full discussion of the effect of the release by one of several joint debtors.

A Judgment Confessed by One Partner for a debt of the firm is a satisfaction. *Eckford v. DeKay*, 26 Wend. (N. Y.) 29.

modern authorities, would seem to depend largely upon the intention of the parties.¹

Joint Creditors.—Accord and satisfaction by one of two or more joint creditors is a bar to an action by the other creditors.²

Joint Tort-feasor.—Accord and satisfaction by one of several joint tort-feasors, is a satisfaction as to all.³

V. EFFECT OF FRAUD, IGNORANCE, OR MISTAKE.—Accord and satisfaction, procured by the defendant's wilfully misrepresenting or suppressing any material fact in the statement of his affairs, is void, and a sealed release based thereon will be set aside;⁴ it will also be set aside if it is shown that the par-

1. See *Solly v. Forbes*, 2 B. & B. 46, 6 E. C. L. 31; *Parmelee v. Lawrence*, 44 Ill. 405; *Burke v. Noble*, 48 Pa. St. 168, 5 Phila. (Pa.) 526; *Maslin v. Hiett*, 37 W. Va. 15. See also the title RELEASE.

2. *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Austin v. Hall*, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376; *Decker v. Livingston*, 15 Johns. (N. Y.) 479. But see *Upjohn v. Ewing*, 2 Ohio St. 13; *Reigart v. Ellmaker*, 14 S. & R. (Pa.) 121; *Eisenhart v. Slaymaker*, 14 S. & R. (Pa.) 153; *Blewett v. Gaynor*, 77 Wis. 378. See also the title RELEASE.

But in order for this rule to apply it seems that there must be such a unity of interest among the joint creditors that all must be joined in a strictly personal action for its recovery. *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409.

Partners.—Accord and satisfaction with one partner is good against all, and a release by one partner is a release by all. *Noyes v. New Haven, etc.*, R. Co., 30 Conn. 1; *Gregg v. James*, 1 Ill. 143, 12 Am. Dec. 151; *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371; *White v. Jones*, 14 La. Ann. 692; *Vanderburgh v. Bassett*, 4 Minn. 242; *Salmon v. Davis*, 4 Binn. (Pa.) 375, 5 Am. Dec. 410; *Doremus v. McCormick*, 7 Gill (Md.) 49; *Allen v. Farrington*, 2 Sneed (Tenn.) 526; *Scott v. Trent*, 1 Wash. (Va.) 77. See *Crowe v. Lysaght*, 12 Ir. C. L. R. 481; *Woolfolk v. McDowell*, 9 Dana (Ky.) 268.

Where one partner signs a general release to a debtor of the firm, and it does not appear to what demands it is intended to apply or that the subscribing partner has any separate demand against the debtor, the release will be a discharge of the debts due to the partnership. *Emerson v. Knower*, 8 Pick. (Mass.) 63.

3. *Peytoe's Case*, 9 Coke 79b; *Goss v. El-lison*, 136 Mass. 503; *Merchants' Bank v. Curtiss*, 37 Barb. (N. Y.) 317; *Comstock v. Hopkins*, 61 Hun (N. Y.) 189; *Brown v. Marsh*, 7 Vt. 320; *Eastman v. Grant*, 34 Vt. 387; *Ellis v. Bitzer*, 2 Ohio 89, 15 Am. Dec. 534; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *Ayer v. Ashmead*, 31 Conn. 447, 85 Am. Dec. 154; *Spurr v. North Hudson County R. Co.*, 56 N. J. L. 346. See generally, upon this subject, the title RELEASE.

Part satisfaction from one joint tort-feasor enures to the benefit of all. *Merchants' Bank v. Curtiss*, 37 Barb. (N. Y.) 319.

4. *Alabama.*—*Abercrombie v. Mosely*, 9 Port. (Ala.) 145; *Maynard v. Johnson*, 4 Ala. 116; *Mooring v. Mobile Marine Dock, etc.*, Ins. Co., 27 Ala. 254.

Arkansas.—*Pope v. Tunstall*, 2 Ark. 209.

California.—*Smith v. Occidental, etc., Steamship Co.*, 99 Cal. 462.

Illinois.—*National Syrup Co. v. Carlson*, 47 Ill. App. 178.

Iowa.—*Springfield Engine, etc., Co. v. Van Brunt*, 77 Iowa 82.

Maine.—*Newall v. Hussey*, 18 Me. 249, 36 Am. Dec. 717; *Comstock v. Smith*, 23 Me. 202.

Massachusetts.—*Bliss v. New York Cent., etc., R. Co.*, 166 Mass. 447; *Bridge v. Batchelder*, 9 Allen (Mass.) 394; *Isley v. Jewett*, 2 Met. (Mass.) 168; *O'Donnell v. Clinton*, 145 Mass. 461.

Mississippi.—*Slocumb v. Holmes*, 1 How. (Miss.) 139.

Missouri.—*Girard v. St. Louis Car-wheel Co.*, 46 Mo. App. 79; *Mateer v. Missouri Pac. R. Co.*, 105 Mo. 320; *Cave v. Hall*, 5 Mo. 59.

New Jersey.—*Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432.

New York.—*Kirchner v. New Home Sewing Mach. Co.*, 135 N. Y. 182; *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366; *Dolsen v. Arnold*, 10 How. Pr. (N. Y. Supreme Ct.) 531; *Pierce v. Drake*, 15 Johns. (N. Y.) 475; *Willson v. Foree*, 6 Johns. (N. Y.) 110; *Central Bank v. Pindar*, 46 Barb. (N. Y.) 467; *Baker v. Spencer*, 58 Barb. (N. Y.) 248; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Oliwill v. Verdenhalven* (City Ct.), 15 N. Y. Supp. 94; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Galoupeau v. Ketchum*, 3 E. D. Smith (N. Y.) 175.

North Carolina.—*Bean v. Western N. Car. R. Co.*, 107 N. Car. 731; *Long v. Spruill*, 7 Jones (N. Car.) 96; *Newbern v. Dawson*, 10 Ired. (N. Car.) 436.

South Carolina.—*Watson v. Owens*, 1 Rich. (S. Car.) 111.

Rhode Island.—*Anthony v. Boyd*, 15 R. I. 495.

Vermont.—*Reynolds v. French*, 8 Vt. 85, 30 Am. Dec. 456.

Wisconsin.—*Leslie v. Keepers*, 68 Wis. 123.

See, generally, the titles FRAUD; MISREPRESENTATION; MISTAKE OF FACT; MISTAKE OF LAW.

In the absence of satisfactory evidence showing mistake, fraud, or unconscionable advantage, courts cannot disturb a compromise between the parties. *Chicago, etc., Coal Co. v. Peterson*, 39 Ill. App. 114; *Nash v. Manistee Lumber Co.*, 75 Mich. 346; *Hart v. Gould*, 62 Mich. 262; *Powell v. Heisler*, 16 Oregon 412; *White v. Richmond, etc., R. Co.*, 110 N. Car. 456; *Taylor v. Blackman* (Miss.,

ties to the transaction were mutually mistaken in regard to the same facts.¹

1893), 12 So. Rep. 458; *Currey v. Lawler*, 29 W. Va. 111. See also *Mateer v. Missouri Pac. R. Co.*, 105 Mo. 320; *Jenkins v. Clyde Coal Co.*, 82 Iowa 618; *Kirchner v. New Home Sewing Mach. Co.*, 59 Hun (N. Y.) 186; *Ball v. McGeoch*, 81 Wis. 160.

Satisfaction by Third Party in Collusion with Debtor.—Where a judgment debtor furnished his own money to a third party with instructions to buy from his creditor the judgment against him for a smaller amount in full satisfaction of the whole, and this third party did so satisfy the judgment without disclosing the real facts, it was held that such satisfaction was void and the payment only partial. *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578. See also *Carter v. Sheriff*, 1 Hawks (N. Car.) 483.

Discharge Induced by False Representations.—A composition and discharge will be set aside where it was induced by representations of insolvency and poverty, while the debtor had previously made a fraudulent conveyance of his property. *Richards v. Hunt*, 6 Vt. 251, 27 Am. Dec. 545.

Mere Formal Execution of Promise.—Though the promise is executed literally, or in form, if it is rendered worthless by an act of commission or omission on the part of the debtor there will be no accord and satisfaction. *Turner v. Browne*, 3 C. B. 157, 54 E. C. L. 157; *Coles v. Soulsby*, 21 Cal. 47; *Hall v. Smallwood*, Peake's Add. Cas. 13.

Settlement with Knowledge Not Set Aside.—An action cannot be founded on fraud or misrepresentations where a settlement has been made with full knowledge on the plaintiff's part of the facts relied on to constitute fraud. *King v. Williams*, 71 Iowa 74. See also *Pierce v. Ten Eyck*, 9 Mont. 349.

Settlement Set Aside in Part.—In an action to set aside a settlement for fraud and misrepresentation, the settlement may be set aside in part and left undisturbed as to the balance. *Reid v. Beyle*, 39 Kan. 559.

1. *Mowatt v. Wright*, 1 Wend. (N. Y.) 360, 19 Am. Dec. 508; *Calkins v. Griswold*, 11 Hun (N. Y.) 210; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Wheadon v. Olds*, 20 Wend. (N. Y.) 174; *Reed v. Horn*, 143 Pa. St. 323.

Accord by Advice of Third Party.—But where the accord was made upon the advice of a third party, who was mistaken as to some facts, the consequent satisfaction formed a bar to further action if the principals in the transaction were not mistaken about the facts. *Thompson v. Bennett*, 34 Mo. 477.

Waiver of Conditions.—A condition of an accord agreement, like that of any other contract, may be waived by both parties. *Cary v. McIntyre*, 7 Colo. 173.

Satisfaction Based on Erroneous Account.—In an action on a covenant in a demise of mines alleging nonpayment of tonnage rents and not keeping books of account, the plea was, that the defendant did keep books of account, which were submitted to the plaintiff and a certain amount accepted by the plaintiff in full satisfaction. The replication was that by reason of the mistake and ignorance

on the part of the plaintiff divers quantities of tonnage rents were omitted from the accounts. It was held that the plea afforded no answer to the action, and if it afforded a *prima facie* defense, it was answered by the replication. *Perry v. Attwood*, 25 L. J. Q. B. 408.

What Constitutes a Mutual Mistake.—As to what is such a mutual mistake of fact as will authorize a court to open and correct an accord and satisfaction, see *Calkins v. Griswold*, 11 Hun (N. Y.) 208; *Bensen v. Perry*, 17 Hun (N. Y.) 16; *Woodford v. Marshall*, 72 Wis. 129; *Langevin v. St. Paul*, 49 Minn. 189.

When Made under Advice of Attorney.—The evidence showed a settlement of a controversy to have been prudent and fair, and to have been made deliberately and under the advice of a competent attorney. It was held that equity would not set aside a conveyance made thereunder. *DeWolf v. Hays*, 125 U. S. 614.

A settlement has also been held good when made against the advice of the attorney. *Sullivan v. Bruhling*, 70 Wis. 388; *Stono v. Weiller*, 128 N. Y. 655.

Trifling Mistake.—When there is a trifling mistake as to a fact especially within the knowledge of the party attacking the settlement, it is final, in the absence of fraud. *Currey v. Lawler*, 29 W. Va. 111.

Mistake of Fact.—A creditor received three notes of third parties from the debtor in satisfaction of his claim. Both parties believed one of the notes to be secured by mortgage, as was represented by the debtor. The note proved to be unsecured and worthless. The creditor sued for balance of his debt, and it was held that he could rescind his acceptance on the ground of mistake, retain the other notes, and return the worthless note at the trial. *Wiswall v. Harriman*, 62 N. H. 671.

Adequacy of Consideration.—The adequacy of consideration cannot be inquired into, but the want of any consideration whatever may be; a mere threat or fear of a suit on a groundless pretext is not such a consideration as will uphold a compromise. *Creutz v. Heil*, 89 Ky. 429; *Grandin v. Grandin*, 49 N. J. L. 508; *Gilliam v. Alford*, 69 Tex. 267.

A father and son had a settlement, and the latter gave the former a note for the amount found due. The father agreed that the interest on the note should go to the son as compensation for board. Such a settlement cannot be questioned by the heirs or legatees of the father after his death. *Bell v. Henshaw*, 91 Ky. 430.

By an instrument under seal, the plaintiff assigned and conveyed to the defendant one third of the estate acquired by him under the will of their ancestor, in settlement of a dispute and threatened lawsuit respecting the validity of the will. It was held that being an executed transfer it would be set aside for fraud only. *Copley v. Hyland*, 46 Minn. 205.

Whether Necessary to Refund Amount Paid—Personal Action for Injury.—The defendant pleaded accord and satisfaction. The repli-

Rescission upon Notice of Fraud.—If a compromise agreement pleaded as accord and satisfaction is claimed to be fraudulent, in an action at law upon the original claim, the plaintiff must show that he rescinded the fraudulent compromise prior to the commencement of the suit; that he acted promptly on the discovery of the fraud; and if he received anything of value by reason of the fraudulent compromise, that he unqualifiedly offered to restore it.¹

ACCORDING. (See also **ACCORDING TO LAW.**)—The words "according to" a contract, or law, or statute, imply that everything has been done in compliance with the terms of the instrument, law, or statute referred to, it being understood that the construction of the law or statute is governed by the recognized principles of the law at the time the words were used.²

ACCORDINGLY.—Agreeably, conformably, or in that capacity.³

ACCORDING TO LAW. (See also **LAW.**)—This phrase has received construction in various connections in a number of cases, which will be found set out in the notes.⁴

cation was that the plaintiff signed the receipt thinking he was signing the pay-roll, that he was unable to read, and the receipt was obtained by fraud. It was held that an action could be maintained without refunding or tendering back the money received. *Butler v. Richmond, etc., R. Co.*, 88 Ga. 594. See also *Springfield F. & M. Ins. Co. v. Hull*, 51 Ohio St. 270. But see *Alexander v. Grand Ave. R. Co.*, 54 Mo. App. 66; *Galvin v. O'Brien*, 96 Mich. 483.

1. *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Vandervelden v. Chicago, etc., R. Co.*, 61 Fed. Rep. 54. But see *Mateer v. Missouri Pac. R. Co.*, 105 Mo. 320; *Shaw v. Webster* (Supreme Ct.), 29 N. Y. Supp. 437.

2. *Doe v. Harrison*, 3 B. & Ad. 764, 23 E. C. L. 182.

According to Population.—Where the constitution provided that apportionment should be "according to population," the court said: "It is evident that the term 'according to population' means as near as reasonably practicable, in view of other requirements." *State v. Cunningham*, 83 Wis. 163.

According to and in Pursuance of. (See also **PURSUANCE.**)—A charge that an overt act was done according to and in pursuance of a conspiracy which had been previously recited is equivalent to charging that it was done to effect the object of the conspiracy. *Dealy v. U. S.*, 152 U. S. 546. The court said: "It is also said that the indictment does not charge that the overt act was done 'to effect the object of the conspiracy,' as the statute expresses it, but is charged to have been done simply 'according to and in pursuance of said conspiracy.' But this is too great a refinement of construction. Something more is intended by the use of the words 'according to and in pursuance of' than that the overt act was done after the formation of the conspiracy, or even that it was simply a result of the conspiracy. It implies that the act was one contemplated by the conspiracy, 'according to,' and was done in carrying it out 'in pursuance of,' something which the conspiracy provided should be done, something which when done should tend to accomplish the purpose of the conspiracy. Again, it is objected that the time

at which the overt act was done is not specifically stated, but the date of the conspiracy is alleged, and that the overt act was 'according to and in pursuance of.' Necessarily, therefore, it was subsequent to the conspiracy."

According to Directions of Engineer.—"According to such directions, therefore, as the city engineer may from time to time give in superintending the construction of the work," should be construed to mean such directions that he may give looking to a completion of the work according to the plans and specifications, and not to mean that the engineer may give directions for an improvement in manner different from that provided in the plans and specifications. It is made the duty of the engineer under the contract to see that the contract is complied with, not violated." *Burke v. Kansas City*, 34 Mo. App. 580.

According to Conditions.—The insertion of a clause in a bond enlarging it so as to include a subsequent advance, the accompanying mortgage remaining unchanged, does not affect the operation of the mortgage, or enlarge the meaning of the words "according to the conditions of said bond" in said mortgage so as to include the advance. *Stoddard v. Hart*, 23 N. Y. 556.

3. *Lindley v. Girdler*, 13 L. J. Q. B. 53.

4. Importing Compliance with Requisites.—An averment in the declaration that the defendant subscribed for certain shares in the capital stock of plaintiff's company "according to the statute incorporating the company" will be held, on general demurrer, to mean that he had done everything required by the charter in order to become a subscriber. *Fiser v. Mississippi, etc., R. Co.*, 32 Miss. 360.

The words "according to the forms of statute," at the head of proclamations, indorsed on a fine, import that the fine was proclaimed as required by statute. *Doe v. Harrison*, 3 B. & Ad. 764, 23 E. C. L. 182.

An averment in a complaint that an affidavit was made according to law will be held, after verdict and judgment, to mean that it was made within the time prescribed by law. *McElhanev v. Gilleland*, 30 Ala. 183.

Record.—Where the docket entries fairly showed that bail for an appeal was entered in

ACCOUNT. (See also ACCOUNTABLE; ACCOUNTABLE RECEIPT; and the title ACCOUNTS.)—See note 1.

ACCOUNTABLE.—See note 2.

a fixed sum, "*according to Act of Assembly*," the recognizance was deemed sufficient, and in a suit thereon the plea of *nul tiel* record was held properly overruled. *Harvey v. Beach*, 38 Pa. St. 500.

If the docket entry shows that the jury were "*sworn according to law*," and no objection is made at the time, it will be presumed that they were regularly sworn. *Williamson v. Fox*, 38 Pa. St. 214.

Devise.—In *Stark v. Hunton*, 1 N. J. Eq. 216, it was held, where a testator devised certain property to his wife during her life, provided she remained a widow, but in case she married, then the property to be disposed of *according to law*, that the manifest intent of the testator was that the devise should be in lieu of dower, at least in the premises so devised.

After giving a life estate, a testator devised his plantation to the next male heir *according to law*. The court said: "The words *according to law* are not to be rejected in the construction of this will. It is true that the testator may have meant that the law is to be regarded in ascertaining who is his next male heir nearest in kindred and relation to him; but he may also have meant that the estate shall come to him in the same manner that the law would have given it to the heirs of the testator. We adopt this as the true meaning." *McIntyre v. Ramsey*, 23 Pa. St. 320.

And where a testator provided that his surviving children should, after the expiration of a life estate, take the property *according to law*, it was held that they took according to the law at the death of the life tenant, and not according to the law at the execution of the will or at the death of the deceased. *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32.

Law of What Time—Official Bond. (See also the title PUBLIC OFFICERS.)—An official bond conditioned for the faithful discharge of the duties of an office *according to law* embraces duties required by laws in force during the term of the officer, whether enacted before or after the execution of the bond. *King v. Nichols*, 16 Ohio St. 80; *approved* in *Dawson v. State*, 38 Ohio St. 1.

Change of Law.—Where coaches have been allowed by statute to stand in certain places, *according to the statutes* made for that purpose, and a subsequent statute gives the vestrymen of a church the right to designate the place for such standing, and to regulate it, a coach cannot, after a prohibition by the vestrymen from a certain stand, be said to occupy such stand *according to the statutes*, and it may, if found there, be impounded. *Frost v. Williams*, 7 Ad. & El. 773, 34 E. C. L. 221.

To Administer according to Law is to fulfil the functions of an administrator; in other words, to perform all his duties. *Balch v. Hooper*, 32 Minn. 162.

Remand of Cause to Lower Court.—The judg-

ment of a trial court was reversed, and the cause was "remanded for further proceedings *according to law*." The appellate court said: "The words *according to law* manifestly meant, *according to the opinion of the court* filed upon that appeal; for, without regard to the merit or demerit of that opinion, it necessarily became the law of the case. This being so, it would seem to follow that, upon the cause being remanded, the plaintiff was entitled to judgment against the garnishee in accordance with the determinations of this court in the opinion filed." *Winner v. Hoyt*, 68 Wis. 284.

In *State v. Fowler*, 42 La. Ann. 144, it was held, where a judge made an appeal returnable to the supreme court *according to law*, that this indicated that the judge had considered and construed the law, and even if he had committed an error it could not be visited upon the appellant under the authority of *State v. Dellwood*, 33 La. Ann. 1220.

Appeal from Justice.—Where a statute provides that appeals from justices must be tried *according to equity and justice* without regard to any defect in the summons, or other process before the justice, a defect in a notice cannot be considered on appeal. *Abrams v. Johnson*, 65 Ala. 465.

1. On Account of—Bill of Exchange.—In *Rice v. Porter*, 16 N. J. L. 440, it was held that an order to pay one hundred dollars on account of drawer's share of rent, and to be accepted by drawee when due, was not a bill of exchange. The court said: "Had the drawer of this order directed it to be paid out of his share of rent, instead of on account of it, most clearly it would have been payable out of a particular fund. All the cases in the books speak but one language on this point. Is there any substantial difference between the two? Does the change of phraseology convey to the mind any new or distinct idea? I think not. If a man owe me for a horse, and I request him to pay a sum on account of the consideration money or out of the consideration money, it is one and the same thing—a designation of the particular fund from which the payment is to be made. This construction was recognized as the true one in *Banbury v. Lisset*, 2 Stra. 1211, where the draft was 'on account of the freight of the galley Veale,' and it was held by Lee, C.J., no bill of exchange, because it was only payable out of a particular fund."

2. Officer Accountable to Another.—A provision making an officer *accountable* to another may imply authority to remove him. *McPhillips v. McPhillips*, 9 R. I. 536.

Indorsement upon Note.—A party has a reasonable ground to expect, upon receiving notes indorsed by the payee's name, followed by the word *accountable*, that the said payee shall be "subject to pay," "responsible" or "liable for," or make good the amount of said notes as soon as they become due and payable, without subjection to previous de-

ACCOUNTABLE RECEIPT. (See also ACQUITTANCE, and the title RECEIPTS.)—An accountable receipt is an instrument acknowledging the receipt of money or personal property, coupled with an obligation to account for or pay or deliver the whole or some part of it to some person.¹

ACCOUNTANT.—See note 2.

ACCOUNT BOOKS.—See the titles ACCOUNTS; DOCUMENTARY EVIDENCE.

ACCOUNTING OFFICER.—See note 3.

mand upon the makers. *Furber v. Caverly*, 42 N. H. 74.

Will.—A bequest of personal property, with a devise over of the residue, declared that the legatee should not be *accountable* for depreciation of farming implements and stock; this was held to give an absolute title to the farming implements and stock. *Breton v. Mockett*, 9 Ch. Div. 95.

1. *State v. Riebe*, 27 Minn. 315.

Forgery. (See the title FORGERY.)—"Boston, Aug. 15, 1868. Received of Wm. J. Dale, Surgeon-General of Mass., my discharge and check No. 6979 for \$100. George P. Gill. Witness, Frederick P. Cutting." This, not acknowledging that anything has been received to be accounted for, is not an *accountable receipt* within a statute making an *accountable receipt* for money, goods, or other property a subject of forgery, and is fatal to an indictment for forgery as of an *accountable receipt*. *Com. v. Lawless*, 101 Mass. 32. See *State v. Wheeler*, 19 Minn. 98; *Reg. v. West*, 2 C. & K. 496, 61 E. C. L. 496.

A Railway Scrip Certificate, signed by two of the directors, and stating that the holder of it, "having paid the deposit of £5, signed the parliamentary contract and subscribers' agreement, and agreed to pay all costs in respect thereof, is the proprietor of one share of £50, part of the additional capital," and that "the share represented by this certificate will bear interest at the rate of £5 per cent." from 1st Jan., 1847, to 1st July, 1853, and after that share in the net profits of the company, is neither a "receipt," nor an "acquittance," nor an *accountable receipt* within the stat. 1 Will. IV., c. 66, § 10; and the forgery of such certificate is, therefore, not an offense against that statute. *Reg. v. West*, 2 C. & K. 496, 61 E. C. L. 496.

A Statement of Account, such as is received by a bank from other banks having business connections with it, and containing an acknowledgment of the receipt of money to be accounted for, is an *accountable receipt*, and the fraudulent alteration thereof is forgery. *Ex p. Debaun*, 4 Mont. L. Rep. Q. B. 145.

A Receipt in Full of all demands is not an *accountable receipt*. *Com. v. Talbot*, 2 Allen (Mass.) 162.

A Bank Pass-book is an *accountable receipt*. *R. v. Smith*, 31 L. J. M. C. 154; *R. v. Moody*, 31 L. J. M. C. 156.

A Clearance Certificate from one branch of a friendly society to another is not an *accountable receipt*. *R. v. French*, L. R. 1 C. C. R. 217.

Indictment.—In *State v. Riebe*, 27 Minn. 315, it was held that an indictment for altering an *accountable receipt* for money, so as to give it the form of a promissory note, is not good unless it states or shows what the obligation of the receipt was, so that it may appear that the legal effect of it has been changed by the alteration. The court said: "Such receipt for money may be in legal effect, though not in form, a promissory note."

An indictment for forging an *accountable receipt* of an elevator company, which was set out in the indictment, and appeared to be signed "M. G., Inspector," not showing that the person whose name was so signed was agent of the company, was held bad. The court said: "The case at bar is of an *accountable receipt*, not purporting to be signed by an officer of the elevator company duly empowered to sign it. It is not on the face of the instrument of any apparent legal effect." *State v. Wheeler*, 19 Minn. 98.

2. **English Bills of Sale Acts.**—A person who carried on business as agent to an *accountant*, and was employed as *accountant* by other persons, was held to be properly described as an *accountant* for the purposes of the Bills of Sale Acts. *Briggs v. Boss*, 37 L. J. Q. B. 101, L. R. 3 Q. B. 268. But a clerk in the *accountant* office of a railway, who occasionally balances books for other people after office hours, is not properly described as an *accountant*. *Larchin v. North Western Deposit Bank*, 44 L. J. Exch. 71, L. R. 10 Exch. 64. In the latter case Mellor, J., said: "I think in *Briggs v. Boss*, 37 L. J. Q. B. 101, L. R. 3 Q. B. 268, we went to the extreme limit."

3. An Ohio statute provides that whosoever shall knowingly present false and fraudulent claims to the auditor or other *accounting officer* of a municipal corporation shall be guilty of a crime. It was held that the board of infirmity directors is an *accounting officer* within the statute. The court said: "It seems too clear for serious discussion that the words 'other *accounting officer*' imply such an officer as may lawfully pass upon and allow a claim or account against a municipal corporation, upon the authority of which allowance the comptroller may issue his warrant upon the treasurer; and even if these words were not chosen with a view to their prior technical signification, the fact of their employment in the connection in which we here find them is sufficient in itself to enlarge or qualify the sense in which they had theretofore been used." *Hauck v. State*, 45 Ohio St. 443.

ACCOUNTS.

By L. P. McGEHEE.

I. DEFINITION, 434.

II. VARIOUS KINDS OF ACCOUNTS, 435.

1. *Open Accounts*, 435.
2. *Current Accounts*, 435.
3. *Accounts Rendered*, 436.
4. *Accounts Settled*, 436.
5. *Account Sales*, 436.
6. *Book Accounts*, 436.
7. *Bank Accounts*, 436.
8. *Accounts Stated*, 437.
 - a. *Definition*, 437.
 - b. *Parties*, 437.
 - (1) *Generally*, 437.
 - (2) *Joint Parties*, 438.
 - (3) *Infants*, 438.
 - (4) *Married Women*, 438.
 - (5) *Executors and Administrators*, 438.
 - (6) *Partners*, 439.
 - (7) *Public Officers*, 439.
 - c. *Previous Transactions*, 440.
 - (1) *Necessity of Previous Transactions of Monetary Character*, 440.
 - (2) *Original Debt Void*, 442.
 - (3) *Original Indebtedness not Recoverable*, 442.
 - d. *Agreement as to Correctness of Accounts*, 442.
 - (1) *General Principles*, 442.
 - (2) *Assent of Party to be Charged*, 444.
 - (a) *Generally*, 444.
 - (b) *Admissions must be Unconditional*, 446.
 - (c) *Assent Implied from Conduct*, 446.
 - (aa) *Accounts Adjusted in the Presence of Both Parties*, 446.
 - (bb) *Payment of Balance*, 446.
 - (cc) *Payment without Objection, on Accounts Rendered*, 446.
 - (dd) *Giving Evidence of Indebtedness*, 447.
 - (ee) *Claiming Balance*, 447.
 - (ff) *Objection to Particular Items*, 447.
 - (gg) *Promising to Pay an Account Received without Objection*, 448.
 - (hh) *Retaining Account Rendered, without Objection*, 448.
 - (a) *Scope of Matters Covered*, 453.
 - e. *Account Stated Question of Law or Fact*, 454.
 - f. *Promise*, 455.
 - (1) *Generally*, 455.
 - (2) *Future or Conditional Promise*, 455.
 - (3) *Consideration*, 455.
 - g. *Nature and Effect of Account Stated*, 456.
 - (1) *As a New Promise*, 456.
 - (a) *Generally*, 456.
 - (b) *Original Items not Provable*, 456.
 - (c) *Balance is Principal*, 457.
 - (2) *As Payment*, 458.

- (3) *How Far Conclusive*, 458.
 (a) *Generally*, 458.
 (b) *Notes for Balance Settled*, 459.

III. IMPEACHING SETTLED OR STATED ACCOUNTS, 460.

1. *Generally*, 460.
2. *Opening Accounts De Novo*, 463.
3. *Surcharging and Falsifying*, 463.
 - a. *Meaning of the Terms*, 463.
 - b. *When Leave Granted*, 464.
4. *Lapse of Time*, 464.
5. *Usury*, 465.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the following titles in the *ENCYCLOPEDIA OF PLEADING AND PRACTICE: ACCOUNTS AND ACCOUNTING*, Vol. I., p. 83; *ACTIONS*, Vol. I., p. 153; *ASSUMPSIT*, Vol. II., p. 1024; *EQUITY*; *REFERENCES*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADMISSIONS*; *AGENCY* (and the titles under which particular classes of agents are treated, such as *ATTORNEY AND CLIENT*; *AUCTIONS AND AUCTIONEERS*; *BROKERS*; *FACTORS OR COMMISSION MERCHANTS*, and the like); *APPLICATION OF PAYMENTS*; *DOCUMENTARY EVIDENCE*; *EXECUTORS AND ADMINISTRATORS*; *FORGERY*; *GUARDIAN AND WARD*; *INTEREST*; *JOINT TENANTS*; *LIMITATION OF ACTIONS*; *MERCHANTS' ACCOUNTS*; *MUTUAL ACCOUNTS*; *PARTNERSHIP*; *RECEIPTS*; *TRUSTS AND TRUSTEES*.

I. DEFINITION—Accounts—Generally.—An account is a written statement of pecuniary transactions;¹ a detailed statement of demands in the nature of debt and credit between parties, arising out of contract or some fiduciary relation.²

1. *Abbott's Law Dict.* "An account," said Sanford, Chancellor, in *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587, "is no more than a list or catalogue of items whether of debts or credits."

The word "account" has no very clearly defined legal meaning. *Nelson v. Posey County*, 105 Ind. 287; *Watson v. Penn.*, 108 Ind. 21; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587.

Account—Meaning in Statute Providing for Reference.—"Account," as used in § 2864 of *Wisconsin Rev. Stat.*, providing for a peremptory reference in cases involving a long account, means an account in fact kept by one party or the other; and a long account is an account of at least some length. *Druse v. Horter*, 57 Wis. 644.

A "long account" is a series of charges made at various times as the transactions occurred. *Freeman v. Atlantic Mut. Ins. Co.*, 13 Abb. Pr. (N. Y. Supreme Ct.) 124. See the title *REFERENCES*.

2. *Bouvier* defines an account as "a detailed statement of mutual demands in the nature of debt and credit between the parties, arising out of contract or some fiduciary relation." This definition has been quoted with approval in *McWilliams v. Allan*, 45 Mo. 573; *Gale v. Drake*, 51 N. H. 78; but it seems open to the criticism that the word "mutual" would imply that each party must have demands against the other, thus excluding ordinary accounts rendered for work, services, etc. See *People v. Peek*, 57 How. Pr. (N. Y. Supreme Ct.) 315; *Hosack v. Heyerdahl*, 38 N. Y. Super. Ct. 391; *Camp v. Ingersoll*, 86 N. Y. 433.

The definition given in *Sweet's Law Dict.* is accurate. It is as follows: "An account is a list or statement of monetary transactions, such as payments, purchases, sales, debts, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, e.g., receipts and payments." This definition, however, fails to bring out the necessary relations between parties, upon which an account must be based.

In *Whitwell v. Willard*, 1 Met. (Mass.) 216, *Shaw, C. J.*, said: "The primary idea of account, *computatio*, whether we look to the proceedings of courts of law or equity, is some matter of debt and credit, or demands in the nature of debt and credit, between parties. It implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation of a public or private nature created by law or otherwise." In accordance with this principle, it was held in this case that a statute authorizing the court to appoint an auditor to state accounts did not authorize it to appoint such an officer in an action against a sheriff for nonfeasance in not attaching or levying on certain articles of personal property, inasmuch as the case involved "no relation of debtor and creditor, no relation of responsibility for money or property intrusted by one to another, either in fact or in law, either between the parties or other persons." See also *Nelson v. Posey County*, 105 Ind. 287; *Watson v. Penn.*, 108 Ind. 21; *McMaster v. Booth*, 4 How. Pr. (N. Y. Supreme Ct.) 427; *Vanbebbber v. Plunkett* (Oregon, 1895), 38 Pac. Rep. 707; and *infra*,

An account in most cases shows a balance or result of comparison between the items of an opposite nature, e.g., receipts and payments,¹ but a balance is not itself an account.²

II. VARIOUS KINDS OF ACCOUNTS—1. Open Accounts.—An open account is an account not stated or agreed upon between the parties.³ Thus, an account is open when some term of the contract is not settled by the parties, whether the account consists of one item or many.⁴ An account is also open whenever there have been current dealings between the parties, which are kept unclosed with the expectation of further transactions between them.⁵

2. Current Accounts.—An account current is an account not stated; a running account.⁶

this title, *Accounts Stated; Previous Transactions*.

In *Stringham v. Winnebago County*, 24 Wis. 594, it was held, *quoting and approving* *Whitwell v. Willard*, 1 Met. (Mass.) 216, that under the statute giving the county supervisors power to examine, settle, and allow all accounts chargeable against the county, the supervisors had no jurisdiction over a claim to have taxes on land refunded on the ground that they were excessive and illegal, because no matter of account was involved in such a question.

Where a Testator made a Bequest of "All my Accounts" it was held that this did not include a deposit in a savings bank, inasmuch as the word "accounts" was to be taken in its ordinary and popular meaning, which is a "statement of mutual demands, in the nature of debt and credit, which arise out of contracts and dealings between parties, and the items of which are entered from time to time in the books commonly known as account books." *Gale v. Drake*, 51 N. H. 78.

Creditor not Bound to Furnish.—A creditor is not bound to furnish an itemized account before bringing suit for an amount due to him. *Foster v. Newbrough*, 66 Barb. (N. Y.) 645.

1. Sweet's Law Dict.

2. Account and Balance of Account Distinguished.—Where the plaintiffs filed with their papers for a mechanic's lien a mere statement of the balance due to them from the defendant, it was held that they did not satisfy the statute requiring a lienor "to file with lien papers an account of the demand due to" him. *McWilliams v. Allan*, 45 Mo. 573. In this case the court, by Currier, J., said: "There is a broad distinction between an account and the mere balance of an account, resembling the distinction in logic between the premises of an argument and the conclusion drawn therefrom. A balance is but the conclusion or result of the debit and credit sides of an account."

3. Sweet's Law Dict.

The settled distinction seems to be between an open or current account and one that is stated; the former is holden to be within the exception of the statute of limitations, but the latter is barred by it. *Webber v. Tivill*, 2 Saund. 127, note.

Open account sometimes seems equivalent to mutual account as meaning an account open to entries by either party. *Abbott's Law Dict.*

Assignability.—In *Arkansas* an open account is not an assignable instrument within the meaning of the statute, and a party to whom it is transferred cannot sue on it alone, but must make his assignor a party to the suit. *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541. But an open account is assignable by statute in other states. See *McClain's Anno. Code of Iowa* (1888), § 3263.

"Continuous, Open, Current Account."—The words "continuous, open, current account," as used in the Code of *Iowa* (*McClain's Anno. Code of Iowa* (1888), § 3736) are defined by the court in *Tucker v. Quimby*, 37 Iowa 17, as follows: "An account to be 'continuous' must be without break or interruption. By the term 'open' we mean something that is not closed; and the term 'current,' as used in the statute, signifies 'running,' 'passing,' a 'connected series.' See Webster's Unabridged Dictionary. Hence a continuous, open, current account is an account which is not interrupted or broken, not closed by settlement or otherwise, and is a running connected series of transactions."

4. *Maury v. Mason*, 8 Port. (Ala.) 230; *Sheppard v. Wilkins*, 1 Ala. 62. In this latter case Ormond, J., said: "If a single article be sold and delivered and the price or time of payment be left in uncertainty, this is an open account, because there is a term of the contract to be ascertained. The account is, therefore, unliquidated. It is open."

Terms Agreed upon—Contract not in Writing.—Where all the terms of the contract are agreed upon, an account is not open, although not reduced to writing. *Sheppard v. Wilkins*, 1 Ala. 62; *Maury v. Mason*, 8 Port. (Ala.) 211.

5. *Goodwin v. Harrison*, 6 Ala. 438.

6. See *supra*, this title, *Open Accounts*.

The difference between a running account and one that does not run is that in the latter each item is a separate cause of action in itself, the minds of parties are presumed to have concurred only on single transactions; but in the case of a running account, according to the doctrine of relation, the subsequent acts relate back each to the preceding act and all the original acts. *Ring v. Jamison*, 2 Mo. App. 584.

When each of a series of transactions covering a number of years is separate and distinct from those which precede it, there is no running account. *Compton v. Johnson*, 19 Mo. App. 88.

Where an account constitutes one trans-

3. Accounts Rendered.—An account rendered is a statement presented by a creditor to his debtor showing the charges of the former against the latter.¹ Merely rendering an account gives it no binding effect upon the debtor, but by his acquiescence, express or implied, it becomes an account stated.²

Effect of Rendering Account in Absence of Prior Agreement as to Terms.—Rendering an account for personal or professional services, without an agreement as to the price thereof, does not preclude the party rendering the bill from proving the actual value of his services.³

4. Accounts Settled—Defined.—When the balance admitted upon a stated account is paid, the account is deemed a settled account.⁴ The term is also used in another sense.

Accounts of Trustees and Executors.—Settled accounts are accounts rendered by a trustee or executor to *cestuis que trustent*, or to residuary legatees, upon their releasing him of his accountability to them, and approved and accepted by the *cestuis que trustent* or legatees.⁵

Conclusiveness.—Settled accounts are conclusive until impeached for fraud or error.⁶

5. Account Sales.—Account sales are separate accounts rendered to his principal by a factor or broker showing goods sold, prices obtained, and the net results after deduction of expenses, etc.⁷

6. Book Accounts.—The statutes of some of the states of the Union provide for a distinct action upon book accounts. Other statutes provide that books of account may, under certain restrictions, be given in evidence to support the claims of the party offering them, and these statutes are known as "book account" or "book debt" laws.⁸

7. Bank Accounts.—The phrase designates the fund which merchants, traders; and others have deposited into the common cash of some bank, to be drawn out by checks from time to time, as the owner or depositor may require; also the statement of the amount deposited and drawn, which is kept in duplicate, one in the depositor's bank-book and the other in the books of the bank.⁹

action in fact, it is immaterial that it is stated with one or many balances. *Lamb v. Hanneman*, 40 Iowa 41; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346. See the titles LIMITATION OF ACTIONS; MUTUAL ACCOUNTS. See also the title ACTIONS, 1 Encyc. Pl. & Pr. 153.

1. Century Dictionary.

2. See *infra*, this title, *Accounts Stated*.

3. *Allis v. Day*, 14 Minn. 516; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481; *Williams v. Glenney*, 16 N. Y. 389; *Harrison v. Ayers*, 18 Hun (N. Y.) 336; *Burlingame v. Shelmire* (Supreme Ct.), 12 N. Y. Supp. 655; *Hard v. Burton*, 62 Vt. 325; *Brauns v. Green Bay*, 78 Wis. 81.

Cannot Claim beyond Amount of the Bill Rendered.—But it has been held that the amount of a bill so presented is the extreme limit of compensation which the party rendering it can claim. *Daniels v. Wilber*, 60 Ill. 526. And see *Nicholson v. Pelanne*, 14 La. Ann. 514; *Ayland v. Rice*, 23 La. Ann. 75.

Money Advanced upon the Account—Conclusiveness.—Where money has been actually advanced upon such an account, it becomes conclusive unless error or other sufficient equity be shown. *Rayburn v. Mason Lumber Co.*, 57 Mich. 274; *Kehl v. Smith*, 87 Wis. 212. See *Cicotte v. Wayne County*, 59 Mich. 509.

Fraud or Duress.—But where there are elements of fraud or duress, payment upon

such an account does not render it conclusive. *Cicotte v. Wayne County*, 59 Mich. 509; *Turnbull v. Boggs*, 78 Mich. 158.

Accounts Rendered as Affecting Previous Contracts.—Lills rendered cannot control a previous contract between the parties. *Gallinger v. Lake Shore Traffic Co.*, 67 Wis. 529.

4. Story Equity Pl. 798.

Giving a promissory note is *prima facie* evidence that the accounts have been settled. See *infra*, this title, *Accounts Stated: Giving Evidence of Indebtedness*.

But settlement of accounts is not always used in so strict a sense as this. Thus, parties are said to settle accounts when they agree and strike a balance. See the title SETTLEMENT.

5. Brown's Law Dict.; Sweet's Law Dict.

6. See *infra*, this title, *Opening Settled or Stated Accounts*.

7. Century Dict.

8. See the title DOCUMENTARY EVIDENCE.

The word "accounts" includes book accounts. *Bunell v. Pinto*, 2 Conn. 431.

9. Bouv. Law. Dict. *Gale v. Drake*, 51 N. H. 78.

Balancing the depositor's bank-book and returning it to him makes an account stated between the bank and the depositor, if the latter retains it without objection. See *infra*, this title, *Accounts Stated: Retaining Account Rendered, without Objection*.

8. Accounts Stated—*a*. DEFINITION.—An account stated is an agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance.¹

Promise Implied.—The importance of an account stated is due to the fact that it operates as an admission of liability from the person against whom the balance appears, or, in the language of the common law, "the law implies that he against whom the balance appears has engaged to pay it to the other," and on this implied promise or admission an action may be brought.²

***b*. PARTIES—(1) Generally.**—An account must be stated between the person in whose favor the balance appears, or his duly authorized agent, and the person against whom the balance lies, or his duly authorized agent.³

1. Lord Mansfield in *Trueman v. Hurst*, 1 T. R. 42, defined an account stated as follows: "What is an account stated? It is an agreement by both parties that all the articles are true." This definition is followed in *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; *Davis v. Tiernan*, 2 How. (Miss.) 804; *Stebbins v. Niles*, 25 Miss. 348; *Reinhardt v. Hines*, 51 Miss. 346; *Claire v. Claire*, 10 Neb. 57; *Hawkins v. Long*, 74 N. Car. 783.

An account stated is defined by Mr. Abbott to be "an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions and promising payment." Abbott's Trial Ev. 458. This definition is quoted in *Zacardino v. Pallotti*, 49 Conn. 36; *McKinster v. Hitchcock*, 19 Neb. 100; *Truman v. Owens*, 17 Oregon 525.

"An account stated," said George, C. J., in *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435, "is defined to be an agreement, after an examination of the accounts between the parties, that all the items are true, and the balance struck a just and true balance."

2. *Vanbeber v. Plunkett* (Oregon, 1895), 38 Pac. Rep. 707; *quoting with approval* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 11.

3. *Tarback v. Bispham*, 2 M. & W. 2; *Hughes v. Thorpe*, 5 M. & W. 656; *Bates v. Townley*, 2 Exch. 152; *Chatham v. Niles*, 36 Conn. 403; *Hoffar v. Dement*, 5 Gill (Md.) 132, 46 Am. Dec. 628; *Mink v. Morrison*, 42 Mich. 567; *Harvey v. West Side El. R. Co.*, 13 Hun (N. Y.) 392.

Accounts Stated by Agents.—The clerk of the creditors, corn-factors, may state an account with the debtor of such factors. *Chisman v. Count*, 2 M. & G. 307, 40 E. C. L. 385.

The respective bookkeepers of debtor and creditor may state an account binding upon the employees as a stated account. *Rice v. Schloss*, 90 Ala. 416.

The clerk of a merchant, merely as such, cannot bind him by an account stated. *Spears v. Turpin*, 9 Rob. (La.) 293.

Attorney.—It seems that an attorney employed to collect a bill for goods sold and delivered has power to state an account with reference to such bill. *Grundy v. Townsend*, 36 W. R. 531.

Agents to Copy Accounts.—Persons selected by the parties merely to copy their account-

books, and put the matter in convenient form, cannot state accounts so as to bar a suit for the settlement thereof. *Whitehead v. Darling* (Ky., 1887), 5 S. W. Rep. 356.

Arbitrators and Appraisers.—Evidence of an award between the parties, and an admission of the balance due, are admissible under a count upon an account stated. *Bates v. Curtis*, 21 Pick. (Mass.) 247; *Buschman v. Morling*, 30 Md. 384; *Keen v. Batshore*, 1 Esp. 194.

Aliter, in *England*, if regular bonds of submission are entered into. *Bates v. Townley*, 2 Exch. 152.

In *Tennessee* it has been held that an award is not an account stated unless signed by the parties. *Collins v. Oliver*, 4 Humph. (Tenn.) 439; *Henniken v. Brown*, 4 Baxt. (Tenn.) 397.

An account stated cannot be based on an appraisal where it does not appear that the defendant took part in the choice of the appraisers, or authorized them to bind him by their actions. *Chicago, etc., R. Co. v. Peters*, 45 Mich. 636.

When an award has been made by arbitrators, after the time has expired they cannot be said to be proceeding with the defendant's assent, and to be stating an account by him as his agents. *Ruthven v. Ruthven*, 8 U. C. Q. B. 12.

Equitable Owner.—Where the consignor of goods assents to an account of sales received from the consignee, the account becomes a stated account binding upon the equitable owner of the goods, although his equitable interest was known to the consignee. *Bevan v. Cullen*, 7 Pa. St. 281.

Officer of Corporation.—The bookkeeper of a corporation, who also acts as secretary and assistant treasurer, has no implied authority to bind the corporation upon an account stated, but his authority must be actually shown. *Harvey v. West Side El. R. Co.*, 13 Hun (N. Y.) 392.

The certificate of a roadmaster of a railroad company duly authorized to issue it, that the bearer is entitled to a specific sum for labor performed, which certificate has been accepted by the laborer, constitutes an account stated on which an action may be maintained against the railroad company. *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541.

Admissions to Third Persons.—Admissions to third persons not connected with the creditor do not constitute an account stated.¹

(2) *Joint Parties.*—One of several joint debtors cannot, in the absence of special authority, bind his associates by stating an account with the creditor;² but such authority may be proved by the relations existing between the debtors.³

(3) *Infants.*—An account stated by an infant is not binding upon him, though it was for necessities;⁴ but it may be ratified by him on attaining his majority.⁵

(4) *Married Women—Wife as Agent of Husband.*—It is sufficient to show that the account was stated with the wife of the creditor as agent for her husband.⁶

Wife and Husband Jointly.—At common law a wife could not state an account so as to bind herself, but it seems that a husband and wife might state an account, with respect to a debt due to the wife, or for which she had been the meritorious cause of action, so as to acquire a right which might be enforced in an action by the husband and wife.⁷

(5) *Executors and Administrators.*—An executor may sue upon an account

Officers of Municipal Corporation.—Auditors appointed by a municipal corporation may state an account with a debtor of the corporation, and the admission of the corporation made to such debtor binds it as to the correctness of the account. *St. John v. Lockhart*, 23 New Bruns. 430; *St. Louis Gas Light Co. v. St. Louis*, 11 Mo. App. 55, 84 Mo. 202. See also *Huron Dist. Council v. London Dist. Council*, 4 U. C. Q. B. 302; *Milwaukee County v. Hackett*, 21 Wis. 620; *Chatham v. Niles*, 36 Conn. 403.

1. *Breckon v. Smith*, 1 Ad. & El. 488, 28 E. C. L. 125; *Bates v. Townley*, 2 Exch. 152; *Thurmond v. Sanders*, 21 Ark. 255; *McMurtry v. Munro*, 14 U. C. Q. B. 166; *Green v. Burtch*, 1 U. C. C. P. 313.

Ratification.—Proof of a settlement made with an unauthorized person, if afterwards ratified by the party whom such unauthorized person undertook to bind, is sufficient. *Mink v. Morrison*, 42 Mich. 567.

2. **One of Several Joint Debtors Stating Account with Creditor.**—*Reed v. Pixley*, 22 Minn. 540.

Where a person is bound under seal to pay two jointly, the legal interest under the bond of one of the two creditors cannot be extinguished by an account stated between the obligor and the other creditor. *Zimmerman v. Woodruff*, 17 U. C. Q. B. 584.

3. Where A and B were trustees of an insolvent estate indebted to the plaintiff, the question was whether B was bound by an account stated between A and the plaintiff. Proof that A and B were such joint trustees; that they were at the plaintiff's counting-house on several occasions together; that at a meeting of the creditors of the insolvent estate the amount of the plaintiff's debt was stated by one and acquiesced in by the other; and that B had admitted in a letter that there was a debt due to the plaintiff, was held sufficient to warrant the jury in finding that B had constituted A his agent in stating the account. *Chisman v. Count*, 2 M. & G. 307, 40 E. C. L. 385.

4. **Account Stated by Infant not Binding.**—*Trueman v. Hurst*, 1 T. R. 40; *Bartlett v.*

Emery, 1 T. R. 42, note; *Williams v. Moor*, 11 M. & W. 256; *Hedgley v. Holt*, 4 C. & P. 104, 19 E. C. L. 297; *Ingledeu v. Douglas*, 2 Stark. 36.

5. **Ratification after Attaining Majority.**—*Williams v. Moor*, 11 M. & W. 256. In this case Parke, B., said: "We can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract. * * * The general doctrine is, that a party may, after he attains his age of twenty-one years, ratify, and so make himself liable on contracts made during infancy. We think that, on principle unopposed by authority, this may be done on a contract arising on an account stated as well as on any other contract."

6. 2 Chitty on Contracts (11th Am. ed.) 963. Mr. Chitty cites Buller's N. P. 129, where it is said: "In assumpsit upon an account stated, proof that the defendant and the plaintiff's wife reckoned that the defendant had borrowed forty shillings at one time, at another time forty shillings, and at another time four pounds, and that this came to eight pounds, and that he promised to pay it, is good evidence. And yet in such case no confession of the wife's would be allowed to be given in evidence against the husband. *Stuart v. Rowland*, 1 Show. 215."

7. **Wife's Interest must Appear.**—In a suit by a husband and wife on such a cause of action, the declaration must show the wife's interest. *Johnson v. Lucas*, 1 El. & Bl. 659, 72 E. C. L. 659.

A Wife is not Bound by the silent retention of an account rendered to her by her husband, who has the custody of her money and property, of moneys disbursed for her use. The rule of accounts stated does not apply in such a case. *Southwick v. Southwick*, 1 Sweeny (N. Y.) 47.

An Account Kept in the Husband's Name and rendered to him in that form will not be presumed correct as against the wife because she did not object to it when so rendered. *Powell v. Hopson*, 13 La. Ann. 626.

stated with him as executor concerning money due the testator, or concerning money due him as executor.¹

Allowance of Account by Executor or Administrator.—In some jurisdictions the allowance of an account by an executor or administrator gives it the character of an account stated against the estate, and renders it binding upon the executor or administrator, but not upon the heirs, next of kin, legatees, or devisees.²

Statute of Limitations.—An account stated by an executor or administrator with a creditor of the estate, before the claim has been barred by lapse of time, will arrest the running of the statute of limitations with respect thereto.³

(6) **Partners.**—An account stated between a third person and one member of a firm is binding upon the firm.⁴ As between the partners, one member of the copartnership may sue another member in assumpsit upon an account stated between them.⁵

(7) **Public Officers.**—Accounts audited and settled by public officers are not accounts stated.⁶

1. 2 Williams on Executors (7th Am. ed.), 79. See *Farnam v. Brooks*, 9 Pick. (Mass.) 223.

Evidence of an Account Stated with Executors.—Where the executors of the payee of a note sued the makers of the note upon which was the following indorsement, signed by the makers and one of the executors: "Hull, 1838, memorandum that the sum of £1. 7s. 6d., one quarter's interest, was paid on within note"—it was held sufficient evidence of an account stated with the executors, without proof of the time of the testator's death. *Purdon v. Purdon*, 10 M. & W. 562.

2. *Lambert v. Craft*, 98 N. Y. 342; *Schutz v. Morette*, 81 Hun (N. Y.) 518, 2 N. Y. Anno. Cas. 35. See *Watkins v. Washburn*, 2 U. C. Q. B. 291. *Contra*, *Fish v. Morse*, 8 Mich. 34. This question is, however, largely dependent on statute. See the title DEBTS OF DECEDENTS.

Failure to Object.—The rule that an account rendered, retained without objection, becomes an account stated, applies here, and it makes no difference that one of the representatives was a woman unacquainted with mercantile affairs. *Ogden v. Astor*, 4 Sandf. (N. Y.) 332.

Aliter under the present statutory provisions in *New York* relative to the powers and duties of executors and administrators. *Schutz v. Morette* (Ct. App.), 2 N. Y. Anno. Cases 35, reversing on this point *Schutz v. Morette*, 81 Hun 518.

3. *Smith v. Forty*, 4 C. & P. 126, 19 E. C. L. 305; *Ashby v. James*, 11 M. & W. 542; *Watkins v. Washburn*, 2 U. C. Q. B. 291. See also, generally, upon the question as to how far an admission of an executor or administrator will arrest the running of the statute of limitations, the title LIMITATIONS, STATUTE OF.

No Express Promise Necessary.—An account stated by an executor of an unliquidated debt due by the testator, without any express promise to pay, is sufficient to arrest the running of the statute. *Watkins v. Washburn*, 2 U. C. Q. B. 291. Compare *Tullock v. Dunn*, R. & M. 416.

4. **Account Stated by One Member of Firm.**—*Fergusson v. Fyffe*, 8 Cl. & F. 121; *Cunningham v. Sublette*, 4 Mo. 224; *Cady v. Kyle*,

47 Mo. 346. See *Kemp v. Peck*, 59 Hun (N. Y.) 118. See also the title PARTNERSHIP.

Admissions by One Partner.—An admission by one partner of the correctness of an account stated against a firm is binding upon the firm. *Cady v. Kyle*, 47 Mo. 346. *Heidenheimer v. Ellis*, 67 Tex. 426.

A declaration by a partner, after the death of A, that the firm owed A eleven hundred dollars, is evidence of an account stated between the firm and A during the latter's lifetime. *Cunningham v. Sublette*, 4 Mo. 224.

An admission of a debt by one partner during the continuance of the partnership is a promise binding upon the firm. *Burgan v. Lyell*, 2 Mich. 102, 55 Am. Dec. 53. See *Phillips v. Purington*, 15 Me. 425.

Entry by One Partner.—An entry in a book of accounts by one partner during the partnership binds his copartners and is evidence against all. *Walden v. Sherburne*, 15 Johns. (N. Y.) 409.

Retention of Account Addressed to a Firm.—If one retains an account wherein he is charged as liable with some other person as his partner, the retention of the account does not prove the partnership, and if proof thereof *aliunde* fails, neither the partnership nor the individual retaining the account can be charged thereon. *Kemp v. Peck*, 59 Hun (N. Y.) 118.

Transactions beyond the Scope of Business.—Where a partner, in the name of a firm, enters into a contract with a third person outside the scope of the partnership business, and the managing clerk of the firm without the knowledge of the other partners wrote letters to such third person containing evidence of an account stated respecting the amount due under the unauthorized contract, it was held that the letters of the clerk were not evidence of an account stated as against the other partners. *Brettel v. Williams*, 4 Exch. 623.

5. The cases under this head are numerous and diversified. Upon the question whether a final balance of accounts is necessary and when a partial balance is sufficient, and whether an express promise to pay the balance is required, see the title PARTNERSHIP.

6. *State v. Brown*, 10 Oregon 215; *Nutt v. U. S.*, 23 Ct. of Cl. 68.

c. PREVIOUS TRANSACTIONS—(1) *Necessity of Previous Transactions of Monetary Character*.—An account stated must be founded on previous transactions of a monetary character creating the relation of creditor and debtor between the parties.¹

Single or Cross Demands.—These transactions may have consisted of mutual or cross demands, or of a single item only.² When the account is stated with

Such an account lacks the element of agreement between competent parties, since such a public officer has no authority to state an account. *State v. Brown*, 10 Oregon 215.

An account audited by an accounting officer of the United States Treasury is a departmental proceeding, and is not conclusive or *prima facie* evidence of the indebtedness of the government, nor can an action be brought upon it. *McKnight v. U. S.*, 13 Ct. of Cl. 292.

In suits brought by the general government against individuals no claim for a credit shall be admitted upon trial unless it has been presented to the accounting officers of the treasury and by them disallowed. *Western Union R. Co. v. U. S.*, 101 U. S. 543; *Halliburton v. U. S.*, 13 Wall. (U. S.) 63; *U. S. v. Giles*, 9 Cranch (U. S.) 212.

Treasury settlements are only *prima facie* evidence of the correctness of the balance certified, and it is competent for accounting officers to correct mistakes and restate the balance. *Soule v. U. S.*, 100 U. S. 8; *U. S. v. Eckford*, 1 How. (U. S.) 256. See also *U. S. v. Smith*, 1 Bond (U. S.) 68.

The settlement of accounts by a public officer is not a judicial proceeding, and is only *prima facie* evidence of the correctness of the result stated. *Washington County v. Parlier*, 10 Ill. 232; *Marion County v. Phillips*, 45 Mo. 75; *State v. Brown*, 10 Oregon 215. See also *Cumberland County v. Edwards*, 76 Ill. 544; *Hunt v. Edger*, 93 Ind. 311; *Leavenworth County v. Keller*, 6 Kan. 510; *Howe v. State*, 53 Miss. 57; *State v. Roberts*, 62 Mo. 388; *Chenango County v. Birdsall*, 4 Wend. (N. Y.) 453; *People v. Broome County*, 65 N. Y. 222; *Grant County v. Sels*, 5 Oregon 243; *Jefferson County v. Jones*, 19 Wis. 51.

1. *Clarke v. Webb*, 1 C., M. & R. 29; *Lubbock v. Tribe*, 3 M. & W. 607; *Wilson v. Marshall*, 2 Ir. R. C. L. 356; *Toms v. Sills*, 29 U. C. Q. B. 497; *Murray v. Moffat*, 19 New Bruns. 485; *Nutt v. U. S.*, 23 Ct. of Cl. 68; *Truman v. Owens*, 17 Oregon 527; *Vanbebbler v. Plunkett* (Oregon, 1895), 38 Pac. Rep. 707. See *Whitwell v. Willard*, 1 Met. (Mass.) 216; *French v. French*, 2 M. & G. 644, 40 E. C. L. 555; *Mellon v. Campbell*, 11 Pa. St. 415; *Austin v. Wilson* (Buffalo Super. Ct.), 33 N. Y. St. Rep. 503.

An account stated only determines the amount of the debt where a liability exists. It cannot be made the instrument to create *per se* a liability where none previously existed. *Austin v. Wilson* (Buffalo Super. Ct.), 33 N. Y. St. Rep. 503.

Previous Pecuniary Transactions Necessary.—In *Truman v. Owens*, 17 Oregon 527, Lord, J., said: "It will be noted then that the account stated relates to some previous transactions or dealings between the parties, or some article or articles formerly sold by one

to the other, and that the relation of debtor and creditor already exists between them."

In *Vanbebbler v. Plunkett* (Oregon, 1895), 38 Pac. Rep. 707, Wolverton, J., after citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 110, and other authorities, stated the following conclusion: "It would seem that an account stated should be the result of computation between the parties concerning monetary transactions, or debts in the restrictive sense, as distinguished from liabilities and demands either existing reciprocally or entirely upon the one side or the other."

Where the defendant, at the request of the plaintiff's husband, opened an account with the plaintiff, but the account was really with the husband, and all the defendant's dealings and transactions were with him, and plaintiff's name upon his books stood really for the husband's, there could be no account stated, since there were no dealings between the parties upon which the account stated could be founded. *Field v. Knapp*, 108 N. Y. 87.

Report of an Officer of Government.—The report of the quartermaster-general of the United States, acting in pursuance of an act of Congress, that a specified sum is due from the government to a certain person on account of property destroyed by the United States armies, is not an account stated. *Nutt v. U. S.*, 23 Ct. of Cl. 68. In this case Nott, J., said: "As to the second ground taken by counsel, the court is of the opinion that an account stated grows out of commercial transactions, being the rendition of a running account by one party to the other and his acceptance or acquiescence in its accuracy and amount. It is, therefore, in legal effect but the liquidation of fractional items into a single amount by the agreement of parties express or implied. In the present case the court is unable to perceive in the report of the quartermaster-general a single element of an account stated. There was no running account between the parties; there had been no transactions which brought them within the usage or law of merchants; the account was not rendered by one party to the other; time did not run against the government so as to raise a presumption of acquiescence, and the subsequent payment of a part instead of the whole negated the idea that the whole was acquiesced in by Congress and acknowledged as an indebtedness."

2. *Mutual or Cross Demands—Single Items*.—*Chitty on Contracts* (11th Am. ed.) 962; *Bartlett v. Emery*, 1 T. R. 42, note; *Highmore v. Primrose*, 5 M. & S. 65; *Porter v. Cooper*, 1 C., M. & R. 387; *Knowles v. Michel*, 13 East 249; *Kirton v. Wood*, 1 M. & R. 253; *Lane v. Hill*, 18 Q. B. 252, 83 E. C. L. 252; *Ware v.*

reference to a single item, that item must be of a character which creates an actual debt between the parties;¹ but when there are cross demands, and the relation of debtor and creditor already subsists, and the parties strike a balance, they may include therein debts not due *in presenti*, and equitable as well as legal demands.²

Dudley, 16 Ala. 742; Rutledge v. Moore, 9 Mo. 537; Boylan v. Steamboat Victory, 40 Mo. 244; State v. Hartman Steel Co., 51 N. J. L. 446; Kock v. Bonitz, 4 Daly (N. Y.) 117; Robbins v. Downey (C. Pl.), 45 N. Y. St. Rep. 279; Neyland v. Neyland, 19 Tex. 426; Cobb v. Arundell, 26 Wis. 553.

In State v. Hartman Steel Co., 51 N. J. L. 446, Reed, J., said: "It is apparent from an examination of the course of decisions touching what will and what will not amount to an account stated, that the courts have drifted away from the original standard of a stated account. An account stated originally presented to the legal mind the idea of mutual accounts and of a balance struck by a comparison of such accounts made by the respective creditors. Such an account stated involved an agreement in respect to the items in such account which were to be allowed, and so implied an assent to the correctness of a balance found to be due against one of such creditors. * * * But it now seems to be entirely settled that it is not essential that there should be mutual or counter accounts between the parties to support an action for an account stated. A bill of items rendered, or even a single item presented to a party and acknowledged to be correct, will constitute such an account."

1. Account Stated with Reference to Single Item.—Tucker v. Barrow, 7 B. & C. 623, 14 E. C. L. 103; Whitehead v. Howard, 2 B. & E. 372, 5 Moore 105; Lemere v. Elliott, 6 H. & N. 656; Lubbock v. Tribe, 3 M. & W. 607; Gough v. Findon, 7 Exch. 48; Buck v. Hurst, L. R. 1 C. P. 297; Wilson v. Marshall, 2 Ir. R. C. L. 356; Ware v. Dudley, 16 Ala. 742; Truman v. Owens, 17 Oregon 523; Toms v. Silis, 29 U. C. Q. B. 497; Kennedy v. Adams, 15 New Bruns. 162.

Debt Due upon Contingency.—An account cannot be stated with reference to a debt due upon a contingency. 2 Chitty on Contracts (11th Am. ed.) 962; Baker v. Heard, 5 Exch. 939; Tuggle v. Minor, 76 Cal. 96.

Illustrations.—In Gough v. Findon, 7 Exch. 48, a testator left certain sealed letters directed to G. These letters contained promissory notes for a large amount in G.'s favor. G. applied to the executors for payment, and on seeing the notes they paid her a portion and promised to pay the remainder. It was held that the notes were in effect a legacy, and as such were void, not being attested as required by statute, and that the executors' part payment and promise did not amount to an account stated, inasmuch as the promise was made on a supposed debt, not in fact due.

In Truman v. Owens, 17 Oregon 525, the plaintiffs sold defendants a stump-puller, the defendants promising to pay for it by an order on P., the employer of the defendants.

This order P. was to pay as soon as the amount due the defendants for work was sufficient for the purpose. Subsequently a bill for the stump-puller was rendered by the plaintiffs to the defendants, who, according to their agreement, gave the plaintiffs an order on P. It was held that upon these facts the plaintiffs could not recover in an action upon an account stated; that the order was not given as a statement of previous transactions, but was itself a part of the original transaction, and that it was not an admission of a debt then due, but was to become due at a future time according to the contract.

In Vanbebber v. Plunkett (Oregon, 1895), 38 Pac. Rep. 707, defendants agreed to construct for the plaintiff a fence of a certain length. The defendants failed to construct the fence, and the plaintiff had it built at his own expense. Afterwards the defendants agreed to pay the plaintiff a certain amount in liquidation of the latter's claim for damages for defendants' failure to carry out their contract. It was held that the plaintiff, under the circumstances, could not recover in an action upon an account stated, inasmuch as the obligation of the defendants to construct the fence in question was not a debt due and owing from the defendants to the plaintiff, but was merely a demand for unliquidated damages for breach of contract, and not a proper subject upon which to base an account stated. Perhaps if the parties agree that a debt due in future shall be considered as due and owing, that will be sufficient. See opinion of Wightman, J., in Laycock v. Pickles, 4 B. & S. 497, 116 E. C. L. 497; but this was a case involving mutual demands, and Blackburn, J., places the decision of the court on other and more satisfactory grounds. See the following note.

2. Debts not Due in Presenti—Equitable and Legal Demands.—Laycock v. Pickles, 4 B. & S. 497, 116 E. C. L. 497; Swain v. Knapp, 34 Minn. 232; Jugla v. Troutet, 120 N. Y. 21; Smith v. Holland, 61 Barb. (N. Y.) 333. See the remarks of Parke, B., in Bates v. Townley, 2 Exch. 152. Where there were mutual demands between the plaintiff and defendant, and the parties, desirous of settling all differences and striking a balance, agreed that the plaintiff's interest in certain lands upon which the defendants held an equitable mortgage should be conveyed to the defendant, valued at a certain sum in the adjustment of the account between the parties, and the accounts were adjusted upon that footing, and a balance found to be due to the plaintiff, it was held that the plaintiff was entitled to recover such balance on a count upon an account stated. Laycock v. Pickles, 4 B. & S. 497, 116 E. C. L. 497. In this case Blackburn, J., said: "In common talk, an account stated is

(2) *Original Debt Void*.—Since the statement of accounts must rest upon a subsisting indebtedness, it follows that a claim void by reason of illegality or immorality in consideration will not support an account stated.¹

(3) *Original Indebtedness not Recoverable*.—If the original debt is not void, but simply not enforceable because of the want of legal evidence to support it, it may still afford a basis for a statement of accounts.²

Transaction within the Statute of Frauds.—Thus, where an agreement could not have been enforced had it remained executory on account of the statute of frauds; yet, if it has been executed except as to the payment of the consideration, and the consideration has been acknowledged as a subsisting debt by the party who has received the benefit of the transaction, a recovery may be had upon an account stated.³

d. AGREEMENT AS TO CORRECTNESS OF ACCOUNTS—(1) *General Principles*.—In stating an account, as in making any other agreement, the minds of the parties must meet.⁴

treated as an admission of a debt due from the defendant to the plaintiff. But there is also a real account stated, which is equivalent to what is called in the old law an *insimul computaverunt* when several items of claims are brought into account on each side, and, being set against one another, a balance was struck, and the consideration for the payment of the balance was the discharge on each side. I do not agree with Mr. Quaine that, in order to make out a real account stated, there must be real debts due at the time, or that the claims brought into account must be legal claims; equitable claims would do, and I am not certain that a moral obligation would not be sufficient." In reply to an argument of counsel the same judge said: "I incline to think that a debt *in presenti solvendum in futuro* might be set off [in an account stated] against a debt payable immediately."

The plaintiffs and the defendants entered into an agreement by which the plaintiffs sold to the defendants the stock and goodwill of their business in the city of New York for a certain sum, the plaintiffs at the same time agreeing to manufacture and supply for defendants the goods in which they dealt. Defendants were to pay in monthly instalments. After about half the purchase money was paid, the plaintiffs sent defendants an account embracing all the dealings between the parties, including the unpaid purchase money. The defendants retained this account without objecting to its correctness. It was held that the account would sustain an action upon an account stated. *Jugla v. Troutt*, 120 N. Y. 21. Here Bradley, J., said: "If the fact that the balance, as represented by the account rendered, was not then payable, denied to the statement the character of an account stated, the cause of action as alleged was not established by the evidence. * * * There may have been an effectual adoption by acquiescence of the amount of the balance at a specified time, in a statement embracing the unpaid purchase money, and if nothing intervened or was essential on the part of the plaintiffs to perfect their right to payment when it became payable, no reason appears why it may not have been treated as an account stated."

1. *Illegal or Immoral Consideration*.—*Cocking v. Ward*, 1 C. B. 858, 50 E. C. L. 858; *Kennedy v. Broun*, 13 C. B. N. S. 677, 106 E. C. L. 677; *Brooks v. Bockett*, 9 Q. B. 847, 58 E. C. L. 847; *Thomas v. Hawkes*, 8 M. & W. 140; *Rundlett v. Weeber*, 3 Gray (Mass.) 263; *Dunbar v. Johnson*, 108 Mass. 519; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605. See *Stephens v. Berry*, 15 U. C. C. P. 548.

Illegal Sale of Liquors.—As, for example, where the statement of account was founded upon an illegal sale of liquors. *Dunbar v. Johnson*, 108 Mass. 519; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

2. *Chitty on Contracts* (11th Am. ed.) 967; *Crooks v. Law*, 5 U. C. Q. B., O. S. 306.

Account Stated for Goods Sold on Sunday.—A recovery may be had for goods sold on Sunday, contrary to Sunday laws, upon an account subsequently stated upon a secular day in respect thereto. *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

3. *Statute of Frauds*.—*Knowles v. Michel*, 13 East 249; *Cocking v. Ward*, 1 C. B. 858, 50 E. C. L. 858; *Seagoe v. Dean*, 4 Bing. 459, 3 C. & P. 170, 14 E. C. L. 255; *Wilson v. Marshall*, 2 Ir. R. C. L. 356. See *Pinchon v. Chilcott*, 3 C. & P. 236, 14 E. C. L. 283; *Stevens v. Tuller*, 4 Mich. 387.

Original Agreement Executory.—But if the original agreement remains executory, there can be no recovery in such case. *Gross v. Bricker*, 18 U. C. Q. B. 410; *Lemere v. Elliott*, 6 H. & N. 656.

4. *Cape Girardeau, etc., R. Co. v. Kimmel*, 58 Mo. 83; *Lockwood v. Thorne*, 18 N. Y. 285; *Stenton v. Jerome*, 54 N. Y. 484; *Larder v. Farquhar*, 20 Nova Scotia 454. See *Raymond v. Leavitt*, 46 Mich. 447, 41 Am. Rep. 763; *Carpenter v. Nickerson*, 7 Daly (N. Y.) 424; *McColl v. Jackson Iron Co.*, 98 Mich. 482.

The Consent of the Parties to the Balance Claimed is what imparts to an account the character of an account stated. *McCall v. Nave*, 52 Miss. 494.

Transfer of Balance Standing against Firm to Private Account of One of the Partners.—A transfer by a merchant, in his ledger, of the balance of his account against a firm to the private account of one of the partners, without the privity of any of them, does not conclude the

Final Adjustment.—Each party must understand the transaction as a final adjustment of the respective demands between them.¹

Agreement as to the Items and Balance.—And they must come to an agreement as to the allowance or disallowance of the items composing the account, and as to the balance struck.²

merchant, and his recharging the firm is good and sufficient to hold them. *Barker v. Blake*, 11 Mass. 16.

Acquiescence or Consent.—Where A strikes a balance in his books of account with B, such a balance cannot have the effect of a stated account unless it appears that it was struck with the consent or acquiescence of B. *Nosstrand v. Dittmis*, 127 N. Y. 355.

Landlord and Tenant.—Where a landlord demanded forty pounds from an incoming tenant upon his agreement to pay for the crops growing upon the ground, and the tenant offered to pay seventeen pounds, this was held to be no evidence to support a count upon an account stated. *Wayman v. Hilliard*, 7 Bing. 101, 20 E. C. L. 62.

1. Must be Understood as Final Adjustment.—*Harvey v. West Side El. R. Co.*, 13 Hun (N. Y.) 392; *Middleditch v. Ellis*, 2 Exch. 623; *Zimmerman v. Woodruff*, 17 U. C. Q. B. 590. See *Rehill v. McTague*, 114 Pa. St. 82, 60 Am. Rep. 341; *Schettler v. Smith*, 34 N. Y. Super. Ct. 17; *Holmes v. Morse*, 50 Me. 102; *Surdam v. Fuller*, 31 Hun (N. Y.) 500; *Glasscock v. Rosengrant*, 55 Ark. 376.

Account Made out, but with no Intention to Bind Corporation.—Where an officer of a corporation, at the request of a party who had dealings with the company, furnishes him a copy of his account on the books of the corporation, but has no intention of binding the company, or asserting the claim, or establishing a balance due, the copy of accounts furnished was held not to be an account stated. *Harvey v. West Side El. R. Co.*, 13 Hun (N. Y.) 392.

Where the Beneficiary under a Trust Deed, not aware of his interest thereunder, examines the accounts of the trustee which have been rendered to the grantor, the account does not become an account stated as to the beneficiary. *Andrews v. Hobson*, 23 Ala. 219.

Balance Sheet to show Partnership Condition.—A balance sheet drawn up merely to show the general condition of affairs of a partnership, and not to show the state of accounts between the partnership and a member of the firm, is not an account stated between such partner and the firm. *Wood v. Gault*, 2 Md. Ch. 433. See *McCarthy v. Wood* (Ky., 1890), 13 S. W. Rep. 792.

Monthly Statement of Bank Account.—And the same is true in case of a monthly statement between a bank and a depositor, intended merely to show how the accounts stood between the parties. *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346.

Sale under Mortgage—Account of Sale.—Where there was a sale under a mortgage with power of sale, and the account of sale showed a certain deficiency which the defendant admitted to be correct, it was held not to constitute an account stated. *Rolfe, B.*, said:

"It is a perversion of language to speak of this as an account stated. It is merely the process adopted for the purpose of ascertaining how much of the original debt has been discharged, and all which is really done is to make out to what extent the defendant remains liable on the debt. This does not entitle the plaintiff to proceed as on a new liability, as on an account stated." *Middleditch v. Ellis*, 2 Exch. 623.

Cotenants—Special Agreement.—The plaintiff and the defendant entered into an agreement for the improvement of certain lands whereof they were cotenants, and for the erection of houses thereon. In this agreement it was declared "that the accounts of the costs of said lands, the costs of the improvements thereon, and the expenses connected therewith, and also the accounts of moneys furnished by each of them" for the purposes of the agreement, were stated in and appeared upon the books of account of the plaintiff's firm. It was held that this admission was not intended to give the books the weight of accounts stated, or to be a conclusive admission of their correctness, but that it was intended as a declaration that such accounts were *prima facie* correct. *Brown v. Brown* (Supreme Ct.), 5 N. Y. Supp. 893.

2. Agreement as to Balance Struck.—*Hughes v. Thorpe*, 5 M. & W. 667; *Ware v. Manning*, 86 Ala. 238; *Reinhardt v. Hines*, 51 Miss. 344; *State v. Hartman Steel Co.*, 51 N. J. L. 446; *Lockwood v. Thorne*, 18 N. Y. 285; *Stenton v. Jerome*, 54 N. Y. 484; *Larder v. Farquhar*, 20 Nova Scotia 454.

Agreement as to Correctness of Items Only.—If the correctness of the items of the accounts involved between the parties is admitted so that finding a balance is a mere matter of addition and subtraction, it is not necessary that these operations should be actually performed, but the accounts will have the character of accounts stated. *Ware v. Manning*, 86 Ala. 238. See *Treadway v. Ryan*, 3 Kan. 437; *Finlay v. Kirkland*, 9 Martin (La.) 463.

Sum Certain after Deductions.—An instrument reciting a settlement and an understanding that the plaintiff shall receive a certain sum, "first claims deducted," will sustain an action upon an account stated. *Millikin v. Ferguson*, 56 Mich. 189.

The Amount need not be Expressed.—It is not necessary that the amount of the balance should be expressed in words in the agreement between the parties if it is so referred to as to be provable to be a definite amount. Thus, where a party to whom a bill was sent admitted the correctness of "the bill" and promised payment, it was held sufficient. *Goodrich v. Coffin*, 83 Me. 324, 2 Greenl. on Ev., § 126.

Actual Examination or Admission of Correctness.—For this purpose there must be an examination by the parties of the accounts between them, or circumstances must exist from which it may be concluded that their correctness has been admitted.¹

(2) **Assent of Party to be Charged**—(a) **Generally.**—The meeting of the minds of the parties upon the correctness of an account stated is usually the result of a statement of accounts by one party and an acquiescence therein by the other.

Necessity of Assent—Form Immaterial.—The form of this acquiescence or assent is immaterial. It need not be in writing,² nor signed.³ It may be express,

Debtor Dissenting from Balance.—Where it appears that at the time of the alleged statement of the account one party dissented from the balance found and claimed an additional credit which was disallowed, an action upon an account stated cannot be maintained. *Cape Girardeau, etc., R. Co. v. Kimmel*, 58 Mo. 83.; *Bouslog v. Garrett*, 39 Ind. 338.

Account Closed by Death.—Although the death of one of the parties closes an account in the sense that there can be no additions to it, yet it does not make it an account stated, although a considerable time has elapsed since the death, since in such case there is no balance struck nor assent thereto, express or implied. *Bass v. Bass*, 8 Pick. (Mass.) 187.

1. **Must be Examination or Circumstances Supporting Admission as to Correctness.**—In some cases it is stated that in order to constitute an account stated there must be a mutual examination of their respective claims by the parties. *Reinhardt v. Hines*, 51 Miss. 344; *Lockwood v. Thorne*, 18 N. Y. 288; *Bussey v. Gant*, 10 Humph. (Tenn.) 241.

Lapse of Time, Acquiescence, etc.—But without actual examination and approval, circumstances may give to accounts the weight of accounts stated. Such are length of time, acquiescence, and the fact that the party has acted upon them to his injury. *Greene v. Harris*, 11 R. I. 28; *Bottum v. Moore*, 13 Daly (N. Y.) 464; *Murphy v. Ross* (Supreme Ct.), 7 N. Y. St. Rep. 182; *Benites v. Hampton*, 3 Utah 369.

Thus, in 1 Daniel Ch. Pr. (6th ed.) 666, it is said: "It does not seem to be necessary to aver that the account was settled between the parties upon a minute investigation of items; a general agreement or composition will be sufficient."

Where the plaintiff went over the account in the presence of the debtor and found a certain amount due to himself, and the result was not objected to by the defendant, it was held to be an account stated. *Kock v. Bonitz*, 4 Daly (N. Y.) 117.

Examination of Account on One Side Only.—It is not sufficient that one side only of the account was gone over, when the other side was not examined and no balance was agreed upon. *Pickard v. Simpson* (Supreme Ct.), 6 N. Y. Supp. 93, 2 Silv. (N. Y. Supreme Ct.) 468.

Where the Payee of a Promissory Note, upon which several payments have been made, presents it to the maker, and at his request

agrees to remit a proportion of the interest, and the parties compute the amount due upon that basis, and fix upon the amount so found as the amount to be taken as due upon the note, it is such an accounting as will sustain an action on an account stated. *Buxton v. Edwards*, 134 Mass. 578.

Insufficient Opportunity for Examination.—Where an account stated was pleaded as a bar to a bill for an accounting brought by a town against former selectmen thereof, and it appeared that the relation between the parties was, to a limited extent, of a confidential nature; that the report was presented to the town at an unexpected time, without previous notice, and with no opportunity for the town or its agents to examine it with that degree of care and scrutiny which its importance demanded; that it was not a full and complete account, but was merely an abstract showing the results of the various transactions, deficient in many particulars and wholly unaccompanied with vouchers; that the report was withheld from the officers of the town so that no opportunity was given for a thorough examination; and that acquiescence in the pretended settlement for an unreasonable length of time was wholly wanting,—it was held that the account ought not to be deemed a stated account. *Chatham v. Niles*, 36 Conn. 403.

2. **General Rule—Writing not Necessary.**—*Nooe v. Garner*, 70 Ala. 443; *James v. Fellowes*, 20 La. Ann. 118; *Darby v. Lastrapes*, 28 La. Ann. 605; *Hea v. Jones*, 2 Allen (New Bruns.) 646; *St. John v. Lockhart*, 23 New Bruns. 430.

An account stated need not be in writing to sustain an action upon an account stated. *Pinchon v. Chilcott*, 3 C. & P. 236, 14 E. C. L. 283; *Knowles v. Michel*, 13 East 249; *Watkins v. Ford*, 69 Mich. 357.

Writing, when Necessary.—But where a party pleads an account stated as a bar to a suit for an accounting, he must show that it was in writing. *Burk v. Brown*, 2 Atk. 399; *Wood v. Gault*, 2 Md. Ch. 433.

3. **Need not be Signed.**—*Willis v. Jernegan*, 2 Atk. 252; *Wood v. Gault*, 2 Md. Ch. 433; *Stebbins v. Niles*, 25 Miss. 348; *Brown v. Vandyke*, 8 N. J. Eq. 801, 55 Am. Dec. 250; *Lockwood v. Thorne*, 11 N. Y. 170, 42 Am. Dec. 81; *Bruen v. Hone*, 2 Barb. (N. Y.) 586.

Effect when Signed.—When a party signs his name to an account current, it is not conclusive evidence of his owing the amount therein stated. Proof of fraud or mistake rebuts

or implied from the conduct of the parties, but there must in every case be proof in some form of an assent to the account rendered, that is, a definite acknowledgment of indebtedness in a certain sum.¹

Time of Assent.—The admissions of the correctness of an account rendered may be made either before or after suit brought, provided the debt existed before suit brought.² And where the account has been assigned, the admission may be made either before or after assignment.³

the implied admission. *Nichols v. Alsop*, 6 Conn. 476; *Miller v. Probst*, Add. (Pa.) 344. See *Zacharie v. Blandin*, 6 La. 204.

1. Assent Express or Implied.—*Nooe v. Garner*, 70 Ala. 443; *Terry v. Sickles*, 13 Cal. 427; *Hendy v. March*, 75 Cal. 566; *Chatham v. Niles*, 36 Conn. 403; *Stevens v. Tuller*, 4 Mich. 387; *Cape Girardeau, etc., R. Co. v. Kimmel*, 58 Mo. 83; *Powell v. Pacific R. Co.*, 65 Mo. 658; *Cochrane v. Allen*, 58 N.H. 250; *State v. Hartman Steel Co.*, 51 N. J. L. 446; *Hall v. Morrison*, 3 Bosw. (N. Y.) 527; *Philips v. Belden*, 2 Edw. Ch. (N. Y.) 1; *Stenton v. Jerome*, 54 N. Y. 480; *Volkening v. DeGraaf*, 81 N. Y. 268; *Nostrand v. Ditmis*, 127 N. Y. 355; *Stephens v. Ayers*, 57 Hun (N. Y.) 51; *Murphy v. Ross* (Supreme Ct.), 7 N. Y. St. Rep. 182; *Hawkins v. Long*, 74 N. Car. 781; *Ford v. Reid*, 23 New Bruns. 589; *Larder v. Farquhar*, 20 Nova Scotia 454.

Assent under Duress or Obtained by Misrepresentations.—A party is not bound by an account where his assent is obtained by compulsion or fraudulent misrepresentations. *Kelsey v. Hobby*, 16 Pet. (U. S.) 269; *Stenton v. Jerome*, 54 N. Y. 480; *Dunham v. Griswold*, 100 N. Y. 224; *Upton v. Bedlow*, 4 Daly (N. Y.) 216. See *Tucker v. Barrow*, 7 B. & C. 623, 14 E. C. L. 103; *Kinney v. Heatley*, 13 Oregon 35.

Promise to Pay Another's Debt.—A promise to pay the debt of another is insufficient to support an action upon an account stated. *French v. French*, 2 M. & G. 644, 40 E. C. L. 555; *Wilson v. Marshall*, 2 Ir. R. C. L. 356; *Stevens v. Ayers* (Supreme Ct.), 10 N. Y. Supp. 502. See also *Porter v. Lobach*, 2 Bosw. (N. Y.) 188; *Holmes v. Morse*, 50 Me. 102.

Judgment as Evidence.—Assent must be voluntary; so a judgment is not evidence of an account stated. *Gooding v. Hingston*, 20 Mich. 439.

Recovery on Account Stated where the Original has been Lost.—The plaintiff may recover upon an admission of indebtedness with regard to rent due, as upon an account stated, although he fails to produce or account for the written lease. *Burch v. Harrell*, 93 Ga. 719.

Consent Withdrawn.—An account wherein a deduction was assented to for a time is not an account stated if the person so assenting afterwards objects and refuses to receipt in full. *Fickett v. Cohn* (C. Pl.), 1 N. Y. Supp. 436.

An Admission of Mere Liability not Sufficient.—In *Bloomley v. Grinton*, 1 U. C. C. P. 309, the defendant admitted a certain balance due to the plaintiff from which was to be deducted an unascertained debt due to the defendant, and also a balance on a certain account due by the plaintiff to his brother, which he had

agreed should be paid by the defendant out of moneys coming to the plaintiff. It was held that this was not evidence of an account stated. *Macaulay, C. J.*, said: "The mere admission of the balance remaining on one part of a transaction or agreement, to be reduced by deductions concurrently agreed to be made as another part of such transaction or agreement, such deductions not being ascertained or admitted in point of amount (which is the present case), does not admit any specific sum as presently due so as to amount to evidence of an account stated either at that time or at any prior period. Such admission only shows a liability to account, or a state of accounts unadjusted; nor would proof of the amount of the counter claim to be deducted show an admitted balance of the residue sufficient to support the count on an account stated." See also *Calvert v. Baker*, 2 Jur. 1020; *Burgh v. Legge*, 5 M. & W. 418; *Irving v. Veitch*, 3 M. & W. 90; *Lane v. Hill*, 18 Q. B. 252, 83 E. C. L. 252; *Kirton v. Wood*, 1 M. & R. 253.

Evidence of Assent.—Any facts which show that the admission of indebtedness in a fixed sum is the necessary result of the settlement between the parties, are competent upon the trial of an account stated. Thus upon an action on an account stated, for the unpaid balance of the purchase money of land, the written contract between the parties and the vendor's subsequent deed to the purchaser may be introduced to show the amount of the purchase money. *Chapman v. Lee*, 47 Ala. 143.

Where a workman furnishes goods to workmen on orders from their employer, and receives his pay from the employer on presentation of the orders, the amount being fixed by the orders and deducted from the wages of the workmen, the arrangement is evidence of an account stated with the employer. *Bull v. Brockway*, 48 Mich. 523.

Where a client delivered to his attorney an account of coal furnished to him, and the attorney delivered to the client an account for services, crediting the amount of the coal bill, it is evidence of the client's assent to the attorney's bill that he takes it away with him, promising to send coal as usual to apply thereon, and that he afterwards does send a large amount of coal. *Beals v. Wagener*, 47 Minn. 489.

2. Assent may be either Before or After Suit Brought.—2 Greenl. Ev. 128; *Ex p. Randleson*, 2 Deac. & C. 534; *Powell v. Pacific R. Co.*, 65 Mo. 658. See *Skinler v. Clute*, 9 Nev. 343; *Stowe v. Sewall*, 3 Stew. & P. (Ala.) 67.

3. Time of Assent when Account has been Assigned.—*Powell v. Pacific R. Co.*, 65 Mo. 658.

(b) **Admissions must be Unconditional.**—When the party to whom the account is rendered admits that it is correct, it becomes an account stated,¹ but the admission must be direct and unconditional.²

(c) **Assent Implied from Conduct.**—(aa) **ACCOUNTS ADJUSTED IN THE PRESENCE OF BOTH PARTIES.**—Where parties adjust accounts between themselves in the presence of both, and no objection is made to their correctness, they become accounts stated against the debtor.³

(bb) **PAYMENT OF BALANCE.**—The payment of the balance due upon an account stated is an admission of its correctness.⁴ But where such payment is brought about by the other party by threats of a criminal prosecution, or of selling property in his hands belonging to the debtor, payment is not an acquiescence.⁵

(cc) **PAYMENT WITHOUT OBJECTION, ON ACCOUNTS RENDERED.**—Where an account is rendered by the creditor to the debtor, and the latter retains it and makes payment upon it without objection, it becomes an account stated between the parties;⁶ but in such case the account rendered must be free from ambiguity,

1. *Ryan v. Gross*, 48 Ala. 370; *Burns v. Campbell*, 71 Ala. 271; *Joseph v. Southwark Foundry, etc., Co.*, 99 Ala. 47; *Pulliam v. Booth*, 21 Ark. 420; *Carroll v. Paul*, 16 Mo. 226; *May v. Kloss*, 44 Mo. 300; *Beach v. Kidder* (Supreme Ct.), 8 N. Y. Supp. 587; *Philips v. Belden*, 2 Edw. Ch. (N. Y.) 1; *Tassey v. Church*, 4 W. & S. (Pa.) 141, 39 Am. Dec. 65.

Delivering up Vouchers.—Delivering up vouchers is an admission that the account is a stated one, but this is not essential. *Willis v. Jernegan*, 2 Atk. 252.

Sufficient Admission.—Where a party admits payment of a certain sum and another for goods sold and delivered, the latter admits that a certain sum (less than that demanded) is due, and suit is brought upon an account stated for the sum admitted, the admission of the defendant and the bringing of the action amount to a stated account. *Grundy v. Townsend*, 36 W. R. 531.

It seems that any admission by one party of a balance, or an acknowledgment that a sum of money is due another, supports a count upon an account stated. *Gooding v. Hingston*, 20 Mich. 439. See *Gregory v. Bailey*, 4 Harr. (Del.) 256; *Neyland v. Neyland*, 19 Tex. 426; and *supra*, this title, *Previous Transactions*.

2. **Admission must be Direct and Unconditional.**—*Evans v. Verity*, R. & M. 230; *Wilson v. Marshall*, 2 Ir. R. C. L. 356; *State v. Hartman Steel Co.*, 51 N. J. L. 446.

In *Evans v. Verity*, R. & M. 230, the defendant, upon the plaintiff's demanding payment of a certain sum, replied that he would pay it if the plaintiff "had not removed the grates." It was held that this was no admission of liability, but only an admission that the sum would have been paid if something else had not happened.

Where the defendant admitted the correctness of the plaintiff's bill, but refused to pay because the plaintiff owed him a larger bill, this admission was held not to amount to an account stated. *State v. Hartman Steel Co.*, 51 N. J. L. 446.

Defendant admitted the correctness of an account presented by the plaintiff, but re-

fused to sign it, alleging that there might be other credits to which he was entitled and for which he required time to consider; it was held that this was not evidence of a stated account. *Harley v. Goodfellow*, 1 Hannay (New Bruns.) 335.

Where one to whom an account is rendered admits the correctness of the items, but denies his liability, insisting that some other person is justly chargeable and ought to pay, the account does not become an account stated. *Ryan v. Gross*, 48 Ala. 370. See *Harris v. Woodard*, 40 Mich. 408.

3. 2 *Greenleaf Ev.*, § 126; *Darlington v. Taylor*, 3 Grant's Cas. (Pa.) 195; *Kock v. Bonitz*, 4 Daly (N. Y.) 117.

4. **Payment as Admission of Correctness.**—*Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Gilchrist v. Brooklyn Grocers' Mfg. Assoc.*, 66 Barb. (N. Y.) 390. In this latter case the defendant, after an account rendered to him by the plaintiff, objected to only one item, which the plaintiff deducted, and the defendant paid the balance. It was held that the account was a stated account.

5. **Payment Made in Consequence of Threats.**—*Stenton v. Jerome*, 54 N. Y. 480; *Dunham v. Griswold*, 100 N. Y. 224. See *Kelsey v. Hobby*, 16 Pet. (U. S.) 269.

6. *Manion Blacksmith, etc., Co. v. Carreras*, 26 Mo. App. 229. See *Kehl v. Smith*, 87 Wis. 212; *Rayburn v. Mason Lumber Co.*, 57 Mich. 274.

Where a party after retaining an account rendered for several weeks accepts a draft upon himself in order to make part payment of the balance, this is an admission of the correctness of the account. *Weed v. Dyer*, 53 Ark. 155.

Where the defendant was silent for some time after an account was rendered to him, made payments on account, and promised to pay the whole in instalments, and stated that he owed the balance of the gambling debt, the jury were warranted in finding an account stated. *Mulford v. Caesar*, 53 Mo. App. 263.

When not Conclusive.—Where the defendant retains, unchallenged for a long time, an account submitted by the plaintiff, and makes

and must show aggregate charges in the plaintiff's favor and deduct proper credits.¹

(dd) **GIVING EVIDENCE OF INDEBTEDNESS.**—Promissory notes,² due bills and I.O.U.'s,³ being admissions of a certain sum due, are *prima facie* evidence of accounts stated. So acceptances for a given sum,⁴ or bills of exchange drawn by the debtor in favor of the creditor,⁵ are evidence of a stated account.

(ee) **CLAIMING BALANCE.**—Where accounts are rendered by one to another showing a balance in favor of the latter, and he makes no objection to the items of account, but claims the balance, as by drawing on the other party, the account becomes a stated account.⁶

(ff) **OBJECTION TO PARTICULAR ITEMS.**—If, when an account is rendered by one person to another, the latter objects to only one item, it is an admission of the correctness of the other items, and the account becomes stated as to them.⁷

a payment thereon, this does not amount to a conclusive admission of the correctness of the account, and these facts may be met by defendant by evidence of mistake, and his explanation consistent therewith; and the question is then properly submitted to the jury upon evidence. *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161.

1. *Manion Blacksmith, etc., Co. v. Carreras*, 26 Mo. App. 229.

2. **Promissory Notes.**—*Maybury v. Berkery* (Mich., 1894), 60 N. W. Rep. 699; *Seabury v. Bolles*, 51 N. J. L. 103; *Lake v. Tysen*, 6 N. Y. 461; *Dutcher v. Porter*, 63 Barb. (N. Y.) 15; *Robbins v. Downey* (C. Pl.), 45 N. Y. St. Rep. 279; *Davis v. Gallagher* (Supreme Ct.), 9 N. Y. Supp. 11; *Rhodes v. Crawford*, 1 U. C. Q. B. 257; *Merritt v. Woods*, *Berton* (New Bruns.) 261; *Casey v. Hanington*, 19 New Bruns. 282.

Joint Note.—Where there are two makers of a promissory note, the note is *prima facie* evidence of an account stated against both, but if one of the makers is a surety merely, he must show the facts and rebut the presumption as to himself. *Hogan v. McSherry*, 6 U. C. Q. B. O. S. 633.

When Promissory Note is not Evidence.—When one party was in the habit of giving the other notes not representing what was actually due, but as collateral security for his indebtedness, it shall be presumed that a note depended on as evidence of an account stated was given for a balance on a settlement of accounts. *Hill v. Durand*, 58 Wis. 160.

Evidence of Settlement.—A promissory note may be *prima facie* evidence of a settlement and payment of the balance of an account stated, but it is not conclusive. *Rosencrantz v. Mason*, 85 Ill. 252; *Hill v. Sloan*, 59 Ind. 181; *Gaskin v. Wells*, 15 Ind. 253; *Morton v. Rogers*, 12 Wend. (N. Y.) 484, 14 Wend. (N. Y.) 576; *Dutcher v. Porter*, 63 Barb. (N. Y.) 15; *Sherman v. McIntyre*, 7 Hun (N. Y.) 592; *Treadwell v. Abrams*, 15 How. Pr. (N. Y. Supreme Ct.) 219; *Proctor v. Thompson*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 340.

Writings Lacking Essentials of Promissory Notes.—Writings which are not formal promissory notes, through lacking some of the essential requisites of commercial paper, are yet evidences of accounts stated. *Montgomerie v. Ivers*, 17 Johns. (N. Y.) 38; *Reed v. Reed*, 11 U. C. Q. B. 26; *Grant v. Young*, 23 U. C. Q. B. 387; *Tyke v. Cosford*, 14 U.

C. C. P. 64; *Wood v. Young*, 14 U. C. C. P. 250; *Ritchie v. Prout*, 16 U. C. C. P. 426; *Palmer v. McLennan*, 22 U. C. C. P. 258, 565.

3. **Due Bills, etc.**—*Wilson v. Wilson*, 14 C. B. 626, 78 E. C. L. 626; *Buck v. Hurst*, L. R. 1 C. P. 297; *Douglas v. Holme*, 4 P. & D. 685, 12 Ad. & El. 641, 40 E. C. L. 145; *Payne v. Jenkins*, 4 C. & P. 324, 19 E. C. L. 404; *Frost v. Clark*, 82 Iowa 298; *Mackay v. Kahn* (C. Pl.), 44 N. Y. St. Rep. 286.

Joint and Several I. O. U.—A joint and several I. O. U. signed by A and B is evidence of an account stated by A and B jointly, although the money for which the I. O. U. was given was loaned to A only on B's promise to become surety for its repayment. *Buck v. Hurst*, L. R. 1 C. P. 297.

4. **Acceptances.**—*Weed v. Dyer*, 53 Ark. 155; *Stewart v. Kirk*, 5 Allen (New Bruns.) 131.

5. **Bills of Exchange.**—*Emerson v. Gardiner*, 1 Allen (New Bruns.) 451.

But a bill of exchange is not evidence of an account stated between the acceptor and indorsee, for there is no privity between these parties. *Stephens v. Berry*, 15 U. C. C. P. 548.

6. **American Nat. Bank v. Bushey**, 45 Mich. 135; *Lockwood v. Thorne*, 11 N. Y. 170, 42 Am. Dec. 81; *Bevan v. Cullen*, 7 Pa. St. 281; *Hall v. Sloan*, 9 Phila. (Pa.) 138. See also *Woodward v. Suydam*, 11 Ohio 360.

Receiving the Balance.—Where one party sent an account, with his check for the balance thereon appearing against him, to the other party, and the latter received it and obtained the money thereon, though he objected at the time that the balance was too small, he was bound. *Davenport v. Wheeler*, 7 Cow. (N. Y.) 231. See *Pyncheon v. Day*, 118 Ill. 9; *Horn v. St. Paul*, etc., R. Co., 37 Minn. 375; *Schuyler v. Ross* (Supreme Ct.), 37 N. Y. St. Rep. 805.

But where the testimony of the two parties to the alleged statement is conflicting, and the plaintiff testified that he accepted the check under protest, and it appeared that upon receiving the account he immediately notified the defendant of an error in the account, the question whether there was an account stated is for the jury. *Rosenfield v. Fortier*, 94 Mich. 29. See also *supra*, this title, *Accounts Rendered*.

7. **Objection to Particular Item—Admission of Correctness of the Others.**—*Chisman v. Count*, 2 M. & G. 307, 40 E. C. L. 385; *Burns v.*

(gg) PROMISING TO PAY AN ACCOUNT RECEIVED WITHOUT OBJECTION.—Where an account has been rendered to the debtor, and he receives it without objection and promises to pay it, it becomes a stated account, the items of which cannot afterwards be questioned.¹ The same is true where an account is received without objection, and the amount of the balance is credited on a subsequent account against the party presenting the first account.²

(hh) RETAINING ACCOUNT RENDERED, WITHOUT OBJECTION—General Principles—Rule Stated.—An account rendered by one party to another and retained beyond a reasonable time without objection is regarded as admitted to be correct, and becomes an account stated.³

Campbell, 71 Ala. 271; Ware v. Manning, 86 Ala. 238; Joseph v. Southwark Foundry, etc., Co., 99 Ala. 47; Tuggle v. Minor, 76 Cal. 96; Sergeant v. Ewing, 36 Pa. St. 156. See also Wiggins v. Burkham, 10 Wall. (U. S.) 129; Mulford v. Caesar, 53 Mo. App. 263; Craighead v. State Bank, Meigs (Tenn.) 199; Milwaukee County v. Hackett, 21 Wis. 620.

Where the defendant agreed to pay an account, but one item of the account was left open for further investigation, and the defendant agreed to the amount excluding such item, and no subsequent investigation as to it was shown, it was held that the plaintiff could only recover the admitted amount, as the account was stated as to that only. Tuggle v. Minor, 76 Cal. 96.

Where an account showing a balance in favor of the plaintiff was presented by him to the defendant, and the defendant wrote thereon the sum to be deducted from the balance, this was held to be no admission of the correctness of the account without the deduction. Spurr v. Allison, 3 Allen (New Bruns.) 454.

Objecting to Price Only in Bills of Goods.—The retention by the vendee for several weeks of a bill sent to him by the vendor, not followed by any objection on the part of the vendee except as to the price at which the goods are charged in the bill, constitutes a recognition of the correctness of the quantity of the goods stated therein. Dakin v. Walton (Supreme Ct.), 33 N. Y. Supp. 203.

1. Walker v. Steel, 9 Colo. 388; Flower v. O'Bannon, 43 La. Ann. 1042; Clemens v. Baltimore, 16 Md. 208; McCormack v. Sawyer, 104 Mo. 36; Powell v. Noye, 23 Barb. (N. Y.) 184; Dickerson v. Schener (Super. Ct.), 1 N. Y. Supp. 419; Vernon v. Simmons (C. Pl.), 7 N. Y. Supp. 649; Lawson v. Douglass (Supreme Ct.), 43 N. Y. St. Rep. 356.

It is otherwise when the debtor to whom an account is presented, although he does not object to it, states that he intends to keep the plaintiff out of the bill as long as he can. Blanc v. Forgay, 5 La. Ann. 695.

2. Bewick v. Butterfield, 60 Mich. 203.

3. England.—Sherman v. Sherman, 2 Vern. 276; Willis v. Jernegan, 2 Atk. 252; Tickel v. Short, 2 Ves. 239.

United States.—Freeland v. Heron, 7 Cranch (U. S.) 147; Wiggins v. Burkham, 10 Wall. (U. S.) 129; Standard Oil Co. v. Van Etten, 107 U. S. 325; Leather Manufacturers' Nat. Bank v. Morgan, 117 U. S. 96; Marye v. Strouse, 5 Fed. Rep. 490; Talcott v. Chew, 27 Fed. Rep. 273; Edwards v. Hoeffinghoff,

38 Fed. Rep. 635; Eichel v. Sawyer, 44 Fed. Rep. 845; Baker v. Biddle, 1 Baldw. (U. S.) 394; Bainbridge v. Wilcocks, 1 Baldw. (U. S.) 536; Bradley v. Richardson, 2 Blatchf. (U. S.) 343; Hopkirk v. Page, 2 Brock. (U. S.) 20; White v. Macon, 3 Cranch (C. C.) 250.

Alabama.—Langdon v. Roane, 6 Ala. 518, 41 Am. Dec. 60; Ryan v. Gross, 48 Ala. 370; Burns v. Campbell, 71 Ala. 271; Hirschfelder v. Levy, 69 Ala. 351; Rice v. Schloss, 90 Ala. 416; Ware v. Manning, 86 Ala. 238; Joseph v. Southwark Foundry, etc., Co., 99 Ala. 47. Arkansas.—Lawrence v. Ellsworth, 41 Ark. 502; Weed v. Dyer, 53 Ark. 155.

California.—Terry v. Sickles, 13 Cal. 427; Hendy v. March, 75 Cal. 566.

Colorado.—Freas v. Truitt, 2 Colo. 489.

Georgia.—Field v. Reid, 21 Ga. 327.

Illinois.—McCord v. Manson, 17 Ill. App. 118; Mackin v. O'Brien, 33 Ill. App. 474; House v. Beak, 43 Ill. App. 615; B. S. Greene Co. v. Smith, 52 Ill. App. 158.

Iowa.—White v. Hampton, 10 Iowa 238.

Louisiana.—Shaw v. Oakley, 3 Rob. (La.) 362; Freeman v. Howell, 4 La. Ann. 196, 50 Am. Dec. 561; Mansell v. Payne, 18 La. Ann. 124; Blanc v. Scruggs, 26 La. Ann. 208; Darby v. Lastrapes, 28 La. Ann. 605; Irving v. Edrington, 41 La. Ann. 671; Flower v. O'Bannon, 43 La. Ann. 1045.

Maryland.—Wood v. Gault, 2 Md. Ch. 433; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Michigan.—Rossman v. Bock, 97 Mich. 430.

Minnesota.—See Robson v. Bohn, 22 Minn. 410.

Mississippi.—Stebbins v. Niles, 25 Miss. 267; Coopwood v. Bolton, 26 Miss. 212; McCall v. Nave, 52 Miss. 498; Anding v. Levy, 57 Miss. 62, 34 Am. Rep. 435.

Missouri.—Shepard v. State Bank, 15 Mo. 143; Powell v. Pacific R. Co., 65 Mo. 658; Brown v. Kimmel, 67 Mo. 430; McCormack v. Sawyer, 104 Mo. 36; Kent v. Highleyman, 17 Mo. App. 9; Marmon v. Waller, 53 Mo. App. 610; Ruprecht v. O'Malley, 1 Mo. App. Rep. 71.

New Hampshire.—Rich v. Eldredge, 42 N. H. 153; Austin v. Ricker, 61 N. H. 97.

New Jersey.—Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; State v. Hartman Steel Co., 51 N. J. L. 452.

New York.—Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417; Phillips v. Belden, 2 Edw. Ch. (N. Y.) 1; Lockwood v. Thorne, 11 N. Y. 170, 42 Am. Dec. 81; Quincey v. White, 63 N. Y. 370; Sharkey v. Mansfield, 90 N. Y. 227,

Origin of the Rule.—This rule arose from the practice of merchants, and was originally adopted by courts of chancery¹ as applicable to merchants only.²

43 Am. Rep. 161; *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 1 Silv. (N. Y. Ct. App.) 368; *Knickerbocker v. Gould*, 115 N. Y. 533; *Case v. Hotchkiss*, 1 Abb. App. Dec. (N. Y.) 324; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Dows v. Durfee*, 10 Barb. (N. Y.) 213; *Powell v. Noye*, 23 Barb. (N. Y.) 184; *Towsley v. Denison*, 45 Barb. (N. Y.) 490; *Hutchinson v. Market Bank*, 48 Barb. (N. Y.) 302; *Avery v. Leach*, 9 Hun (N. Y.) 106; *Dickerson v. Scheuer* (Super. Ct.), 1 N. Y. Supp. 419; *Vernon v. Simmons* (C. Pl.), 7 N. Y. Supp. 649; *Burke v. Isham*, 3 Alb. L. J. 209. See *Lambert v. Craft*, 98 N. Y. 342; *Dakin v. Walton* (Supreme Ct.), 33 N. Y. Supp. 203; *Allen v. Stevens*, 1 N. Y. Leg. Obs. 359; *Bottum v. Moore*, 13 Daly (N. Y.) 464; *Campbell v. Campbell* (C. Pl.), 40 N. Y. St. Rep. 817.

North Carolina.—*Hawkins v. Long*, 74 N. Car. 781; *Gooch v. Vaughan*, 92 N. Car. 610. **Oregon.**—*Holmes v. Page*, 19 Oregon 232; *Fleischner v. Kubli*, 20 Oregon 328.

South Carolina.—*Pratt v. Weyman*, 1 McCord Eq. (S. Car.) 156; *Burden v. McElmoyle*, 1 Bailey Eq. (S. Car.) 375.

Tennessee.—*Craighead v. State Bank*, 7 Yerg. (Tenn.) 399; *Johnson v. McCampbell*, 11 Heisk. (Tenn.) 27.

Utah.—*Benites v. Hampton*, 3 Utah 369.

Vermont.—*Tharp v. Tharp*, 15 Vt. 105.

Virginia.—*Townes v. Birchett*, 12 Leigh (Va.) 173; *Mertens v. Nottebohm*, 4 Gratt. (Va.) 163; *Robertson v. Wright*, 17 Gratt. (Va.) 534.

Washington.—*Baxter v. Waite*, 2 Wash. Ter. 28.

West Virginia.—*Ruffner v. Hewitt*, 7 W. Va. 585.

Wisconsin.—*Engfer v. Roemer*, 71 Wis. 11.

Merely Rendering an Account does not make it an account stated. *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Aylard v. Rice*, 23 La. Ann. 75; *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262; *Guernsey v. Rexford*, 63 N. Y. 631; *Rowland v. Donovan*, 16 Mo. App. 554. Such an account rendered may be impeached or corrected within a reasonable time. *Champion v. Joslyn*, 44 N. Y. 653.

Bank and Depositor.—Where the pass-book of a depositor in a bank is written up and delivered to him and retained without objection it constitutes an account stated. *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96; *Peddicord v. Connard*, 85 Ill. 102; *Benton County Bank v. Walker*, 85 Iowa 728; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Shepard v. State Bank*, 15 Mo. 148; *Weisser v. Denison*, 10 N. Y. 68, 41 Am. Dec. 731; *Shipman v. State Bank*, 126 N. Y. 318; *Welsh v. German American Bank*, 73 N. Y. 424; *Hutchinson v. Market Bank*, 48 Barb. (N. Y.) 302; *August v. New York Fourth Nat. Bank* (Supreme Ct.), 15 N. Y. St. Rep. 956; *Schneider v. Irving Bank*, 1 Daly (N. Y.) 500; *Harley v. Eleventh Ward Bank*, 7 Daly (N. Y.) 476; *Craighead v. State Bank*, 7 Yerg. (Tenn.) 399.

In *Leather Manufacturers' Nat. Bank v.*

Morgan, 117 U. S. 96, Harlan, J., said: "The object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass-book to be written up and returned with the vouchers is, therefore, in effect a demand to know what the bank claims to be the state of his account; and the return of the book with the vouchers is the answer to that demand, and in effect imports a request by the bank that the depositor will in proper time examine the account so rendered and either sanction or repudiate it."

Broker and Customer.—A broker's pass-book balanced and returned to a customer periodically constitutes an account stated with him. *Marve v. Strouse*, 5 Fed. Rep. 485.

No Evidence of an Account Settled.—The failure to object to an account rendered for a considerable length of time is no evidence that the account has been settled. *Irvine v. Young*, 1 Sim. & Stu. 333; *Clancarty v. Latouche*, 1 Ball & B. 428; *Killam v. Preston*, 4 W. & S. (Pa.) 16.

1. The rule was early applied in the *United States* in cases at law. *Richardson Mfg. Co. v. Starks*, 4 Mason (U. S.) 296; *White v. Macon*, 3 Cranch (C. C.) 250; *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 536.

2. **Statement of Rule by the Early Authorities.**—The earliest statement of the rule is in *Sherman v. Sherman*, 2 Vern. 276, decided in 1692. In this case Lord Hutchins said: "Amongst merchants it is looked upon as an allowance of an account current if the merchant that receives it does not object against it in a second or third post."

The rule seems to have been next noticed in *Willis v. Jernegan*, 2 Atk. 251, a case before Lord Hardwicke in 1741, where, to an objection that an account was not a stated account because not signed, the court declared that signing was not essential, since, in the case of a merchant beyond sea and a merchant in England, transmitting an account from one to the other and keeping it without objection any length of time will make it an account stated.

In *Tickel v. Short*, 2 Ves. 239, decided in 1751, Lord Hardwicke said: "As between merchants in different countries, when an account sent by one to the other is kept without objection about two years, the rule with the court of chancery and with merchants is, that it is considered a stated account."

The statement of *Tickel v. Short*, 2 Ves. 239, is followed in *Freeland v. Heron*, 7 Cranch (U. S.) 147, and in *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569. These cases will be found discussed in *Anding v. Levy*, 57 Miss. 62, 34 Am. Rep. 435; and in *Townes v. Birchett*, 12 Leigh (Va.) 173, in the dissenting opinion of

In Some Jurisdictions Rule Confined to Merchants.—In some of the states of the Union, the courts have refused to extend the rule beyond controversies between merchants.¹

In Other Jurisdictions Rule Applied to Business Men Generally.—But in other states it has been said to be applicable between all classes of business men.²

Difference not Substantial, Ordinarily.—The difference is, however, in many cases, one of terms rather than of substance. The courts holding the rule as applicable generally, regard retention as in no case conclusive, to the extent that upon the admission or finding of the fact of retention for a sufficient length of time unexplained the account becomes, as a necessary consequence, a stated account—as under the chancery rule for merchants—but merely as evidence from which acquiescence may be inferred;³ while courts restricting the rule to the dealings of merchants allow the fact that an account was retained without objection in any case to go to the jury, but consider that the weight to be given to the fact depends upon the business, character, and education of the parties, and their local situation.⁴

Allen, J. See also Wittkowski v. Harris, 64 Fed. Rep. 720; White v. Campbell, 25 Mich. 463; Shepard v. State Bank, 15 Mo. 143; Brown v. Kimmel, 67 Mo. 430; Rich v. Eldredge, 42 N. H. 153.

1. **How Limited by Some Courts.**—McCord v. Manson, 17 Ill. App. 121; Mackin v. O'Brien, 33 Ill. App. 474; B. S. Greene Co. v. Smith, 52 Ill. App. 158; Anding v. Levy, 57 Miss. 51, 34 Am. Rep. 435; Rich v. Eldredge, 42 N. H. 153.

In other cases the rule is stated so as to embrace merchants only. See Brown v. Vanduyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Ruffner v. Hewitt, 7 W. Va. 585.

In Virginia the question seems open. Townes v. Birchett, 12 Leigh (Va.) 173; Robertson v. Wright, 17 Gratt. (Va.) 541.

2. **Regarded as Applicable to All Classes of Business Men.**—Shepard v. State Bank, 15 Mo. 143; Brown v. Kimmel, 67 Mo. 430; Fleischner v. Kubli, 20 Oregon 328. See Hawkins v. Long, 74 N. Car. 781; Johnson v. McCampbell, 11 Heisk. (Tenn.) 27.

In Brown v. Kimmel, 67 Mo. 430, it was said by Napton, J.: "The principle seems to have been extended to all cases where the relation of debtor and creditor exists."

Illustrations.—Illustrations of the classes of persons between whom the rule has been applied are: a vendor of stone, and a canal contractor, Towsley v. Denison, 45 Barb. (N. Y.) 490; a railroad company, and one boarding laborers employed by the company on its road, Powell v. Pacific R. Co., 65 Mo. 658. The rule is applicable to corporations, Bradley v. Richardson, 2 Blatchf. (U. S.) 343; and to accounts between principal and agent, McCord v. Manson, 17 Ill. App. 118; Philips v. Belden, 2 Edw. Ch. (N. Y.) 1. Thus it obtains between attorney and client, Case v. Hotchkiss, 1 Abb. App. Dec. (N. Y.) 324; stock broker and customer, Mansell v. Payne, 18 La. Ann. 124; commission broker and customer, Darby v. Lastrapes, 28 La. Ann. 605; Bruen v. Hone, 2 Barb. (N. Y.) 586; Dows v. Durfee, 10 Barb. (N. Y.) 213.

A pass-book kept by an employee, occasionally handed to the bookkeeper of the

employer, by whom all necessary entries are made therein, is an account stated between the parties. Burke v. Wolfe, 38 N. Y. Super. Ct. 263.

3. Brown v. Kimmel, 67 Mo. 430; Kent v. Highleyman, 17 Mo. App. 9; White v. Hampton, 10 Iowa 238; Johnson v. McCampbell, 11 Heisk. (Tenn.) 27. See Bertrand v. Taylor, 32 Ark. 470; Miller v. Bruns, 41 Ill. 293.

In Brown v. Kimmel, 67 Mo. 430, Napton, J., after admitting that the rule is applicable to commercial transactions generally, proceeds as follows: "The rule at best is a very flexible one, and undoubtedly depends in its application on the circumstances of each case, to be judged by the nature of the transaction, the habits of the business in which it occurs, and the course of trade. * * * There are cases in which this presumed acquiescence, arising from lapse of time and failure to object within a reasonable time, has been considered very slight evidence of the correctness of the account, Killam v. Preston, 4 W. & S. (Pa.) 16; Spangler v. Springer, 22 Pa. St. 454; and others, again, where the courts have regarded it as conclusive, except where fraud or mistake is clearly shown, Lockwood v. Thorne, 11 N. Y. 170, 42 Am. Dec. 81. It will readily be perceived, on an examination of the numerous cases reported on this subject, that they have been decided on the peculiar circumstances attending each case, and most generally in proceedings in equity. In no case has such implied admissions been held to be an estoppel, but simply a *prima facie* case throwing the burden of contradiction or explanation on the adverse party." See also Lockwood v. Thorne, 18 N. Y. 285; Quincy v. White, 63 N. Y. 370; Baxter v. Lockett (Wash. Ter., 1884), 6 Pac. Rep. 429.

4. McCord v. Manson, 17 Ill. App. 118; Mackin v. O'Brien, 33 Ill. App. 474; Anding v. Levy, 57 Miss. 51, 34 Am. Rep. 435; Rich v. Eldredge, 42 N. H. 153; Wittkowski v. Harris, 64 Fed. Rep. 712.

In Rich v. Eldredge, 42 N. H. 153, Bell, C.J., said: "The rule as thus stated does not apply in the cases of persons who are not merchants; but some presumption of assent

In *Pennsylvania* the decisions render the force of the rule somewhat doubtful.¹

Account Rendered by Post.—The rule applies equally in the case of accounts rendered by mail or other regular method of communication.² The fact that an account was so rendered being proven, the presumption is that it was received.³

Reasonable Time.—What is a reasonable time for the retention of an account depends upon the circumstances of the case and the usual course of business.⁴ The courts have not attempted to lay down any general test.⁵ When all the

to the correctness of an account rendered, from the silence and acquiescence of the party without making any objection after a reasonable opportunity has elapsed for its examination, and reasonable time for objecting, arises with more or less force in the case of all persons who can be properly regarded as men of business, considering the nature of their business and education, their local situation, and other circumstances, such presumptions applying with most force in cities and being slightly regarded in the country."

1. *Pennsylvania*.—The mere retention of an account without objection was said by the court, in *Killam v. Preston*, 4 W. & S. (Pa.) 14, to be some evidence, although at most very slight, that it was admitted to be correct. The same rule was declared, *citing* the former case, in *Spangler v. Springer*, 22 Pa. St. 454.

But in other cases a rule more in accordance with the weight of authority elsewhere is laid down. Thus, in *Sergeant v. Ewing*, 30 Pa. St. 75, it is said: "It is too well settled now to be doubted that accounts rendered to a party indebted, by his creditor, and not objected to in a reasonable time, are *prima facie* evidence against the party to whom rendered." The same rule is stated in *Verrier v. Guillou*, 97 Pa. St. 63, and *Phillips v. Tapper*, 2 Pa. St. 323.

In accord are *Porter v. Patterson*, 15 Pa. St. 229; *Smedley v. Williams*, 1 Pars. Eq. Cas. (Pa.) 359; *Payne v. Nicholas*, 2 Phila. (Pa.) 220; *Lodge v. Heron*, 3 Phila. (Pa.) 356; *Colket v. Ellis*, 1 W. N. C. (Pa.) 246; *Preston v. Killam*, 1 Am. L. J. (Pa.) 168. See also *Jones v. Dunn*, 3 W. & S. (Pa.) 109.

2. **Accounts Sent by Mail.**—*Bailey v. Bensley*, 87 Ill. 556; *Darby v. Lastrapes*, 28 La. Ann. 605; *McCormack v. Sawyer*, 104 Mo. 36. But see *Price v. Ramsay*, 2 Jebb & Sy. (Ireland) 338, where it is declared that the rule does not apply where the accounts are transmitted by post.

3. **Presumption as to Receipt of Accounts Mailed.**—*Darby v. Lastrapes*, 28 La. Ann. 605. In this case the evidence showed that accounts were rendered to the defendant regularly in the usual way, by the regular vehicles of communication, and it was held that in the absence of all evidence to rebut the presumption that they were received, and in view of the fact that they had not been objected to for four years, they became accounts stated.

4. *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 536; *Freeman v. Howell*, 4 La. Ann. 196, 50 Am. Dec. 561; *Darby v. Lastrapes*, 28 La. Ann. 605.

5. **No General Test as to Reasonable Time for Retaining Account.**—Lord Hutchins in *Sherman v. Sherman*, 2 Vern. 276, declared that merchants must object by the second or third post. Lord Hardwicke declared that after the retention of about two years, the rule would apply. *Tickel v. Short*, 2 Ves. 239. The same period (two years) is stated to be sufficient, in *Freeland v. Heron*, 7 Cranch (U. S.) 147, and in *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569. Mr. Justice Story (1 Story's Eq. Jur., § 526) states that the passage of several posts between merchants at home, or several opportunities of writing between foreign merchants, is sufficient. This is in agreement with *Lockwood v. Thorne*, 11 N. Y. 170, 42 Am. Dec. 81, and is quoted as a correct statement of the law in *Rich v. Eldredge*, 42 N. H. 159.

In *Talcott v. Chew*, 27 Fed. Rep. 273, an account rendered was held to be converted into an account stated, upon evidence that it was rendered by mail on September 20, the receipt acknowledged on September 22, and that it was retained without objection until October 20 of the same year.

In *Hawkins v. Long*, 74 N. Car. 781, three months' retention of an account without objection was held to convert it into a stated account.

In *Lott v. Mobile County*, 79 Ala. 69, the retention of a long account for thirty-five days was held not unreasonable under the circumstances of the case, and not sufficient to convert it into a stated account.

Objection Entertained by Party Rendering Account.—Where, after retaining an account for two months without objection, the defendants objected to certain items, and the plaintiffs who had rendered the account made no claim that it was too late to question its accuracy, but requested that the matter stand until a third person should return from Europe, it was held that the account could not be considered as an account stated. *Porter v. Lobach*, 2 Bosw. (N. Y.) 188.

Where a party rendered a bill for coal delivered, at so much per ton, and, upon the vendee returning it after several weeks with an objection as to the price of the coal, rendered another bill including additional items, and the second bill was retained for two or three weeks, it was held that the vendor was precluded by his own conduct from treating the first bill as admitted to be correct (although it seems that before rendering the second bill, he might have so treated the first), and the vendee was not precluded by his retention of the second bill for the time

facts are undisputed, the question is for the court, but where the evidence is contradictory, it should be submitted to the jury under proper instructions.¹

Form of Account Rendered.—Accounts rendered to which assent is claimed must show the amount claimed to be due,² and must in terms make the person to whom they are rendered a party or clearly make known the grounds upon which it is sought to hold him as a debtor.³ But the fact that accounts rendered begin with balances brought forward from other accounts previously rendered will not prevent their forming stated accounts;⁴ nor will the fact that they contained the letters "E. and O. E." ("errors and omissions excepted") have that effect.⁵ The account rendered need not be accompanied by vouchers.⁶

For Whom Inference Available—Statute of Limitations.—It has been held that the inference of acquiescence of retention cannot be set up by the party to whom an account was rendered, against the party rendering it, in order to avail himself of the statute of limitations.⁷ He cannot be allowed to make his own inaction the basis of his defense, but must show some word or act implying that he assented to the account.⁸

Retention not Conclusive.—The inference of acquiescence from the retention of an account is not conclusive, and its strength depends upon other facts

stated, from showing that the price therein charged for the coal was erroneous. *Dakin v. Walton* (Supreme Ct.), 33 N. Y. Supp. 203.

1. **When a Question for Court and when for the Jury.**—*Toland v. Sprague*, 12 Pet. (U. S.) 336; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Standard Oil Co. v. Van Etten*, 107 U. S. 334; *Talcott v. Chew*, 27 Fed. Rep. 273; *Hutchinson v. Market Bank*, 48 Barb. (N. Y.) 302; *Fleischner v. Kubli*, 20 Oregon 328.

The question of reasonable time for the retention of an account is one of fact. *Austin v. Ricker*, 61 N. H. 97.

2. **Must Show Amount Claimed.**—*Powell v. Pacific R. Co.*, 65 Mo. 658. See *Manion Blacksmith, etc., Co. v. Carreras*, 26 Mo. App. 229.

It seems that a writing in which most of the dates are omitted, and no dollar marks are placed before the figures, and no balance is struck or stated, and which has the appearance of a mere memorandum put together hastily for future consideration, does not constitute an account stated. *Coffee v. Williams* (Cal., 1894), 37 Pac. Rep. 504.

Statements showing but one side of the account, rendered periodically while the account is accruing, do not become accounts stated by retention without objection. *Thomlinson v. Earnshaw*, 14 Ill. App. 593.

Not Itemized.—It has been held that the account need not be itemized to become an account stated. *May v. Kloss*, 44 Mo. 300. But in *Williams v. Glenny*, 16 N. Y. 389, *Denio, C. J.*, said: "I do not think a claim for a round sum where the subject of the demand is one which would naturally consist of many items, is in the nature of an account." See also *Robbins v. Downey* (C. Pl.), 45 N. Y. St. Rep. 279.

3. *Benites v. Hampton*, 3 Utah 369.

4. **Containing Balances Brought Forward from Other Accounts Rendered.**—*Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; *Dows v. Durfee*, 10 Barb. (N. Y.) 213; *Fleischner v. Kubli*, 20 Oregon 328.

5. **Effect of Letters "E. and O. E." ("Errors and Omissions Excepted").**—*Johnson v. Curtis*, 3 Bro. C. C. 266; *Branger v. Chevalier*, 9 Cal. 353; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Kent v. Highleyman*, 28 Mo. App. 614; *Fleischner v. Kubli*, 20 Oregon 328. See *Elliott v. Walker*, 1 Rawle (Pa.) 126; *McKay v. Overton*, 65 Tex. 86. But compare *Ingraham v. Lukens*, 30 S. Car. 616.

Provision for Future Correction.—Where an account contains all the essentials of an account stated, it is not prevented from being such by the words: "This settlement is correct according to our understanding at this time, but should anything occur we are amicable to settle it." *Marmon v. Waller*, 53 Mo. App. 610.

6. **Account need not be with Vouchers.**—*Ogden v. Astor*, 4 Sandf. (N. Y.) 332.

7. *White v. Campbell*, 25 Mich. 463; *Paine v. Walker*, 26 Mich. 60.

8. In *White v. Campbell*, 25 Mich. 463, upon this point, *Graves, J.*, for the court, said: "Considering the origin and nature of the rule, I think a person who has chosen to hold an equivocal position in such a case is not at liberty to assert the rights which pertain to a definite and decided one. He ought not to be allowed at his election to turn his own considerate inaction and reticence into a positive admission in his own favor to serve as the very basis of his defense under the statute. When he claims the benefit of the statute on the ground that the account sued on has been converted into a stated one through his assent to it as rendered to him, it is not enough to substantiate the defense that there is no evidence as to whether he objected or not, nor is it sufficient to sustain such a defense to prove that upon and after the exhibition of the account he remained perfectly passive. He must go further. He must show some word or act marking or implying that he assented to the account."

besides the mere length of time during which the account has been retained.¹ Thus the fact of retention may be explained by showing that the party failing to object was absent from home, suffering from illness, or expected shortly to see the other party,² or that the parties had already come to a disagreement when the account was rendered.³

Admissions to Third Parties, Evidence.—Admissions made to third parties may be evidence to the jury of a previous accounting then admitted to have taken place, if they are unequivocal as to a specific amount acknowledged to be due, although such admissions cannot in themselves constitute a statement of account.⁴

(d) **Scope of Matters Covered.**—The strong presumption is, that the parties include in a settlement all the items each has against the other that are due, and clear and convincing proof is required to rebut this presumption.⁵ But it does

1. Presumption of Acquiescence not Conclusive—*Upon What its Force Depends.*—*Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Talcott v. Chew*, 27 Fed. Rep. 273; *Rice v. Schloss*, 90 Ala. 416; *Hyman v. Coen*, 22 Ill. App. 623; *Lockwood v. Thorne*, 18 N. Y. 285; *Quincey v. White*, 63 N. Y. 370; *Guernsey v. Rexford*, 63 N. Y. 631; *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161; *Benites v. Hampton*, 3 Utah 369.

Where a factor, after selling a consignment of goods and sending to his principal an account of the sales, which account was acquiesced in, was unable to collect from the purchaser, and thereupon resold the goods and sent his principal an account of the resale, no presumption of assent arises from retention or failure to object to the account of resale. *Cartwright v. Greene*, 47 Barb. (N. Y.) 9.

2. Retention—How Explainable.—*Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Talcott v. Chew*, 27 Fed. Rep. 273.

Account Barred by Statute of Limitations.—Retaining an account barred by the statute of limitations does not render it an account stated. *Bryan v. Ware*, 20 Ala. 687.

Account Rendered by Agent Retained in Ignorance of Facts.—Where an account is rendered to a principal by an agent, and retained by the former without objection, in ignorance of the circumstances, he is not afterwards precluded from disputing the account. *Folansbee v. Parker*, 70 Ill. 11.

3. Edwards v. Hoeffinghoff, 38 Fed. Rep. 645. See *Verrier v. Guillou*, 97 Pa. St. 63; *Engfer v. Roemer*, 71 Wis. 11.

Where goods not ordered by the defendant were sent to him by the plaintiff, but defendant refused to receive them from the plaintiff's agent, the failure of the defendant afterwards to return an account for such goods rendered to him by the plaintiff is not evidence of an account stated. *Cobb v. Arundell*, 26 Wis. 553. See also *Austin v. Wilson* (Super. Ct.), 11 N. Y. Supp. 565.

Where the plaintiffs, believing that they had performed their part of the contract by which they were to deliver a quantity of wool in good order at a stipulated price to the defendants, when in fact the wool had been sent in bad order, rendered an account of such shipment, the defendants did not make such an account a stated account by

the failure to object thereto. *Polhemus v. Heiman*, 50 Cal. 438.

Where the plaintiff, dissatisfied with the account rendered, requested a more detailed statement, and received something on account and was promised the detailed account asked for, the first account did not become a stated account because the plaintiff waited a long time for the detailed account promised. *Carpenter v. Nickerson*, 7 Daly (N. Y.) 424.

So where a party renders an account which is at variance with the positive contract of the parties as to the price of the articles included therein, its silent relation does not render it an account stated. *Kusterer Brewing Co. v. Friar*, 99 Mich. 190.

4. Wharton v. Cain, 50 Ala. 408; *Goodrich v. Coffin*, 83 Me. 324; *Bloomley v. Grinton*, 1 U. C. C. P. 309; *Green v. Burtch*, 1 U. C. C. P. 313. See *Curtis v. Flindall*, 3 U. C. Q. B. 323.

5. Presumption as to Matters Included in Settlement.—*Alabama.*—*Dowling v. Blackman*, 70 Ala. 303; *Mills v. Geron*, 22 Ala. 669.

Illinois.—*Bull v. Harris*, 31 Ill. 487; *Straubher v. Mohler*, 80 Ill. 21.

Indiana.—*Linville v. Delaware County*, 130 Ind. 210, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), title ACCOUNTS.

Iowa.—*Allen v. Bryson*, 67 Iowa 591, 56 Am. Rep. 358.

Kentucky.—*Lee v. Reed*, 4 Dana (Ky.) 109.

Louisiana.—*Taylor v. Simon*, 14 La. Ann. 350.

Michigan.—*Bourke v. James*, 4 Mich. 336.

Minnesota.—*Leighton v. Grant*, 20 Minn. 345.

Mississippi.—*Stebbins v. Niles*, 25 Miss. 267.

Missouri.—*Gibson v. Hanna*, 12 Mo. 165; *Pickel v. St. Louis Chamber of Commerce Assoc.*, 10 Mo. App. 191.

Nebraska.—*Keller v. Keller*, 18 Neb. 366.

New Hampshire.—*Ryan v. Rand*, 26 N. H. 15.

North Carolina.—*Farmer v. Barnes*, 3 Jones Eq. (N. Car.) 109; *Kennedy v. Williamson*, 5 Jones (N. Car.) 285.

New York.—*Smith v. Tucker*, 2 E. D. Smith (N. Y.) 193; *Dutcher v. Porter*, 63 Barb. (N. Y.) 15.

Tennessee.—*Robertson v. Branch*, 3 Sneed (Tenn.) 506.

not prevent a transaction being an account stated, that the parties limited its scope to some only of the items and matters involved in their mutual dealings.¹ Thus an account rendered by the plaintiff to the defendant may become a stated account by the admission of the latter that it is correct, although the defendant may have counter claims which are not deducted.²

c. ACCOUNT STATED, QUESTION OF LAW OR FACT.—Where all the facts are undisputed, the question whether they constitute an account stated is for the court; but where there is conflicting evidence the question should be submitted to the jury.³

Texas.—Blackman v. Green, 17 Tex. 322; Rowe v. Collier, 25 Tex. Supp. 252; Barclay v. Tarrant County, 53 Tex. 251.

Vermont.—Nichols v. Scott, 12 Vt. 47.

West Virginia.—McNeel v. Baker, 6 W. Va. 153.

Wisconsin.—Freeman v. Bolzell, 63 Wis. 378. See Copeland v. Clark, 2 Ala. 388; Treadwell v. Abrams, 15 How. Pr. (N. Y. Supreme Ct.) 219.

Such a settlement is no bar to a recovery for matters not included in the settlement though existing at the time. Normandin v. Gratton, 12 Oregon 505; Nichols v. Scott, 12 Vt. 47.

Agreement as to Claims not Embraced in Accounting.—Where, at the time of stating accounts, the parties entered into a written agreement to the effect that demands not included should not be barred by the settlement, it was held that the effect of the stipulation was to do away with the presumption of satisfaction arising from the settlement, leaving either party free to pursue against the other claims not embraced in the settlement by appropriate proceedings, but not conferring the right to set off such claims against the balance found due on the accounting. Troup v. Haight, Hopk. (N. Y.) 239. See Middletown Tp. v. Miles, 61 Pa. St. 290; Baxter v. Card, 59 Fed. Rep. 165.

Presumptively Confined to Dealings of Parties.—*Prima facie*, an account stated between two persons relates to matters between those persons alone. Sutphen v. Cushman, 35 Ill. 186.

1. **Effect of not Including all Transactions between the Parties.**—Perkins v. Hart, 11 Wheat. (U. S.) 256; Ware v. Manning, 86 Ala. 238; Waldron v. Evans, 1 Dakota 11; Graham v. Chubb, 39 Mich. 417; Clarke v. Kelsey, 41 Neb. 766; Normandin v. Gratton, 12 Oregon 505. See Dudley v. Geauga Iron Co., 13 Ohio St. 168.

Where the parties attempt to settle their accounts, and agree up to a certain point, and then, being unable to arrive at an agreement with regard to other items, give up further efforts to arrive at a settlement, the partial statement of accounts is not binding upon the parties as an account stated. Bouslog v. Garrett, 39 Ind. 338. See Tioga Mfg. Co. v. Stimson, 48 Mich. 213.

Showing Omission by Parol.—An account having been stated between the parties and signed by them, parol evidence to show other items of indebtedness cannot be received. Pickens v. Friend, 26 La. Ann. 585. See generally *infra*, this title, *Impeaching Settled or Stated Accounts*.

2. **Counter Claims not Deducted.**—Stuart v. Rowland, 1 Show. 215; Ware v. Manning, 86 Ala. 238; Filer v. Peebles, 8 N. H. 226; State v. Hartman Steel Co., 51 N. J. L. 446.

In State v. Hartman Steel Co., 51 N. J. L. 446, it appeared that defendant admitted W.'s bill, but claimed that W. owed him a larger amount. The court, by Reed, J., said: "It is now insisted by the counsel for the plaintiff that the defendant's claim was a set-off, and that the effect of his acknowledgment of the correctness of the plaintiff's bill is not defeated by coupling with such assent an assertion of the right to set off against it a counter claim. There is, undoubtedly, authority for the doctrine that where the correctness of the account presented is admitted it will amount to an account stated, although the person so acknowledging its accuracy insists that he has an offset. It was so ruled in the case of Filer v. Peebles, 8 N. H. 226, upon the authority of the case of Stuart v. Rowland, 1 Show. 215. In view of the character of an account stated which has grown up by judicial decisions, I think it is true that where parties get together and reduce an account to a balance by agreement, such balance may amount to an account stated, although there may exist some outstanding independent claim which one of the parties at the time signifies his intention to produce as an offset against the balance or as a demand in addition to the balance so agreed upon. But this can be so only when such unconsidered demand is an independent matter having no connection with or relation to the subject matter, the items of which are resolved into a sum certain by the agreement of the parties. The notion that there can be an account stated of certain items of the account while other items of the same account are questioned and left open for further adjustment or litigation, as was held in a case decided in the English Court of Common Pleas (Cressman v. Hawley, 2 Scott N. R. 569), cannot be supported upon any rational view of the nature of an account stated. It confounds every admission with an account stated."

3. **When Facts Undisputed, a Question for the Court—When Conflicting, for Jury.**—Bishop v. Chambre, 3 C. & P. 55, 14 E. C. L. 207; Davis v. Tiernan, 2 How. (Miss.) 786; Powell v. Pacific R. Co., 65 Mo. 658; Burger v. Burger, 34 Mo. App. 153; Lockwood v. Thorne, 11 N. Y. 170, 42 Am. Dec. 81; Stephens v. Ayers, 57 Hun (N. Y.) 51. See Rosenfield v. Fortier, 94 Mich. 30.

f. PROMISE—(1) *Generally—Express or Implied*.—A promise to pay the balance ascertained is a necessary ingredient of an account stated,¹ but this promise need not be express, for when the parties agree upon a balance due, or when their conduct justifies the inference that they have so agreed, the law implies a promise to pay such a balance.²

(2) *Future or Conditional Promise*.—The promise, if express, need not be to pay at once.³ Nor need it be absolute or unconditional; a promise to pay upon some future contingency is sufficient if coupled with an acknowledgment of a definite and subsisting indebtedness.⁴

(3) *Consideration*.—The consideration for the express or implied promise essential to an account stated is said to be the stating of the account.⁵

New Consideration Arising.—In case of mutual accounts, the demands on the two sides are set off against one another, and the consideration for the promise to pay the balance is the discharge on each side.⁶ A new and distinct

Whether a conversation between defendant and a witness is sufficient to entitle the plaintiff to recover upon an account stated, is a question of law and not of fact. *Bishop v. Chambre*, 3 C. & P. 55, 14 E. C. L. 207. But compare *Burritt v. Villeneuve*, 92 Mich. 282.

In all cases where there is controversy as to whether or not a full settlement has been made by the parties, the question whether or not such settlement was in fact made is one for the jury and not for the court. *Meyer v. Marshall*, 34 W. Va. 42; *Robbins v. Downey* (City Ct.), 41 N. Y. St. Rep. 95.

1. *Ward v. Farrelly*, 9 Mo. App. 370; *Kent v. Highleyman*, 17 Mo. App. 9; *State v. Hartman Steel Co.*, 51 N. J. L. 446. See *Stevens v. Tuller*, 4 Mich. 387.

2. *Promise to Pay Balance need not be Express*.—*Bouslog v. Garrett*, 39 Ind. 338; *James v. Fellowes*, 20 La. Ann. 116; *Chace v. Trafford*, 116 Mass. 529; *Buxton v. Edwards*, 134 Mass. 578; *Watkins v. Ford*, 69 Mich. 357; *McCall v. Nave*, 52 Miss. 494; *Koegel v. Givens*, 79 Mo. 77; *Kent v. Highleyman*, 17 Mo. App. 9; *Hanson v. Jones*, 20 Mo. App. 595; *Burger v. Burger*, 34 Mo. App. 153; *Claire v. Claire*, 10 Neb. 54; *Cochrane v. Allen*, 58 N. H. 250; *Jaques v. Hulit*, 16 N. J. L. 38; *State v. Hartman Steel Co.*, 51 N. J. L. 446; *Robbins v. Downey* (C. Pl.), 45 N. Y. St. Rep. 279; *Dyer v. Isham*, 4 Ohio Cir. Ct. Rep. 429; *Hea v. Jones*, 2 Allen (New Bruns.) 646.

Merely Striking Balance.—It is sufficient to support a count upon an account stated when it appears that as a result of an accounting between the parties in respect of debts or accounts a balance has been struck. *Gooding v. Hingston*, 20 Mich. 439.

Promise is Implied to Pay True Balance.—It is immaterial that a mistake was made in addition and subtraction in footing up the account, for it is the true balance by which the parties are bound, and upon which the law raises a promise to pay. *Jaques v. Hulit*, 16 N. J. L. 38.

Express Promise Supersedes Implied Promise.—An express promise to pay the balance supersedes the implied promise, and no action can be maintained upon the latter; the action must be upon the express promise and according to its terms. *Work v. Beach*, 53

Hun (N. Y.) 7, 35 N. Y. St. Rep. 22, 37 N. Y. St. Rep. 547. See *Hill v. Lott*, 13 U. C. Q. B. 465. But see *Coughlin v. Gutta Percha, etc.*, Co., 33 Ill. App. 71.

3. *Promise may be to Pay in Future*.—*Tuggle v. Minor*, 76 Cal. 96; *Baird v. Crank*, 98 Cal. 293; *Coughlin v. Gutta Percha, etc.*, Co., 33 Ill. App. 71; *Fergusson v. Kerr*, 5 U. C. Q. B. 261; *McQueen v. McQueen*, 9 U. C. Q. B. 536, 10 U. C. Q. B. 359; *Young v. Fluke*, 15 U. C. C. P. 360.

Where the defendant acknowledges the correctness of the account and promises payment to the plaintiff in fifteen days, the plaintiff is not compelled to wait for the expiration of that period before bringing suit. *Coughlin v. Gutta Percha, etc.*, Co., 33 Ill. App. 71.

4. *Promise to Pay may be Conditional*.—So, a promise to pay "if I am able," *McCormack v. Sawyer*, 104 Mo. 36; or, "when I can do so," *Work v. Beach*, 53 Hun (N. Y.) 7, is sufficient. See also *Russell v. Wells*, 5 U. C. Q. B., O. S. 725.

As to whether plaintiff must show fulfillment of the condition, see *Baird v. Crank*, 98 Cal. 293; *Work v. Beach*, 53 Hun (N. Y.) 7, (Supreme Ct.) 37 N. Y. St. Rep. 547, 35 N. Y. St. Rep. 22.

But a promise by a party who has destroyed a boat, to replace it or pay one hundred and fifty dollars, will not sustain an action upon an account stated. *Rutledge v. Moore*, 9 Mo. 537.

5. 1 *Stephen N. P.* 362; *Laycock v. Pickles*, 4 B. & S. 497, 116 E. C. L. 497, per *Wightman, J.*; *Holmes v. D'Camp*, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293.

But the statement of an account without more is not a new consideration, and so does not create an estoppel. *McKinster v. Hitchcock*, 19 Neb. 100; *Abbott's Trial Evidence*, 458.

6. *Mutual Accounts*.—*Laycock v. Pickles*, 4 B. & S. 497, 116 E. C. L. 497, per *Blackburn, J.*; *Callander v. Howard*, 10 C. B. 290, 70 E. C. L. 290; *Ashby v. James*, 11 M. & W. 542; *Brenan v. Cradley*, 16 W. R. 754; *Rand v. Wright*, 129 Mass. 50. See also *May v. King*, 12 Mod. 537, 1 *Ld. Raym.* 680; *Bump v. Phoenix*, 6 Hill (N. Y.) 308.

More Acknowledgment of Debt.—Where the

consideration also arises for the promise to pay, where, in arriving at the balance, there has been some concession made upon items in dispute between the parties, so that the balance is the result of a compromise.¹

g. NATURE AND EFFECT OF ACCOUNT STATED—(1) As a New Promise—
(a) Generally.—An account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties.² In accordance with this principle it has been seen that a recovery may be had upon an account stated although there could be no recovery on the original debt.³

(b) Original Items not Provable.—Since the account stated is a new promise, the items of which the original cause of action was composed cannot be inquired into.⁴

items are all on one side of the account, and the statement of the account consists merely in the acknowledging of the debt due, whether consisting of one or more items, it is evident that there is no alteration of the situation of the parties and no new consideration. *Ashby v. James*, 11 M. & W. 542.

1. Compromise.—*Wharton v. Anderson*, 28 Minn. 301; *Hanley v. Noyes*, 35 Minn. 174; *Kock v. Bonitz*, 4 Daly (N. Y.) 117; *Dunham v. Griswold*, 100 N. Y. 224.

2. St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank, 8 Colo. 70; *Chambers v. Fennemore*, 4 Harr. (Del.) 368; *Throop v. Sherwood*, 9 Ill. 92; *Chace v. Trafford*, 116 Mass. 529; *Christofferson v. Howe* (Minn., 1894), 58 N. W. Rep. 830; *McKinster v. Hitchcock*, 19 Neb. 100; *Smith v. Glenn Falls Ins. Co.*, 66 Barb. (N. Y.) 556; *Holmes v. D'Camp*, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293.

Right of Action Accrues Immediately.—The amount found due by an account stated is due from the time of settlement, and, in the absence of special agreement, the right of action for the balance accrues immediately. The time for payment may be extended by receiving promissory notes payable at a future date, but if the debtor promises to give such notes and fails to do so, the creditor may sue at once. *Kronenberger v. Binz*, 56 Mo. 121.

Illustrations of Effect of Account Stated being New Promise.—Since an account stated is a new promise, assumpsit will lie thereon, although only debt or covenant would have lain on the original debt. *Foster v. Allanson*, 2 T. R. 479; *Moravia v. Levy*, 2 T. R. 483, note.

Where one contracts a debt with a partnership, and one of the firm dies, and the debtor afterwards states an account with the surviving partner, the latter may recover upon an account stated without bringing his action as survivor and without alleging the death of his deceased copartner. *Holmes v. D'Camp*, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293.

If A, indebted to B, becomes indebted to B and C as partners, and states an account with B and C of both the debt due B and that due B and C, B and C may recover both claims in an action upon account stated. *Moor v. Hill*, Peake's Add. Cas. 10.

Assignability of Account Stated—Arkansas.—An account stated signed by the debtor is a written acknowledgment of a debt, and is an assignable instrument under the statutes of

Arkansas (Mansfield's Dig., § 473), and may be sued upon by the holder without making his assignee a party, though there is no written assignment upon it. *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541.

3. See supra, this title, *Previous Transactions*.

4. No Inquiry may be Had as to Original Items.—*Bartlett v. Emery*, 1 T. R. 42, note; *Gregory v. Bailey*, 4 Harr. (Del.) 256; *Irving v. Edrington*, 41 La. Ann. 671; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96; *Christofferson v. Howe* (Minn., 1894), 58 N. W. Rep. 830; *McCall v. Nave*, 52 Miss. 494; *May v. Kloss*, 44 Mo. 300; *McClelland v. West*, 70 Pa. St. 183; *Benites v. Hampton*, 3 Utah 369; *Lyne v. Gilliat*, 3 Call (Va.) 5; *Hawley v. Harran*, 79 Wis. 379.

Proof of Items Unnecessary.—A stated account may be proved by the person making it, at the request of the parties, and if the items were admitted by the parties no other evidence of them is necessary. Thus, where an account consisted, among other items, of judgments rendered by a justice of the peace, which were on a stating of the account admitted, there was no necessity for the production of other evidence of such judgments. *Walker v. Driver*, 7 Ala. 679.

The plaintiff may recover upon an account stated, on proof of the admission of a general balance, without proving the items of the account. *Gregory v. Bailey* 4 Harr. (Del.) 256; *Thompson v. Thompson*, 2 Harr. (Del.) 202; *Parkins v. Bennington*, 1 Harr. (Del.) 209; *Oakey v. Weil*, 7 La. Ann. 169; *Stevens v. Tuller*, 4 Mich. 387.

Evidence of Prior Transaction Inadmissible.—If a stated account is not impeached for fraud or mistake, evidence of transactions which took place before the settlement is inadmissible. *Martin v. Beckwith*, 4 Wis. 219.

When the Statement of Accounts is at Issue.—If the issue is whether the account is a stated one or not, evidence that the items of the account are false is admissible. *Coffee v. Williams* (Cal., 1894), 37 Pac. Rep. 504.

Prior Balances Incidentally Mentioned.—When an account sued on contained as one item a balance agreed on at a certain date, July 1, 1887, and the plaintiff was permitted to state that the defendant's books were balanced at the end of each month, and incidentally gave the different balances thus found for several months prior to July, 1887, no attempt being made to relate different items

(c) **Balance is Principal.**—The balance of an account stated is principal,¹ and bears interest from the date of the statement of the account.²

Money Secured by Deed not Recoverable upon an Account Stated.—An account stated is not so far a new cause of action that a previous deed or bond is merged in it; consequently, where a sum of money is secured by deed and a balance is struck ascertaining how much is due thereon, and the obligor admits the correctness of the account stated and promises payment, an action will not lie upon the accounting and promise, but the action must be brought on the security.³ But a sealed instrument executed upon the paper upon which a statement of accounts has been made, acknowledging the correctness and completeness of the accounts and containing an agreement as to the cancellation of securities, does not merge the mutual simple demands, nor prevent a recovery upon the account stated.⁴

constituting the July balance, but the plaintiff's testimony tending directly to support its correctness, it was held that although the prior balances need not be mentioned, the defendant could not contend that the plaintiff was permitted to enumerate specific items of which he had received no sufficient notice. *Ohio Creek Anthracite Coal Co. v. Hinds*, 15 Colo. 175.

Original Accounts as Evidence.—Original accounts may be introduced to prove previous dealings between the parties. *Albrecht v. Gies*, 33 Mich. 389; *Jacksonville, etc., R. Co. v. Warriner* (Fla., 1895), 16 So. Rep. 898.

Whether Suit can be Maintained on Original Items.—It has been held that even after an account stated, suit may be maintained upon the original items, and that it is not necessary to declare specifically upon the account stated. *Cross v. Moore*, 23 Vt. 482. And this seems the general doctrine where the account consists of items on one side only or of a single item which the debtor acknowledges and promises to pay. See *Milward v. Ingram*, 2 Mod. 43; *Ashby v. James*, 11 M. & W. 542; *Buxton v. Edwards*, 134 Mass. 578.

Where, however, the accounting is founded on mutual or cross demands which are set off against one another and a balance struck, the weight of authority seems to show that the settlement of accounts is a good plea to a suit upon the original items, although the authorities differ as to the proper form of the plea. *Milward v. Ingram*, 2 Mod. 43; *Callander v. Howard*, 10 C. B. 290, 70 E. C. L. 290; *Richardson v. Rickman*, stated 5 T. R. 517; *Smith v. Page*, 15 M. & W. 683; *Rand v. Wright*, 129 Mass. 50; *Melville v. Carpenter*, 11 U. C. Q. B. 132. See *Beattie v. Hatch*, 12 U. C. Q. B. 195; *Comyns Dig.*, "Pleader," 2 G. 11.

The reason of the cases allowing the plea when in proper form is, that where there are mutual demands the accounting is a payment by set-off of the mutual demands whence a new consideration arises for the promise to pay the balance. See *supra*, this title, *Consideration*.

Where the parties meet and liquidate a disputed claim by a compromise, the only remedy is upon the account so stated. *Hanley v. Noyes*, 35 Minn. 174.

Bringing an Action on Original Accounts Conclusively.—Where the party brings suit upon

an open account and relies exclusively upon it, thereby abandoning or repudiating the settlement, he cannot afterwards resort to the settlement to enlarge his recovery. *Rowell v. Marcy*, 47 Vt. 627. See *Northern Line Packet Co. v. Platt*, 22 Minn. 413.

1. Balance of Account Stated is Principal.—*Marye v. Strouse*, 6 Sawy. (U. S.) 204; *Orr v. Hopkins*, 3 N. Mex. 45; *Hawkins v. Long*, 74 N. Car. 781; *McClelland v. West*, 70 Pa. St. 183; *Hodge v. Manley*, 25 Vt. 210, 40 Am. Dec. 253.

2. Interest on Balance.—*Haight v. McVeagh*, 69 Ill. 624; *Coughlin v. Gutta Percha, etc., Co.*, 33 Ill. App. 71; *Case v. Hotchkiss*, 1 Abb. App. Dec. (N. Y.) 324; *McClelland v. West*, 70 Pa. St. 183.

This although, at the time of the settlement, interest was included in the balance. *McClelland v. West*, 70 Pa. St. 183.

3. Middleditch v. Ellis, 2 Exch. 623; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Gilson v. Stewart*, 7 Watts (Pa.) 100. Compare *Danforth v. Schoharie, etc.*, Turnpike Road, 12 Johns. (N. Y.) 227.

Blended with Other Matters.—But if other matters of account between the parties are blended with the settlement of that which arose out of specialty, a recovery may be had upon an account stated. *Foster v. Allanson*, 2 T. R. 479; *Gilson v. Stewart*, 7 Watts (Pa.) 100. But see *Moravia v. Levy*, 2 T. R. 483, note; *Jaques v. Hulit*, 16 N. J. L. 38, to the effect that a recovery may be had upon an account stated, although the balance, if any, arose upon a transaction respecting which the parties had entered into a covenant by deed.

Estoppel by Deed.—Where payments have been made upon the purchase money and certain lands conveyed to the defendant by a deed reciting the receipt of the consideration, the plaintiff cannot recover the balance of the consideration still due upon an account stated, because he is estopped by the receipt of the deed. *Sparling v. Savage*, 25 U. C. Q. B. 259. See *M'Allister v. Day*, 4 Allen (New Bruns.) 37.

4. Hoyt v. Wilkinson, 10 Pick. (Mass.) 31. In this case it was said *per curiam*: "We think there is nothing in the contract under seal which should prevent the plaintiffs from maintaining assumpsit. It is not a contract to pay money; it is a release of mutual de-

(2) *As Payment*.—When an account is stated involving mutual or cross demands, and the demands on one side are set off against the demands on the other, this is considered as an actual part payment.¹

(3) *How Far Conclusive*.—(a) *Generally*.—An account stated is not in general conclusive. Its effect is to establish *prima facie* the accuracy and correctness of the items,² and it seems that the strength of the presumption of correctness

remains, except those enumerated, which remain just as if there had been no release. A specialty is not substituted for the simple contract. The intestate and the defendant agree, that whenever this account shall be balanced, then and at such time all mortgages, bills of goods, or any other property, and notes of hand which either party holds against the other, shall be cancelled. This is precise. When the account shall be balanced, the securities shall be given up, but the instrument is not a contract to pay the balance; it does not merge the original demands. But another effect may be given to this contract. It is an admission of the existence of the demands enumerated; it is like any other acknowledgment of a debt. It supports the allegation of an *insimul computassent*.³

1. *Owens v. Denton*, 1 C. M. & R. 711; *Calander v. Howard*, 10 C. B. 290, 70 E. C. L. 290; *Ashby v. James*, 11 M. & W. 542; *Scholey v. Walton*, 12 M. & W. 510; *Livingstone v. Whiting*, 15 Q. B. 722, 69 E. C. L. 722; *Pott v. Clegg*, 16 M. & W. 321; *Benj. on Sales* (Bennett's ed.), § 711.

Such a mutual account has been said to be "equivalent to a payment by one, and a repayment by the other party." *Parke, B.*, in *Pott v. Clegg*, 16 M. & W. 327.

2. *Account Stated in General not Conclusive*.—*Perkins v. Hart*, 11 Wheat. (U. S.) 237; *St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank*, 8 Colo. 70; *Gruby v. Smith*, 13 Ill. App. 43; *Hodge v. Boynton*, 16 Ill. App. 524; *Bouslog v. Garrett*, 39 Ind. 338; *Clark v. Marbourg*, 33 Kan. 471; *Wharton v. Anderson*, 28 Minn. 301; *McKinster v. Hitchcock*, 19 Neb. 100; *Vanderveer v. Statesir*, 39 N. J. L. 593; *Barker v. Hoff*, 52 How. Pr. (N. Y. Supreme Ct.) 382; *Stenton v. Jerome*, 54 N. Y. 480; *Clark v. Mechanics' Nat. Bank*, 11 Daly (N. Y.) 239; *Sampson v. Freedman*, 1 Silv. (N. Y. Ct. App.) 128; *Tennent v. Dewees*, 7 Pa. St. 305; *Carrere v. Whaley*, 17 S. Car. 595; *McKay v. Overton*, 65 Tex. 82; *Jefferson County v. Jones*, 19 Wis. 51.

How Far Conclusive on Person Rendering Account.—In *Schettler v. Smith*, 34 N. Y. Super. Ct. 17, it is sought to distinguish between the binding effect of an account stated on the party rendering it and on the party assenting thereto. In this case *Monell, J.*, said: "The principle upon which an account stated is made conclusive against the party who receives it is, that if he omits to object he is deemed to acquiesce in its correctness, and hence he is estopped from afterwards questioning its accuracy. But the principle does not apply to the party who furnishes the account. As to him, it contains certain admissions, and is generally regarded to be cor-

rect, but it is, nevertheless, open to explanation for any omissions or mistakes."

Guarantor of Balance of Account.—One who guarantees the payment of a balance due upon an account stated is as much bound as if he were a party to the account, and no greater latitude will be allowed to him in opening the account than if he were an original party. *Bullock v. Boyd*, 2 Edw. Ch. (N. Y.) 293, 1 Hoffm. Ch. (N. Y.) 294.

When Account Stated Conclusive—Estoppel.—An account stated may, however, become conclusive upon the principle of estoppel *in pais* when some act has been done or forbore in consequence thereof and in reliance thereon, which would put the party claiming the benefit of it in a worse condition than if no accounting had been had. So, also, where, in case of mutual compromise, it is founded upon a new and independent consideration. *Wharton v. Anderson*, 28 Minn. 301. See also *Houston, etc., R. Co. v. Snelling*, 59 Tex. 116; *Comer v. Mackey*, 73 Hun 236.

Where a balance was struck by parties in respect to certain matters, after a hearing before referees had commenced, and was reported to the referees and entered by them on their minutes, it was held conclusive as an admission in the cause and could not be opened. *Clark v. Fairchild*, 22 Wend. (N. Y.) 576. In this case the court by *Cowen, J.*, said: "The defendant's counsel relies on the law as unquestionable, that you may always prove a mistake in accounting. And I do not deny that this is correct as a general rule. But there are whole classes of exceptions; and the settlement in question plainly belongs to one of them. * * * The settlement was conclusive. In the first place it was conclusive as being an admission in the course of the cause for the purpose of superseding all proof in respect to the general account, and every part of it. Being made with that intent, its conclusive effect is perfectly well established by authority, even though it had been made out of court. *Davies v. Burton*, 4 C. & P. 166, 19 E. C. L. 324; *Phil. Ev.* 278; 8th Lond. ed. 1 *Phil. Ev.* 105, from 7th Lond. ed., and notes by *Cowen and Hill*, note 192, p. 200. *A fortiori*, where the admission is in open court. The reason, says *Phillips*, is that a court of justice has been induced, on the faith of the admission, to adopt a particular course of proceeding. *Phil. Ev.* 8th ed. *ut supra*, *et vide* 7th ed. and notes, *ut supra*. The same books at the same places present and illustrate an additional ground, viz.: 'Where other persons have, on the faith of the representations, been led to alter their condition.' 8th ed. *ut supra*. Here the plaintiff had of course been led to avoid all preparation by way of proof

depends to some extent upon the circumstances of the case.¹

(b) *Notes for Balance Settled.*—Where upon an accounting a party has given a note for the balance, or has allowed as an item of the account a note previously given by him, he cannot afterwards set up as a defense to the note matters fully within his knowledge at the time of the settlement,² nor, in the absence of fraud or mistake, claim a partial failure of consideration,³ and the burden is upon him to establish such fraud or mistake.⁴

on the point settled, but now proposed to be contested. It would have looked much fairer, though I do not admit the offer would then have been admissible, at least to have given the plaintiff previous notice of the new move. Again, the settlement was in the nature of a contract in consideration of the plaintiff's assignment; yet it was claimed to throw it open without even relinquishing this."

The mere fact of the knowledge, at the time of the rendering of the account, of the truth of the matters which are set up to defeat an account, does not create an estoppel. *Baxter v. Waite*, 2 Wash. Ter. 238.

Waiving Statement of Accounts.—Although parties may have agreed upon a statement of accounts, they may by mutual consent waive this, and agree to a reopening and restatement thereof. *Horn v. St. Paul, etc., R. Co.*, 37 Minn. 375.

Agreement Reserving Items.—After a settlement of an account between the parties and the giving of a note for the balance, it was agreed that if a certain shipment of lumber yet to arrive, which was included in the settlement, should prove deficient, the defendant should make good the deficiency. It was held that this agreement, being subsequent to the settlement, although at the same interview, was not merged in it, and the lumber proving deficient a recovery was had against the defendant upon the agreement. *Smith v. Holland*, 61 Barb. (N. Y.) 333. See *supra*, *Scope of Matters Covered*.

Written Acknowledgment of Correctness.—A written acknowledgment of the correctness of an account will not estop the signer as against parties having notice of defects. *Higham v. Harris*, 108 Ind. 246.

Agreement as to Conclusiveness of Account Stated.—Where, upon the statement of an account, the parties entered into an agreement reciting that errors of undercharging or overcharging might be discovered in the account, and stipulated that errors might be corrected notwithstanding a bond and mortgage given for the balance found due, it was held that the parties thereby determined for themselves the extent of their own rights in re-examining the account; that their rights rested entirely upon this agreement; that no charges or credits could be introduced, but that errors might be shown and items varied in amount or totally rejected. *Troup v. Haight*, *Hopk. Ch.* (N. Y.) 239.

Formerly Considered Conclusive.—Formerly, the stating of an account was considered so deliberate an act as to be conclusive of the

matters included therein. *Trueman v. Hurst*, 1 T. R. 40; *Gruby v. Smith*, 13 Ill. App. 43.

1. Strength of Presumption as to Correctness Dependent upon Circumstances.—In *Lockwood v. Thorne*, 18 N. Y. 285, *Selden, J.*, said: "An account stated or settled is a mere admission that the amount is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without other proof, and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. The force of the admission, and the strength of the evidence which will be necessary to overcome it, will depend upon the circumstances of the case. An account stated which is shown to have been examined by both parties and expressly assented to or signed by them would afford stronger evidence of the correctness of its items than if it merely appeared that it had been delivered to the party or sent by mail and acquiesced in for a sufficient length of time to entitle it to be considered as an account stated." See also *infra*, this title, *Opening Settled or Stated Account*.

2. Party Setting up Matters within his Knowledge at Time of Settlement.—Where a master has credited his employee with full time, and settled upon that basis, he cannot afterwards in an action upon a promissory note given to the employee, such note having been an item in the settlement of accounts which took place several months after the note was given, claim a set-off on the ground of loss of time on the part of the employee by reason of sickness. *Prussing Vinegar Co. v. Meyer*, 26 Ill. App. 564.

Where a debtor by a promissory note and his creditor meet and have an accounting and settlement, and the debtor gives a new note for the balance due in renewal of the old note, the debtor cannot, when sued upon the renewed note, without alleging fraud or mistake, set up in a plea of payment alleged credits which ought to have been made on the first note, and which the facts show must have been entirely within his knowledge at the time of the settlement. *Turner v. Pearson*, 93 Ga. 515.

3. Claiming Partial Failure of Consideration in Absence of Fraud or Mistake.—*Leighton v. Grant*, 20 Minn. 345; *Pickel v. St. Louis Chamber of Commerce Assoc.*, 80 Mo. 65; *Robinson v. Dawson*, 2 W. N. C. (Pa.) 185.

4. Burden to Show Fraud or Mistake.—*Abraham v. McCurdy* (Miss., 1894), 15 So. Rep. 137.

III. IMPEACHING SETTLED OR STATED ACCOUNTS—1. Generally.—Settled or stated accounts cannot be opened or corrected except on the ground of fraud, mistake, omission, accident, or undue advantage,¹ and the burden is on the

1. *England.*—Pritt v. Clay, 6 Beav. 503.
United States.—Chappedelaine v. Dechenaux, 4 Cranch (U. S.) 306; Perkins v. Hart, 11 Wheat. (U. S.) 237; Brydie v. Miller, 1 Brock. (U. S.) 147; Baker v. Biddle, 1 Baldw. (U. S.) 394; Edler v. Clark, 51 Fed. Rep. 117; U. S. v. Kuhn, 4 Cranch (C. C.) 401.

Alabama.—Langdon v. Roane, 6 Ala. 518, 41 Am. Dec. 60; Walker v. Driver, 7 Ala. 679; Rembert v. Brown, 17 Ala. 667; Cowan v. Jones, 27 Ala. 317; Dickinson v. Lewis, 34 Ala. 638; Paulling v. Creagh, 54 Ala. 646; Sloan v. Guice, 77 Ala. 394; Ware v. Manning, 86 Ala. 238.

Arkansas.—Roberts v. Totten, 13 Ark. 609; Moscovitz v. Lemp (Ark., 1890), 12 S. W. Rep. 781.

California.—Cross v. Sacramento Sav. Bank, 66 Cal. 462.

Colorado.—St. Louis Lager Beer Bottling Co. v. Colorado Nat. Bank, 8 Colo. 70.

Connecticut.—Nichols v. Alsop, 6 Conn. 476; Goodwin v. U. S. Annuity, etc., Ins. Co., 24 Conn. 591.

Florida.—La Trobe v. Hayward, 13 Fla. 190.

Georgia.—Turner v. Pearson, 93 Ga. 515; Threlkeld v. Dobbins, 45 Ga. 144.

Illinois.—Town v. Wood, 37 Ill. 512; Eddie v. Eddie, 61 Ill. 134; Gage v. Parmelee, 87 Ill. 329; Brandon v. Brown, 106 Ill. 519.

Indiana.—Linville v. Delaware County, 130 Ind. 210, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), tit. ACCOUNTS.

Kansas.—Clark v. Marbourg, 33 Kan. 471.

Kentucky.—Lee v. Reed, 4 Dana (Ky.) 109; Waggoner v. Minter, 7 J. J. Marsh. (Ky.) 173.

Maryland.—Stiles v. Brown, 1 Gill (Md.) 350; Gover v. Hall, 3 Har. & J. (Md.) 43; Brown v. Rowles, 21 Md. 11; Bourke v. James, 4 Mich. 336.

Michigan.—Linn v. Gilman, 46 Mich. 628; Stevens v. Saginaw, 62 Mich. 579.

Minnesota.—Wharton v. Anderson, 28 Minn. 301; Mower County v. Smith, 22 Minn. 97.

Mississippi.—Peteet v. Crawford, 51 Miss. 43.

Missouri.—Moore v. McCullough, 8 Mo. 401; Carroll v. Paul, 16 Mo. 226; Kronenberger v. Binz, 56 Mo. 121; Pickel v. St. Louis Chamber of Commerce Assoc., 10 Mo. App. 191; Kent v. Highleyman, 28 Mo. App. 614; Marmon v. Waller, 53 Mo. App. 610.

Nebraska.—Kennedy v. Goodman, 14 Neb. 585; Keller v. Keller, 18 Neb. 366; Savage v. Aiken, 21 Neb. 605.

New Jersey.—Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Vanderveer v. Statesir, 39 N. J. L. 593.

New York.—Manhattan Co. v. Lydig, 4 Johns. (N. Y.) 377; Bullock v. Boyd, 2 Edw. Ch. (N. Y.) 293; Kock v. Bonitz, 4 Daly (N. Y.) 117; Ract v. Duviard-Dime (Supreme Ct.), 4 N. Y. Supp. 156; Bucklin v. Chapin, 1 Lans. (N. Y.) 443; Philips v. Belden, 2 Edw. Ch. (N. Y.) 1; Frankel v. Wathen,

58 Hun (N. Y.) 543; Liscomb v. Agate, 67 Hun (N. Y.) 388; Ratty v. Person, 52 N. Y. Super. Ct. 329; Burke v. Isham, 3 Alb. L. J. 209; Welsh v. German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Harley v. Eleventh Ward Bank, 76 N. Y. 618; Carpenter v. Kent, 101 N. Y. 591; Samson v. Freedman, 102 N. Y. 699; Manchester Paper Co. v. Moore, 104 N. Y. 680; Conville v. Shook (N. Y., 1895), 39 N. E. Rep. 405; Hutchinson v. Market Bank, 48 Barb. (N. Y.) 302; Gilchrist v. Brooklyn Grocers' Mfg. Assoc., 66 Barb. (N. Y.) 390; New York First Nat. Bank v. Continental Nat. Bank, 17 N. Y. Wkly. Dig. 42.

North Carolina.—Costin v. Baxter, 6 Ired. Eq. (N. Car.) 197; Hawkins v. Long, 74 N. Car. 781; Hall v. Guilford County, 74 N. Car. 130; Gooch v. Vaughan, 92 N. Car. 610.

Ohio.—Fowler v. Piatt, Wright (Ohio) 206.

Oregon.—Fleischner v. Kubli, 20 Oregon 328; Kinney v. Heatley, 13 Oregon 35.

Pennsylvania.—Kirkpatrick v. Turnbull, Add. (Pa.) 260; Miller v. Probst, Add. (Pa.) 344; Shirk's Appeal, 3 Brewst. (Pa.) 119; Shillingford v. Good, 95 Pa. St. 25.

South Carolina.—Porter v. Cain, 1 McMull. Eq. (S. Car.) 81; Pratt v. Weyman, 1 McCord Eq. (S. Car.) 156; Murrel v. Murrel, 2 Strobb. Eq. (S. Car.) 148; Fraser v. Hext, 2 Strobb. Eq. (S. Car.) 250.

Tennessee.—Love v. White, 4 Hayw. (Tenn.) 210; Bankhead v. Alloway, 6 Coldw. (Tenn.) 56; Raht v. Union Consol. Min. Co., 5 Lea (Tenn.) 22.

Texas.—Horan v. Long, 11 Tex. 230; Neyland v. Neyland, 19 Tex. 427; Houston, etc., R. Co. v. Snelling, 59 Tex. 116.

Virginia.—Freeland v. Cocke, 3 Munf. (Va.) 352; Neff v. Wooding, 83 Va. 432.

West Virginia.—Ruffner v. Hewitt, 7 W. Va. 585.

Wisconsin.—Martin v. Beckwith, 4 Wis. 219; Orr v. LeClair, 55 Wis. 93; Hill v. Durand, 58 Wis. 160; Case v. Fish, 58 Wis. 56; Hawley v. Harran, 79 Wis. 379; Freeman v. Bolzell, 63 Wis. 378.

As to what amounts to fraud and mistake see, generally, the titles FRAUD; MISTAKE.

Accounts between Partners.—Accounts stated or settled between partners are conclusive except so far as they impeach for fraud or mistake. Gage v. Parmelee, 87 Ill. 329; Silver v. St. Louis, etc., R. Co., 5 Mo. App. 381, 72 Mo. 194; Wahl v. Barnum, 116 N. Y. 87. See the title PARTNERSHIP.

What Accounts Equity will Open or Correct.—Equity will not open a stated account for fraud or error unless it be such an account as falls within the equity jurisdiction. Dickenson v. Lewis, 34 Ala. 634. See the title ACCOUNTS AND ACCOUNTING, 1 Encyc. Pl. & Pr. 93.

Negligence in Detecting Errors.—A stated account will not be opened where it appears that the plaintiff has been guilty of negli-

party seeking to impeach the account to prove the existence of such fraud, mistake, or the like.¹ Even where any of these elements are shown to exist, the

gence in detecting the errors which he claims to have discovered. *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Paulling v. Creagh*, 54 Ala. 646; *Philips v. Belden*, 2 Edw. Ch. (N. Y.) 1.

Where the Mistakes are the Direct Result of Gross Negligence on the part of the party making them, equity may refuse to relieve against them. *Cannon v. Sanford*, 20 Mo. App. 590.

An Omission to Read an Account rendered does not qualify its effect. *Weber v. Bridgman* (Supreme Ct.), 12 N. Y. St. Rep. 622.

Accounts Settled with Knowledge.—Where an account is settled by the parties and there is no unfairness, and all the facts are equally known to both parties, their adjustment is final and conclusive. *Hager v. Thomson*, 1 Black (U. S.) 80; *Gage v. Parmelee*, 87 Ill. 329; *Harrison v. Dewey*, 46 Mich. 173; *Rutty v. Person*, 52 N. Y. Super. Ct. 329. See *Harley v. Eleventh Ward Bank*, 7 Daly (N. Y.) 476; *Kilpatrick v. Henson*, 81 Ala. 464.

Fraud.—But a party is not prevented by silent assent to an account rendered, from setting up fraud to defeat an action thereon, though the fraud was known to him when the account was rendered. *Baxter v. Waite*, 2 Wash. Ter. 237.

Mistake in Law.—A mistake in law is no ground for opening a settled account. *Scioto County v. Gherky*, *Wright* (Ohio) 493. But otherwise, apparently, where the mistake is mutual. See *Daniell v. Sinclair*, L. R. 6 App. Cas. 181; see also the title **MISTAKE**.

Simple Accounts.—Where an account, consisting of few and simple items concerning which the complainant had knowledge or means of easily obtaining it, is stated and settled by giving independent security, the courts are much more reluctant to disturb it than where the account is complicated and consists of many items as to which the complainant had not such particular means of knowledge; especially where complaint of errors and mistakes is made for the first time after the death of one of the parties. *Paulling v. Creagh*, 54 Ala. 646.

Effect of Release.—If a settled account is impeached, a release executed in consideration of the settlement of the account will not prevent the courts from looking into the settlement; and the release in such a case is entitled to no greater force in a court of equity than the settlement upon which it was given. *Kelsey v. Hobby*, 16 Pet. (U. S.) 269; *Pritt v. Clay*, 6 Beav. 503. See *Gist v. Gist*, *Bailey Eq.* (S. Car.) 346.

Effect of Receipt.—A receipt given upon a settlement of accounts will not render the settlement conclusive. *Fuller v. Crittenden*, 9 Conn. 406, 23 Am. Dec. 364; *McDougall v. Cooper*, 31 N. Y. 498; *McCrae v. Hollis*, 4 Desaus. (S. Car.) 122; *Ingraham v. Lukens*, 30 S. Car. 616 (mem.). See the title **RECEIPTS**.

Agreement not to Open after Certain Period.—Even when there is an agreement that closed accounts shall not be opened after the death of the parties, or after the expiration of a

fixed period, a court of equity will open and restate the accounts for fraud or great danger of fraud; and in case of such an agreement, even after the death of the parties, or after a long acquiescence, a settlement will be opened and an account restated for an important error. *Peteet v. Crawford*, 51 Miss. 43.

Express Promise to Pay Balance.—Where there is an actual express promise to pay a balance of accounts, founded upon a good consideration, and the only issue is the existence of the promise, it cannot be avoided except by proof that the promise was induced by fraud. *Hawley v. Harran*, 79 Wis. 379.

Fraud or Error Discovered after Action Brought.—Fraud or error discovered after action brought may be set up to defeat an action upon a stated account. *Baxter v. Waite*, 2 Wash. Ter. 240.

1. Burden on the Party Seeking to Impeach.—*England.*—*Pit v. Cholmondeley*, 2 Ves. 565; *Brownell v. Brownell*, 2 Bro. C. C. 62.

United States.—*Stearns v. Page*, 7 How. (U. S.) 819.

Alabama.—*Paulling v. Creagh*, 54 Ala. 646.

Arkansas.—*Roberts v. Totten*, 13 Ark. 609.

Illinois.—*Sutphen v. Cushman*, 35 Ill. 186.

Louisiana.—*Green v. Glasscock*, 9 Rob. (La.) 119; *Waters v. Briscoe*, 11 La. Ann. 639.

Maine.—*Goodrich v. Coffin*, 83 Me. 324.

Maryland.—*Gover v. Hall*, 3 Har. & J. (Md.) 43.

Mississippi.—*Coopwood v. Bolton*, 26 Miss. 212.

Missouri.—*Pickel v. St. Louis Chamber of Commerce Assoc.*, 10 Mo. App. 191; *Nolte v. Leary*, 14 Mo. App. 598.

New Jersey.—*Somers v. Cresse* (N. J., 1888), 13 Atl. Rep. 23.

New York.—*White v. Whiting*, 8 Daly (N. Y.) 23; *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Philips v. Belden*, 2 Edw. Ch. (N. Y.) 1; *Kock v. Bonitz*, 4 Daly (N. Y.) 117; *Herrick v. Ames*, 1 Keyes (N. Y.) 190; *McIntyre v. Warren*, 3 Abb. App. Dec. (N. Y.) 99; *Chubbuck v. Vernam*, 42 N. Y. 432; *Farmers' L. & T. Co. v. Mann*, 4 Robt. (N. Y.) 356.

North Carolina.—*Gooch v. Vaughan*, 92 N. Car. 610.

Vermont.—*Hodges v. Hosford*, 17 Vt. 615.

Wisconsin.—*Hoyt v. McLaughlin*, 52 Wis. 280.

In *Chappedelaine v. Dechenaux*, 4 Cranch (U. S.) 306, *Marshall, C. J.*, said: "The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist."

It requires evidence to overcome an account stated, and where the balance has been paid it requires stronger evidence to overcome the settlement than where the balance is simply agreed upon. *Nolte v. Leary*, 14 Mo. App. 598. See 1 Story Eq. Jur., § 527.

courts will not readily set aside a settlement or statement presumably made by the parties after an examination of the state of their mutual dealings, and where the error or other taint does not affect the whole transaction, they will merely allow the account to be surcharged or falsified.¹

Impeaching Accounts Collaterally.—The right to show that settled or stated accounts are vitiated by fraud or mistake is not confined to a party bringing an action to set aside such statement or settlement.²

1. Settled Accounts Opened with Reluctance.—1 Story Eq. Jur., § 523; *Roberts v. Totten*, 13 Ark. 609.

In *Vernon v. Vawdry*, 2 Atk. 119, it is declared that "if there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify. But if it is apparent to the court that there has been fraud and imposition, the decree must be that the whole shall be opened, notwithstanding it was a stated account of twenty-three years' standing, and he who was guilty of the fraud was dead."

It is not the policy of the law to disturb settlements made with deliberation and with tolerable fairness, more particularly where they have been acquiesced in for two or three years. *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Smith v. Marvin*, 27 N. Y. 137; *Fraser v. Hext*, 2 Strobb. Eq. (S. Car.) 250; *Pratt v. Weyman*, 1 McCord Eq. (S. Car.) 156; *Love v. White*, 4 Hayw. (Tenn.) 210.

The rule applies with greater force where vouchers have been delivered up and destroyed. *Brown v. Rowles*, 21 Md. 21, 1 Story Eq. Jur., § 527.

In *Chappelaine v. Dechenaux*, 4 Cranch (U. S.) 306, Marshall, C. J., said: "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent."

Immaterial Error in Approximate Settlement.—Where the parties settle mutual accounts, not upon an exact investigation of all the items involved, but by adopting a basis which they believe in the main just, and intending to waive and release all accidental errors which might occur, such a settlement will be binding and cannot be attacked by showing a merely trivial error. *Hamilton Woollen Co. v. Goodrich*, 6 Allen (Mass.) 191. See *Farnam v. Brooks*, 9 Pick. (Mass.) 212.

Accounts Settled and Security Given for Balance.—In *Drew v. Power*, 1 Sch. & Lef. 182, Lord Redesdale said: "One rule material to observe in all cases of account is, that where there has been a settlement of accounts, either the account has been signed or a security taken from the footing of the account, a court of equity does not open that transaction and throw it again between the parties

as if no such transaction had happened, unless the evidence which is produced (and that evidence founded on charges in the bill) shows the whole transaction to be so iniquitous that it ought not to be brought forward at all to affect the parties so to be bound. If the account impeached be a settled account, or if an instrument has been executed upon the foot of it, the court expects that the errors should be specified in a bill and proved as specified; otherwise it would be easy to overthrow the fairest account and those settled in the most solemn manner, when there happens to be any complication in their nature." See also *Paulling v. Creagh*, 54 Ala. 546; *Pickel v. St. Louis Chamber of Commerce Assoc.*, 10 Mo. App. 191.

Settled Accounts.—In cases of settled accounts, a court of equity will not generally open the account, but will, at most, only grant leave to surcharge and falsify, except in cases of apparent fraud. 1 Story Eq. Jur., § 527; *White v. Walker*, 5 Fla. 478; *Phillips v. Belden*, 2 Edw. Ch. (N. Y.) 1; *Smith v. Ogilvie* (Supreme Ct.), 5 N. Y. Supp. 382; *Ruffner v. Hewitt*, 7 W. Va. 585; *Miller v. Chippewa County*, 58 Wis. 630.

2. Upon an inquiry to ascertain damages as on default, a written agreement by the defendant made after suit brought, to the effect that the amount owing was a sum stated or offered in evidence, it was held that the defendant should have been allowed to show that he signed the paper under a mistake of facts in consequence of plaintiff's misrepresentations at a time when he could not personally inspect the property to which the agreement related, because it was overflowed with water, and that he gave notice as soon as the facts were discovered. *Dewey v. Sloan*, 11 Cinc. L. Bull. (Ohio) 102.

But it has been held that where the plaintiff brings assumpsit for work and labor, and the defendant pleads a stated account and payment thereon, the plaintiff cannot show mistakes in the settlement, and that this can only be done in an action brought to surcharge and falsify. *Roach v. Gilmer*, 3 Utah 389.

Recovery for Items not Included.—An item omitted in an account may be afterwards recovered. *Pavie v. Noyrel*, 5 Martin N. S. (La.) 92.

An action at law will lie to recover a balance found to be due upon the correction of a mistake in the settlement, and such a recovery may be had on showing a mistake apparent upon the face of the account. *Hanson v. Jones*, 20 Mo. App. 595; *Jaques v. Hulit*, 16 N. J. L. 38; *Anthony v. Day*, 52 How. Pr. (N. Y. Supreme Ct.) 35.

2. Opening Accounts De Novo.—In cases of gross fraud, imposition, mistake, or error, tainting the entire transaction, courts will allow the whole account to be opened and examined.¹ Accounts stated between parties standing in confidential relations toward one another, as attorney and client, will be opened more readily than others.²

3. Surcharging and Falsifying—*a.* **MEANING OF THE TERMS.**—The terms surcharge and falsify have a peculiar meaning in the vocabulary of courts of equity. To surcharge an account, is to show omitted credits; to falsify an account, is to show wrong chargés.³ The effect of surcharging and falsifying

Memoranda of accounts between the parties used as a basis in the settlement are admissible in evidence as a part of the *res gesta* in such a case. *Madigan v. DeGraff*, 17 Minn. 52.

1. Gross Fraud, Imposition, Mistake, or Error.—*Vernon v. Vawdry*, 2 Atk. 119; *Vaughan v. Lloyd*, cited in 5 Ves. Jr. 48; *Piddock v. Brown*, 3 P. Wms. 288; *Wharton v. May*, 5 Ves. Jr. 48; *Paulling v. Creagh*, 54 Ala. 646; *Branger v. Chevalier*, 9 Cal. 353; *Goodwin v. U. S. Annuity, etc., Ins. Co.*, 24 Conn. 591; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Bullock v. Boyd*, *Hoffm. Ch.* (N. Y.) 294; *Rehill v. McTague*, 114 Pa. St. 82, 60 Am. Rep. 341; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56.

Fraud is a sufficient ground to open the whole account even after the lapse of considerable time. *Liscomb v. Agate*, 67 Hun (N. Y.) 388.

Upon a bill for an accounting, it appeared that the plaintiffs were the assignees in bankruptcy of a merchant, who, having been, for a long period, in straitened circumstances, borrowed money at various times from the defendant, a confidential clerk, giving bonds and securities for the sums borrowed, and agreeing to pay usurious interest. The defendant relied upon the fact that at various times during ten years the parties had come to settlements of their accounts, the merchant giving his bonds and securities for the balances found due upon the settlements. It was held that there being evidence not only of errors and omissions in the settlements, but of oppression and imposition and undue advantage taken of the merchant's necessities, the settlements should be entirely set aside and the whole accounts opened *de novo*. *Barrow v. Rhineland*, 1 Johns. Ch. (N. Y.) 550.

Fraud not Essential—Substantial Errors.—In *Williamson v. Barbour*, 9 Ch. Div. 529, Sir George Jessel, M.R., said: "The practice of the court of chancery, which, of course, is the practice of the high court of justice, is to consider whether the accounts shall be opened, or whether there shall be liberty to surcharge and falsify; that is, if the court is of opinion that errors of sufficient number and sufficient magnitude are shown, it is not, as I understand it, necessary that the errors shown should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake, or errors caused by fraud, the court has a right to open the accounts." See also *Clarke v. Tipping*, 9 Beav. 284.

2. Parties in Fiduciary Relations.—*Matthews v. Wallwyn*, 4 Ves. Jr. 125; *Newman v. Payne*, 2 Ves. Jr. 199; *Vaughan v. Lloyd*, cited in 5 Ves. Jr. 48; *Kennedy v. Broun*, 13 C. B. N. S. 677, 106 E. C. L. 677; *Williamson v. Barbour*, 9 Ch. Div. 529; *Gruby v. Smith*, 13 Ill. App. 43; *Hopkinson v. Jones*, 28 Ill. App. 409; *Sanchez v. Dickinson* (Supreme Ct.), 47 N. Y. St. Rep. 203. See *Raht v. Union Consol. Min. Co.*, 5 Lea (Tenn.) 23.

A court of equity will interfere and open a stated account between a principal and his agent, where it is shown that the principal is of a weak and confiding mind, and that undue advantage has been taken of him. *Rembert v. Brown*, 17 Ala. 667.

In *Paulling v. Creagh*, 54 Ala. 656, *Brickell, C.J.*, said: "If a confidential relation exists between the parties, or the one is, by force of circumstances, peculiarly subject to imposition from the other, the transactions will be closely and jealously scrutinized, and settlements had between them whereby a balance is found due from the one reposing confidence, or subject to imposition, will be more readily opened than a settlement between those dealing with each other at arm's-length."

Ignorance of Party Acquiescing in Accounts Rendered.—Where an employer, intrusted by a servant with money to invest, rendered accounts to him from time to time, and one of such accounts rendered showed the balance due to the servant to be in notes of a certain bank, while another account, previously rendered, showing the same balance, did not state it to be in any particular currency, and it was proved that the servant could not read handwriting or sign his name, it was held that the servant would not be bound by the statement of the particular kind of currency in the account whose contents he did not know. *Guenivet v. Perret*, 18 La. Ann. 356.

3. "Surcharge" and "Falsify" Defined.—*Pit v. Cholmondeley*, 2 Ves. 565; *Perkins v. Hart*, 11 Wheat. (U. S.) 256; 1 Story Eq. Jr., § 525. See *Rehill v. McTague*, 114 Pa. St. 82, 60 Am. Rep. 341.

In *Pit v. Cholmondeley*, 2 Ves. 565, *Lord Hardwicke* said: "The *onus probandi* is always on the party having that liberty [to surcharge and falsify]; for the court takes it as a stated account and establishes it. But if any of the parties can show an omission for which credit ought to be, that is a surcharge; or if anything is inserted that is a wrong charge, he is at liberty to show it, and that is falsification; but that must be by proof on his side."

leaves an account in full force, except as to errors or omissions shown.¹

b. WHEN LEAVE GRANTED.—When the fraud, omission, or mistake is not shown to taint the whole settlement, courts will give leave to surcharge and falsify as to the mistaken items only.² When leave has been granted to one party to surcharge and falsify, the other party will be allowed to set right mistakes in the account.³

4. Lapse of Time.—Courts will not open settlements of accounts which have been acquiesced in for a great length of time,⁴ except in the case of actual

Judge Story (1 Story Eq. Jur., § 525) defined the terms as follows: "In the sense of courts of equity, these words are used in contradistinction to each other. A surcharge is appropriately applied to the balance of the whole account, and supposes credits to be omitted which ought to be allowed; a falsification applies to some item in the debits, and supposes that the item is wholly false, or in some part erroneous." This definition has been approvingly quoted in *Bruen v. Hone*, 2 Barb. (N. Y.) 592; *Bailey v. Westcott*, 6 Phila. (Pa.) 525. See also *Philips v. Belden*, 2 Edw. Ch. (N. Y.) 23.

1. Effect of Surcharging and Falsifying.—*Pit v. Cholmondeley*, 2 Ves. 565; *Perkins v. Hart*, 11 Wheat. (U. S.) 237; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Bailey v. Westcott*, 6 Phila. (Pa.) 525; *Rehill v. McTague*, 114 Pa. St. 82, 60 Am. Rep. 341.

Party may not Go beyond Items of Bill.—A party seeking to surcharge and falsify cannot go beyond the items and charges of his bill. *Drew v. Power*, 1 Sch. & Lef. 182; *Gover v. Hall*, 3 Har. & J. (Md.) 43; *Branger v. Chevalier*, 9 Cal. 353; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587, 17 Johns. (N. Y.) 511.

Consenting to Surcharge and Falsify.—When a party consents to a reference to surcharge and falsify, he waives a right to impeach the whole account on the ground of undue influence. *Compton v. Culberson*, 2 Dev. Eq. (N. Car.) 93.

2. When the Fraud, Mistake, etc., do not Taint Entire Settlement.—1 Story Eq. Jur., § 523; *Gover v. Hall*, 3 Har. & J. (Md.) 43; *Bullock v. Boyd*, 1 Hoffm. Ch. (N. Y.) 294; *Carpenter v. Kent*, 101 N. Y. 591; *Berdell v. Allen* (Super. Ct.), 3 N. Y. St. Rep. 523; *Ract v. Duviard-Dime* (Supreme Ct.), 21 N. Y. St. Rep. 736; *Rehill v. McTague*, 114 Pa. St. 82, 60 Am. Rep. 341; *Bankhead v. Alloway*, 6 Coldw. (Tenn.) 56. See *Boston*, etc., R. Corp. v. *Nashua*, etc., R. Corp., 157 Mass. 258.

Where it is not necessary to open the whole account upon proof of unfairness, fraud, or mistake, the mistake must be corrected and the rights of the parties readjusted as to such mistake. *Conville v. Shook* (N. Y., 1895), 39 N. E. Rep. 405.

After a settlement of accounts, if it be shown that a considerable sum which should have been charged to the defendant has been omitted from the account by mistake, an action will lie to correct the mistake and recover the item omitted. *McDougall v. Cooper*, 31 N. Y. 498.

Error must be Clearly Shown.—If a party

can show an error in a settled account, leave will be granted to surcharge and falsify, but the error must be clearly shown. *Redman v. Green*, 3 Ired. Eq. (N. Car.) 54. See *Mayo v. Bosson*, 6 Ohio 525.

Mere Error.—Mere errors, if not fraudulent, where the other party had ample opportunities to examine the account-books of the party making them, and of making full inquiries of the latter, are no ground for opening an account. *Farnam v. Brooks*, 9 Pick. (Mass.) 212. So a clerical error, not affecting the result of a settlement, is no ground for opening an account. *Wilson v. Frisbie*, 57 Ga. 269.

Mistake as to One Item.—A mistake as to one item does not authorize the opening of the accounts as to other items. *Carpenter v. Kent*, 101 N. Y. 591.

Trifling Errors in Calculation of Interest.—Where an account between parties is stated, and, upon the basis of this statement, certain real estate is transferred at a fixed value in part discharge of the balance, an account will not, in the absence of fraud, be opened for trifling errors in the calculation of interest. *Maguire v. Filley*, 9 Mo. App. 581.

Accounts before a Surrogate.—Where a party seeks to open a settled account before a surrogate, he should show such a case as would have enabled him to file a bill in equity to surcharge and falsify. *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430.

3. Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; *Higginson v. Fabre*, 3 Desaus. (S. Car.) 89; *Floyd v. Priester*, 8 Rich. Eq. (S. Car.) 248.

4. England.—*Brownell v. Brownell*, 2 Bro. C. C. 62; *Bright v. Legerton*, 6 Jur. N. S. 1179.

United States.—*Stearns v. Page*, 7 How. (U. S.) 819; *Dexter v. Arnold*, 2 Sumn. (U. S.) 108; *Badger v. Badger*, 2 Cliff. (U. S.) 137; *Baker v. Biddle*, 1 Baldw. (U. S.) 394.

Illinois.—*Conlin v. Carter*, 93 Ill. 536.

Maryland.—*Hutchins v. Hope*, 7 Gill (Md.) 119; *Gover v. Hall*, 3 Har. & J. (Md.) 43.

Massachusetts.—*Farnam v. Brooks*, 9 Pick. (Mass.) 212.

Mississippi.—*Dickerson v. Thomas*, 67 Miss. 777.

New York.—*Atwater v. Fowler*, 1 Edw. Ch. (N. Y.) 417; *Dakin v. Demming*, 6 Paige (N. Y.) 95; *Augsbury v. Flower*, 68 N. Y. 619; *Kingsley v. Melcher*, 56 Hun (N. Y.) 547.

South Carolina.—*Weatherford v. Tate*, 2 Strobb. Eq. (S. Car.) 27.

Tennessee.—*Love v. White*, 4 Hayw. (Tenn.) 210; *Gray v. Washington*, *Cooke* (Tenn.) 321.

fraud;¹ yet after the lapse of considerable time, if the transaction is not barred by the statute of limitations and errors of sufficient importance exist, leave may be granted to surcharge and falsify.² Even when tainted with fraud an account stated becomes conclusive, unless it is attacked within a certain period after the discovery of the fraud.³

5. Usury.—When some of the items of an account stated are shown to be usurious, the account may be opened and corrected as to them.⁴ And receiv-

Virginia.—*Winston v. Street*, 2 Fatt. & H. (Pa.) 169; *Irvine v. Robertson*, 3 Rand. (Va.) 549.

See also the titles LACHES; LIMITATIONS OF ACTIONS, as to how far courts of equity will act upon, or upon the analogy of, the statute of limitations.

Not Claiming within Prescribed Period against Testator's Estate.—The plaintiffs sued defendants for a balance found due to their testator upon a settlement of accounts with him, and the defendants pleaded mistake in the settlement, upon which the balance should have been in their favor. It was held that they were concluded by the settlement and by not having made their claim against the testator's estate within the period limited by the court of probate for exhibiting claims. *Cogswell v. Whittlesey*, 1 Root (Conn.) 384.

Account Formerly Adjudicated.—Where no leave was given to surcharge and falsify an account which had been settled almost twenty years, and there were circumstances which showed that the account had already been adjudicated in a former suit by the court, the master was right in refusing to open the account. *Dexter v. Arnold*, 2 Sumn. (U. S.) 108.

Evidence Destroyed.—Courts are especially reluctant to open long-settled accounts after the evidence of the original transaction has been destroyed. *George v. Johnson*, 45 N. H. 456; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Emmons v. Stahlnecker*, 11 Pa. St. 366.

Not Opened after Six Years.—Generally, courts of equity will not open an account after six years of delay unaccounted for. *Tatam v. Williams*, 3 Hare 347; *George v. Johnson*, 45 N. H. 456; *Randel v. Ely*, 3 Brewst. (Pa.) 270.

Doubtful or even Probable Testimony is not sufficient to open a long-settled account in the absence of any proof of fraud or undue influence. *Wilde v. Jenkins*, 4 Paige (N. Y.) 481; *Lockwood v. Thorne*, 11 N. Y. 170, 42 Am. Dec. 81. Upon this principle the testimony of a witness as to admissions made by the defendant many years after the settlement and many years before the trial, no memoranda of the admissions having been made at the time, and the testimony not being corroborated or complete, is insufficient to open an account. *McIntyre v. Warren*, 3 Abb. App. Dec. (N. Y.) 99.

1. Actual Fraud.—*Michoud v. Girod*, 4 How. (U. S.) 503; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Kingsley v. Melcher*, 56 Hun (N. Y.) 547; *Pratt v. Weyman*, 1 McCord Eq. (S. Car.) 156.

Where there has been fraud committed by

either party, a court of equity will open and re-examine accounts after any length of time, even though the person committing the fraud is dead. *Pratt v. Weyman*, 1 McCord Eq. (S. Car.) 156.

Probate Accounts.—Where probate accounts which have been settled for a long time are sought to be opened as being fraudulent, fraud must be specifically alleged and proved. *Badger v. Badger*, 2 Cliff. (U. S.) 137.

2. Farnam v. Brooks, 9 Pick. (Mass.) 212; *Peteet v. Crawford*, 51 Miss. 43; *Ogden v. Astor*, 4 Sandf. (N. Y.) 311.

In *Farnam v. Brooks*, 9 Pick. (Mass.) 212, it appeared that a series of complicated accounts extending over many years had been settled by general composition. The defendant offered a statement showing a balance in favor of the plaintiff's intestate of \$64,688.72 as a basis for a settlement. The predecessors of the plaintiff in the office of administrators agreed to receive \$60,000 in discharge of the whole account, and gave a receipt in full. After nearly twenty years had elapsed a re-examination of the defendant's books showed that the balance due the plaintiff should have been \$68,276. It was held that although the whole account would not be opened, yet, there being a promise on the part of the defendant which took the case out of the statute of limitations, leave would be granted to surcharge and falsify; and that though the settlement had been made on the basis of a compromise, the presumption was violent that, had the true balance been known, the sum offered would have been thought too large a deduction for the contingencies supposed to exist.

Where a great length of time has elapsed, for instance, twenty years, proof of error must be clear and satisfactory to induce the court to grant leave to surcharge and falsify. *Bruce v. Child*, 4 Hawks. (N. Car.) 372.

3. Stearns v. Page, 7 How. (U. S.) 819; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Kingsley v. Melcher*, 56 Hun (N. Y.) 547.

A stated account will not be opened on the ground of fraud after six years, unless the fraud was not discovered, and with reasonable diligence could not have been discovered, within that time. Frauds apparent upon the face of the account, or which a slight examination would have disclosed, are not sufficient. *Ogden v. Astor*, 4 Sandf. (N. Y.) 311.

4. Opening Accounts Stated for Usury.—*Bosanquett v. Dashwood*, Cas. temp. Tal. 38; *Lee v. Reed*, 4 Dana (Ky.) 109; *Bullock v. Boyd*, Hoffm. Ch. (N. Y.) 294; *Bullard v. Raynor*, 30 N. Y. 197.

In *Bosanquett v. Dashwood*, Cas. temp.

ing, without objection, an account containing usurious items will not estop the debtor from pleading the usury when sued thereon.¹

Tal. 38, a bill for an accounting was filed by the assignees of a bankrupt charging the defendant's testator with lending on usury upon agreements made and repeated from 1710 to 1724. The defendant insisted that the money having been long paid and the account settled by the consent of all the parties, the transaction could not be inquired into at that time; but it being a case of apparent extortion and oppression, the accounts were ordered opened and the demand reduced to moneys lent with lawful interest.

Where accounts are rendered and the balance paid in cash, they cannot be opened to inquire into the correctness of charges for commissions and interest as usurious. *Flower v. Millaudon*, 19 La. 185.

Compound Interest.—An agreement to pay future compound interest cannot be enforced as an account stated. *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

1. *Hickman's Succession*, 13 La. Ann. 364.

But it has been held that an acquiescence for two years in such items would estop a party from objection. *Smith v. Marvin*, 27 N. Y. 137; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80. See *Millaudon v. Arnaud*, 4 La. 544; *Poydras v. Turgeau*, 14 La. 34.

Where a party has submitted accounts to arbitration and has acquiesced in and performed the award, his representatives cannot open the settlement on account of usury in the accounts. *Radcliffe v. Wightman*, 1 McCord Eq. (S. Car.) 408.

ACCRETION.

By ARCHIBALD R. WATSON.

I. DEFINITION, 467.

II. PROPERTY IN ACCRETIONS, 469.

1. *In General*, 469.
2. *Accretion and Reliction Compared*, 473.
3. *Reappearance of Land after Submergence*, 474.
4. *Doctrine of Accretion and Reliction as Applicable to Islands*, 475.

III. RATIONALE OF RULE AS TO PROPERTY IN ACCRETIONS, 476.

1. *In General*, 476.
2. *De Minimis non Curat Lex*, 476.
3. *Considerations of Public Policy*, 476.
4. *As a Compensation for Risk of Loss*, 476.

IV. APPORTIONMENT OF ACCRETIONS, 477.

1. *In General*, 477.
2. *Islands in Private Waters*, 478.

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCESSION*; *BOUNDARIES*; *ISLANDS*; *LAKES AND PONDS*; *WATERCOURSES*.

I DEFINITION.—Accretion is the process of gradual and imperceptible increase of land, caused by the deposit of earth, sand, or sediment thereon by contiguous waters.¹

Accretions, or alluvion, is the result of this process.²

1. See Bouvier Law Dict.; Rapalje & Lawrence Law Dict.; 3 Washburn on Real Property (5th ed.) 451.

In *Rex v. Yarborough*, 3 B. & C. 91, accretion was defined as an increase by imperceptible degrees.

Accretion as a Source of Title.—“Accretion is more properly an incident to real property than a mode of acquisition of lands. But inasmuch as new property is thus acquired, the means or manner of acquisition may fitly be called a title.” Tiedeman on Real Property, § 685.

In Anderson's Law Dict., accretion is also regarded as a source of title, being defined as “a mode of acquiring title to realty, where portions of the soil are added by gradual deposit, through the operation of natural causes, to that already in possession of the owner.”

2. Alluvion Defined.—According to Angell on Watercourses (7th ed.), p. 49, “the rule of the common law, on the subject of alluvion, is the same as that of the civil law. The latter is thus translated: ‘That ground which a river has added to your estate by alluvion

becomes your own, by the law of nations; and that is said to be alluvion which is added so gradually that no one can judge how much is added in each moment of time.’”

Alluvion, by the common law, is an addition made to land by the washing of the sea, a navigable river, or other stream, where the increase is so gradual in its progress that it cannot be perceived how much is added in any moment of time. Woolrych on the Law of Waters, marg. p. 29 *et seq.*; Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 24; Lovington v. St. Clair County, 64 Ill. 56, 16 Am. Rep. 517.

Of What Alluvion may Consist.—Alluvion comprises “the soil and various other things, such as marine and water plants, seaweeds, etc., which are washed up on the shore of a stream by the action of the water.” Tiedeman on Real Property, § 686.

Seaweed.—In *Emans v. Turnbull*, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427, it was held that seaweed thrown up by the sea may be considered as one of those marine increases arising by slow degrees; and, according to the rule of the common law, it belongs to

Navigability of the Waters.—Some writers have included in their definition of accretion, or alluvion, the adjectives "navigable" or "unnavigable" as modifying waters; but in considering this subject it is ordinarily a matter of indifference whether the contiguous waters be navigable or unnavigable, fresh or salt, or whether affected by tide or current;¹ the only instance in which the navigability of the body of water is of importance being when the existence or non-existence of this characteristic determines the ownership of the shores, bed, or bottom.²

Result of Combination of Natural and Artificial Causes.—It has been stated also by some writers that the accretions or alluvion must be the result of the natural action of the water.³ But the better view seems to be that the addition by way of alluvion may as well be due to the combined influence of natural and artificial causes.⁴

the owner of the soil. "The rule is," said Kent, C.J., delivering the opinion of the court, "that if the marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable, it belongs to the sovereign. 2 B. Com. 261; Hargrave Law Tracts 28."

Rights of Littoral Proprietor.—Though a littoral proprietor whose right terminates at ordinary high-water mark may be entitled to all accretions and land reclaimed from the sea by natural or artificial means, he has no exclusive right to seaweed cast upon the beach adjoining his premises, below ordinary high-water mark; he has, however, a right to seaweed cast by extraordinary floods, above ordinary high-water mark. *Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 46. See also *Church v. Meeker*, 34 Conn. 432; *Anthony v. Gifford*, 2 Allen (Mass.) 550; *Phillips v. Rhodes*, 7 Met. (Mass.) 323.

The Code Napoleon declares that accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other stream are denominated alluvion. Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one permitting floats or not. Book 2, Of Property, etc., § 566.

Such was the law of *France* before the Code Napoleon was adopted. 4 *Nouv. Dic. de Brillon* 278; *Morgan v. Livingston*, 6 *Martin* (La.) 19.

Spain.—And such was the law of *Spain*. Part III., tit. xxviii., law 26.

1. **Immaterial whether the Water Navigable or not.**—*Rex v. Yarborough*, 3 B. & C. 91; *Nebraska v. Iowa*, 143 U. S. 359; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 25; *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516; *Denny v. Cotton*, 3 Tex. Civ. App. 634, quoting 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 137; *Angell on Tide-Waters* (1st ed.) 68; 3 *Kent Com.* (13th ed.) 428. It is immaterial whether the land which is increased by alluvion is upon navigable or unnavigable waters. The rule is the same in either case, the accretion belonging to the owner of the land. *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 25. In

this case the court said: "But whether a river or other water is or is not navigable can in no way affect the right of the riparian proprietor to such additions as may be made by alluvion or dereliction. His right rests altogether on another and different foundation. The facts to be ascertained are the local situation of the land and the mode by which the increase has been added. If the land is contiguous to the water, and the addition is made slowly and insensibly, his title to such addition is complete."

In *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516, it is said: "The navigability of the stream, as the term is used at common law, has no applicability to this case. If commerce had been obstructed, or the public easement interrupted, or a question were to arise as to the ownership of the bed of the stream, then the inquiry as to whether the stream was navigable or not, in the sense of the common law, might be pertinent."

In *England* the same rule is applied to gradual accretion on the shores of fresh waters as in the case of such accretion on the shores of the sea. *Rex v. Yarborough*, 1 D. & C. 178.

2. *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516. And see *Barney v. Keokuk*, 94 U. S. 324.

The Beds of Navigable Streams, as well as the Sea, belong to the public; and if, by the instantaneous casting up of sand or other substances, the water is thrown back and an addition made to the land, the sovereign may claim the accession, upon the ground that it was but a part of the bed of the river or sea, of which he was the proprietor. 3 *Kent Com.* (13th ed.) 428.

3. See *Anderson Law Dict.*; *Bouvier Law Dict.*; *Rapalje & Lawrence Law Dict.*

4. **Natural and Artificial Causes.**—*Halsey v. McCormick*, 18 N. Y. 150. In *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516, it is held that whether the deposit of alluvion is due to natural causes or to the artificial works of others, and without regard to the question whether the stream is navigable or not, the proprietor of lands bounded by a stream of water is entitled to all the accretions thereto. And see *Atty.-Gen. v. Chambers*, 5 Jur., N. S. 745, 4 De G. & J. 55.

Meaning of Terms "Imperceptible," "Imperceptible Increase."—There has been some conflict of authority as to the exact meaning of the word "imperceptible" which appears in the definition. It has generally been held that "imperceptible increase" means an increase so gradual and insensible that its progress in any one moment of time may not be perceived.¹ On the other hand, the position has been taken, less reasonably, that "imperceptible" refers to the final result of the accretion.²

II. PROPERTY IN ACCRETIONS—1. In General.—The general rule is that to the owner of the shore belong these imperceptible and insensible additions to his land,³ which, when once acquired, become in all respects a part of the origi-

In *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Rep. 476, the public landing had been enlarged and extended into the river by both natural and artificial means; and the court held that the accretions attached to and formed a part of the landing. See also *New Orleans v. U. S.*, 10 Pet. (U. S.) 662.

Pier Wrongfully Built.—In *Steers v. Brooklyn*, 101 N. Y. 51, the plaintiff owned a lot in the city of B., bounded westerly by the water-line of the East river and southerly by the central line of a certain street, the latter terminating at the said water-line. A wharf had been built in front of his lot, extending to the centre of the said street, which the plaintiff maintained, receiving wharfage from all persons using the same. The city authorities built a pier at the end of the street, shutting off from the water that portion of the plaintiff's wharf in front of his half of the street. In an action to recover damages, it was held that the erection of the pier was a wrongful interference with the plaintiff's rights, and rendered the city liable; that the pier was to be considered as an accretion, and so much of it as was in front of his half of the street became his property. Compare 3 Washburn on Real Property (5th ed.) 451, citing *Austin v. Rutland R. Co.*, 45 Vt. 215.

But where an Embankment has been Built by a railroad company in the bed of a river, in the lawful construction of its tracks, below the ordinary high-water mark, and the high-water mark is changed thereby to the further side of the embankment, the riparian owner cannot claim title to the last-named high-water mark on the ground that his boundary has been changed by accretion. *Chicago, etc., R. Co. v. Porter*, 72 Iowa 426.

Labor of Trespasser Enuring to Benefit of Riparian Proprietor.—In *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267, the court seems to be of opinion, though admitting that a consideration of the question is uncalled for by the circumstances of the case, that if accretion is made impracticable, without the authority of government, by the labor of some third person excluding the water from its former limits, such third person, being a trespasser, should not be allowed to derive a profit, but he who has been deprived of an increase of the soil by natural causes should be allowed to enjoy what art has reclaimed.

1. Consideration of the Word "Imperceptible."—*Rex v. Yarborough*, 3 B. & C. 91; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 24;

Thornton, J., in Lovington v. St. Clair County, 64 Ill. 56, 16 Am. Rep. 517; *Woolrych on Law of Waters*, marg. p. 29 *et seq.* This would appear to be the correct construction.

2. In Atty.-Gen. v. Chambers, 4 De G. & J. 71, it was held that the law of gradual accretion should be limited to the cases where the boundaries of the seashore and the adjoining land are so indistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing, and where it is evident, at the end of a long period, that there has been a considerable gain from the shore, while yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. The court concludes with this question: "But where the limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case?"

3. Rule as to Property in Accretions—England.—*Buckleuch v. Metropolitan Board of Works*, L. R. 5 H. L. Cas. 418, 2 Moak Rep. 448; *Seebkrist v. East India Co.*, 10 Moo. P. C. C. 140, 6 Moore Ind. App. 267; *Atty.-Gen. v. Chambers*, 5 Jur., N. S. 745, 4 De G. & J. 55; *Rex v. Yarborough*, 3 B. & C. 91; *Scrutton v. Brown*, 4 B. & C. 485; *Rex v. Trafford*, 1 B. & Ad. 874.

United States.—*New Orleans v. U. S.*, 10 Pet. (U. S.) 662; *Jones v. Souland*, 24 How. (U. S.) 41; *Saulet v. Shepherd*, 4 Wall. (U. S.) 502; *St. Louis Schools v. Risley*, 10 Wall. (U. S.) 110; *Jones v. Johnston*, 18 How. (U. S.) 150; *Handly v. Anthony*, 5 Wheat. (U. S.) 380; *Barney v. Keokuk*, 94 U. S. 324; *Granger v. Swart*, 1 Woolw. (U. S.) 88; *Rutz v. Seeger*, 35 Fed. Rep. 188; *East Omaha Land Co. v. Jefferies*, 40 Fed. Rep. 386; *Jeffries v. East Omaha Land Co.* 134 U. S. 178; *St. Louis v. Rutz*, 138 U. S. 226.

Alabama.—*Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

California.—*Fillmore v. Jennings*, 78 Cal. 634.

Connecticut.—*Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 46; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48.

Illinois.—*Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Rep. 476; *Seaman v. Smith*, 24

Ill. 523; *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516; *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Chicago Dock, etc., Co. v. Kinzie*, 93 Ill. 475; *Griffin v. Kirk*, 47 Ill. App. 258.

Indiana.—*Bonewits v. Wygant*, 75 Ind. 41.

Iowa.—*Kraut v. Crawford*, 18 Iowa 549, 87 Am. Dec. 417; *Coulthard v. Stevens*, 84 Iowa 241.

Kentucky.—*Miller v. Hepburn*, 8 Bush (Ky.) 326.

Louisiana.—*Morgan v. Livingston*, 6 Martin (La.) 19; *Stephenson v. Goff*, 10 Rob. (La.) 99, 43 Am. Dec. 171; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624; *Barrett v. New Orleans*, 13 La. Ann. 105; *Buras v. O'Brien*, 42 La. Ann. 527; *State v. Buck*, 46 La. Ann. 656.

Maryland.—*Giraud v. Hughes*, 1 Gill & J. (Md.) 249; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Patterson v. Gelston*, 23 Md. 447.

Massachusetts.—*Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 277.

Missouri.—*Smith v. St. Louis Public Schools*, 30 Mo. 290; *St. Louis Public Schools v. Risley*, 40 Mo. 356; *Benson v. Morrow*, 61 Mo. 353; *St. Louis v. Lemp*, 93 Mo. 477.

Nebraska.—*Lammers v. Nissen*, 4 Neb. 250.

New Hampshire.—*Rix v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165.

New Jersey.—*Camden, etc., Land Co. v. Lippincott*, 45 N. J. L. 405.

New York.—*Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70; *Halsey v. McCormick*, 18 N. Y. 147; *East Hampton v. Kirk*, 84 N. Y. 218; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206; *Saunders v. New York Cent., etc., R. Co.* (Supreme Ct.), 23 N. Y. Supp. 927.

Ohio.—*Lamb v. Ricketts*, 11 Ohio 311; *Niehaus v. Shepherd*, 26 Ohio St. 45.

Oregon.—*Minto v. Delaney*, 7 Oregon 337.

South Carolina.—*Spigener v. Cooner*, 8 Rich. (S. Car.) 301, 64 Am. Dec. 755.

Tennessee.—*Posey v. James*, 7 Lea (Tenn.) 98.

Texas.—*Fulton v. Frandolig*, 63 Tex. 330.

Utah.—*Poynter v. Chipman*, 8 Utah 442.

Wisconsin.—*Boorman v. Sunnuchs*, 42 Wis. 235.

And see *Bissell v. Fletcher*, 27 Neb. 582; *Nearcy v. Bybee*, 20 Oregon 385; *Prior v. Comstock*, 17 R. I. 1.

In *Spigener v. Cooner*, 8 Rich. (S. Car.) 301, 64 Am. Dec. 755, O'Neill, J., in delivering the opinion of the court, said: "There is, I think, no doubt of the proposition that in the case of mere alluvion, 'where the change is so gradual as not to be perceived in any one moment of time, the proprietor whose bank on the river is increased is entitled to the addition.' Angell on Watercourses (7th ed.), c. 2, § 53."

In the Institutes of Justinian, Liber II., tit. 1, § 20, it is said: "Moreover, the alluvial soil added by the river to your land becomes yours by the law of nations. Allu-

vion is an imperceptible increase, and that is added by alluvion which is so gradual that no one can perceive how much is added in any one moment of time."

"Once a Riparian Proprietor, Always so; because accretions or newly formed ground belong to such proprietor *jure gentium*." *Kraut v. Crawford*, 18 Iowa 549, 87 Am. Dec. 416.

Owner of Lands Bounded by the Great Lakes.—In *Banks v. Ogden*, 2 Wall. (U. S.) 57, it was held that accretion by alluvion from Lake Michigan belonged to the proprietor of the land bounded by the lake.

Reason of the Rule.—In *New Orleans v. U. S.*, 10 Pet. (U. S.) 662, it was said: "The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain." To the same effect see *Saulet v. Shepherd*, 4 Wall. (U. S.) 502; and *St. Louis Public Schools v. Risley*, 10 Wall. (U. S.) 110.

Bar Formed outside of One's Land.—In an action of trespass, the contention of the defendants was that at the time of the *United States* grant to the plaintiff's grantor, the land upon which the trespasses were alleged to have been committed was existing and susceptible of ownership, in the shape of a large bar just outside of the plaintiff's line. The court held that if, at the time of the *United States* grant, the land was in existence and capable of ownership, the plaintiff had no title, it not having been specifically conveyed; on the other hand, if it was not then in existence, but had been formed since the grant, by accretion, the plaintiff, as owner of the contiguous land, was entitled to the alluvion. *Stephenson v. Goff*, 10 Rob. (La.) 99, 43 Am. Dec. 17.

Flats.—Under an ancient statute relating to the subject of flats, and annexing them to the adjoining land, to the distance of one hundred rods from the shore, it was held that whatever increase happened from natural causes, or from a union of natural and artificial causes, within that distance, must be to the benefit of the owner of the upland, or of him who owned the flats to which the increase was attached. *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151.

Increase must be Imperceptible or Gradual.—To acquire title to land by alluvion, it is necessary that its increase should be imperceptible. *Kraut v. Crawford*, 18 Iowa 549, 87 Am. Dec. 414; *Lovington v. St. Clair County*, 64 Ill. 56, 23 Wall. (U. S.) 68, 16 Am. Rep. 517; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 551; *Benson v. Morrow*, 61 Mo. 352; *Cooley v. Golden*, 117 Mo. 33; *Emans v. Turnbull*, 2 Johns. (N. Y.) 314, 3 Am. Dec. 427; *Halsey v. McCormick*, 18 N. Y. 147; *Cook v. McClure*, 58 N. Y. 437,

nal tract,¹ the title thereto being held subject to the same incumbrances and

17 Am. Rep. 270; *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206; *Murry v. Sermon*, 1 Hawks (N. Car.) 56.

In *Murry v. Sermon*, 1 Hawks (N. Car.) 56, the defendant in ejectment claimed title to the land in dispute, which was bounded by Mattamuskeet lake, under a patent dated in 1761. The plaintiff claimed under a grant of more recent date, covering lands between the defendant's lines and the lake. Both parties introduced evidence as to what had been actually run for the lines of the defendant's land; and the court below instructed the jury to find for the defendant, no matter whether the lake had receded or not, for in either case it remained his boundary. This was held to be erroneous, and a new trial was awarded, in order that the jury might find the fact whether the waters of the lake had receded gradually or imperceptibly, or suddenly and sensibly, from the land in controversy, because on that question, the court said, the rights of the parties depended.

Sudden Formation—Avulsion.—Where considerable quantities of soil are, by a sudden action of the water, taken from the land of one and deposited upon or against the land of another, they are called "avulsion." The title to such soil remains in the original owner, unless he fails to claim his right of ownership until the deposited soil has united with the soil of the other owner. Angell on Watercourses (7th ed.), § 60; 3 Washburn on Real Property (5th ed.) 453; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344.

Notwithstanding the fact that, owing to the swiftness of the current of the Missouri river and the softness of its banks, the changes of the latter are more rapid and extensive than on most other streams, the law of alluvion has been held to apply. *Nebraska v. Iowa*, 143 U. S. 359; *Nebraska v. Iowa*, 145 U. S. 519.

Gradual as Distinguished from Sudden Increase.—"The test of what is gradual, as distinguished from what is sudden, seems to be that, though witnesses are able to perceive from time to time that the land has encroached on the sea line, it is enough if it was done so that they could not perceive the progress at the time it was made." Angell on Tide-Waters (1st ed.) 71; *St. Clair County v. Lovington*, 23 Wall. (U. S.) 46.

As to what has been held alluvion and not avulsion, see *Denny v. Cotton*, 3 Tex. Civ. App. 634, quoting 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 137.

Urban and Rural Alluvion.—In *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624, the contention was made by counsel that, under the Roman law, urban property holders were not entitled to the right to alluvion, as is the case in respect to rural property holders. The court held, however, that the *jus alluvionis* was as applicable to the one class of property owners as to the other. See also *St. Louis v. Missouri R. Co.*, 114 Mo. 13.

Dower in Accretions.—The widow of the owner of the property to which there has

been accretion is entitled to dower in such portion, whether the accretion took place during the possession of the husband or of an alienee. *Lombard v. Kinzie*, 73 Ill. 446; *Gale v. Kinzie*, 80 Ill. 132.

Legislation on the Subject of Accretions.—Accretion has been made the subject of legislative enactments in some of the states.

California.—By the civil code of this state, accretions to land belong to the owner of the land, whether situated on navigable or unnavigable waters. *California Civil Code*, § 6014.

Dakota.—See Civil Code, § 588, for a provision similar to that of *California*, just set forth above.

Georgia.—The *Georgia Code*, § 2228, lays down the same rule as the foregoing.

Louisiana.—The provision of the *Louisiana Code*, § 509, is different only in excluding from its application land resulting from derelictions of the sea. In this state it has also been held that alluvion which forms upon the shores of Lake Pontchartrain is not susceptible of private ownership; such alluvion does not, therefore, become the property of the owners of lots fronting on said lake. It is the accretion made by rivers and streams only that belongs to the proprietors of adjacent lands. *Zeller v. Southern Yacht Club*, 34 La. Ann. 837.

Maryland.—The statutes of this state are to the same effect. See *Maryland Code* 1878, art. 16, § 38.

1. *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624; *Kennedy v. Municipality No. 2*, 10 La. Ann. 54; *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; *Morgan v. Scott*, 26 Pa. St. 51.

Future Accretions.—A party, however, as a riparian proprietor, cannot be protected in the matter of accretions to his land which are not in existence, and which may or may not exist in the future. *Taylor v. Underhill*, 40 Cal. 471.

In *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624, it was decided that the right to future alluvial formation was a vested right inherent in the property, and an essential attribute of it, resulting from natural law, in consequence of the local situation of the land to which it attaches; and that it was an accessory to the principal estate or land which cities as well as individuals might acquire, *jure alluvionis*, as the owner of the front or riparian proprietor; and that the right was founded in justice arising from the risks to which the land was exposed, and from the burden of keeping up levees or embankments in front of the river to protect the estate.

Right of Lessee to Accretions.—A lessee of land bordering on a stream not navigable is entitled, at common law, to the accretions thereto caused by the receding of the stream, or a change in its current during his term. Such accretions will attach to and form a part of the grant, as under a deed of convey-

with the benefit of the same rights as is the land to which accretion is made;¹ and this, as has been before stated, whether the accretions be due to natural causes alone or to a combination of both natural and artificial influences.²

Alluvion the Result of Encroachment.—The *jus alluvionis* would not apply, however, where the alluvion was the result of an encroachment or purpresture upon a public harbor.³

Public Use.—Where the banks of a river are subject to a public use, the accretions thereon will be subject to the same use;⁴ though the right of property in such accretions becomes vested in the owner of the bank upon which the alluvion is formed.⁵ If, by reason of the increase by alluvion, a portion of the

ance. *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91. *Rutz v. Kehr*, 143 Ill. 558; *Williams v. Baker*, 41 Md. 523.

1. *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

How Accretions are Affected by Lien on Original Tract.—When land on a navigable river is leased, mortgaged, or subject to any other lien, subsequent accretions thereto will come under the same burdens and liens. *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Cruikshanks v. Wilmer*, 93 Ky. 19. And see *Rhoades v. Raymer*, 6 Ohio Cir. Ct. Rep. 68.

Statute of Limitations as Applicable to Accretions.—A riparian proprietor is entitled to the accretions made to his land by the river, and the statute of limitations in its application to such accretions relates back to the time when it began to run in favor of the riparian owner as to the main bank. The accretions, in becoming a part of the land to which they are joined, take the title and condition of that land just as it exists at the time of their formation. If the riparian owner is barred, or partially barred, by the statute of limitations as to the bank, he will be barred as to the accretions in like manner, although they may have been deposited but a year or a day. *Campbell v. Laclede Gas Light Co.*, 84 Mo. 353.

Adverse Possession of Original Tract.—Where a disseisor enters upon riparian lands, which he encloses and holds by adverse possession, the title to the shore includes title to the accretions; it is unnecessary that he should extend his fence to keep pace with the formation of the alluvion. Chicago, etc., *R. Co. v. Groh* (Wis., 1893), 55 N. W. Rep. 714.

Deprivation by Legislature of Right to Alluvion.—A riparian owner cannot be deprived, by the legislature, of his right to future alluvion that may be deposited upon his property. *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624.

Lands formed by accretion belong to the riparian proprietor, and cannot be granted by the state as vacancy, *Patterson v. Gelston*, 23 Md. 433; nor be selected as swamp and overflowed land, *Minto v. Delaney*, 7 Oregon 337.

2. See *supra*, this title, *Definition*.

3. **Purpresture.**—The right to alluvion which has resulted from purpresture or encroachment does not vest in the contiguous proprietor. In *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118, 89 Am. Dec. 165, where the defendant had built a wharf out from the plaintiff's premises into a public harbor, which wharf the plaintiff claimed inured to his advantage, it was held that the owner of the premises

would not thus become the owner of the alluvion, the wharf being an unauthorized encroachment into the public harbor.

4. **Banks of River Subject to Public Use—Accretions Subject Thereto also.**—Where a street extends down to the water line, it will not be deemed cut off therefrom by accretions formed by alluvial deposits, nor by the act of the owner of the land subject to the public easement. *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624; *People v. Lambier*, 5 Den. (N. Y.) 9, 47 Am. Dec. 273; *Matter of Wells Avenue* (Supreme Ct.), 4 N. Y. Supp. 301.

Where certain property has been dedicated to the public for the purposes of a street and public landing, all accretions accrue to the public benefit. *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Rep. 476. And see *Mobile v. Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325.

In *Barney v. Keokuk*, 94 U. S. 339, it was held that if a city acquires the right to a street along the water front of certain private property, and then proceeds to reclaim land and widen the street, the land reclaimed will at all events be subject to the same easement as was the original street, whether the legal title to such additions vests in the city or in the private individual.

An act of Congress having reference to the laying off of the city of Burlington, Iowa, provided that a "quantity of land of proper width, on the river bank at the town of Burlington, and running with the said river the whole length of said town, shall be reserved from sale, for public use, and remain forever for public use as a public high way, and for other public uses." It was held that under this act the city, taking the land subject to the trusts and conditions expressed in the act, had an equal right to the accretion thereon from the river, which accretion partook of the same nature as the original reservation. The city has no right, however, to make an unqualified disposition of it to a railroad company to be held and used as private property, but may grant the right of way over it to such railroad company. *Cook v. Burlington*, 30 Iowa 94, 6 Am. Rep. 649.

In *Barrett v. New Orleans*, 13 La. Ann. 105, it is said that the owner of soil situated on the edge of the water, to whom belongs the alluvion, is bound to leave the public that portion of the bank which is required by law for the public use. And see *The Edmondson Island Case*, 42 Fed. Rep. 15.

5. *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624; *People v.*

original bank is no longer needed for the exercise of the use, the owners of the right of property therein will be entitled to its occupation.¹

Necessity of Title to Water Line.—That the law of alluvion may have application, it is obvious, the property holder must have title to the water line; if the boundary is established by allusion to fixed monuments simply near the water mark, the alluvion will not accrue to such proprietor.²

2. Accretion and Reliction Compared.—Reliction may mean either the process of gradual and imperceptible recession of water from land, or the land thus left dry.³ In its latter sense, it is regarded the same in effect as alluvion, and the same principles are held to regulate both.⁴

Lambier, 5 Den. (N. Y.) 9, 47 Am. Dec. 273; Parker v. Taylor, 7 Oregon 435.

1. Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624; Donovan v. New Orleans, 35 La. Ann. 461; Leonard v. Baton Rouge, 39 La. Ann. 275; Louisiana Ice Mfg. Co. v. New Orleans, 43 La. Ann. 217; Delachaise v. Maginnis, 44 La. Ann. 1043.

When land bordering upon a river is granted, and there is reserved a public right of passage along the bank of such river, the title vests absolutely in the grantees, subject only to the servitude. The fact of the road running along the bank of the river cannot be held to limit the grant having the river for its boundary, so as to exclude the proprietor of the lands from his riparian rights. The passage might have been changed by the grantee, or his assignees, as the river gradually receded, so as to continue it along the bank. Hagan v. Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267. See also Morgan v. Livingston, 6 Martin (La.) 19.

2. In Cook v. McClure, 58 N. Y. 437, 17 Am. Rep. 270, the claim was to a small strip of land which had once been covered by water, but now adjoined an artificial pond, the defendant claiming to be the riparian owner. The boundary line, as described in the deed of the land to the defendant, was from a stake near the high-water mark of said pond to the upper end of said pond, or to the north line of said lot. The ground which the defendant held was formed by accretion and by subsidence of the waters of the pond. The only real question involved in this case was whether the boundary in the deed under which the plaintiff, by several mesne conveyances, made title, established a fixed and permanent line, or whether such line would follow a change in the water of the pond if produced by natural causes. It was held that the language of the deed indicated an intention to establish a fixed and permanent line, and not one changeable by the varying quantity of water in the pond. Compare Rix v. Johnson, 5 N. H. 520, 22 Am. Dec. 472; Mansur v. Blake, 62 Me. 38.

Where a landowner was not proprietor of the shore, strictly speaking, but owned to a water front of statutory creation, it was held that to such the law of alluvion did not apply. Dana v. Jackson St. Wharf Co., 31 Cal. 111, 89 Am. Dec. 166.

Right to Accretions as Dependent upon Contiguity.—The right to accretions, as such, in the bed of a river, depends on actual contiguity. Any separation of the claimant's land

from the alluvion by the land of another defeats the claim. Bates v. Illinois Cent. R. Co., 1 Black (U. S.) 204; Saul v. Shepherd, 4 Wall. (U. S.) 502; Bristol v. Carroll County, 95 Ill. 84; New Orleans v. Gravier, 11 Martin (La.) 620; Giraud v. Hughes, 1 Gill & J. (Md.) 249; Matter of State Reservation Comrs., 37 Hun (N. Y.) 537; Doe v. Duncan, 1 Jones (N. Car.) 234; Posey v. James, 7 Lea (Tenn.) 98. See also Lebeaume v. Postlington, 21 Mo. 36; Smith v. St. Louis Public Schools, 30 Mo. 294; Ellinger v. Missouri Pac. R. Co., 112 Mo. 525; St. Louis v. Missouri Pac. R. Co., 114 Mo. 13; Rhoades v. Raymer, 6 Ohio Cir. Ct. Rep. 68.

3. Reliction Defined.—Century Dict.; Bouvier Law Dict. Reliction is the term applied to land made by the recession of the water by which it was previously covered. Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 23; Murry v. Sermon, 1 Hawks (N. Car.) 56; Banks v. Ogden, 2 Wall. (U. S.) 57.

Dereliction is a recession of the waters of the sea, a navigable river, or other stream, by which land which was before covered with water is left dry. In such case, if the alteration takes place suddenly and sensibly, the ownership remains according to former bounds; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has so receded. Woolrych on Law of Waters, marg. p. 29 *et seq.*; Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 24.

4. Banks v. Ogden, 2 Wall. (U. S.) 57; Granger v. Swart, 1 Woolw. (U. S.) 88; Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 23; Buse v. Russell, 86 Mo. 209; Murry v. Sermon, 1 Hawks (N. Car.) 56; Den v. Allen, 4 Dev. & B. (N. Car.) 62, 32 Am. Dec. 672; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; Lammers v. Nissen, 4 Neb. 245; Boorman v. Sunnuchs, 42 Wis. 233; Angell on Tide-Waters (1st ed.) 68; Shulte's Aquatic Rights 116; Woolrych on Law of Waters 34; 2 Black. Com. 262; 3 Kent Com. (13th ed.) 428 *et seq.*

Recession must be Slow, Gradual, and Imperceptible.—In order to entitle the adjoining property holders to the right of possession of the land left bare by the receding water, the recession must be slow, gradual, and imperceptible. In case of a sudden and sensible recession of the water, the ownership of the land will not be changed. Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 23; Cooley v. Golden, 117 Mo. 33; Gill v. Lydick, 40 Neb. 508.

3. Reappearance of Land after Submergence.—It seems that, although land be

Sudden and Violent Floods.—In *Doe v. Allen*, 4 Dev. & B. (N. Car.) 62, 32 Am. Dec. 672, in which a boundary line of lands was in controversy, the court held that it did not follow that because the river had deserted the bed in which it flowed when the deed was executed, the boundary of the land of the lessor of the plaintiff had shifted with it. "Admit," said the court, "that such would have been the consequence if the river had receded from its southern bank by small and almost imperceptible gradations, a point upon which no opinion is intended to be expressed or intimated, this consequence does not follow from changes by sudden and violent floods."

Reliction Takes Place most Frequently in Lakes and Ponds.—The owner of land bounded on a lake, whether navigable or not, has title to the land left dry by the gradual and imperceptible recession of the water. *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23; *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Granger v. Swart*, 1 Woolw. (U. S.) 88; *Murry v. Sermon*, 1 Hawks (N. Car.) 56; *Boorman v. Sunnuchs*, 42 Wis. 233.

Under the English Common Law, though a proprietor acquired no title to the soil lying between high and low water mark, yet he was entitled to all accessions made to his land, either by the retreating of the river from its former limits, or by the slow and secret deposit of sand and other substances, so as to leave the soil theretofore inundated, uncovered by water. 3 Kent Com. (13th ed.) 428 *et seq.*

Reason of the Rule.—In *Giraud v. Hughes*, 1 Gill & J. (Md.) 249, the court said: "The principle seems to be well settled, that where a tract of land lies adjacent or contiguous to a navigable river or water, any increase of soil formed by the waters gradually or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land."

"As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry." 2 Black. Com. 262; Woolrych on the Law of Waters 34; Shulte's Aquatic Rights 116.

Reclamation of Soil.—In *Connecticut* it has

been held that the owners of land bounded on a harbor own only to high-water mark, and whatever rights such owners have of reclaiming the shore are mere franchises. *Lockwood v. New York, etc., R. Co.*, 37 Conn. 387. And see *Boston v. Richardson*, 105 Mass. 351, as to rights of proprietors of land upon the shore of the sea, lying within the city of Boston, to land reclaimed from the sea.

Submergence—Reliction.—Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 215. See also *infra*, this title, *Reappearance of Land after Submergence*.

An Island which is cut off from the Mainland by a stream in the ordinary stages of low water cannot be added to the land of an adjacent proprietor merely because in the very dry season of the year the stream has almost disappeared and no water flows over the intervening dry and sandy or pebbly bed. *Stover v. Jack*, 60 Pa. St. 339, 100 Am. Dec. 566.

In *St. Paul, etc., R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272, it was held, however, that a sandbar in the Mississippi river, separated by a slough twenty-eight feet wide from the mainland, and at high water entirely submerged, belonged to the riparian owner, although the acts of Congress made the river a public highway at the place in question. And see *Shoemaker v. Hatch*, 13 Nev. 261.

Where the intermediate space between a survey on the mainland of the Missouri river and a surveyed island, at the times of the surveys, consisted of a slough, and since then the slough has so filled up as to connect the island and the mainland and to make them one continuous tract of land, the adjacent owners of the island and the survey are entitled to the accretions to their respective lands; but if the slough simply filled up from the bottom, or by deposits within its bed, and the accretions did not form on the one side or the other, then the centre of the slough as it was before the water left it is the boundary between the survey and the island. Where the shore lines of two tracts of land divided by a watercourse receive accretions until they come together, the line of contact will then be the division line. If the slough gradually filled up as the water receded, the same principle is applied, and the new land belongs to the riparian owner from whose shore the water receded, it being immaterial whether the water was navigable in the common-law sense or general acceptance of the term, or was a non-navigable stream. *Buse v. Russell*, 86 Mo. 209; *Bigelow v. Hoover*, 85 Iowa 161. And see *Naylor v. Cox*, 114 Mo. 232.

Proof to be Made by a Claimant by Reliction.—In *Boorman v. Sunnuchs*, 42 Wis. 235, Lyon, J., delivering the opinion of the court, said that where one claimed land by reliction, he should give reasonably definite information of the progress of the falling or recession of the water. He should show the several

submerged by the sea, yet if it eventually reappears and remains capable of identification, the title thereto revests in the original owner.¹

4. Doctrine of Accretion and Reliction as Applicable to Islands.—The proprietorship of an island formed by alluvion or subsidence of water is in the owner of the bed or bottom of the stream.² If the island is formed in public waters, the title thereto immediately vests in the state;³ if formed in private

stages of the process through longer or shorter periods of time as determined by the width of the strip uncovered, or by comparison with known and fixed objects, so that the court might have satisfactory data upon which to determine the character of the reliction. Mere proof that persons watching the process could not see the water recede should not suffice.

1. Reappearance after Submergence.—*Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 213. In *Hargrave Law Tracts* (Sir Matthew Hale *De Jure Maris*) 36, 37, it is said: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by *Cooke and Foster*, M. (7 Jac. C. B.), though the inundation continue forty years. * * * But if it be freely left again by the reflex and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues."

When Portions of the Mainland have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. *Houck on Rivers*, § 258; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 215.

Duration of Submergence.—The lapse of time during which the submergence continues does not bar the right of such owner to enter upon the land reclaimed and assert his proprietorship. *Angell on Tide-Waters* (1st ed.) 77; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 211.

Where Identity is Lost.—Land lost by submergence may be regained by reliction, unless the submergence has been followed by such a lapse of time as precludes the identity of the land from being established. *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 211.

2. Islands Formed by Accretion or Reliction.—*Heckman v. Swett*, 99 Cal. 303; *Hopkins*

Academy v. Dickinson, 9 Cush. (Mass.) 548; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; 16 Am. Dec. 342; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 277; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 212. Thus it has been held that the owner of a bank on the Missouri river is not the owner of an island which springs up in the middle of the river, whether the island be on one side of the thread of the stream or the other. *Cooley v. Golden*, 117 Mo. 33.

In *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 212, it is said: "A case quite in point is referred to by the respondent's counsel as arising in *Delaware* in 1815, decided by the court of common pleas, upon a learned opinion by Judge Wilson, a copy of which is attached to the plaintiff's brief. The case does not seem to be elsewhere reported. It arose over the ownership of an island called Wilson's Bar, which had been created by alluvion upon land formerly contained within the boundaries of an island called Little Tinnicum, but which at some time had been worn away by the ocean. The court said: 'The right to the new island and also to land gained by alluvion or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnicum was destroyed by the force of the winds and waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining land covered by the water; if it was regained, either by natural or artificial means, it continued to belong to the original proprietor. * * * The earth deposited on it became his by the right of alluvion, and of course this island formed on it by such deposit became his. And though it probably has extended beyond the limits of the old island, the addition is plainly alluvion.'"

If an island was washed away, in whole or in part, after it was surveyed, and then reformed on the same bed, the owner of it as it was before being washed away would be entitled to it; but when it was washed away, and the land sought to be recovered was made by deposits to and against the survey of the main land, then such deposits became the property of the owner of the survey. *Buse v. Russell*, 86 Mo. 209.

Where, by the deposit of alluvion, an island in a lake gradually becomes connected by a spit to the neighboring shore, such island does not become the property of the owner of the shore. *Bigelow v. Hoover*, 85 Iowa 161.

3. Islands in Public Waters.—*Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 213. But where a lagoon divided the main shore from

waters, it becomes vested in the one or more private individuals to whom the bed or bottom belongs.¹

III. RATIONALE OF RULE AS TO PROPERTY IN ACCRETIONS—1. In General.—Several reasons have at various times been advanced as foundations for the *jus alluvionis*.

2. **De Minimis non Curat Lex.**—Blackstone is authority for the statement that the right of riparian proprietors to alluvion had its origin in the maxim *de minimis non curat lex*.²

3. **Considerations of Public Policy.**—Another reason which has been assigned is that well-known principle of public policy which urges the expediency of having all property vested in some owner; and in whom, argue the advocates of this theory, could alluvion vest, if not in the contiguous proprietors?³

4. **As a Compensation for Risk of Loss.**—The weight of authority, however, inclines to the opinion that alluvion is allowed to the owners of the land upon

the beach, it was held that this constituted no obstruction to the proprietorship of the beach formation, the entire property, including the beach, having formerly belonged to the individual still owning the main shore. *Deerfield v. Arms*, 17 Pick. (Mass.) 43, 28 Am. Dec. 276. *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 212.

"As Touching Islands Arising in the Sea or in the arms of creeks, or havens thereof, the same rule holds which is before observed, touching acquets by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie* it is true they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea, or creek or haven, doth in point of property belong to a subject either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject according to the limits and extent of such propriety." *Hargrave Law Tracts* (Sir Matthew Hale *De Jure Maris*) 36, 37. See also *Gould on Waters* (2d ed.), § 166.

1. **Islands in Private Waters.**—*Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Granger v. Avery*, 64 Me. 202; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; *McCullough v. Wall*, 4 Rich. (S. Car.) 68, 53 Am. Dec. 715.

Where a River Changes its Course so as to cut off a point of the property of a landowner, this will not change the ownership; the title to the island thus formed will still be in the original owner. *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Bonewits v. Wygant*, 75 Ind. 41.

2. **Blackstone's Reason of the Rule.**—In 2 Black. Com. 262, it is said, that as to lands gained from the sea by alluvion, where the gain is by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining, for *de minimis non curat lex*; and besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such charge or loss.

This Reason Criticised.—This passage of

Blackstone has been criticised more or less by the authorities. In *Atty.-Gen. v. Chambers*, 4 De G. & J. 55, Lord Chelmsford is reported to have said: "I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which, if the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson in the case of *In re Hull*, etc., R. Co., 5 M. & W. 327, viz.: 'That which cannot be perceived in its progress is taken to be as if it never had existed at all;' and, as Lord Abinger said in the same case, 'the principle,' as to gradual accretion, 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss, from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore."

3. **Public Policy.**—The rule governing additions made to land bounded by a river, lake, or sea, has been much discussed and variously settled by usage and positive law. Almost all jurists and legislatures, however, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions. By some the principle has been vindicated on the ground of natural justice, that he who sustains the burden of losses and repairs imposed by the contiguity of the waters ought to receive whatever benefits they may bring by accretion; by others it is derived from the principle of public policy that it is to the interest of the community that all land should have an owner, and it is most convenient that insensible additions to the shore should follow title to the shore itself. *Banks v. Ogden*, 2 Wall. (U. S.) 57.

which it forms, as a compensation for possible loss from the same source, which in the case of accretions operates to their gain.¹

IV. APPORTIONMENT OF ACCRETIONS—1. In General.—The general principle to be observed in the apportionment of alluvion between adjacent property holders is to make such a division as will give to the proprietors of the new shore line such proportion thereof as they possessed of the former shore before the formation of the alluvion.²

1. Consideration of Natural Justice.—Atty.-Gen. *v. Chambers*, 4 De G. & J. 55; *In re Hull*, etc., R. Co., 5 M. & W. 327; *New Orleans v. U. S.*, 10 Pet. (U. S.) 662; *Lovington v. St. Clair County*, 64 Ill. 56, 16 Am. Rep. 516, *affirmed in St. Clair County v. Lovington*, 23 Wall. (U. S.) 68; *Delachaise v. Maginnis*, 44 La. Ann. 1043; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Giraud v. Hughes*, 1 Gill & J. (Md.) 249; *Smith v. St. Louis Public Schools*, 30 Mo. 200; *Benson v. Morrow*, 61 Mo. 352.

Where the Sea, instead of Retreating, encroaches on the land, property so gradually submerged belongs to the state. *Wilson v. Shiveley*, 11 Oregon 215.

A Riparian Owner is Entitled to the Alluvion deposited upon his land, upon the principle of compensation for the burdens of his exposed situation and the risk of loss through the agency of the river. *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624. In conformity with this reason for allowing contingent property owners the title in alluvion was the case of *Gravier v. New Orleans* (referred to in *Saulet v. Shepherd*, 4 Wall. (U. S.) 508), where the court held that the owner of certain property, along whose water front ran a public road, was not entitled to alluvion, on the ground that, as the public was under an obligation to keep the road in repair, the private individual was not liable to any loss from encroachments of the water.

In respect to the law entitling riparian proprietors to the accretions to their land, the court in *Kraut v. Crawford*, 18 Iowa 549, 87 Am. Dec. 416, said: "The law is wise and just. If the action of the river had gradually worn away the defendant's land, after the purchase from the *United States*, the loss would have been his. To compensate him for risk of loss in this manner, as well as to preserve to him the benefits of his water front, the law gives him the advantage of any gains by accretions or alluvial deposits."

In Grants of Lands Lying along the Seashore, the parties act with a knowledge of the variety of changes to which all parts of the shore are subject. The grantee takes no fixed freehold, but one that shifts with the changes that gradually take place. The proprietor of lands having such a boundary is obliged to accept the alteration of his boundary by the gradual changes to which the shore is subject. He is subject to loss by the same means that may add to his territory; and as he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations, and in such case he will hold by the same boundary, including the accumulated soil. *Tyler on Boundaries*, etc., 40; 3 Kent

Com. (13th ed.) 428; *New Orleans v. U. S.*, 10 Pet. (U. S.) 662.

Riparian Owner may Protect Himself from Encroachment of River.—In *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165, it appeared that for several years a river lying between the property of the plaintiff and the property of the defendant had been encroaching upon the defendant's land and receding correspondingly from the plaintiff's land on the opposite shore. The defendant, to prevent further encroachments, erected certain breakwaters in the river along his land, which the plaintiff complained changed the current of the river and threw it upon his land, washing it away. The court held that the defendant had a right to protect himself against the encroachment of the river in any way so that it did not change the channel of the river to the injury of the neighboring riparian owners. See also *Angell on Watercourses* (7th ed.), §§ 330-334; *Barnes v. Marshall*, 68 Cal. 569.

2 Principles of Division—Rules Given.—In *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 277, this rule is laid down for the division of alluvion between the contiguous riparian proprietors—First: To measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line. Second: Supposing the former line, for instance, to amount to two hundred rods, to divide the newly formed bank or river line into two hundred equal parts, and appropriate to each proprietor as many portions of this new river line as he owned rods on the old; then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. The new lines thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals or exceeds or falls short of the old. Commenting on this method of apportionment, the court said: "This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion, and the rule is obviously founded in that principle of equity upon which the distribution ought to be made."

A similar rule of apportionment is stated in *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 867. See also *Johnston v. Jones*, 1 Black. (U. S.) 209; *Miller v. Hepburn*, 8 Bush (Ky.) 326; *Emerson v. Taylor*, 9 Me. 43, 23 Am. Dec. 531; *Sparhawk v. Bullard*, 1

2. Islands in Private Waters.—Where, from accretion or reliction, an island is formed in private waters, the shores and bed of which are owned by different proprietors, their boundary lines may be run as they existed immediately before the formation of the island.¹

Met. (Mass.) 96; Winnisimmet Co. v. Wyman, 11 Allen (Mass.) 438; Wonson v. Wonson, 14 Allen (Mass.) 85; Knight v. Wilder, 2 Cush. (Mass.) 199, 48 Am. Dec. 660; Gray v. Deluce, 5 Cush. (Mass.) 9; Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 552; Rust v. Boston Mill Corp., 6 Pick. (Mass.) 158; Deerfield v. Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; Lorman v. Benson, 8 Mich. 18; Rice v. Ruddiman, 10 Mich. 125; Clark v. Campau, 19 Mich. 329; Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182; Batchelder v. Keniston, 51 N. H. 496, 12 Am. Rep. 143; Nott v. Thayer, 2 Bosw. (N. Y.) 10; O'Donnell v. Kelsey, 10 N. Y. 412; Mulry v. Norton, 100 N. Y. 426, 53 Am. Rep. 213; Thornton v. Grant, 10 R. I. 477, 14 Am. Rep. 701; Aborn v. Smith, 12 R. I. 370; Manchester v. Point Street Iron Works, 13 R. I. 355.

It has been declared that the **Course of the Side Lines of Property** in front of which alluvion is formed is of no consequence in the division of the alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such manner as that each of the contiguous riparian proprietors shall have such proportion of the alluvial soil as the total extent of his front line bears to the total quantity of the alluvial soil to be divided. *Delord v. New Orleans*, 11 La. Ann. 699.

In *Miller v. Hepburn*, 8 Bush (Ky.) 326, the court had occasion to apply a rule of apportionment of accretions, holding that the several shares were to be ascertained by extending the original river frontage of the respective lots at right angles with the course of the river to the thread of the stream. At page 329 of the opinion will be found an illustrative diagram showing the operation of the rule.

For Another Method of Apportionment of Alluvion, with explanatory diagrams, see *Emerson v. Taylor*, 9 Me. 42, 23 Am. Dec. 531.

In *Gould on Waters* (2d ed.), § 162, it is stated: "In all cases where practicable, every proprietor is entitled to a frontage of the same width on the new shore as on the old shore, and at low-water mark as well as high-water mark, without regard to the side lines of the upland, unless referred to as guides in particular grants, or established as boundaries by the agreement or conduct of the conterminous proprietors or the acts of public authorities."

In *Batchelder v. Keniston*, 51 N. H. 496, 12 Am. Rep. 143, certain alluvial deposits were apportioned between contiguous proprietors by ascertaining the length of the shore line before any alluvion had been deposited and that of the shore line since the accretions, and making a division among the

riparian owners in proportion to the length owned by them formerly.

Where alluvion begins to form upon the land of one of two contiguous riparian proprietors, and gradually extends in front of the land of the other, the proprietor of the land on which the alluvion first commences is entitled to only that alluvion which lies in front of his own land. *Crandall v. Allen*, 118 Mo. 403.

Modification of Rules of Apportionment.—The rules of apportionment may require modification under particular circumstances. For instance, in applying the rule to the ancient margin of a river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin if it happens to be elongated by deep indentations or sharp projections. In such case it should be reduced by an equitable and judicious estimate to the general available line of the land upon the river. *Knight v. Wilder*, 2 Cush. (Mass.) 209, 48 Am. Dec. 660; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 552; *Wonson v. Wonson*, 14 Allen (Mass.) 85; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 277; *Batchelder v. Keniston*, 51 N. H. 496, 12 Am. Rep. 143. In *Kehr v. Snider*, 114 Ill. 313, 55 Am. Rep. 868, it was held that, under special circumstances, generally recognized rules of apportionment of accretions may be modified or departed from.

1. *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; *McCullough v. Wall*, 4 Rich. (S. Car.) 68, 53 Am. Dec. 715.

In *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548, it is said, in respect to the decision of the court in *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342, that it "recognizes the rule of the common law that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them; and from this right of property in the soil in the bed of the river the court deduce the right of property in an island which gradually arises above the surface and becomes valuable for use as land. Assuming the thread of the river, as it was immediately before such island made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line, and held in severalty by the adjacent proprietors."

ACCRUE—ACCRUED—ACCRUING.—These words, in their generally received sense, are used of something which is to be added or attached to something else.¹ Accrued means due and payable,² vested.³

1. *Johnson v. Humboldt Ins. Co.*, 91 Ill. 95.

2. *Mundt v. Sheboygan, etc.*, R. Co., 31 Wis. 451; *Kennedy v. Burrier*, 36 Mo. 128; *Hall v. Pritchett*, 3 Q. B. Div. 215; *Fay v. Halloran*, 35 Barb. (N. Y.) 297; *Cutcliff v. McAnnally*, 88 Ala. 509.

3. *Hartshorne v. Ross*, 2 Disney (Ohio) 15.
Claims against Railroad.—Notloe.—A statute rendering railroads liable for claims against a contractor for work performed on the railroad required that notice should be given to the road "within thirty days after such claim or demand shall have accrued." Where it was customary for laborers upon a road to receive payment a certain day of each month for the whole of the previous month's work, it was held that the claim did not *accrue* until the usual day of payment, and notice within thirty days thereof was sufficient. *Mundt v. Sheboygan, etc.*, R. Co., 31 Wis. 451.

In Sense of Existed.—The words "shall have accrued" have in one case been held to mean "shall have existed," where there has been an inchoate right or title, effect to which, however, could not be given until there was some intrusion upon that right. *Weber v. Harbor Com'rs*, 18 Wall. (U. S.) 57.

Cause of Action. (See also the titles DEATH BY WRONGFUL ACT; DEBTS OF DECEDENTS; LIMITATION OF ACTIONS.)—The *Missouri* statute giving a right of action for wrongful death provides that the suit must be commenced within one year after the cause of action *accrues*. In *Kennedy v. Burrier*, 36 Mo. 130, the court said: "The sixth section of the act provides that suit must be brought 'within one year from the time the cause of action accrued.' When, then, did the cause of action *accrue*? We think the cause of action *accrued* whenever the defendant's liability became perfect and complete. Whenever the defendant had done an act which made him liable in damages, and there was a person *in esse* to whom the damages ought to be paid and who might sue for and recover the same, then clearly the cause of action had *accrued* as against him."

To Accrue in Sense of to Arise.—"Although a cause of action may not, in general, be said to have *accrued* until the time of credit, if any, has expired, yet in giving a construction to the particular words of a statute we are to look to the whole act, and from it determine the sense in which they are used, so as to give effect to the legislative intent. The verb *to accrue* is often and properly used to convey the same idea as the verb 'to arise.' Such is evidently the sense in which it is here used. A cause of action may be said to arise when the contract out of which it grows is entered into or made." *Emerson v. Steamboat Shawano City*, 10 Wis. 435.

Accrued Costs. (See also the titles COSTS; CONFESSION OF JUDGMENT.)—In *Petrosky v. Flanagan*, 38 Minn. 26, defendant offered judgment in favor of plaintiff and *accrued*

costs instead of judgment "with costs," as provided by statute. Defendant claimed that the offer was insufficient. The court held it sufficient, saying: "But we do not think there is any substantial difference between these terms as applied to the facts of the case." See also *Keller v. Allee*, 87 Ind. 252; *Holland v. Pugh*, 16 Ind. 21.

In *Tallahassee Mfg. Co. v. Glenn*, 50 Ala. 489, it was held that the words "all the costs that have *accrued*," when used in the compromise of a pending suit or in a private statute providing for such compromise, mean costs that would follow the judgment, and do not include attorney's fees.

Accrue Distinguished from Sustain.—In *Adams v. Brown*, 4 Litt. (Ky.) 7, the declaration recited as a condition of the bond that the complainant should pay all costs and damages which the defendant should *sustain*. Upon oyer, the condition set out was for the payment of all costs and damages which might *accrue*. This was held a material variance. The court said: "But there is still another variance between the condition of the bond as alleged in the declaration, and the condition as set forth upon oyer, in this, that the former is 'to pay to the plaintiff all costs and damages which he should *sustain* in consequence of the injunction,' and the latter is 'to pay all costs and damages that may *accrue* in consequence of the injunction.' Now, the word *sustain*, used in the former, and the word *accrue*, used in the latter, are not only different terms, but terms of different import, as they are here implied. The word *sustain* implies a loss; but the word *accrue* implies a gain or acquisition. The costs, for example, whether extra or legal, expended by the plaintiff in consequence of the injunction, might be said to be *sustained* by him; but it is only such as were decreed to him that could with propriety be said to have *accrued* to him in consequence of the injunction. So any damages occasioned by the delay produced by the injunction may be said to be *sustained* by the plaintiff; but it is only those damages which were adjudged to him by the decree of the court, on a dissolution of the injunction, which can with propriety be said to have *accrued* to the plaintiff."

Title.—A title *accrues* when the instrument creating it or the fact constituting it first becomes operative. *Reid v. Reid*, 31 Ch. Div. 402.

Dues to Accrue Weekly.—In *Strasser v. Staats*, 59 Hun (N. Y.) 145, it was held that where the constitution of a society provided that "the dues of members of the lodge *accrue* weekly," the phrase "*accrue* weekly" was not equivalent to "become payable weekly" or "due weekly." The court said: "It is quite apparent, from the uniform action of the lodge in not exacting weekly payments of dues from its members, that it did not interpret the phrase '*accrue* weekly' as equivalent to 'payable weekly' or 'due weekly.' Bou-

ACCRUER, CLAUSE OF.—An express clause frequently occurs in the case of gifts by deed or will to persons as tenants in common, providing that,

vier defines *accrue* as to grow to, to be added to, as the interest *accrues* on the principal. Applying this definition to the phrase 'dues *accrue* weekly,' it would not signify that they are payable weekly, but rather that they are estimated or measured weekly, to grow or to be added to each other as interest is added to or increases the amount of a debt."

Accruing Interest.—In *Gross v. Partenhimer*, 159 Pa. St. 556, it was held that the assumption of a mortgage and the agreement to pay *accruing* interest thereon did not extend to interest *accrued* or matured. The court said: "If '*accruing* interest' means interest which, according to the terms of the security, was due and payable on February 26, 1893, and remained overdue and unpaid at the date of the contract, the defendant's construction should prevail; but we cannot agree that these words mean any such thing. Such a construction would be strained and wholly unwarranted by the language employed. As generally understood, *accruing* interest means running or accumulating interest, as distinguished from *accrued* or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it *accruing* interest. When we refer to interest heretofore payable, but still remaining unpaid, we speak of it as overdue interest, arrears of interest, or interest in arrear, just as we speak of rent in arrear. We are therefore of opinion that the words '*accruing* interest' do not refer to or in any manner embrace any part of the six months' interest which was then overdue and unpaid."

Saving Clause of Statute. (See also the title STATUTES.)—A saving clause of rights and liabilities, *accruing* under the acts repealed, was held not merely to preserve the *accrued* rights, but rights *accruing*, and to continue in force the provisions of the repealed statute for their enforcement. The court said: "The language of the proviso is broad and comprehensive. It saves not only rights, with their remedies, which had then *accrued*, and on which an action could be maintained at that time, but also rights then *accruing* which might thereafter ripen into an existing cause of action. * * * This right and this liability may be said to have been *accruing* from the time the bond was executed and the money received, precisely as the right and liability arising upon a promissory note is *accruing* from its execution and delivery until its maturity. Before due, it is a right *accruing*; when due it becomes a right *accrued*." *Cochran v. Taylor*, 13 Ohio St. 387.

The saving clause in the *Ohio Wills Act* preserved "all rights that had *accrued* under the repealed statutes." In *Hartshorne v. Ross*, 2 Disney (Ohio) 21, it was contended that this included rights of devisees under an executed will, although the testator was alive at the passage of the statute. This was not allowed. The court said: "When the testator died, the

Wills Act then existing repealed all prior laws on the same subject, saving, however, by section 79, 'all rights that had *accrued*' under them, or either of them, which saving, it is claimed, includes the rights of these plaintiffs as devisees, thereby referring the operation of the will to its execution, instead of the time of the testator's death. We suppose the term *accrued* is equivalent in its meaning to the word 'vested,' which necessarily implies that something has been imparted to or conferred upon a third person, over which he may have the immediate control by possession, or the present right to future possession, of which he cannot be deprived without his assent. It must be a right he can legally assert, independent of any future condition of things as well as any subsequent change of the existing law."

Accrue and Occur Distinguished. (See also the title FIRE INSURANCE.)—A policy of insurance contained a condition that no recovery should be had unless suit was brought within twelve months next after the loss should *occur*. It was contended that *occur* in the policy was used in the sense of *accrue*. The court said: "The word '*occur*' means 'to happen' in its general and most popular sense, whilst the word *accrue* is to be added or attached to something else in its generally received sense; but if we were to substitute the word *accrue*, then, in its grammatical connection, it would mean that the loss had attached to appellants, and that was when the fire destroyed the property, and would not change the obvious meaning from what it is as written. It would not be construction to say the condition means a suit or action might be commenced within twelve months after an action had *accrued*. It would not only be to change the grammatical structure of the clause, but it would be to make a new and different contract for the parties." *Johnson v. Humboldt Ins. Co.*, 91 Ill. 95.

Accruing or Owning.— "When the words '*accruing* or owing' are used, as they plainly are, to designate two classes of debts, they can receive each a distinct meaning only by taking one as denoting debts which are not yet payable, and the other as denoting those which are." *Dresser v. Johns*, 6 C. B. N. S. 434, 95 E. C. L. 434, *citing Jones v. Thompson*, 27 L. J. Q. B. 234, 1 El. Bl. & El. 64, 96 E. C. L. 64.

Mechanic's Lien. (See also the title MECHANIC'S LIEN.)—An *Alabama* statute provides that the lien of an original contractor is waived and lost unless filed within six months "after the indebtedness has *accrued*." It was held that where there was an entire contract for building a house, and the house was destroyed by fire before its completion, the balance payable on completion became due and payable at once, if at all, and not at the time when, but for accident, the building would have been completed. The court said: "In this connection the word *accrued* is evidently used in the

upon the death of one or more of the beneficiaries, his or their shares shall go to the survivors or survivor. It is a rule of law that there is "no survivorship upon survivorship;" i.e., that the clause of accruer extends only to the original, not also to the accrued shares, unless in terms it is expressly made to extend to the latter also, which it customarily is made to do.¹

ACCUMULATED SURPLUS (OF A CORPORATION).—This is the fund the corporation has in excess of its capital stock after payment of its debts.²

ACCUMULATIONS.—As to trusts for accumulation, see the title PERPETUITIES.

ACCUSED.—The expression "to accuse" is used to denote the bringing a charge against one before some court or officer.³ And the person against

sense of having come to maturity, so as to be due and payable. Or, in other words, it indicates the time when the work contracted for is completed, or the materials furnished, one or both, as the case may be, and the account for the same is past due." *Cutcliff v. McAnally*, 88 Ala. 509.

1. *Brown's Law Dict.*; *Pain v. Benson*, 3 Atk. 80.

2. *State v. Parker*, 35 N. J. L. 578; *State v. Utter*, 34 N. J. L. 480; *State v. Yard*, 42 N. J. L. 359.

3. *People v. Braman*, 30 Mich. 468.

Whether Charge must be before Legal Tribunal.—"What is meant by the word *accused*? Though frequently used in that sense, it does not necessarily import the charge of a crime by judicial procedure. In its popular sense it is used to express a charge or imputation merely. In this sense one may be *accused* of that which is no legal offense; as if he is charged with immoral or disgraceful conduct or official delinquency. It certainly is not synonymous with arrested under criminal process." *State v. South*, 5 Rich. (S. Car.) 493. To the same effect see *Com. v. O'Brien*, 12 Cush. (Mass.) 90; *Robbins v. Smith*, 47 Conn. 188; *Robinson's Case*, 2 M. & Rob. 141. But to the contrary is *State v. Duncan*, 9 Port. (Ala.) 260.

Charge and Accuse. (See also CHARGE.)—These are phrases implying certain legal steps. Therefore, a statute against the concealment or carrying away of any slave "charged with a capital crime" could be violated only after legal proceedings were commenced against the slave. *State v. Duncan*, 9 Port. (Ala.) 260. But see *State v. South*, 5 Rich. (S. Car.) 489.

And where an indictment charged that the defendants did "falsely charge and *accuse* him of the crime of adultery, and thereby to extort," etc., the term "charge and *accuse*" thus used and in this connection does not mean actually charge and *accuse* before a grand jury or magistrate, but to impute to him these offenses falsely as a means of inducing him to pay money to avoid such actual prosecution. *Com. v. O'Brien*, 12 Cush. (Mass.) 90.

An indictment charging that the prisoner "did feloniously and maliciously, with intent to extort money, charge and *accuse* A B with having committed the horrible and detestable crime, etc., and feloniously, etc., menace and threaten to *prosecute* the said A B, etc.," is not good under the stat. 4 Geo.

IV., c. 54, §5. But if the indictment follow the statute, and the evidence be of a threat to *prosecute*, the judge will leave it to the jury to say whether that was not a threatening to *accuse*. *Rex v. Abgood*, 2 C. & P. 436, 12 E. C. L. 209.

Threat to Accuse. (See also the title THREATS AND THREATENING LETTERS.)—It has been held that a threat to procure witnesses to support a complaint already made is not a threat to *accuse*. *Rex v. Gill*, 1 Lew. C. C. 305.

It has been held that a threat to cause process falsely stated to have been issued to be served on a party for a crime was within the statute; the court remarking that "a threat of *accusation*, in the sense of the statute, comprehends a threat to use any of the preliminary means necessary to cause a person to be proceeded against for a criminal offense." *Com. v. Murphy*, 12 Allen (Mass.) 449; *Com. v. Dorus*, 108 Mass. 488.

A threat to *accuse* need not be a threat to charge before any judicial tribunal; a threat to charge before any third person is sufficient. *Robinson's Case*, 2 M. & Rob. 14.

Accused and Indicted.—In *Com. v. Cawood*, 2 Va. Cas. 527, *Barbour, J.*, in his dissenting opinion confines the word *accused* to persons indicted. He says: "The judge, on the first of May, made a special order for a jury for the trial of a prisoner *accused* of murder, though, in legal propriety, he could not, after passing an examining court, be said to be *accused* until he was indicted."

Accusation.—An *Alabama* statute provided that "all persons to the number of two or more who abuse, whip, or beat any person, upon an *accusation* real or pretended, or to force such person to confess himself guilty of an offense," shall be guilty of a crime. In *Underwood v. State*, 25 Ala. 71, the court says: "To make out the offense contemplated by the first part of this section it is essential that the *accusation* should be the moving cause of the abuse or violence. The term *accusation* must not be confounded with the act on which it is based. It means something distinct from and independent of it. If two persons were to bring a charge against a third and beat him upon provocation of the act complained of, that is very different from inflicting the same violence upon him, not from the provocation of the act itself, but because they believed him guilty of the *accusation* brought against him, for the commission of it. The one is simply an act of

whom the charge is made is very often referred to as the "accused."¹

ACCUSTOMED.—See note 2.

ACID PHOSPHATE.—Any compound or any phosphoric acid with a base may appropriately be called a phosphate; and if there is present so much acid that it could saturate a greater quantity of the base, it is properly called an "acid phosphate," to distinguish it from a "basic phosphate."²

ACKNOWLEDGE. (As to acknowledgments of deeds, etc., see the title **ACKNOWLEDGMENTS.** As to the acknowledgment of a debt which will bar the running of the statute of limitations, see the title **LIMITATION OF ACTIONS.**)—Acknowledge means to own or admit the knowledge of.⁴

private vengeance, while the other implies, to some extent, the usurpation of legal authority—to try and punish upon a charge—what is commonly called lynching."

Accusation—Bastardy. (See also the title **BASTARDY.**)—Upon the construction of *accusation* in a statute as to bastardy proceedings, the court said: "The word *accusation*, as used in the statute, should be considered as having its ordinary meaning, of a declaration by the mother that a certain person is the father of her child, and not a charge made in legal form by means of a complaint to a magistrate. Indeed, it is only as the statute uses the words 'continue constant in her *accusation*' that any ground is furnished for the idea that such constancy of accusation must follow the institution of a legal complaint. Her continued *accusation* must necessarily be in itself an informal one, and there is nothing in the statute to suggest the idea that it must follow the birth of the child or the discovery to which she is put in the time of her travail." *Robbins v. Smith*, 47 Conn. 188.

1. *People v. Braman*, 30 Mich. 468.

Defendant in Civil Action.—An *accused* being one who is charged with a crime or misdemeanor, the word cannot well be said to apply to a defendant in a civil action. *Castle v. Custer*, 19 Kan. 426. This was a civil action for libel, and the state constitution provided that the *accused* should be acquitted only when the alleged libelous matter, even though true, was published for justifiable ends, which provision was held not to apply to the civil action.

In *Mosby v. St. Louis Mut. Ins. Co.*, 31 Gratt. (Va.) 634, it is said: "If it had been the intention of the legislature to confine the provision to criminal cases alone, it would not have used the words 'the party affected' thereby, but the word *accused*, or some similar word indicating a criminal offense."

2. **Accustomed Way.**—Where a deed conveyed a water privilege with the power and appurtenances as they then existed, with the right to rebuild and repair the dam, and

to pass and repass, in the use of the same, "over the *accustomed way*," it was held that the right of way must be regarded as limited to the last *accustomed way*. *Ferriss v. Knowles*, 41 Conn. 308.

Accustomed to Bite. (See also the title **ANIMALS.**)—This formula, used in text-books and in forms given for pleadings, "does not mean that the keeper of a ferocious dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person. But, as he is held to be a man of common vigilance and care, if he had good reason to believe, from his knowledge of the ferocious nature and propensity of the dog, that there was ground to apprehend that he would under some circumstances bite a person, then the duty of restraint attached, and to omit it was negligence." *Godeau v. Blood*, 52 Vt. 251.

Accustomed and Usually.—In *Farwell v. Smith*, 16 N. J. L. 137, it was held that there was no variance between *accustomed* to navigate the river and *usually* navigating the river.

3. *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 526. And in this case it was held that the name was not meaningless and arbitrary, or such as could be appropriated for a trade-mark.

4. *Blythe v. Ayres*, 96 Cal. 577. And see this case as to the facts which will constitute the *acknowledgment* of an illegitimate child within the *California Code*. See also the titles **LEGITIMACY**; **BASTARDY**.

In a Will. (See also the titles **HEIR**; **WILLS**.)—"I *acknowledge* A B to be my heir-at-law," has been held to pass the testator's lands in fee. *Parker v. Nickson*, 1 De G. J. & S. 177. In giving judgment in this case Lord Westbury said: "Nothing is better settled in our law than that the words 'I make A B my heir,' or 'I declare A B to be my heir,' or even the words 'A B is my heir,' amount to a devise to A B in fee of all the inheritable lands of the testator." See also *Taylor v. Webb*, Styles 301; *Spark v. Purnell*, Hob. 75.

ACKNOWLEDGMENTS.

By Jos. R. LONG.

- I. DEFINITION AND OBJECT, 484.**
- II. NATURE OF THE ACT—WHETHER MINISTERIAL OR JUDICIAL, 485.**
- III. ORIGIN AND NECESSITY, 488.**
 - 1. *Of Statutory Origin, 488.*
 - 2. *How Far Necessary to Validity of Deed, 488.*
- IV. WHO MAY TAKE ACKNOWLEDGMENTS, 493.**
 - 1. *In General, 493.*
 - a. *Competency Depends on Statute, 493.*
 - b. *Circumstances Affecting Qualification of Officer, 493.*
 - (1) *Interest, 493.*
 - (2) *Relationship, 494.*
 - (3) *Officer also Attesting Witness, 494.*
 - (4) *De Facto and Ex Officio Officers, 495.*
 - (5) *Deputy, 496.*
 - c. *Extra-Territorial Authority of Officer, 498.*
 - 2. *Within the State, 499.*
 - 3. *In Other States, 501.*
 - 4. *In Foreign Countries, 505.*
- V. WHO MAY MAKE ACKNOWLEDGMENTS, 507.**
 - 1. *Generally, 507.*
 - 2. *Agent or Attorney, 508.*
 - 3. *Partners, 509.*
 - 4. *Corporations, 510.*
 - 5. *Married Women, 512.*
 - a. *Generally, 512.*
 - b. *Refusal to Acknowledge—Power of Court to Order, 514.*
 - c. *Separate Examination, 514.*
 - (1) *In General, 514.*
 - (2) *Origin and Object of the Practice, 516.*
 - (3) *General Requirements, 517.*
 - (a) *Certification, 517.*
 - (b) *Explanation of Contents, 518.*
 - (c) *Act Free from Compulsion, 520.*
 - (d) *Examination Apart from Husband, 521.*
 - (e) *Examination must be Personal, 521.*
 - (4) *Exceptions and Qualifications of Rule, 521.*
 - (a) *Estoppel, 521.*
 - (b) *Separation, Abandonment, Divorce, 521.*
 - d. *Under Recent Statutes, 522.*
- VI. TIME WHEN ACKNOWLEDGMENT MUST BE MADE, 525.**
- VII. THE CERTIFICATE, 526.**
 - 1. *Generally, 526.*
 - a. *Requirements Statutory, 526.*
 - b. *Certain Provisions Considered, 526.*
 - (1) *Place of the Certificate, 526.*
 - (2) *Time of Making, 527.*
 - (3) *Venue, 527.*
 - (4) *Date, 529.*

- (5) *Signature*, 529.
- (6) *Official Character of Officer*, 530.
 - (a) *General Rule—Should Appear from Certificate*, 530.
 - (b) *Surplusage in Description*, 532.
- (7) *Seal*, 532.
 - c. *Certificate of Magistracy and Conformity*, 535.
2. *What It must Certify*, 538.
 - a. *Compliance with Statute*, 538.
 - b. *Fact of Acknowledgment*, 541.
 - c. *Name and Identity of Grantor*, 542.
3. *Errors and Omissions*, 546.
 - a. *Generally*, 546.
 - b. *Clerical Errors, Technical Omissions*, 547.
 - c. *Parol Evidence Not Admissible*, 551.
 - d. *Surplusage*, 552.
4. *Amendment*, 552.
 - a. *By the Officer*, 552.
 - b. *By the Court*, 554.
5. *Liability of Officer for False Certificate*, 555.
6. *Certificate as Evidence*, 555.
 - a. *Generally*, 555.
 - b. *How Far Conclusive*, 556.
 - (1) *Generally*, 556.
 - (2) *View that Certificate is Prima Facie Evidence Only*, 556.
 - (3) *View that Certificate is Conclusive in Absence of Fraud*, 557.
 - (4) *Showing Want of Acknowledgment or Jurisdiction*, 558.
 - (5) *Impeachment—Nature of Evidence Required*, 560.

VIII. CURING DEFECTIVE ACKNOWLEDGMENTS, 562.

1. *By Subsequent Acknowledgment*, 562.
 - a. *In General*, 562.
 - b. *Ratification by Widow*, 563.
 - c. *Fraudulent Acknowledgment*, 564.
2. *By Statute*, 564.
 - a. *Generally*, 564.
 - b. *How Far Retroactive*, 566.
 - c. *Constitutionality of Curing Acts*, 567.
 - d. *Curing Acts Construed Liberally*, 568.
3. *Proof by Subscribing Witnesses*, 569.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE, related to this subject, see the following titles: AGENCY; ALTERATION OF INSTRUMENTS; ASSIGNMENTS; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; CONFLICT OF LAWS; DEEDS; EVIDENCE; MARRIED WOMEN; POWER OF ATTORNEY; PUBLIC OFFICERS; RECORD; RECORDING ACTS; REFORMATION OF INSTRUMENTS; STATUTES; WITNESSES.

I. DEFINITION AND OBJECT—Definition.—Acknowledgment is the act of one who has executed a deed, in going before some competent officer or court and declaring it to be his act or deed.¹

Object.—The object of acknowledgment is twofold: first, to entitle a deed to be recorded; and, second, to make it competent evidence without further proof of its execution.²

1. **Definition.**—Bouv. Law Dict. 88.
United States.—Taylor v. U. S., 45 Fed. Rep. 531; Strong v. U. S., 34 Fed. Rep. 17.
Georgia.—White v. Magarahan, 87 Ga. 217, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), this title.

- Illinois.*—Short v. Conlee, 28 Ill. 219.
Nebraska.—Burbank v. Ellis, 7 Neb. 156; Aultman, etc., Co. v. Jenkins, 19 Neb. 209.

2. **Twofold Object of Acknowledgment.**—*United States.*—Doe v. Smith, 3 McLean (U. S.) 362.

- Arkansas.*—Griesler v. McKennon, 44 Ark. 517.

- California.*—Fogarty v. Finlay, 10 Cal. 239, 70 Am. Dec. 714; Clark v. Troy, 20 Cal. 219; Landers v. Bolton, 26 Cal. 393; Wetherbee v. Dunn, 32 Cal. 106.

- Connecticut.*—Stanton v. Button, 2 Conn. 527.

- Illinois.*—Reed v. Kemp, 16 Ill. 445.

- Indiana.*—Allen v. Vincennes, 25 Ind. 531; State v. Dufour, 63 Ind. 567.

II. NATURE OF THE ACT—WHETHER MINISTERIAL OR JUDICIAL.—The decisions of the courts as to whether the officer, in taking and certifying acknowl-

Missouri.—Harrington v. Fortner, 58 Mo. 468.

Nebraska.—Burbank v. Ellis, 7 Neb. 156.
New Hampshire.—Wark v. Willard, 13 N. H. 389.

New York.—Jackson v. Shepard, 2 Johns. (N. Y.) 77; Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207; Elwood v. Klock, 13 Barb. (N. Y.) 50.

Ohio.—Foster v. Dennison, 9 Ohio 121.
South Carolina.—Woolfolk v. Graniteville Mfg. Co., 22 S. Car. 332.

Texas.—Wiggins v. Fleishel, 50 Tex. 57.
Vermont.—Pitkin v. Leavitt, 13 Vt. 379.

Virginia.—Hutchison v. Rust, 2 Gratt. (Va.) 394.

Wisconsin.—Hinchliff v. Hinman, 18 Wis. 139.

See also Ward v. Fuller, 15 Pick. (Mass.) 185; Loree v. Abner, 6 C. C. A. 302, 6 U. S. App. 649; Bradford v. Dawson, 2 Ala. 203; Pierce v. Brown, 24 Vt. 165.

Acknowledgment Essential to Admit Deed to Record.—*United States.*—Loree v. Abner, 6 C. C. A. 302, 6 U. S. App. 649.

Arkansas.—Haskill v. Sevier, 25 Ark. 153.
Georgia.—White v. Magarahan, 87 Ga. 217.

Indiana.—Doe v. Naylor, 2 Blackf. (Ind.) 32; Bever v. North, 107 Ind. 544; Westhafer v. Patterson, 120 Ind. 459, 16 Am. St. Rep. 330.

Iowa.—Brinton v. Seevers, 12 Iowa 389.
Kansas.—Meskimen v. Day, 35 Kan. 46.

Massachusetts.—Pidge v. Tyler, 4 Mass. 541; Palmer v. Paine, 9 Gray (Mass.) 56.

Michigan.—Harrington v. Fish, 10 Mich. 415; Buell v. Irwin, 24 Mich. 145. See People v. Marion, 29 Mich. 31.

Missouri.—Hughes v. Morris, 110 Mo. 306.
Pennsylvania.—Powell's Appeal, 98 Pa. St. 403.

Tennessee.—M'Iver v. Robertson, 3 Yerg. (Tenn.) 84.

Texas.—Deen v. Wills, 21 Tex. 642; Holliday v. Cromwell, 26 Tex. 188; Coffey v. Hendricks, 66 Tex. 676.

See also Stramler v. Coe, 15 Tex. 211; Gordon v. Collett, 107 N. Car. 362; Tarpey v. Deseret Salt Co., 5 Utah 205.

The Chief Object of a Certificate of Acknowledgment is to admit the deed to registry. It is only where the rights of third persons intervene that recording a deed or other instrument becomes necessary; and due acknowledgment of the instrument, evidenced by a proper certificate thereof, is a condition precedent to registration. Black v. Gregg, 58 Mo. 565.

See further, as to the necessity for acknowledgment in order to admit a deed to record, and the effect of recording an unacknowledged instrument, *infra*, this title, *Origin and Necessity*.

Under the Alabama Act of 1828 it was held that in order to admit trust deeds to record it was only necessary that they be proved or acknowledged without regard to the form prescribed by the Act of 1812, which was applicable to absolute deeds only. Hobson v.

Kissam, 8 Ala. 357; *followed*, though *disapproved*, in Herbert v. Hanrick, 16 Ala. 581.

Acknowledgment Not Necessary for Recording when Execution is Otherwise Proved.—*Texas.*—The *Texas* statute (Sayles' Tex. Civ. Stat., art. 600) making the acknowledgment or proof of execution of a deed by a corporation necessary before such deed can be admitted to record does not affect the validity of a conveyance, the execution of which may be proven otherwise than by the officer's certificate of acknowledgment, or by a subscribing witness, as prescribed by statute. Thus, a conveyance, signed by the president of a railroad company, conveying land certificates issued to the company, was properly recorded, although neither acknowledged nor proven according to the statute. Kimmarle v. Houston, etc., R. Co., 76 Tex. 686. See also *infra*, this title, *Proof by Subscribing Witnesses*.

Whether Record Essential to Admission in Evidence.—A deed proved or acknowledged in the manner provided by law is entitled to be received in evidence though it has never been recorded. Keichline v. Keichline, 54 Pa. St. 75. See M'Dill v. M'Dill, 1 Dall. (Pa.) 63; Hamilton v. Galloway, 1 Dall. (Pa.) 93.

It was held in *Arkansas* that the acknowledgment of the execution of an instrument is not sufficient of itself to authorize the same to be read in evidence. The instrument and certificate of acknowledgment must be recorded. Wilson v. Spring, 38 Ark. 181; Watson v. Billings, 38 Ark. 278, 42 Am. Rep. 1.

Record of Acknowledgment Not Essential.—A sheriff's deed having indorsed upon it the clerk's certificate of acknowledgment taken in open court, may be read in evidence without producing the record entry of the acknowledgment. Chandler v. Bailey, 89 Mo. 641.

Where the validity of a deed as against third parties was contested on the ground that the record thereof failed to show any acknowledgment, it was held that the deed itself, purporting to have been regularly acknowledged and properly certified, was admissible in evidence without further proof of execution. Gardner v. Port Blakely Mill Co., 8 Wash. 1.

Duly Acknowledged Deed Admissible in Evidence without Further Proof of Execution.—*United States.*—Houghton v. Jones, 1 Wall. (U. S.) 702; New York Pharmaceutical Assoc. v. Tilden, 14 Fed. Rep. 740.

Alabama.—Barnett v. Proskauer, 62 Ala. 486; Bradford v. Dawson, 2 Ala. 203.

California.—Landers v. Bolton, 26 Cal. 393; Wetherbee v. Dunn, 32 Cal. 106.

Colorado.—McGinnis v. Egbert, 8 Colo. 41.
Connecticut.—Stanton v. Button, 2 Conn. 527.

Florida.—L'Engle v. Reed, 27 Fla. 345.

Illinois.—Post v. Springfield First Nat. Bank, 138 Ill. 559; Schroder v. Keller, 84 Ill. 46.

Indiana.—Allen v. Vincennes, 25 Ind. 531. See also Doe v. Naylor, 2 Blackf. (Ind.) 32.

edgments, acts in a ministerial or a judicial capacity, have not been uniform. The point has arisen mainly in the consideration of the questions of the ter-

Kansas.—*Simpson v. Mundee*, 3 Kan. 172; *McCaustin v. McGuire*, 14 Kan. 234; *Wilkins v. Moore*, 20 Kan. 538.

Maryland.—*Hutchins v. Dixon*, 11 Md. 29.

Minnesota.—*Ferris v. Boxell*, 34 Minn. 262; *Ellingboe v. Brakken*, 36 Minn. 156; *McMillan v. Edfast*, 50 Minn. 414; *Romer v. Conter*, 53 Minn. 171.

New York.—*Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Blackman v. Riley*, 63 Hun (N. Y.) 521.

Pennsylvania.—*Duncan v. Duncan*, 1 Watts (Pa.) 322.

Texas.—*Parker v. Chancellor*, 73 Tex. 475.

Virginia.—*Hutchison v. Rust*, 2 Gratt. (Va.) 394.

See also *Lewis v. Baird*, 3 McLean (U. S.) 56; *Clark v. Troy*, 20 Cal. 219; *Stetson v. Gulliver*, 2 Cush. (Mass.) 494; *Samuels v. Borrowscale*, 104 Mass. 207; *Maxwell v. Higgins*, 38 Neb. 671; *Van Cortlandt v. Tozer*, 17 Wend. (N. Y.) 338; *Armijo v. New Mexico Town Co.*, 3 N. Mex. 244; *M'Iver v. Robertson*, 3 Yerg. (Tenn.) 84; *Meuley v. Zeigler*, 23 Tex. 88.

A Bill of Sale for live stock is inadmissible in evidence under the *Idaho* Act of 1889, unless acknowledged before an officer authorized to take acknowledgments, and recorded with the county recorder in the same manner as a deed. *Ferbrache v. Martin* (Idaho, 1893), 32 Pac. Rep. 252.

A Deed with a Defective Certificate of Acknowledgment may be introduced in evidence, but is not conclusive. *Gould v. Woodward*, 4 Greene (Iowa) 82.

Acknowledgment Insufficient Proof of Execution where Deed is Produced by Grantee—Indiana.

A deed duly acknowledged and recorded is *prima facie* evidence without further proof of its execution; but it was held in *Indiana* that when made immediately to the party who produced it, its execution must be proved as if it had not been acknowledged or recorded. *Bowser v. Warren*, 4 Blackf. (Ind.) 522; *Mullis v. Cavins*, 5 Blackf. (Ind.) 77. See *Doe v. Vandewater*, 7 Blackf. (Ind.) 6.

Acknowledgment of Instrument Not Required to be Recorded, Not Proof of Execution.—The acknowledgment and recording of an instrument not required to be recorded does not prove its execution. *Stevens v. Irwin*, 12 Cal. 306. *Dutton v. Ives*, 5 Mich. 515; *Wing v. McDowell*, Walk. (Mich.) 175. See also *Carpentier v. Gardiner*, 29 Cal. 160; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *St. John v. Conger*, 40 Ill. 535.

Acknowledgment does Not Cure Defects in Execution.—An acknowledgment does not supersede the necessity of the usual formalities of a deed; and where a deed is void for want of signature or other essential part, it is not made good by acknowledgment. *Linsley v. Brown*, 13 Conn. 192; *Koltenbrock v. Craft*, 36 Ohio St. 584; *Miller v. Ruble*, 107 Pa. St. 395.

Unauthorized Sheriff's Deed Not Validated by Acknowledgment.—The acknowledgment of a sheriff's deed cures irregularities in the pro-

cess or proceedings, but not a want of authority to sell. *St. Bartholomew's Church v. Wood*, 61 Pa. St. 96. In delivering the opinion of the court in this case *Agnew, J.*, said: "This was very fully proved by *Gibson, C. J.*, and decided in *Cash v. Tozer*, 1 W. & S. (Pa.) 527, and again considered in *Shields v. Miltenberger*, 14 Pa. St. 78, where Judge Bell, in an exhaustive opinion, discusses all the authorities and arrives at the same conclusion, that the acknowledgment affirms a voidable but not a void sale. This case was followed by *McFee v. Harris*, 25 Pa. St. 102, delivered at the same term with *Spragg v. Shriver*, 25 Pa. St. 282, 64 Am. Dec. 698; and the same judge (Lewis, C. J.), citing *Shields v. Miltenberger*, 14 Pa. St. 79, says: 'After acknowledgment of the sheriff's deed in open court the title of the sheriff's vendee cannot be affected by mere irregularities, however gross; nothing but fraud in the sale, or a want of authority to sell, can defeat his title.' This makes it very clear Judge Lewis did not intend in *Spragg v. Shriver* to impute to the acknowledgment the effect sought now to be drawn from his opinion in that case. *Gardner v. Sisk*, 54 Pa. St. 506, announces the same doctrine, and it certainly should be regarded as now the settled law of the state."

Deed Acknowledged but Not Attested.—It has been held that a deed not attested according to law, but which was subsequently acknowledged, operated when recorded as constructive notice in spite of the want of attestation. *Brydon v. Campbell*, 40 Md. 331.

Section 27 of the *New York* Act of 1837 (1 Banks Rev. Stat. N. Y., 7th ed., p. 516), authorizing the loan of certain moneys to the United States deposited with the State of New York, requires mortgages taken on such loans to be executed in the presence of two or more witnesses, who shall subscribe the same as such witnesses. It was held under this act that the reason for an attestation by witnesses fails when the deed is duly acknowledged; and where such mortgage was signed by but one witness, but properly acknowledged, it was held that this was a good execution. *U. S. Deposit Fund v. Chase*, 6 Barb. (N. Y.) 37. See also the title ATTESTATION.

Acknowledgments of Recognizances—Fees of Officer.—Under U. S. Rev. Stat., §§ 828, 847, it has been held that a clerk or a commissioner of the United States courts taking the acknowledgments of parties and sureties to recognizances to appear in court is entitled to only one fee, regardless of the number of persons joining in the same acknowledgment. *U. S. v. Ewing*, 140 U. S. 142; *U. S. v. Barber*, 140 U. S. 164; *U. S. v. Hall*, 147 U. S. 691. But such officer is entitled to separate fees for the oaths of each surety to a recognizance, and the jurors to such oaths. *U. S. v. Barber*, 140 U. S. 164.

Compare, as to applicability of these sections to recognizances, and necessity for acknowledging such instruments, *Strong v. U. S.*, 34 Fed. Rep. 17; *McKinstry v. U. S.*, 34 Fed. Rep. 211, reversed in 40 Fed. Rep. 813.

ritorial jurisdiction of the officer, his disqualification by reason of interest in the conveyance, his power to amend a defective certificate of acknowledgment, and the effect of the certificate as evidence. The weight of authority seems to be in favor of the view that the act is ministerial, and not judicial.¹ In several of the states, however, the act is regarded as judicial;² and in *Missis-*

See also *Goodrich v. U. S.*, 42 Fed. Rep. 392.

1. Taking Acknowledgments Held Ministerial—United States.—*Elliott v. Peirsol*, 1 Pet. (U. S.) 328; *Loree v. Abner*, 6 C. C. A. 302, 6 U. S. App. 649.

Arkansas.—*Biscoe v. Byrd*, 15 Ark. 655.

Georgia.—*Wardlaw v. Mayer*, 77 Ga. 620.

Illinois.—*Hill v. Bacon*, 43 Ill. 477; *Herkelrath v. Stookey*, 58 Ill. 21; *People v. Bartels*, 138 Ill. 322, reversing 38 Ill. App. 428. Compare decisions under earlier laws relating to acknowledgments by married women: *Calumet, etc., Canal, etc., Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634. See also *Lickmon v. Harding*, 65 Ill. 505.

Kentucky.—*Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Stevenson v. Brasher*, 90 Ky. 23; *Beuley v. Curtis*, 92 Ky. 505.

Maine.—*Gibson v. Norway Sav. Bank*, 69 Me. 579.

Massachusetts.—*Haskell v. Haven*, 3 Pick. (Mass.) 404; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344.

Minnesota.—*Benson Bank v. Hove*, 45 Minn. 40.

New Hampshire.—*Odiorne v. Mason*, 9 N. H. 24.

New York.—*Lynch v. Livingston*, 8 Barb. (N. Y.) 463, 6 N. Y. 422.

Ohio.—*Truman v. Lore*, 14 Ohio St. 144; *Williamson v. Carskadden*, 36 Ohio St. 664.

See also *Shults v. Moore*, 1 McLean (U. S.) 520; *Munn v. Lewis*, 2 Port. (Ala.) 24; *Rowan v. Wallace*, 7 Port. (Ala.) 171; *Penn v. Garvin*, 56 Ark. 511; *People v. Nelson*, 133 Ill. 565; *Piper v. Chippewa Iron Co.*, 51 Minn. 435; *Helena First Nat. Bank v. Roberts*, 9 Mont. 323; *Stewart v. Perkins*, 110 Mo. 660; *Moore v. Vance*, 1 Ohio 1; *Ford v. Osborne*, 45 Ohio St. 1.

The officer in making the certificate of a married woman's acknowledgment acts ministerially, and not judicially. *Lewis v. Waters*, 3 Har. & M. (Md.) 430.

Why Act Ministerial.—In a case holding that in *Massachusetts* a justice of the peace might take acknowledgments of conveyances of lands lying outside of his own county, *Gray, J.*, delivering the opinion of the court, said: "Taking the voluntary acknowledgment of a deed, under our statutes, is a purely ministerial and not a judicial act, nor in any way connected with a judicial proceeding. It may be taken out of the commonwealth by a notary public, who is in no sense a judicial officer. It involves no compulsion or summons of any person who does not appear of his own accord, and rarely, if ever, requires any investigation of the circumstances under which the deed was executed. Even in case of a refusal to acknowledge, the justice, as the law now stands, cannot exercise any coercion over the grantor,

or inquire into the reasons of refusal, or receive any testimony to the execution, except from the subscribing witnesses." *Learned v. Riley*, 14 Allen (Mass.) 109. See also *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155.

In *People v. Bartels*, 138 Ill. 322, *Magruder, C. J.*, said: "The doctrine that the taking of an acknowledgment is a judicial act, had its origin in the consideration of acknowledgments by married women, where the officer is required to make the privy examination herein referred to; and, as applied to such cases, the doctrine is sound. In *Calumet, etc., Canal, etc., Co. v. Russell*, 68 Ill. 426, and *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634, the acknowledgments were by married women, and the certificates stated that they were examined separate and apart from their husbands, * * * as required by the statute then in force. In those cases the taking of the acknowledgment was correctly held to be a judicial act. But the present statute of this state no longer requires the separate examination of a married woman in order to relinquish her dower or convey her separate estate. She is treated as though she were a *feme sole*. An ordinary acknowledgment, such as that involved in the present case, cannot be regarded as a judicial act; and those cases which hold that it is a judicial act will be found upon examination to have improperly applied the ruling in regard to acknowledgments by married women where a privy examination is made necessary by statute, to acknowledgments not made by married women, or where there has been no requirement of such an examination."

2. Taking Acknowledgments Held to be a Judicial Act—Alabama.—*Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918; *Griider v. American Freehold Land Mortg. Co.*, 99 Ala. 281; *American Freehold Land Mortg. Co. v. James* (Ala., 1895), 16 So. Rep. 887; *Thompson v. New England Mortg. Security Co.* (Ala., 1895), 18 So. Rep. 315. Compare *Halso v. Seawright*, 65 Ala. 431; *Shelton v. Aultman, etc., Co.*, 82 Ala. 315.

California.—*Wedel v. Herman*, 59 Cal. 514.

Iowa.—*Wilson v. Traer*, 20 Iowa 231. But see *Abrams v. Ervin*, 9 Iowa 87.

Missouri.—*Stevens v. Hampton*, 46 Mo. 404.

North Carolina.—*Paul v. Carpenter*, 70 N. Car. 502; *Piland v. Taylor*, 113 N. Car. 1; *Long v. Crews*, 113 N. Car. 256.

Pennsylvania.—*Jamison v. Jamison*, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; *Withers v. Baird*, 7 Watts (Pa.) 227, 32 Am. Dec. 754; *Louden v. Blythe*, 16 Pa. St. 532, 55 Am. Dec. 527; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204; *Com. v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805; *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552.

Tennessee.—*Shields v. Netherland*, 5 Lea

sippi a distinction has been made between taking the acknowledgment and making the certificate, the former being looked upon as a judicial and the latter as a ministerial act.¹

III. ORIGIN AND NECESSITY—1. Of Statutory Origin.—The practice of acknowledging instruments is a creation of modern statutes, being unknown to the common law. It arose from a desire to prevent fraud and litigation in establishing title to lands, by providing reliable evidence of such title.²

2. How Far Necessary to Validity of Deed.—Acknowledgment has reference to the proof of execution, and not to the force of the deed.³ It is not an essential part of the instrument; and as to the parties and persons with actual notice, neither an imperfect acknowledgment nor a total want of any acknowledgment affects the validity of the conveyance.⁴

(Tenn.) 193. But see *Beaumont v. Yeatman*, 8 Humph. (Tenn.) 543.

Virginia.—*Harkins v. Forsyth*, 11 Leigh (Va.) 307; *Davis v. Beazley*, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67.

West Virginia.—*Tavener v. Barrett*, 21 W. Va. 658; *Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622.

See also *Harris v. Burton*, 4 Harr. (Del.) 66; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; *Stevens v. Hampton*, 46 Mo. 404; *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Romanes v. Fraser*, 17 Grant's Ch. (Canada) 267.

In *Wasson v. Connor*, 54 Miss. 351, the court, by Chalmers, J., said: "It is evident that the taking of an acknowledgment of a grantor is a *quasi-judicial* act. * * * The officer who takes an acknowledgment acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance, actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument." See also *Jamison v. Jamison*, 3 Whart. (Pa.) 457; 31 Am. Dec. 536.

In *Pennsylvania* the certificate of a justice of the peace, of the acknowledgment of a deed, is a judicial act. *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204; *Cressona Sav. Fund, etc., Assoc. v. Sowers*, 134 Pa. St. 354; *Heilman v. Kroh*, 155 Pa. St. 1.

In *North Carolina* the clerk of a superior court in adjudicating a certificate of acknowledgment and admitting the instrument to probate and ordering registration acts judicially. *White v. Connelly*, 105 N. Car. 65; *Turner v. Connelly*, 105 N. Car. 72.

1. *Harmon v. Magee*, 57 Miss. 410. See also *Banbury v. Arnold*, 91 Cal. 606; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699.

2. Origin of the Practice of Taking Acknowledgments.—*French v. Gray*, 2 Conn. 92; *Gould v. Howe*, 131 Ill. 490; *Pidge v. Tyler*, 4 Mass. 541; *Shaw v. Poor*, 6 Pick. (Mass.) 86, 17 Am. Dec. 347; *Moore v. Thomas*, 1 Oregon 201; *Saunders v. Hackney*, 10 Lea (Tenn.) 104; *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304.

3. In the absence of statute an acknowledgment

is unnecessary. An unacknowledged deed executed before there was any statute requiring an acknowledgment may be proved like other writings without an acknowledgment. *Stevens v. Griffith*, 3 Vt. 448. See also *Hill v. Greenwood*, 23 U. C. Q. B. 404.

3. Acknowledgment No Part of Deed.—The acknowledgment is no part of the deed itself, but is required by the statute as evidence of execution, or as authority for registration. *Doe v. Beardsley*, 2 McLean (U. S.) 412; *Foster v. Dennison*, 9 Ohio 121; *Burbank v. Ellis*, 7 Neb. 156; *Gray v. Ulrich*, 8 Kan. 112; *Leinenkugel v. Kehl*, 73 Wis. 238. See cases cited in note immediately following.

Acknowledgment is necessary for the admission of the deed to record, but it is not essential to its validity. Where a deed appears on its face to have been regularly executed, and its execution is attested by subscribing witnesses, it is admissible in evidence, although not acknowledged. *Doe v. Naylor*, 2 Blackf. (Ind.) 32.

4. Unacknowledged Deed Good between Parties.—*United States*.—*Wood v. Owings*, 1 Cranch (U. S.) 239; *Doe v. Smith*, 3 McLean (U. S.) 362; *Richards v. Randolph*, 5 Mason (U. S.) 115; *Sicard v. Davis*, 6 Pet. (U. S.) 124; *Hepburn v. Dubois*, 12 Pet. (U. S.) 345; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73.

Arkansas.—*Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Haskill v. Sevier*, 25 Ark. 152; *Stirman v. Cravens*, 29 Ark. 548; *Jackson v. Allen*, 30 Ark. 110; *Martin v. O'Bannon*, 35 Ark. 62; *Conner v. Abbott*, 35 Ark. 365; *Criscoe v. Hambrick*, 47 Ark. 235; *Watson v. Thompson Lumber Co.*, 49 Ark. 84.

California.—*Hastings v. Vaughn*, 5 Cal. 315; *Wolf v. Fogarty*, 6 Cal. 224, 65 Am. Dec. 509; *Kelsey v. Dunlap*, 7 Cal. 160; *Bryan v. Ramirez*, 8 Cal. 462, 68 Am. Dec. 340; *Landers v. Bolton*, 26 Cal. 393; *Grant v. Oliver*, 91 Cal. 158.

Colorado.—*Holladay v. Dailey*, 1 Colo. 460; *Crane v. Chandler*, 5 Colo. 21.

Illinois.—*Doe v. Miles*, 3 Ill. 315; *Doe v. Reed*, 3 Ill. 371; *Porter v. Dement*, 35 Ill. 478; *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302; *McDowell v. Stewart*, 83 Ill. 538; *Robinson v. Robinson*, 116 Ill. 250; *Roane v. Baker*, 120 Ill. 308.

Indiana.—*Doe v. Naylor*, 2 Blackf. (Ind.)

As against Persons without Notice.—But a deed without proper acknowledgment not being entitled to record, the record of such instrument is not notice to

32; *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516; *Stevenson v. Cloud*, 5 Blackf. (Ind.) 92; *Givan v. Doe*, 7 Blackf. (Ind.) 210; *Perdue v. Aldridge*, 19 Ind. 290; *Hubble v. Wright*, 23 Ind. 322; *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. St. Rep. 330; *Bever v. North*, 107 Ind. 544; *Davidson v. State*, 135 Ind. 254.

Iowa.—*Miller v. Chittenden*, 2 Iowa 315; *Blain v. Stewart*, 2 Iowa 378; *Hopping v. Burnam*, 2 Greene (Iowa) 39; *Gould v. Woodward*, 4 Greene (Iowa) 82; *Dessaume v. Burnett*, 5 Iowa 95; *Brinton v. Seavers*, 12 Iowa 389; *Haynes v. Seachrest*, 13 Iowa 455; *Carleton v. Byington*, 18 Iowa 482; *Simms v. Hervey*, 19 Iowa 273; *Lake v. Gray*, 30 Iowa 415, 35 Iowa 459; *Fogg v. Holcomb*, 64 Iowa 621; *Morse v. Beale*, 68 Iowa 463; *Waterhouse v. Black*, 87 Iowa 317; *McMaken v. Niles* (Iowa, 1894), 60 N. W. Rep. 199; *Krueger v. Walker* (Iowa, 1895), 63 N. W. Rep. 320.

Kansas.—*Simpson v. Mundee*, 3 Kan. 166; *Gray v. Ulrich*, 8 Kan. 112; *Clark v. Akers*, 16 Kan. 166; *Arn v. Matthews*, 39 Kan. 272; *Munger v. Baldridge*, 41 Kan. 236, 13 Am. St. Rep. 273; *Missouri Pac. R. Co. v. Houseman*, 41 Kan. 300.

Kentucky.—*Garrison v. Haydon*, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139.

Maine.—*Lawry v. Williams*, 13 Me. 281; *Beaman v. Whitney*, 20 Me. 413; *Buck v. Babcock*, 36 Me. 491; *Poor v. Larrabee*, 58 Me. 543; *Gibson v. Norway Sav. Bank*, 69 Me. 579; *Fitch v. Lewiston Steam-Mill Co.*, 80 Me. 34.

Maryland.—*Webster v. Hall*, 2 Har. & M. (Md.) 19, 1 Am. Dec. 370; *Johnston v. Canby*, 29 Md. 211.

Massachusetts.—*Howard Mut. Loan, etc., Assoc. v. McIntyre*, 3 Allen (Mass.) 571; *Call v. Buttrick*, 4 Cush. (Mass.) 345; *Pidge v. Tyler*, 4 Mass. 541; *Shaw v. Poor*, 6 Pick. (Mass.) 86, 17 Am. Dec. 347; *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76; *Davis v. Blunt*, 6 Mass. 487, 4 Am. Dec. 168; *Gibbs v. Swift*, 12 Cush. (Mass.) 393; *Dole v. Thurlow*, 12 Met. (Mass.) 157.

Michigan.—*Brown v. McCormick*, 28 Mich. 215; *People v. Marion*, 29 Mich. 31; *Price v. Haynes*, 37 Mich. 487; *Taylor v. Youngs*, 48 Mich. 268.

Minnesota.—*Tidd v. Rines*, 26 Minn. 201; *Benson Bank v. Hove*, 45 Minn. 40; *Lydiard v. Chute*, 45 Minn. 277.

Mississippi.—*Hill v. Samuel*, 31 Miss. 307; *Bass v. Estill*, 50 Miss. 300.

Missouri.—*Cooley v. Rankin*, 11 Mo. 642; *Strickland v. McCormick*, 14 Mo. 166; *Caldwell v. Head*, 17 Mo. 561; *Stevens v. Hampton*, 46 Mo. 404; *Ryan v. Carr*, 46 Mo. 483; *Dalton v. St. Louis Bank*, 54 Mo. 105; *Harrington v. Fortner*, 58 Mo. 468; *Black v. Gregg*, 58 Mo. 565; *Bennett v. Shipley*, 82 Mo. 448; *Wilson v. Kimmel*, 109 Mo. 260; *Hannah v. Davis*, 112 Mo. 599.

Montana.—*Taylor v. Holter*, 1 Mont. 688; *Middle Creek Ditch Co. v. Henry* (Mont., 1895), 39 Pac. Rep. 1054.

Nebraska.—*Kittle v. St. John*, 10 Neb. 605; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *Blazier v. Johnson*, 11 Neb. 404; *Harrison v. McWhirter*, 12 Neb. 152; *Weaver v. Coumbe*, 15 Neb. 167; *Buck v. Gage*, 27 Neb. 306; *Keeling v. Hoyt*, 31 Neb. 453; *Connell v. Galligher*, 36 Neb. 749, 39 Neb. 793; *Pearson v. Davis*, 41 Neb. 608.

New Hampshire.—*Tomson v. Ward*, 1 N. H. 9; *Montgomery v. Dorion*, 6 N. H. 250; *Odiorne v. Mason*, 9 N. H. 24; *Wark v. Willard*, 13 N. H. 389; *Brown v. Manter*, 22 N. H. 468; *Kingsley v. Holbrook*, 45 N. H. 313, 36 Am. Dec. 173.

New York.—*Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Voorhees v. Presbyterian Church*, 17 Barb. (N. Y.) 103; *Watson v. Campbell*, 28 Barb. (N. Y.) 421; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Fryer v. Rockefeller*, 63 N. Y. 268; *Strough v. Wilder*, 49 Hun (N. Y.) 405.

Oregon.—*Moore v. Thomas*, 1 Oregon 201; *Musgrove v. Bonser*, 5 Oregon 314, 20 Am. Rep. 737; *Manaudas v. Mann*, 14 Oregon 450.

Pennsylvania.—*Heister v. Fortner*, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; *Cable v. Cable*, 146 Pa. St. 451.

South Dakota.—*Banbury v. Sherin* (S. Dak., 1893), 55 N. W. Rep. 723.

Tennessee.—*Mount v. Kesterson*, 6 Coldw. (Tenn.) 452.

Texas.—*McLane v. Canales* (Tex. Civ. App., 1894), 25 S. W. Rep. 29; *Frank v. Frank* (Tex. Civ. App., 1894), 25 S. W. Rep. 819; *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304.

Vermont.—*Harrington v. Gage*, 6 Vt. 532; *Pierce v. Brown*, 24 Vt. 165; *Wood v. Cochran*, 39 Vt. 544.

Washington.—*Mann v. Young*, 1 Wash. Ter. 454; *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100; *Isensee v. Peabody*, 8 Wash. 660.

Wisconsin.—*Myrick v. McMillan*, 13 Wis. 188; *Quinney v. Denney*, 18 Wis. 485; *McMahon v. McGraw*, 26 Wis. 614; *Gilbert v. Jess*, 31 Wis. 110; *McPherson v. Featherstone*, 37 Wis. 632; *Leinenkugel v. Kehl*, 73 Wis. 238; *Nelson v. McDonald*, 80 Wis. 605.

Hawaii.—*Laanui v. Puohu*, 2 Hawaiian 161.

See also *Goodenough v. Warren*, 5 Sawy. (U. S.) 494; *Hurlbutt v. Butenop*, 27 Cal. 50; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *State v. Dufour*, 63 Ind. 567; *Mays v. Hedges*, 79 Ind. 288; *Ogden v. Walters*, 12 Kan. 282; *Saunders v. Hackney*, 10 Lea (Tenn.) 194; *Wailles v. Cooper*, 24 Miss. 208; *Siemens v. Kleeburg*, 56 Mo. 196; *Keen v. Schnedler*, 92 Mo. 516; *Pearson v. Davis*, 41 Neb. 608; *Hastings v. Cutler*, 24 N. H. 481; *Webb v. Chisolm*, 24 S. Car. 487; *Green v. Goodall*, 1 Coldw. (Tenn.) 404; *Hewitt v. Week*, 59 Wis. 444. And also "A Reading upon the Provincial Statute of Massachusetts Bay for Registering of Deeds," etc., 3 Mass. 573.

Acknowledgments Intended to Protect Purchasers and Creditors.—In *Sicard v. Davis*, 6

third persons of the rights it confers, and is therefore not good against creditors and subsequent purchasers for valuable consideration without notice.¹

Pet. (U. S.) 124, the court by Marshall, C.J., said: "The acknowledgment or the proof which may authorize the admission of the deed to record, and the recording thereof, are provisions which the law makes for the security of creditors and purchasers. They are essential to the validity of the deed, as to persons of that description, not as to the grantor. His estate passes out of him and vests in the grantee, so far as respects himself, as entirely, if the deed be in writing, sealed and delivered, as if it be also acknowledged or attested and proved by three subscribing witnesses, and recorded in the proper court. In a suit between them, such a deed is completely executed, and would be conclusive, although never admitted to record, nor attested by any subscribing witness. Proof of sealing and delivery would alone be required, and the acknowledgment of the fact by the party would be sufficient proof of it." See also *Hopping v. Burnam*, 2 *Greene (Iowa)* 39.

Mere Trespasser.—In *Missouri* an unacknowledged deed is not good against subsequent purchasers without notice, but is valid between the grantee and a mere trespasser. *Strickland v. McCormick*, 14 *Mo.* 166.

Plaintiff and Defendant Claiming under Same Unacknowledged Deed.—Where conveyances under which both parties to a suit respecting land claimed were made with reference to a recorded town plat, it was held that the objection that it was not properly acknowledged was of no force. *Quinn v. Reimers*, 46 *Mich.* 605. See also *Johnstone v. Scott*, 11 *Mich.* 232.

Necessity of Acknowledgment—Miscellaneous Instruments—Map or Plat.—It was held in *California* that a map or plat is not an instrument affecting the title to real property within the meaning of the statute requiring such instruments to be acknowledged so as to entitle them to be recorded. If deposited in the recorder's office, it may be introduced in evidence without acknowledgment. *Colton Land, etc., Co. v. Swartz*, 99 *Cal.* 278.

See also, as to acknowledgments of town plats, *Lake View v. Le Bahn*, 120 *Ill.* 92; *Scott v. Des Moines*, 64 *Iowa* 438; *Weeping Water v. Reed*, 21 *Neb.* 261; and the title DEDICATION.

A Covenant by Adjacent Lot Owners to reserve an open space in front of their lots, and not to build thereon, is not a conveyance within the statutory meaning of that term respecting the acknowledgment of conveyances by married women (1 *N. Y. Rev. Stat.*, p. 758, § 10). It does not purport to grant or convey any estate, and none passes by it, and such a covenant is not affected by defective acknowledgments. *Bradley v. Walker (Super. Ct.)*, 14 *N. Y. Supp.* 315.

A Lease by the State, of the Surplus Water of Canals, and Lands connected therewith, is not required to be acknowledged under the laws of *Ohio*, there being no statute in that state requiring state officers to acknowledge deeds and other like instruments executed by them

in the performance of their official duties. *Emmitt v. Lee*, 50 *Ohio St.* 662, *distinguishing Atkinson v. Dailey*, 2 *Ohio* 212.

A Bond of a Commissioner of Sale appointed by a chancery court is valid in *West Virginia* without being either acknowledged or proven before the clerk. *Lytle v. Cozad*, 21 *W. Va.* 183.

As to other instruments requiring acknowledgment, see the titles where those instruments are treated; *e.g.*, CHATTEL MORTGAGES; CONDITIONAL SALES; DEEDS; EASEMENTS; LEASE; MORTGAGES; SHERIFF'S SALES; TAX SALES, etc. See also ASSIGNMENTS; CEMETERIES; DEDICATION.

1. Registration without Acknowledgment is Not Notice.—In most of the states it is held that registration of an unacknowledged or defectively acknowledged instrument without proof of due execution is a mere nullity, and is not notice to creditors and subsequent purchasers of the rights claimed by the grantee.

United States.—*Shults v. Moore*, 1 *McLean (U. S.)* 520; *Morton v. Smith*, 2 *Dill. (U. S.)* 316; *Hodgson v. Butts*, 3 *Cranch (U. S.)* 140; *Doe v. Smith*, 3 *McLean (U. S.)* 362; *Sicard v. Davis*, 6 *Pet. (U. S.)* 124; *Hepburn v. Dubois*, 12 *Pet. (U. S.)* 345; *Hill v. Gordon*, 45 *Fed. Rep.* 276.

Arkansas.—*Jacoway v. Gault*, 20 *Ark.* 190, 73 *Am. Dec.* 494; *Simpson v. Montgomery*, 25 *Ark.* 365, 99 *Am. Dec.* 228; *Wright v. Graham*, 42 *Ark.* 140; *Green v. Abraham*, 43 *Ark.* 420.

California.—*Wolf v. Fogarty*, 6 *Cal.* 224, 65 *Am. Dec.* 509; *Kelsey v. Dunlap*, 7 *Cal.* 160; *Fogarty v. Finlay*, 10 *Cal.* 239, 70 *Am. Dec.* 714; *Ricks v. Reed*, 19 *Cal.* 571; *Hurlbutt v. Butenop*, 27 *Cal.* 50; *Emeric v. Alvarado*, 90 *Cal.* 444.

Connecticut.—*Sumner v. Rhodes*, 14 *Conn.* 135.

Georgia.—*Herndon v. Doe*, 7 *Ga.* 432, 50 *Am. Dec.* 406.

Iowa.—*Wickersham v. Reeves*, 1 *Iowa* 413; *Blain v. Stewart*, 2 *Iowa* 383; *Dussaume v. Burnett*, 5 *Iowa* 95; *Suiter v. Turner*, 10 *Iowa* 517; *Brinton v. SeEVERS*, 12 *Iowa* 389; *Reynolds v. Kingsbury*, 15 *Iowa* 238; *Newman v. Samuels*, 17 *Iowa* 528; *Wilson v. Traer*, 20 *Iowa* 231; *Willard v. Cramer*, 36 *Iowa* 22; *Greenwood v. Jenswold*, 69 *Iowa* 53; *City Bank v. Radtke*, 87 *Iowa* 363.

Kansas.—*Wickersham v. Chicago Zinc Co.*, 18 *Kan.* 481, 26 *Am. Rep.* 784; *Sanford v. Weeks*, 38 *Kan.* 319, 5 *Am. St. Rep.* 748.

Kentucky.—*Simpson v. Loving*, 3 *Bush (Ky.)* 458, 96 *Am. Dec.* 252.

Maine.—*De Witt v. Moulton*, 17 *Me.* 418; *Brown v. Lunt*, 37 *Me.* 423.

Maryland.—*Price v. McDonald*, 1 *Md.* 403, 54 *Am. Dec.* 657; *Johns v. Scott*, 5 *Md.* 81; *Cockey v. Milne*, 16 *Md.* 200; *Sitler v. McComas*, 66 *Md.* 135.

Massachusetts.—*Graves v. Graves*, 6 *Gray (Mass.)* 391; *Sigourney v. Larned*, 10 *Pick. (Mass.)* 72; *Dole v. Thurlow*, 12 *Met. (Mass.)* 157; *Blood v. Blood*, 23 *Pick. (Mass.)* 80;

Exceptions to General Rule—Married Woman's Deed.—In several states, acknowledgment has been held necessary to the validity of an instrument, even as between

Pidge v. Tyler, 4 Mass. 541; *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76.

Michigan.—*Galpin v. Abbott*, 6 Mich. 17; *Farmers', etc., Bank v. Bronson*, 14 Mich. 361; *People v. Marion*, 29 Mich. 31; *Price v. Haynes*, 37 Mich. 487.

Minnesota.—*Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. Rep. 619; *St. Paul Title Ins., etc., Co. v. Berkey*, 52 Minn. 497.

Mississippi.—*Tillman v. Cowand*, 12 Smed. & M. (Miss.) 262; *Work v. Harper*, 24 Miss. 517; *Bass v. Estill*, 50 Miss. 300; *Wasson v. Connor*, 54 Miss. 351; *Buntyn v. Shippers' Compress Co.*, 63 Miss. 94.

Missouri.—*Stevens v. Hampton*, 46 Mo. 404; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Musick v. Barney*, 49 Mo. 458.

Nebraska.—*Irwin v. Welch*, 10 Neb. 479; *Heelan v. Hoagland*, 10 Neb. 511; *Keeling v. Hoyt*, 31 Neb. 453.

New Hampshire.—*Montgomery v. Dorion*, 6 N. H. 250; *Brown v. Manter*, 22 N. H. 468.

New York.—*Fryer v. Rockefeller*, 63 N. Y. 268; *Bradley v. Walker*, 138 N. Y. 291.

North Carolina.—*Long v. Crews*, 113 N. Car. 256.

Oregon.—*Musgrove v. Bonser*, 5 Oregon 313; 20 Am. Rep. 737; *Fleschner v. Sumpter*, 12 Oregon 161.

Pennsylvania.—*Heister v. Fortner*, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; *Barney v. Sutton*, 2 Watts (Pa.) 31; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Green v. Drinker*, 7 W. & S. (Pa.) 440; *Simon v. Brown*, 3 Yeates (Pa.) 186, 2 Am. Dec. 368; *McKean, etc., Land Imp. Co. v. Mitchell*, 35 Pa. St. 269, 78 Am. Dec. 335.

South Carolina.—*Woolfolk v. Graniteville Mfg. Co.*, 22 S. Car. 332.

South Dakota.—*Cannon v. Deming*, 3 S. Dak. 421; *Banbury v. Sherin* (S. Dak., 1893), 55 N. W. Rep. 723.

Tennessee.—*Henderson v. McGhee*, 6 Heisk. (Tenn.) 55.

Texas.—*Hill v. Taylor*, 77 Tex. 295; *Kalamazoo Nat. Bank v. Johnson*, 5 Tex. Civ. App. 535; *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Hayden v. Moffatt*, 74 Tex. 647, 15 Am. St. Rep. 866.

Vermont.—*Isham v. Bennington Iron Co.*, 19 Vt. 230; *Wood v. Cochrane*, 39 Vt. 544.

Virginia.—*Davis v. Beazley*, 75 Va. 491.

West Virginia.—*Cox v. Wayt*, 26 W. Va. 807.

Wisconsin.—*Myrick v. McMillan*, 13 Wis. 188; *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436; *Fallass v. Pierce*, 30 Wis. 443.

Hawaii.—*Lenehan v. Akana*, 6 Hawaiian 538.

See also *Astor v. Wells*, 4 Wheat. (U. S.) 466; *McNeil v. Magee*, 5 Mason (U. S.) 244; *U. S. v. Crosby*, 7 Cranch (U. S.) 115; *Denn v. Reid*, 10 Pet. (U. S.) 524; *Martin v. O'Bannon*, 35 Ark. 62; *Ford v. Burks*, 37 Ark. 91; *Bryan v. Ramirez*, 8 Cal. 462, 68 Am. Dec. 340; *French v. Gray*, 2 Conn. 92; *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695; *Cheney v. Watkins*, 1 Har. & J. (Md.) 527, 2 Am. Dec. 530; *Wing v. McDowell*, Walk. (Mich.) 175; *Dutton v. Ives*, 5 Mich. 515;

Mastin v. Halley, 61 Mo. 196; *Frost v. Beckman*, 1 Johns. Ch. (N. Y.) 300; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Genter v. Morrison*, 31 Barb. (N. Y.) 155; *Goodyear v. Vosburgh*, 57 Barb. (N. Y.) 243; *Chamberlain v. Spargur*, 86 N. Y. 603; *Smith v. Castrix*, 5 Ired. (N. Car.) 518; *Galt v. Dibrell*, 10 Yerg. (Tenn.) 146; *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 497; *Burnham v. Chandler*, 15 Tex. 441; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

Deed by Several—Acknowledged by One.—As to the effect of the registration of a deed executed by several grantors and acknowledged by one only, see *infra*, this title, *Who may Make Acknowledgments—Generally*.

A Written Contract for the Sale of Land, not acknowledged or filed for record, does not impart constructive notice. *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748.

Recording an Unacknowledged Lease of Lands for life does not impart constructive notice. *Hoisington v. Hoisington*, 2 Aik. (Vt.) 235.

A Deed Not Acknowledged or Recorded is no evidence of seizin or possession in the grantee except as against the grantor and his heirs. *Kellogg v. Loomis*, 16 Gray (Mass.) 48.

A Sheriff's Certificate for the Sale of Land when recorded will be notice, although not acknowledged, under the *California* statute requiring such instruments to be recorded, but not providing for their acknowledgment (Cal. Pol. Code, § 4237). *Foorman v. Wallace*, 75 Cal. 552.

Mortgage—Arkansas.—In *Arkansas* a mortgage recorded without proper acknowledgment constitutes no lien on the mortgaged property as against a stranger, notwithstanding he may have actual knowledge of its existence. *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Hannah v. Carrington*, 18 Ark. 105; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Haskill v. Sevier*, 25 Ark. 152; *Martin v. O'Bannon*, 35 Ark. 62; *Conner v. Abbott*, 35 Ark. 365; *Ford v. Burks*, 37 Ark. 91; *Dodd v. Parker*, 40 Ark. 536; *Wright v. Graham*, 42 Ark. 141; *Watson v. Thompson Lumber Co.*, 49 Ark. 84; *Carle v. Wall* (Ark., 1891), 16 S. W. Rep. 293. See also *Carnall v. Duval*, 22 Ark. 136.

Chattel Mortgage—Illinois—Colorado.—It is so held as to chattel mortgages in *Illinois* under the statute requiring such instruments to be acknowledged and recorded (*Starr & Curtis Illinois Annot.*, Stat. 1630). *Forest v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Ill. 478; *Frank v. Miner*, 50 Ill. 444; *Sage v. Browning*, 51 Ill. 217 (*explaining* *Hathorn v. Lewis*, 22 Ill. 395); *Long v. Cockern*, 128 Ill. 29. The law is the same in *Colorado* as to chattel mortgages, unless possession of the personal property be delivered to and remain with the mortgagee. *Crane v. Chandler*, 5 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521. See 1 *Mills Colo. Annot. Stat.* (1891), § 385.

Unacknowledged Deed Good against One Not a Purchaser for Value.—One not a purchaser for value cannot avail himself of a defective

the parties thereto;¹ and except where changed by recent statutes, this is the general rule in case of deeds executed by married women.²

Constructive Notice.—In a few states, statutes have been enacted by which the recording of an unacknowledged deed is made to impart constructive notice to third persons.³

acknowledgment. *Moore v. Little Rock*, 42 Ark. 66; *Welch v. Sullivan*, 8 Cal. 165; *Chouteau v. Burlando*, 20 Mo. 482; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Mastin v. Halley*, 61 Mo. 196; *Hutton v. Webber* (Super. Ct.), 17 N. Y. Supp. 463; *Scruggs v. Burruess*, 25 W. Va. 670. See also *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. Rep. 330 (citing 1 AM. AND ENG. ENCYC. OF LAW, 1st ed., 154, 158); *McCaskle v. Amarine*, 12 Ala. 17.

The grantor's heirs and their grantees are not such purchasers. *Strough v. Wilder*, 119 N. Y. 530.

Actual Notice.—Nor can a person having actual notice of the existence of the deed take advantage of a defective acknowledgment. *Le Moynes v. Braden*, 87 Iowa 739; *Johnson v. Badger Mill, etc., Co.*, 13 Nev. 351; *Irwin v. Welch*, 10 Neb. 479; *Parker v. Wood*, 1 Dall. (Pa.) 436.

If the subsequent grantee had seen the record an unauthorized record would operate as notice. *Musgrove v. Bonser*, 5 Oregon 313, 20 Am. Rep. 737. See also *Sumner v. Rhodes*, 14 Conn. 135; *Musick v. Barney*, 49 Mo. 458.

Correction by Recording Officer.—Where the record of a deed was improper on account of a defective certificate of acknowledgment, it was held that it did not impart constructive notice although the certificate was corrected by the clerk in making the record. *Newman v. Samuels*, 17 Iowa 528.

1. Acknowledgment Held Essential to Pass Title.—In *Alabama* a deed without a subscribing witness, or a certificate of acknowledgment, is inoperative as a conveyance of the legal title to lands. *Hendon v. White*, 52 Ala. 597; *Lord v. Folmar*, 57 Ala. 615; *Stewart v. Beard*, 69 Ala. 470; *Doe v. Richardson*, 76 Ala. 329; *Chadwick v. Carson*, 78 Ala. 116; *Caperton v. Hall*, 83 Ala. 171. See also *Kentucky Bank v. Jones*, 59 Ala. 123; *Eureka Lumber Co. v. Brown* (Ala., 1894), 15 So. Rep. 518.

In *Ohio* unacknowledged or defectively acknowledged deeds have been held insufficient to convey title. *Roads v. Symmes*, 1 Ohio 281, 13 Am. Dec. 621; *Richardson v. Bates*, 8 Ohio St. 257; *Smith v. Hunt*, 13 Ohio 260, 42 Am. Dec. 201; *Hout v. Hout*, 20 Ohio St. 119; *Reynolds v. Clark*, Wright (Ohio) 656.

Unacknowledged Deed Good as a Contract.—But while such an instrument does not pass the legal title, if fair and just and founded on a valuable and adequate consideration, in the absence of a superior equity, it may be enforced in equity as a contract to convey. *Caperton v. Hall*, 83 Ala. 171; *Pollard v. Maddox*, 28 Ala. 321; *Louisville, etc., R. Co. v. Boykin*, 76 Ala. 560; *Reynolds v. Clark*, Wright (Ohio) 656. See also *Eureka Lumber Co. v. Brown* (Ala., 1894), 15 So. Rep. 518.

Where a deed executed by husband and wife was defectively acknowledged by the wife, and therefore inoperative to convey the legal title, it was held in *Virginia* that the deed might be good as an executory contract and enforced in equity. *Virginia Coal, etc., Co. v. Roberson*, 88 Va. 116; *Clinch River Veneer Co. v. Kurth*, 88 Va. 222.

In *Washington* a deed not sealed or acknowledged is good as a contract, and will pass the equitable title. *Edson v. Knox*, 8 Wash. 642.

2. See *infra*, this title, *Who may Make Acknowledgments—Married Women*.

3. **Recording Unacknowledged Deed Made Notice by Statute—Alabama.**—Under *Alabama* Code 1886, § 1797, the recording in the proper office of any conveyances of property which may be legally admitted to record operates as notice of the contents of the conveyance without any acknowledgment or probate thereof. *Merritt v. Phenix*, 48 Ala. 87; *Bickley v. Keenan*, 60 Ala. 293.

Illinois.—The law in this state relating to the record of deeds and other instruments affecting real estate differs materially from that of nearly every other state in the Union. The statute is as follows: "Deeds, mortgages, and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors; though not acknowledged or proven according to law; but the same shall not be read as evidence unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof." *Illinois* Annot. Stat. 1885, c. 30, par. 32, § 31. See *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Gillispie v. Reed*, 3 McLean (U. S.) 377; *Stebbins v. Duncan*, 108 U. S. 32; *Reed v. Kemp*, 16 Ill. 445.

Under the *Illinois* Act of 1822, a conveyance made and acknowledged in another state would be admissible to record in *Illinois*, but if not so acknowledged, registration in the latter state would not be notice. By the Act of 1837, a recorded deed is notice without acknowledgment or proof. *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Deininger v. McConnel*, 41 Ill. 227.

This is not the law as to deeds of chattel mortgages. They must be acknowledged and recorded in order to be notice. *Illinois* Annot. Stat. 1885, c. 95, par. 1; *Davis v. Ransom*, 18 Ill. 396; *Hunt v. Bullock*, 23 Ill. 320; *Henderson v. Morgan*, 26 Ill. 432; *Forest v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Ill. 478; *Frank v. Miner*, 50 Ill. 444; *Sage v. Browning*, 51 Ill. 217; *Long v. Cockern*, 128 Ill. 29.

Kansas.—Under the former laws of *Kansas*, the record of an unacknowledged deed was notice to subsequent purchasers. *Simpson*

IV. WHO MAY TAKE ACKNOWLEDGMENTS—1. In General—*a. COMPETENCY DEPENDS ON STATUTE.*—As has been already stated, the practice of taking acknowledgments is regulated entirely by statute. Each state has enacted statutes prescribing the forms to be observed in taking and certifying acknowledgments, and designating the officers by whom acknowledgments of conveyances affecting property situated within its limits may be taken, both within the state and in other states and foreign countries. While there is a general uniformity in these statutory regulations, the statutes of the several states vary considerably in matters of detail, both as to the officers who may take acknowledgments and the formalities to be observed. For these details and peculiarities of local legislation, reference must be made to the statutes of the respective states.

b. CIRCUMSTANCES AFFECTING QUALIFICATION OF OFFICER—(1) Interest.—It is a general rule that an officer who is a party to a conveyance or interested therein may not take the acknowledgment of the grantor, and an acknowledgment so taken would be a nullity so far as third persons are concerned.¹

v. Mundee, 3 Kan. 166; *affirmed* in *Brown v. Simpson*, 4 Kan. 64.

Michigan.—The record of a deed defectively acknowledged is not evidence of the original instrument, but if the instrument is made in good faith for valuable consideration, and intended to be a conveyance, the record is made by statute to operate as notice of the rights the deed conveys. *Brown v. McCormick*, 28 Mich. 215.

But the record cannot be changed to conform to a subsequent acknowledgment. *Burton v. Martz*, 38 Mich. 761.

See further, *infra*, this title, *Curing Defective Acknowledgments—By Statute.*

1. **An Officer Who is Grantee or Mortgagee** in a conveyance or mortgage is disqualified to take the acknowledgment of the instrument. *Hogans v. Carruth*, 18 Fla. 587; *West v. Krebaum*, 88 Ill. 263; *Hubble v. Wright*, 23 Ind. 322; *Wilson v. Traer*, 20 Iowa 231; *Beaman v. Whitney*, 20 Me. 413; *Groesbeck v. Seeley*, 13 Mich. 329; *Laprad v. Sherwood*, 79 Mich. 520; *Wasson v. Connor*, 54 Miss. 351; *Hainey v. Alberry*, 73 Mo. 427. See also *Bennett v. Shipley*, 82 Mo. 448; *Hannah v. Davis*, 112 Mo. 599.

See also *Wells v. Wood*, 28 Kan. 400; *Freeman v. Person*, 106 N. Car. 251; *Benson Bank v. Hove*, 45 Minn. 40.

As to the validity between the parties of an instrument so acknowledged, see *supra*, this title, *Origin and Necessity.*

A clerk is not empowered to act as judge in any matter affecting his personal interest, and where the clerk of the superior court adjudged the certificate of acknowledgment of an instrument to which he was a party to be in due form, admitted the instrument to probate, and ordered registration, it was held that such registration was unauthorized and invalid as to third parties. *White v. Connelly*, 105 N. Car. 65; *Turner v. Connelly*, 105 N. Car. 72; *Freeman v. Person*, 106 N. Car. 257.

Where the Only Officers Competent to Take Acknowledgments are Interested Parties.—The acknowledgment of a mortgage taken before a justice of the peace, who was also the mort-

gagee, is void as to third parties, notwithstanding the fact that he is the only justice in the township qualified to take acknowledgments. In such a case the parties would be remitted to their rights at common law. *Hammers v. Dole*, 61 Ill. 307. See *Brereton v. Bennett*, 15 Colo. 254.

But where the county clerk and his deputies were the only persons authorized to take acknowledgments of deeds, it was held in *Kentucky* that the clerk might take the acknowledgment of a deed in which he was the grantee. *Stevenson v. Brasher*, 90 Ky. 23.

Under the *North Carolina* statute (Rev. Code, c. 37, § 2) allowing a deputy clerk to take the probate of a deed, the fact that the clerk was grantee was held not to invalidate a probate so taken. *Piland v. Taylor*, 113 N. Car. 1.

Mortgage Sale by Deputy Sheriff—Acknowledgment by Sheriff.—Under the *Michigan* statute (Mich. Rev. Stat., §§ 8501, 8505) providing that a mortgage sale may be made by a sheriff or his deputy, and the deed be executed by the officer who makes the sale, a deed executed by the deputy making such a sale may be acknowledged before the sheriff who is also a notary. *Cook v. Foster*, 96 Mich. 610.

It is no objection to a sheriff's deed that it was acknowledged in the court of which one of the grantees was judge. *Lewis v. Curry*, 74 Mo. 49.

An Officer Who is Trustee in a Deed of Trust may not take the acknowledgment of the deed. *Green v. Abraham*, 43 Ark. 420; *Darst v. Dale*, 83 Ill. 136; *Stevens v. Hampton*, 46 Mo. 404; *Dail v. Moore*, 51 Mo. 589; *Black v. Gregg*, 58 Mo. 565; *Brown v. Moore*, 38 Tex. 645; *Rothschild v. Daugher*, 85 Tex. 332; *Clinch River Veneer Co. v. Kurth*, 88 Va. 222; *Bowden v. Parrish*, 86 Va. 67 (*citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 145). See also *Corey v. Moore*, 86 Va. 721; *Tavener v. Barrett*, 21 W. Va. 658.

Where a deed of trust was acknowledged before a trustee, but its execution was duly proved, it was held that it was good between the parties and those claiming under them,

(2) *Relationship*.—It is generally held that the acknowledgment of a deed is not invalidated by the fact that the officer taking it is related to the parties to the instrument. The courts so holding have usually based their decisions upon the ground that the officer taking acknowledgments acts ministerially, and not judicially.¹

(3) *Officer also Attesting Witness*.—An officer who is an attesting witness

and might be read in evidence. *Bennett v. Shipley*, 82 Mo. 448.

The acknowledgment of a deed of foreclosure made by a sheriff as trustee under a deed of trust may be taken by a notary who is also deputy sheriff. *Ewing v. Vannewitz*, 8 Mo. App. 602.

Where a deed, originally drawn so as to include a notary as beneficiary, was changed for acknowledgment so as to make the notary a trustee, it was held that the notary was not qualified thereby to take the acknowledgment, and the deed so acknowledged was invalid as to all persons without actual notice. *Haney v. Alberry* (Mo., 1880), 12 Cent. L. J. 39.

In *Fredericksburg Nat. Bank v. Conway*, 1 Hughes (U. S.) 37, it was held that a notary who was one of the beneficiaries under a deed of trust might take the grantor's acknowledgment.

An Officer Who is Bound to Make Title through a third person is so far interested in the conveyance as to be disqualified to take the acknowledgment of the wife of the grantor. *Withers v. Baird*, 7 Watts (Pa.) 227, 32 Am. Dec. 754.

Officer Who is Grantor.—The grantor in a deed cannot take his own acknowledgment of it before himself in his official capacity. *Davis v. Beazley*, 75 Va. 491. See also *Penn v. Garvin*, 56 Ark. 511.

Officer Who is Attorney or Agent of Grantor.—A notary who identifies himself with the transaction by placing his name on the face of a deed of trust as the avowed agent of one of the parties cannot acknowledge the instrument. *Sample v. Irwin*, 45 Tex. 567.

A notary who is also attorney for the mortgagor cannot take his client's acknowledgment of the mortgage. *Nichols v. Hampton*, 46 Ga. 253. Compare *Bierer v. Fretz*, 32 Kan. 329.

A notary who acted as agent of a mortgagor in obtaining the loan secured by the mortgage is not so interested as to be disqualified to take the acknowledgment of the mortgage. *Penn v. Garvin*, 56 Ark. 511.

The acknowledgment of a mortgage is not invalidated by the fact that the officer before whom it was made negotiated the loan secured by the mortgage, and was a partner of the mortgagee, there being no evidence to show that he was a party in interest. *Brereton v. Bennett*, 15 Colo. 254.

A married woman's acknowledgment taken by a notary who was the attorney of her husband, but not beneficially interested in the deed, his name nowhere appearing on the face of the instrument as the agent of either of the parties, is valid. *Kutch v. Holley*, 77 Tex. 220; *Romanes v. Fraser*, 16 Grant Ch. (Canada) 97.

Mortgage to Firm, Acknowledged before Partner.—The acknowledgment of a chattel mortgage, made to a partnership, before a notary who is one of the partners, is void as to third persons without actual notice. *City Bank v. Radtke*, 87 Iowa 363.

Preferred Creditor.—The attempted acknowledgment of a trust deed before a notary who is a preferred creditor therein, being taken before an officer disqualified to act, is a nullity, and is not cured by probate before the county clerk upon such acknowledgment and subsequent registration. *Long v. Crews*, 113 N. Car. 256 (citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 145, note 6); *Baxter v. Howell* (Tex. Civ. App., 1894), 26 S. W. Rep. 453. See also *White v. Connelly*, 105 N. Car. 65; *Tittle v. Vanleer* (Tex. Civ. App., 1894), 27 S. W. Rep. 736.

A Person Owning an Undivided Interest in a tract of land is not thereby disqualified to take in his official capacity the acknowledgment of a deed conveying a separate and distinct interest in the same land to a third party. *Dussaume v. Burnett*, 5 Iowa 95.

1. Acknowledgment before Officer Related to Parties.—*Penn v. Garvin*, 56 Ark. 511; *Gibson v. Norway Sav. Bank*, 69 Me. 579. See *Wilson v. Traer*, 20 Iowa 231.

A commissioner of deeds may take the acknowledgment of a deed although so related to the makers as to be disqualified to act as judge or juror in a trial where they are parties. *Lynch v. Livingston*, 6 N. Y. 422.

A justice of the peace may take the acknowledgment of a deed in which his father is grantor and his wife grantee. *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474. See *Welsh v. Lewis*, 71 Ga. 387.

But wherever the officer is beneficially interested, the acknowledgment of a relative would be void on that ground. So the acknowledgment of a deed before the husband of the grantee is void. *Jones v. Porter*, 59 Miss. 628. Compare *Kimball v. Johnson*, 14 Wis. 674, in which the acknowledgment of a mortgage before the husband of the mortgagee was held valid.

A notary who is the attorney and nephew of a party to a deed is not so interested as to be disqualified to take the acknowledgment of the deed. *Helena First Nat. Bank v. Roberts*, 9 Mont. 323.

Disqualification Not Appearing on Instrument.—Where it did not appear from the instrument that the officer was disqualified to act by reason of interest, it was held that the instrument was entitled to record, and that the record was notice to subsequent creditors and encumbrancers. *Benson Bank v. Hove*, 45 Minn. 40. See also *Heilbrun v. Hammond*, 13 Hun (N. Y.) 474; *Banks v. Ollerton*, 26 Eng. L. & Eq. 508.

to a deed is not for that reason incompetent to take the acknowledgment of its execution.¹

(4) *De Facto and Ex Officio Officers*.—An acknowledgment taken by a *de facto* officer is valid, and cannot be questioned in a collateral proceeding.² Where a person holding one office is also *ex officio* an officer authorized to take acknowledgments, acknowledgments taken by him are valid.³

1. Acknowledgment before Attesting Witness.

—A clerk may take the acknowledgment of a deed to which he is an attesting witness. *Trenwith v. Smallwood*, 111 N. Car. 132.

A notary public who is the officer of a corporation and whose duty it is to countersign and register its deeds, and whose signature is not essential to their validity, and is of no more effect than the signature of a witness, may take the acknowledgment of a deed signed by himself. *Sawyer v. Cox*, 63 Ill. 130. See also *Winsted Sav. Bank, etc., Assoc. v. Spencer*, 26 Conn. 195.

An acknowledgment before a commissioner who is also an attesting witness is valid. *Baird v. Evans*, 58 Ga. 350. See also *Hall v. Redson*, 10 Mich. 21.

Where the Mortgagee was the Identifying Witness before the commissioner taking the acknowledgment of the mortgage, it was held that the acknowledgment was defective, and no proof of execution. *Goodhue v. Berrien*, 2 Sandf. Ch. (N. Y.) 630.

2. De Facto Officer may Take Acknowledgments.—*Davidson v. State*, 135 Ind. 254; *Brown v. Lunt*, 37 Me. 423; *Farmers', etc., Bank v. Chester*, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318; *Thompson v. Johnson*, 84 Tex. 548; *Bullene v. Garrison*, 1 Wash. Ter. 587. See also *Thompson v. Johnson*, 84 Tex. 548.

Officer with Defective Commission.—An acknowledgment taken by a *de facto* officer is good and sufficient in a collateral proceeding although there may have been a defect in his commission. *Hamilton v. Pitcher*, 53 Mo. 334.

Alien Officer.—Where a duly commissioned notary public was disqualified to hold such office on account of his being an alien, it was held that he was nevertheless a *de facto* officer, and that acknowledgments taken by him were valid, and could not be impeached collaterally. *Wilson v. Kimmel*, 109 Mo. 260.

Officer pro Tempore.—An acknowledgment taken by one describing himself in his certificate as clerk *pro tempore* is good. It is sufficient if the person taking acknowledgments is a clerk *de facto* without reference to the temporary character of his appointment. *Woodruff v. McHarry*, 56 Ill. 218. See also *Cocke v. Halsey*, 16 Pet. (U. S.) 71.

Officer Removing to Another State.—Where a justice of the peace, commissioned for and residing in New Hampshire, moved with his family to Maine, but continued to transact business in the former state, where he still had his office, it was held that he was an officer *de facto*, and acknowledgments taken by him were good, and could not be inquired into in proceedings to which he was not a party. *Prescott v. Hayes*, 42 N. H. 56.

Officer of an Unrecognised Government.—The acknowledgment of a deed taken by a county

clerk placed in office by the "Provisional Government of Kentucky," a government not recognized as *de facto* by the United States or the State of Kentucky, was held invalid. *Simpson v. Loving*, 3 Bush (Ky.) 458, 96 Am. Dec. 252.

Acknowledgment before an Officer after the Expiration of His Term.—An acknowledgment taken by a person ten months after the expiration of his commission as notary public is void, such officer being neither a *de jure* nor a *de facto* officer. *Bernier v. Becker*, 37 Ohio St. 72.

But in *Brown v. Lunt*, 37 Me. 423, an acknowledgment taken by a justice of the peace after the expiration of his commission was held valid, it appearing that he had frequently acted as justice until after he took the acknowledgment, believing that he was still qualified, and the parties to the deed knowing well that he so acted. See also *Parker v. Wood*, 1 Dall. (Pa.) 436; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73.

After Resignation.—An acknowledgment purporting to have been taken by a clerk of court, and attested by the seal of the court, is not invalidated by the production of a record entry showing that he had resigned, where there is nothing to show when the resignation took effect or that his successor had assumed the duties of the office prior to the time when the acknowledgment was taken. *Macey v. Stark*, 116 Mo. 481; *Macey v. Pitillo*, (Mo., 1893), 21 S. W. Rep. 1004.

After the Abolition of His Office.—Where the incumbent of the office of county judge became, under a statute abolishing that office, *ex officio* county auditor and clerk of the board of supervisors, such officers not being authorized to take acknowledgments, it was held that his power to take acknowledgments ceased with the abolition of his office as judge. *Goodykoontz v. Olsen*, 54 Iowa 174. See also the title DE FACTO OFFICERS.

3. Acknowledgment before Ex-officio Officer.—An acknowledgment of a conveyance of a wife's paraphernal property, made by husband and wife in *Texas* in 1837, before an officer describing himself as chief justice and *ex officio* notary public, was held good. *Harvey v. Hill*, 7 Tex. 591.

Under the *Texas* Act of 1841, the acknowledgment of a power of attorney before a primary judge who was by the law of that state *ex officio* notary public, was sufficient to admit the deed to record without other acknowledgment or proof. *Butler v. Dunagan*, 19 Tex. 559. See also *Dennistoun v. Potts*, 26 Miss. 13; *Doe v. Mosher*, 15 New Bruns. 355.

A deed to land in *Texas*, acknowledged in *Louisiana* before an officer in that state styling himself recorder and *ex officio* notary pub-

(5) *Deputy*.—A deputy appointed under proper authority may take acknowledgments for his principal;¹ and while it is undoubtedly more regular in

lic, is admissible in evidence in *Texas*. *Willson v. Simpson*, 68 Tex. 306.

Under the *Alabama* statutory provisions regulating the proof and acknowledgment of conveyances and powers of attorney in other states, the acknowledgment of a power of attorney taken in *Texas* by an officer describing himself in his certificate as justice of the peace and *ex officio* notary public is sufficient to render the deed admissible in evidence in *Alabama*. *Goree v. Wadsworth*, 91 Ala. 416.

Under the laws of *Vermont* authorizing a justice of the peace to take acknowledgments of deeds, it was held that an acknowledgment before a judge of a supreme court of that state was good, although he failed to designate himself in his certificate as justice of the peace, the constitution of the state making such judge *ex officio* justice of the peace. *Middlebury College v. Cheney*, 1 Vt. 336. See also *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108.

Where a deed to property in *Virginia* was acknowledged before two aldermen of New York City, and their certificate described them as aldermen, but did not state further that they were justices of the peace, it was held that the deed was properly admitted to record in *Virginia*. *Welles v. Cole*, 6 Gratt. (Va.) 645.

Certificate of Conformity.—Under the *New York* statute authorizing deeds executed and acknowledged in other states to be recorded when accompanied by a certificate of a county clerk that the acknowledgment was made in conformity with local laws, it was held, where such certificate purported to be by a clerk of the circuit court, that the recording officer properly refused to admit the deed to record, and that he was not required to consult the laws of the state where the acknowledgment was made, to ascertain that a clerk of a circuit court was there *ex officio* clerk of the county court. *People v. Register*, 6 Abb. Pr. (N. Y. Supreme Ct.) 180. See also the title *EX OFFICIO*.

1. Acknowledgment Taken by Deputy—Alabama.—*Kemp v. Porter*, 7 Ala. 138.

California.—*Emmal v. Webb*, 36 Cal. 197.

Illinois.—*Hope v. Sawyer*, 14 Ill. 254.

Iowa.—*Abrams v. Ervin*, 9 Iowa 87; *Grea-sons v. Davis*, 9 Iowa 219.

Kansas.—*Babbitt v. Johnson*, 15 Kan. 252.

Kentucky.—*Talbott v. Hooser*, 12 Bush (Ky.) 408; *Drye v. Cook*, 14 Bush (Ky.) 459.

Mississippi.—*McRaven v. McGuire*, 9 Smed. & M. (Miss.) 34 (*affirmed* on this point in 23 Miss. 100).

Missouri.—*Gibbons v. Gentry*, 20 Mo. 468; *Springer v. McSpadden*, 49 Mo. 299; *Small v. Field*, 102 Mo. 104.

New York.—*Lynch v. Livingston*, 8 Barb. (N. Y.) 463.

North Carolina.—*Coltrane v. Lamb*, 109 N. Car. 209; *Piland v. Taylor*, 113 N. Car. 1.

Tennessee.—*Farmers', etc., Bank v. Chester*, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318.

Texas.—*Rose v. Newman*, 26 Tex. 131, 80 Am. Dec. 646; *Cook v. Knott*, 28 Tex. 85;

Frizzell v. Johnson, 30 Tex. 31 (the last three cases *overruling* a dictum to the contrary in *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172); *Wert v. Schneider*, 64 Tex. 327; *Thompson v. Johnson*, 84 Tex. 548.

See also *Wood v. James* (Ky., 1888). 9 S. W. Rep. 513; *Gordon v. Leach*, 81 Ky. 229; *Jefferson County Bldg. Assoc. v. Heil*, 81 Ky. 513; *Ralston v. Moore*, 83 Ky. 571; *Ansaldia v. Schwing*, 81 Tex. 198; *Gulf, etc., R. Co. v. Carter*, 5 Tex. Civ. App. 675. Compare *Tatom v. White*, 95 N. Car. 453.

In *Abrams v. Ervin*, 9 Iowa 87, a certificate of acknowledgment signed by "J. S. D., clerk, by J. W. W., deputy," was held good. The court, by Stockton, J., said: "From the certificate in this case it may fairly be presumed that the deed was acknowledged before the clerk and his name signed by the deputy. Without regard to his principal it is not intended to be held that the deputy has any power. It might be doubted whether a certificate that the deed was acknowledged before the deputy, and signed with his own name, without showing his principal, would be good. The taking and certifying the acknowledgment of a deed is, however, so far a ministerial act, that it may be done by the deputy in the name of the principal, as other acts of a ministerial nature are authorized to be performed by him."

A deed of trust to secure a debt due to a firm of which the county clerk was a member was properly acknowledged before his deputy. *Tipton v. Jones*, 10 Heisk. (Tenn.) 564.

Presumption as to Authority and Appointment of Deputy.—The certificate of acknowledgment of a deed to land in *Illinois*, made in *Missouri* and signed "A. B., clerk, by C. D., deputy clerk," and authenticated by the seal of a court of record, is *prima facie* sufficient, the presumption being that the clerk was authorized by the laws of *Missouri* to take acknowledgments through a deputy, and that the deputy was regularly appointed as such. *Hope v. Sawyer*, 14 Ill. 254. See also *Piper v. Chippewa Iron Co.*, 51 Minn. 495, 499; *Small v. Field*, 102 Mo. 104.

Where a deed to land in *Florida* is acknowledged in another state before a deputy clerk of a court, signing himself as such, and affixing his seal of office, it will be presumed, *prima facie*, that his appointment as deputy clerk was valid. *Summer v. Mitchell*, 29 Fla. 179. See also *Coltrane v. Lamb*, 109 N. Car. 209; *Piland v. Taylor*, 113 N. Car. 1. See, as to certificate of probate by unauthorized deputy, *Suddereth v. Smyth*, 13 Ired. (N. Car.) 452.

A certificate of acknowledgment purporting to be taken by a clerk, but signed by the deputy as deputy, is valid, the law presuming that the acknowledgment was made before the clerk, and that he authorized the deputy to sign the certificate. *Ament v. Brennan*, 1 Tenn. Ch. 431.

A Deputy Recorder, in some states, may

point of form for the acknowledgment to be taken in the name of the principal,¹ acknowledgments taken by a deputy, in his own name as deputy, without naming the principal, have been held good in some jurisdictions.²

take acknowledgments in the name of his principal. *Muller v. Boggs*, 25 Cal. 175; *Stewart v. Perkins*, 110 Mo. 660.

Kentucky—Deputy Clerk.—The *Kentucky Act of 1854* (Gen. Stat. 1888, c. 24, § 38) provides that "if the deputy of any county clerk shall take the acknowledgment of a deed or other instrument of writing, and indorse a memorandum thereof on such deed or instrument of writing, but shall fail from any cause to write out and sign the certificate thereof, it shall be lawful for the clerk to write out and sign the certificate, setting forth in such certificate the facts, including the indorsement, and thereupon record such deed or instrument and certificate, and the deed or instrument and the certificate shall be as good and effectual as if certified and signed by such deputy." It was held under this act, where the clerk set forth in his certificate the fact of acknowledgment, but failed to include the indorsement by the deputy, or to state that an indorsement had been made by the deputy, that the certificate was fatally defective. *Franklin v. Becker*, 11 Bush (Ky.) 595; *Waters v. Davis* (Ky., 1887), 2 S. W. Rep. 695.

See also, for the further construction of this provision, *McCormack v. Woods*, 14 Bush (Ky.) 73; *Drye v. Cook*, 14 Bush (Ky.) 463; *Gordon v. Leech*, 81 Ky. 229; *Jefferson County Bldg. Assoc. v. Heil*, 81 Ky. 514; *Ralston v. Moore*, 83 Ky. 571; *Wood v. James*, 87 Ky. 511; *Withers v. Pugh*, 91 Ky. 522.

Signature by Deputy Not Essential.—A certificate of acknowledgment in the regular form, purporting to have been signed in person by B. M. H., clerk of the county court, but in fact taken by R. E. H., a regularly appointed and qualified deputy, though a minor, was held good, notwithstanding the deputy failed to sign his own name as deputy. *Talbot v. Hooser*, 12 Bush (Ky.) 414.

Statutory Change.—The *Kentucky Act of 1884* provides: "No conveyance of real estate heretofore made by a married woman or other person shall be adjudged to be void or invalid because of a failure by the county clerk to incorporate in his certificate to such conveyance the indorsement of acknowledgment which may have been made by his deputy thereon." *Kentucky Statutes 1894*, § 571. This act does not apply to acknowledgments upon which there has already been a judgment. *Ralston v. Moore*, 83 Ky. 571. But it may be applied to cure a defective acknowledgment upon which suit was brought before the passage of the act. *Edmunds v. Leavell* (Ky., 1887), 3 S. W. Rep. 134.

See also *infra*, this title, *Curing Defective Acknowledgments—By Statute*.

1. *McCraven v. Doe*, 23 Miss. 100. See *Summer v. Mitchell*, 29 Fla. 179.

In *Beuley v. Curtis*, 92 Ky. 505, *Holt, C. J.*, said: "Undoubtedly the proper course for a deputy is to act in the name of his principal. He should always do so. * * *

Any official act done by him should be done in the name of his principal. In certifying the acknowledgment or recording of a deed it should be in the name of the clerk, by him as the deputy. The authority given by law to a ministerial officer is to the incumbent of the office. It is not to the deputy, but to the principal, and is exercised by the latter by himself or deputy."

Compare *Beaumont v. Yeatman*, 8 Humph. (Tenn.) 542. In this case *Turley, J.*, said: "How this acknowledgment of the execution of the mortgage made before the deputy clerk could have been taken in the name of the principal clerk, it seems very difficult to conceive. How would the entry of the acknowledgment be indorsed? 'This day personally appeared before A B the principal clerk of the County Court of Montgomery, by his deputy C D.' This is not so; for an appearance before the deputy is not an appearance before the principal, and cannot possibly be. Well, let us see again: 'This day personally appeared before A B the deputy, and acknowledged to C D the principal.' This will not do, for an acknowledgment to A B is not and cannot be an acknowledgment to C D; it not being a case where the acknowledgment inures upon the relation of principal and agent, there being nothing acknowledged for the benefit of the principal. Well, again: 'This day personally appeared before A B the principal clerk C D, and acknowledged. Test, E F, deputy.' This is not true; the appearance was not before A B, the principal, but E F, the deputy; and if it had been before the principal, the principal must have certified. Then it seems to us that an acknowledgment of deed can only be taken in the name of the person before whom the acknowledgment is made, and that there is no sense in talking about taking it in the name of a person before whom it is not made. It is true the signature to the certificate might be A B principal clerk, by his deputy C D; but *cui bono*? The signature by the deputy binds the principal to nothing; it is not like a contract, where the agent must bind the principal by his signature, or there is no obligation on his part; the act is merely ministerial on the part of the deputy, and is good by law, independent of the statute, which makes no new rule, except it be (as is contended) by implication." See also *MacKenzie v. Jackson*, 82 Ga. 80.

2. **Deputy may Take Acknowledgments in His Own Name.**—*Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Waddingham v. Dickson*, 17 Colo. 223; *Summer v. Mitchell*, 29 Fla. 179; *Moore v. Farrow*, 3 A. K. Marsh. (Ky.) 41; *Willamette Falls Canal, etc., Co. v. Gordon*, 6 Oregon 175; *Beaumont v. Yeatman*, 8 Humph. (Tenn.) 542; *Herndon v. Reed*, 82 Tex. 647; *Ballard v. Carmichael*, 83 Tex. 355, *overruling*, as to power of deputy to take acknowledgments, a dictum in *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172.

c. **EXTRA-TERRITORIAL AUTHORITY OF OFFICER.**—In the absence of statutory provision, the question as to the validity of acknowledgments taken by an officer outside of the territorial division within which his commission runs will be determined mainly by the position taken by the court before which the question arises as to whether the act of taking acknowledgments is ministerial or judicial. The courts which have denied the validity of such acknowledgments are generally those holding that the act is judicial, and as such incapable of being performed without the officer's jurisdiction. Most courts, however, consider the act as a ministerial one, personal to the officer taking the acknowledgments, and therefore valid, although performed beyond the officer's appropriate territorial jurisdiction.¹

See also *Steeple v. Downing*, 60 Ind. 484.

And in Some Jurisdictions must Use His Own Name.—It has been held in several instances that where a deputy clerk certifies an instrument he must certify over his own name, and not that of his principal. *MacKenzie v. Jackson*, 82 Ga. 80; *Beaumont v. Yeatman*, 8 Humph. (Tenn.) 542. See also the title **DEPUTY**.

1. Extra-territorial Acknowledgments Held Valid — Arkansas.—A justice of the peace may take acknowledgments anywhere within the state, and so an acknowledgment of a deed conveying land in one county may be taken by a justice of the peace of another county. *Biscoe v. Byrd*, 15 Ark. 655.

California.—A justice of the peace may take an acknowledgment in his own county of a conveyance of lands lying in another county. *Colton v. Seavy*, 22 Cal. 496.

Illinois.—Notaries public appointed in towns and cities are county officers, and may take acknowledgments anywhere within the limits of the county. *Hill v. Bacon*, 43 Ill. 477.

It was held under the act in force in *Illinois* in 1872 that a notary public might take acknowledgments in a different county from that in which he resided. *Guertin v. Mombleau*, 144 Ill. 32. See also *Harding v. Curtis*, 45 Ill. 252; *Hardin v. Kirk*, 49 Ill. 153, 95 Am. Dec. 581; *Doe v. Miles*, 3 Ill. 315.

Iowa.—A deed conveying lands in one county may be acknowledged before any officer in the state who is authorized to take acknowledgments. *Henderson v. Robinson*, 76 Iowa 603. See also *Buckley v. Early*, 72 Iowa 289.

Kentucky.—Since the passage of the *Kentucky Act* of 1810, clerks of county courts may take the acknowledgment or proof of deeds regardless of the county in which the land lies, and such deeds may be recorded in the proper county. *Moore v. Farrow*, 3 A. K. Marsh. (Ky.) 41; *Ford v. Gregory*, 10 B. Mon. (Ky.) 175. But they had no such power prior to the passage of that act. *McCulloch v. Myers*, 1 Dana (Ky.) 522; *Hedger v. Ward*, 15 B. Mon. (Ky.) 106.

The clerk of a district court was authorized to take the acknowledgment of deeds conveying lands within the district only. *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 49.

Maryland.—A deed by a citizen of the *District of Columbia* conveying land lying in Somerset county, *Maryland*, acknowledged in Prince George county before an officer

represented to be the chief judge of the first judicial district in *Maryland*, was admitted to be read in evidence without further evidence of the officer's authority to take acknowledgments. *Teackle v. Nicols*, 3 Har. & J. (Md.) 574.

A deed conveying land in *Maryland*, acknowledged by the grantor, a citizen of another state, before two justices of the peace of a different county in *Maryland* from that in which the land lay, is valid under the Act of 1766, a temporary residence in the county in which the deed was acknowledged being sufficient. *Sim v. Deakin*, 2 Har. & M. (Md.) 46; *Fouke v. Fleming*, 13 Md. 392. See also *Gittings v. Hall*, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502; *Hall v. Gittings*, 2 Har. & J. (Md.) 380.

But an acknowledgment of a deed before two justices of the peace of a county of which the grantors were not residents, and in which the land did not lie, was held invalid. *Johns v. Reardon*, 3 Md. Ch. 57, following *Hall v. Gittings*, 2 Har. & J. (Md.) 380.

Where the place of residence of the person making the acknowledgment does not appear on the face of the acknowledgment, it will be presumed, in the absence of proof of residence elsewhere, that he resided in the county where the acknowledgment was taken. *Carroll v. Tyler*, 2 Har. & G. (Md.) 54.

See, as to the power of a justice of the peace of *Maryland* to take acknowledgments out of the state, *Cowan v. Beall*, 1 McArthur (D. C.) 270.

Massachusetts.—A justice of the peace may take acknowledgments of deeds conveying lands in any county in the state, and the acknowledgment may be taken by the justice while outside of his county. *Learned v. Riley*, 14 Allen (Mass.) 109. But see *Howard Mut. Loan, etc., Assoc. v. McIntyre*, 3 Allen (Mass.) 571.

Minnesota.—The jurisdiction of a notary to take acknowledgments extends throughout the entire state. *Roussain v. Norton*, 53 Minn. 560.

Mississippi.—Under the *Mississippi Acts* of 1833 and 1836 a justice of the peace of one county may take an acknowledgment of a conveyance of lands lying in another county. *Dennistoun v. Potts*, 26 Miss. 13; *Love v. Taylor*, 26 Miss. 567. Compare, as to previous law, *Hughes v. Wilkinson*, 37 Miss. 482.

New Hampshire.—A justice may take acknowledgments outside of his county as well

2. Within the State.—The statutes of the several states vary somewhat as

as within it, the place being wholly immaterial. *Odiorne v. Mason*, 9 N. H. 24.

Ohio.—A deed made in 1802 conveying lands in *Ohio* was acknowledged in *New Jersey* before a judge of the Northwest Territory, of which *Ohio* was then a part. The acknowledgment was held good. *Moore v. Vance*, 1 Ohio 1; *Kinsman v. Loomis*, 11 Ohio 475.

It is the settled law in *Ohio*, that a justice may take acknowledgments of conveyances of lands lying outside of his county. *Crumbaugh v. Kugler*, 2 Ohio St. 373.

The mayor of a city in *Ohio* may take acknowledgments outside the city limits. *Moore v. Moore*, 3 Ohio St. 155.

Pennsylvania.—Under the *Pennsylvania* Act of 1715, providing for the acknowledgment of deeds before "one of the justices of the peace of the proper county or city where the lands lie," it was held, in conformity with the constant practice of the province, that an acknowledgment, before an associate judge of Bedford county, of a deed to lands in Westmoreland county, was valid. *McFerran v. Powers*, 1 S. & R. (Pa.) 102.

Under the same act it was held that a deed acknowledged before one of the justices of the supreme court of the province was properly recorded in the county in which a part of the land lay. *M'Keen v. Delancy*, 5 Cranch (U. S.) 22.

But it has been held that a justice of the peace could not take an acknowledgment of a deed out of his own proper county. *Share v. Anderson*, 7 S. & R. (Pa.) 43, 10 Am. Dec. 421. See 1 Brightley's Purdon's *Pennsylvania Digest* 636, § 40.

West Virginia.—A county clerk may take acknowledgments outside of his office anywhere within his county. *Janesville Hay Tool Co. v. Boyd*, 35 W. Va. 240.

Wisconsin.—A notary public may take acknowledgments anywhere in the state. *Maxwell v. Hartmann*, 50 Wis. 660.

Such Acknowledgments Held Invalid—Alabama.—A justice cannot take acknowledgments outside of his county. *Edinburgh American Land Mortg. Co. v. Peoples* (Ala., 1894), 14 So. Rep. 656, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 146.

Under the *Alabama* Act of 1831, a notary may take acknowledgments of deeds conveying lands situated anywhere in the state, but the acknowledgments must be taken within the county for which he is commissioned. *Johnson v. McGehee*, 1 Ala. 186.

Delaware.—A notary of *Delaware* cannot while out of the state take acknowledgments of deeds conveying lands within the state. *Harris v. Burton*, 4 Harr. (Del.) 66.

Florida.—The acknowledgment of a deed taken by a justice when out of his county may be void, but yet the deed is good *inter partes*. *Stewart v. Stewart*, 19 Fla. 846.

Michigan.—Where a justice of the peace went into another county to take the acknowledgment of a deed to land lying in his own county, it was held that the acknowledgment was invalid, a justice of the peace having no

authority to take acknowledgments outside of his county. *Brown v. McCormick*, 28 Mich. 215.

Missouri.—It has been held that a justice cannot take acknowledgments of deeds conveying lands outside of his county. *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Musick v. Barney*, 49 Mo. 458. Compare, as to authority of a justice of the peace of the territory of *Missouri*, *Duly v. Brooks*, 30 Mo. 515.

New York.—A notary may take acknowledgments of deeds anywhere within his own county, and, when accompanied by a certificate by the county clerk of the official character of the notary, such deeds may be recorded anywhere within the state; but an acknowledgment taken by a notary out of his own county is invalid. *People v. Hascall*, 18 How. Pr. (N. Y. Supreme Ct.) 118; *Utica, etc., R. Co. v. Stewart*, 33 How. Pr. (N. Y. Supreme Ct.) 312; *People v. Globe Mut. L. Ins. Co.*, 65 How. Pr. (N. Y. Supreme Ct.) 239.

The proof of the execution of a deed to lands in *New York*, made by a judge of that state while in *Canada*, is extra-judicial and invalid. *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498. See also *Hopkins v. Menderback*, 5 Johns. (N. Y.) 234; *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Van Cortlandt v. Tozer*, 17 Wend. (N. Y.) 338, 20 Wend. (N. Y.) 423; *Mutual L. Ins. Co. v. Corey* (Ct. App.), 48 N. Y. St. Rep. 247, reversing same case, 54 Hun (N. Y.) 495.

North Carolina.—The separate examination of a married woman, taken in one county before a justice of another county, is invalid. *Dixon v. Robbins*, 114 N. Car. 102; *Ferebee v. Hinton*, 102 N. Car. 99.

Acknowledgment before Clerk of Another County than That of Registration.—The *North Carolina* statute (N. Car. Code, § 1246, subsec. 6) requiring the certificate of probate of a deed, made by a clerk of the superior court of a county other than that in which the deed is to be registered, to be passed on by the clerk of the superior court of the county of registration before it can be registered, is directory only, and a registration upon a probate not so passed on is valid. *Holmes v. Marshall*, 72 N. Car. 37; *Young v. Jackson*, 92 N. Car. 444; *Darden v. Neuse, etc., Steamboat Co.*, 107 N. Car. 437.

But such adjudication is essential where the probate is before a commissioner of affidavits resident in another state. *Todd v. Outlaw*, 79 N. Car. 235; *Evans v. Etheridge*, 99 N. Car. 43.

When Jurisdiction need Not be Shown.—In *Louisiana* it has been held that where the capacity of an officer taking the acknowledgment of an act of sale in another state is admitted, the fact that it does not appear that the act was executed and signed within the officer's jurisdiction is immaterial. *Morrison v. White*, 16 La. Ann. 100.

Effect of Division of County on Jurisdiction of Officer.—At a time when a county clerk in *Kentucky* was not authorized to take the ac-

to the persons who may take acknowledgments within their own territory.¹ The persons most usually named are notaries public,² justices of the peace,³ judges and clerks of superior courts, courts of record, or courts having a seal,⁴

knowledge of, and to record, a conveyance of land lying in any other county, a deed to land situate in one county was executed in that county and afterwards acknowledged and recorded in the same place, but in a different county, the new county having been in the mean time established by a division of the original county. It was held that the acknowledgment and record of the deed by the clerk of the original county was not valid. *Garrison v. Haydon*, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70.

1. See the various local statutes.

Acknowledgment under United States Statutes.

—In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any state or territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district, or territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace. U. S. Rev. Stat. 1888, § 1778.

The Act of Aug. 15, 1876, provides that notaries public of the several states, territories, and the District of Columbia are authorized to take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States Circuit Court. Supp. to Rev. Stat., 2d ed., p. 123.

2. See the title NOTARY PUBLIC.

Under the *Illinois* statute (Annot. Stat. 1885, c. 95, par. 2), prescribing that chattel mortgages executed within the state shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides, or, if there be there no acting justice of the peace, before the county judge of the county, it was held that an acknowledgment of a chattel mortgage taken by a notary public of the county in which the mortgagors resided, and in the form appropriate to conveyances of real property, was void. *Long v. Cockern*, 128 Ill. 29.

In *Illinois*, prior to the revision of 1874, a notary public could not take the acknowledgment of a town plat. *Gould v. Howe*, 131 Ill. 490.

Under the *Missouri* Act of 1859, authorizing the transfer of a railroad pre-emption claim to land, and requiring it to be acknowledged before a justice of the peace, an acknowledgment before a notary public is void. *Cravens v. Moore*, 61 Mo. 178.

So also a notary's acknowledgment of a tax deed is void under an act requiring such deed to be acknowledged before a county clerk. *Dunlap v. Henry*, 76 Mo. 106.

A notary public was competent in *Missouri* in 1857 to take a married woman's acknowledgment of a conveyance of her real estate. *Siemers v. Kleeburg*, 56 Mo. 196.

Under the *Ohio* Act of 1856, authorizing notaries public to take acknowledgments, a notary has no power to take the acknowledgment of certificates of incorporation which a subsequent statute provides shall be made before a justice of the peace. *State v. Lee*, 21 Ohio St. 662.

As to authority of notary to take the probate of a deed proved by subscribing witnesses in *Tennessee*, see *McGuire v. Gallagher* (Tenn., 1895), 32 S. W. Rep. 209.

3. See the title JUSTICE OF THE PEACE.

Justice of the Peace Holding an Incompatible Office.—An acknowledgment taken by a justice of the peace, who was also the duly commissioned and acting clerk of the county court of oyer and terminer, is not invalid under the *Pennsylvania* Act of 1874, declaring the two offices to be incompatible, that act containing no provision declaring which office shall be forfeited. *Adam v. Mengel* (Pa., 1887), 8 Atl. Rep. 606.

Under the *Missouri* Act of 1855 prescribing that a married woman may convey her real estate by acknowledging the conveyance and having it certified by some court having a seal, or some judge, justice, or clerk thereof, it was held that such acknowledgment might be taken by a justice of the peace. *Mitchell v. Peoples*, 46 Mo. 203, overruling *West v. Best*, 28 Mo. 551.

Acknowledgment before One Justice Insufficient.—It was held under the *Maryland* Act of 1766, requiring a deed to be acknowledged before two or more justices, that a deed of a nonresident grantor acknowledged by an attorney under a letter of attorney proved before one justice of the peace only, is invalid. *Beall v. Lynn*, 6 Har. & J. (Md.) 336.

Other statutes containing similar provisions have received similar constructions. *Malloy v. Bruden*, 88 N. Car. 305; *Loree v. Abner*, 6 C. C. A. 302.

4. A Circuit Judge in *Lower Canada* has authority, under 7 Vict., c. 18, to examine married women as to their consent to convey their estate. *Doe v. Henderson*, 5 U. C. Q. B. 208.

Judges of Courts of Claims.—Judges and clerks of the courts of claims may take acknowledgments of instruments in writing, and give certificates of the same. U. S. Rev. Stat. 1878, § 1071.

Probate Judges.—Prior to the Act of 1852, declaring probate courts of the Territory of *Minnesota* courts of record, the judges of such courts had no authority to take acknowledgments. *Baze v. Arper*, 6 Minn. 220. See also *Lynde v. Williams*, 68 Mo. 360.

Clerks of Courts of Probate may take acknowledgments. *McCraven v. Doe*, 23 Miss. 100; *Young v. Boardman*, 97 Mo. 181. See also *People v. Bartels*, 38 Ill. App. 428, 138 Ill. 322.

It is held in *Alabama* that clerks of probate may take acknowledgments in the name of the judge under a statute giving that authority to probate judges. *Halso v. Seawright*.

county recorders or registers of deeds, and the chief officers of cities and towns.¹

3. In Other States—By Officers of Other States.—All the states have enacted statutes providing that deeds conveying property situated within their territory may be acknowledged before designated officers of other states, or before officers authorized by the laws of those states to take acknowledgments, and when accompanied by proper certificates of acknowledgment may be admitted to record in the state where the property affected is situated.²

65 Ala. 431; *Shelton v. Aultman, etc., Co.*, 82 Ala. 315.

In *Mississippi*, probate clerks have been held empowered to take acknowledgments under a statute giving that authority to clerks of courts of record. *James v. Fisk*, 9 Smed. & M. (Miss.) 144, 47 Am. Dec. 111.

County Clerks are authorized in *Nebraska* to take acknowledgments of deeds to real estate. *Franklin v. Kelley*, 2 Neb. 79; *Davis v. Huston*, 15 Neb. 28.

Clerk of District Court.—Under the *Missouri* statute (Mo. Rev. Stat. 1835 (2d ed.), p. 120, § 8), the clerk of the district court, who is also *ex officio* recorder of deeds, may take acknowledgments as clerk, but not as recorder. *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618. See also *Durst v. Daugherty*, 81 Tex. 650.

A Vice-chancellor was not authorized to take acknowledgments in *New York* in 1840. *Ridabock v. Levy*, 8 Paige (N. Y.) 197, 35 Am. Dec. 682.

County Judge.—It was held in *Alabama* in 1823 that a county court, acting judicially, had no authority to take the acknowledgment of a deed to land. *Munn v. Lewis*, 2 Port. (Ala.) 24.

1. County Auditors may take acknowledgments under *Iowa* Rev. Code 1888, § 277, although they do not come within the provisions of § 1955, requiring deeds conveying real estate to be acknowledged before a court having a seal or certain designated officers. Chapter 164 of the Acts of 1878, legalizing acknowledgments previously made by them, is not necessarily a legislative declaration that they were not authorized to take acknowledgments. *Long v. Schee*, 86 Iowa 619.

The Superintendent of Washington City has been held competent to take acknowledgments of deeds to lands within the city. *Peltz v. Clarke*, 2 Cranch (C. C.) 703.

A Mayor of a Town cannot take acknowledgments under a statute authorizing the mayor of a city to do so. *Dundy v. Chambers*, 23 Ill. 369.

A deed acknowledged before the mayor of *Cincinnati* in 1818 was held good on the authority of a previous decision of the Supreme Court of *Ohio*, the court, however, independently of this decision, being inclined against the power of a mayor to take the acknowledgment. *Shults v. Moore*, 1 McLean (U. S.) 520, *Wright* (Ohio) 280.

A Provost Marshal, as the chief officer of a town under military authority, may take the acknowledgment of deeds. *Paul v. Carpenter*, 70 N. Car. 502.

A Police Magistrate may take acknowledgments of chattel mortgages under the *Illinois*

Act of 1854. *Herkelrath v. Stookey*, 58 Ill. 21.

2. Acknowledgment before Officers of Other States—United States.—*Gordon v. Hobart*, 2 Sumn. (U. S.) 401; *Morton v. Smith*, 2 Dill. (U. S.) 316; *Doe v. Smith*, 3 McLean (U. S.) 362; *Gillespie v. Reed*, 3 McLean (U. S.) 377; *Doe v. Nelson*, 3 McLean (U. S.) 383; *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Culbertson v. H. Witbeck Co.*, 127 U. S. 326. *Alabama.*—*Toulmin v. Austin*, 5 Stew. & P. (Ala.) 410; *Hart v. Ross*, 57 Ala. 518; *Goree v. Wadsworth*, 91 Ala. 416; *Torrey v. Forbes*, 94 Ala. 135.

Arkansas.—*Worsham v. Freeman*, 34 Ark. 55.

Illinois.—*Phillips v. People*, 11 Ill. App. 340; *Adams v. Bishop*, 19 Ill. 395; *Montag v. Linn*, 19 Ill. 399; *Dunlap v. Daugherty*, 20 Ill. 397; *Bowman v. Wettig*, 39 Ill. 416; *Harding v. Curtis*, 45 Ill. 252; *Dawson v. Hayden*, 67 Ill. 52.

Indiana.—*Steeple v. Downing*, 60 Ind. 478.

Iowa.—*Jones v. Berkshire*, 15 Iowa 248, 83 Am. Dec. 412.

Kentucky.—*Ewing v. Savary*, 3 Bibb (Ky.) 235; *Herd v. Cist* (Ky., 1889), 12 S. W. Rep. 466.

Michigan.—*Galpin v. Abbott*, 6 Mich. 17; *Brooks v. Fairchild*, 36 Mich. 231. See also *Shotwell v. Harrison*, 22 Mich. 410.

Missouri.—*Lamarque v. Langlais*, 8 Mo. 328; *Crispen v. Hannavan*, 50 Mo. 415; *Small v. Field*, 102 Mo. 104.

Nebraska.—*Hoadley v. Stephens*, 4 Neb. 431; *Green v. Gross*, 12 Neb. 117; *Galley v. Galley*, 14 Neb. 174.

New Hampshire.—*Southerin v. Mendum*, 5 N. H. 420.

New York.—*People v. Register*, 6 Abb. Pr. (N. Y. Supreme Ct.) 180; *Matter of Wilcox's Estate* (Surrogate Ct.), 21 N. Y. Supp. 780. See also *Dias v. Glover*, Hoffm. Ch. (N. Y.) 71.

Ohio.—*Allen v. Parish*, 3 Ohio 107; *Livingston v. McDonald*, 9 Ohio 169.

Pennsylvania.—*Creigh v. Beelin*, 1 W. & S. (Pa.) 83; *Criswell v. Altemus*, 7 Watts (Pa.) 565; *Sandford v. Decamp*, 8 Watts (Pa.) 542. See also *Green v. Drinker*, 7 W. & S. (Pa.) 440; *Stevens v. Martin*, 18 Pa. St. 101.

Virginia.—*Lockridge v. Carlisle*, 2 Leigh (Va.) 186; *Cales v. Miller*, 8 Gratt. (Va.) 6; *Hassler v. King*, 9 Gratt. (Va.) 115. See also *Shanks v. Lancaster*, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

Washington.—*Carson v. Thompson* (Wash., 1894), 38 Pac. Rep. 1116.

Wisconsin.—*Smith v. Garden*, 28 Wis. 685. See also *Fisher v. Vaughn*, 75 Wis. 609; *MacKenzie v. Jackson*, 82 Ga. 80; *McCulloch v. Eudaly*, 3 Yerg. (Tenn.) 346; *Galt v.*

By Commissioners of the State where the Property is Situated.—Special commissioners are also appointed by the different states to reside in other states for the pur-

Dibrell, 10 Yerg. (Tenn.) 146; Wise v. Postlewait, 3 W. Va. 452.

Illustrations.—A deed to land in *Alabama*, acknowledged before a notary of the city of *New York* and properly certified by him, may be received in evidence under the Acts of 1803 and 1812. Toulmin v. Austin, 5 Stew. & P. (Ala.) 410.

Under the provisions of the *Alabama Code* of 1867, § 1546, authorizing judges of courts of record to take acknowledgments without the state, a certificate of acknowledgment purporting to be taken by a judge of a superior court of a sister state without showing that such court was a court of record, is defective as an acknowledgment, although the certificate of acknowledgment appended may operate as an attestation by the officer as a subscribing witness. Torrey v. Forbes, 94 Ala. 735.

The acknowledgment of a deed to lands in *Arkansas* before a justice of the peace of a sister state is invalid in the absence of a statute authorizing acknowledgments by such officers. Elliott v. Pearce, 20 Ark. 508; Wentworth v. Clark, 33 Ark. 432. But it was held that the curing act of 1883 cured the defect in an acknowledgment so taken. Apel v. Kelsey, 47 Ark. 413.

A Master in Chancery was not one of the officers authorized by the laws of *California* in force in 1864 to take acknowledgments in other states. Kimball v. Semple, 25 Cal. 441.

A certified copy of a contract to convey land in *Illinois*, purporting to have been acknowledged before a county judge in the state of *New York*, without evidence that he was authorized by the laws of that state to take acknowledgments of deeds, or that he was a judge authorized by the laws of *Illinois* to take such acknowledgments, is not sufficient proof of the execution of the contract. McCormick v. Evans, 33 Ill. 328.

A deed to land in *Kentucky* acknowledged before the mayor of Richmond, *Virginia*, the grantor being only a temporary resident of that city, may be recorded in the county where the land lies. McCulloch v. Myers, 1 Dana (Ky.) 522.

Under the *Kentucky* statute (Ky. Gen. Stat., c. 24, § 16) providing that deeds executed out of the state may be admitted to record when certified by a notary under his official seal, a recorded deed executed and acknowledged in another state, and certified under a notarial seal, takes priority over a previously recorded deed, also executed out of the state, the acknowledgment of which was not so certified. Herd v. Cist (Ky., 1889), 12 S. W. Rep. 466. See also, for a similar decision under the *North Carolina* statutes, Evans v. Etheridge, 99 N. Car. 43.

Under the *Maryland* Act of 1856 (General Laws 1888, art. 21, § 4) providing that acknowledgments may be taken in other states by notaries public, judges of the United States courts, judges of state courts having a seal, or commissioners of the state of *Maryland*, the acknowledgment of a conveyance of

personal property before two justices of the peace of the *District of Columbia* is not a proper acknowledgment. Berry v. Matthews, 13 Md. 537.

A deed to lands in *Maryland*, acknowledged in 1782 according to the laws of *Pennsylvania*, of which state the grantors, husband and wife, were residents, was held inoperative as to the wife, the laws of *Maryland* not authorizing the husband, though a nonresident, to acknowledge a deed to lands in that state before an officer of another state. Lawrence v. Heister, 3 Har. & J. (Md.) 371.

It was held in *Massachusetts* in 1853, that where a deed had been recorded for fifty years upon an acknowledgment before the mayor of the city of Hudson, *New York*, it might be presumed to have been properly acknowledged before such officer, and a registered copy might be read in evidence without any proof of the laws of *New York* at the time of acknowledgment showing the extent of authority of the mayor of Hudson. Palmer v. Stevens, 11 Cush. (Mass.) 147.

Under the *Minnesota* statute (Minn. Gen. Stat. 1878, c. 40, § 77) providing for the acknowledgment of deeds before the clerks of courts of record of sister states, the acknowledgment before a deputy clerk, certified by him in the name and under the seal of his principal, is valid. Piper v. Chippewa Iron Co., 51 Minn. 495, 499.

Under the *Missouri Territory* Act of 1815, providing for the acknowledgment of deeds in other states, a notary public of another state was not one of the officers authorized to take acknowledgment. Lamarque v. Langlais, 8 Mo. 328.

Under the *Missouri* act providing for the recording of conveyances of military bounty lands executed in other states, when acknowledged or proved according to the laws of such states (Mo. Rev. Stat. 1889, § 2433), such a deed acknowledged before a notary public of another state was inadmissible in evidence without proof that the notary was authorized by the laws of his own state to take such acknowledgment. Crispen v. Hannavan, 50 Mo. 415. See also, as to the acknowledgment of conveyances of military bounty lands, Wright v. Taylor, 2 Dill. (U. S.) 23; Barton v. Murrain, 27 Mo. 235; Tully v. Canfield, 60 Mo. 99; Ferguson v. Bartholomew, 67 Mo. 212.

A deed to lands in *Nebraska*, executed in another state and acknowledged there before a notary, is sufficiently proven by his certificate and official seal. Green v. Gross, 12 Neb. 117; Galley v. Galley, 14 Neb. 174.

Under the *New York* Act of 1829 the mayor of *Philadelphia* was authorized to take the acknowledgment of deeds to be recorded in *New York*. Fryer v. Rockefeller, 63 N. Y. 268.

An instrument executed by a married woman and acknowledged before a justice of the peace in *Pennsylvania* is not entitled to be recorded in *New Jersey*, and will not bar the wife's right of dower. Earle v. Earle, 16

pose of taking the acknowledgments of instruments relating to property situated in the state by which they are appointed.¹

N. J. L. 273; *Chandler v. Herrick*, 11 N. J. Eq. 497.

Under the *Oregon* statute acknowledgments taken without the state, unless before a commissioner appointed by the governor for that purpose, must be supported by the certificate of the clerk, or other certifying officer of a court of record. *Knighton v. Smith*, 1 *Oregon* 276.

A deed to lands in *Pennsylvania*, acknowledged in 1799 before two justices of the peace of Baltimore county, *Maryland*, with a certificate by the county clerk under his official seal, stating that there were at that time no superior officers in the county, may be received in evidence. *M'Intire v. Ward*, 3 Yeates (Pa.) 424, 5 Binn. (Pa.) 296, 6 Am. Dec. 417. But it would not be good without such certificate that they were the chief officers of the place. *Cassell v. Cooke*, 8 S. & R. (Pa.) 268, 11 Am. Dec. 610; *Rhoades v. Selin*, 4 Wash. (U. S.) 715.

Under the registry laws in force in *South Carolina* in 1820, a deed to lands in that state could not be admitted to record upon acknowledgment before a justice of the peace of another state. *Woolfolk v. Graniteville Mfg. Co.*, 22 S. Car. 333. See also *Wings v. Parker*, 19 S. Car. 9.

The *Texas* statute authorizing clerks of courts of record having a seal, commissioners of deeds, and notaries public to take acknowledgments without the state, does not give that power to judges of courts of record. *Talbert v. Dull*, 70 Tex. 675.

A deed to lands in *Vermont*, acknowledged before a justice of the peace of a neighboring state, is valid without evidence that the justice had power to take acknowledgments, the court possessing sufficient knowledge of the laws of that state to dispense with further proof upon that point. *Middlebury College v. Cheney*, 1 Vt. 336.

By the *Virginia* Act of 1814 the certificates of magistrates of other states were made sufficient evidence of the execution of a married woman's deed, and, by the Act of 1819, of the deeds of other persons also. *Sexton v. Pickering*, 3 Rand. (Va.) 468.

Where the laws of another state required three justices to constitute a court, an acknowledgment before two was not before the persons authorized to take it under the *Virginia* Act of 1785. *Loree v. Abner*, 6 C. C. A. 302, 6 U. S. App. 649.

It was held in 1873 that a deed with a certificate of acknowledgment by the grantor from the mayor of Staunton, *Virginia*, and also a certificate of acknowledgment from the clerk of the Circuit Court of Richmond, that the deed had been admitted to record in his office, and also a certificate from the clerk of the County Court of Augusta county, *Virginia*, that the said deed, with the certificates, had been admitted to record in his office, was not sufficiently authenticated to be read in evidence in *West Virginia*, the laws of that state not authorizing the acknowledgment of a deed before the mayor of a city or town in

another state. *Fleming v. Ervin*, 6 W. Va. 215.

Presumption of Correctness of Official Act.—A deed by a nonresident conveying lands in *Kentucky* or *Virginia*, acknowledged before the mayor of a city in another state, accompanied by a certificate of acknowledgment in all respects formal, and made by the mayor in his official capacity and under his seal, is presumed without further proof to be authenticated in a manner usual with such officer. *Hassler v. King*, 9 Gratt. (Va.) 115; *Cales v. Miller*, 8 Gratt. (Va.) 6; *Ewing v. Savary*, 3 Bibb (Ky.) 235. See also *McCulloch v. Myers*, 1 Dana (Ky.) 522; *Loree v. Abner*, 6 C. C. A. 302. See the title PRESUMPTIONS.

Strict Compliance with Statute Required.—The requirements of the statute providing for acknowledgments of deeds without the state must be strictly complied with. *Knighton v. Smith*, 1 *Oregon* 276.

1. Acknowledgments before Commissioners of Deeds.—*Keller v. Moore*, 51 Ala. 340; *Grider v. Williams*, 25 Ark. 1; *Woods v. Polhemus*, 8 Ind. 60; *Langley v. Burrows*, 15 La. Ann. 392; *Leibe v. Hebersmith*, 39 La. Ann. 1050; *Gray v. Waldron*, 101 Mich. 612; *Simmons v. Gholson*, 5 Jones (N. Car.) 401; *James, etc., Buggy Co. v. Pegram*, 102 N. Car. 540; *Brannon v. Brannon*, 2 Disney (Ohio) 224; *Hultz v. Ackley*, 63 Pa. St. 142; *Monroe v. Arledge*, 23 Tex. 478.

See also *Steeple v. Downing*, 60 Ind. 478; *Johnson v. Badger Mill, etc., Co.*, 13 Nev. 351; *Bason v. King's Mountain Min. Co.*, 90 N. Car. 417; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Davis v. Roosevelt*, 53 Tex. 305.

Proof of Official Character.—A commissioner appointed by the governor of a state to take acknowledgments in another state is an officer of the state from which he derives his appointment. The courts of that state are bound to take judicial notice of his official acts, and these require no other authentication than his certificate and seal of office. *Smith v. Van Gilder*, 26 Ark. 527; *Johnson v. Cocks*, 12 Ark. 672; *Kaufman v. Stone*, 25 Ark. 336.

In *Illinois* it has been held that acknowledgments of deeds taken before, and certified by, commissioners of deeds of other states, were valid without proof of official character of such commissioners. *Vance v. Schuyler*, 6 Ill. 160; *Thompson v. Schuyler*, 7 Ill. 271; *Irving v. Brownell*, 11 Ill. 402. It is to be noted that these decisions were made before the statute (*Illinois* Laws of 1869, c. 2) authorizing the appointment of commissioners for the state of *Illinois* to reside in other states. See *Vance v. Schuyler*, 6 Ill. 160.

In *Pennsylvania* the acknowledgment of a deed to lands in that state, taken before a commissioner of another state, is defective if the certificate does not state that the commissioner is authorized by the governor of *Pennsylvania* to take acknowledgments. *Uhler v. Hutchinson*, 23 Pa. St. 110.

See further, as to proof of official character, *infra*, this title, *The Certificate*.

Formalities Required.—It is an established principle of the common law, that real property can pass only in the manner and by the forms allowed by the law of the place where the property is situated. It follows that each state has the exclusive right to determine by what law acknowledgments affecting property situated within its territory shall be governed, and the laws of one state have no force in another state except so far as acknowledgments made in accordance therewith have been recognized by the statutes of the latter state.¹ The statutory regulations in the several states as to the form of the acknowledgments of deeds which are intended to pass title to lands within the limits of such states, but which are executed and acknowledged in other states, vary considerably.² In some states it is provided that the acknowledgment must be made according to the laws of the state where the property is situated ;³ in

Where a married woman's deed to land in *Indiana* was acknowledged in *Queens county, New York*, before an officer who described himself in his certificate as commissioner of deeds for *Virginia*, but who subsequently, after the death of the woman, and while acting as commissioner of the state of *Ohio* and notary public for the county of *New York*, indorsed on the deed another certificate of acknowledgment, of the same date and in the same words as the first, it was held that the deed was never acknowledged in conformity with the laws of *Indiana*, and was therefore wholly void as a conveyance of lands in that state. *Woods v. Polhemus*, 8 Ind. 60.

Acknowledgment before Witnesses—Louisiana.—Acts acknowledged before commissioners of *Louisiana*, resident in other states, have no effect as authentic acts unless the acknowledgment takes place also before two competent witnesses; otherwise they remain acts under private signature, and are inadmissible in evidence without proof of signature. *Langley v. Burrows*, 15 La. Ann. 392; *Leibe v. Hebersmith*, 39 La. Ann. 1050. See also *Botto v. Berges*, 47 La. Ann. 959.

The Term of Office of a commissioner of deeds appointed by the governor of one state to reside in another state, to continue in office "during the pleasure of the governor," does not expire with that of the appointing governor, and he may continue to take acknowledgments until removed by the governor's successor. *Kaufman v. Stone*, 25 Ark. 336; *Thorn v. Frazer*, 60 Tex. 259.

Commissioner Witnessing Deed.—A deed acknowledged in *Florida*, before the *Georgia* commissioner of deeds, with his certificate as commissioner, although he subscribed his name as a witness without adding that he was commissioner, was properly acknowledged. *Baird v. Evans*, 58 Ga. 350.

Place of Residence of Person Making Acknowledgment.—It was held under the former laws of *North Carolina* that a commissioner appointed by the governor to take acknowledgments in other states could take acknowledgments of those persons only who were nonresidents of *North Carolina*. *De Courcy v. Barr*, Busb. Eq. (N. Car.) 181. But it is now held, to be immaterial whether the person making acknowledgment is a resident of the state of *North Carolina* or domiciled in the state in which the acknowledgment is made. *James, etc., Buggy Co. v. Pegram*,

102 N. Car. 540; *Maphis v. Pegram*, 107 N. Car. 505.

But under the *New Jersey* law he must reside in the state where the acknowledgment is made. If the residence of the grantor appears on either the face of the deed or the certificate of acknowledgment, this is sufficient *prima facie* evidence of the officer's jurisdiction, and if it does not so appear, it may be shown by evidence *aliunde*. *Graham v. Whitely*, 26 N. J. L. 254.

Adjudication by Clerk of Court.—The execution of a deed acknowledged in another state, before a commissioner of affidavits for *North Carolina*, must be properly adjudicated by the clerk of the Superior Court of *North Carolina*, to entitle the deed to be recorded in that state. *Evans v. Etheridge*, 99 N. Car. 43; *Todd v. Outlaw*, 79 N. Car. 235. See also *James, etc., Buggy Co. v. Pegram*, 102 N. Car. 540; *Simmons v. Gholson*, 5 Jones (N. Car.) 401.

Substantial Adjudication Sufficient.—Where the acknowledgment of a deed in another state was before an officer authorized to take it, and the probate was in fact in due form, it was held that the omission of the clerk of the superior court to adjudge in so many words that the probate was "in due form," when he did in substance so adjudge, was not sufficient ground to exclude the deed. *Deans v. Pate*, 114 N. Car. 194. See also *Devereux v. McMahon*, 102 N. Car. 284.

1. Validity of Acknowledgment Determined by Lex Loci Rei Sitæ.—*U. S. v. Crosby*, 7 Cranch (U. S.) 115; *McDaniel v. Grace*, 15 Ark. 465; *Brannon v. Brannon*, 2 Disney (Ohio) 224; *Griffith v. Black*, 10 S. & R. (Pa.) 160; *Bone v. Greenlee*, 1 Coldw. (Tenn.) 29; *Sartor v. Bolinger*, 59 Tex. 411; *Harman v. Taft*, 1 Tyler (Vt.) 6. See also *Root v. Brotherson*, 4 McLean (U. S.) 230; *Butterfield v. Beall*, 3 Ind. 203.

The laws of the state where the land lies must govern the courts of another state in determining the validity and operation of a deed conveying such land, but in the absence of proof of such laws the courts must decide these questions according to the laws of the state where suit is brought. *Haney v. Marshall*, 9 Md. 194. See also the title **CONFLICT OF LAWS**.

2. See the various local statutes.

3. The question is dependent entirely upon statutes, and the latest local statutes should

others, it will be sufficient if the laws of the foreign state be observed.¹ Again, under some of the statutes the acknowledgment may be made according to the laws of either state, but in such case the laws of both cannot be combined to make valid an acknowledgment void when tested by either.²

Certificate of Magistracy or Conformity.—Where the certificate is taken by an officer of the foreign state, in addition to the certificate by the officer a second certificate by a clerk of a court of record that the officer is authorized to take acknowledgments, or that the acknowledgment is in conformity with the laws of the state, is usually required.³

4. In Foreign Countries.—Among the officers authorized by the statutes of the several states of the Union to take acknowledgments in foreign countries of instruments affecting lands in this country, are notaries public;⁴ ministers,

be carefully examined. The following cases, decided under statutes of various dates, present rulings to the effect that the acknowledgment must be in accordance with the requirements of the law of the state where the property is situated: *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Woods v. Polhemus*, 8 Ind. 60; *Bone v. Greenlee*, 1 Coldw. (Tenn.) 29; *Harmon v. Taft*, 1 Tyler (Vt.) 6; *Sumner v. Wentworth*, 1 Tyler (Vt.) 42. See also *McGuire v. Hay*, 6 Humph. (Tenn.) 419; *Townsend v. Downer*, 27 Vt. 119.

Commissioners of Deeds were required under certain statutes to take acknowledgments according to the laws of the state by which they were appointed. *Keller v. Moore*, 51 Ala. 340; *Brannon v. Brannon*, 2 Disney (Ohio) 224; *Winkler v. Higgins*, 9 Ohio St. 599. See also *Farrel Foundry v. Dart*, 26 Conn. 376.

A Deed Acknowledged in Another State, according to the laws of the state where the land lies, is admissible in evidence. *Dawson v. Hayden*, 67 Ill. 52; *Post v. Springfield First Nat. Bank*, 138 Ill. 559; *Knight v. Leary*, 54 Wis. 459.

A deed conveying lands in another state, defectively acknowledged according to the laws of *Maryland*, is not admissible in the courts of that state without proof that it was properly acknowledged according to the laws of the state where the land is situated. *Haney v. Marshall*, 9 Md. 194. See also *Harper v. Hampton*, 1 Har. & J. (Md.) 622.

1. See the local statutes. The following cases are instances of rulings under statutes requiring only a conformity with the laws of the state where the deed is executed and acknowledged: *Secrist v. Green*, 3 Wall. (U. S.) 744; *Farmers' Loan, etc., Co. v. McKinney*, 6 McLean (U. S.) 1; *Little v. Hernndon*, 10 Wall. (U. S.) 26; *Shepard v. Carriel*, 19 Ill. 313; *Deininger v. McConnel*, 41 Ill. 227; *Garrick v. Chamberlain*, 97 Ill. 620; *Kreuger v. Walker*, 80 Iowa 733; *Galpin v. Abbott*, 6 Mich. 17; *Hoadley v. Stephens*, 4 Neb. 431; *Green v. Gross*, 12 Neb. 117; *Murdock v. Memphis, etc., R. Co.*, 7 Baxt. (Tenn.) 557. See also *Harrington v. Fish*, 10 Mich. 415; *Brown v. Cady*, 11 Mich. 535.

Presumption as to Foreign Law.—In the absence of proof to the contrary, it will be presumed that the requirements of another state in which an acknowledgment is taken are the same as those of the home state. *Hewitt v. Morgan*, 88 Iowa 468.

2. Acknowledgment according to Either Law.

—Where the validity of an acknowledgment is based on the laws of the foreign state, a substantial compliance with such laws must be shown; if based on the laws of the home state, a like compliance with their provisions must appear. The laws of both cannot be invoked to aid an acknowledgment defective when tested by either. *Adams v. Bishop*, 19 Ill. 395; *Montag v. Linn*, 19 Ill. 399.

The acknowledgment of a deed to land in *Connecticut* before a commissioner of that state in *New York* city, attested by only one witness, is defective, and is not cured by the *Connecticut* Act of 1855 validating all "deeds and other conveyances of real estate in this state, which have been executed and acknowledged in any other state or territory in conformity with the laws of such state or territory relative to the conveyance of lands therein situated." Although a deed so attested, if acknowledged before a proper officer, would be sufficient to convey land in *New York*, such acknowledgment is not according to the laws of that state, for a *Connecticut* commissioner has no power to take acknowledgments of deeds to land situated in that state, and, consequently, any deed there acknowledged before him would not be acknowledged in conformity with the laws of *New York*. *Farrel Foundry v. Dart*, 26 Conn. 376.

3. See *infra*, this title, *The Certificate*.

4. **Notary Public.**—See the statutes.

A notary public is authorized by the laws of *New Brunswick* to take the acknowledgment of deeds without the province. *Torrence v. Currie*, 22 New Bruns. 342.

The acknowledgment of a deed or power of attorney before a notary public of the republic of *Texas* was not sufficient to admit these writings to record in *Virginia*. *Randolph v. Adams*, 2 W. Va. 519.

The acknowledgment of a deed to lands in the republic of *Texas*, taken by a notary public of another state or country, who was not authorized by the laws of *Texas* to take acknowledgments of such deeds, is invalid. *Baker v. Westcott*, 73 Tex. 129; *Birdseye v. Rogers* (Tex. Civ. App., 1894), 26 S. W. Rep. 841. See also *infra*, this title, *Curing Defective Acknowledgments—By Statute*.

The *Pennsylvania* Act of 1705, providing for the sale of lands by attorneys for owners living out of the state, directs that proof of the power shall be made by two or more of

envoys, and consular, diplomatic, or commercial agents of the United States resident abroad;¹ mayors and chief officers of cities and towns; and judges of superior courts, courts of record, or courts having a seal.²

the witnesses before any mayor or chief magistrate or officer of the city, town, or place where the letter of attorney shall be made or executed, and certified accordingly under the seal of the place where proved. It was held under this act that the certificate of a notary public of the city of *Rotterdam*, of such proof before him, was insufficient. *Griffith v. Black*, 10 S. & R. (Pa.) 160.

1. **Consular Officers.**—A United States consul in a foreign country is a "magistrate" within the meaning of the *Massachusetts* statute of 1783, authorizing such officers to take acknowledgments of deeds. *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344. See also *Palmer v. Stevens*, 11 Cush. (Mass.) 147.

The acknowledgment of a deed to land in *Nevada*, made before the vice-consul-general of the United States in *London*, certified under his official seal, is valid. *Evans v. Lee*, 11 Nev. 194.

A married woman's acknowledgment of a deed to land in *Pennsylvania*, taken before a United States commercial agent in *Canada*, was held valid. *Moore v. Miller*, 147 Pa. St. 378.

In 1859, and prior thereto, a consular agent of the United States was not one of the officers authorized by the laws of *California* to take and certify acknowledgments in foreign countries. *McMinn v. O'Connor*, 27 Cal. 238.

A deed acknowledged in the *Hawaiian Islands* before an officer describing himself in his certificate as "the principal notary public" of the islands, and another by the "vice-consul of the United States of America at Honolulu, Hawaiian Islands," under the respective seals of these officers, were admitted in evidence in *California*, the language of the statute providing that acknowledgments in foreign countries might be taken by "any notary public, etc., or consul of the United States," being sufficiently comprehensive to embrace consuls and notaries of every grade. *Mott v. Smith*, 16 Cal. 533.

It was held in *New York* that the execution of a power of attorney was sufficiently proven by the acknowledgment before a United States consul in a foreign country without evidence *aliunde* of the genuineness of the signature or seal of the consul. *St. John v. Croel*, 5 Hill (N. Y.) 573.

The United States Statute provides that every secretary of legation and consular officer may perform within his jurisdiction any notarial act which any notary public is required or authorized by law to do within the United States, and such notarial act, certified under his hand and seal of office, shall be as valid within the United States as if done there by any person authorized and competent so to act. U. S. Rev. Stat. 1888, § 1750.

"Consular officer" shall be deemed to include consuls-general, consuls, commercial agents, deputy consuls, vice-consuls, vice-

commercial agents, and consular agents, and none others. U. S. Rev. Stat. 1888, § 1674.

2. **Mayors of Cities, etc.**—A deed conveying land in *Kentucky*, acknowledged before the mayor of *London*, certified by him and having his official seal annexed, being duly recorded in the county where the land was situated, was good as evidence, and, under the Act of 1795, to pass title. *Bell v. Fry*, 5 Dana (Ky.) 341.

It was held in *Mississippi* that a certificate of probate of a power of attorney purporting to be by the mayor of *Liverpool*, and bearing his official seal, but not signed by him, but by the town clerk for him, was sufficient. *Sessions v. Doe*, 7 Smed. & M. (Miss.) 130.

A deed to land in *Pennsylvania*, executed under a power of attorney, acknowledged before the chief magistrate of *Edinburgh*, is admissible in evidence under the common law, notwithstanding the Act of 1705, requiring such powers to be proved by witnesses before such magistrates. *Milligan v. Dickson*, Pet. (C. C.) 433.

Under the same act the certificate of acknowledgment of a power of attorney before a magistrate describing himself as a "magistrate in the chief office of said town of Carlo, in the county of Carlo, Ireland," and signed "E. B., sovereign of Carlo, Ireland," and attested with the seal of the town, was held sufficient to entitle the instrument to be recorded. *Bowser v. Cravener*, 56 Pa. St. 132.

An acknowledgment of a deed taken in *Germany* by an officer designated as "Kanzlei Director" of the city of *Stuttgart*, is not entitled to be recorded in *Texas*, such officer not being authorized by the statutes of that state to take acknowledgments; and the acknowledgment is not aided by a consular certificate that this officer was authorized to take acknowledgments. *Sartor v. Bolinger*, 59 Tex. 411.

The record of a deed to land in *Ohio*, purporting to have been acknowledged before "a public auditor" in *France*, an officer unknown to the laws of *Ohio*, is inadmissible in evidence in that state without proof that the officer was authorized to take acknowledgments. *De Segond v. Culver*, 10 Ohio 188.

An acknowledgment before a deputy-mayor of a borough in *Great Britain*, under the seal of the borough, is sufficient in *New Brunswick*. *Blair v. Armour*, 3 Kerr (New Bruns.) 341.

City Clerk.—An acknowledgment taken before a clerk of a foreign city, an officer unknown to the statute, and failing to show that the grantor was known to the officer to be the person whose name was subscribed to the instrument, was held invalid in *Missouri*. *Callaway v. Fash*, 50 Mo. 420.

District Judges.—A deed acknowledged in 1842 "before an associate judge of the sixth judicial district of the state of *Maryland*" cannot be received in evidence under a

V. WHO MAY MAKE ACKNOWLEDGMENTS—1. Generally.—The person who executes a deed is the proper one to acknowledge its execution.¹ The acknowledgment of a deed executed by an incompetent grantor is void.²

Several Grantors.—In the absence of statutes providing otherwise, a deed executed by two or more grantors must be acknowledged by each one in order to be binding on him.³ But where there is nothing on the face of a deed exe-

statute of the republic of *Texas*, providing that deeds may be acknowledged without the republic, before "any judge of a superior court of record," for the court cannot judicially know that such judge was a judge of a superior court of record. *Hill v. Taylor*, 77 Tex. 295.

1. Acknowledgment must be by Grantor.—A deed purporting to be made by husband and wife, stating that the husband, with the consent of the wife, granted, etc., duly acknowledged by both, was held invalid as to the wife, she not being a grantor. *Hawkins v. Gould*, 3 Har. & J. (Md.) 243. See *infra*, this title. *The Certificate: What it must Certify.*

Acknowledgment by Strangers a Nullity.—A deed can be acknowledged only by those who have executed it. *Hunter v. Bryan*, 2 Murph. (N. Car.) 178, 5 Am. Dec. 526. See also *Hendon v. White*, 52 Ala. 597.

Where certain persons are named in a deed as grantors, but do not sign the instrument, it is not made their deed by their subsequent acknowledgment of it as their act and deed; and a deed in which certain persons are named as grantors, and which is signed and acknowledged by other persons also, is not the deed of the other persons not named therein. *Adams v. Medsker*, 25 W. Va. 127.

A Deed of Trust need not be acknowledged by the trustee and *cestui que trust*; it is sufficient if the grantor acknowledge it. *Williams v. Jones*, 2 Ala. 314. See *Bradford v. Dawson*, 2 Ala. 203.

Mutual Covenant must be Acknowledged by Both Parties—Iowa.—A lease containing mutual covenants as between the parties is valid without acknowledgment, but cannot be read in evidence under the *Iowa Code* unless acknowledged by both parties. *Chicago, etc., R. Co. v. Lewis*, 53 Iowa 101.

2. Acknowledgment by Infant Feme Covert is Void.—*Ross v. Adams*, 28 N. J. L. 160; *Porch v. Fries*, 18 N. J. Eq. 204; *Sandford v. McLean*, 3 Paige (N. Y.) 117; *Priest v. Cummings*, 16 Wend. (N. Y.) 617; *Schrader v. Decker*, 9 Pa. St. 14, 49 Am. Dec. 538. See also *Doe v. Player*, 72 N. Car. 94; *Jones v. Cohen*, 82 N. Car. 75; *Epps v. Flowers*, 101 N. Car. 158.

Where the certificate of acknowledgment fails to state that the *feme covert* was of full age, the presumption is that she was of age, until the contrary is proved. *Battin v. Bigelow*, Pet. (C. C.) 452.

Where the magistrate is not required to certify as to the full age of the person making the acknowledgment, his certificate of that fact is not conclusive. *Williams v. Baker*, 71 Pa. St. 476. See also *Thompson v. New England Mortg. Security Co. (Ala., 1895)*, 18 So. Rep. 315.

Acknowledgment by Deranged Grantor Void.—

A married woman's acknowledgment taken while she was suffering from mental disorder is void. *Owing's Case*, 1 Bland (Md.) 370. See also *Woodbourne v. Gorrel*, 66 N. Car. 82.

Whether Officer should Ascertain Mental Capacity of Grantor.—In an action on a bill to set aside assignments of mortgages procured by the transferee under suspicious circumstances, it was held that where the officer summoned to take the acknowledgment of the transfers neglected to investigate the condition of things, in the absence of the beneficiary, his testimony that the donor was in full possession of his faculties and gave an intelligent assent to the transfers is less satisfactory than if he had taken such precautions. *Duncombe v. Richards*, 46 Mich. 166.

The officer is not required to ascertain the mental capacity of a married woman to give her voluntary assent to a mortgage, and his certificate of her acknowledgment is, therefore, not conclusive as to her capacity, and parol evidence is admissible to show that she was insane when she affixed her name to the instrument and made the acknowledgment. *Thompson v. New England Mortg. Security Co. (Ala., 1895)*, 18 So. Rep. 315, following *Williams v. Baker*, 71 Pa. St. 476.

3. The record of a deed executed by several grantors, but not acknowledged by one of them, is not constructive notice to a subsequent purchaser or incumbrancer from him. *Farmers', etc., Bank v. Bronson*, 14 Mich. 361. See also *Hall v. Redson*, 10 Mich. 21; *Weeping Water v. Reed*, 21 Neb. 261.

When Acknowledgment by One of Several Grantors Valid—Massachusetts.—A deed executed by husband and wife need be acknowledged by the husband only, it not being necessary for both grantors to acknowledge the deed. *Mass. Pub. Stat. 1882, c. 120, § 6*; *Perkins v. Richardson*, 11 Allen (Mass.) 538.

It was held, prior to the enactment of this statute, that a recorded deed properly executed by two persons, but acknowledged by one only, is at least presumptive evidence of notice to creditors and subsequent purchasers, and the notice is the same whether the grantors are seized as tenants in common of the whole land conveyed, or are separately seized of distinct parts. *Shaw v. Poor*, 6 Pick. (Mass.) 86, 17 Am. Dec. 347, followed in *Palmer v. Paine*, 9 Gray (Mass.) 56, where it was held that a deed by husband and wife, of the wife's estate, acknowledged by the husband only, was properly recorded, and constituted notice as if acknowledged by both.

In *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56, it was held that a deed executed by husband and wife need be acknowledged by the husband only. The court said: "As to

cuted by several grantors showing that it was not intended to operate or have any effect unless it was so executed by all the parties as to be valid and binding on all, it has been held that the fact that the acknowledgment of some of the grantors was defective will not render the deed invalid as to the others.¹

2. Agent or Attorney.—Acknowledgments of deeds and other instruments may be made by an agent or attorney in fact who has authority to execute the same for his principal; but it must appear from the certificate that the acknowledgment is the act of the principal, and not of the agent or attorney.²

the want of acknowledgment by the wife, we think an acknowledgment unnecessary in the case. One party to a deed acknowledging it gives notoriety to it, and that is the whole that is necessary." See also *Dudley v. Sumner*, 5 Mass. 438.

Missouri.—Under the *Missouri* law as it stood in 1821 the only object of acknowledgment was to authorize the recording of a deed, and thus to impart notice, and for this purpose acknowledgment by one of the grantors only was sufficient. It was therefore held that a deed by husband and wife executed at that time and acknowledged by the wife only was properly admitted to record. *Meyer v. Campbell*, 12 Mo. 603.

1. *Walker v. Walker*, 67 Pa. St. 185. See also *Hendon v. White*, 52 Ala. 597, and *infra*, this title, *Married Women*.

2. *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Lowenstein v. Flauraud*, 11 Hun (N. Y.) 399; *Moses v. Dibrell*, 2 Tex. Civ. App. 457.

The acknowledgment of a deed certified as follows: "Personally appeared * * * J. A. S. by his attorney in fact, J. S. F., known to me to be the person who executed the within instrument of writing, who acknowledged * * * that he signed, sealed, and delivered the same as his voluntary act," is a valid acknowledgment. *Talbert v. Stewart*, 39 Cal. 602; *followed in* *McAdow v. Black*, 9 Mont. 601. See *Bigelow v. Livingston*, 28 Minn. 57.

Prior to the *Iowa* Act of 1858 (*Iowa* Rev. Code 1888, §1962) the acknowledgment by an attorney in fact, as such, of a chattel mortgage as his own act and deed, the deed being afterwards signed by the principal, would be considered in law as the acknowledgment of his principal. *Sowden v. Craig*, 26 Iowa 156, 96 Am. Dec. 125.

And the acknowledgment by an attorney, as attorney, that a deed is the voluntary act and deed of his principal, would probably be good under the provisions of § 1963 of the same act (*Iowa* Rev. Code 1888). *Clark v. Connor*, 28 Iowa 311.

A deed executed by an attorney in fact as attorney, and acknowledged by him "on part and behalf of his principal," is valid. *Onion v. Hall*, 1 Har. & M. (Md.) 173.

Acknowledgment in Court.—A deed by husband and wife, acknowledged in open court by an attorney, as attorney, in pursuance of a power annexed to the deed, is valid. *Elliot v. Osborn*, 1 Har. & M. (Md.) 146.

Several Attorneys.—A deed executed by

several attorneys in fact must be acknowledged by them, all as the act and deed of their principal, and not as their own. *Peters v. Condron*, 2 S. & R. (Pa.) 80. See also *Hevner v. Matthews* (D. C. App.), 22 Wash. L. Rep. 745.

Several Principals.—Where an attorney in fact executed a deed for his principals and acknowledged it for the said principals (naming them) as his own act and deed, the acknowledgment was held valid. *Fulweiler v. Baugher*, 15 S. & R. (Pa.) 45. It was so held in the case of an acknowledgment by a deputy sheriff for the sheriff. *Wilson v. Russell*, (Dakota, 1887), 31 N. W. Rep. 645. Compare *Clarke v. Courtney*, 5 Pet. (U. S.) 319.

Sheriff's Deed.—A deed executed by the deputy sheriff in the name of the sheriff was acknowledged by the deputy, the certificate stating that "Personally appeared J. M. H., sheriff, * * * by W. T. S., deputy, * * * and acknowledged that he executed the foregoing deed for the purposes and consideration and in the capacity therein set forth and expressed." The acknowledgment was held sufficient. *Tegrell v. Martin*, 64 Tex. 121. See also *Huey v. Van Wie*, 23 Wis. 613; *Scheiber v. Kaehler*, 49 Wis. 291; *Ward v. Walters*, 63 Wis. 39; *Marx v. Hanthorn*, 30 Fed. Rep. 579.

It has been held in *Missouri* that the acknowledgment of a sheriff's deed by the deputy sheriff in his own name as deputy was void. *Samuels v. Shelton*, 48 Mo. 444.

Acknowledgment by Guardian.—A deed executed by a guardian for his ward, and acknowledged by him "to be his act and deed, as guardian as aforesaid, and thereby the act and deed of said M.," was held valid. *Van Ness v. U. S. Bank*, 13 Pet. (U. S.) 17.

Agent of Corporation.—Under a statute which provided that any corporation authorized to hold real estate might convey the same by an agent appointed for that purpose, the acknowledgment of a deed from the corporation by a duly appointed agent, who as agent of the corporation acknowledged the instrument to be his free act and deed, was a valid acknowledgment. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

Acknowledgment by Husband as Attorney for Wife.—Where the husband executed a mortgage for himself and as attorney in fact for his wife, and the certificate, after the usual recital of the appearance and acknowledgment of the instrument by him, continued: "And I do further certify that personally appeared P. V., personally known to me to

3. Partners.—Conveyances executed by a partnership may be acknowledged by any member of the firm signing the instrument in the name of the firm,¹ but an acknowledgment purporting to have been made by the firm with-

be the same person whose name is subscribed to the within instrument as the attorney in fact of M. A. V., his wife, and the said P. V. duly acknowledged to me that he subscribed the name of M. A. V. thereto as principal, and his own name as attorney in fact," it was held that the certificate showed a sufficient acknowledgment by the husband in behalf of his wife, as well as for himself. *Richmond v. Voorhees* (Wash., 1894), 38 Pac. Rep. 1014.

Where Separate Examination Required, Husband Cannot be Attorney for Wife.—Under *Texas* Civil Statutes (Sayles), art. 559, a married woman cannot convey her separate property by her husband as her attorney unless she herself join in the deed and acknowledge it upon separate examination. *Mexla v. Oliver*, 148 U. S. 664; *Cannon v. Boutwell*, 53 Tex. 626; *Peak v. Brinson*, 71 Tex. 310.

But she may jointly with her husband make a valid conveyance of her separate property by an attorney in fact, duly authorized by power of attorney executed and acknowledged in the manner prescribed by law for the execution and acknowledgment of her deeds of conveyance. *Patton v. King*, 26 Tex. 685, 84 Am. Dec. 596; *Warren v. Jones*, 69 Tex. 462. See also *Cannon v. Boutwell*, 53 Tex. 626; *Jones v. Robbins*, 74 Tex. 615. See *infra*, this title, *Married Women—Examination must be Personal*.

Wife as Attorney for Husband.—As to a wife's executing and acknowledging a deed as attorney for her husband, see *Fowler v. Shearer*, 7 Mass. 14.

Acknowledgment for an Undisclosed Principal.

—A deed executed by an attorney in fact in his own name, and acknowledged by him for the purposes therein mentioned, the name of the principal and the fact that the attorney was an attorney nowhere appearing in the certificate or deed, was held void as a deed of the principal although the deed was subsequently altered so that it purported to be executed by the principal by his attorney in fact. *North v. Henneberry*, 44 Wis. 306.

Dedication of Town Plats—Illinois.—Under the *Illinois* statute in force in 1833, providing for the record of town plats, it was held that an attorney in fact was not authorized to acknowledge such plats, and a plat so acknowledged would not vest the legal title of the streets in the city. *Gosselin v. Chicago*, 103 Ill. 623.

Proof of Agent's Authority.—A certificate of acknowledgment showing only an acknowledgment of the professed agent of the grantor of his execution of the deed in the name of the said grantor, without the exhibition of any evidence of his authority to represent him in that behalf, is insufficient. *Job v. Tebbetts*, 9 Ill. 143. See also *Elliott v. Pearce*, 20 Ark. 508.

The power of attorney to convey lands should be proved or acknowledged, and recorded in the same manner as the convey-

ance itself. *Moore v. Farrow*, 3 A. K. Marsh. (Ky.) 41; *McDaniels v. Grace*, 15 Ark. 465; *Citizens' F. Ins., etc., Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360. See also the titles AGENCY; RECORDING ACTS.

1. Acknowledgment by Member of Partnership.—*Klumpp v. Gardner*, 114 N. Y. 153; *Hooper v. Baillie*, 118 N. Y. 413; *Troy Nat. Bank v. Scriven* (Supreme Ct.), 18 N. Y. Supp. 277.

A mortgage deed of a partnership, executed by both members of the firm and acknowledged by one only, is not sufficiently acknowledged to be admitted to record under the *Florida* recording acts, one partner not being competent to acknowledge for the other member of the firm. *Sanders v. Pepoon*, 4 Fla. 465. See also *Treadwell v. Sackett*, 50 Barb. (N. Y.) 440.

But it was held in *McCoy v. Boley*, 21 Fla. 803, that a mortgage executed by one member of a firm and legally binding upon it may be acknowledged for the firm by the partner executing it. In this case *Raney, J.*, in *distinguishing Sanders v. Pepoon*, 4 Fla. 465, said: "Without questioning in the least the correctness of the position that, where two partners actually join in the execution of an instrument of which a record is contemplated by our recording acts, each must acknowledge for himself, and that one cannot for the other, we do not think there is any inconsistency between such position and the one that where an instrument covered by our recording statutes is executed by one partner in the firm name as a partnership act, and is such as under the law of partnership it is competent for him to execute, he may also acknowledge it for record. In the former case one cannot, of course, acknowledge as having done for his partner that which his copartner did for himself, but in the latter case when, acting as a partner, he has himself done that which is as binding on all the partners as it would be had each acted, he can, we think, certainly acknowledge the act, and the fact that the law of his relation to the others makes the act binding upon them does not change the fact that he did the act, nor should it, for any reason that we can see, restrain his power under the statute to acknowledge that he did it."

A mortgage by a partnership, signed with the firm name by one of the partners, may be acknowledged by any one of the firm so signing, although his name does not appear in the style of the firm. *Keck v. Fisher*, 58 Mo. 532; *Leon, etc., Land Co. v. Dunlap*, 4 Tex. Civ. App. 315.

To a partnership deed of trust signed "W. K. & Co." was appended a notary's certificate that it was acknowledged by "E. W., one of the firm of W. K. & Co., the grantors." It was held that this was a sufficient acknowledgment. *McNeal Pipe, etc., Co. v. Wolman*, 114 N. Car. 178; *Citizens' Nat. Bank v. Johnson*, 79 Iowa 290.

Surviving Partner.—A certificate of acknowl-

out anything to show by which member of the firm it was made is void.¹

4. Corporations.—The acknowledgment of deeds and other instruments by corporations should be made by some representative of the corporation who has authority to execute such instruments in its behalf.² In the absence of statutory provisions the officer affixing the corporate seal is the proper person to make the acknowledgment.³ Acknowledgments may be made by the president, vice president, secretary, treasurer, cashier of a bank, or other authorized officer or agent of the corporation.⁴ An instrument may be

edgment of an assignment executed by "D. F." and "D. F. as surviving partner," reciting that "D. F." acknowledged the instrument, is sufficient, without showing that he acknowledged it "as surviving partner" also. *Hanson v. Metcalf*, 46 Minn. 25.

Proof of Authority to Acknowledge.—A partner has no authority to execute and acknowledge a deed in the name of a firm, without the previous consent or subsequent ratification of the other members of the firm; and where a deed purporting to be executed by a firm was signed in the firm's name and was acknowledged by one of the partners "as his act and deed, and the act and deed of said firm," but no authority or subsequent adoption of the deed was shown, it was held that the execution thereof as a deed of the firm was not sufficiently proven. *Shirley v. Fearn*, 33 Miss. 653, 69 Am. Dec. 375.

1. *Sloan v. Owens, etc.*, Mach. Co., 70 Mo. 206. In this case the court by Norton, J., said: "The proper form of a certificate of acknowledgment to a deed executed in the partnership name relating to personal property is given in the case of *Keck v. Fisher*, 58 Mo. 532. In that case the instrument was signed 'H. H. & Co.,' the form of the certificate was as follows: 'Be it remembered that H. H. & Co., by C. B., of the firm of H. H. & Co., who is personally known * * * to be the person who subscribed the foregoing as a party thereto, appeared before me and acknowledged that he executed and delivered the same for the uses and purposes therein mentioned.' This certificate was held to be sufficient. We apprehend that if the certificate of the officer in that case had simply stated that 'H. & Co.' personally appeared and acknowledged the same, it would have been held insufficient." Followed in *Hughes v. Morris*, 110 Mo. 306.

Proof of Existence of Partnership.—It has been held that § 1185 of the *California* Civil Code does not require the notary taking the acknowledgment of a partnership instrument to know who are members of the firm, and that a power of attorney executed by a partnership cannot be admitted in evidence upon a notary's certificate to the effect that the instrument was "acknowledged by the therein named A. B. & Co. by C. B. (personally known to me), a member of that firm," etc., without outside evidence of the existence of the partnership, and of the fact that the person named in the certificate as the party making the acknowledgment is a member thereof. *Malloye v. Coubrough*, 96 Cal. 649.

Form of Partnership Acknowledgment—California.—Under the *California* statute (Cal. Civ. Code, § 2468) no particular form of ac-

knowledge of certificates of partnership is required, any form being sufficient which indicates that the partners have acknowledged, before the proper officer, that the instrument is theirs. *Fabian v. Callahan*, 56 Cal. 159. See also the title *PARTNERSHIP*.

2. *Hopper v. Lovejoy*, 47 N. J. Eq. 573; *Lovett v. Steam Saw Mill Assoc.*, 6 Paige (N. Y.) 54. See also *New Haven Sav. Bank v. Davis*, 8 Conn. 191; *Morris v. Keil*, 20 Minn. 531; *Evans v. Lee*, 11 Nev. 194; *Bason v. King's Mountain Min. Co.*, 90 N. Car. 417. See also the title *CORPORATIONS (PRIVATE)*.

3. **Acknowledgment by Officer Affixing Seal.**—*Kelly v. Calhoun*, 95 U. S. 710; *Murphy v. Welch*, 128 Mass. 489; *Merrill v. Montgomery*, 25 Mich. 73; *Bowers v. Hechtman*, 45 Minn. 238; *Lovett v. Steam Saw Mill Assoc.*, 6 Paige (N. Y.) 54; *Sheehan v. Davis*, 17 Ohio St. 571. See also *Jinwright v. Nelson* (Ala., 1895), 17 So. Rep. 91; *Johnson v. Bush*, 3 Barb. Ch. (N. Y.) 207; *Isham v. Bennington Iron Co.*, 19 Vt. 230.

In *Bowers v. Hechtman*, 45 Minn. 238, the court by Mitchell, J., said: "The officer or agent who, in behalf of the corporation, affixes the common seal to an instrument, is, in the absence of any statutory provision, deemed the party executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by authority of the board of directors."

Where the Corporate Seal was Not Confided to the Care of Any Particular Officer, a deed of a corporation signed by all the directors present at the meeting, and sealed with the corporate seal, was properly acknowledged by such directors as officers empowered to affix the seal of the corporation. *Gordon v. Preston*, 1 Watts (Pa.) 385, 26 Am. Dec. 75. See also *Benedict v. Denton, Walk.* (Mich.) 336; *Den v. Tunis*, 25 N. J. L. 633.

4. **Acknowledgment by Officers of Corporation—Illinois.**—*Sawyer v. Cox*, 63 Ill. 130.

Maine.—*Fitch v. Lewiston Steam Mill Co.*, 80 Me. 34.

Maryland.—*Frostburg Mut. Bldg. Assoc. v. Brace*, 51 Md. 508.

Michigan.—*Merrill v. Montgomery*, 25 Mich. 73; *Gray v. Waldron*, 101 Mich. 612.

Minnesota.—*Bowers v. Hechtman*, 45 Minn. 238.

Missouri.—*Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67; *Kansas City v. Hannibal, etc.*, R. Co., 77 Mo. 180; *Eppright v. Nickerson*, 78 Mo. 482.

acknowledged as the act of the corporation as such,¹ or in the name of the officer as his own act and deed where it appears that he is acting for the corporation.²

New Hampshire.—Tenney v. East Warren Lumber Co., 43 N. H. 343.

New York.—Hoopes v. Auburn Water Works Co., 37 Hun (N. Y.) 572.

Texas.—Muller v. Boone, 63 Tex. 91; Ballard v. Carmichael, 83 Tex. 355.

Vermont.—McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

See also Smith v. Smith, 62 Ill. 493; Chicago, etc., R. Co. v. Lewis, 53 Iowa 101; Morse v. Beale, 68 Iowa 463; Ingraham v. Grigg, 13 Smed. & M. (Miss.) 22; Johnson v. Badger Mill, etc., Co., 13 Nev. 351.

Municipality.—A deed executed by the president *pro tempore* of a city council and acting mayor of the city, and acknowledged by him as the voluntary act and deed of such president and mayor, was properly admitted in evidence without further proof of the officer's character as such. Middleton Sav. Bank v. Dubuque, 19 Iowa 467.

Acknowledgment by Trustees of Corporation.—A deed purporting on its face to be the deed of a corporation, sealed with a corporate seal, and signed by the trustees of the corporation as such, and duly acknowledged by them, was held good as the deed of the corporation. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Corporate Mortgage without Seal—North Carolina.—Where a mortgage by a corporation was signed by the president, secretary, and two stockholders, but not sealed under the common seal, and the secretary had no power to execute the instrument, it was held that a probate reciting that it was acknowledged by the secretary, and proven on his oath and examination as to the president and the two stockholders, was insufficient, and did not authorize registration, and was ineffectual to pass title as to creditors. Duke v. Markham, 105 N. Car. 131, 18 Am. St. Rep. 889.

Acknowledgment by President and Secretary where there is no Special Provision.—There being in *Alabama* no statutory provisions regulating the manner in which conveyances by corporations may be acknowledged, the provisions of the code, sections 1799-1804, in regard to the acknowledgment of conveyances by individuals, apply to those of corporations as well, and it was accordingly held in that state that a deed by a corporation, sealed with the corporate seal and signed in the name of the corporation by the president and secretary, accompanied by a certificate of acknowledgment of execution, in due form, purporting to have been made before the United States consul for Leith at Edinburgh, *Scotland*, by the president and secretary of the corporation, who were certified by the consul to be known to him, and to have made the acknowledgment in their official capacity, was sufficiently acknowledged. Jinwright v. Nelson (Ala., 1895), 17 So. Rep. 91.

Missouri: Sufficient Corporation Acknowledgment.—The *Missouri* statute (Acts of 1883, p. 20) prescribing the form of acknowledg-

ments by corporations has been held to be simply additional to the statutory requirements existing at the time, so that an acknowledgment, good under the law as it existed before the passage of that act, would still be good. Thus where a notary public, in certifying an acknowledgment by a corporation, attempted to follow the form prescribed by the Act of 1883, but omitted the words "by authority of its board of directors" where they appeared in the form immediately after the words "and that said instrument was signed and sealed in behalf of said association," the acknowledgment following the form given in all other respects, it was held that the acknowledgment, being sufficient under *Missouri* Rev. Stat. 1879, § 743, was good. Huse v. Ames, 104 Mo. 91.

Acknowledgment Not Showing Official Character of Officers.—An assignment of a judgment purporting to be executed by a bank was executed and acknowledged by persons designating themselves to be the president and cashier of the bank, but the certificates did not state that they were such officers. It was held that it was not sufficient proof of the official character of a person to designate him as an officer, and that the acknowledgment was insufficient in the absence of further proof of their authority. Klemme v. McLay, 68 Iowa 158.

Acknowledgment before an Officer of the Corporation.—The acknowledgment of a deed of a corporation may be made by the vice president, before a notary who is also the secretary of the corporation and who countersigned the deed, his signature as secretary not being necessary to its validity, and his signing as witness not disqualifying him as notary. Sawyer v. Cox, 63 Ill. 130. See also Benson Bank v. Hove, 45 Minn. 40; Horton v. Columbian Bldg. Assoc., 6 Cinc. L. Bull. (Ohio) 141.

1. Acknowledgment as Act of Corporation.—Bowers v. Hechtman, 45 Minn. 238; Missouri Fire Clay Works v. Ellison, 30 Mo. App. 67; Chouteau v. Allen, 70 Mo. 290.

2. Acknowledgment by Officer as His Own Act.—A certificate of acknowledgment stating that designated individuals (being the same persons whose names are signed to the conveyance) holding specified offices in the grantor corporation acknowledged the instrument as their own act for the uses and purposes mentioned has been held valid. Eppright v. Nickerson, 78 Mo. 483; Descombes v. Wood, 91 Mo. 196, 60 Am. Rep. 239; Kansas City v. Hannibal, etc., R. Co., 77 Mo. 180; Muller v. Boone, 63 Tex. 91; Ballard v. Carmichael, 83 Tex. 355. But compare Brinley v. Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669.

Where the deed of a corporation was signed by "F., the president of the L. Company," and "C., the treasurer of the L. Company," and acknowledged by F. and C. as individuals, the acknowledgment was held to be sufficient. Tenney v. East Warren Lumber

5. Married Women—*a*. GENERALLY—Disabilities of Married Women Removed by Statute.—At common law a married woman could not convey her property by deed. This disability has been removed in all of the states by statutes regulating the manner of making such conveyances and prescribing the formalities to be observed in taking and certifying the acknowledgment thereof.¹

Acknowledgment Essential Part of Married Woman's Deed.—Except where the practice is changed by recent statutes, a married woman's deed is absolutely void unless accompanied by a certificate showing an acknowledgment before an authorized officer in strict or at least substantial conformity with the statutory regulations.²

Co., 43 N. H. 343; *Fitch v. Lewiston Steam Mill Co.*, 80 Me. 34. See *Hoopes v. Auburn Water Works Co.*, 37 Hun (N. Y.) 572.

Acknowledgment by Attorney for Corporation.

—In *Frostburg Mut. Bldg. Assoc. v. Brace*, 51 Md. 508, the certificate of the justice stated that the attorney of the corporation appeared and acknowledged the mortgage to be his act and deed, instead of "the act and deed of the corporation." It was held that the acknowledgment was aided by intentment, and that it should be read and understood as the acknowledgment of the corporation by its attorney, according to what was the manifest intention. But compare *Howe Mach. Co. v. Avery*, 16 Hun (N. Y.) 555.

Acknowledgment of Articles of Incorporation.

—Under the *California* act (Cal. Civ. Code, § 292) providing that articles of incorporation must be subscribed by five or more persons and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property, an acknowledgment by four out of five of such subscribers was held insufficient. *People v. Montecito Water Co.*, 97 Cal. 276, *distinguishing Larrabee v. Baldwin*, 35 Cal. 155, where a similar defective acknowledgment was held to be cured by statute.

Under the *New York* act (Laws 1844, c. 158, § 1) providing that a certificate of incorporation may be acknowledged before "any officer authorized to take acknowledgments or proofs of conveyances of real estate," it was held that a county commissioner of deeds could take such an acknowledgment. The official character of the officer need not appear in the subscription to the certificate if it is shown in the body thereof. *Second M. E. Church v. Humphrey* (Supreme Ct.), 21 N. Y. Supp. 89, 66 Hun (N. Y.) 628. Compare as to former law *First Baptist Soc. v. Rapalee*, 16 Wend. (N. Y.) 605. See also *Humphreys v. Mooney*, 5 Colo. 283; *Sword v. Wickersham*, 29 Kan. 746; *Riker v. Cornwell*, 113 N. Y. 115; *State v. Lee*, 21 Ohio St. 662; *Spinning v. Home Bldg., etc., Assoc.*, 26 Ohio St. 483.

Under *Indiana* Rev. Stat. 1881, § 3851, requiring persons who desire to organize a corporation to "make, sign, and acknowledge before some officer capable to take acknowledgments of deeds, a certificate in writing," etc., it was held that merely signing the articles of association, without acknowledgment thereof, did not make one a stockholder of a corporation and bind him to its articles of association. *Coppage v. Hutton*, 124 Ind.

401. See also *Indianapolis Furnace, etc., Co. v. Herkimer*, 46 Ind. 142.

1. See the title MARRIED WOMEN.

2. Acknowledgment Essential to Validity of Deed of Married Woman—United States.—*Lane v. Dolick*, 6 McLean (U. S.) 200; *Hollingsworth v. Flint*, 101 U. S. 591. See also *Meegan v. Boyle*, 19 How. (U. S.) 130; *Goodenough v. Warren*, 5 Sawy. (U. S.) 494.

Alabama.—*Cahall v. Citizens' Mut. Bldg. Assoc.*, 61 Ala. 232; *Smith v. McGuire*, 67 Ala. 34.

Arkansas.—*Elliott v. Pearce*, 20 Ark. 508; *Wood v. Terry*, 30 Ark. 385; *Wentworth v. Clark*, 33 Ark. 432; *McGehee v. McKenzie*, 43 Ark. 156. See also *Witter v. Biscoe*, 13 Ark. 423; *McDaniel v. Grace*, 15 Ark. 465.

California.—*Selover v. American-Russian Commercial Co.*, 7 Cal. 266; *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779; *Landers v. Bolton*, 26 Cal. 393; *Leonis v. Lazzarovich*, 55 Cal. 52; *Healdsburg Bank v. Bailhache*, 65 Cal. 327; *Durfee v. Garvey*, 65 Cal. 406; *Danglarde v. Elias*, 80 Cal. 65 (*citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 164). See also *Joseph v. Dougherty*, 60 Cal. 358.

Dakota.—*Wambole v. Foote*, 2 Dakota 1.

Florida.—*Carn v. Haisley*, 22 Fla. 317.

Illinois.—*Mariner v. Saunders*, 10 Ill. 113; *Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490; *Lindley v. Smith*, 46 Ill. 523, 58 Ill. 250; *Murphy v. Williamson*, 85 Ill. 149.

Indiana.—*Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516; *Woods v. Polhemus*, 8 Ind. 60.

Kentucky.—*Barnett v. Shackleford*, 6 J. J. Marsh. (Ky.) 532, 22 Am. Dec. 100; *Miller v. Shackleford*, 3 Dana (Ky.) 289; *McCann v. Edwards*, 6 B. Mon. (Ky.) 208; *Pribble v. Hall*, 13 Bush (Ky.) 61.

Maryland.—*Jacob v. Kraner*, 1 Har. & J. (Md.) 291; *Peddicoart v. Rigges*, 1 Har. & J. (Md.) 293; *Roman Catholic Clergymen's Corp. v. Hammond*, 1 Har. & J. (Md.) 580; *Lewis v. Waters*, 3 Har. & M. (Md.) 430; *Johns v. Reardon*, 11 Md. 465; *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76.

Michigan.—*Dewey v. Campau*, 4 Mich. 505.

Mississippi.—*Toulmin v. Heidelberg*, 32 Miss. 268; *Allen v. Lenoir*, 53 Miss. 321.

Missouri.—*Dervorse v. Snider*, 60 Mo. 235; *Reaume v. Chambers*, 22 Mo. 36; *McDowell v. Little*, 33 Mo. 523; *Wannall v. Kem*, 54 Mo. 150; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Goff v. Roberts*, 72 Mo. 570; *Hoskins v. Adkins*, 77 Mo. 537; *Rust v. Goff*, 94 Mo. 511; *Mays v. Pryce*, 95 Mo. 603; *Sutton v. Casselleggi*, 5 Mo. App. 111.

Nebraska.—*Roode v. State*, 5 Neb. 14.

Deed from Husband and Wife to Wife's Lands Acknowledged by Husband Only.—Unless otherwise provided by statute, a deed conveying the wife's lands, executed by both

New Jersey.—Sheppard v. Wardell, 1 N. J. L. 516.

New York.—Gillett v. Stanley, 1 Hill (N. Y.) 121; Martin v. Dwelly, 6 Wend. (N. Y.) 9; 21 Am. Dec. 245; Jackson v. Stevens, 16 Johns. (N. Y.) 110; Jackson v. Cairns, 20 Johns. (N. Y.) 301; Doe v. Howland, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445; Knowles v. McCamly, 10 Paige (N. Y.) 342.

North Carolina.—Den v. Lewis, 8 Ired. (N. Car.) 70, 47 Am. Dec. 338.

Ohio.—Kilbourn v. Fury, 26 Ohio St. 153.

Tennessee.—Perry v. Calhoun, 8 Humph. (Tenn.) 551.

Texas.—Berry v. Donley, 26 Tex. 737; Cross v. Everts, 28 Tex. 523; Coffey v. Hendricks, 66 Tex. 676; Norton v. Davis, 83 Tex. 32; Stiles v. Japhet, 84 Tex. 91; Stone v. Sledge (Tex. Civ. App., 1894), 24 S. W. Rep. 697.

West Virginia.—Renick v. Renick, 5 W. Va. 285.

See also *Perdue v. Aldridge*, 19 Ind. 290; *Grapengether v. Fejervary*, 9 Iowa 163, 74 Am. Dec. 336; *McNair v. Com.*, 26 Pa. St. 388; *Waltee v. Weaver*, 57 Tex. 569; and cases cited in notes *infra*.

Certificate of Acknowledgment Not Essential—California.—Under the provisions of the *California Civil Code*, §§ 1186, 1187, the certificate of acknowledgment is not, as formerly, an essential part of a married woman's conveyance. An acknowledgment, according to the code, is sufficient of itself to pass the estate. The certificate is simply record proof of the fact of acknowledgment. *Wedel v. Herman*, 59 Cal. 507. See also *Danglarde v. Elias*, 80 Cal. 65.

But the deed has no validity until acknowledged in conformity with the statutory provisions. *Ewald v. Corbett*, 32 Cal. 493.

It is held in *Healdsburg Bank v. Bailhache*, 65 Cal. 327, in apparent conflict with *Wedel v. Herman*, 59 Cal. 507, that the deed must be acknowledged and certified to be valid. The deed in question, however, had not been acknowledged at all, which of itself would be sufficient to prevent its being valid, the question as to the necessity for the certificate being, therefore, not directly involved.

Acknowledgment through a Telephone.—Where the notary's certificate of a married woman's acknowledgment is in due form, and neither fraud nor duress is alleged, it is no objection to the sufficiency of the acknowledgment that the woman was not personally present before the notary, but, being three miles distant from him, made the acknowledgment through a telephone. *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156.

Evidence of Acknowledgment.—The certificate of acknowledgment of a deed executed by husband and wife stated the fact of the wife's acknowledgment, but not that of the husband's. On the minutes of the court was this entry: "Deed from A B and C B to D E was acknowledged." It was held that the deed could be read as being acknowledged

by the husband. *Hunter v. Bryan*, 2 Murph. (N. Car.) 178, 5 Am. Dec. 526.

Acknowledgment to Bind Wife, of Deeds Executed by Both Husband and Wife.—In *Illinois*, prior to 1869, a married woman could not dispose of her right to dower, nor of any other interest she might have in land, by merely joining her husband in the deed, unless the deed was duly acknowledged by her, as required by statute. *Ayres v. Doe*, 3 Ill. 307; *Heinrich v. Simpson*, 66 Ill. 57; *Bute v. Kneale*, 109 Ill. 652. But she may do so under the Act of 1869. *Bute v. Kneale*, 109 Ill. 652.

Under the laws of *Massachusetts* (Mass. Pub. Stat. 1882, c. 124, § 6) it was held that a deed executed by husband and wife was sufficient to bind the wife, although acknowledged by the husband only. *Dudley v. Sumner*, 5 Mass. 438; *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Perkins v. Richardson*, 11 Allen (Mass.) 538.

Under the *Michigan* Laws of 1838, a deed by husband and wife of the wife's real estate must be acknowledged by both, and the wife must be separately examined. *Dewey v. Campau*, 4 Mich. 565.

Acknowledgment by Husband and Wife need Not be at Same Time.—It was held under the *Ohio* statute of 1831, that while a deed executed by husband and wife was not binding on the wife until acknowledged by both, it was not necessary that they should both acknowledge at the same time or place, or before the same officer, or that their acknowledgment should be certified by a single certificate. *Williams v. Robson*, 6 Ohio St. 510; *Ludlow v. O'Neil*, 29 Ohio St. 181. So also in *Kentucky*. *Ford v. Gregory*, 10 B. Mon. (Ky.) 175. See also *infra*, this title, *Time when Acknowledgment must be Made*.

Lands of Husband and Wife Embraced in the Same Conveyance.—Where lands owned by the husband and those owned by the wife are embraced in the same conveyance, it is not necessary under the *Missouri* statute of 1855 that the wife should make two acknowledgments, one for her own lands and one relinquishing dower in the lands of her husband; nor need the single acknowledgment contain distinct references to the lands thus severally owned. *Barker v. Circle*, 60 Mo. 258.

Deed from Wife to Husband.—Under the *North Carolina* statute (N. Car. Code, § 1835) providing that a conveyance of a married woman to her husband shall be acknowledged according to the rules of conveyances to married women, and that the officer shall certify that the conveyance is not unreasonable or injurious to her, a deed without such certificate is void. *Sims v. Ray*, 96 N. Car. 87.

Deed from Husband to Wife.—It was held in *Texas* that it was not necessary to the validity of a deed executed by a husband to his wife, that he should acknowledge it. *Frank v. Frank* (Tex. Civ. App., 1894), 25 S. W. Rep. 819.

Assent of Husband.—Under the statutes in

husband and wife and acknowledged by the husband only, is valid as to him, and passes his interest in the land to the grantee.¹

b. REFUSAL TO ACKNOWLEDGE—POWER OF COURT TO ORDER.—If a married woman, after the execution of a deed which requires an acknowledgment in order to convey or release her own rights, refuses to acknowledge it pursuant to the statute, it seems that she cannot be compelled by a court of equity to acknowledge the instrument.² But when the legal title to land in trust was cast by descent upon a married woman, and the law required that a deed executed by her should be acknowledged as executed voluntarily, and she refused so to acknowledge it, the court compelled her by decree.³

c. SEPARATE EXAMINATION—(1) In General.—It is, or has been, provided by statute in most of the states, that the acknowledgment of a married woman could be taken only upon her examination separate and apart from her husband.⁴ In some of the states, however, the provision just referred to has

force in *Virginia* and *Ohio* in 1837, a deed by husband and wife conveying the latter's land, and duly acknowledged by her, is inoperative to convey her title unless the husband in her lifetime, by a proper acknowledgment in the form prescribed by law, signifies his assent to such conveyance. *Sewall v. Haymaker*, 127 U. S. 719.

Such assent is sufficiently signified by his signing and acknowledging his wife's deed, although he is not named therein as grantor. *Evans v. Summerlin*, 19 Fla. 858.

Deed to Lands of Husband Not Acknowledged by Wife.—Where a deed by husband and wife was duly executed and acknowledged by the husband, but the wife's acknowledgment was defective, it was held that the deed nevertheless passed the title subject to the contingent right of dower, and was properly recorded as the deed of the husband. *Rayner v. Lee*, 20 Mich. 384. See also *Hall v. Redson*, 10 Mich. 21.

Where husband and wife join in the execution of a deed conveying the husband's lands, the deed is good though not acknowledged by the wife, and where she hands it to the grantee, saying that the signature was hers, she will be bound thereby. *Mays v. Hedges*, 79 Ind. 288. See *Hubble v. Wright*, 23 Ind. 322.

Where the Wife Unnecessarily Joins with the husband in the conveyance of his property, the fact that her acknowledgment is defective is immaterial. *Bassett v. Martin*, 83 Tex. 339; *Jack v. Dillon*, 6 Tex. Civ. App. 192; *Sampson v. McArthur*, 8 Grant's Ch. (Canada) 72. See also *Edens v. Simpson* (Tex., 1891), 17 S. W. Rep. 788.

1. *Wilson v. Albert*, 89 Mo. 537; *Ryerss v. Wheeler*, 25 Wend. (N. Y.) 437. 37 Am. Dec. 243; *Curtiss v. Follett*, 15 Barb. (N. Y.) 337; *Kincaid v. Perkins*, 63 N. Car. 282; *Osborne v. Mull*, 91 N. Car. 203; *Newcomb v. Smith*, *Wright* (Ohio) 208; *James v. Lyon*, 3 Yeates (Pa.) 471; *Churchill v. Monroe*, 1 R. I. 209; *Merchants', etc., Bank v. Thomas*, 69 Tex. 237; *Harris v. Wells*, 85 Tex. 312; *Knapper v. Wooster*, *Brayt.* (Vt.) 50.

Deed from Husband and Wife, of Wife's Lands, Not Acknowledged by Husband.—A deed by husband and wife conveying the wife's lands, and acknowledged by the wife but not by the

husband, is void. *Den v. Hunter*, 2 Hayw. (N. Car.) 401.

But under the *Tennessee* Act of 1833, where a husband joined in his wife's deed conveying her land, acknowledgment by the wife only was held sufficient. *Mount v. Kesterson*, 6 Coldw. (Tenn.) 452. See *Montgomery v. Hobson*, *Meigs* (Tenn.) 437.

2. Where a married woman joined with her husband in a mortgage deed to secure the purchase price of land, but refused to acknowledge that she had voluntarily executed the deed, it was held that, while she could not be compelled to acknowledge it, the contract was binding upon her, and she could hold the land only on condition of paying the purchase price. *Burns v. McGregor*, 90 N. Car. 222. But see *Martin v. Dwelly*, 6 Wend. (N. Y.) 9.

3. *Dundas v. Biddle*, 2 Pa. St. 160.

4. Cases construing statutes to this effect, either existing now or formerly in force in the states named, are here collected. In several of these states the statutes are no longer in force. See *infra*, this title, *Under Recent Statutes*. As statutory changes in this respect are constantly being made, the latest local statutes should be consulted.

Alabama.—*Beene v. Randall*, 23 Ala. 514; *Balkum v. Wood*, 58 Ala. 642.

See *Dundas v. Hitchcock*, 12 How. (U. S.) 256.

Arkansas.—*Stedham v. Matthews*, 29 Ark. 650.

California.—*Selover v. American Russian Commercial Co.*, 7 Cal. 266; *Kendall v. Miller*, 9 Cal. 591; *Mott v. Smith*, 16 Cal. 534.

Colorado.—*Nippel v. Hammond*, 4 Colo. 211.

Delaware.—*Lewis v. Cox*, 5 Harr. (Del.) 401.

Florida.—*Carn v. Haisley*, 22 Fla. 317.

Illinois.—*Moore v. Titman*, 33 Ill. 358; *Marston v. Brittenham*, 76 Ill. 611; *Coleman v. Billings*, 89 Ill. 183.

Indiana.—*Clark v. Redman*, 1 Blackf. (Ind.) 379.

Kentucky.—*Allen v. Shortridge*, 1 Duv. (Ky.) 35; *Steele v. Lewis*, 1 T. B. Mon. (Ky.) 48; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7. 13 Am. Dec. 124; *Whitaker v. Blair*, 3 J.

J. Marsh. (Ky.) 236; Nantz v. Bailey, 3 Dana (Ky.) 111; Thompson v. Peebles, 6 Dana (Ky.) 387; Sutton v. Pollard (Ky., 1891), 16 S. W. Rep. 126; Stevenson v. Brasher, 90 Ky. 23. See also Louisville Bank v. Gray, 84 Ky. 565.

Maryland.—Young v. State, 7 Gill & J. (Md.) 253. See also Roman Catholic Clergymen's Corp. v. Hammond, 1 Har. & J. (Md.) 530; Heath v. Eden, 1 Har. & J. (Md.) 751; Griffith v. Ridgely, 2 Har. & M. (Md.) 418; Morris v. Harris, 9 Gill (Md.) 19.

Michigan.—Fisher v. Meister, 24 Mich. 447.

Minnesota.—Dodge v. Hollinshead, 6 Minn. 25, 80 Am. Dec. 433; Edgerton v. Jones, 10 Minn. 427.

See Drury v. Foster, 2 Wall. (U. S.) 24.

Mississippi.—James v. Fisk, 9 Smed. & M. (Miss.) 144, 47 Am. Dec. 111; Love v. Taylor, 26 Miss. 567.

Missouri.—Wannell v. Kem, 57 Mo. 478; Steffen v. Bauer, 70 Mo. 399; Rust v. Goff, 94 Mo. 511.

New Jersey.—Tuthill v. Townley, 1 N. J. L. 281; Armstrong v. Ross, 20 N. J. Eq. 109; Marsh v. Mitchell, 26 N. J. Eq. 497, *affirmed* in Mitchell v. Marsh, 27 N. J. Eq. 631.

New York.—Gillett v. Stanley, 1 Hill (N. Y.) 121; Doe v. Howland, 8 Cow. (N. Y.) 277; Meriam v. Harsen, 2 Barb. Ch. (N. Y.) 232; Elwood v. Klock, 13 Barb. (N. Y.) 50; Blood v. Humphrey, 17 Barb. (N. Y.) 660; People v. Galloway, 17 Wend. (N. Y.) 540; Bradley v. Walker, 138 N. Y. 291. See also Albany F. Ins. Co. v. Bay, 4 N. Y. 9; Boole v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

North Carolina.—Green v. Branton, 1 Dev. Eq. (N. Car.) 504; Den v. Wilson, 2 Dev. (N. Car.) 306; Den v. Fletcher, 1 Ired. (N. Car.) 313; Askew v. Daniel, 5 Ired. Eq. (N. Car.) 321; Den v. Lewis, 8 Ired. (N. Car.) 70, 47 Am. Dec. 338; Woodbourne v. Gorrell, 66 N. Car. 82; Scott v. Battle, 85 N. Car. 184, 39 Am. Rep. 694; Clayton v. Rose, 87 N. Car. 106; McGlennery v. Miller, 90 N. Car. 215; Robbins v. Harris, 96 N. Car. 557; Wynne v. Small, 102 N. Car. 133; Farthing v. Shields, 106 N. Car. 289; Thompson v. Smith, 106 N. Car. 357; Wood v. Wheeler, 106 N. Car. 512. See also Doe v. Player, 72 N. Car. 94; Towles v. Fisner, 77 N. Car. 437; Jones v. Cohen, 82 N. Car. 75; Ware v. Nesbit, 94 N. Car. 664; Epps v. Flowers, 101 N. Car. 158; Thurber v. LaRoque, 105 N. Car. 301; Hinton v. Ferrebee, 107 N. Car. 154.

Ohio.—Brown v. Farran, 3 Ohio 140; Worthington v. Young, 6 Ohio 313; Carney v. Hopple, 17 Ohio St. 39; Ludlow v. O'Neil, 20 Ohio St. 181; Dengenhart v. Cracraft, 36 Ohio St. 549.

Pennsylvania.—Kirk v. Dean, 2 Binn. (Pa.) 341; Thompson v. Morrow, 5 S. & R. (Pa.) 289, 9 Am. Dec. 358; Watson v. Mercer, 6 S. & R. (Pa.) 49, 9 Am. Dec. 411; Fowler v. McClurg, 6 S. & R. (Pa.) 143; West v. West, 10 S. & R. (Pa.) 445; Miller v. Harbert, 6 Phila. (Pa.) 531, *affirmed* in 4 W. N. C. (Pa.) 325; McCandless v. Engle, 51 Pa. St. 309; Miller v. Wentworth, 82 Pa. St. 280; Caldwell's Appeal (Pa., 1886), 7 Atl. Rep. 211.

See also Stoops v. Blackford, 27 Pa. St. 213; Hepburn v. Dubois, 12 Pet. (U. S.) 345.

Tennessee.—Montgomery v. Hobson, Meigs (Tenn.) 437; Prater v. Hoover, 1 Coldw. (Tenn.) 544; Mount v. Kesterson, 6 Coldw. (Tenn.) 452; Perry v. Calhoun, 8 Humph. (Tenn.) 551; Ward v. Daniel, 10 Humph. (Tenn.) 603; Scott v. Buchanan, 11 Humph. (Tenn.) 468; McCallum v. Petigrew, 10 Heisk. (Tenn.) 394; Murdock v. Memphis, etc., R. Co., 7 Baxt. (Tenn.) 557.

Texas.—Callahan v. Patterson, 4 Tex. 61, 51 Am. Dec. 712; Hollis v. Francois, 5 Tex. 195, 51 Am. Dec. 760; Roy v. Bremond, 22 Tex. 626; Nichols v. Gordon, 25 Tex. Supp. 109; Berry v. Donley, 26 Tex. 737; Cross v. Everts, 28 Tex. 523; Smith v. Elliott, 39 Tex. 201; Fitzgerald v. Turner, 43 Tex. 79; Mullins v. Weaver, 57 Tex. 5; Cole v. Bammel, 62 Tex. 108; Coffey v. Hendricks, 66 Tex. 676; Parker v. Chancellor, 73 Tex. 475.

Vermont.—Sumner v. Wentworth, 1 Tyler (Vt.) 42.

Virginia.—Healy v. Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94. See also Harvey v. Pecks, 1 Munf. (Va.) 518; Shanks v. Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

West Virginia.—Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445; McMullen v. Eagan, 21 W. Va. 233; Rollins v. Menager, 22 W. Va. 461.

Canada.—A married woman's deed conveys no title unless the wife has been examined as to her voluntary consent, and a proper certificate thereof is endorsed on the deed. Doe v. Twigg, 5 U. C. Q. B. 167; McKinnon v. Arnold, 5 U. C. Q. B. 604; Doe v. Ten Eyck, 7 U. C. Q. B. 600; Malloch v. Derivan, 22 U. C. Q. B. 54; Amey v. Card, 25 U. C. Q. B. 501; McNally v. Church, 27 U. C. Q. B. 103; Morgan v. Sabourin, 27 U. C. Q. B. 230; Grant v. Taylor, 28 U. C. Q. B. 234; Jackson v. Robertson, 4 U. C. C. P. 272; Moffatt v. Grover, 4 U. C. C. P. 402; McGill v. Frazer, 5 U. C. C. P. 404; Stayner v. Applegate, 8 U. C. C. P. 133, 451; Farquharson v. Morrow, 12 U. C. C. P. 311; Orser v. Vernon, 14 U. C. C. P. 573; Monk v. Farlinger, 17 U. C. C. P. 41; Commercial Bank v. Smith, 18 U. C. C. P. 214; Beattie v. Mutton, 14 Grant's Ch. (Canada) 686; Romanes v. Fraser, 16 Grant's Ch. (Canada) 97. See also Heward v. Scott, 2 Ch. Cham. (Canada) 274; Sampson v. McArthur, 8 Grant's Ch. (Canada) 72; Hope v. Beard, 8 Grant's Ch. (Canada) 380; Graham v. Meneilly, 16 Grant's Ch. (Canada) 661; Robinson v. Byers, 13 Grant's Ch. (Canada) 388; Tiffany v. McCumber, 13 U. C. Q. B. 159; Allison v. Rednor, 14 U. C. Q. B. 459; Allan v. Levesconte, 15 U. C. Q. B. 9; Hill v. Greenwood, 23 U. C. Q. B. 404; Doran v. Reid, 13 U. C. C. P. 393.

For additional cases holding that the wife must be separately examined, see notes immediately following, and *infra*, this title, *Under Recent Statutes*.

Contract to Convey Land Void unless Duty Acknowledged.—Where a married woman's contract to convey her separate real estate was not acknowledged by her own separate examination as required by law, it was held that her contract was void both at law and in equity. Rumfelt v. Clemens, 46 Pa. St. 455; Kirk v. Clark, 59 Pa. St. 479; Glidden v.

been abolished by the force of more recent statutes.¹

(2) *Origin and Object of the Practice.*—The separate examination of married women is designed as a substitute for the common-law method of conveying lands belonging to married women by the process of fine and recovery.²

Strupler, 52 Pa. St. 400; Colburn v. Kelly, 61 Pa. St. 314; Innis v. Templeton, 95 Pa. St. 262, 40 Am. Rep. 643; Miltenberger v. Croyle, 27 Pa. St. 170; Caldwell's Appeal (Pa., 1886), 7 Atl. Rep. 211; Stivers v. Tucker, 126 Pa. St. 74; Kirkland v. Hepselgefer, 2 Grant's Cas. (Pa.) 84; Knowles v. McCamy, 10 Paige (N. Y.) 342. See also Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Clark v. Thompson, 12 Pa. St. 274.

Unacknowledged Executory Contract cannot be Enforced.—It was held under *California* Civ. Code, §§ 1093, 1116, that a specific performance of an unacknowledged executory contract of a married woman to convey her separate real property could not be compelled. Jackson v. Torrence, 83 Cal. 521.

It was so held under the *Pennsylvania* Act of 1848. Roseburgh v. Sterling, 27 Pa. St. 292.

And in *Banbury v. Arnold*, 91 Cal. 606, it was held that a married woman could not enforce against the vendee such an unacknowledged executory contract for the sale of her estate.

Acknowledgment of Deeds Executed before Marriage.—The acknowledgment by a married woman of a deed executed by her before marriage, made as a *feme sole* without separate examination, is a nullity. Johnson v. Walton, 1 Sneed (Tenn.) 258.

But it was held in *North Carolina* that separate examination was not necessary where a married woman acknowledged a lease of land made by her while sole, as the executrix under the will of a former husband. Darden v. Neuse, etc., Steamboat Co., 107 N. Car. 437.

When Separate Examination is Not Necessary—Miscellaneous Cases.—Separate examination is not necessary in the absence of a statute requiring it, and an acknowledgment without separate examination was good in *Texas* prior to the Act of 1841. Harvey v. Hill, 7 Tex. 591. See also Groesbeck v. Bodman, 73 Tex. 287.

Prior to the enactment of the *California* statute requiring the declaration of a homestead selected from the separate property of a married woman (Cal. Civ. Code, §§ 1239, 1262, 1186) a married woman might acknowledge such declaration as if sole. Clements v. Stanton, 47 Cal. 60.

Where, by the Terms of the Conveyance Creating an Estate in a married woman, she is authorized to dispose of the same without privy examination, no such examination is necessary. Sharpe v. McPike, 62 Mo. 300; Sherman v. Turpin, 7 Coldw. (Tenn.) 382; Peterson v. Richman, 93 Tenn. 71. See also Small v. Field, 102 Mo. 104; Clayton v. Rose, 87 N. Car. 106.

There are decisions in colonial times in *Pennsylvania* holding conveyances good which failed to show a privy examination of the wife, the error in so taking acknowledgments being so common that the court ap-

plied the maxim *communis error facit jus*. Davey v. Turner, 1 Dall. (Pa.) 11; Lloyd v. Taylor, 1 Dall. (Pa.) 17. See Watson v. Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462; Kirk v. Dean, 2 Binn. (Pa.) 341.

Examination by a Commission.—Under the former laws of *North Carolina* requiring the examination of the wife to be made before a judge or court, if the wife by reason of infirmity was unable to attend, the judge or court might issue a commission to examine her elsewhere; but in case of a deed by husband and wife such commission could not be issued until the conveyance had been first acknowledged by the husband or proved by witnesses. Den v. Sutton, 1 Dev. & B. (N. Car.) 582. See also Joyner v. Faulcon, 2 Ired. Eq. (N. Car.) 386; Den v. Wilson, 2 Dev. (N. Car.) 306; Woodbourne v. Gorrel, 66 N. Car. 82.

Where neither the commission nor the order of record for issuing it sets forth that the woman was either so infirm or aged that she could not travel to court, an acknowledgment taken under a commission is inoperative to convey the wife's interest in the land. Fenner v. Jasper, 1 Dev. & B. (N. Car.) 34.

Under the *Kentucky* Acts of 1785 and 1796 providing that the acknowledgment of a *feme covert* might be taken by two justices of the peace, when a commission was issued to them for that purpose, it was held that an acknowledgment taken without such commission would not pass title. Phillips v. Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; Still v. Swan, Litt. Sel. Cas. (Ky.) 155; Stansberry v. Pope, 4 Bibb (Ky.) 492; Smith v. White, 1 B. Mon. (Ky.) 16.

Acknowledgment in Open Court.—It was held in *North Carolina* that the probate of a deed by husband and wife, showing that it had been duly acknowledged in open court, and that the court had appointed a certain person to take the privy acknowledgment of the wife, who certified that he had examined her separate and apart from her husband, and that she had declared that she signed the deed freely and voluntarily, without any coercion or compulsion on the part of her husband, was sufficient. Robbins v. Harris, 96 N. Car. 557.

See also, as to acknowledgment in open court, Joyner v. Faulcon, 2 Ired. Eq. (N. Car.) 385; Den v. Lamb, 13 Ired. (N. Car.) 400; Den v. Ferebee, 9 Ired. (N. Car.) 312; Den v. Wilson, 2 Dev. (N. Car.) 306; Den v. Hunter, 2 Hayw. (N. Car.) 401; Den v. Sutton, 1 Dev. & B. (N. Car.) 582.

1. See *infra*, this title, *Under Recent Statutes*.

2. **Origin of Separate Examination—United States.**—Hitz v. Jenks, 123 U. S. 297. See also Sewall v. Haymaker, 127 U. S. 719.

Arkansas.—McGehee v. McKenzie, 43 Ark. 156.

Dakota.—Wambole v. Foote, 2 Dakota 1.
Florida.—Hart v. Sanderson, 18 Fla. 103.

The object of the separate examination and acknowledgment is to enable the wife to act freely, and without fear or coercion.¹

(3) *General Requirements*—(a) *Certification*.—There is some diversity in the statutory requirements respecting the separate examination, but it is generally provided that the officer's certificate must show that the wife was separately examined.²

Illinois.—Kerr v. Russell, 69 Ill. 666, 18 Am. Rep. 634; Ennor v. Thompson, 46 Ill. 214; Russell v. Rumsey, 35 Ill. 362.

Iowa.—Simms v. Hervey, 19 Iowa 273; Heaton v. Fryberger, 38 Iowa 185.

Maryland.—Chase's Case, 1 Bland (Md.) 206.

New York.—Priest v. Cummings, 16 Wend. (N. Y.) 617; Morris v. Wadsworth, 17 Wend. (N. Y.) 103.

North Carolina.—Den v. Barfield, 2 Murph. (N. Car.) 391. See also Woodbourne v. Gorel, 66 N. Car. 82.

Ohio.—Brown v. Farran, 3 Ohio 140.

Pennsylvania.—Watson v. Bailey, 1 Binn. (Pa.) 470, 2 Am. Dec. 462; Schrader v. Decker, 9 Pa. St. 14, 49 Am. Dec. 538.

Tennessee.—Mount v. Kesterson, 6 Coldw. (Tenn.) 452; Young v. Young, 7 Coldw. (Tenn.) 461; Montgomery v. Hobson, Meigs (Tenn.) 437; Perry v. Calhoun, 8 Humph. (Tenn.) 551.

Texas.—Langton v. Marshall, 59 Tex. 296; Groesbeck v. Bodman, 73 Tex. 287; Hollis v. Francois, 5 Tex. 196, 51 Am. Dec. 760.

Virginia.—Harkins v. Forsyth, 11 Leigh (Va.) 306; Harrisonburg First Nat. Bank v. Paul, 75 Va. 594, 40 Am. Rep. 740; Murrell v. Diggs, 84 Va. 900, 10 Am. St. Rep. 893.

West Virginia.—Rollins v. Menager, 22 W. Va. 461.

1. *Object of Separate Acknowledgment*—*England*.—Goodchild v. Dougal, 3 Ch. Div. 650.

United States.—Hepburn v. Dubois, 12 Pet. (U. S.) 345; Hitz v. Jenks, 123 U. S. 297. See also Holladay v. Daily, 19 Wall. (U. S.) 366.

California.—Pease v. Barbiers, 10 Cal. 436; Landers v. Bolton, 26 Cal. 393.

Dakota.—Wambole v. Foote, 2 Dakota 1.

Illinois.—Stuart v. Dutton, 39 Ill. 91.

Kentucky.—Barnett v. Schackleford, 6 J. J. Marsh. (Ky.) 532, 22 Am. Dec. 100.

Maryland.—Webster v. Hall, 2 Har. & M. (Md.) 19, 1 Am. Dec. 370.

Michigan.—Dewey v. Campau, 4 Mich. 565; Fisher v. Meister, 24 Mich. 447.

Mississippi.—Love v. Taylor, 26 Miss. 567; Bernard v. Elder, 30 Miss. 336.

Missouri.—Wannell v. Kem, 57 Mo. 478; Steffen v. Bauer, 70 Mo. 399.

New York.—Meriam v. Harsen, 2 Barb. Ch. (N. Y.) 232.

North Carolina.—McGlennery v. Miller, 90 N. Car. 216.

Ohio.—Brown v. Farran, 3 Ohio 140; Good v. Zercher, 12 Ohio 364; Chesnut v. Shane, 16 Ohio 599, 47 Am. Dec. 387.

Pennsylvania.—Roseburgh v. Sterling, 27 Pa. St. 202; Rumfelt v. Clemens, 46 Pa. St. 455; Miller v. Wentworth, 82 Pa. St. 280.

Rhode Island.—Churchill v. Monroe, 1 R. I. 209.

Texas.—Hollis v. Francois, 5 Tex. 196, 51

Am. Dec. 760; Womack v. Womack, 8 Tex. 397, 58 Am. Dec. 119; Mullins v. Weaver, 57 Tex. 5; Coombes v. Thomas, 57 Tex. 321; Angier v. Coward, 79 Tex. 551.

Virginia.—Countz v. Geiger, 1 Call (Va.) 191.

It was held in *Moorman v. Board*, 11 Bush (Ky.) 135, that unless a married woman acknowledges her deed and consents to its being recorded upon an examination separate and apart from her husband, the presumption that she did not act freely and without constraint arises as a matter of law, and is conclusive of the question.

2. *Fact of Separate Examination must Appear in Certificate*—*Alabama*.—Cox v. Holcomb, 87 Ala. 589, 13 Am. St. Rep. 79.

Arkansas.—Stillwell v. Adams, 29 Ark. 346; Shryock v. Cannon, 39 Ark. 434.

California.—Bours v. Zachariah, 11 Cal. 281, 70 Am. Dec. 779; Ewald v. Corbett, 32 Cal. 493; McLeran v. Benton, 43 Cal. 467; Wedel v. Herman, 59 Cal. 507; Muir v. Galloway, 61 Cal. 498; Hutchinson v. Ainsworth, 63 Cal. 286; Beck v. Soward, 76 Cal. 527; Danglarde v. Elias, 80 Cal. 65; Kennedy v. Gloster, 98 Cal. 143.

Illinois.—Garrett v. Moss, 22 Ill. 363; Chester v. Rumsey, 26 Ill. 97; Russell v. Rumsey, 35 Ill. 362; Board of Trustees v. Davison, 65 Ill. 124; Mettler v. Miller, 129 Ill. 630.

Indiana.—Jordan v. Corey, 2 Ind. 385, 52 Am. Dec. 516, *distinguishing* Stevens v. Doe, 6 Blackf. (Ind.) 475; Butterfield v. Beall, 3 Ind. 203; Pardun v. Dobesberger, 3 Ind. 389.

Kentucky.—Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177; Blackburn v. Pennington, 8 B. Mon. (Ky.) 217; Applegate v. Gracy, 9 Dana (Ky.) 215. See Elliott v. Peirsol, 1 Pet. (U. S.) 328, 1 McLean (U. S.) 11.

Maryland.—Webster v. Hall, 2 Har. & M. (Md.) 19, 1 Am. Dec. 370; Flanagan v. Young, 2 Har. & M. (Md.) 38. See Deery v. Cray, 5 Wall. (U. S.) 795.

Michigan.—Sibley v. Johnson, 1 Mich. 380; Dewey v. Campau, 4 Mich. 565.

Mississippi.—Warren v. Brown, 25 Miss. 66, 57 Am. Dec. 191; Garrison v. Fisher, 26 Miss. 352; Russ v. Wingate, 30 Miss. 440; Robinson v. Noel, 49 Miss. 253; Allen v. Lenoir, 53 Miss. 321; Willis v. Gattman, 53 Miss. 721; Kenneday v. Price, 57 Miss. 771.

Missouri.—Rogers v. Woody, 23 Mo. 548; Garnier v. Barry, 28 Mo. 438; Bagby v. Emberson, 79 Mo. 139.

New York.—Elwood v. Klock, 13 Barb. (N. Y.) 50; Dennis v. Tarpenny, 20 Barb. (N. Y.) 371. See also Jackson v. Gilchrist, 15 Johns. (N. Y.) 89.

North Carolina.—Den v. Barfield, 2 Murph. (N. Car.) 391; Den v. Sawyer, 4 Dev. & B. (N. Car.) 51; Den v. Lewis, 8 Ired. (N. Car.)

(b) **Explanation of Contents.**—It must also appear that the contents and legal effect of the deed were fully explained to her.¹

Who may Make the Explanation.—This explanation is generally made by the officer himself, but it has been held by some courts that the source of the wife's knowledge is immaterial, and that a certificate showing that the contents of the instrument were explained, without stating by whom the explanation was made, is sufficient.²

70, 47 Am. Dec. 338; Den v. Ashbee, 9 Ired. (N. Car.) 353; Den v. Wanett, 10 Ired. (N. Car.) 446.

Ohio.—Meddock v. Williams, 12 Ohio 377.

Oregon.—Harty v. Ladd, 3 Oregon 353.

Pennsylvania.—Jourdan v. Jourdan, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724; Tate v. Stooltzfoos, 16 S. & R. (Pa.) 35, 16 Am. Dec. 546; Graham v. Long, 65 Pa. St. 383; Shrawder v. Snyder, 142 Pa. St. 1, 28 W. N. C. (Pa.) 84; Hand v. Weidner, 151 Pa. St. 362.

Tennessee.—Mount v. Kesterson, 6 Coldw. (Tenn.) 452; Ellett v. Richardson, 9 Baxt. (Tenn.) 293.

Texas.—Rice v. Peacock, 37 Tex. 392; Looney v. Adamson, 48 Tex. 619; Coombes v. Thomas, 57 Tex. 321; Davis v. McCartney, 64 Tex. 584; Jones v. Robbins, 74 Tex. 615; Williams v. Ellingsworth, 75 Tex. 480.

Vermont.—Pratt v. Battels, 28 Vt. 685.

Virginia.—Healy v. Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94.

West Virginia.—Laughlin v. Fream, 14 W. Va. 322.

Canada.—Stayner v. Applegate, 8 U. C. C. P. 133, 451. See also Buck v. McCallum, 13 U. C. C. P. 163; Grant v. Taylor, 28 U. C. Q. B. 234.

Where the Certificate Shows on its Face that the acknowledgment was made in the presence of the husband, the acknowledgment is void, although it may not appear that the husband used any influence to induce his wife to make the acknowledgment, or even though it may be inferred that he was opposed to her doing so. Allen v. Shortridge, 1 Duv. (Ky.) 35. See also McMullen v. Eagan, 21 W. Va. 233.

Examination must Precede Acknowledgment.

—The acknowledgment must be after the examination, and where the certificate shows that the wife was personally examined after she had executed the acknowledgment, it is fatally defective. McMullen v. Eagan, 21 W. Va. 233; Laidley v. Knight, 23 W. Va. 735; Hockman v. McClanahan, 87 Va. 33; Virginia Coal, etc., Co. v. Roberson, 88 Va. 116.

1. It must Appear that the Contents of the Deed were Explained.—Alabama.—Roney v. Moss, 76 Ala. 491.

California.—Pease v. Barbiers, 10 Cal. 436; McLeran v. Benton, 43 Cal. 467; Hutchinson v. Ainsworth, 63 Cal. 286; Beck v. Soward, 76 Cal. 527; Bollinger v. Manning, 79 Cal. 7; Kennedy v. Gloster, 98 Cal. 143.

Illinois.—Hughes v. Lane, 11 Ill. 123, 50 Am. Dec. 436; Owen v. Robbins, 19 Ill. 545; Garrett v. Moss, 22 Ill. 363; Mettler v. Miller, 129 Ill. 630.

See Lane v. Dolick, 6 McLean (U. S.) 200.

Iowa.—O'Ferrall v. Simplot, 4 Greene (Iowa) 162; Heaton v. Fryberger, 38 Iowa 185.

Kentucky.—Martin v. Davidson, 3 Bush (Ky.) 572; Nautz v. Bailey, 3 Dana (Ky.) 111; Woodhead v. Foulds, 7 Bush (Ky.) 222; Shaw v. Shaw (Ky., 1894), 24 S. W. Rep. 630.

Missouri.—Wannell v. Kem, 57 Mo. 478; Steffen v. Bauer, 70 Mo. 399; Burnett v. McCluey, 78 Mo. 676; Bagby v. Emberson, 79 Mo. 139; Mays v. Pryce, 95 Mo. 603.

Ohio.—Connell v. Connell, 6 Ohio 353; Good v. Zercher, 12 Ohio 364; Meddock v. Williams, 12 Ohio 377; Silliman v. Cummins, 13 Ohio 116. Compare Chesnut v. Shane, 16 Ohio 599, 47 Am. Dec. 387; Ruffner v. McLenan, 16 Ohio 639.

Pennsylvania.—Steele v. Thompson, 14 S. & R. (Pa.) 84; Barnet v. Barnet, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516; Manufacturers' Natural Gas Co. v. Douglass, 130 Pa. St. 283; Spencer v. Reese, 165 Pa. St. 158.

Rhode Island.—Bateman's Petition, 11 R. I. 585; Paine v. Baker, 15 R. I. 100.

Texas.—Stone v. Sledge (Tex. Civ. App., 1894), 24 S. W. Rep. 697 (Tex., 1894), 26 S. W. Rep. 1068; Ruleman v. Pritchett, 56 Tex. 482; Langton v. Marshall, 59 Tex. 296; Locker v. Miller, 59 Tex. 499; Johnson v. Bryan, 62 Tex. 623; Jones v. Robbins, 74 Tex. 615; Williams v. Ellingsworth, 75 Tex. 480; Norton v. Davis, 83 Tex. 32; Moores v. Linney, 2 Tex. Civ. App. 293; Runge v. Sabin (Tex. Civ. App., 1895), 30 S. W. Rep. 568. See also Edens v. Simpson (Tex., 1891), 17 S. W. Rep. 788.

Virginia.—Hairston v. Doe, 12 Leigh (Va.) 445; Bolling v. Teel, 76 Va. 487; Virginia Coal, etc., Co. v. Roberson, 88 Va. 116.

West Virginia.—Bartlett v. Fleming, 3 W. Va. 163; Watson v. Michael, 21 W. Va. 568; Tavenner v. Barrett, 21 W. Va. 566.

Statute Requiring Explanation Not Applicable to Deed by Widow.—The statutory requirement that the contents of a deed shall be read and explained by the officer taking the acknowledgment applies only to cases of acknowledgments by married women; and although it would be eminently proper for the officer taking the acknowledgment of a widow, where she is known to him to be illiterate, aged, or mentally weak, to read or explain the contents of the instrument, failure to do so will not invalidate the acknowledgment. Beville v. Jones, 74 Tex. 148.

Explanation of an Instrument Referred to in the Deed Not Necessary.—Where a married woman conveys her property by a deed of trust, upon conditions stated in a separate instrument referred to in the deed, the notary taking her acknowledgment is not required to explain to her the contents of the document referred to. Bull v. Coe, 77 Cal. 54, 11 Am. St. Rep. 235.

2. Source of Wife's Knowledge Immaterial.—Unless so required by statute, the certificate need not state that the explanation was made

Interpreters.—Where an officer and the woman making the acknowledgment are ignorant of each other's language, the examination and explanation may be conducted by an interpreter, who shall be properly sworn.¹

Whether Explanation must be Private.—It is held in some states that the contents of a deed may be explained in the presence of the husband, as well as during the separate examination;² but in others the courts hold that the explanation must be made during the separate examination.³

When Explanation Unnecessary.—It is held in *Missouri* that no explanation is necessary where the wife is already informed,⁴ nor is it necessary as to immaterial points.⁵

by the officer himself. It is sufficient if the wife be made acquainted with the contents of the instrument, and a certificate showing that fact, without stating by whom the explanation was made, is good. *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *La Société Française, etc., v. Beard*, 54 Cal. 480; *Thomas v. Meier*, 18 Mo. 573.

It is immaterial whether the wife obtains her knowledge from her own examination of the instrument, from her husband, or from the officer taking the acknowledgment. *Talbot v. Simpson*, Pet. (C. C.) 188. See also *Jett v. Rogers*, 12 Bush (Ky.) 564.

A certificate of a married woman's acknowledgment of a deed of lands in *Illinois* in 1856, which showed that she, "fully understanding the contents of the foregoing instrument, acknowledged," etc., was held, by the Supreme Court of the United States to be sufficient under the statutes of *Illinois* in force at the time of the acknowledgment. *Schley v. Pullman's Palace Car Co.*, 120 U. S. 575.

In *Texas*, under Tex. Civ. Stat. (Sayles) 1889, art. 4310, a certificate which fails to show that the instrument was explained by the officer is fatally defective. *Ruleman v. Pritchett*, 56 Tex. 482; *Langton v. Marshall*, 59 Tex. 296; *Johnson v. Bryan*, 62 Tex. 623. But see *Miller v. Yturria*, 69 Tex. 549.

Presumption of Knowledge.—Where a deed by husband and wife is executed after due consultation and deliberation, and then acknowledged, it will be presumed that the grantors had read the deed, and that the wife executed it freely and voluntarily, with a full knowledge of its contents. *Massey v. Huntington*, 118 Ill. 80.

1. Explanation by Means of an Interpreter.—*Norton v. Meader*, 4 Sawy. (U. S.) 603.

Where the deed of a married woman who did not speak English was explained to her by the officer through an interpreter of her own selection, she cannot be heard to say that he was incompetent or corrupt, or failed to interpret correctly. The proper practice in such cases is for the interpreter to be sworn. *Waltee v. Weaver*, 57 Tex. 569.

Where the wife claimed that the interpreter did not correctly interpret the contents of the deed conveying her land, but told her it was a mortgage, it was held that the certificate was conclusive of the facts recited. *De Arnaz v. Escandon*, 59 Cal. 486; *Herring v. White*, 6 Tex. Civ. App. 249. See also *Spurigin v. Traub*, 65 Ill. 170.

But it was held in *Michigan*, that the acknowledgment of an Indian squaw taken through an interpreter was not authorized

by the laws of that state. *Dewey v. Campau*, 4 Mich. 565. See also *Fisher v. Meister*, 24 Mich. 447.

A notary's certificate of a married woman's acknowledgment, where she does not understand English, is of little worth as evidence in the absence of proof that the deed was explained to her in her own language, by the notary himself. *Harrison v. Oakman*, 56 Mich. 390.

Woman Who is Deaf and Dumb.—A certificate of acknowledgment of a married woman's deed, stating that the woman was deaf and dumb and that the nature of the transaction had been duly explained to her by signs, in the presence of the officer, by a person accustomed to converse with her in that manner, and that she had by the same means signified her assent, was allowed by the court. *In re Harper*, 6 M. & G. 732, 7 Scott N. R. 431.

2. Explanation in the Husband's Presence.—It is held in *Missouri* and *Kentucky* that the contents of the deed may be explained to a married woman in the presence of her husband as well as during her separate examination. *Belo v. Mayes*, 79 Mo. 67 (*criticising* on this point *Wannell v. Kem*, 57 Mo. 478); *Webb v. Webb*, 87 Mo. 540; *Moorman v. Board*, 11 Bush (Ky.) 135.

3. In California the explanation as well as the acknowledgment must be made upon separate examination, and a deed whose contents were explained to a married woman in her husband's presence, though afterwards separately acknowledged by her, is void. *Hutchinson v. Ainsworth*, 63 Cal. 286; *Beck v. Soward*, 76 Cal. 527; *Bollinger v. Manning*, 79 Cal. 7.

It was held in *West Virginia* that the explanation must be made during the separate examination, and a certificate showing that the instrument was explained before such examination is fatally defective. *Watson v. Michael*, 21 W. Va. 568.

4. No Explanation Required Where Wife is Already Informed—Missouri.—It is held in *Missouri* that it is not essential for the notary to read or explain the deed where the woman says she is already acquainted with its contents, provided she gives such a description thereof as to show that she properly understands the nature and effect of the instrument. *Bohan v. Casey*, 5 Mo. App. 101; *Ray v. Crouch*, 10 Mo. App. 321; *Morrison v. McKee*, 11 Mo. App. 594; *Thomas v. Meier*, 18 Mo. 573; *Chauvin v. Wagner*, 18 Mo. 532; *Drew v. Arnold*, 85 Mo. 128.

5. Immaterial Points need Not be Explained.—It is not necessary that the wife be in-

Whether Certificate must Show Explanation.—Under statutes requiring the officer taking the acknowledgment to read or otherwise make known to the wife the contents of the instrument, but not expressly requiring him to certify that he has done so, it has been held that the acknowledgment is not invalidated by the failure of the certificate to state that such explanation was made.¹ In some states the certificate must show that the wife understood the contents and effect of the instrument.²

(c) **Act Free from Compulsion.**—It must appear that the wife acknowledged the instrument to be her voluntary act and deed, without fear or compulsion,³ and that she did not wish to retract it.⁴

formed of every detail or formality contained in the instrument. *Ray v. Crouch*, 10 Mo. App. 321.

Nor need the officer explain to her the title by which the property is held, *Morrison v. McKee*, 11 Mo. App. 594; unless by some special covenant the title is made a part of the contents of the deed, *Ray v. Crouch*, 10 Mo. App. 321.

1. Fact of Explanation need Not be Stated unless So Required—*Illinois*.—*Coleman v. Birlings*, 89 Ill. 183.

Indiana.—*Stevens v. Doe*, 6 Blackf. (Ind.) 475; *Fleming v. Potter*, 14 Ind. 486.

Kentucky.—*Nantz v. Bailey*, 3 Dana (Ky.) 111; *Martin v. Davidson*, 3 Bush (Ky.) 572; *Gregory v. Ford*, 5 B. Mon. (Ky.) 471.

Ohio.—*Card v. Patterson*, 5 Ohio St. 319; *Williams v. Robson*, 6 Ohio St. 510; *Chesnut v. Shane*, 16 Ohio 599, 47 Am. Dec. 387; *Ruffner v. McLenan*, 16 Ohio 639.

See also *Tod v. Baylor*, 4 Leigh (Va.) 498; *Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691; *Mintire v. Ward*, 5 Binn. (Pa.) 296, 6 Am. Dec. 417.

2. Certificate must show that the Wife Understood.—*Lyon v. Kain*, 36 Ill. 362; *Vaughn v. Carlisle*, 2 Lea (Tenn.) 525; *Anderson v. Bewley*, 11 Heisk. (Tenn.) 29; *Wright v. Dufield*, 2 Baxt. (Tenn.) 218.

3. It must appear that it was Her Voluntary Act and Deed—*Alabama*.—*Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349; *Alabama L. Ins., etc., Co. v. Boykin*, 38 Ala. 510; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79.

Arkansas.—*Chaffe v. Oliver*, 39 Ark. 531.

Dakota.—*Wambole v. Foote*, 2 Dakota 1.

Illinois.—*Garrett v. Moss*, 22 Ill. 363.

Kentucky.—*Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Blackburn v. Pennington*, 8 B. Mon. (Ky.) 217.

Maryland.—*Hollingsworth v. McDonald*, 2 Har. & J. (Md.) 230, 3 Am. Dec. 545.

Missouri.—*Bagby v. Emberson*, 79 Mo. 139.

North Carolina.—*Den v. Cobbs*, 1 Dev. & B. (N. Car.) 228.

New York.—*Meriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232.

Ohio.—*Meddock v. Williams*, 12 Ohio 377.

Pennsylvania.—*Graham v. Long*, 65 Pa. St. 383; *Fowler v. McClurg*, 6 S. & R. (Pa.) 143; *Spencer v. Reese*, 165 Pa. St. 158; *Watson v. Bailey*, 1 Binn. (Pa.) 470, 2 Am. Dec. 462; *Evans v. Com.*, 4 S. & R. (Pa.) 272, 8 Am. Dec. 711; *Hornbeck v. Mutual Bldg., etc., Assoc.*, 88 Pa. St. 64.

Rhode Island.—*Churchill v. Monroe*, 1 R. I. 209.

Tennessee.—*Henderson v. Rice*, 1 Coldw. (Tenn.) 223; *Laird v. Scott*, 5 Heisk. (Tenn.) 314.

Texas.—*Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Davis v. McCartney*, 64 Tex. 584.

Virginia.—*Clinch River Veneer Co. v. Kurth*, 88 Va. 222.

West Virginia.—*Bartlett v. Fleming*, 3 W. Va. 163; *Leftwich v. Neal*, 7 W. Va. 569; *Laughlin v. Fream*, 14 W. Va. 322; *Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622; *Blair v. Sayre*, 29 W. Va. 604; *Laidley v. Central Land Co.*, 30 W. Va. 505.

Pennsylvania—Ohio.—Although the certificate does not expressly state that the wife acted without any fear or coercion, this is sufficiently shown when it is certified that she acknowledged the deed to be her voluntary act. *Brown v. Farran*, 3 Ohio 140; *Shaller v. Brand*, 6 Binn. (Pa.) 435, 6 Am. Dec. 482. In *Miller v. Wentworth*, 82 Pa. St. 280, it was held that an acknowledgment "without any fear or compulsion from her said husband" was a sufficient declaration of free will.

North Carolina.—A certificate stating that the wife acknowledged upon privy examination that she signed the deed "with her own free will and accord, and without any compulsion of her husband," was sufficient without adding "and doth voluntarily assent thereto." *Robbins v. Harris*, 96 N. Car. 557. See also *Joyner v. Faulcon*, 2 Ired. Eq. (N. Car.) 386, in which a similar certificate passed without objection.

4. Statement that She does Not Wish to Retract—*California*.—*Landers v. Bolton*, 26 Cal. 393.

Missouri.—*Le Bourgeoise v. McNamara*, 5 Mo. App. 576; *Robidoux v. Cassilegi*, 10 Mo. App. 516.

Ohio.—*Ward v. McIntosh*, 12 Ohio St. 231.

Rhode Island.—*Churchill v. Monroe*, 1 R. I. 209; *Bateman's Petition*, 11 R. I. 585.

Texas.—*Stone v. Sledge* (Tex. Civ. App., 1894), 24 S. W. Rep. 697, (Tex., 1894), 26 S. W. Rep. 1068; *Murphy v. Reynaud*, 2 Tex. Civ. App. 470; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Ruleman v. Pritchett*, 56 Tex. 482; *Locker v. Miller*, 59 Tex. 499; *Davis v. McCartney*, 64 Tex. 584; *Davis v. Agnew*, 67 Tex. 206; *Williams v. Ellingsworth*, 75 Tex. 480; *Freeman v. Preston* (Tex. Civ. App., 1895), 29 S. W. Rep. 495. See also *Uquhart v. Womack*, 53 Tex. 616.

Virginia.—*Grove v. Zumbro*, 14 Gratt. (Va.) 501.

(d) **Examination Apart from Husband.**—An examination separate and apart means an examination out of the presence of the husband, so that he cannot communicate by word or look or motion.¹ But it has been held not necessary to the validity of the examination that the husband go entirely out of the wife's presence. It is sufficient if he be so far separated from her as to leave her at liberty to express her will and desire in the matter freely and voluntarily.²

(e) **Examination must be Personal.**—The private examination of a married woman, being designed for her protection from the influence of fear or coercion, is in its nature personal, and is therefore not a matter in which she may be represented by another, and, under statutes requiring such examination, acknowledgments made by a married woman through an attorney in fact have been held void.³

(4) **Exceptions and Qualifications of Rule**—(a) **Estoppel.**—Where a married woman represented herself to be unmarried and sold her real estate as a *feme sole*, it was held that she could not set up in equity the want of examination and certificate thereof, as required in case of conveyances by married women, so as to avoid her conveyance.⁴

(b) **Separation, Abandonment, Divorce.**—It has been held that the statutory requirements as to the separate examination and acknowledgment of married women do not apply to deeds executed by a woman who has left her husband,⁵ or

West Virginia.—Bartlett v. Fleming, 3 W. Va. 163; Linn v. Patton, 10 W. Va. 187; Henderson v. Smith, 26 W. Va. 829, 53 Am. Rep. 139.

Prior to the *Ohio* Act of 1831 it was not necessary for the certificate to state that the woman did not wish to retract. Brown v. Farran, 3 Ohio 140.

Nor is it required by the statutes of *Illinois*. Hughes v. Lane, 11 Ill. 123, 50 Am. Dec. 436; Stuart v. Dutton, 39 Ill. 91; Tourville v. Pierson, 39 Ill. 446. See also Chauvin v. Wagner, 18 Mo. 531; Chauvin v. Lownes, 23 Mo. 223.

In *Texas* the wife's declaration, in a certificate of acknowledgment, that she does not wish to retract, does not apply to the acknowledgment of an executory contract to convey the homestead. Jones v. Goff, 63 Tex. 248.

1. **What Constitutes a Separate Examination.**—Steffen v. Bauer, 70 Mo. 399; Belo v. Mayes, 79 Mo. 67; McCandless v. Engle, 51 Pa. St. 309. See also Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691.

The presence of a third person, not her husband, will not invalidate the acknowledgment. Jones v. Maffet, 5 S. & R. (Pa.) 523. See also Deery v. Cray, 5 Wall. (U. S.) 795; Bernard v. Elder, 50 Miss. 336.

The separate examination may as well take place in open court as before a single officer. It need not be privy in any legal or other sense, except as it is separate and apart from and without the presence of the husband. Rainey v. Gordon, 6 Humph. (Tenn.) 345.

2. Hall v. Castleberry, 101 N. Car. 153; Donahue v. Mills, 41 Ark. 421. But see Webb v. Webb, 87 Mo. 540.

An acknowledgment made on horseback, where the husband was on another horse only six or eight feet away, but not near enough to hear what was said was held sufficient. Meyer v. Gossett, 38 Ark. 377.

3. **Acknowledgment must be Personal.**—Wamble v. Foote, 2 Dakota 1; Mott v. Smith, 16 Cal. 534; Dawson v. Shirley, 6 Blackf. (Ind.) 531; Sumner v. Conant, 10 Vt. 9; Holladay v. Daily, 19 Wall. (U. S.) 606. See also Lewis v. Cox, 5 Harr. (Del.) 401; Hoban v. Campau, 52 Mich. 346; Halbert v. Hendrix (Tex. Civ. App., 1894), 26 S. W. Rep. 911; Halbert v. Bennett (Tex. Civ. App., 1894), 26 S. W. Rep. 913.

4. Graham v. Meneilly, 16 Grant's Ch. (Canada) 661.

5. Where a married woman left her husband in *England*, and came to the *United States*, where for more than twenty years she lived separate from her husband, who had never been in the *United States*, during which time she formed a meretricious union with another man, and was known as his wife, and executed and acknowledged as if sole a deed conveying her separate property from him, it was held in *California* that she could not set up the fact of her former marriage to avoid the deed on the ground that the acknowledgment was not taken on separate examination, as required in conveyances of married women. Hand v. Hand, 68 Cal. 135, 58 Am. Rep. 5.

But in *Danglarde v. Elias*, 80 Cal. 65, it was held that the provisions of the civil code requiring conveyances by married women to be acknowledged on separate examination apply without exception to all married women, whether living apart from their husbands or not, and to their separate property as well as any other, and that where a married woman had been abandoned by her husband, and they had been living apart for forty years, and she had for many years assumed and been known by her maiden name, a deed executed during the lifetime of her husband conveying property paid for by her own earnings was void unless acknowledged on separate examination, as required by the code.

who has been separated from him by a decree of divorce;¹ and where a married woman so separated from her husband resumed her maiden name, and continued to act and represent herself as a *feme sole*, a deed executed and acknowledged by her as such was held binding on her, although the decree of divorce was invalid.²

d. UNDER RECENT STATUTES.—The tendency of recent legislation has been to remove the disabilities of married women in executing and acknowledging deeds conveying their property. This is especially true in cases where their separate estate is concerned. In many states the separate examination has been abolished, and a married woman may now acknowledge her deed as if sole.³ Whereas acknowledgment was formerly regarded as an essential

The *Texas* statute requiring separate examination does not apply to the case of deeds executed by a married woman who has been abandoned by her husband. *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200.

1. *Delafield v. Brady*, 108 N. Y. 524.

2. *Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83, and note, p. 85.

3. **Arizona.**—Conveyances and transfers of a married woman's separate estate may be acknowledged by her without a separate examination as though she were unmarried. *Arizona* Rev. Stat. 1887, § 2581; *Miller v. Fisher*, 1 Arizona 232; *Charauleau v. Woffenden*, 1 Arizona 243.

Arkansas.—Since the adoption of the Constitution of 1874 (Ark. Dig. of Stat. 1884, § 648) a married woman may convey her separate estate in all respects as if unmarried. The acknowledgment need not be made upon separate examination. *Roberts v. Wilcoxson*, 36 Ark. 355; *Bryan v. Winburn*, 43 Ark. 28; *Stone v. Stone*, 43 Ark. 160; *Criscoe v. Hambrick*, 47 Ark. 235. See also *Donahue v. Mills*, 41 Ark. 421.

Georgia.—A married woman may dispose of her separate estate in real property by the ordinary deed of conveyance. The Act of 1760 (Ga. Code 1882, § 2706a), prescribing the mode of acknowledgment for married women, does not apply to conveyances of a married woman's separate estate, but only to conveyances by the husband of real estate in which the wife has an interest. *Brown v. Kimbrough*, 55 Ga. 41; *Haines v. Fort*, 93 Ga. 24. See also *Hicks v. Johnston*, 24 Ga. 194; *Wynn v. Bryce*, 59 Ga. 529.

Illinois.—Prior to the Act of 1869 (Ill. Annot. Stat., c. 30, par. 20) a married woman could not convey her real estate without acknowledgment upon privy examination. See *supra*, this title, *Married Women—Separate Examination*. Nor was this disability removed by the Act of 1861. *Hawes v. Mann*, 8 Biss. (U. S.) 21; *Hogan v. Hogan*, 89 Ill. 427.

The law was changed by the Act of 1869. A married woman may now acknowledge her deed as if sole. *Hawes v. Mann*, 8 Biss. (U. S.) 21; *Knight v. Paxton*, 124 U. S. 552; *Spurgin v. Traub*, 65 Ill. 170; *Stiles v. Probst*, 69 Ill. 382; *Hogan v. Hogan*, 89 Ill. 427; *Bradshaw v. Atkins*, 110 Ill. 323; *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526.

Indiana.—A married woman may acknowledge her deed as if sole. *Indiana* Annot. Rev. Stat. 1894, § 3358; *Hubble v. Wright*, 23 Ind. 322. See also *Brown v. Corbin*, 121 Ind. 455.

Iowa.—No separate examination required. *Iowa* Annot. Rev. Code 1888, § 1935. Prior to the Code of 1851 a married woman's acknowledgment could be taken only upon separate examination. Now conveyances of married women are placed upon the same footing as those of other persons. *Simms v. Hervey*, 19 Iowa 273, *distinguishing* *Westfall v. Lee*, 7 Iowa 12, and *McHenry v. Day*, 13 Iowa 445. 81 Am. Dec. 438; *Grapengether v. Fejervary*, 9 Iowa 163, 74 Am. Dec. 336; *Morris v. Sargent*, 18 Iowa 90.

Kansas.—A married woman may convey her real and personal property, and contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his property. *Kansas* Gen. Stat. 1889, par. 3753.

No separate examination is required. *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273.

Maine.—A married woman may convey her separate real estate as if sole. *Maine* Rev. Stat. 1883, c. 61, § 1; *Springer v. Berry*, 47 Me. 330; *Brookings v. White*, 49 Me. 479; *Allen v. Hooper*, 50 Me. 371.

Michigan.—Under the Act of 1877 (How. Stat., §§ 5662, 5662a) conveyances of real property executed by married women may be acknowledged in the same manner as if they were sole. The same has been true of deeds conveying separate estate since the Act of 1855 (How. St. 6295), no separate examination being necessary. *Watson v. Thurber*, 11 Mich. 457.

Minnesota.—No separate examination is required. Statutes 1894, § 5651. It was held in 1857 that a married woman's deed conveying her separate real estate need not be acknowledged by her separate and apart from her husband. *Merril v. Nelson*, 18 Minn. 366.

A married woman's contract to convey her real estate need not be acknowledged. *Kingsley v. Gilman*, 15 Minn. 59.

Missouri.—No separate examination is required. Rev. Stat. 1889, § 2408. Prior to the passage of this act it was held under statutes requiring separate examination that where a deed conveying land to a trustee for the sole and separate use of a married woman authorizes him at her written request to convey or mortgage the property, a conveyance made in accordance with such request is good, although the woman's acknowledgment of the deed was taken in the presence of her husband. *Sharpe v. McPike*, 62 Mo. 300.

part of a married woman's deed, without which title could not pass,¹ it is now held by some courts to be no more essential to the validity of such deeds than of conveyances by other competent grantors.² In some states, however, separate examination is still required.³

In *Small v. Field*, 102 Mo. 104, it was held that a married woman's deed conveying her separate estate, created "for her sole use," was good to pass the equitable fee without any acknowledgment, just as much so as if she had been a *feme sole*.

Montana.—The acknowledgment of a married woman must be taken the same as that of any other person. *Montana Civ. Code* 1895, § 1606. A conveyance by a married woman may be acknowledged as if she were unmarried. *Montana Civ. Code* 1895, § 1607.

New York.—No separate examination is required. Laws of 1879, c. 249; Banks' Statutes (7th ed.), p. 2233.

The Act of 1848 as amended by the Act of 1849 authorized married women to convey their real estate "in the like manner" and "with the like effect" as if unmarried. It was held under this act that no separate examination was required. *Richardson v. Pulver*, 63 Barb. (N. Y.) 67; *Allen v. Reynolds*, 36 N. Y. Super. Ct. 297; *Blood v. Humphrey*, 17 Barb. (N. Y.) 660; *Andrews v. Shaffer*, 12 How. Pr. (N. Y. Supreme Ct.) 441; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503. See also *McIlvaine v. Kadel*, 3 Robt. (N. Y.) 429; *Wiles v. Peck*, 26 N. Y. 42.

These acts were not repealed, nor their effect impaired, by the Acts of 1860 and 1862. *Allen v. Reynolds*, 36 N. Y. Super. Ct. 297.

The former statutes requiring separate examination did not apply to married women residing without the state. *Andrews v. Shaffer* 12 How. Pr. (N. Y. Supreme Ct.) 441.

Tennessee.—Where real estate is conveyed to a married woman by a deed investing her with power to dispose of the same as if sole, there is no necessity that her conveyance of such property should be privately acknowledged by her. *Sherman v. Turpin*, 7 Coldw. (Tenn.) 382; *Peterson v. Richman*, 93 Tenn. 71, *distinguishing* *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690, where a privy examination was held necessary under *Tennessee Code* 1884, § 3347. In this case the instrument creating the separate estate did not in terms give her the power to convey it as a *feme sole*. See also *Young v. Young*, 7 Coldw. (Tenn.) 461.

Wisconsin.—No separate acknowledgment required. Annot. Stat. 1889, §§ 2221-2224. The provisions of Rev. Stat. 1849, c. 59, § 12, requiring the acknowledgment of a deed executed by husband and wife to be acknowledged by the wife on separate examination, was repealed by Laws of 1850, c. 229, § 2, and impliedly as to all conveyances of real estate made by a married woman by c. 44, § 3. *Hayes v. Frey*, 54 Wis. 503.

For a list of states in which the separate examination is still required see note *infra*, where it is believed that all the present statutes prescribing such examination are cited.

1. See *supra*, this title, *Married Women—In General*.

2. Acknowledgment Not Essential to Validity of Deed—Arizona.—*Charauleau v. Woffenden*, 1 Arizona 243.

Arkansas.—*Roberts v. Wilcoxson*, 36 Ark. 355; *Donahue v. Mills*, 41 Ark. 421; *Bryan v. Winburn*, 43 Ark. 28; *Stone v. Stone*, 43 Ark. 160; *Criscoe v. Hambrick*, 47 Ark. 235.

Illinois.—*Terry v. Eureka College*, 70 Ill. 236; *Hogan v. Hogan*, 89 Ill. 427; *Bradshaw v. Atkins*, 110 Ill. 323. See also *Hawes v. Mann*, 8 Biss. (U. S.) 21; *Knight v. Paxton*, 124 U. S. 552.

New York.—*Andrews v. Shaffer*, 12 How. Pr. (N. Y. Supreme Ct.) 441; *Wiles v. Peck*, 26 N. Y. 42. See *Blood v. Humphrey*, 17 Barb. (N. Y.) 660; *Allen v. Reynolds*, 36 N. Y. Super. Ct. 297.

Missouri.—*Siemers v. Kleeburg*, 56 Mo. 196.

A mortgage executed by a married woman jointly with her husband is valid as to her without being acknowledged. *Hubble v. Wright*, 23 Ind. 322; *Mays v. Hedges*, 79 Ind. 288.

While the acknowledgment of a married woman's deed is necessary to entitle it to be recorded, it is not essential to its validity. *Simms v. Hervey*, 19 Iowa 273. See also *Morris v. Sargent*, 18 Iowa 90.

3. Present Statutes Requiring Separate Examination.—The statutes of the following states require a married woman's acknowledgment to be taken on separate examination. See, for further authorities construing the statutes existing in the states named below, *supra*, this title, *Married Women—Separate Examination*.

Alabama.—In case of conveyances of homestead only. Code 1886, § 2508; *Balkum v. Wood*, 58 Ala. 642; *Halso v. Seawright*, 65 Ala. 431; *Scott v. Simons*, 70 Ala. 352; *Gates v. Hester*, 81 Ala. 357; *Richardson v. Woodstock Iron Co.*, 90 Ala. 266; *Hodges v. Winston*, 95 Ala. 514. See also the title *HOME-STEAD*.

No separate examination is necessary under this section where a wife joins in a mortgage of lands belonging wholly to the husband and forming no part of the homestead. *Orr v. Blackwell*, 93 Ala. 212.

California.—Civ. Code, §§ 1187, 1186; *Le Mesnager v. Hamilton*, 101 Cal. 532.

Cal. Civ. Code, § 162, provides that a married woman may convey her separate property without the consent of her husband, and § 158 that either husband or wife may enter into any transaction or engagement with the other or with third persons as if sole; but when the disposition of the wife's real estate is involved, the statutory mode of acknowledgment must be presumed, that is, by separate examination according to § 1186 of the code. *Leonis v. Lazzarovich*, 55 Cal. 52; *Wedel v. Herman*, 59 Cal. 507.

A mortgage executed by a married woman on her separate real estate is an "instrument" and "conveyance" within the mean-

VI. TIME WHEN ACKNOWLEDGMENT MUST BE MADE.—In the absence of a statute designating the period within which acknowledgments must be made, it is

ing of those terms as employed in §§ 1186, 1187, of the code, and is of no validity unless acknowledged as therein required. *Tolman v. Smith*, 74 Cal. 345.

Delaware.—Laws 1893, c. 83, § 4.

A married woman abandoned by her husband may acknowledge her deed as if sole. Laws 1893, c. 76, § 4.

District of Columbia.—While privy acknowledgment is not necessary to the conveyance of a married woman's separate estate since the Act of 1869 (Rev. Stat., §§ 727-730), it is required to a deed by husband and wife in which her dower interest is relinquished (Rev. Stat., 1892, §§ 450-452). *Hitz v. Jenks*, 123 U. S. 297; *Young v. Duvall*, 109 U. S. 573.

Florida.—Rev. Stat. 1892, § 1958; *Hartley v. Ferrell*, 9 Fla. 374.

An instrument purporting to convey a married woman's real estate, in which her husband does not join, and which is not sealed, or acknowledged by her on privy examination, is a nullity. *Carn v. Haisley*, 22 Fla. 317.

But it is not necessary to name the husband in the body of the instrument. A deed privily acknowledged by the wife and executed and acknowledged by the husband, whose name does not elsewhere appear, is good. *Evans v. Summerlin*, 19 Fla. 858.

Idaho.—Rev. Stat. 1887, § 2956.

Kentucky.—Stat. 1894, § 507.

The certificate of acknowledgment taken within the state need state only the fact and time of acknowledgment, and shall then be evidence of acknowledgment according to the statute. Stat. 1894, § 507. i. *Dowell v. Mitchell*, 82 Ky. 47.

A deed by husband and wife conveying the separate estate of the latter is void if not acknowledged by her on separate examination. *Louisville, etc., R. Co. v. Stephens* (Ky., 1895), 29 S. W. Rep. 14; *Louisville, etc., R. Co. v. Wilhite* (Ky., 1895), 29 S. W. Rep. 326.

Louisiana.—Voorhis' Rev. L. 1884, § 1717.

Nevada.—Gen. Stat., 1885, § 2591.

New Jersey.—Revision, "Conveyances," § 9.

The fact of separate examination need not be stated in the certificate. *Den v. Geiger*, 9 N. J. L. 233; *Thayer v. Torrey*, 37 N. J. L. 339.

New Mexico.—Comp. Laws, 1884 § 2759.

North Carolina.—Code 1883, §§ 1246, 1256.

See *supra*, this title, *Married Women—Separate Examination*.

Conveyances of Equitable as well as legal estates must be acknowledged upon separate examination, unless the instrument creating the estate authorizes a different mode of transfer. *Clayton v. Rose*, 87 N. Car. 106.

As to Conveyances from Wife to Husband and method of taking the separate acknowledgment, see Code 1883, §§ 1835, 1836; *Sims v. Ray*, 96 N. Car. 87.

Sale of Household Furniture.—The *North Carolina Act of 1891*, c. 91, providing that whenever household or kitchen furniture is conveyed by chattel mortgage or otherwise,

the privy examination of married women shall be taken as prescribed by law in conveyances of land, does not apply to an absolute sale of such property by the husband. *Kelly v. Fleming*, 113 N. Car. 133.

Husband must Acknowledge before Wife's Examination.—It is held in *North Carolina* that a conveyance of a married woman's land must be executed and acknowledged by both husband and wife, the wife being privily examined, and the examination must be after the instrument has been proved or acknowledged by the husband. *Gilchrist v. Buie*, 1 Dev. & B. (N. Car.) 346; *Den v. Sutton*, 1 Dev. & B. (N. Car.) 582; *Southerland v. Hunter*, 93 N. Car. 310; *Ferguson v. Kinsland*, 93 N. Car. 337; *Wynne v. Small*, 102 N. Car. 133; *Lineberger v. Tidwell*, 104 N. Car. 506.

Unless this order be observed the deed will pass neither the wife's estate nor that of the husband as tenant by courtesy. *McGlenery v. Miller*, 90 N. Car. 215.

But where the certificate states a single transaction, it is immaterial that it appears from the certificate that the wife's separate acknowledgment preceded the probate of the deed. *Joyner v. Faulcon*, 2 Ired. Eq. (N. Car.) 386.

Want of Acknowledgment: Color of Title.—In *Perry v. Perry*, 99 N. Car. 270, it was held that a conveyance of a married woman's lands executed by husband and wife, but not acknowledged by the wife on separate examination as required by law, constituted color of title when delivered to the vendee. See *Pearse v. Owens*, 2 Hayw. (N. Car.) 234.

But a deed executed by a married woman, in which her husband did not join, and which was not privately acknowledged by her, conveys no title. *Scott v. Battle*, 85 N. Car. 184, 39 Am. Rep. 694.

Where land is sold under a judicial decree for the partition of lands, the purchaser and his assignees secure an equitable title against a tenant in common who at the time of the partition was a minor, and who afterwards, when a married woman, received her share of the purchase money without privy examination. *Farmer v. Daniel*, 82 N. Car. 152.

Examination by One Officer, where the statute requires it to be made by two, is invalid. *Malloy v. Bruden*, 88 N. Car. 305, following *Den v. Wilson*, 2 Dev. (N. Car.) 306.

See also, as to construction of similar statutes, *Loree v. Abner*, 6 C. C. A. 302; *Beall v. Lynn*, 6 Har. & J. (Md.) 336.

Pennsylvania.—Brightly's *Purdon's Digest* (12th ed.), "Deeds and Mortgages," § 22.

Under the *Pennsylvania Married Women's Act of 1848*, creating the wife's separate estate and providing that the property of a married woman should not be sold, conveyed, etc., by her husband without the written consent of the wife, duly acknowledged, it was held that a mortgage belonging to a married woman could not be assigned by husband and wife without such acknowledgment by the wife. *Moore v. Cornell*, 68 Pa. St. 320.

immaterial when a deed is acknowledged.¹ The acknowledgment may be

The acknowledgment may be made according to the law as it stood prior to the passage of the Act of 1848. *Moore v. Cornell*, 68 Pa. St. 320, *distinguishing* *Haines v. Ellis*, 24 Pa. St. 253; *Haffey v. Carey*, 73 Pa. St. 431; *Stoops v. Blackford*, 27 Pa. St. 213.

This act does not apply to the transfer of real or personal property where the husband and wife unite in such transfer. *Haffey v. Carey*, 73 Pa. St. 431, *explaining* *Moore v. Cornell*, 68 Pa. St. 320; *Shinn v. Holmes*, 25 Pa. St. 142; *Miner v. Graham*, 24 Pa. St. 491.

Choses in Action.—No acknowledgment is necessary where husband and wife join in conveying the wife's choses in action. *Bond v. Bunting*, 78 Pa. St. 210, 9 Phila. (Pa.) 149.

A release executed by a married woman, of a legacy charged upon land, being a chose in action, is valid without the separate examination of the woman, though it is not entitled to be recorded without due acknowledgment on such examination. *Powell's Appeal*, 98 Pa. St. 403.

Rhode Island.—Pub. Stat. 1882, c. 166, § 8; *Churchill v. Monroe*, 1 R. I. 209; *Lippitt v. Huston*, 8 R. I. 415, 94 Am. Dec. 115; *Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691; *Paine v. Baker*, 15 R. I. 100. See also *Bateman's Petition*, 11 R. I. 585; *Warner v. Peck*, 11 R. I. 431.

Under the act providing for the acknowledgment of conveyances of estates tail in open court (R. I. Rev. Stat. 1882, c. 172, § 3) it was held that an acknowledgment of such a conveyance made by husband and wife in accordance with that act need not comply further with the provisions of the statute regulating the acknowledgment of married women's deeds on separate examination. *Lippitt v. Huston*, 8 R. I. 415, 94 Am. Dec. 115.

South Carolina.—Separate examination is required under Gen. Stat. 1882, §§ 1796-1798, where the wife relinquishes her dower. *Townsend v. Brown*, 16 S. Car. 91.

It was held in this case that this requirement was not repealed by the Act of 1870 (S. Car. Gen. Stat. 1882, §§ 2036, 2037) giving a married woman power to convey her separate estate in the same manner and to the same extent as if she were unmarried.

See, as to the separate examination required under former laws for the relinquishment of inheritance, *Kottman v. Ayer*, 1 Strobb. (S. Car.) 552; *McLaurin v. Wilson*, 16 S. Car. 402; *Wingo v. Parker*, 19 S. Car. 9; *Gaffney v. Peeler*, 21 S. Car. 55; *Williams v. Cudd*, 26 S. Car. 213, 4 Am. St. Rep. 714.

Tennessee.—Instruments executed by husband and wife. Code (M. & V.) 1884, § 2891.

Wife's conveyances of separate estate. §§ 3347, 3350; *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690. See also *Molloy v. Clapp*, 2 Lea (Tenn.) 586. See p. 522, note 3.

Texas.—*Sayles' Civ. Stat.* 1888, arts. 4310, 4313.

A married woman cannot be divested of her property except by deed acknowledged on privy examination. *Fitzgerald v. Turner*, 43 Tex. 79 (*distinguishing* *Clayton v. Frazier*, 33

Tex. 99, and *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119); *Stephens v. Shaw*, 68 Tex. 261; *Angier v. Coward*, 79 Tex. 551. See also *Gregory v. Van Vleck*, 21 Tex. 40; *Tucker v. Carr*, 39 Tex. 98; *Halbert v. Hendrix* (Tex. Civ. App., 1894), 26 S. W. Rep. 911; *Chester v. Breitling* (Tex. Civ. App., 1895), 30 S. W. Rep. 464.

Land Certificates.—The Texas Act of 1846, requiring a wife's conveyance of her personal property in writing to be accompanied by her privy acknowledgment, does not prohibit her making a verbal transfer of such property; and a written receipt signed by a married woman, containing an admission of the transfer of unlocated land certificates, is evidence of such transfer, though not privately acknowledged. *Ballard v. Carmichael*, 83 Tex. 355; *Ikard v. Thompson*, 81 Tex. 285; *Bennett v. Virginia Ranch, etc., Co.*, 1 Tex. Civ. App. 321. See also *Lecomte v. Toudouze*, 82 Tex. 208.

But if the certificate by location and survey has lost all the characteristics of personal property or choses in action, and becomes realty, a conveyance, although purporting to be an assignment of the certificates as personalty, is void unless acknowledged by the wife on privy examination. *Groesbeck v. Bodman*, 73 Tex. 287.

Receipt for Advancements.—An instrument executed by a married woman setting forth a donation of real estate from her father as an advancement, and releasing his estate to that extent, being in the nature of a receipt for advancements made, is not a conveyance of property within the meaning of the Texas statute requiring "a deed and other writing purporting to be a conveyance" to be privately acknowledged by the wife. *French v. Strumberg*, 52 Tex. 92. See also, as to law in *Pennsylvania*, *Powell's Appeal*, 98 Pa. St. 403.

West Virginia.—Code 1887, c. 73, §§ 4-6.

Wyoming.—Conveyances of homesteads must be acknowledged on separate examination. Rev. Stat. 1887, § 2784.

1. *Time of Making Acknowledgment Immaterial*.—*Kelly v. Dunlap*, 3 P. & W. (Pa.) 136; *Fisher v. Butcher*, 19 Ohio 406, 53 Am. Dec. 436; *Pitkin v. Leavitt*, 13 Vt. 379; *Pierce v. Brown*, 24 Vt. 165.

The acknowledgment may be made at any time before the paper is offered in evidence. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

Neither the constitution nor the statutes of *Alabama* appoint any particular time within which the wife shall give her assent and signature to the conveyance of the husband, nor does the statute appoint any particular time in which her privy examination and acknowledgment shall be taken and certified. *Cahall v. Citizens' Mut. Bldg. Assoc.*, 61 Ala. 232. See *Carlisle v. Carlisle*, 78 Ala. 542.

No *Alabama* statute limits a period within which the acknowledgment or proof of a deed must be made. *Johnson v. McGehee*, 1 Ala. 186. See also the title *Recording Acts*.

Acknowledgment before Completion of Deed.—

made after bringing suit, when the instrument is offered in evidence.¹ Where a deed is executed by two grantors it is not necessary that they should acknowledge it at the same time.² An acknowledgment is not void because taken on a legal holiday³ or on Sunday.⁴

VII. THE CERTIFICATE—1. Generally.—a. REQUIREMENTS STATUTORY.—The statutes of the several states generally prescribe forms to be used by the officer in certifying the acknowledgments of instruments acknowledged both within and without the state.⁵

b. CERTAIN PROVISIONS CONSIDERED—(1) Place of the Certificate.—The certificate should be written on the deed itself,⁶ but a certificate written on a

Where the deed and the acknowledgment, regular on their face, are delivered to a subsequent purchaser, without notice of any irregularity, the fact that at the time of acknowledgment certain portions of the deed were left blank, and afterwards filled out, is immaterial, the grantor being estopped to deny that the deed was completed when acknowledged. *Pence v. Arbuckle*, 22 Minn. 417; *Roussain v. Norton*, 53 Minn. 560. See also *Cole v. Bammel*, 62 Tex. 108; *Nelson v. McDonald*, 80 Wis. 605.

A mortgage of a married woman's separate estate by husband and wife, in which the name of the mortgagee and the sum for which the land was mortgaged were left blank, was executed and acknowledged by the wife. The husband afterwards filled the blanks and delivered the deed. It was held that the mortgage was a nullity as to the wife. *Drury v. Foster*, 2 Wall. (U. S.) 24. See also *Wilson v. South Park Com'rs*, 70 Ill. 46; *Ayres v. Probasco*, 14 Kan. 175; *Warren v. White*, 52 Vt. 46.

Acknowledgment by Ex-Officer of Deed Executed during Term of Office.—Where a deed executed by a sheriff while in office was acknowledged by him after his term of office had expired, it was held that such acknowledgment was carried back by relation to the time of execution. *Doe v. Dugan*, 8 Ohio 87.

Acknowledgment after Judgment but before Execution Sale.—It was held in *Arkansas* that the acknowledgment and registration of a deed after recovery of judgment against the grantor, but before the execution sale, defeated the title of the purchaser at such sale. *Jackson v. Allen*, 30 Ark. 110. See also *Byers v. Engles*, 16 Ark. 543.

1. Instrument may be Acknowledged when Offered in Evidence.—*Kelly v. Dunlap*, 3 P. & W. (Pa.) 136; *Pitkin v. Leavitt*, 13 Vt. 379; *Pierce v. Brown*, 24 Vt. 165; *Sheldon v. Stryker*, 42 Barb. (N. Y.) 284. See also *Hays v. McGuire*, 8 Yerg. (Tenn.) 92; *Hale v. Darter*, 10 Humph. (Tenn.) 92; *Ward v. Daniel*, 10 Humph. (Tenn.) 603; *Harrington v. Gage*, 6 Vt. 532.

Where, in an action of ejectment, a deed was ruled out on account of an irregularity in the acknowledgment, but was afterwards correctly acknowledged, it was held that it was admissible in evidence in a new trial, the acknowledgment being a mere matter of proof, and not affecting the validity of the deed. *Babbitt v. Johnson*, 15 Kan. 252.

But it was held in *Hollingsworth v. Flint*, 101 U. S. 591, where the acknowledgment and

privy examination of a married woman was made after the commencement of the suit, that the deed could not be offered in evidence, such acknowledgment being essential to pass titled. *Followed in Carn v. Haisley*, 22 Fla. 317.

2. Time of Acknowledgment by Husband and Wife.—Where there was nothing in the statute requiring a deed executed by husband and wife to be jointly acknowledged by them, it was held that a certificate of the acknowledgment of a married woman taken on a day subsequent to the time of the acknowledgment of her husband, but certified on the same sheet with it, was sufficient. *Williams v. Robson*, 6 Ohio St. 510. To the same effect see *Lineberger v. Tidwell*, 104 N. Car. 506; *Newell v. Anderson*, 7 Ohio St. 12; *Ludlow v. O'Neil*, 29 Ohio St. 181; *Halbert v. Hendrix* (Tex. Civ. App., 1894), 26 S. W. Rep. 911; *Halbert v. Bennett* (Tex. Civ. App., 1894), 16 S. W. Rep. 913. See also *Watson v. Peters*, 26 Mich. 508; *Ford v. Gregory*, 10 B. Mon. (Ky.) 175.

3. Acknowledgment on Legal Holiday.—In taking the acknowledgment of the execution of a deed a notary public is engaged in private business, and he may therefore take the acknowledgment on February 22, under statutes declaring that day a legal holiday and prohibiting public business and the service of civil process on that day. *Slater v. Schack*, 41 Minn. 269.

4. Acknowledgment on Sunday.—An acknowledgment is not void because taken on Sunday. *Lucas v. Larkin*, 85 Tenn. 355.

A deed made, executed, acknowledged, and recorded on Sunday after sunset was held good. *Tracy v. Jenks*, 15 Pick. (Mass.) 465. See also *Greene v. Godfrey*, 44 Me. 25.

5. See the local statutes for forms.

Acknowledgment in Form of a Jurat.—Where the officer's certificate of acknowledgment was in the form of a jurat, it was held that its character as a certificate of acknowledgment was not thereby destroyed. *Ingraham v. Grigg*, 13 Smed. & M. (Miss.) 22. See also *Whitney v. Arnold*, 10 Cal. 531. But the signature of the mortgagor to a mortgage and the officer's jurat thereto are not alone sufficient to constitute a valid acknowledgment. *Dugger v. Collins*, 69 Ala. 324.

6. Certificate should be Indorsed on Deed.—*Smith v. Tim*, 14 Abb. N. Cas. (N. Y. C. Pl.) 447.

A statute requiring in terms that the certificate be indorsed on the deed need not be strictly followed. It is sufficient if it be sub-

separate sheet and pasted to the deed has been held sufficient.¹ An acknowledgment in the body of the deed instead of in a separate certificate has been held good.²

(2) *Time of Making*.—It has been held that the certificate need not be made at the time of acknowledgment, and that an interval of many years between the time of acknowledgment and the date of the certificate was not fatal to the admissibility of the deed in evidence.³

(3) *Venue*.—The county and state in which the acknowledgment was taken should be stated in the certificate.⁴ When the certificate is formal in all re-

joined to the deed. *Thurman v. Cameron*, 24 Wend. (N. Y.) 87.

Such a certificate was passed without objection in *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552. See also *Rex v. Bigg*, 1 Stra. 18.

A certificate written on the face of the deed, on the margin, is sufficient. *Simpson v. Hartman*, 27 U. C. Q. B. 460.

1. *Certificate Pasted on Instrument*.—*Schramm v. Gentry*, 63 Tex. 583.

But it was held, under a statute requiring the certificate to be on the same sheet as the deed, that a certificate written on a separate sheet and pasted to the deed is void. *Winkler v. Higgins*, 9 Ohio St. 599. See also *Norman v. Shepherd*, 38 Ohio St. 322; *Poor v. Scanlan*, 7 Cinc. L. Bull. (Ohio) 15; *Harrisonburg First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740.

2. *Acknowledgment in Body of Deed*.—Where a deed to land in *Texas* was executed in *Louisiana* according to the customary form in that state, the grantee and the officer taking his acknowledgment both signing the instrument, and the acknowledgment, made simultaneously with the execution, being contained in the body of the deed instead of at the foot of it, it was held that such deed was admissible to record in *Texas*. *Brownson v. Scanlan*, 59 Tex. 222. See also *Snowden v. Rush*, 69 Tex. 593.

3. *Stevens v. Martin*, 18 Pa. St. 101. See also *Grant v. Oliver*, 91 Cal. 158.

The Certificate is a Part of the Record, and until it be made out, a deed cannot be considered as recorded. Where a deed to land was acknowledged before a register of deeds, and handed to him to be recorded, but at the same time a creditor of the grantor attached the estate, it was held that the creditor had priority, inasmuch as some time must have elapsed before the certificate could be written out. *Sigourney v. Larned*, 10 Pick. (Mass.) 72.

Certificate by Successor of Officer Taking Acknowledgment.—Under the *Missouri* statute requiring a sheriff's deed to be acknowledged in open court and the certificate of acknowledgment to be indorsed by the clerk on the deed, it was held that a clerk of another court, although he may succeed to the custody of the records of the former court, cannot indorse the certificate of the acknowledgment taken by the former clerk. *Allen v. King*, 35 Mo. 216.

4. *Certificate must Show where Acknowledgment was Made*.—*McMahon v. McGraw*, 26 Wis. 614. See also *De Segond v. Culver*, 10 Ohio 189; *Buckley v. Early*, 72 Iowa 289. Compare, as to

former law in *New Brunswick*, *Buggs v. McBride*, 17 New Bruns. 663.

The certificate must show some assignable locality; "Lincoln ss. Wiscasset," in an acknowledgment of a deed taken out of the state, is not sufficient, and the defect will not be aided by reference to the notarial seal. *Vance v. Schuyler*, 6 Ill. 160. But such defect might be aided by the recitals in the certificate of conformity attached. *Harding v. Curtis*, 45 Ill. 252.

A venue "United States of America" is too indefinite. *Montag v. Linn*, 19 Ill. 399.

A venue "County of New York," in a certificate of acknowledgment taken without the state, is insufficient where there is nothing in the certificate or deed to show the state. *Hardin v. Kirk*, 49 Ill. 153, 95 Am. Dec. 581. But an acknowledgment of a deed to land in *Missouri* is not bad because the certificate headed "County of St. Louis, ss.," does not state that said county is in *Missouri*. *Robidoux v. Cassilegi*, 10 Mo. App. 516.

A certificate failing to state of what county the officer is a justice of the peace, or whether he is a justice of any county, or in what county or state the acknowledgment is taken, is fatally defective. Nor is the defective certificate aided by the appearance of the name of a certain state and county at the commencement of the deed. *Emeric v. Alvarado*, 90 Cal. 444.

The venue in the caption of the certificate sufficiently shows where a married woman's privy examination was made. *Simpson v. Hartman*, 27 U. C. Q. B. 460; *Robinson v. Byers*, 13 Grant's Ch. (Canada) 388.

Conflicting Statements of Locality.—A mortgage was acknowledged in C. county before a justice of the peace of that county, and there recorded. The caption of the certificate named E. county, and read: "Before the subscriber, a justice of the peace of said county, etc." It was held that the justice had evidently used the blank of another county without correcting the caption, and that parol evidence was admissible to show the facts. *Angier v. Schiefflin*, 72 Pa. St. 106, 13 Am. Rep. 659.

A deed to lands in R. county was accompanied by a certificate naming that county in the caption, and reciting that the notary public was a notary "in and for said county." To the signature was appended a designation of the officer as a notary of B. county, and the certificate was sealed with the seal of that county. It was held that it sufficiently appeared that the acknowledgment was taken in B. county. *Alexander v. Houghton*, 86 Tex. 702.

pects except that it omits the name of the county in the caption, it has been held that the omission may be supplied by reference to the seal affixed, containing the name of the county.¹

Where the body of the certificate shows of what county the officer taking the acknowledgment was notary, it is not necessary for the name of the county to appear after his signature also.²

Venue Supplied from Deed.—Where the certificate fails altogether to show where the acknowledgment was taken, it is held in some states that the venue may be supplied by reference to the deed to which the certificate is annexed.³

Venue Supplied by Extrinsic Evidence.—It is held in *Illinois* that where the certificate fails to state of what county the officer is officer, the omission may be supplied by extrinsic evidence.⁴

Presumption of Venue.—Where a conveyance is acknowledged before an officer authorized within the limits of his territorial jurisdiction to take acknowledgments, it will be presumed that the acknowledgment was taken within these limits, although this fact is not stated in the certificate.⁵

Where a notary public certifying the acknowledgment of a conveyance of land in L. county described himself as notary public within and for the county of L., but signed himself as notary for H. county, the court was of opinion that the deed ought to have been admitted in evidence. *Merchants' Bank v. Harrison*, 39 Mo. 433, 93 Am. Dec. 285.

Erroneous Statement of Venue when Unnecessary may be Disregarded.—Where a notary has authority to take acknowledgments anywhere in the state, it is sufficient if the certificate name the state in the venue; and the addition of a wrong county, or of a county that does not exist, will be regarded as surplusage, and will not affect the validity of the certificate. *Roussain v. Norton*, 53 Minn. 560. See also *Maxwell v. Hartmann*, 50 Wis. 660.

1. Venue Supplied by Use of Seal.—*Chiniquy v. Catholic Bishop*, 41 Ill. 148; *Stephens v. Mott*, 81 Tex. 115.

But it was held that where notaries public have jurisdiction only in the respective counties for which they are appointed, the certificate must show the county of the notary making it. The omission to state the venue is not supplied by the appearance of the name of the county in the notary's seal. *Greenwood v. Jenswold*, 69 Iowa 53, following *Willard v. Cramer*, 36 Iowa 22; *Vance v. Schuyler*, 6 Ill. 160. See also *Stoddard v. Sloan*, 65 Iowa 680.

2. Colby v. McOmber, 71 Iowa 469.

3. Venue may be Supplied by Reference to the Deed.—*Brooks v. Chaplin*, 3 Vt. 281, 23 Am. Dec. 209; *Ives v. Allyn*, 12 Vt. 589; *Oney v. Clendenin*, 28 W. Va. 34.

Where the certificate fails to state where the deed was acknowledged, in the absence of proof to the contrary the court will presume that the acknowledgment was taken in the county where the deed purports to have been made. *Doe v. Roe*, 1 Ga. 3.

A certificate of acknowledgment purporting to be made in — county before one styling himself a justice of the peace of said county is valid, where the county in which the grantors resided is named in the body of the deed. *Fuhrman v. Loudon*, 13 S. & R.

(Pa.) 386, 15 Am. Dec. 608; *Bennet v. Paine*, 7 Watts (Pa.) 334, 32 Am. Dec. 765; *Beckel v. Petticrew*, 6 Ohio St. 247.

The fact that the officer taking the acknowledgment was a justice of the peace of a certain county named in the caption of the certificate, and that the grantor of the deed is described therein as residing in the same county, affords strong evidence that the acknowledgment was taken in that county. *Dunlap v. Daugherty*, 20 Ill. 397.

Where a deed conveying lands in *West Virginia* shows on its face that the parties were residents of Fayette county, *Pennsylvania*, and the certificate of acknowledgment shows the county but not the state, but is accompanied by a certificate attesting that the justices named are justices of Fayette county, *Pennsylvania*, it is sufficiently shown that the Fayette county named in their certificate is in the state of *Pennsylvania*. *Adams v. Medsker*, 25 W. Va. 127.

Where both certificate and deed fail to show where the acknowledgment was taken, the deed is inadmissible in evidence. *Hardin v. Kirk*, 49 Ill. 153, 95 Am. Dec. 581.

But if the name of the place appears in the certificate of conformity, it is sufficient. *Hardin v. Osborne*, 60 Ill. 93.

4. Locality may be Shown by Extrinsic Evidence—Illinois.—*Irving v. Brownell*, 11 Ill. 402.

The omission of the name of the county in the caption will not invalidate a certificate, on proof that the justice who took the acknowledgment was justice of the county where it was taken and acted as such. *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89.

5. Presumption of Venue.—*Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Rackleff v. Norton*, 19 Me. 274; *Bradley v. West*, 60 Mo. 33; *People v. Snyder*, 41 N. Y. 397; *Bensimer v. Fell*, 35 W. Va. 15.

If the county be stated in the caption, it will be presumed that the officer was an officer of that county and acted within his own appropriate territory. *Livingston v. Kettelle*, 6 Ill. 116, 41 Am. Dec. 166; *Douglass v. Bishop*, 45 Kan. 200; *Douglass v.*

(4) *Date*.—Although the certificate is usually dated, the date is not essential, and a mistake in the date, or its omission, will not invalidate the certificate.¹ Where the certificate fails to state the time of acknowledgment, the omission may be supplied from the deed.²

Certificate Dated Earlier than Deed.—The fact that the certificate was dated earlier than the deed has been held an immaterial variance,³ and it may be shown by parol evidence, or by reference to the deed, that such dating is erroneous.⁴ It has been held in such cases that the date of the certificate should prevail.⁵ When necessary to show the authority of the officer taking the acknowledgment, a statement of date becomes essential.⁶ Where it appears that the date is correct, it is no objection to the filing of the certificate that the date is written over an erasure.⁷

(5) *Signature*.—The certificate must be signed by the officer taking the acknowledgment.⁸ If the officer's name be signed at the end of the certifi-

Carmean, 49 Kan. 674; Wright v. Wilson, 17 Mich. 192; Sidwell v. Birney, 69 Mo. 144; Chamberlain v. Pybas, 81 Tex. 511.

1. **Statement of Date Not Essential.**—Irving v. Brownell, 11 Ill. 402; Attaway v. Carter, 1 Tex. Unrep. Cas. 73; Webb v. Huff, 61 Tex. 677; Horsley v. Garth, 2 Gratt. (Va.) 474, 44 Am. Dec. 393.

Where the statute does not require the certificate of a county clerk as to the official character of the officer certifying an acknowledgment to be dated, absence of the date will not vitiate such certificate. Thorn v. Mayer (Buffalo Super. Ct.), 33 N. Y. Supp. 664. See also Brooke's Appeal, 64 Pa. St. 127.

Discrepancy between Certificate and Recital of Acknowledgment.—Where the certificate of a wife's acknowledgment dated August 7th recited that the acknowledgment was made September 4th, that being the date of her husband's acknowledgment of the same mortgage, it was held that the date in the body of the instrument was clearly the true date and would prevail. Homer v. Schonfeld, 84 Ala. 313.

2. **Omissions Supplied from the Deed.**—Under a statute requiring the certificate to state the time of taking the acknowledgment, the date may be supplied by reference to the rest of the instrument. Kelly v. Rosenstock, 45 Md. 389.

When No Date Appears in the Certificate, it will be presumed, in the absence of proof to the contrary, that the acknowledgment was taken at the time of the date of the deed. Doe v. Roe, 1 Ga. 3; Rackleff v. Norton, 19 Me. 274. See also Caruthers v. McLaran, 56 Miss. 371.

When the Year is Omitted from a Certificate dated the same day of the month as the deed, it is presumed that the acknowledgment was taken in the year named in the deed, Galusha v. Sinclair, 3 Vt. 394; or at least before the deed was recorded, Chase v. Whiting, 30 Wis. 544; Wickes v. Caulk, 5 Har. & J. (Md.) 36. See also Sloan v. Thompson, 4 Tex. Civ. App. 419.

3. **Certificate Dated Earlier than Deed.**—It is an immaterial variance that a certificate of acknowledgment is dated a year earlier than the deed. Sellers v. Sellers, 98 N. Car. 13; Vorty v. Paine, 62 Wis. 154.

4. Hoit v. Russell, 56 N. H. 559; Gest v.

Flock, 2 N. J. Eq. 108; Fisher v. Butcher, 19 Ohio 406, 53 Am. Dec. 436. See also Solms v. McCulloch, 5 Pa. St. 473.

5. Buck v. Gage, 27 Neb. 306; Gorman v. Stanton, 5 Mo. App. 585. See also Norfleet v. Russell, 64 Mo. 176.

Where the Certificate and Deed Bear the Same Date, it will not be supposed, in the absence of proof, that the acknowledgment was in fact taken before the deed was executed. Cover v. Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552.

6. **Date must be Stated when Necessary to Show Authority.**—A deed to lands lying in a county first Bedford, then Huntingdon, then Cambria, was acknowledged before one styling himself as a justice for the county of Bedford, the certificate not being dated. The certificate was held defective, on the ground that, being without date, it did not appear that the acknowledgment was taken at a time when the officer had authority. Downing v. Gallagher, 2 S. & R. (Pa.) 455.

7. Anonymous, 16 C. B. 574, 81 E. C. L. 574; Cover v. Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552; Bowlby v. Thunder (Pa., 1886), 3 Atl. Rep. 588. See also *In re Bingle*, 15 C. B. 449, 80 E. C. L. 449.

8. **Certificate must be Signed.**—Carlisle v. Carlisle, 78 Ala. 542; Clark v. Wilson, 127 Ill. 449, 11 Am. St. Rep. 143; Jefferson County Bldg. Assoc. v. Heil, 81 Ky. 513; Marston v. Brashaw, 18 Mich. 81, 100 Am. Dec. 152; Fund Com'rs v. Glass, 17 Ohio 542; Hout v. Hout, 20 Ohio St. 119. See also Bigelow v. Booth, 39 Mich. 624.

Authority of Deputy to Sign for Officer.—Where a certificate is signed with the name of the officer by a deputy, and the officer afterwards acknowledges his signature, it will be presumed, in the absence of evidence to the contrary, that the name was signed by his authority. Duff v. Wynkoop, 74 Pa. St. 300.

Two Certificates Regarded as One.—Where the separate certificates of acknowledgment by husband and wife are both on the same deed, one immediately under the other, it is sufficient if the bottom one only is signed. Wright v. Wilson, 17 Mich. 192.

Variance in Signature Not Fatal.—Where the name of a notary taking an acknowledgment in a foreign state appeared in his signature and seal as "W. F. Bill," but in the

cate, it need not appear in the body thereof also,¹ but an unsigned certificate is void, although the officer's name is given in the body of the instrument;² nor is a certificate, void for want of signature, cured by the use of the officer's official seal.³

Signature to Defective Certificate as Attestation.—It is held in *Alabama* that a defective certificate of acknowledgment may operate as an attestation, the signature of the officer being treated as that of an attesting witness.⁴ In other states, however, decisions laying down a contrary rule are found.⁵

(6) **Official Character of Officer**—(a) **General Rule**—Should Appear from Certificate.—The official character of the person taking the acknowledgment must appear in the certificate;⁶ and where the officer represents himself to be such an officer

certificate of conformity and copy of his notarial commission as "Wilbur F. Bill," the discrepancy was held insufficient to exclude the deed as evidence. *Denny v. Ashley*, 12 Colo. 165.

Where a probate judge certifying the acknowledgment of a deed by W. L. H. F. concluded his certificate, "In testimony whereof I, W. L. H. F., judge of said court, etc.," and subscribed his name correctly "M. L. W., Probate Judge," the mistake in name was held immaterial. *Agan v. Shannon*, 103 Mo., 661, *overruling* *Lincoln v. Thompson*, 75 Mo. 623. See also *Ferguson v. Williams*, 58 Iowa 717, *affirming* *Clark v. Wilson*, 27 Ill. App. 610.

Officer may Not Sign after Expiration of Term.—Where a clerk's certificate of a married woman's acknowledgment, recorded with the deed, was not signed by him or any one for him while he held the office, he cannot, after his term has expired, sign his name to it on the deed book so as to make the deed effectual. *Fitzgerald v. Millikin*, 83 Ky. 70.

1. **Name of Officer need Not Appear in Body of Certificate.**—Under the *Iowa* statute (Rev. Code 1888, § 1958), requiring the certificate to set forth the title of the court or officer before whom the acknowledgment is made, it is not necessary for the name of the officer to appear in the body of the certificate. *Fogg v. Holcomb*, 64 Iowa 621.

A certificate "before me, register of deeds," etc., signed "L. T. J., register of deeds," was held sufficient in *Kansas*, although the officer did not insert his name in the body of the certificate. *McCauslin v. McGuire*, 14 Kan. 234.

2. *Marston v. Brashaw*, 18 Mich. 81, 100 Am. Dec. 152; *Hout v. Hout*, 20 Ohio St. 119.

3. *Clark v. Wilson*, 27 Ill. 449, 11 Am. St. Rep. 143, *affirming* *Clark v. Wilson*, 127 Ill. App. 610.

4. **Defective Certificate as an Attestation—Alabama.**—*Merritt v. Phenix*, 48 Ala. 87; *Rogers v. Adams*, 66 Ala. 600; *Jones v. Hagler*, 95 Ala. 529; *Torrey v. Forbes*, 94 Ala. 135; *Nashville, etc., R. Co. v. Hammond* (Ala., 1894), 15 So. Rep. 935. See also *Sharpe v. Orme*, 61 Ala. 263.

But the officer's name written in the beginning of an unsigned printed form of a certificate of acknowledgment is not sufficient as the signature of a witness. *Carlisle v. Carlisle*, 78 Ala. 542.

5. It has been held in *New York* that the

officer's signature to the defective certificate, not being affixed for that purpose, is not good as the attestation of a witness. *Mutual L. Ins. Co. v. Corey*, 54 Hun (N. Y.) 493.

In *Ohio*, under a statute requiring the grantor to acknowledge his deed before a magistrate in the presence of two attesting witnesses, it was held that the official signature of the officer taking the acknowledgment of a deed attested by only one witness could not be made to answer a double purpose, and supply the deficiency in the attestation. *White v. Denman*, 1 Ohio St. 210.

6. **Certificate must Show Official Character of Officer—Florida.**—*Summer v. Mitchell*, 29 Fla. 179.

Iowa.—*Greenwood v. Jenswold*, 69 Iowa 53.

Nebraska.—*Connell v. Galligher*, 39 Neb. 793.

New York.—*People v. Register*, 6 Abb. Pr. (N. Y. Supreme Ct.) 180.

Ohio.—*Johnston v. Haines*, 2 Ohio 55.

Pennsylvania.—*Uhler v. Hutchinson*, 23 Pa. St. 110; *Shields v. Buchanan*, 2 Yeates (Pa.) 219; *Cassell v. Cooke*, 8 S. & R. (Pa.) 268, 11 Am. Dec. 610.

Tennessee.—*Patton v. Brown*, 1 Cooke (Tenn.) 126.

Texas.—*Coffey v. Hendricks*, 66 Tex. 676; *Whitehead v. Foley*, 28 Tex. 268; *Gulf, etc., R. Co. v. Carter*, 5 Tex. Civ. App. 675.

Virginia.—*Cales v. Miller*, 8 Gratt. (Va.) 6.

See also *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *McAllister v. Clement*, 75 Cal. 182; *Steeple v. Downing*, 60 Ind. 478; *Missouri Pac. R. Co. v. Houseman*, 41 Kan. 300; *Gillespie v. Johnston*, *Wright* (Ohio) 231; *Evans v. Lee*, 11 Nev. 194; *Bledsoe v. Wiley*, 7 Humph. (Tenn.) 507.

Under the Former Laws of Maryland it was not necessary for the certificate to show official character. This might be shown by evidence *aliunde*. *U. S. Bank v. Benning*, 4 Cranch (C. C.) 81; *Van Ness v. U. S. Bank*, 13 Pet. (U. S.) 17; *Byer v. Etnyre*, 2 Gill (Md.) 150, 41 Am. Dec. 410; these last two cases distinguished *Connelly v. Bowie*, 6 Har. & J. (Md.) 141, where a certificate which did not state the official character of the officer was held defective, there being no evidence *aliunde* to show such character.

As to whether this rule would hold good under the former laws of *Ohio*, see the remarks of the court in *Shults v. Moore*, 1 McLean (U. S.) 520.

The Courts will Take Judicial Notice of who

as is generally authorized to take acknowledgments, this will be *prima facie* evidence of his character and authority.¹

Where the officer has recited his official character in the body of the certificate, it is not necessary for it to be shown in the signature also,² and certificates with no other designation of official character than descriptive terms and abbreviations appended to the signature have been held sufficient.³

are justices of the peace in the counties in which they are sitting. *Livingston v. Kettelle*, 6 Ill. 116, 41 Am. Dec. 166; *Irving v. Brownell*, 11 Ill. 402; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89. See also *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73; *Thompson v. Haskell*, 21 Ill. 215; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618; *Watson v. Hay*, 3 Kerr (New Bruns.) 559; and the title JUDICIAL NOTICE.

Presumption of Authority.—Where a deed executed by husband and wife was acknowledged in open court before two justices of the peace, who took the separate acknowledgment of the wife and made report to the court, which acted upon the report, it was held, in *North Carolina*, that the evidence was irresistible that the justices were members of the court, appointed for the purpose. *Den v. Ferebee*, 9 Ired. (N. Car.) 312; *Den v. Lamb*, 13 Ired. (N. Car.) 400; *Robbins v. Harris*, 96 N. Car. 557. See also *Kidd v. Venable*, 111 N. Car. 535; and *supra*, this title, *Certain Provisions Considered—Venue*.

Official Character of the Person Taking Acknowledgment of Deeds in Another State.—It has been held in *Illinois* that in the absence of a statute requiring it, the certificate of acknowledgment taken by an officer of another state need not contain evidence of his official character. *Secrist v. Green*, 3 Wall. (U. S.) 744. See also *Carpenter v. Dexter*, 8 Wall. (U. S.) 513.

In case of acknowledgments taken in another state, the recording officer is not required to consult the laws of that state to ascertain the authority of the officer taking the acknowledgment. *People v. Register*, 6 Abb. Pr. (N. Y. Supreme Ct.) 180.

Certificate must show that the Court before which Acknowledgment is Made is a Court of Record.—Under a statute authorizing instruments affecting real estate to be acknowledged in other states, before a court of record or officer holding the seal of such court, a certificate of acknowledgment under the seal of a court in another state, but failing to state, and it being not otherwise shown, that such court was a court of record or that the officer was the holder of the seal, is defective. *Fogg v. Holcomb*, 64 Iowa 621; *McCammon v. Beaupre*, 25 U. C. Q. B. 419. See also *Torrey v. Forbes*, 94 Ala. 135; *MacKenzie v. Jackson*, 82 Ga. 80; *Fisher v. Vaughn*, 75 Wis. 600.

Unless This is Shown by the Laws of the State.—An acknowledgment taken in another state is not invalidated by the omission of the magistrate to certify that his is a court of record, that fact being shown by the laws of the state. *Pierce v. Hakes*, 23 Pa. St. 231.

Acknowledgment Taken by Commissioners.—The official character of a commissioner of

deeds appointed to reside in another state is sufficiently shown by his certificate and official seal. *Johnson v. Cocks*, 12 Ark. 672; *Kaufman v. Stone*, 25 Ark. 336; *Smith v. Van Gilder*, 26 Ark. 527.

It was so held in *Illinois* with reference to commissioners of other states taking acknowledgments of deeds to lands in *Illinois*. *Vance v. Schuyler*, 6 Ill. 160; *Thompson v. Schuyler*, 7 Ill. 271; *Irving v. Brownell*, 11 Ill. 402.

Commissioner need Not State Source of Authority.—It is not necessary for a commissioner taking acknowledgments in another state to recite in his certificate the source of his power, or that he was duly qualified. *Sparrow v. Hovey*, 41 Mich. 708.

See further, as to proof of official character of officers taking acknowledgments in other states, *infra*, this title, *Certificate of Magistracy and Conformity*.

1. Representations of Officer Prima Facie Evidence of His Authority—United States.—*Wilink v. Miles*, Pet. (C. C.) 429; *Rhoades v. Selin*, 4 Wash. (U. S.) 715.

Alabama.—*Holleman v. DeNyse*, 51 Ala. 95; *Goree v. Wadsworth*, 91 Ala. 416; *Jinwright v. Nelson* (Ala., 1895), 17 So. Rep. 91.

Florida.—*Tuten v. Gazan*, 18 Fla. 751.

Minnesota.—*Thompson v. Morgan*, 6 Minn. 292; *Baze v. Arper*, 6 Minn. 220.

Missouri.—*Macey v. Stark*, 116 Mo. 481.

New York.—*Thurman v. Cameron*, 24 Wend. (N. Y.) 87.

North Carolina.—*Piland v. Taylor*, 113 N. Car. 1.

Ohio.—*Livingston v. McDonald*, 9 Ohio 168, *distinguishing Johnston v. Haines*, 2 Ohio 55. See also *Ruggles v. Bucknor*, 1 Paine (U. S.) 358; *Mott v. Smith*, 16 Cal. 533.

Where the officer describes himself as an officer whom the law authorizes to take acknowledgments, he need not state that he is so authorized. *Livingston v. McDonald*, 9 Ohio 169.

But where the acknowledgment purports to be taken by an officer not known to local laws, his authority to take acknowledgments must be shown. *De Second v. Culver*, 10 Ohio 188.

Handwriting need Not be Proved.—It is not necessary to prove the handwriting of the magistrate. His certificate is *prima facie* evidence of his signature and authority. *Keichline v. Keichline*, 54 Pa. St. 75. See also *Goddard v. Gloninger*, 5 Watts (Pa.) 209.

2. Statement of Official Character in Body of Certificate.—*Summer v. Mitchell*, 29 Fla. 179; *Second M. E. Church v. Humphrey* (Supreme Ct.) 21 N. Y. Supp. 89, 66 Hun (N. Y.) 628; *Brown v. Farran*, 3 Ohio 140; *Lake Erie*, etc., R. Co. v. *Whitham*, 155 Ill. 514.

3. Initials and Abbreviations may be used to show official character.

Official Character Shown by Evidence Aliunde.—It has been held by some courts that failure to state the official character of the officer is not a fatal defect, and that the omission may be supplied by extrinsic evidence.¹

(b) **Surplusage in Description.**—Where the certificate shows that the officer held two offices by virtue of only one of which he was authorized to take acknowledgments, that portion of the description showing him to be an officer not authorized will not invalidate the certificate, but may be rejected as surplusage.²

(7) **Seal.**—When so required by statute, the certificate must be sealed with the officer's official seal.³ The prescribed form of seal need not be strictly

Alabama.—*Holleman v. DeNyse*, 51 Ala. 95; *Goree v. Wadsworth*, 91 Ala. 416.

Florida.—*Summer v. Mitchell*, 29 Fla. 179.

Texas.—*Blythe v. Houston*, 46 Tex. 65.

See also the title ABBREVIATIONS.

Official Character Shown in Signature Alone.—

An acknowledgment before a person who subscribed his name "H. G. Clopper," with the abbreviation "Reg'r" added, it being proved that Henry George Clopper was a registrar of deeds at the time the deed purported to have been acknowledged and registered, and that he always signed his name "H. G. Clopper," was held good. *Briggs v. McBride*, 17 New Bruns. 663.

A certificate signed "A. B. Comm'r," without other statement of official character, sufficiently shows the character of the subscriber as commissioner. *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561.

It was held competent to explain on the hearing that the letters "J. P. H. C.," attached to the signature of a certificate bearing the caption "State of Mississippi, Hancock County," were intended to signify "Justice of the Peace of Hancock County," and the certificate was held good without any other statement of official character. *Russ v. Wingate*, 30 Miss. 440.

A certificate of acknowledgment when taken in another state, being in the form prescribed for such acknowledgments, and accompanied by a county clerk's certificate attesting the official character of the officer taking the acknowledgment as justice of the peace, was signed by one who designated his official character only by the use of the letters "J. P." affixed to his signature. This was held sufficient. *Final v. Backus*, 18 Mich. 218.

Where the caption of the deed shows the county, and the certificate of acknowledgment bears the seal of the county court and is signed by one styling himself in his signature "Recorder," it is sufficiently shown that the deed was acknowledged before the county clerk, who was also by law county recorder. *Broussard v. Dull*, 3 Tex. Civ. App. 59.

A certificate of the record of a deed headed "Republic of Texas, Liberty County," and signed "G. W. Miles, R. L. C.," is sufficient to show the officer's character as county recorder. *McDonald v. Morgan*, 27 Tex. 503.

A certificate with no other statement of official character than the subscription "G. H. M., Clerk, by G. M. W., Deputy," was held insufficient. *Gulf, etc., R. Co. v. Carter*, 5 Tex. Civ. App. 675.

1. **Extrinsic Evidence of Official Character.**—*Irving v. Brownell*, 11 Ill. 402; *Graham v.*

Anderson, 42 Ill. 514, 92 Am. Dec. 89; *Russ v. Wingate*, 30 Miss. 440; *Berks County v. Ross*, 3 Binn. (Pa.) 539; *Bennet v. Paine*, 7 Watts (Pa.) 334, 32 Am. Dec. 765; *Scott v. Gallagher*, 11 S. & R. (Pa.) 347; *Pierce v. Hakes*, 23 Pa. St. 231. See also *Carolina Sav. Bank v. McMahon*, 37 S. Car. 309; *Robinson v. Wilson*, 3 Kerr (New Bruns.) 301.

But by some courts it is held that official character cannot be shown by parol evidence. *People v. Register*, 6 Abb. Pr. (N. Y. Supreme Ct.) 180; *Coffey v. Hendricks*, 66 Tex. 676. See also *Gulf, etc., R. Co. v. Carter*, 5 Tex. Civ. App. 675.

It was held in *Ohio* that extrinsic proof of official character was not admissible, when a copy of the deed and not the original instrument, was offered in evidence. *Johnston v. Haines*, 2 Ohio 55, 15 Am. Dec. 533.

2. **Dual Official Character.**—*Summer v. Mitchell*, 29 Fla. 179; *Buntyn v. Shippers' Compress Co.*, 63 Miss. 94; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618. See also *Bird v. McClelland, etc., Brick Mfg. Co.*, 45 Fed. Rep. 458.

3. **Seal Necessary.**—*United States.*—*Richards v. Randolph*, 5 Mason (U. S.) 115; *Wetmore v. Laird*, 5 Biss. (U. S.) 160.

Arkansas.—*Blagg v. Hunter*, 15 Ark. 246; *Little v. Dodge*, 52 Ark. 453; *Worsham v. Freeman*, 34 Ark. 55.

California.—*Hastings v. Vaughn*, 5 Cal. 315; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108.

Illinois.—*Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490; *Booth v. Cook*, 20 Ill. 129; *Moore v. Titman*, 33 Ill. 358; *Holbrook v. Nichol*, 36 Ill. 161; *Skinner v. Fulton*, 39 Ill. 484. See also *Stout v. Slattery*, 12 Ill. 162; *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73.

Indiana.—*Watson v. Clendennin*, 6 Blackf. (Ind.) 477. See also *Hinckley v. O'Farrel*, 4 Blackf. (Ind.) 185; *Dumont v. McCracken*, 6 Blackf. (Ind.) 355.

Iowa.—*Jones v. Berkshire*, 15 Iowa 248, 83 Am. Dec. 412; *Pitts v. Seavey*, 88 Iowa 336.

Kansas.—*Meskimen v. Day*, 35 Kan. 46; *Kelley v. McBlain*, 42 Kan. 764.

Kentucky.—*Kemper v. Hughes*, 7 B. Mon. (Ky.) 255; *Herd v. Cist* (Ky., 1889), 12 S. W. Rep. 466.

Michigan.—*Detroit v. Detroit, etc., R. Co.*, 23 Mich. 173; *Buell v. Irwin*, 24 Mich. 145. See also *Pope v. Cutler*, 34 Mich. 150.

Minnesota.—*DeGraw v. King*, 28 Minn. 118; *Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. Rep. 619. See also *Bigelow v. Livingston*, 28 Minn. 57; *Colman v. Goodnow*, 36 Minn. 9.

Pennsylvania.—*Duncan v. Duncan*, 1 Watts

observed.¹ Where no seal or no special form of seal is prescribed by statute,

(Pa.) 322; *Barney v. Sutton*, 2 Watts (Pa.) 31.

South Carolina.—*McLaurin v. Wilson*, 16 S. Car. 402; *McCreary v. McCreary*, 9 Rich. Eq. (S. Car.) 34.

Texas.—*Monroe v. Arledge*, 23 Tex. 478; *Ballard v. Perry*, 28 Tex. 347; *McKellar v. Peck*, 39 Tex. 381; *Texas Land Co. v. Williams*, 51 Tex. 51; *Masterson v. Todd*, 6 Tex. Civ. App. 131. See also *Stooksbury v. Swan*, 85 Tex. 563.

Wisconsin.—*Williams v. Milwaukee Industrial Exposition Assoc.*, 79 Wis. 524.

Hawaii.—*Lenahan v. Akana*, 6 Hawaiian 538.

Under the *Kentucky* statute providing that deeds executed out of the state may be admitted to record when certified by a notary public under his seal of office, it was held that a recorded deed, executed out of the state, and acknowledged before a notary public, the certificate being certified under his official seal, takes priority over a deed also executed out of the state, recorded before the former, but whose acknowledgment was not so certified under the notary's seal. *Herd v. Cist* (Ky., 1889), 12 S. W. Rep. 466.

Want of Seal Vitiates Certificate.—Under a statute requiring the certificate of authentication of acknowledgments taken in another state to be under seal, it was held that a certificate not under seal, was void. *Pope v. Cutler*, 34 Mich. 150 (*distinguishing Starkweather v. Martin*, 28 Mich. 471); *Fisher v. Vaughn*, 75 Wis. 609.

But where a judge took the probate of one of the witnesses to a deed and certified the same, but not under seal, the deed was held to be well proved. *Whitmire v. Napier*, 4 S. & R. (Pa.) 290, *criticised in Duncan v. Duncan*, 1 Watts (Pa.) 329.

Recorded Acknowledgment Not under Seal.—It was held in *Missouri* that a deed admitted to record as duly acknowledged and certified will not be defeated by the fact that the notary's certificate of acknowledgment was attested merely as "given under hand" and had no seal affixed. *Mitchner v. Holmes*, 117 Mo. 185.

Where the Deed Itself is Produced in Evidence, the fact that the notary's certificate of acknowledgment was not sealed is no objection to the admission of the deed as evidence. *Rullman v. Barr*, 54 Kan. 643.

A Seal on the Certificate is not necessary to the validity of the deed. *Robinson v. Robinson*, 116 Ill. 250. See also *Barton v. Morris*, 15 Ohio 408.

Statute Requiring Seal Held Directory.—It was held in *North Carolina* that the statute requiring the notary to affix his seal to a certificate of probate of a deed is directory only, and his omission to attach his seal to the certificate of a married woman's privy examination will not invalidate a certificate otherwise regular. *Lineberger v. Tidwell*, 104 N. Car. 506.

Presumption of Seal.—One who objects to the absence of seal from a notary's certificate of acknowledgment offered in evidence sixteen

years after it was made, the objection being overruled, must show that the seal was in fact omitted, for it may have been affixed and become detached. *Clark v. Sawyer*, 48 Cal. 133.

Two Certificates on the Same Sheet Sealed with One Seal.—An assignment for the benefit of creditors had indorsed on it a certificate of acknowledgment in due form signed by a notary, but not sealed. Following this and on the same page was another certificate, by the same notary, of the assignee's acknowledgment of the execution of his acceptance. This had the notarial seal attached. It was held that the two certificates could not be regarded as one, requiring only one seal, and that the first certificate was a nullity. *DeGraw v. King*, 28 Minn. 118.

1. Device of Seal Prescribed by Statute.—The absence from a notary's seal affixed to his certificate of acknowledgment, of certain emblems and devices prescribed by statute, will not invalidate the certificate. *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 49.

But see, as to the law in *Iowa*, *Hewitt v. Morgan*, 88 Iowa 468; *Kruger v. Walker* (Iowa, 1894), 59 N. W. Rep. 65.

Prior to the enactment of the law requiring a special form of seal showing a star in the centre to be used by commissioners of *Texas* in certifying acknowledgments taken in other states, the omission of the star from the seal would not invalidate the certificate. *Davis v. Roosevelt*, 53 Tex. 305.

Under the *Nebraska* statute (Consol. Statutes 1893, § 3218), prescribing the form of seal to be used by a notary and providing that it shall at his option contain his name or the initial letters thereof, it was held that a seal on a certificate of acknowledgment complying in other respects with the statutory form was sufficient without the addition of the name or initials of the certifying officer. *Weeping Water v. Reed*, 21 Neb. 261. See also *Sparrow v. Hovey*, 41 Mich. 708.

Seal on Wrong Side of Sheet.—Where a mortgage was written upon one side of a sheet of paper, and the certificate of acknowledgment in proper form was on the other side, the seal being impressed on the same side as the mortgage, but distinctly visible through the sheet on the same side as the certificate of acknowledgment, though at the opposite end, there being no other certificate on the paper to which the seal could be made applicable, it was held that the certificate was sufficiently authenticated thereby. *Evans v. Smith*, 43 Minn. 59.

Seal Presumed to be That of Officer Using It.—In the absence of evidence to the contrary, the seal appended by a notary to his certificate is presumed to be his own. The presumption is not rebutted by the mere fact that a notary signs his name as "Geo. Theo. Sommer" and the seal is inscribed "Theo. Sommer," the fact of the execution of the deed having been adjudged to be proven by the certificate and seal. *Deans v. Pate*, 114 N. Car. 194. See also *Deveber v. Britain*, 9 New Bruns. 330.

failure to affix a seal,¹ or the use of a private seal,² will not invalidate the certificate.

Place of Seal.—It is not essential that the seal follow the officer's signature; a seal appearing on a certificate before the name of the officer has been held sufficient.³

Statement that Seal was Affixed.—It is held in several states that the certificate need not show affirmatively that the seal was affixed.⁴

Seal need Not be Copied into Record.—Where it is stated in the body of the certificate that the seal of the officer was affixed, the presumption arises that it was so affixed, it not being necessary for the recording officer to make a copy of the seal in the records.⁵

Use of Seal Belonging to Another Officer Fatal.—Where a notary used the seal of the county clerk instead of his own, it was held that the certificate was fatally defective. *McKellar v. Peck*, 39 Tex. 381. See also *Moses v. Dibrell*, 2 Tex. Civ. App. 457.

1. Seal Unnecessary unless Required by Statute.—*Powers v. Bryant*, 7 Port. (Ala.) 9; *Harrison v. Simons*, 55 Ala. 510; *Ingoldsby v. Juan*, 12 Cal. 564; *Irving v. Brownell*, 11 Ill. 402; *Thompson v. Robertson*, 9 B. Mon. (Ky.) 383; *Baze v. Arper*, 6 Minn. 220; *Thompson v. Morgan*, 6 Minn. 292; *Farnum v. Buffum*, 4 Cush. (Mass.) 260; *Fund Com'r's v. Glass*, 17 Ohio 542; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Maxwell v. Hartmann*, 50 Wis. 660. See also *Ashley v. Wright*, 19 Ohio St. 291.

Under a statute authorizing the clerk of a court "having a seal" to take acknowledgments, it was held that it is no objection to an acknowledgment taken by a county clerk that he has no seal of office, the general phrase "having a seal" being only intended to denote a court of record, which is defined to be a court having a seal. The power of the clerk is not intended to depend on his having procured and taken care of a seal. *Ingoldsby v. Juan*, 12 Cal. 564.

2. Private Seal.—Under the *Florida* Act of 1831, requiring a commissioner of that state resident in another state to certify acknowledgments of deeds to be recorded in *Florida* under his seal, it was held that his private seal was sufficient. *Tuten v. Gazan*, 18 Fla. 751.

No Official Seal Provided.—Under the statute requiring the officer to use his official seal a certificate sealed with his private seal stating that no official seal had yet been provided was held sufficient. *Collins v. Boyd*, 5 Dana (Ky.) 317; *Agan v. Shannon*, 103 Mo. 661; *Creigh v. Beelin*, 1 W. & S. (Pa.) 83.

It was so held in *California* under a statute making special provision for such cases. *Stark v. Barrett*, 15 Cal. 362; *Fogarty v. Sawyer*, 23 Cal. 570.

But it was held in *Illinois* that a certificate sealed with a notary's private seal and reciting that no public seal had been furnished was insufficient. *Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490.

A certificate of conformity sealed with a scroll instead of a seal of the court, the clerk stating that such seal is lost, is insufficient. *Skinner v. Fulton*, 39 Ill. 484. See also *Moore v. Titman*, 33 Ill. 358.

And in *Missouri* it was held that the mayor of a city could not use his private seal in the absence of a public seal, although the statute allowed clerks of courts of record to do so, *Geary v. Kansas City*, 61 Mo. 378.

Certificate of Officer Having neither Private nor Public Seal.—A justice of the peace in *Tennessee* not having any seal of office, and private seals being abolished, it was held that his certificate of acknowledgment was valid, though not under seal. *Lucas v. Larkin*, 85 Tenn. 355.

3. Seal may Precede Signature.—*Gilbreath v. Dilday*, 152 Ill. 207; *Barton v. Morris*, 15 Ohio 408.

4. Harrington v. Fish, 10 Mich. 415; *Dale v. Wright*, 57 Mo. 110; *Webb v. Huff*, 61 Tex. 677.

In *Webb v. Huff*, 61 Tex. 677, *Delany, J.*, said: "It is objected that the notary did not add the words, 'Given under my hand and seal of office,' etc. These venerable words ought, no doubt, to be used by all notaries, especially as they have been adopted into the form given by the statute; but we do not think that their presence or their absence will affect the validity of the instrument." See also a certificate held good in *Broussard v. Dull*, 3 Tex. Civ. App. 59.

Contra.—But it has been held that nothing will be presumed in favor of a notary's certificate of acknowledgment, and that where the attesting clause in such certificate simply read as follows: "Witness my hand and seal this day," it will not be presumed that the notary meant his notarial or official seal. *Wetmore v. Laird*, 5 Biss. (U. S.) 160.

5. Recording Officer need Not Copy Seal.—*United States.*—*Smith v. Gale*, 144 U. S. 509. *California.*—*Smith v. Dall*, 13 Cal. 510; *Jones v. Martin*, 16 Cal. 165.

Dakota.—*Gale v. Shillock* (Dakota, 1886), 29 N. W. Rep. 651.

Michigan.—*Starkweather v. Martin*, 28 Mich. 470.

Mississippi.—*Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646.

Missouri.—*Dale v. Wright*, 57 Mo. 110; *Geary v. Kansas City*, 61 Mo. 378; *Norfleet v. Russell*, 64 Mo. 176; *Parkinson v. Caplinger*, 65 Mo. 290; *Addis v. Graham*, 88 Mo. 197; *Hammond v. Gordon*, 93 Mo. 223.

Texas.—*Ballard v. Perry*, 28 Tex. 347; *Witt v. Harlan*, 66 Tex. 660; *Coffey v. Herdricks*, 66 Tex. 676.

See also *Wetmore v. Laird*, 5 Biss. (U. S.) 160; *Sonfield v. Thompson*, 42 Ark. 46, 48

c. **CERTIFICATE OF MAGISTRACY AND CONFORMITY.**—It is usually required in case of acknowledgments taken without the state by officers of other states, that the certificate of acknowledgment shall be accompanied by a second certificate under the hand and seal of an officer of a court of record, or other proper officer, certifying the official character and authority of the officer taking the acknowledgment, that his signature is genuine, and, where it is required that the foreign law be observed in taking the acknowledgment, that the deed was executed and acknowledged according to the laws of the foreign state or country.¹ This second certificate is necessary in some states only when the

Am. Rep. 49; *Bucklen v. Hasterlik*, 155 Ill. 423; *Hedden v. Overton*, 4 Bibb (Ky.) 406; *Sneed v. Ward*, 5 Dana (Ky.) 187; *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73; *Moore v. Titman*, 33 Ill. 358.

The same doctrine applies to a certificate by a county clerk as to the official character of the acknowledging officer. *Thorn v. Mayer*, (Buffalo Super. Ct.), 33 N. Y. Supp. 664.

Use of Words "No Seal" in Certified Copy.—Where a certified copy of a deed from the county records had in place of "seal" on the notary's certificate of acknowledgment the words "no seal," but the original deed with the seal affixed was produced, and it was proved that the officer had affixed his seal at the time of taking the acknowledgment, it was held that the deed was properly admitted to record and might be read in evidence. *Equitable Mortgage Co. v. Kempner*, 84 Tex. 102.

In a similar case the certified copy had the words "no seal" in the usual place of affixing the seal. The court admitted the instrument in evidence, holding that the words did not imply the absence of seal from the certificate, but were a mere note of the recorder of the place of the seal which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 165. See also *Farmers', etc., Bank v. Bronson*, 14 Mich. 361.

See generally the title **SEAL**.

1. **Double Certificate for Acknowledgments out of State—Colorado.**—*Quimby v. Boyd*, 8 Colo. 194.

Illinois.—*Phillips v. People*, 11 Ill. App. 340; *Shepard v. Carriel*, 19 Ill. 319; *Dunlap v. Daugherty*, 20 Ill. 397; *Lyon v. Kain*, 36 Ill. 362; *Skinner v. Fulton*, 39 Ill. 484; *Harding v. Curtis*, 45 Ill. 252; *Grand Tower Min., etc., Co. v. Gill*, 111 Ill. 541. See also *Gillespie v. Reed*, 3 McLean (U. S.) 377; *Doe v. Nelson*, 3 McLean (U. S.) 383; *Elwood v. Flannigan*, 104 U. S. 562; *Booth v. Cook*, 20 Ill. 130.

Indiana.—*Steeple v. Downing*, 60 Ind. 478. See also *Doe v. Smith*, 3 McLean (U. S.) 362.

Iowa.—*Jones v. Berkshire*, 15 Iowa 248, 83 Am. Dec. 412.

Michigan.—*Final v. Backus*, 18 Mich. 218; *Nelson v. Graff*, 44 Mich. 433; *Dohm v. Has-kin*, 88 Mich. 144. See also *Culbertson v. H. Witbeck Co.*, 127 U. S. 326; *Marston v. Brashaw*, 18 Mich. 81, 100 Am. Dec. 152.

Nebraska.—*Hoadley v. Stephens*, 4 Neb. 431; *Irwin v. Welch*, 10 Neb. 479; *O'Brien v. Gaslin*, 20 Neb. 347; *Connell v. Gallagher*, 36 Neb. 749, 39 Neb. 793. See also *Morton v. Smith*, 2 Dill. (U. S.) 316.

Oregon.—*Musgrove v. Bonser*, 5 Oregon 313, 20 Am. Rep. 737; *Fleschner v. Sump-ter*, 12 Oregon 161.

Pennsylvania.—*Creigh v. Beelin*, 1 W. & S. (Pa.) 83; *M'Intire v. Ward*, 5 Binn. (Pa.) 296, 6 Am. Dec. 417; *Crisswell v. Altemus*, 7 Watts (Pa.) 565; *Cassell v. Cooke*, 8 S. & R. (Pa.) 268, 11 Am. Dec. 610. See also *Sand-ford v. Decamp*, 8 Watts (Pa.) 542.

Texas.—*Texas Land Co. v. Williams*, 51 Tex. 51.

Wisconsin.—*Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436; *Fisher v. Vaughn*, 75 Wis. 609.

See also *Crispen v. Hannavan*, 50 Mo. 415; *Den v. Clay*, 9 Yerg. (Tenn.) 257.

Statutory Form need Not be Strictly Followed.—An acknowledgment regularly taken before an authorized officer of another state, with the adjudication of the clerk of a superior court that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," will not be rendered invalid by the omission in the clerk's certificate of the words "in due form," as required by the *North Carolina Code*, § 1246. *Deans v. Pate*, 114 N. Car. 194.

The Two Certificates may be Read Together.—Where the certificate by a county clerk, attesting the official character of the officer before whom the acknowledgment was taken, omitted the name of the justice and his official character, where these could be easily supplied when this certificate was read in connection with the certificate of acknowledgment, it was held that the two might be read together to sustain the clerk's certificate. *Thorn v. Mayer* (Buffalo Super. Ct.), 33 N. Y. Supp. 664.

Certificate by Unauthorized Officer.—A certificate of official character, given by an officer having no authority to issue such certificate, is a nullity. *Doe v. Smith*, 3 McLean (U. S.) 362; *Sartor v. Bolinger*, 59 Tex. 411. See also *Gillespie v. Reed*, 3 McLean (U. S.) 377.

A Judge who is His Own Clerk may certify under the seal of the court to his attestation of a deed. *Moore v. Hill*, 59 Ga. 760.

Want of Certificate of Authentication.—A deed inadmissible in evidence for want of a certificate that the officer before whom it was acknowledged was an authorized officer, and that his signature was genuine, and that the acknowledgment was according to the laws of the state where made, is not cured by the introduction of evidence that it was executed according to the laws of the state where it was acknowledged. *O'Brien v. Gaslin*, 20 Neb. 347.

Authority of Officer at Time of Taking Acknowl-

edgment.—A certificate, dated July 5th, that a person certifying an acknowledgment taken by him July 2d "is an acting justice of the peace," was held defective in not showing that the officer was a justice of the peace at the time of the acknowledgment. *Phillips v. People*, 11 Ill. App. 340.

A certificate by a clerk of court that a certain person "is" a commissioner duly authorized to take acknowledgments is not sufficient to show that he was such commissioner on the day preceding the date of the certificate, when the acknowledgment was taken. *Hilgendorf v. Ostrom*, 46 Ill. App. 465.

Clerical Error in Commission Accompanying Certificate.—Under the *Colorado* statute requiring deeds acknowledged before an officer of another state to be accompanied by a copy of his commission as officer, it was held that an evident clerical error in such commission, making it appear that the officer was not qualified at the time of taking the acknowledgment, was not a fatal defect. *Quimby v. Boyd*, 8 Colo. 194. See also *Denny v. Ashley*, 12 Colo. 165; and as to laws in *Maryland*, *Warner v. Hardy*, 6 Md. 525.

Effect of Change of Venue on Proof of Official Character.—Under the *Illinois* statute requiring a deed acknowledged within the state before a justice of the peace to be accompanied by a certificate by the county clerk that he was an acting justice of the peace, but providing that no such certificate shall be required if the acknowledgment is taken by a justice in the county where the land is situated, it was held that a deed without such certificate, being properly admitted in evidence in a suit brought in the county where it was acknowledged and recorded, was not rendered inadmissible by a change of venue of the suit to another county. *Holbrook v. Nichol*, 36 Ill. 161.

Certificate Authenticating Officer's Signature.—Under the *Georgia* statute requiring a deed executed in another state, in order to be recorded, to be attested by certain named officers or a judge of a court of record, with a certificate by the clerk under the seal of the court, that the signature of the judge is genuine, etc., a certificate failing to show that such court was a court of record, there being no other evidence of that fact, and containing no more positive assertion of the genuineness of the judge's signature than the recital by the clerk, "I am acquainted with the handwriting of said judge, and believe his signature to the foregoing to be genuine," is fatally defective. *MacKenzie v. Jackson*, 82 Ga. 80.

But a recital in the certificate of authentication "that the signature attached to the annexed instrument is genuine," was held to be a sufficient compliance with the statutory form that the certifying officer "is acquainted with the handwriting of such person, and that he verily believes the signature subscribed to the certificate of acknowledgment to be genuine." *Wells v. Atkinson*, 24 Minn. 161.

Certificate that Acknowledgment is According to Law.—Failure to state in the certificate of authentication that the acknowledgment was

according to the laws of the state when made, is a fatal defect. *Morton v. Smith*, 2 Dill. (U. S.) 316.

When the certificate of conformity made several years after the acknowledgment was taken certified that the deed was acknowledged according to the "existing" law of the foreign state, it was held that the use of that word did not invalidate the certificate, but it was referred back to the date of the acknowledgment. *Harrington v. Fish*, 10 Mich. 415. See also *Morse v. Hewett*, 28 Mich. 481; *Warner v. Hardy*, 6 Md. 525; *McPherson v. Featherstone*, 37 Wis. 632; and *supra*, this title, *Who may Take Acknowledgments—In Other States*.

Clerk in One State Certifying Acknowledgments Taken in Another State.—Under a statute authorizing the record of a deed executed and acknowledged in another state, when accompanied by a certificate of conformity by a clerk of a court of record, that the deed was executed and acknowledged according to the law of that state, the certificate of a clerk of a court of record in *New York* that the execution and acknowledgment of a deed in *Pennsylvania* before a *New York* commissioner was in accordance with the laws of *New York* is insufficient to admit the deed to record in *Illinois*. *Lyon v. Kain*, 36 Ill. 362.

Conformity to Law must be Shown Directly.—Under statutes authorizing the satisfaction of a decree of a surrogate court to be acknowledged in the same manner as deeds, and providing that deeds may be acknowledged in another state before authorized officers thereof, and that they may be recorded when accompanied by a certificate of the official character of the officer, it was held that a certificate of authority stating that the notary taking the acknowledgment of the satisfaction of such decree in another state was "duly authorized to take the same," without stating that he was authorized to take the acknowledgment of deeds, is insufficient. *Matter of Wilcox's Estate* (Surrogate Ct.), 21 N. Y. Supp. 780.

Certificate that Clerk is Clerk of a Court of Record.—A deed conveying land in *Illinois* was executed in another state, and acknowledged there before a justice of the peace in that state. The county clerk of the proper county, in certifying the official character of the justice of the peace, failed to state that he himself was the clerk of a court of record. It was held that this was not required, and that the deed was admissible in evidence, although not so certified. *Grand Tower Min., etc., Co. v. Gill*, 111 Ill. 541, *distinguishing* *Shepard v. Carriel*, 19 Ill. 319, in which a certificate by a county clerk of another state, certifying that an acknowledgment there taken was taken according to the laws of that state, was held to be defective in not stating that he was a clerk of a court of record, the statute requiring such certificate to be furnished by the clerk of a court of record. In this case, however, as not noticed in the case above, the court expressly extended its judgment to include the case of another certificate certifying the official character of an officer taking an acknowledgment out of the state,

acknowledgment is taken by an officer not having an official seal,¹ and by some states it is required in case the acknowledgment is taken by a justice of the peace out of the county for which he is appointed.²

the certificate of acknowledgment, however, being itself adjudged defective.

Judicial Notice that Certain Courts are Courts of Record.—Under the *Michigan* statute requiring the certificate of conformity and official character accompanying an acknowledgment taken by an officer in another state to be by a clerk of a court of record, a certificate purporting to be that of a clerk of the judicial courts of the commonwealth of Massachusetts for Franklin county, signed by the clerk and sealed with the seal of the Supreme Court, is good without a recital that such court is a court of record, the courts taking judicial notice of that fact. *Shotwell v. Harrison*, 22 Mich. 410; *Morse v. Hewett*, 28 Mich. 481; *Munroe v. Eastman*, 31 Mich. 283. See also *People v. Marion*, 29 Mich. 31.

And where, by the constitution of the sister state, the county clerk is also clerk of the Supreme Court, the court will take judicial notice of this also. *Morse v. Hewett*, 28 Mich. 481.

Certificate of Conformity after Record of Deed.

—A deed executed in another state in 1839 and recorded in *Michigan* in 1846, to which a proper certificate of authentication by a county clerk of a foreign state was attached in 1879, is cured of any previous defects for want of such certificate, and is admissible in evidence, and by the curative act of 1861 (*Howell's Mich. Annot. Stat.* 1882, § 5724) the record of 1846 was made constructive notice. *Healey v. Worth*, 35 Mich. 166.

But it was held that a deed executed without witnesses and acknowledged out of the state in 1843 was not cured by a clerk's certificate in 1855 not purporting to have been made by a clerk of a court of record, nor did this case come within the Act of 1861. *Donahue v. Klassner*, 22 Mich. 252.

Record Dates from Time of Filing Certificate of Authority.—A mortgage to land in A county was executed and acknowledged in the county of B, and filed in the office of the recorder of A county, but no certificate of the official character of the justice of the peace who took the acknowledgment was filed with the recorder until some months after the time of filing the mortgage. It was held that the mortgage could not be treated as recorded until the certificate was filed. *Reasoner v. Edmundson*, 5 Ind. 393.

Under the Michigan Code of 1833 a deed executed and acknowledged in another state according to the laws of that state was valid without any certificate of authentication. *Ives v. Kimball*, 1 Mich. 308; *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524; *Galpin v. Abbott*, 6 Mich. 17.

Valid Inter Partes without Certificate of Authentication.—A deed executed and acknowledged in a foreign state is good between the parties without any certificate of conformity or official character. *Connell v. Gallagher*, 36 Neb. 749; *Gillespie v. Johnston*, *Wright (Ohio)* 231. See also *Galpin v. Abbott*, 6

Mich. 17; and *supra*, this title, *Origin and Necessity*.

1. Under the laws in force in the *District of Columbia* in 1871 it was not necessary for a notary's certificate, under his official seal, of an acknowledgment taken out of the state, to be authenticated by the certificate of some person having cognizance of his official character and appointment. *Williams v. Ten Eyck*, 5 Mackey (D. C.) 168.

This is also the law in *Nebraska*. *Hoadley v. Stephens*, 4 Neb. 433; *Green v. Gross*, 12 Neb. 117; *Galley v. Galley*, 14 Neb. 174. See also *Summer v. Mitchell*, 29 Fla. 179; *South-erin v. Mendum*, 5 N. H. 420; *O'Brien v. Gaslin*, 20 Neb. 347.

Under a statute requiring deeds acknowledged without the state, before an officer not using an official seal, to be accompanied by a certificate by a clerk of a court of record, or other proper officer, showing the official character of the officer taking the acknowledgment, that said clerk is well acquainted with the handwriting of the officer, that he believes his signature to be genuine, and that the instrument is executed and acknowledged according to the laws of the state, a certificate failing to state the three latter particulars was held void. *Irwin v. Welch*, 10 Neb. 479.

2. *Milligan v. Mayne*, 2 Cranch (C. C.) 210; *McGinnis v. Egbert*, 8 Colo. 41; *Holbrook v. Nichol*, 36 Ill. 161; *Reasoner v. Edmundson*, 5 Ind. 393; *M'Connell v. Brown*, Litt. Sel. Cas. (Ky.) 459; *Hall v. Gittings*, 2 Har. & J. (Md.) 380; *Beall v. Lynn*, 6 Har. & J. (Md.) 336; *Warner v. Hardy*, 6 Md. 525; *Dyson v. Simmons*, 48 Md. 207; *Sitler v. McComas*, 66 Md. 135. See also *Deery v. Cray*, 5 Wall. (U. S.) 795; *Doe v. Miles*, 3 Ill. 315; *Griffith v. Ridgely*, 2 Har. & M. (Md.) 418.

Under the former laws of *New York* deeds acknowledged before a county judge, who was of the degree of counsellor at law in the Supreme Court, were entitled to be recorded and read in evidence in any county in the state without a certificate of authentication by the county clerk. *Jackson v. Chapin*, 5 Cow. (N. Y.) 485; *Jackson v. Phillips*, 9 Cow. (N. Y.) 94.

But such certificate was necessary in case of acknowledgments before a county judge not of the degree of counsellor, or before a commissioner of deeds appointed for any county or city. *Wood v. Weiant*, 1 N. Y. 77.

This applies to the acknowledgment of a bond of indemnity before a commissioner of deeds, as well as to the acknowledgment of conveyances of real estate, *Campbell v. Hoyt*, 23 Barb. (N. Y.) 555; but does not apply to a deed executed prior to 1818, *Hunt v. Johnson*, 19 N. Y. 279.

Under the Act of 1847 it was held immaterial whether the judge was or was not of the degree of counsellor, and his certificate of acknowledgment might be read in evidence or recorded in any other county with-

2. What It must Certify—*a*. COMPLIANCE WITH STATUTE.—A certificate must state all that is necessary to show a valid acknowledgment; no material fact should be omitted.¹ While it is better that the statutory form be strictly followed, this is by no means necessary.

Strict or Substantial Compliance.—The courts have generally been disposed to give to the certificate of acknowledgment a liberal construction, and have almost uniformly held that a certificate showing a substantial compliance with the statutory requirements is sufficient.² By some courts, however, in case of

out authentication by the county clerk. *People v. Hurlbutt*, 44 Barb. (N. Y.) 126.

1. Certificate must Show Every Material Fact—*Illinois*.—*Ennor v. Thompson*, 46 Ill. 214; *Lindley v. Smith*, 46 Ill. 523; *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128.

Michigan.—*Dewey v. Campau*, 4 Mich. 565.

Missouri.—*Hughes v. Morris*, 110 Mo. 306.

New York.—*People v. Register*, 6 Abb. Pr. (N. Y. Supreme Ct.) 180.

Tennessee.—*Ellett v. Richardson*, 9 Baxt. (Tenn.) 293.

Virginia.—*Hairston v. Doe*, 12 Leigh (Va.) 445; *Virginia Coal, etc., Co. v. Roberson*, 88 Va. 116; *Hockman v. McClanahan*, 87 Va. 33.

2. Certificate must Show Substantial Compliance with Statute—*United States*.—*Talbot v. Simpson*, Pet. (C. C.) 188; *Lane v. Dolick*, 6 McLean (U. S.) 200; *Dundas v. Hitchcock*, 12 How. (U. S.) 256; *Kelly v. Calhoun*, 95 U. S. 710; *McCormack v. James*, 36 Fed. Rep. 14.

Alabama.—*Bradford v. Dawson*, 2 Ala. 203; *Stewart v. Fowler*, 3 Ala. 629; *Shelton v. Armor*, 13 Ala. 647; *Keller v. Moore*, 51 Ala. 340; *Cahall v. Citizens' Mut. Bldg. Assoc.*, 61 Ala. 232; *Sharpe v. Orme*, 61 Ala. 263; *Barnett v. Proskauer*, 62 Ala. 486; *Boykin v. Smith*, 65 Ala. 294; *Coker v. Ferguson*, 70 Ala. 284; *Scott v. Simons*, 70 Ala. 352; *Gates v. Hester*, 81 Ala. 357; *Homer v. Schonfeld*, 84 Ala. 313; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79; *East Tennessee, etc., R. Co. v. Davis*, 91 Ala. 615.

Arkansas.—*Trammell v. Thurmond*, 17 Ark. 203; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Tubbs v. Gatewood*, 26 Ark. 128; *Little v. Dodge*, 32 Ark. 453; *Martin v. O'Bannon*, 35 Ark. 62.

California.—*Henderson v. Grewell*, 8 Cal. 581; *Goode v. Smith*, 13 Cal. 81; *Spect v. Gregg*, 51 Cal. 108; *Muir v. Galloway*, 61 Cal. 498.

Florida.—*Einstein v. Shouse*, 24 Fla. 490; *L'Engle v. Reed*, 27 Fla. 345; *Summer v. Mitchell*, 29 Fla. 179; *Jackson v. Haisley* (Fla., 1895), 17 So. Rep. 631.

Georgia.—*White v. Magarahan*, 87 Ga. 217, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), this title.

Illinois.—*Vance v. Schuyler*, 6 Ill. 160; *Delauney v. Burnett*, 9 Ill. 454; *Hughes v. Lane*, 11 Ill. 123, 50 Am. Dec. 436; *Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490; *Shephard v. Carriel*, 19 Ill. 313; *Adams v. Bishop*, 19 Ill. 395; *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711; *Moore v. Titman*, 33 Ill. 358; *Russell v. Rumsey*, 35 Ill. 362; *Stuart v. Dutton*, 39 Ill. 91; *Tourville v. Pierson*, 39 Ill. 446; *Lindley v. Smith*, 46 Ill. 523; *Alvis v. Morrison*, 63 Ill. 181, 14 Am. Rep. 117; *Calumet, etc., Canal, etc., Co. v. Russell*, 68 Ill. 426; *Hartshorn v. Dawson*, 79 Ill. 108 *Schroder v.*

Keller, 84 Ill. 46; *Edwards v. Schoeneman*, 104 Ill. 278.

Indiana.—*Owen v. Norris*, 5 Blackf. (Ind.) 479; *Pardun v. Dobesberger*, 3 Ind. 389; *Woods v. Polhemus*, 8 Ind. 60.

Iowa.—*Tiffany v. Glover*, 3 Greene (Iowa) 387; *O'Ferrall v. Simplot*, 4 Greene (Iowa) 162; *Wickersham v. Reeves*, 1 Iowa 413; *Cavender v. Smith*, 5 Iowa 157; *Bell v. Evans*, 10 Iowa 353; *Dickerson v. Davis*, 12 Iowa 353; *Reynolds v. Kingsbury*, 15 Iowa 238; *Milner v. Nelson*, 86 Iowa 452.

Kansas.—*Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273.

Kentucky.—*Martin v. Davidson*, 3 Bush (Ky.) 572; *Nantz v. Bailey*, 3 Dana (Ky.) 111; *Gordon v. Leech*, 81 Ky. 229; *Sutton v. Polard* (Ky., 1891), 16 S. W. Rep. 126; *Shaw v. Shaw* (Ky., 1894), 24 S. W. Rep. 630.

Maryland.—*Heath v. Eden*, 1 Har. & J. (Md.) 751; *Hollingsworth v. M'Donald*, 2 Har. & J. (Md.) 230, 3 Am. Dec. 545; *Lewis v. Waters*, 3 Har. & M. (Md.) 430; *Young v. State*, 7 Gill & J. (Md.) 253; *Warner v. Hardy*, 6 Md. 525; *Basshor v. Stewart*, 54 Md. 376.

Michigan.—*Sibley v. Johnson*, 1 Mich. 380; *Harrington v. Fish*, 10 Mich. 415.

Minnesota.—*Wells v. Atkinson*, 24 Minn. 161.

Mississippi.—*Hall v. Thompson*, 1 Smed. & M. (Miss.) 443; *Pickett v. Doe*, 5 Smed. & M. (Miss.) 470, 43 Am. Dec. 523; *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373; *Love v. Taylor*, 26 Miss. 567; *Russ v. Wingate*, 30 Miss. 440; *Bernard v. Elder*, 50 Miss. 336; *Allen v. Lenoir*, 53 Miss. 321.

Missouri.—*Bohan v. Casey*, 5 Mo. App. 101; *Gorman v. Stanton*, 5 Mo. App. 585; *Alexander v. Merry*, 9 Mo. 514; *McDaniel v. Priest*, 12 Mo. 544; *Thomas v. Meier*, 18 Mo. 573; *Chauvin v. Lownes*, 23 Mo. 223; *Garnier v. Barry*, 28 Mo. 438; *Johnson v. Prewitt*, 32 Mo. 553; *McClure v. McClurg*, 53 Mo. 173; *Dale v. Wright*, 57 Mo. 110; *Wannell v. Kem*, 57 Mo. 478; *Steffen v. Bauer*, 70 Mo. 399; *Hughes v. McDivitt*, 102 Mo. 77; *Wilson v. Quigley*, 107 Mo. 98; *Hughes v. Morris*, 110 Mo. 306; *Warder v. Henry*, 117 Mo. 530.

Nebraska.—*Burbank v. Ellis*, 7 Neb. 156; *Becker v. Anderson*, 11 Neb. 493; *Spitznagle v. Vanhesssch*, 13 Neb. 338; *Gregory v. Kenyon*, 34 Neb. 640.

Nevada.—*Johnson v. Badger Mill, etc., Co.* 13 Nev. 351.

New Jersey.—*Den v. Geiger*, 9 N. J. L. 225; *Den v. Hamilton*, 12 N. J. L. 109; *Thayer v. Torrey*, 37 N. J. L. 339.

New York.—*Troup v. Haight*, Hopk. (N. Y.) 239; *Meriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232; *Dennis v. Tarpenny*, 20 Barb.

acknowledgments by married women, a strict and even a literal compliance

(N. Y.) 371; *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Clafin v. Smith*, 35 Hun (N. Y.) 372; *Sheldon v. Stryker*, 42 Barb. (N. Y.) 284; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Fryer v. Rockefeller*, 63 N. Y. 268; *Canandaqua Academy v. McKechnie*, 90 N. Y. 618; *Smith v. Boyd*, 101 N. Y. 472.

North Carolina.—*Devereux v. McMahon*, 102 N. Car. 284; *Mitchell v. Budgers*, 113 N. Car. 63; *Deans v. Pate*, 114 N. Car. 194.

Ohio.—*Brown v. Farran*, 3 Ohio 140; *Silliman v. Cummins*, 13 Ohio 116; *Barton v. Morris*, 15 Ohio 408; *Ward v. McIntosh*, 12 Ohio St. 231; *Carney v. Hopple*, 17 Ohio St. 39; *Dengenhart v. Cracraft*, 36 Ohio St. 549.

Oregon.—*Musgrove v. Bonser*, 5 Oregon 313, 20 Am. Rep. 737.

Pennsylvania.—*Watson v. Bailey*, 1 Binn. (Pa.) 470, 2 Am. Dec. 462; *Evans v. Com.*, 4 S. & R. (Pa.) 272, 8 Am. Dec. 711; *M'Intire v. Ward*, 5 Binn. (Pa.) 296, 6 Am. Dec. 417; *Shaller v. Brand*, 6 Binn. (Pa.) 435, 6 Am. Dec. 482; *Watson v. Mercer*, 6 S. & R. (Pa.) 49, 9 Am. Dec. 411; *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 263, 11 Am. Dec. 724; *Luffborough v. Parker*, 12 S. & R. (Pa.) 48; *Graham v. Long*, 65 Pa. St. 383; *Miller v. Wentworth*, 82 Pa. St. 280; *Hornbeck v. Mutual Bldg.*, etc., Assoc., 88 Pa. St. 64; *Gable's Appeal* (Pa., 1886), 7 Atl. Rep. 52.

Rhode Island.—*Churchill v. Monroe*, 1 R. I. 209; *Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691.

Tennessee.—*Peacock v. Tompkins*, 1 Humph. (Tenn.) 135; *Anderson v. Bewley*, 11 Heisk. (Tenn.) 29; *Davis v. Bogle*, 11 Heisk. (Tenn.) 315.

Texas.—*Moses v. Dibrell*, 2 Tex. Civ. App. 457; *Dorn v. Best*, 15 Tex. 62; *Deen v. Wills*, 21 Tex. 642; *Smith v. Elliott*, 39 Tex. 201; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Watkins v. Hall*, 57 Tex. 1; *Mullins v. Weaver*, 57 Tex. 5; *Schramm v. Gentry*, 63 Tex. 583; *Little v. Weatherford*, 63 Tex. 638; *Huff v. Webb*, 64 Tex. 284; *Talbert v. Dull*, 70 Tex. 675; *Salmon v. Huff*, 80 Tex. 133; *Wilson v. Simpson*, 80 Tex. 279; *McDaniel v. Horrell*, 1 Tex. Unrep. Cas. 521.

Virginia.—*Langhorne v. Hobson*, 4 Leigh (Va.) 224; *Tod v. Baylor*, 4 Leigh (Va.) 498; *Hairston v. Doe*, 12 Leigh (Va.) 445; *Welles v. Cole*, 6 Gratt. (Va.) 645; *Harrisonburg First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Hockman v. McClanahan*, 87 Va. 33; *Virginia Coal, etc., Co. v. Roberson*, 88 Va. 116.

West Virginia.—*Wise v. Postlewait*, 3 W. Va. 452; *McMullen v. Eagan*, 21 W. Va. 233; *Watson v. Michael*, 21 W. Va. 568; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622; *Blair v. Sayre*, 29 W. Va. 604.

Wisconsin.—*Smith v. Garden*, 28 Wis. 685; *Wilson v. Henry*, 40 Wis. 594.

See also *Fipps v. McGehee*, 5 Port. (Ala.), 413; *Whitney v. Arnold*, 10 Cal. 531; *Ingholdsby v. Juan*, 12 Cal. 564; *Clark v. Connor*, 28 Iowa 311; *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561; *Abrams v. Rhoner*, 44 Hun (N. Y.) 507, 9 N. Y. St. Rep. 211; *Van Winkle v. Constantine*, 10 N. Y. 422; *Browder v. Browder*, 14 Ohio St. 589; *Fosdick v. Risk*,

15 Ohio 84, 45 Am. Dec. 562; *Cavit v. Archer*, 52 Tex. 166.

Under the Kentucky Act of 1792, providing for the acknowledgment of deeds before two justices of the peace in the county where the grantor resides, and requiring the justices to state in the certificate that the deed was so acknowledged, and also so subscribed or signed, in their presence, a certificate failing to show affirmatively that both these acts were done in the presence of the officers is defective. *Womack v. Hughes*, Litt. Sel. Cas. (Ky.) 292; *M'Connell v. Brown*, Litt. Sel. Cas. (Ky.) 459; *Hyne v. Campbell*, 6 T. B. Mon. (Ky.) 286; *Kay v. Jones*, 7 J. J. Marsh. (Ky.) 38; *Smith v. White*, 1 B. Mon. (Ky.) 16; *Harris v. Price*, 14 B. Mon. (Ky.) 333; *Brown v. Swift* (Ky., 1886), 1 S. W. Rep. 474. See also *Taylor v. Bush*, 5 T. B. Mon. (Ky.) 85.

Under the Pennsylvania Act of 1770 a certificate by the officer stating that husband and wife acknowledged the deed to be their act and deed, "she being of full age, and by him examined apart," is insufficient to pass the wife's estate. *Watson v. Bailey*, 1 Binn. (Pa.) 470, 2 Am. Dec. 462; *Evans v. Com.*, 4 S. & R. (Pa.) 272, 8 Am. Dec. 711; *Watson v. Mercer*, 6 S. & R. (Pa.) 49, 9 Am. Dec. 411; *Fowler v. McClurg*, 6 S. & R. (Pa.) 143.

The following certificate was held insufficient in *Tennessee*: "This deed of conveyance was acknowledged in open court and ordered to be registered." *Lipe v. Mitchell*, 2 Yerg. (Tenn.) 400; *Malone v. Stevens*, 2 Yerg. (Tenn.) 520; *Crutchfield v. Stewart*, 10 Yerg. (Tenn.) 237. See also *Cox v. Bowman*, 2 Yerg. (Tenn.) 108; *Smith v. Boren*, 2 Yerg. (Tenn.) 238; *Henderson v. Crawford*, 7 Yerg. (Tenn.) 439; *Greer v. Smith*, 7 Yerg. (Tenn.) 487; *Yerger v. Young*, 9 Yerg. (Tenn.) 37.

But the following certificate indorsed on the deed was held sufficient: "Then was the execution of the within conveyance duly acknowledged in open court by S. C., the grantor therein named, and admitted to record; let it be registered." *Love v. Shields*, 3 Yerg. (Tenn.) 405.

Under the Texas Statute (Hartley's Dig., art. 2777) providing that any conveyance "shall be duly registered in the office of the proper county upon the acknowledgment of the parties or party signing the same," before certain named officers, an assignment signed by the grantor and accompanied by an officer's certificate that the grantor acknowledged to him "that he signed over the above deed as therein expressed" was properly admitted to record. *Harlowe v. Hudgins*, 84 Tex. 107.

Under the Virginia Act of 1792, requiring the separate examination of the wife, but not expressly requiring that the officers should certify that the deed was explained to her, where the certificate stated that the wife was privately examined, and acknowledged the deed freely and voluntarily, and that she was willing for it to be recorded, but failed to state that it was shown or explained to her by the officers, and that she declared that she had willingly signed and sealed the same, it was held that if she had in fact signed the

with the requisitions of the statute has been insisted upon.¹

A certificate by the officer that the acknowledgment has been made "according to law" is generally held to be insufficient to show compliance with statute, it being the duty of the officer to certify as to the facts, while the court is to decide upon the sufficiency of the acknowledgment.²

deed such certificate was substantially in compliance with the requisitions of the statute, and binding on her; but if she had not signed the deed, such certificate was insufficient to make the deed binding on her. *Tod v. Baylor*, 4 Leigh (Va.) 498.

Under Section 1437 of the General Statutes of Washington, providing that a certificate of acknowledgment substantially in the form there given, containing a recital that the execution of the instrument was the free and voluntary act of the party executing the same, but not providing that this form should be exclusive, it was held that a certificate of acknowledgment of a deed by husband and wife stating that they acknowledged that they signed and executed the deed, and that the wife, on separate examination, acknowledged that she signed the same voluntarily, is sufficient. *Kley v. Geiger*, 4 Wash. 484.

"Acknowledged before Me," etc., Insufficient. —Where the statute requires that a deed or mortgage to become efficacious must be acknowledged by the grantor before a competent officer who must certify such acknowledgment, "with the date and year when the same was made, and by whom," a certificate "Subscribed and acknowledged before me this eighth day of June, 1872," is entirely destitute of the chief ingredients essential to constitute a valid acknowledgment. *Myers v. Boyd*, 96 Pa. St. 427.

An acknowledgment of an assignment of land "acknowledged by S. D. E., this fifth day of December, A.D. 1859, before me, T. D., justice of the peace," was held insufficient to entitle the instrument to be recorded. *Ryerson v. Eldred*, 18 Mich. 12.

1. Strict Compliance Sometimes Required. — *Wentworth v. Clark*, 33 Ark. 432; *Dewey v. Campau*, 4 Mich. 565; *Laird v. Scott*, 5 Heisk. (Tenn.) 314; *Perry v. Calhoun*, 8 Humph. (Tenn.) 551. See also *Stidham v. Matthews*, 29 Ark. 650; *Barrett v. Tewksbury*, 9 Cal. 13, 15 Cal. 354; *Scott v. Battle*, 85 N. Car. 184, 39 Am. Rep. 694.

The statutory provisions as to a married woman's private examination and acknowledgment ought to be substantially and literally adhered to. *Den v. Wilson*, 2 Dev. (N. Car.) 306; *Smith v. Williams*, 38 Miss. 48.

2. Acknowledgment "according to law," etc. —Statements in the certificates that the acknowledgment was taken "in due form," or "according to law," or "as the law directs" have been held insufficient. *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Blackburn v. Pennington*, 8 B. Mon. (Ky.) 217; *Flanagan v. Young*, 2 Har. & M. (Md.) 38; *Den v. Cobbs*, 1 Dev. & B. (N. Car.) 228; *Den v. Lewis*, 8 Ired. (N. Car.) 70, 47 Am. Dec. 338; *Meddock v. Williams*, 12 Ohio 387.

In *Meddock v. Williams*, 12 Ohio 387,

Read, J., said: "A certificate by an officer that he has acted according to law is no evidence that the things are done which the law requires. It is evidence of the opinion of the officer, nothing more. It is the duty of the officer to certify the things he has done, and the court will then judge whether he has pursued the law. It is not a certificate of the opinion of the officer that he has pursued the law which the statute requires, but a certificate of the acts he has pursued in obedience to the statute. The certificate itself must contain all the acts done, that it may appear upon its face that the requisitions of the statute have been complied with."

In several of the states, however, the decisions have not been uniform. Thus in *Kentucky*, under a statute requiring the certificate to state merely the fact and time of acknowledgment, a certificate of acknowledgment "as the law directs" is sufficient; privy examination, voluntary acknowledgment, and consent to record being all presumed from such certificate. *Gordon v. Leech*, 81 Ky. 229.

In *Maryland*, under the Act of 1699, a certificate of acknowledgment of a deed by husband and wife conveying the wife's land was sufficient if it stated that the wife was "first examined as the law requires." *Robins v. Bush*, 1 Har. & M. (Md.) 50; *Robinson v. Lloyd*, 1 Har. & M. (Md.) 78.

In *North Carolina* it has been held that when the clerk of a court of record certifies that an instrument has been "duly proved" in that court it is implied that everything required by law has been proved, upon the maxim *res judicata pro veritate accipitur*. *Horton v. Hagler*, 1 Hawks (N. Car.) 48.

In *Ohio* there is an early decision leaning against the doctrine announced in the text. *Newcomb v. Smith*, *Wright* (Ohio) 208.

An allegation, in a petition for judgment on a mortgage executed by a husband and wife, that said mortgage was "duly acknowledged" by the wife, must be held to mean that it was acknowledged by her in such manner as to be legally binding on her as her act and deed, and is sufficient to authorize the introduction of testimony to show that the acknowledgment was in the manner required by law. *Roy v. Bremond*, 22 Tex. 626.

A certificate of a married woman's acknowledgment, reciting that the said woman, "being examined separate and apart from her husband, as the law directs, acknowledged the above deed of conveyance to be their voluntary act and deed for the uses and purposes therein mentioned," was held sufficient under the *Indiana* Act of 1824. *Stevens v. Doe*, 6 Blackf. (Ind.) 475; *Watson v. Clendennin*, 6 Blackf. (Ind.) 477; *Pardun v. Dobesberger*, 3 Ind. 389.

b. FACT OF ACKNOWLEDGMENT.—The certificate must show that the grantor acknowledged the instrument to be his act and deed.¹

Sufficiency of Acknowledgment must be Decided by the Court.—The question as to whether a deed has been properly executed and acknowledged should not be submitted to the jury, but is a question of law, to be decided by the court. *Bullock v. Narrott*, 49 Ill. 62.

The register must record a deed upon a proper certificate of probate or acknowledgment; he has no power to determine whether the probate is valid or invalid; and if the certificate be good he must register, although the probate is bad, and he cannot record a deed on a defective certificate, though the probate may have been properly made. *M'Iver v. Robertson*, 3 Yerg. (Tenn.) 84.

1. Fact of Acknowledgment must be Shown—California.—*Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Henderson v. Grewell*, 8 Cal. 581.

Connecticut.—*Stanton v. Button*, 2 Conn. 529; *Pendleton v. Button*, 3 Conn. 406; *Hayden v. Westcott*, 11 Conn. 129.

Georgia.—*White v. Magarahan*, 87 Ga. 217.

Illinois.—*Short v. Conlee*, 28 Ill. 219; *Stuart v. Dutton*, 39 Ill. 91.

Maryland.—*Lewis v. Waters*, 3 Har. & M. (Md.) 430.

Michigan.—*Dewey v. Campau*, 4 Mich. 565.

Missouri.—*Cabell v. Grubbs*, 48 Mo. 353.

New Jersey.—*Hoboken Land, etc., Co. v. Kerrigan*, 31 N. J. L. 13.

Texas.—*Huff v. Webb*, 64 Tex. 284; *Davis v. McCartney*, 64 Tex. 584.

Virginia.—*Hockman v. McClanahan*, 87 Va. 33; *Virginia Coal, etc., Co. v. Roberson*, 88 Va. 116; *Clinch River Veneer Co. v. Kurth*, 88 Va. 222.

See also *Ingraham v. Grigg*, 13 Smed. & M. (Miss.) 22; *People v. Harrison*, 8 Barb. (N. Y.) 560.

Illustrations.—A certificate stating that the grantor "acknowledged the deed to be his act and deed for the purpose therein mentioned" is sufficient, *Dawson v. Hayden*, 67 Ill. 52; or "to be his act and deed," *Lockwood v. Mills*, 39 Ill. 602.

But a certificate in these words: "Personally appeared A B, known to me to be the person described in and who executed the same, freely, voluntarily, and for the uses and purposes therein mentioned," is not sufficient. *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340.

It was held in *Indiana* that a certificate, "Personally appeared A. P. and N. P., his wife, acknowledged," etc., sufficiently shows acknowledgment by both. *Brown v. Corbin*, 121 Ind. 455.

In *Texas* a certificate attached to a power of attorney reciting that the subscriber thereof personally appeared before the magistrate, and in his presence "signed, sealed, and delivered the same for the uses and purposes therein contained," is not sufficient to admit the instrument to record. *McDaniel v. Needham*, 61 Tex. 269.

A certificate stating that "the subscriber" of a deed appeared and acknowledged it is

defective in not stating explicitly that the person who made the acknowledgment was the grantor. *Downing v. Gallagher*, 2 S. & R. (Pa.) 455.

A deed to be operative must be acknowledged to be the deed of the party, and where a married woman acknowledges "the lands to be the right and estate of the party, according to the Act of Assembly," the acknowledgment is defective. *Lewis v. Waters*, 3 Har. & M. (Md.) 430.

But a deed so acknowledged was held good in *Hoddy v. Harryman*, 3 Har. & M. (Md.) 581; *Blair v. Valliant*, 4 Har. & M. (Md.) 62.

Under the *Virginia* Act of 1792, requiring a deed to be acknowledged by the party or parties who sealed or delivered it, it was held that it need not affirmatively appear from the certificate that the acknowledgment was made by the grantor, and deeds certified to have been acknowledged before the court were admitted in evidence, although it did not appear that they were acknowledged by their respective grantors. *Wise v. Postlewait*, 3 W. Va. 452.

Presumption that Deed was Acknowledged by Grantor.—Where a deed was acknowledged in open court and duly recorded, although it did not appear by whom the acknowledgment was made, it was presumed that it was acknowledged by the person executing the deed, and the acknowledgment was held good. *Philips v. Ruble*, Litt. Sel. Cas. (Ky.) 221.

But where the certificate of acknowledgment of a deed executed by J. T. recited that "personally appeared J. T. and acknowledged," etc., it was held fatally defective for not showing that the person appearing was the grantor. *Torrens v. Currie*, 22 New Bruns. 342.

Acknowledgment of Delivery—Mississippi.—A certificate that fails to show that the grantor acknowledged the delivery as well as the signing of the deed was held defective. *Buntyn v. Shippers' Compress Co.*, 63 Miss. 94.

Where a married woman acknowledged that she "executed" a deed, this was held equivalent to "signed, sealed, and delivered." *Smith v. Williams*, 38 Miss. 48. See also *infra*, this title, *The Certificate—Errors and Omissions*.

Adoption of Signature by Acknowledgment.—

It is not required that the instrument shall be executed in the presence of the officer, nor is it material that he should know that the signature was written by the grantor, for if the grantor acknowledges before the officer the due execution of the instrument, he thereby recognizes and adopts the signature as his own. *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273.

It is the fact of acknowledgment, and not the genuineness of the signature, that the certificate must show; and the acknowledgment of a deed by the grantor is not rendered invalid by the fact that the signature was affixed by another person. *Morris v. Sar-*

The use of the word "acknowledged" is not essential; words of equivalent import may be employed;¹ and it has been held that the fact of acknowledgment may be shown by implication.² The acknowledgment can be only upon personal appearance, and a certificate of a married woman's acknowledgment made by an officer on the assurance of a third person that the grantor executed the deed, is void.³ In some states the certificate must show that the acknowledgment was voluntarily made.⁴

Explanation of Deed.—In *New Jersey* the officer is required to certify that the contents of the instrument were made known to the grantor.⁵

c. NAME AND IDENTITY OF GRANTOR.—According to the better practice, the name of the grantor should be stated in the certificate of acknowledgment, but it seems to be generally held that the omission of the name⁶ from the

gent, 18 Iowa 90; *Newton v. Emerson*, 66 Tex. 142.

Certificate in Alternative.—A certificate of probate reciting that a subscribing witness said "that he either saw J. L. subscribe his name to the within instrument, and acknowledged the same to be his act and deed, or that the said J. L. requested him to witness the same after he had executed it, and acknowledged that he signed, sealed, and delivered the same," etc., was held to be a nullity on account of being in the alternative, and the deed was therefore improperly admitted in evidence. *Riley v. Pool*, 5 Tex. Civ. App. 346; *Harvey v. Cummings*, 68 Tex. 599.

1. Term "Acknowledgment" Not Essential.—*Chouteau v. Allen*, 70 Mo. 290. See also *Short v. Conlee*, 28 Ill. 219.

Omission by Clerical Error.—And where such words have been omitted by an evident clerical error they may be supplied by intentment after an inspection of the certificate in connection with the deed. *Basshor v. Stewart*, 54 Md. 376.

But compare *Stanton v. Button*, 2 Conn. 527, where it was held that a certificate, "Personally appeared A B, signer of the above instrument ——— to be his free act, etc.," could not be aided by intentment or construction. See also *Dewey v. Campau*, 4 Mich. 565.

2. Acknowledgment Shown by Implication.—Where the certificate of acknowledgment of an ancient deed stated that the grantors "came to acknowledge" it, this was held to sufficiently imply that they did acknowledge the deed. *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89.

Acknowledgment is Necessarily Involved in the Private Examination; so that if the certificate shows that the wife was privately examined separate and apart from her husband it will be sufficient, although it omit to state the fact of acknowledgment. *Rainey v. Gordon*, 6 Humph. (Tenn.) 345.

3. Mays v. Hedges, 79 Ind. 288.

4. Certificate must Show Voluntary Acknowledgment—*Iowa, Nebraska*.—*Wickersham v. Reeves*, 1 Iowa 413; *Newman v. Samuels*, 17 Iowa 528. This may be shown by the tenor and words of the certificate as well as by the words of the statute. *Dickerson v. Davis*, 12 Iowa 353; *Becker v. Anderson*, 11 Neb. 493; *Spitznagle v. Vanhesssch*, 13 Neb. 338; *Keeling v. Hoyt*, 31 Neb. 453.

See also, as to this requirement in case of acknowledgments by married women, *supra*, this title, *Who may Make Acknowledgments—Married Women*.

5. Explanation of Contents of Deed—New Jersey.—It was held under the *New Jersey* Act of 1820 that a certificate of acknowledgment failing to set forth that the judge first made known the contents of the instrument to the person making the acknowledgment, and was satisfied that he was the grantor mentioned therein, as required by this act, was insufficient to render the deed admissible in evidence, and that the act directing these things was compulsory and not merely directory. *Pinckney v. Burrage*, 31 N. J. L. 21.

It was held in *New Jersey* that the omission to read a deed to an illiterate marksman rendered the certificate of acknowledgment of no value as proof where the dispute was whether that was the paper read, or whether it was correctly read to the party executing it. *Suffern v. Butler*, 19 N. J. Eq. 202. See also *New Jersey Revision*, "Conveyances," §§ 4, 9.

Deaf and Dumb Grantor.—See, as to explanation of contents of deed to a deaf and dumb grantor, *Morrison v. Morrison*, 27 Gratt. (Va.) 190.

6. Place for Name of Grantor Left Blank.—A certificate in these or equivalent words: "Personally came ——— to me known to be the identical person whose name is affixed to the foregoing instrument as grantor," etc., the grantor being nowhere named in the certificate, is not fatally defective, the name being supplied by reference to the body of the deed. *Magness v. Arnold*, 31 Ark. 103; *Sanford v. Bulkley*, 30 Conn. 344; *Milner v. Nelson*, 86 Iowa 452; *Pickett v. Doe*, 5 Smed. & M. (Miss.) 470, 43 Am. Dec. 523; *Wilcoxon v. Osborn*, 77 Mo. 621.

And to the same effect are *Livingston v. Kettelle*, 6 Ill. 116, 41 Am. Dec. 166; *Wise v. Postlewait*, 3 W. Va. 452.

But the contrary has been held where the certificate contained no clause identifying the grantor as the person acknowledging the instrument. *Hayden v. Westcott*, 11 Conn. 129; *Smith v. Hunt*, 13 Ohio 260, 42 Am. Dec. 201; *Lenahan v. Akana*, 6 Hawaiian 538.

And it has been held that a certificate, although it contains the name of the grantor, is fatally defective if it does not appear that

certificate or a mistake in the name ¹ will not invalidate the acknowledgment if it appears with reasonable certainty, from the certificate and deed together, that the grantor in fact acknowledged the instrument. It is essential that

such grantor acknowledged the execution of the instrument. Thus an acknowledgment in the following form is invalid: "Personally appeared before me A. B., to me known, etc., and acknowledged that — executed the said deed." *Buell v. Irwin*, 24 Mich. 145; *Huff v. Webb*, 64 Tex. 284.

1. Variances in Name Held Not Fatal.—Where the certificate of acknowledgment described the person named therein as the grantor of the deed, the following discrepancies in name were held immaterial: "J. H. Hennepin" for "J. H. Huntington"; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58. "Charles F. Rogers" for "Charles Y. Rogers"; *Rogers v. Manley*, 46 Minn. 403. "Wm. Strieber" for "Wm. Schrieber"; *Rodes v. St. Anthony, etc., Elevator Co.*, 49 Minn. 370. "Richard M. Hopkins" for "R. M. Hopkins"; *Copelin v. Shuler* (Tex., 1887), 6 S. W. Rep. 668. "Adam B. Sharp" for "A. B. Sharp"; *Briggs v. McBride*, 17 New Bruns. 663. "Michael Thompson" for "M. Thompson"; *Paxton v. Boss* (Iowa, 1894), 57 N. W. Rep. 428.

In the body of a deed one of the grantors was described as Richard G. Bailey, and it was signed and sealed by R. G. Bailey. The certificate of acknowledgment recited that Richard G., who executed the instrument, acknowledged, etc. It was held that this rendered it sufficiently certain that the deed was acknowledged by Richard G. Bailey, the grantor. *Chandler v. Spear*, 22 Vt. 388.

Where the grantor was named in the deed and certificate of acknowledgment as "Robert P. McClintock," but the deed was signed "R. Parker McClintock," it was held that it sufficiently appeared that the two names belonged to the same person. *Grand Tower Min., etc., Co. v. Gill*, 111 Ill. 541.

A clerical error in the certificate by which it appears that a deed made by Jasper M. Williamson and signed by J. M. Williamson, was acknowledged by James M. Williamson, is not sufficient to warrant the rejection of the deed as evidence, the identity of the grantor being otherwise proved. *Cheek v. Herndon*, 82 Tex. 146.

A certificate of probate in which the name of one of the grantors was given as William King instead of William Hinton, King being the name of an attesting witness, was held valid. *Mitchell v. Bridgers*, 113 N. Car. 63.

Where the certificate of a wife's acknowledgment of a homestead mortgage recites that "the within-named S. E. S., known to me to be the wife of the said A. J. S., who being by me examined * * * touching her signature to the within mortgage, acknowledged that she signed the same," the mortgage being signed S. E. S., the wife cannot take advantage of the fact that her true name was L. E. S. *Shelton v. Aultman, etc., Co.*, 82 Ala. 315.

Where the certificate of acknowledgment of a deed of trust to L. Triplett, Jr., began

with the words "L. Triplett, Jr., Notary Public," but was signed "L. Triplett, N. P.," it was held that it did not necessarily follow that the trustee and the person taking and certifying the acknowledgment were one and the same person. *Corey v. Moore*, 86 Va. 721.

Fatal Variance in Name.—The certificate of acknowledgment of a deed executed by McKewin reciting that it was acknowledged by McKinnie, was held fatally defective. *Jones v. Parks*, 22 Ala. 446, following *Dubose v. Young*, 10 Ala. 365.

Where the certificate of acknowledgment of a deed signed by F. W. Chandler stated that the acknowledgment was made by T. W. Chandler, it was held that the acknowledgment was void, and that a correction made by the clerk in recording the certificate was a nullity. *Carleton v. Lombardi*, 81 Tex. 355.

A certificate that F. M. McKezie acknowledged that he signed an instrument purporting on its face to have been signed by F. M. McKinzie, was held insufficient in law to authorize the registration of the instrument. *McKinzie v. Stafford* (Tex. Civ. App., 1894), 27 S. W. Rep. 790.

An unexplained certificate that James Butler acknowledged the execution of a deed signed by and purporting to be the act of Jonas Butler is insufficient to entitle the deed to be recorded. *Stephens v. Motl*, 81 Tex. 115.

An acknowledgment purporting to have been made by — Murray, without any other designation of the person making the acknowledgment, is insufficient to convey the title of Jacob Murray. *Hiss v. McCabe*, 45 Md. 77.

A certificate that Geo. H. Crane, known to the notary to be the signer and sealer of the annexed deed, acknowledged the same, is not sufficient proof of execution where the deed is signed Geo. H. Case. *Heil v. Redden*, 38 Kan. 255.

The record of a deed purporting to be by Hiram S., signed by Harmon S. and acknowledged by Hiram S., is inadmissible in evidence without proof of the identity of the grantor. *Boothroyd v. Engles*, 23 Mich. 19.

But it would be otherwise on proof that the two names belonged to the same person. *Middleton v. Findla*, 25 Cal. 76. See also *Hommel v. Devinney*, 39 Mich. 522.

Name of Grantee for That of Grantor.—Where the name of the grantee was inserted in a certificate of acknowledgment instead of that of the grantor, there being nothing apparent on the face of the certificate or in the deed to determine whether an error was committed in writing the name of the man who made the acknowledgment, or in taking the acknowledgment of the wrong man by mistake, it was held that the acknowledgment was fatally defective. *Wood v. Cochrane*, 39 Vt. 544. See also *Maxwell v. Higgins*, 38 Neb. 671.

the identity of the party making the acknowledgment should appear from the certificate. The officer must state that such party was known or proved to him to be the party who executed the instrument.¹

1. Certificate must show that Grantor was Known to Officer.—*United States*.—Gillespie v. Reed, 3 McLean (U. S.) 377; Morgan v. Curtenius, 4 McLean (U. S.) 366; Schley v. Pullman's Palace Car Co., 120 U. S. 575. See also Carpenter v. Dexter, 8 Wall. (U. S.) 513.

Alabama.—Merritt v. Phenix, 48 Ala. 87; Sharpe v. Orme, 61 Ala. 263; Gates v. Hester, 81 Ala. 357; East Tennessee, etc., R. Co. v. Davis, 91 Ala. 615.

California.—Wolf v. Fogarty, 6 Cal. 224, 65 Am. Dec. 509; Kelsey v. Dunlap, 7 Cal. 160; Hopkins v. Delaney, 8 Cal. 85; Henderson v. Grewell, 8 Cal. 581; Fogarty v. Finlay, 10 Cal. 239, 70 Am. Dec. 714; McMinn v. O'Connor, 27 Cal. 238. See Welch v. Sullivan, 8 Cal. 511.

Colorado.—Nippel v. Hammond, 4 Colo. 211.

Illinois.—Shepherd v. Carriel, 19 Ill. 313; Montag v. Linn, 19 Ill. 399; Gove v. Cather, 23 Ill. 634, 76 Am. Dec. 711; Tully v. Davis, 30 Ill. 103, 83 Am. Dec. 179; Lyon v. Kain, 36 Ill. 362; Lindley v. Smith, 46 Ill. 523, 58 Ill. 250; Fell v. Young, 63 Ill. 106; Heinrich v. Simpson, 66 Ill. 57; Ridgeway v. Underwood, 67 Ill. 419; Murphy v. Williamson, 85 Ill. 149; Gage v. Wheeler, 129 Ill. 197; People v. Bartels, 138 Ill. 322. See also Logan v. Williams, 76 Ill. 175.

Iowa.—Tiffany v. Glover, 3 Greene (Iowa) 387; Gould v. Woodward, 4 Greene (Iowa) 82; Cavender v. Smith, 5 Iowa 157; Bell v. Evans, 10 Iowa 353; Brinton v. Seever, 12 Iowa 389; Reynolds v. Kingsbury, 15 Iowa 238; Todd v. Jones, 22 Iowa 146; Rosenthal v. Griffin, 23 Iowa 263.

Maryland.—Warner v. Hardy, 6 Md. 525.

Missouri.—Alexander v. Merry, 9 Mo. 514; Attleboro First Nat. Bank v. Hughes, 10 Mo. App. 7; Garnier v. Barry, 28 Mo. 438; Callaway v. Fash, 50 Mo. 420; Robson v. Thomas, 55 Mo. 581; Holton v. Kemp, 81 Mo. 661; Campbell v. Laclede Gas Light Co., 84 Mo. 352; Hughes v. McDivitt, 102 Mo. 77; Hughes v. Sloan (Mo., 1890), 14 S. W. Rep. 660. See also Chouteau v. Burlando, 20 Mo. 482; Johnson v. Prewitt, 32 Mo. 553.

Nevada.—Johnson v. Badger Mill, etc., Co., 13 Nev. 351.

New Jersey.—Pinckney v. Burrage, 31 N. J. L. 21.

New York.—Troup v. Haight, Hopk. (N. Y.) 239; Miller v. Link, 2 Thomp. & C. (N. Y.) 86; Jackson v. Gumaer, 2 Cow. (N. Y.) 552; Watson v. Campbell, 28 Barb. (N. Y.) 421; Sheldon v. Stryker, 42 Barb. (N. Y.) 284; Treadwell v. Sackett, 50 Barb. (N. Y.) 440; Hunt v. Johnson, 19 N. Y. 279; West Point Iron Co. v. Reymert, 45 N. Y. 703; Wood v. Bach, 54 Barb. (N. Y.) 134; Canandaqua Academy v. McKechnie, 90 N. Y. 618; Irving v. Campbell (Super. Ct.), 4 N. Y. Supp. 103. See also Ritter v. Worth, 1 Thomp. & C. (N. Y.) 406, 58 N. Y. 629; Jackson v. Phillips, 9 Cow. (N. Y.) 94.

Oregon.—Baker v. Woodward, 12 Oregon 3.

South Dakota.—Cannon v. Deming, 3 S. Dak. 421.

Tennessee.—Bone v. Greenlee, 1 Coldw. (Tenn.) 29; Peacock v. Tompkins, 1 Humph. (Tenn.) 135; Johnson v. Walton, 1 Sneed (Tenn.) 258; Vaughn v. Carlisle, 2 Lea (Tenn.) 525; Mullins v. Aiken, 2 Heisk. (Tenn.) 535; Fall v. Roper, 3 Head (Tenn.) 485; Garrett v. Stockton, 7 Humph. (Tenn.) 84; Henderson v. McGhee, 6 Heisk. (Tenn.) 55; Davis v. Bogle, 11 Heisk. (Tenn.) 315. See also Brogan v. Savage, 5 Sneed (Tenn.) 689.

Texas.—Watkins v. Hall, 57 Tex. 4; Schramm v. Gentry, 63 Tex. 583; Little v. Weatherford, 63 Tex. 638; Hayden v. Moffatt, 74 Tex. 647, 15 Am. St. Rep. 866; McKie v. Anderson, 78 Tex. 208; Salmon v. Huff, 80 Tex. 133; Frost v. Erath Cattle Co., 81 Tex. 510; Moses v. Dibrell, 2 Tex. Civ. App. 457; Beitel v. Wagner (Tex. Civ. App., 1895), 32 S. W. Rep. 366.

Wisconsin.—Smith v. Garden, 28 Wis. 685; Hiles v. LaFlesh, 59 Wis. 465.

See also Ogden v. Walters, 12 Kan. 282.

Under the *Illinois* Act of 1833 a certificate failing to state that the party making the acknowledgment is personally known to the officer as the one whose name is subscribed to the deed is fatally defective, and such defect as to deeds executed by one in a fiduciary character is not cured by lapse of time. Fell v. Young, 63 Ill. 106.

Where a commissioner's certificate of the acknowledgment of a deed by a corporation set forth the personal appearance of "E. N., the president, * * * and H. L. J., the secretary of said company, who are personally known to me to be such," etc., it was held that it sufficiently appeared from the certificate that the commissioner was acquainted with the officers, both as individuals and in their official capacity. Kelly v. Calhoun, 95 U. S. 710.

A certificate, "personally appeared J. T. B., tax collector, etc., to me well known, and acknowledged, etc.," instead of reciting that the grantor was known to be the person who executed the deed, was held to be in compliance with the statute, the deed being signed "J. T. B., tax collector of C. county." Schleicher v. Gatlin, 85 Tex. 270.

Under the *Wisconsin* statute requiring the officer to certify that the grantor was personally known to him, and providing that a substantial compliance with this requirement shall be sufficient, it was held that a certificate of acknowledgment of a deed by a county clerk, taken by the notary public who was also an attesting witness to the deed, was not rendered invalid by the failure of the notary to recite that the grantor was known to him. Hiles v. LaFlesh, 59 Wis. 465, *distinguishing* Smith v. Garden, 28 Wis. 685.

Certificate of Probate must State that Witness was Acquainted with Grantor—New York.—A certificate of probate of a deed in which the officer recites that a certain person known to him to be a witness to the deed testified "that he saw the within grantor sign the same for the purposes therein expressed," without stating that the witness knew the

The use of the word "personally" is not essential where the officer recites that the grantor was known to him,¹ and it has been held that a certificate reciting that the grantor personally appeared before the officer includes also a statement that he was personally known to him.²

grantor, is insufficient. *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *Jackson v. Gould*, 7 Wend. (N. Y.) 366. See also *Dias v. Glover*, Hoffm. Ch. (N. Y.) 74.

Exceptions to the General Rule Requiring Recital of Personal Acquaintance—Acknowledgments by Sheriff.—It is held in *Missouri* that the rule requiring a certificate of acknowledgment to state that the grantor is personally known to the officer does not extend to the case of the acknowledgment of deeds by a sheriff before the court of which he is an officer. *Laughlin v. Stone*, 5 Mo. 43. See also *Baker v. Underwood*, 63 Mo. 384; and as to law in *Kansas*, *Ogden v. Walters*, 12 Kan. 282.

By United States Marshal—Missouri.—Where land was sold by a United States marshal, and the deed properly acknowledged by him before the district court of which he was an officer, and to which he was required to make return on execution, it was held that it was not necessary for the clerk of the court to certify that the marshal was personally known to him, as the court must be presumed to know its own officer. *Baker v. Underwood*, 63 Mo. 384.

Of Articles of Incorporation—Colorado.—The provisions of the *Colorado* statute requiring the officer before whom deeds are acknowledged to certify that the persons making the acknowledgment are personally known to him, do not apply to the acknowledgment of articles of incorporation. *People v. Cheeseman*, 7 Colo. 376.

By Married Women—Tennessee.—Under the *Tennessee* Act of 1833, it was held that a statement that the grantor was personally known to the officer was not essential to the validity of the certificate of acknowledgment of a married woman's deed. *Mount v. Kesterton*, 6 Coldw. (Tenn.) 452.

Under § 2076 of the *Tennessee* Code giving the form of certificate to be used in certifying acknowledgments of married women, but containing no provision that the officer shall certify his personal acquaintance with the wife, it was held that it is sufficient if the officer state that he is acquainted with the husband, where husband and wife unite in executing a deed. *Bell v. Lyle*, 10 Lea (Tenn.) 44.

In Absence of Statute.—The certificate of an acknowledgment made prior to the *Missouri* Act of 1825 requiring the officer taking the acknowledgment to certify that the grantor was personally known to him, is good, although it does not state the fact of personal knowledge. *Holton v. Kemp*, 81 Mo. 661.

Nor was such recital necessary in *Texas* prior to the Revised Statutes. *Sloan v. Thompson*, 4 Tex. Civ. App. 419; *Hill v. Smith*, 6 Tex. Civ. App. 312. See also *Watkins v. Hall*, 57 Tex. 4.

As to a certificate held good under the

Illinois Act of 1819, see *Ayres v. Doe*, 3 Ill. 307.

As to law in *Michigan*, see *Elwood v. Flannigan*, 104 U. S. 562.

Under the law in force in *Texas* in 1874 the officer taking acknowledgments was not required to certify that the grantor was known to him, but only, in case he was not known, to attach to the certificate certain proofs of his identity. It was held, under this law, that in case of a certificate without such proofs attached, it would be presumed that the grantor was known to the officer, and the acknowledgment was sustained. *Driscoll v. Morris*, 2 Tex. Civ. App. 607; *Sowers v. Peterson*, 59 Tex. 216. See also *Watkins v. Hall*, 57 Tex. 4.

A deed executed in 1784 was admitted in evidence in *New York* in 1844 on the officer's certificate of acknowledgment, although it failed to show that the grantor was known to the officer, such recital not being required under the laws in force when the deed was made. *Northrop v. Wright*, 7 Hill (N. Y.) 476.

See also, for similar decisions under early laws of *New York*, *Averill v. Wilson*, 4 Barb. (N. Y.) 180; *Jackson v. Vickory*, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522; *Jackson v. Harrow*, 11 Johns. (N. Y.) 434; *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602.

The *Florida* statute requiring that officers taking acknowledgments shall know or have satisfactory proof that the person making the acknowledgment is the individual described in, and who executed, the instrument, applies only to cases where the instruments covered by it have been executed or acknowledged out of the state. *McCoy v. Boley*, 21 Fla. 803.

The omission of a statement of knowledge of the personal identity of the grantor by the officer cannot be taken advantage of by one not a subsequent purchaser. *Chouteau v. Burlando*, 20 Mo. 482.

1. Word "Personally" Not Essential.—A certificate that the grantor, "to me well known, personally appeared and acknowledged," etc., has been held good in *New York*. *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Troup v. Haight*, Hopk. (N. Y.) 239; *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561.

In *Wilson v. Quigley*, 107 Mo. 98, the entire omission of words showing the officer's knowledge of the identity of the grantor was held not fatal. See *infra*, this title, *Errors and Omissions—Omissions Not Fatal*.

2. Personal Acquaintance Shown by Implication.—*Harris v. Pratt*, 37 Kan. 316; *Warder v. Henry*, 117 Mo. 530; *Hughes v. Sloan* (Mo., 1890), 14 S. W. Rep. 660. Compare *Fryer v. Rockefeller*, 63 N. Y. 268 (explaining *Hunt v. Johnson*, 19 N. Y. 279); *Beitel v. Wagner* (Tex. Civ. App., 1895), 32 S. W. Rep. 366. See also *Dias v. Glover*, Hoffm. Ch. (N. Y.) 71; *Elwood v. Flannigan*, 104 U. S. 562.

Under the *Nebraska* statute requiring the

In *Illinois* a certificate of acknowledgment by husband and wife stating that the husband was personally known to the officer to be the person who executed the deed, but failing to make the same statement concerning the wife, is fatally defective.¹

The fact of personal knowledge of the identity of the grantor must be stated with certainty, and a recital that the officer is "satisfied" that the person making the acknowledgment is the grantor, without other proof of his identity, is not sufficient.²

There is no regular rule as to what constitutes personal acquaintance. It has been held that a mere introduction, if satisfactory to the conscience of the officer, is sufficient.³

3. Errors and Omissions—*a. GENERALLY.*—Although no fact necessary to a valid acknowledgment can be presumed in favor of the certificate,⁴ it is the policy of the law to uphold such certificate, whenever possible, and for that purpose resort will be had if necessary to the instrument to which it is attached.⁵

officer taking the acknowledgment to "know, or have satisfactory evidence" of, the identity of the person making the acknowledgment, it was held that a certificate, "personally appeared before me D. D., mayor of Falls City," etc., was a sufficient statement of the identity of the grantor. *Burbank v. Ellis*, 7 Neb. 156.

1. *Lindley v. Smith*, 46 Ill. 523; *Coburn v. Herrington*, 114 Ill. 104; *Heinrich v. Simpson*, 66 Ill. 57; *Hart v. Randolph*, 142 Ill. 521.

2. Recital that Officer is "Satisfied" as to Identity of Grantor.—*Kimball v. Semple*, 25 Cal. 441; *Shepherd v. Carriel*, 19 Ill. 313.

Where the acknowledgment of a deed to land in *Michigan*, taken in *New Jersey*, was objected to on the ground that the officer in certifying the personal identity of the parties, used the language, "who, I am satisfied, are the grantors in the within deed," it was held that all question as to the defect, if material, was set at rest by the certificate of the clerk that the acknowledgment was taken according to the laws of *New Jersey*. *Culbertson v. H. Witbeck Co.*, 127 U. S. 326.

Officer must Certify Identity from Personal Knowledge.—A certificate, "Personally appeared before me J. Q., whose name appears to the foregoing conveyance, and who, by good authority to me given, is the identical person therein named, and acknowledged," etc., is void for not showing that J. Q. was personally known to the officer. *Becker v. Quigg*, 54 Ill. 390.

3. **What Amounts to Personal Acquaintance.**—The right of an officer to take an acknowledgment does not depend on the length of his acquaintance with the person, nor upon the manner in which his knowledge is acquired. An introduction by a common friend is sufficient to satisfy the statutory requirement, if such introduction will satisfy the conscience of the officer as to the identity of the party. *Wood v. Bach*, 54 Barb. (N. Y.) 134 (*repudiating* the doctrine of *Watson v. Campbell*, 28 Barb. (N. Y.) 421, and *Jones v. Bach*, 48 Barb. (N. Y.) 568); *Nippel v. Hammond*, 4 Colo. 211. See also *State v. Meyer*, 2 Mo. App. 413; and *infra*, this tit'c, *Liability of Officer for False Certificate*.

4. **No Material Fact will be Presumed.**—*Wetmore v. Laird*, 5 Biss. (U. S.) 161; *Sutton v. Pollard* (Ky., 1891), 16 S. W. Rep. 126.

Where a set form is prescribed by statute for certificates of married women's acknowledgments, all implication as to every material fact made necessary by the law is entirely excluded. *Henderson v. Rice*, 1 Coldw. (Tenn.) 223; *Ellett v. Richardson*, 9 Baxt. (Tenn.) 293; *Anderson v. Bewley*, 11 Heisk. (Tenn.) 29.

5. **Deed may be Read to Supply Deficiencies in Certificate—***United States.*—*Carpenter v. Dexter*, 8 Wall. (U. S.) 515; *Bird v. McClelland*, etc., *Brick Mfg. Co.*, 45 Fed. Rep. 458.

Alabama.—*Bradford v. Dawson*, 2 Ala. 203; *Dubose v. Young*, 10 Ala. 365; *Sharpe v. Orme*, 61 Ala. 263; *Gates v. Hester*, 81 Ala. 357.

Dakota.—*Wilson v. Russell*, 4 Dakota 376.

Florida.—*Summer v. Mitchell*, 29 Fla. 179; *Cleland v. Long*, 34 Fla. 353; *Jackson v. Haisley* (Fla., 1895), 17 So. Rep. 631. See also *Einstein v. Shouse*, 24 Fla. 490.

Iowa.—*Bell v. Evans*, 10 Iowa 353; *Milner v. Nelson*, 86 Iowa 452.

Maryland.—*Kelly v. Rosenstock*, 45 Md. 389; *Baschor v. Stewart*, 54 Md. 376.

Michigan.—*Nelson v. Graff*, 44 Mich. 433.

Minnesota.—*Wells v. Atkinson*, 24 Minn. 161; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 59.

Missouri.—*Wilcoxon v. Osborn*, 77 Mo. 621; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618; *Hughes v. Morris*, 110 Mo. 306.

New York.—*Bauer v. Schmelcher* (*Brooklyn City Ct.*), 5 N. Y. Supp. 423.

Texas.—*Gulf, etc., R. Co. v. Carter*, 5 Tex. Civ. App. 675, citing 1 AM. AND ENG. ENCYC. OF LAW, p. 156, note 2.

Vermont.—*Brooks v. Chaplin*, 3 Vt. 281, 23 Am. Dec. 209; *Chandler v. Spear*, 22 Vt. 388.

See also *Middleton v. Findla*, 25 Cal. 76; *Razor v. Dowan* (Ky., 1890), 13 S. W. Rep. 914.

See also *supra*, this title, *The Certificate—Generally, and What It Must Certify*.

In *Milner v. Nelson*, 86 Iowa 452, *Rothrock, J.*, said in his opinion: "A very full and exhaustive article upon the subject of ac-

b. CLERICAL ERRORS, TECHNICAL OMISSIONS.—Whenever substance is found, obvious clerical errors¹ and technical omissions or defects² will be dis-

knowngments may be found in 1 AM. AND ENG. ENCYCLOPEDIA OF LAW, p. 143. It is there stated that a 'certificate must be construed with reference to the instrument it is attached to, and the instrument is allowed to help out the construction of the certificate, and, if the certificate is inconsistent with the instrument, and ambiguous, the court will look to the instrument, or any part of it, together with the certificate, in order to arrive at the true meaning of the officer.' In a note to the statement above quoted authorities are cited from some fourteen states, and from the Supreme Court of the United States. It is not necessary to more than refer to these cases. They are in harmony with the decisions of this court. Again, it is said in the article above cited that 'the name of the grantor should appear, although it is now generally held that, if the name can be ascertained from the deed, the certificate will be sustained.' A large number of authorities are cited in support of this last proposition."

1. **Obvious Clerical Errors will Not Invalidate Certificate.**—*Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Summer v. Mitchell*, 29 Fla. 179; *Skinner v. Fulton*, 39 Ill. 484; *Lyne v. Kentucky Bank*, 5 J. J. Marsh. (Ky.) 545; *Morse v. Hewett*, 28 Mich. 481; *Wells v. Atkinson*, 24 Minn. 161; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58; *Samuels v. Shelton*, 48 Mo. 444; *Mitchell v. Bridgers*, 113 N. Car. 63; *Brinkley v. Tomeny*, 9 Baxt. (Tenn.) 275.

Immaterial Mistakes.—"Assigned" for "signed." *Broussard v. Dull*, 3 Tex. Civ. App. 59.

"Foregoing mortgage" for "foregoing deed." *Ives v. Kimball*, 1 Mich. 308.

"The signed" for "he signed." *Durst v. Daugherty*, 81 Tex. 650.

"Subscribed" for "acknowledged." *Cuykendall v. Douglas*, 19 Hun (N. Y.) 577.

"With" for "without," in "without fear or compulsion," where the use of the wrong word was clearly a clerical error. *King v. Merritt*, 67 Mich. 194; *Durst v. Daugherty*, 81 Tex. 650.

"Husband" for "deed" in "contents and meaning of said deed." *Calumet, etc., Canal, etc., Co. v. Russell*, 68 Ill. 426.

"Restrain" for "constrain." *Edmondson v. Harris*, 2 Tenn. Ch. 427.

"Contract" for "retract." *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267.

"I" for "before me" in "before me — personally appeared." *Belbaze v. Ratto*, 69 Tex. 636.

"Is" for "are" and "name" for "names" in the certificate of acknowledgment by several grantors. *Cairo, etc., R. Co. v. Parrott*, 92 Ill. 194.

"Judge" for "Court."—It is no objection to the certificate of acknowledgment of a sheriff's deed, that the clerk states that the personal appearance of a sheriff was made before the judge of the court, where the certificate is not signed by the judge, but is signed by the clerk, and authenticated by the seal of the court, it being plain that the clerk

used the term "judge" as synonymous with "court." *McClure v. McClurg*, 53 Mo. 173. See *Huxley v. Harrold*, 62 Mo. 516.

Name of Cestui que Trust for Trustee.—It was held in *Alabama* that where the grantor of a deed of trust acknowledged the delivery of a *cestui que trust* instead of the trustee, the deed was properly admitted to record on such acknowledgment. *Stewart v. Fowler*, 3 Ala. 229.

Whether Deed Relinquishing Dower Conveys Fee.—Where the certificate of acknowledgment of a conveyance of a married woman's arroperty recited that she acknowledged that she executed the deed for the purpose of relinquishing her right of dower in the lands, she having no such right, it was held that the acknowledgment was sufficient to sustain the deed as conveyance of her estate in fee. *Hartley v. Ferrell*, 9 Fla. 374; *Evans v. Summerlin*, 19 Fla. 858. See also *Surplusage, infra*.

Where the certificate of a married woman's acknowledgment of a conveyance of her separate estate simply stated that she relinquished her right of dower in the land, the conveyance was held void. *Sutton v. Pollard* (Ky., 1891), 16 S. W. Rep. 126; *Breeding v. Tobin* (Ky., 1892), 18 S. W. Rep. 773.

Several Grantors—Singular Pronoun.—A certificate reciting that several grantors of both sexes appeared and acknowledged that "he" acknowledged the execution of a deed is insufficient to admit the deed to record. *Threadgill v. Bickerstaff* (Tex. Civ. App., 1894), 26 S. W. Rep. 739.

2. Omissions Not Fatal.—"Are" in "who are personally known." *Hartshorn v. Dawson*, 79 Ill. 108.

"Appeared" after "personally" was held to be a manifest clerical error, but even if fatal, to be cured by the *Iowa* Act of 1870. *Scharfenburg v. Bishop*, 35 Iowa 60.

"Be" in "known to me to be president" of, etc. *Johnson v. Badger Mill, etc., Co.*, 13 Nev. 351.

"Before me" after "acknowledged." *Gordon v. Leech*, 81 Ky. 229; *Woods v. James*, 87 Ky. 511.

"Husband" after "undue influence of her said." *Gorman v. Stanton*, 5 Mo. App. 585.

"They" before "signed." *Musgrove v. Bonser*, 5 Oregon 313, 20 Am. Rep. 737. *Compare Fatal Omissions, infra*.

"It" in "wished not to retract it." *Moore v. Linney*, 2 Tex. Civ. App. 293.

"And deed" after "voluntary act." *Spitznagle v. Vanhesssch*, 13 Neb. 338.

"To be her act and deed." *Stuart v. Dutton*, 39 Ill. 91; *Tourville v. Pierson*, 39 Ill. 446; *Woods v. James*, 87 Ky. 511; *Solyer v. Romanet*, 52 Tex. 562; *Thompson v. Johnson*, 84 Tex. 548.

"Delivered" in "signed, sealed, and delivered." *Gable's Appeal* (Pa., 1886) 7 Atl. Rep. 52.

"Executed" where the grantor acknowledged that he "signed, sealed, and delivered." *Stuart v. Dutton*, 39 Ill. 91.

regarded; and where the statutory language is not employed, it will be suffi-

"Sealed and delivered" in "signed, sealed, and delivered" in wife's acknowledgment. *Mullins v. Weaver*, 57 Tex. 5. *Compare* *Shelton v. Armor*, 13 Ala. 647.

"Separate" in "separate and apart." *Belo v. Mayes*, 79 Mo. 67. *Compare* *Dewey v. Campau*, 4 Mich. 565.

"Out of the presence of" where words of equivalent import are employed. *Deery v. Cray*, 5 Wall. (U. S.) 795; *Nippel v. Hammond*, 4 Colo. 211.

"Voluntarily" in "freely, voluntarily, and understandingly, without any compulsion or constraint from her husband." *Hunt v. Harris*, 12 Heisk. (Tenn.) 243. *Compare* *Laird v. Scott*, 5 Heisk. (Tenn.) 314.

"Freely" in married woman's acknowledgment where she acknowledged that she executed the deed "without any fear, threat, or compulsion of her husband." *Meriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232; *Tubbs v. Gatewood*, 26 Ark. 128.

"Freely and voluntarily" in a similar case. *Allen v. Lenoir*, 53 Miss. 321.

"Freely and voluntarily" where the grantor "acknowledged that he executed the same." *Henderson v. Grewell*, 8 Cal. 581; *Dawson v. Hayden*, 67 Ill. 52.

"Undue influence" where equivalent words are used. *Little v. Dodge*, 32 Ark. 453.

"Seal" in "hand and seal of office." *Nichols v. Stewart*, 15 Tex. 226.

"Official" in "hand and official seal" where the official seal was affixed. *Monroe v. Arledge*, 23 Tex. 478.

Statement that seal was affixed when such was the fact. *Harrington v. Fish*, 10 Mich. 415; *Dale v. Wright*, 57 Mo. 110; *Webb v. Huff*, 61 Tex. 677. See also *Broussard v. Dull*, 3 Tex. Civ. App. 59. *Compare* *Wetmore v. Laird*, 5 Biss. (U. S.) 161. See on this point *supra*, this title, *The Certificate*.

"Known" in "being first made fully known to her." *Hornbeck v. Mutual Bldg., etc., Assoc.*, 88 Pa. St. 64.

"To be the person described in and who executed the deed" after "to me known." *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561; *Troub v. Haight, Hopk.* (N. Y.) 239; *Watkins v. Hall*, 57 Tex. 1.

"As a party thereto" after "personally known." *Tiffany v. Glover*, 3 Greene (Iowa) 387; *Cavender v. Smith*, 5 Iowa 157.

"Consideration" in the sentence "for the consideration and purposes." *Monroe v. Arledge*, 23 Tex. 478.

"For the purposes therein expressed." *Sowers v. Peterson*, 59 Tex. 216; *Butler v. Brown*, 77 Tex. 342; *Stephens v. Motl*, 81 Tex. 115.

"In person" in "appeared before him in person and acknowledged." *Zimmerman v. Willard*, 114 Ill. 364.

The omission of the title of a trustee in the certificate, where the deed is executed by the trustee as such, does not invalidate the acknowledgment. *Dail v. Moore*, 51 Mo. 589.

"And entered by me" where the statute

required the officer to enter the acknowledgment in his docket, the entry being in fact made, and the certificate being otherwise in substantial compliance with statute. *Schroder v. Keller*, 84 Ill. 46.

"His" before "free and voluntary act." *Dickerson v. Davis*, 12 Iowa 353.

"Her" before "act and deed." *Gray v. Kauffman*, 82 Tex. 65.

"Personally" before "known." *Schley v. Pullman's Palace Car Co.*, 120 U. S. 575; *Hopkins v. Delaney*, 8 Cal. 85; *Welch v. Sullivan*, 8 Cal. 165, 511; *Todd v. Jones*, 22 Iowa 146; *Rosenthal v. Griffin*, 23 Iowa 263; *Brown v. McCormick*, 28 Mich. 215; *Alexander v. Merry*, 9 Mo. 514; *Robson v. Thomas*, 55 Mo. 581; *Hughes v. McDivitt*, 102 Mo. 77; *Canandaqua Academy v. McKechnie*, 90 N. Y. 618; *Davis v. Bogle*, 11 Heisk. (Tenn.) 315. See also *Bell v. Evans*, 10 Iowa 353; *West Point Iron Co. v. Reymert*, 45 N. Y. 703.

"Acknowledged." *Basshor v. Stewart*, 54 Md. 376; *Talbert v. Dull*, 70 Tex. 675.

"This day" after "acknowledged before me," where the certificate itself was dated. *Abney v. DeLoach*, 84 Ala. 393. See also *Hobson v. Kissam*, 8 Ala. 357; *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493.

Statement that the deed was executed on the day it bears date, when the acknowledgment was on the same day on which the deed was executed. *Bradford v. Dawson*, 2 Ala. 203; *Carter v. Doe*, 21 Ala. 72.

"On the day and year mentioned" following a statement of delivery. *Caruthers v. McLaran*, 56 Miss. 371. See also *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373.

Omission to state the residence of witnesses under a statute requiring the officer certifying the probate of a deed by witnesses to set forth the names and residences of the witnesses. *Irving v. Campbell* (Super. Ct.), 4 N. Y. Supp. 103.

A certificate, "personally appeared T. B. M. and H. A. M., his wife, the grantors in the above deed and conveyance, of full age, to me well known, who acknowledged that he had voluntarily executed and delivered the same; * * * and I do further certify that this day voluntarily appeared before me —, to me well known as the person whose name appears upon the within and foregoing deed, and in the absence of —, said husband, declared that — had of her own free will executed the foregoing deed," etc., signed and sealed by the notary, was held sufficient to show due acknowledgment by the wife. *Donahue v. Mills*, 41 Ark. 421.

Where the certificate of acknowledgment indorsed on the back of a sheriff's deed recited that the sheriff appeared in open court, and acknowledged the execution and delivery of "a deed," without specifically referring to the deed acknowledged, it was held that the certificate was not rendered invalid by such want of a direct reference to the deed on which it was indorsed. *Samuels v. Shelton*, 48 Mo. 444.

Statement of Acquaintance with Grantor. — Where the record of the notary's certificate

of acknowledgment was correct in every respect, except that there was nothing to show that the grantor was known by the notary, it was held that the defect was not such as rendered the title to the land unmarketable, and was cured by the subsequent testimony of the notary that he knew the grantor personally, that he saw him execute the deed, and knew him to be the person described therein, and that he properly executed and acknowledged the same. *Hutton v. Webber* (Super. Ct.), 17 N. Y. Supp. 463.

Relinquishment of Homestead.—Where a mortgage executed by husband and wife and duly acknowledged by the wife recited that they relinquished all rights of dower and homestead in the land therein described, it was held that the instrument had the effect of divesting the wife effectually of both homestead and dower right, although the certificate of her acknowledgment stated that she relinquished her dower right merely. *Razor v. Dowan* (Ky., 1890), 13 S. W. Rep. 914.

Fatal Omissions.—"Known" after "personally." *Tully v. Davis*, 30 Ill. 103, 83 Am. Dec. 179.

"Known" in "personally appeared C.A.D., known to be the individual," etc. *Wolf v. Fogarty*, 6 Cal. 224, 65 Am. Dec. 509; *McKie v. Anderson*, 78 Tex. 207.

Omission of "personally known" renders the certificate partially defective. *Gould v. Woodward*, 4 Greene (Iowa) 82.

"Acknowledged" where no equivalent word was used. *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Stanton v. Button*, 2 Conn. 527; *Pendleton v. Button*, 3 Conn. 406; *Cabell v. Grubbs*, 48 Mo. 353; *McDaniel v. Needham*, 61 Tex. 269; *Virginia Coal, etc., Co. v. Roberson*, 88 Va. 116; *Short v. Conlee*, 28 Ill. 219.

"Separately" in "separately and apart." *Dewey v. Campau*, 4 Mich. 565. *Compare* *Belo v. Mayes*, 79 Mo. 67.

"Private" in "private examination separate and apart from her husband," although the other words were used. *Sibley v. Johnson*, 1 Mich. 380.

"Explained" in "the said instrument having been fully explained to her." *Moores v. Linney*, 2 Tex. Civ. App. 293.

"Signed" in "signed, sealed, and delivered." *Smith v. Elliott*, 39 Tex. 201.

"Sealed and delivered" in "signed, sealed, and delivered." *Toulmin v. Heidelberg*, 32 Miss. 268; *Robinson v. Noel*, 49 Miss. 253. *Compare* *Barton v. Morris*, 15 Ohio 408.

"The within named" and "with whom I am personally acquainted." *Fall v. Roper*, 3 Head (Tenn.) 485.

"Ill-usage" in the certificate of a married woman's acknowledgment, although she acknowledged the instrument "of her own free will, and not through any threats of her said husband or fear of his displeasure." *Hawkins v. Burress*, 1 Har. & J. (Md.) 513.

"Fear" in the certificate of a married woman's acknowledgment where no equivalent words were used. The defect was cured by statute. *Hollingsworth v. McDonald*, 2 Har. & J. (Md.) 230, 3 Am. Dec. 545.

"He" in "acknowledged that he signed."

Buell v. Irwin, 24 Mich. 152; *Huff v. Webb*, 64 Tex. 284; *Stanton v. Button*, 2 Conn. 527; *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340.

"Purposes" in "consideration and purposes." *Ford v. Burks*, 37 Ark. 91.

A certificate failing to show that the grantor acknowledged the deed for the consideration and purposes therein expressed, is void. *Conner v. Abbott*, 35 Ark. 365; *Wright v. Graham*, 42 Ark. 140. *Compare*, as to law in *Texas*, *Stephens v. Motl*, 81 Tex. 115.

But while such an omission is fatal to the acknowledgment, if the execution of the deed is otherwise proven at the trial it is admissible in evidence notwithstanding the defective acknowledgment. *Griesler v. McKennon*, 44 Ark. 517.

"For the purposes therein set forth." *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Little v. Dodge*, 32 Ark. 453; *Shryock v. Cannon*, 39 Ark. 434; *Currie v. Kerr*, 11 Lea (Tenn.) 138.

"Without compulsion or constraint from her husband." *Menees v. Johnson*, 12 Lea (Tenn.) 561.

"Voluntarily" in certificate of wife's acknowledgment, although similar words were used. *Laird v. Scott*, 5 Heisk. (Tenn.) 314. *Compare* *Hunt v. Harris*, 12 Heisk. (Tenn.) 243.

"Voluntary" in "his voluntary act and deed" where the statute requires that word to be used. *Wickersham v. Reeves*, 1 Iowa 413; *Newman v. Samuels*, 17 Iowa 528; *Spitznagle v. Vanhessch*, 13 Neb. 338.

"Having been examined" in a certificate reciting "came the *feme covert* and privately and apart from her husband, and acknowledged." *Ellett v. Richardson*, 9 Baxt. (Tenn.) 293.

"Without the hearing of" where the certificate recited that the wife was examined "separate and apart from" her husband. *Butterfield v. Beall*, 3 Ind. 203.

A certificate, "and the said — wife of said — having been by me examined, * * * and that she do— not wish to retract the same. Given under my hand and — seal, etc.," the names of the grantors appearing in the beginning of the certificate, is fatally defective, and cannot afterwards be amended by the officer. *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128. *Compare* *Donahue v. Mills*, 41 Ark. 421.

Relinquishment of Dower.—It has been held that the omission of a statement, in the certificate of acknowledgment of a deed by husband and wife, that the wife relinquished her right of dower, rendered the conveyance inoperative to pass dower. *Owen v. Robbins*, 19 Ill. 545; *Russell v. Rumsey*, 35 Ill. 362; *Thomas v. Meier*, 18 Mo. 573; *Thomas v. Hesse*, 34 Mo. 13, 84 Am. Dec. 66. See also the title DOWER.

Relinquishment of Homestead.—The omission of an express relinquishment of homestead in a conveyance by husband and wife renders the conveyance invalid as affecting the homestead under the *Illinois* Act of 1857. *Vanzant v. Vanzant*, 23 Ill. 536; *Patterson v. Kreig*, 29 Ill. 514; *Boyd v. Cudderback*, 31

cient if the necessary facts be expressed in words of equivalent import.¹

Ill. 113; Thornton v. Boyden, 31 Ill. 200; Best v. Gholson, 89 Ill. 465; Stodalka v. Novotny, 144 Ill. 125. See also title HOMESTEAD.

Reference to Personality in Conveyance of Both Real and Personal Estate.—Where the certificate of a wife's acknowledgment of a mortgage, conveying both real and personal property, executed by husband and wife, stated merely that she had relinquished her right of dower in the land, it was held that the record of such mortgage as to the personality was insufficient to constitute a lien against a purchaser of this property. Carle v. Wall, (Ark., 1891), 16 S. W. Rep. 293.

1. **Equivalent Words may be Used.**—Deery v. Cray, 5 Wall. (U. S.) 795; Tiffany v. Glover, 3 Greene (Iowa) 387; Chouteau v. Allen, 70 Mo. 290; Belcher v. Weaver, 46 Tex. 293; 26 Am. Rep. 267; Norton v. Davis, 83 Tex. 32; and examples *infra*.

Equivalent Expressions.—The following words and expressions have been held equivalent:

"Well known to me" to "personally known to me." Bell v. Evans, 10 Iowa 353. See also Davis v. Bogle, 11 Heisk. (Tenn.) 315.

"Well acquainted with" to "personally knew." Delauney v. Burnett, 9 Ill. 454.

"Personally known to me" to "with whom I am personally acquainted." Kelly v. Calhoun, 95 (U. S.) 710.

"Acknowledged it" to "acknowledged the execution of the annexed deed." Davar v. Cardwell, 27 Ind. 478.

"Acknowledged the foregoing instrument to be his act and deed" to "acknowledged that he signed, sealed, and delivered the foregoing deed." Hall v. Thompson, 1 Smed. & M. (Miss.) 443.

"Signed" to "executed." Belcher v. Weaver, 46 Tex. 293, 26 Am. Rep. 267; Bensimer v. Fell, 35 W. Va. 15. See also Little v. Dodge, 32 Ark. 453.

"Signed, sealed, and delivered," to "acknowledged." Wise v. Postlewait, 3 W. Va. 452.

"Executed" to "subscribed." Dorn v. Best, 15 Tex. 62.

"Executed" to "signed, sealed, and delivered." Smith v. Williams, 38 Miss. 48.

"Seal and acknowledge" to "seal and deliver." Jamison v. Jamison, 3 Whart. (Pa.) 457; 31 Am. Dec. 536.

"Acknowledged * * * that she had willingly acknowledged the same" to "acknowledged that she had willingly executed the same." Pickens v. Knisely, 29 W. Va. 1, 6 Am. St. Rep. 622. See also Joseph v. Dougherty, 60 Cal. 358.

"Signed, sealed, and delivered," to "executed." Stuart v. Dutton, 39 Ill. 91; Jacobway v. Gault, 20 Ark. 190, 73 Am. Dec. 494.

"Signed and sealed" to "signed, sealed, and delivered." Tubbs v. Gatewood, 26 Ark. 128; Little v. Dodge, 32 Ark. 453.

"The same" for "this instrument," referring to a deed to which the certificate was appended. Claffin v. Smith, 35 Hun (N. Y.) 372.

See also *Expressions Not Equivalent, infra*.

"Apart from, and out of the hearing of," to "out of the presence of." Deery v. Cray, 5 Wall. (U. S.) 795.

"Freely, without the threats, etc., of her husband," to "voluntarily." Battin v. Bigelow, Pet. (C. C.) 452.

"Without any bribe, threat, or compulsion," to "willingly." Belcher v. Weaver, 46 Tex. 293, 26 Am. Rep. 267.

"Voluntarily, without any fear, compulsion, or threats," to "of her own free will and accord, and without fear, constraints, or threats." Gates v. Hester, 81 Ala. 357.

"Freely and of her own accord" to "as her voluntary act and deed, freely." Dundas v. Hitchcock, 12 How. (U. S.) 256.

"Constraint or threat" to "constraints or threats." Homer v. Schonfeld, 84 Ala. 313.

"On a private examination separate and apart from her husband" to "on an examination apart from, and without the hearing of, her husband." Muir v. Galloway, 61 Cal. 498.

"Examined separate and apart from her husband" to "privately examined." Love v. Taylor, 26 Miss. 567. Overruling Warren v. Brown, 25 Miss. 66; 57 Am. Dec. 191.

"Separate and apart" to "privily." Coombes v. Thomas, 57 Tex. 321.

"Legally authorized and assigned" to "duly commissioned and sworn." Hall v. Gittings, 2 Har. & J. (Md.) 380. See also Beall v. Lynn, 6 Har. & J. (Md.) 336.

"To be their act and deed for the uses and purposes therein mentioned" to "they signed, sealed, and delivered." Den v. Hamilton, 12 N. J. L. 109.

"Surrender and give up" to "depart with," in "touching her consent to depart with," etc. Simpson v. Hartman, 27 U. C. Q. B. 460.

"Whose name is subscribed to the within instrument" to "described in and who executed." Wilson v. Russell, 4 Dakota 376. See also Whitney v. Arnold, 10 Cal. 531.

"For the purposes herein specified" to "for the purposes therein contained." Davis v. Bogle, 11 Heisk. (Tenn.) 315.

"She still voluntarily assents thereto" to "she does not wish to retract." Norton v. Davis, 83 Tex. 32.

"Coercion" to "compulsion." Jamison v. Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536.

An acknowledgment of a deed "to be her own free act and deed, and that she wished not to retract it" to "willingly signed the deed." Wilson v. Simpson, 80 Tex. 279.

A recital that a married woman acknowledged that she voluntarily executed a deed "fully understanding the contents" thereof, is equivalent to a statement that she was informed of its contents. Schley v. Pullman's Palace Car Co., 120 U. S. 575; Shaw v. Shaw (Ky., 1894), 24 S. W. Rep. 630. See also Nantz v. Bailey, 3 Dana (Ky.) 111; Martin v. Davidson, 3 Bush (Ky.) 572. Compare Langton v. Marshall, 59 Tex. 296.

"Made acquainted with the contents of the within deed" to "the contents were made known and explained." Hughes v. Lane, 11

6. PAROL EVIDENCE NOT ADMISSIBLE.—The certificate must be wholly in writing, and parol evidence is inadmissible to prove an essential fact that has been omitted;¹ and by some courts it is held that words vital to the correct-

Ill. 123, 50 Am. Dec. 436. See also *Lane v. Dolick*, 6 McLean (U. S.) 200.

Expressions Not Equivalent.—The following words and expressions have been held to be not equivalent:

"Signed" to "signed and delivered." *Buntyn v. Shippers Compress Co.*, 63 Miss. 94.

"Stated that" to "acknowledged that." *Dewey v. Campau*, 4 Mich. 565.

"For the uses and purposes" to "for the consideration and purposes." *Martin v. O'Bannon*, 35 Ark. 62.

"Personally appeared, and being informed of the contents of the conveyance, acknowledged that," etc., to "acknowledged that, being informed of the contents of the conveyance, he," etc. *East Tennessee, etc., R. Co. v. Davis*, 91 Ala. 615.

"The same" to "the within instrument," referring to the instrument on which the certificate was indorsed. *Smith v. Tim*, 14 Abb. N. Cas. (N. Y. C. Pl.) 447; *Smith v. Boyle*, 67 How. Pr. (N. Y. C. Pl.) 351, 101 N. Y. 472.

"Separate and apart from her husband" to "on private examination." *Warren v. Brown*, 25 Miss. 66, 57 Am. Dec. 191.

"Privately" to "apart from her husband." *Garrison v. Fisher*, 26 Miss. 352.

"Duly examined" to "privately examined." *Stayner v. Applegate*, 8 U. C. C. P. 133, 451. Compare *Buck v. McCallum*, 13 U. C. C. P. 163.

"Being read to her" to "being fully explained to her." *Watson v. Michael*, 21 W. Va. 568.

A statement that a married woman was "examined and interrogated by me touching the same," is not equivalent to a statement that the instrument was "fully explained" to her. *Runge v. Sabin* (Tex. Civ. App., 1895), 30 S. W. Rep. 568.

"Voluntarily" to "of her own free will and accord, without fear, constraint, or persuasion of her husband." *Scott v. Simons*, 70 Ala. 352.

"Of her own free will and accord" to "freely and voluntarily, without any threat, fear, or compulsion." *Allison v. Smith*, 17 New Bruns. 199.

"Without any fear or compulsion of their husbands" to "without fear or compulsion from any one." *Barstow v. Smith*, Walk. (Mich.) 394.

"Willingly" to "freely, voluntarily, without compulsion, constraint, or coercion by her husband." *Henderson v. Rice*, 1 Coldw. (Tenn.) 223.

An acknowledgment by a married woman, on private examination, that she signed, sealed, and delivered the instrument "on her own free will and accord without any force, persuasion, or threats from her said husband," does not sufficiently comply with the provisions of a statute requiring an acknowledgment of the deed as "her voluntary act and deed freely, without any force, threats, or

compulsion of her said husband." *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349; *Alabama L. Ins., etc., Co. v. Boykin*, 38 Ala. 510.

"She acknowledges that she had willingly executed the same" to "she acknowledged the same to be her act, and declared that she had willingly executed the same." *Blair v. Sayre*, 29 W. Va. 604; *Laidley v. Central Land Co.*, 30 W. Va. 505; *Hockman v. McClanahan*, 87 Va. 33.

"Acknowledged the same freely and willingly" to "acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same." *Hayden v. Moffat*, 74 Tex. 647.

Under the *Alabama* act relating to the acknowledgment of conveyances of the homestead, prescribing that the certificate should recite that the wife "signed the same of her own free will and accord, and without fear, constraint, or threats on the part of her husband," it was held that a certificate in which the word "persuasion" was used, instead of "threats," although in the exact language of a prior statute, was fatally defective. *Motes v. Carter*, 73 Ala. 553; *Strauss v. Harrison*, 79 Ala. 324; *Daniels v. Lowery*, 92 Ala. 519.

1. Defective Certificates cannot be Aided by Parol.—*Ross v. M'Lung*, 6 Pet. (U. S.) 283.

Alabama.—*Scott v. Simons*, 70 Ala. 352; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79.

Connecticut.—*Pendleton v. Button*, 3 Conn. 406; *Hayden v. Westcott*, 11 Conn. 129.

Illinois.—*Russell v. Rumsey*, 35 Ill. 362; *Ennor v. Thompson*, 46 Ill. 214; *Lindley v. Smith*, 46 Ill. 523.

Iowa.—*O'Ferrall v. Simplot*, 4 Greene (Iowa) 162, 4 Iowa 381.

Kentucky.—*Barnett v. Shackelford*, 6 J. J. Marsh. (Ky.) 532, 22 Am. Dec. 100.

New York.—*Elwood v. Klock*, 13 Barb. (N. Y.) 50.

Ohio.—*Silliman v. Cummins*, 13 Ohio 116.

Pennsylvania.—*Watson v. Bailey*, 1 Binn. (Pa.) 470, 2 Am. Dec. 462; *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724; *Barnet v. Barnet*, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516; *Spencer v. Reese*, 165 Pa. St. 158.

Virginia.—*Harrisonburg First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740.

West Virginia.—*Wise v. Postlewait*, 3 W. Va. 452; *Leftwich v. Neal*, 7 W. Va. 569.

See also *Robinson v. Noel*, 49 Miss. 253.

By some courts it is held that where a statement of the official character of the certifying officer has been omitted from the certificate, the omission may be supplied by extrinsic evidence. See *supra*, this title, *The Certificate—Certain Provisions Considered*.

Statement of Private Examination.—Where the certificate of a married woman's acknowledgment fails to show that she was privately examined, the omission is fatal, and cannot be supplied by parol. *Elliott v. Peirsol*, 1 McLean (U. S.) 11, 1 Pet. (U. S.) 328; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep.

ness of the certificate cannot be supplied by intendment or construction.¹

d. SURPLUSAGE.—A certificate complete and regular in other respects will not be rendered invalid by the presence of superfluous matter; this, whether it consists in the use of unnecessary words or in unrequired allegations of fact, may be rejected as surplusage.²

4. Amendment—*a. BY THE OFFICER.*—The decisions of the courts as to whether an officer has a right to correct mistakes in certificates of acknowledgment after the deed has been recorded, have been conflicting. The weight of authority is in favor of the view that after an officer has made the certificate and the deed has been recorded, he has no power to amend or change it so as to correct a mistake or supply an omission therein.³ Some

79; *Harty v. Ladd*, 3 Oregon 353; *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724; *Stone v. Sledge* (Tex. Civ. App., 1894), 24 S. W. Rep. 697; *Looney v. Adamson*, 48 Tex. 619. See also *supra*, this title, *Married Women—Separate Examination*.

1. Material Words cannot be Supplied by Intendment.—*Stanton v. Button*, 2 Conn. 527; *Hayden v. Westcott*, 11 Conn. 129; *Short v. Conlee*, 28 Ill. 219; *Tully v. Davis*, 30 Ill. 103, 83 Am. Dec. 179; *Dewey v. Campau*, 4 Mich. 565; *Cabell v. Grubbs*, 48 Mo. 353.

2. Surplusage may be Rejected.—*La Société Française, etc., v. Beard*, 54 Cal. 480; *Biggers v. St. Louis Mut. House Bldg. Co.*, 9 Mo. App. 210; *Gray v. Kauffman*, 82 Tex. 65; *Thompson v. Johnson*, 34 Tex. 548. See also *Farrell v. Palestine Loan Assoc.* (Tex., 1895), 30 S. W. Rep. 814.

Where the certificate of probate by a witness was in the form of an affidavit, it was held that the signature of the witness, and the jurat of the officer added thereto, might be rejected as surplusage. *Whitney v. Arnold*, 10 Cal. 531.

A statement that the wife does not wish to retract, when unnecessary, will not vitiate the certificate, but may be rejected. *Stuart v. Dutton*, 39 Ill. 91.

Where the certificate stated that the deed was proved or acknowledged according to law, there being nothing to which the words "proved or" could be referred, it was held that they might be rejected as surplusage. *Nelson v. Graff*, 44 Mich. 433.

Under a statute requiring the clerk to indorse upon a deed a certificate of acknowledgment, and to make an entry thereof, and in the entry to state the names of the parties, and a description of the property, it was held in *Missouri*, where the clerk unnecessarily added to the indorsement a copy of the entry in which the description was false, that this would not vitiate the acknowledgment. *Crowley v. Wallace*, 12 Mo. 143.

Relinquishment of Dower in Conveyance of Wife's Estate.—A certificate reciting that a married woman acknowledged that she executed a deed conveying her own estate, "and relinquished her dower" therein, is not invalidated by the clause relating to dower, it being rejected as surplusage.

Hartley v. Ferrell, 9 Fla. 374; *Evans v. Summerlin*, 19 Fla. 858; *Chester v. Rumsey*, 26 Ill. 97; *Moore v. Titman*, 33 Ill. 357; *Stuart v. Dutton*, 39 Ill. 91; *Tourville v. Pierson*, 39 Ill. 446; *Kimmell v. Caruthers* (Ky., 1886),

1 S. W. Rep. 2; *Stone v. Montgomery*, 35 Miss. 83; *Chauvin v. Wagner*, 18 Mo. 532; *Delassus v. Poston*, 19 Mo. 425; *Perkins v. Carter*, 20 Mo. 465; *Miller v. Powell*, 53 Mo. 252; *Siemers v. Kleeburg*, 56 Mo. 196. Compare *McDaniel v. Priest*, 12 Mo. 544.

3. Elliott v. Peirsol, 1 Pet. (U. S.) 328; *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918; *Hodges v. Winston*, 95 Ala. 514; *Shubert v. Winston* (Ala., 1892), 11 So. Rep. 200; *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779; *Wedel v. Herman*, 59 Cal. 507; *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128; *Gilbraith v. Gallivan*, 78 Mo. 452; *Enterprise Transit Co. v. Sheedy*, 103 Pa. St. 492, 49 Am. Rep. 130; *Stone v. Sledge* (Tex. Civ. App., 1894), 24 S. W. Rep. 697 (Tex., 1894), 26 S. W. Rep. 1068; *McMullen v. Egan*, 21 W. Va. 233.

Officer Has no Power to Correct the Certificate after It has been Recorded.—In *Elliott v. Pier-sol*, 1 Pet. (U. S.), 328, it was held that the clerk had no authority to alter the record of his certificate of acknowledgment of a deed at any time after the record was made. In delivering the opinion of the court, Trimble, J., said: "We are of opinion he acted ministerially and not judicially in the matter. Until his certificate of acknowledgment of Elliott and wife was recorded, it was in its nature but an act *in pais* and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio* as soon as the record was made."

No Power of Correction after the Officer's Term has Expired.—A new certificate of a married woman's acknowledgment, made by an officer four years after the original certificate and after the expiration of the term of office held by him when he made the original certificate, although he has been re-elected and holds the same office at the time of making the second certificate, is invalid. *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918. In this case, Coleman, J., after citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 150, proceeded: "Upon investigation we find the great weight of authority and reason in support of the propositions that the power conferred on certain officers to take acknowledgments to deeds of conveyance is statutory, and courts of law or equity have no jurisdiction to amend or correct defective executions of the power; that the acknowledgment and certificate are essential parts of the conveyance; that the officer before whom the acknowledgment

courts, however, have held the contrary.¹ Where corrections are allowed, they must be made during the officer's term of office;² but in *Tennessee*, under

is made, and who is required to make the certificate, acts judicially when certifying to the acknowledgment made before him; and when delivered to the parties and accepted for record, or as the complete execution of the instrument, he has no power to alter, add to, or make a new certificate, without a re-acknowledgment." See also *Gilbraith v. Gallivan*, 78 Mo. 452.

A Notary having Made and Delivered a defective certificate cannot amend it by a second certificate made in the absence of the grantors. *Enterprise Transit Co. v. Sheedy*, 103 Pa. St. 492, 49 Am. Rep. 130.

Recording Officer Has no Power to Correct Certificate.—A recording officer, in making the record of a certificate of acknowledgment, has no authority to correct it when defective. *Newman v. Samuels*, 17 Iowa 528.

Tennessee—Power to Correct Certificates may be Conferred by Statute.—Under section 2896 of the *Tennessee Code of 1884*, providing that the clerk may correct any mistake or omission in a certificate of a married woman's acknowledgment upon application of either party interested, on making oath in open court of the truth of such correction, it was held that this provision applies also to notaries public, and that the correction might be made upon the notary's oath in the court of another state. *Brinkley v. Tomeny*, 9 Baxt. (Tenn.) 275. But this act is not retrospective in its operation. *Fall v. Roper*, 3 Head (Tenn.) 485. See also *Harrison v. Wade*, 3 Coldw. (Tenn.) 505; *Stroud v. McDaniel*, 12 Lea (Tenn.) 617. The grantor cannot be called as a witness to disprove the truth of the amended certificate. *Vaughn v. Carlisle*, 2 Lea (Tenn.) 525. The oath, or note thereof, need not be entered on the minutes of the court. *Grotenkemper v. Carver*, 4 Lea (Tenn.) 375.

If a married woman's separate examination was properly taken, a mistake in the officer's certificate may be corrected, but not so if the examination was not properly taken. The officer who took the acknowledgment is competent to testify that there was no proper separate examination. *Garth v. Fort*, 15 Lea (Tenn.) 683.

1. Correction after Record.—In *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516, it is held that officers have a right, and it is their duty, to correct at any time mistakes in their certificates, and that the officer who made a certificate should be permitted to correct a mistake therein in court *nunc pro tunc*. This was subsequently approved by the *Indiana* courts in *Stott v. Harrison*, 73 Ind. 17; *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. St. Rep. 330. But it has been disapproved and said to be wholly unsupported by authority in other courts. *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918; *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779.

A dictum favoring power of an officer to correct his certificate at any time is to be found in *Wannall v. Kem*, 51 Mo. 150, 57 Mo. 478. And this dictum has been cited with

apparent approval. *Attleboro First Nat. Bank v. Hughes*, 10 Mo. App. 7; *Miller v. Powell*, 53 Mo. 252; *Cox v. Holcomb*, 87 Ala. 589, 53 Am. St. Rep. 79; but it was subsequently examined and disapproved by the supreme court of *Missouri* in *Gilbraith v. Gallivan*, 78 Mo. 456, and by the Supreme Court of *Alabama* in *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918.

A deed properly executed and acknowledged, save that the officer in taking the acknowledgment failed at the time to sign the certificate appended thereto, was admitted to record. Ten months afterwards, the officer, discovering his omission, informed the grantor of the fact, and upon her admission that she had appeared before him and acknowledged it, appended an additional certificate to that effect, no rights of third parties having intervened, and this was held allowable. *Harmon v. Magee*, 57 Miss. 415.

In *Stott v. Harrison*, 73 Ind. 17, it was held, on the authority of *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516, that if the notary had failed, as was claimed, to affix his seal to the certificate of acknowledgment taken by him, he had power to affix it subsequently.

A Notary while He Remains in Office may amend his certificate provided the amendment is in accordance with the facts. *Chicago, etc., R. Co. v. Lewis*, 53 Iowa 101.

Corrections Not Contradicting the Certificate.—Where a clerk in writing out a certificate of an acknowledgment taken by a deputy failed to set forth the facts, and to include the indorsement made on the deed by the deputy, all of which appeared from the instrument itself, and which it was his duty to include in the certificate when he recorded the instrument, it was held that the mistake might be corrected, as the clerk was not thereby contradicting his own certificate by showing that he did something more than appeared from the record. *Ralston v. Moore*, 83 Ky. 71. See also *Franklin v. Becker*, 11 Bush (Ky.) 595; *McCormack v. Woods*, 14 Bush (Ky.) 78; *Waters v. Davis* (Ky., 1887), 2 S. W. Rep. 695.

Before the Instrument has been Recorded amendments of the certificate have been allowed. *Attleboro First Nat. Bank v. Hughes*, 10 Mo. App. 7; *Hanson v. Cochran*, 9 Houst. (Del.) 184.

2. Fitzgerald v. Milliken, 83 Ky. 70; *Gilbraith v. Gallivan*, 78 Mo. 452. See also *Chicago, etc., R. Co. v. Lewis*, 53 Iowa 101; *McKellar v. Peck*, 39 Tex. 381.

An officer cannot fill up blanks in a defective certificate of acknowledgment after he has gone out of office, to have effect by relation as if done at the time the acknowledgment was made. *Carlisle v. Carlisle*, 78 Ala. 542.

Where the certificate of acknowledgment is defective, a proper acknowledgment cannot be shown by the examination of the officer after his term of office has expired. *Elwood v. Klock*, 13 Barb. (N. Y.) 50.

a statute authorizing the officer to correct the defective certificate on making oath in open court of the truth of the correction, it was held that such correction might be made after the expiration of his term.¹

6. BY THE COURT.—Courts of equity, as such, have no power to correct mistakes in the certificate of acknowledgment,² for the reason that the certifying officer derives his authority from statute, and courts of equity do not aid the defective execution of statutory powers.³ But it is provided by statute in several states that where an acknowledgment is properly taken but defectively certified, the certificate may be amended by the court upon the application of any party interested.⁴

1. *Grotenkemper v. Carver*, 4 Lea (Tenn.) 375.

It was held, under § 2082 of the *Tennessee* Code, that a clerk had power to correct mistakes or omissions in the certificate of a married woman's acknowledgment after he had gone out of office, and that, in a suit of ejectment, the deed, with the certificate as amended, might be read in evidence; also that the woman was an incompetent witness to contradict the recitals of the amended certificate. *Vaughn v. Carlisle*, 2 Lea (Tenn.) 525.

2. *In re Millard*, 5 C. B. 753, 57 E. C. L. 751; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79; *Selover v. American Russian Commercial Co.*, 7 Cal. 266; *Barrett v. Tewksbury*, 9 Cal. 14; *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779; *Wannall v. Kem*, 51 Mo. 150. See *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918; *Stodalka v. Novotny*, 144 Ill. 125.

In *Arkansas* a different view has been taken. *Simpson v. Montgomery*, 25 Ark. 365, 99 Am. Dec. 228.

As to the law in *North Carolina*, see *Wynne v. Small*, 102 N. Car. 133.

Effect of Decree Settling Title to Land.—Where an acknowledgment of a deed to land was defective for want of proof that it was taken before an authorized officer, and a petition was filed praying for a decree settling the title to the land, it was held that such decree was binding only against parties to the action and their privies, and would not affect the rights of strangers. *Connell v. Galligher*, 36 Neb. 749, 39 Neb. 793.

3. *Wannall v. Kem*, 51 Mo. 150. See *Gebb v. Rose*, 40 Md. 387; also the title ACCIDENT (IN EQUITY), Vol. I., p. 281.

4. See the various local statutes.

California.—Although an officer cannot amend his certificate after taking the acknowledgment and delivering the return, under the *California* Civil Code, § 1202, where the acknowledgment was properly made but defectively certified, any party interested may bring an action in the district court to obtain a judgment correcting the certificate. *Wedel v. Herman*, 59 Cal. 507; *Hutchinson v. Ainsworth*, 63 Cal. 286. See also *Danglarde v. Elias*, 80 Cal. 65.

But a defective certificate made prior to the enactment of the code could not be reformed in equity. *Judson v. Porter*, 53 Cal. 482; *Selover v. American Russian Commercial Co.*, 7 Cal. 266.

Ohio.—Under the Act of 1857 (Rev. Stat.

1894, §§ 4144-4149), a certificate in which the officer by mistake omits to certify the separate examination of a married woman may be corrected by the court. *Kilbourn v. Fury*, 26 Ohio St. 153.

Where a married woman by mistake acknowledged her deed before an officer not authorized to act, and he omitted to show in his certificate a substantial compliance with all the material matters required by statute, it was held that the certificate might be corrected under this act. *Dengenhart v. Cracraft*, 36 Ohio St. 549. See also *Goshorn v. Purcell*, 11 Ohio St. 641; *Koltlenbrock v. Cracraft*, 36 Ohio St. 584.

Pennsylvania.—The Act of 1878, providing that certificates of acknowledgment defective in form, where the acknowledgment was in fact in due form of law, might be reformed according to the facts, applies to all such cases except those in which actions to recover the property had been commenced before the time of the passage of the act. *Manufacturers' Natural Gas Co. v. Douglass*, 130 Pa. St. 283.

But the act furnishes no remedy unless the acknowledgment is made in due form of law. *Spencer v. Reese*, 165 Pa. St. 158.

Where, however, a bill is brought to reform a defective certificate of acknowledgment, an allegation that such certificate is not true in fact in a part not affected by the proposed correction is not a sufficient defense against the correction. *Cressona Sav. Fund, etc., Assoc. v. Sowers*, 134 Pa. St. 354. See also *Hand v. Weidner*, 151 Pa. St. 362.

South Dakota.—It is provided by § 3289 of the Comp. Laws of *Dakota*, that when the acknowledgment is properly made, but defectively certified, any party interested may bring an action in the district court to obtain a judgment correcting the certificate. *Cannon v. Deming*, 3 S. Dak. 421.

Texas.—Art. 4353, *Sayles* Civil Statutes, providing that any person interested may bring an action in the district court to obtain judgment correcting the certificate of an acknowledgment properly made but defectively certified, applies to a deed and other instruments properly executed and acknowledged by married women, as well as like instruments by other persons, but does not attempt to validate conveyances where, in fact, the acknowledgment was not taken according to law, and the plaintiff cannot prevail in an action to reform the certificate of a married woman's acknowledgment failing to show

5. Liability of Officer for False Certificate.—Where an officer, from malice or through gross negligence, makes a false certificate of acknowledgment, he and his sureties will be liable on his official bond for any damages resulting directly from his wrongful act and not arising from the negligence or procurement of the party injured.¹

6. Certificate as Evidence.—*a. GENERALLY.*—Evidence of Execution and Acknowledgment of Deed.—The certificate of the officer taking the acknowledgment is the usual legal evidence of the execution of the deed² and as a general rule the

that the contents of the instrument were explained to her, when such explanation was not in fact made. *Johnson v. Taylor*, 60 Tex. 360.

As to the time of bringing action, see *Norton v. Davis*, 83 Tex. 32; *Stone v. Sledge* (Tex. Civ. App., 1894), 24 S. W. Rep. 697.

1. *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Bartels v. People*, 45 Ill. App. 306, 38 Ill. App. 428, 138 Ill. 322; *Stevenson v. Brasher*, 90 Ky. 23; *People v. Colby*, 39 Mich. 456; *People v. Butler*, 74 Mich. 643; *State v. Meyer*, 2 Mo. App. 413.

Notary Liable for False Certificate.—Where a notary public, in taking and certifying an acknowledgment, failed to show in the certificate that the grantor was personally known to him, or properly identified, it was held that he was guilty of gross and culpable negligence, and was liable on his official bond to the party injured. *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714.

Where a notary certified that a certain person appeared before him and acknowledged the execution of a mortgage, who did not in fact appear, and whose name was not even signed to the instrument, it was held that he was guilty of malfeasance, and liable on his official bond. *People v. Colby*, 39 Mich. 456.

Dereliction must be Intentional.—A notary will not be held liable in damages for a false certificate of acknowledgment, unless the party claiming damages prove a clear and intentional dereliction of duty on the part of the notary. *Com. v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805. See *Scotten v. Fegan*, 62 Iowa 236; *Browne v. Dolan*, 68 Iowa 645; *Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139.

Duty to Know Truth of Facts Certified.—But where a notary public falsely certified that he was personally acquainted with the grantor in a deed, whom he did not know, and of whose identity he took no pains to satisfy himself, and who was in fact an impostor, it was held, in an action for damages against the notary, that it was no defense for him to say that he was not aware that his certificate was false, or that he believed it to be true, it being his duty to know that it was true. *State v. Meyer*, 2 Mo. App. 413. See *Overacre v. Blake*, 82 Cal. 77; *Hatton v. Holmes*, 97 Cal. 208; *Bartels v. People*, 45 Ill. App. 306, 38 Ill. App. 428, 138 Ill. 322; *Stevenson v. Brasher*, 90 Ky. 23; *Cameron v. Culkins*, 44 Mich. 531.

Officer's Negligence must be Proximate Cause of Damage.—Where a notary public, on the representations of a stranger, drew up a deed for

him in his alleged name and took his acknowledgment of the same, and he then represented himself to be the grantor named therein to a third party, who negligently loaned money on the deed, it was held in an action by the loaner against the notary that the latter was not liable, as the damages did not directly result from his negligence. *Oakland Sav. Bank v. Murfey*, 68 Cal. 456; *Wyllis v. Haun*, 47 Iowa 614. See also *Overacre v. Blake*, 82 Cal. 77; *Hatton v. Holmes*, 97 Cal. 208; *People v. Butler*, 74 Mich. 643; *Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139.

The Measure of Damages for a notary's negligence in taking and certifying the acknowledgment of a mortgage is the amount of the debt and interest intended to be secured by the mortgage. *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714.

A notary's liability in such a case does not depend upon whether the mortgagee has redeemed a prior mortgage and thus collected his claim or reduced the damages. *People v. Colby*, 39 Mich. 456.

No Liability unless Damage.—Where the crop covered by a mortgage was valueless, so that the debt would not have been secured thereby, it was held that the mortgagee, having suffered no injury, could not recover even nominal damages in an action against a notary for misconduct and neglect in certifying the acknowledgment of the mortgage. *McAllister v. Clement* (Cal., 1888), 16 Pac. Rep. 775.

2. Certificate Evidence of Execution of Deed.—*Illinois.*—*Schroder v. Keller*, 84 Ill. 46; *Tunison v. Chamblin*, 88 Ill. 378.

Iowa.—*O'Ferrall v. Simplot*, 4 Greene (Iowa) 162; *Van Orman v. McGregor*, 23 Iowa 300; *Bailey v. Landingham*, 53 Iowa 722; *Fogg v. Holcomb*, 64 Iowa 621; *Morse v. Beale*, 68 Iowa 463.

Minnesota.—*Romer v. Conter*, 53 Minn. 171; *Hanson v. Metcalf*, 46 Minn. 25.

Michigan.—*Harrington v. Fish*, 10 Mich. 415. See also *Camp v. Carpenter*, 52 Mich. 375.

Missouri.—*Clark v. Edwards*, 75 Mo. 87. The certificate of acknowledgment is the evidence required by law of the execution and acknowledgment of a written instrument. *O'Ferrall v. Simplot*, 4 Greene (Iowa) 162. See also *Caruthers v. McLaran*, 56 Miss. 371; and notes *infra*, this section.

Acknowledgment as Evidence of Delivery.—*Kentucky.*—The acknowledgment of a deed is a fact which may be proven to show delivery, but standing alone does not establish a presumption of delivery. *Alexander v. Kermel*, 81 Ky. 345; *McConnell v. Brown*, Litt. Sel.

sole evidence of its acknowledgment.¹

b. HOW FAR CONCLUSIVE—(1) Generally.—The statutes and decisions of the courts of the several states as to the conclusiveness of this evidence are not uniform.

(2) View that Certificate is Prima Facie Evidence Only.—In some states, especially in those in which the act of taking acknowledgments is regarded as judicial in its nature, it is held, in some cases, in accordance with express statutory provisions, that the officer's certificate is only *prima facie* proof of the facts therein recited which the officer is required to certify, as well as of its own genuineness and regularity, and that this *prima facie* evidence may be rebutted by competent proof of its falsity.²

Cas. (Ky.) 459; *Ford v. Gregory*, 10 B. Mon. (Ky.) 175.

Maryland.—Acknowledgment and recording are sufficient to warrant the presumption of legal delivery of the deed. *Stewart v. Reddit*, 3 Md. 67; *Hutchins v. Dixon*, 11 Md. 29. See also *Crauford v. State*, 6 Har. & J. (Md.) 231; and as to law in other states, *Burton v. Boyd*, 7 Kan. 17; *Rigler v. Cloud*, 14 Pa. St. 361; *Roanes v. Archer*, 4 Leigh (Va.) 550; *Portz v. Schantz*, 70 Wis. 497.

Presumption as to Time of Delivery—Illinois.—The presumption is that a deed was delivered on the day of its date, and the fact that the certificate of acknowledgment bears a later date is not sufficient to rebut such presumption. *Deininger v. McConnell*, 41 Ill. 228; *Jayne v. Gregg*, 42 Ill. 413; *Hardin v. Crate*, 78 Ill. 533; *Roane v. Baker*, 120 Ill. 308; *Lake Erie, etc., R. Co. v. Whitham*, 155 Ill. 514.

See also *Darst v. Bates*, 51 Ill. 439; and as to law in *Massachusetts*, *Smith v. Porter*, 10 Gray (Mass.) 66.

Michigan.—In the absence of proof to the contrary, when the date of acknowledgment is subsequent to the date of the deed, it is presumed that the deed was delivered at the date of acknowledgment. *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Johnson v. Moore*, 28 Mich. 3.

But this presumption may be easily overcome by circumstances which are inconsistent with the supposed fact. *Eaton v. Trowbridge*, 38 Mich. 454.

Where Two Deeds Bearing Different Dates were both acknowledged by the grantor at the same time, in the absence of proof to the contrary it will be presumed that both were delivered at the time of their respective dates, and not at the time of their acknowledgment. *Harman v. Oberdorfer*, 33 Gratt. (Va.) 497; *Renick v. Ludington*, 20 W. Va. 512.

Where a Deed has been Executed and Acknowledged by Different Parties in different counties, the presumption that it was delivered on the day of its date cannot stand against the positive averment in the acknowledgment that it was executed afterwards. *Henderson v. Baltimore*, 8 Md. 352.

1. Certificate Evidence of Acknowledgment.—*Greene v. Godfrey*, 44 Me. 25.

Married Women's Deed.—The certificate of acknowledgment is the authentic and sole medium of proving that a *feme covert* has acknowledged the deed with all the solemnities

required by statute. *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; *Elwood v. Klock*, 13 Barb. (N. Y.) 50; *Ford v. Osborne*, 45 Ohio St. 1; *Louden v. Blythe*, 27 Pa. St. 22, 67 Am. Dec. 442; *Williams v. Baker*, 71 Pa. St. 476; *Mount v. Kesterson*, 6 Coldw. (Tenn.) 452; *Harkins v. Forsyth*, 11 Leigh (Va.) 306; *Harrisonburg First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740. See also *Wedel v. Herman*, 59 Cal. 507; *Wannell v. Kem*, 57 Mo. 478.

Sheriff's Deed.—The certificate of acknowledgment of a sheriff's deed indorsed upon the instrument is the original, authentic evidence of the act of the sheriff; and this certificate cannot be aided, if defective in any particular, by reference to the entry made by the clerk upon the records of the court. *Lincoln v. Thompson*, 75 Mo. 613; *Samuels v. Shelton*, 48 Mo. 444; *Adams v. Buchanan*, 49 Mo. 64. See also *Allen v. King*, 35 Mo. 216; *McClure v. McClurg*, 53 Mo. 173.

Nor will it be invalidated by the fact that the clerk's entry is defective. *Scruggs v. Scruggs*, 41 Mo. 242.

Record Controls Certificate.—A certificate of probate by the clerk of a court is made by statute evidence of the probate of the deed, but is not so high evidence as the record of the court; and where the two are in conflict, the record must control. *Den v. Wilson*, 2 Dev. (N. Car.) 306.

No Evidence of Omitted Facts.—In an action on a bill, brought under the *Pennsylvania* Act of 1878, to reform a certificate of acknowledgment, defective in failing to show the separate examination of the wife, it was held that the certificate was evidence only of the existence of facts therein stated, and that the allegations in the bill that the wife was separately examined derived no support from it. *Hand v. Weidner*, 151 Pa. St. 362.

It is held in *California* that the certificate is *prima facie* evidence of the fact that the deed was acknowledged as therein indicated; and if it fails to show any essential to a due and sufficient acknowledgment, it will be presumed that such necessary acts were not done. *Danglarde v. Elias*, 80 Cal. 65.

2. Certificate Prima Facie Evidence—United States.—*Northwestern Mut. L. Ins. Co. v. Nelson*, 103 U.S. 544.

Florida.—*Tuten v. Gazan*, 18 Fla. 751.

Indiana.—*Woods v. Polhemus*, 8 Ind. 60.

(3) *View that Certificate is Conclusive in Absence of Fraud.*—In other states more weight is attached to the certificate, and it is held that where the grantor has appeared before the officer and an acknowledgment of some kind has been taken, the certificate of the officer in due form is conclusive of the facts certified, which he is by law authorized to certify, but that the certificate may be impeached for duress or fraud in which the grantee or mortgagee participated, or of which he had notice before parting with his money.¹

See also *McNeely v. Rucker*, 6 Blackf. (Ind.) 391; *Wright v. Bundy*, 11 Ind. 398.

Iowa.—*O'Ferrall v. Simplot*, 4 Greene (Iowa) 162, 4 Iowa 381; *Tatum v. Goforth*, 9 Iowa 247; *Moons v. Sargent*, 18 Iowa 90; *Van Orman v. McGregor*, 23 Iowa 300; *Borland v. Walrath*, 33 Iowa 130; *Bailey v. Landingham*, 53 Iowa 722; *Mixer v. Bennett*, 70 Iowa 329.

Michigan.—*Camp v. Carpenter*, 52 Mich. 375. See also *Hourtienne v. Schnoor*, 33 Mich. 274; *Johnson v. Van Velsor*, 43 Mich. 208; *Cameron v. Culkins*, 44 Mich. 531.

Minnesota.—*Dodge v. Hollinshead*, 6 Minn. 25, 80 Am. Dec. 433; *Annan v. Folsom*, 6 Minn. 500; *Romer v. Conter*, 53 Minn. 171.

New Jersey.—*Marsh v. Mitchell*, 26 N. J. Eq. 497; *Wells v. Wright*, 12 N. J. L. 131.

New York.—*Jackson v. Perkins*, 2 Wend. (N. Y.) 308; *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 161; *Albany County Sav. Bank v. McCarty*, 71 Hun (N. Y.) 227. See also *Rexford v. Rexford*, 7 Lans. (N. Y.) 6; *Jackson v. Hayner*, 12 Johns. (N. Y.) 469; *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *People v. Brown*, 55 N. Y. 180.

South Carolina.—*Hays v. Hays*, 5 Rich. (S. Car.) 31. See *Bruce v. Perry*, 11 Rich. (S. Car.) 121.

Washington.—*Gardner v. Port Blakeley Mill Co.*, 8 Wash. 1.

Wisconsin.—*Eaton v. Woydt*, 32 Wis. 277.

See also *Tarpey v. Desert Salt Co.*, 5 Utah 205; *Dolph v. Barney*, 5 Oregon 191; *Moore v. Fuller*, 6 Oregon 272, 25 Am. Rep. 524.

Missouri—Acknowledgments of Married Women.—It is held in *Missouri*, with reference to the acknowledgments of married women, that the certificate, when in substantial conformity with the statute, is only *prima facie* evidence of the facts it recites, and that parol evidence is admissible to contradict its recitals. *Wannell v. Kem*, 57 Mo. 480; *Sharpe v. McPike*, 62 Mo. 300; *Steffen v. Bauer*, 70 Mo. 399; *Clark v. Edwards*, 75 Mo. 87; *Belo v. Mays*, 79 Mo. 71; *Drew v. Arnold*, 85 Mo. 128; *Mays v. Pryce*, 95 Mo. 604; *Pierce v. Feagans*, 39 Fed. Rep. 587; *Pierce v. Georger*, 103 Mo. 540.

This rule, which is opposed to the current of authority, seems to be founded upon the peculiar wording of the *Missouri* statute. *Pierce v. Georger*, 103 Mo. 540. See *Webb v. Webb*, 87 Mo. 540.

Release from Liability for Breach of Promise—*California.*—It was held in *California* that a notary's certificate of acknowledgment attached to a receipt and release from liability for breach of promise of marriage is only

prima facie presumed to be true, and can be contradicted by any evidence, direct or indirect. *Moore v. Hopkins*, 83 Cal. 270, 17 Am. St. Rep. 248.

1. Certificate Conclusive in Absence of Fraud—*United States.*—*Hitz v. Jenks*, 123 U. S. 297. See also *Young v. Duvall*, 109 U. S. 573.

Alabama.—*Miller v. Marx*, 55 Ala. 322; *Moses v. Dade*, 58 Ala. 211; *Cahall v. Citizens' Mut. Bldg. Assoc.*, 61 Ala. 232; *Moag v. Strang*, 69 Ala. 98; *Downing v. Blair*, 75 Ala. 216; *Shelton v. Aultman, etc., Co.*, 82 Ala. 315; *Grider v. American Freehold Land Mortg. Co.*, 99 Ala. 281 (citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 160); *Giddens v. Bolling*, 99 Ala. 319 (citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 160); *American Freehold Land Mortg. Co. v. James (Ala., 1895)*, 16 So. Rep. 887; *Jinwright v. Nelson (Ala., 1895)*, 17 So. Rep. 91; *Read v. Rowan (Ala., 1895)*, 18 So. Rep. 211.

Arkansas.—*Holt v. Moore*, 37 Ark. 146; *Meyer v. Gossett*, 38 Ark. 377; *Donahue v. Mills*, 41 Ark. 421.

California.—*Grant v. White*, 57 Cal. 141; *DeArmaz v. Escandon*, 59 Cal. 486; *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156; *Le Mesnager v. Hamilton*, 101 Cal. 532. See also *La Société Française, etc., v. Beard*, 54 Cal. 480.

Illinois.—*Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Hill v. Bacon*, 43 Ill. 477; *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Monroe v. Poorman*, 62 Ill. 523. See *Paxton v. Marshall*, 18 Fed. Rep. 361.

Mississippi.—*Johnston v. Wallace*, 53 Miss. 333, 24 Am. Rep. 699.

Ohio.—*Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303. See also *Williamson v. Carskadden*, 36 Ohio St. 664.

Pennsylvania.—*Schrader v. Decker*, 9 Pa. St. 14, 49 Am. Dec. 538; *Louden v. Blythe*, 16 Pa. St. 532, 55 Am. Dec. 533, 27 Pa. St. 22, 67 Am. Dec. 442; *Jamison v. Jamison*, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; *Michener v. Cavender*, 39 Pa. St. 334, 80 Am. Dec. 486; *Hall v. Patterson*, 51 Pa. St. 289; *McCandless v. Engle*, 51 Pa. St. 309; *Williams v. Baker*, 71 Pa. St. 476; *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46; *Miller v. Wentworth*, 82 Pa. St. 280; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204; *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552; *Cressona Sav. Fund, etc., Assoc. v. Sowers*, 134 Pa. St. 354; *Citizens' Sav., etc., Assoc. v. Heiser*, 150 Pa. St. 514; *Hand v. Weidner*, 151 Pa. St. 362; *Heilman v. Kroh*, 155 Pa. St. 1; *Carr v. Frick Coke Co. (Pa., 1895)*, 32 Atl. Rep. 656. See also *Barnet v. Barnet*, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516; *Creighton v. Ladley*, 6 Am. L. Reg., N. S. 359.

(4) *Showing Want of Acknowledgment or Jurisdiction.*—It is, however, competent to show in contradiction of the certificate that there was in fact no ac-

Rhode Island.—*Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691; *Earle v. Chace*, 12 R. I. 374.

Texas.—*Hartley v. Frosh*, 6 Tex. 208, 55 Am. Dec. 772; *Shelby v. Burtis*, 18 Tex. 644; *Wiley v. Prince*, 21 Tex. 637; *Pool v. Chase*, 46 Tex. 207; *Williams v. Pouns*, 48 Tex. 141; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Rep. 623; *Waltee v. Weaver*, 57 Tex. 569; *Davis v. Kennedy*, 58 Tex. 516; *Miller v. Yturria*, 69 Tex. 550; *Webb v. Burnley*, 70 Tex. 322; *Stallings v. Hullum*, 79 Tex. 421; *Herring v. White*, 6 Tex. Civ. App. 249; *Freiberg v. DeLamar* (Tex. Civ. App., 1894), 27 S. W. Rep. 151. See also *Peterson v. Lowry*, 48 Tex. 408; *Pierce v. Fort*, 60 Tex. 464; *Cole v. Bammel*, 62 Tex. 108.

Virginia.—*Harkins v. Forsyth*, 11 Leigh (Va.) 306; *Carper v. M'Dowell*, 5 Gratt. (Va.) 212. See also *Hutchison v. Rust*, 2 Gratt. (Va.) 394; *Burson v. Andes*, 83 Va. 445.

West Virginia.—*Rollins v. Menager*, 22 W. Va. 461; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622. See also *Ocheltree v. McClung*, 7 W. Va. 232.

See also as to conclusiveness of certificate, *Banks v. Ollerton*, 26 Eng. L. & Eq. 508.

Kentucky.—Under the *Kentucky* Gen. Stat. 1894, § 3760, the officer's certificate of acknowledgment showing a compliance with the statutory requirements is conclusive, and it cannot be contradicted by parol evidence except where fraud or mistake is alleged. *Pribble v. Hall*, 13 Bush (Ky.) 61; *Dowell v. Mitchell*, 82 Ky. 47; *Ritter v. Bell*, (Ky., 1887), 2 S. W. Rep. 675; *Razor v. Dowan* (Ky., 1890), 13 S. W. Rep. 914; *Davis v. Jenkins*, 93 Ky. 353; *Keith v. Silberberg* (Ky., 1895), 29 S. W. Rep. 316. See also *Barnett v. Shackleford*, 6 J. J. Marsh (Ky.) 532, 22 Am. Dec. 100; *Withers v. Pugh*, 91 Ky. 522; *Martin v. Davidson*, 3 Bush (Ky.) 575; *Hughes v. Coleman*, 10 Bush (Ky.) 246. So also as to married women's acknowledgments. *Cox v. Gill*, 83 Ky. 669; *Tichenor v. Yankey*, 89 Ky. 508; *Shaw v. Shaw* (Ky., 1894), 24 S. W. Rep. 630.

Prior to the passage of this statute, and under a former statute requiring the separate examination of a married woman, but dispensing with the formal certificate of such examination, and making the general certificate of acknowledgment *prima facie* evidence of proper separate examination, it was held that it was competent to prove by parol evidence, not contradicting the certificate itself, either that a deed executed by a *feme covert* was not read or explained to her, or that her husband was present when she acknowledged it, and thus avoid the deed as to her. *Ford v. Teal*, 7 Bush (Ky.) 156; *Woodhead v. Foulds*, 7 Bush (Ky.) 222.

But in *Harpending v. Wylie*, 14 Bush (Ky.) 380, also decided before this statute was passed or became operative, it was held that the statements of the officer's certificate of acknowledgment could not be contradicted by parol evidence.

Maryland.—The certificate of acknowledgment may be impeached for fraud or duress. *Central Bank v. Copeland*, 18 Md. 305; *Ramsburg v. Campbell*, 55 Md. 227.

It has been held that the certificate was *prima facie* evidence only. *Barry v. Hoffman*, 6 Md. 78; *Davis v. Hamblin*, 51 Md. 525.

In some of the earlier cases where the question arose it was held that no evidence could be received to invalidate the acknowledgment of a deed or contradict the certificate. *Bissett v. Bissett*, 1 Har. & M. (Md.) 211; *Ridgely v. Howard*, 3 Har. & M. (Md.) 321; *Gittings v. Hall*, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502. See also *Byer v. Etnyre*, 2 Gill (Md.) 150, 41 Am. Dec. 410.

Mississippi.—Where the certificate of a married woman's acknowledgment purported to have been made by a competent officer, and showed a due acknowledgment according to the statute requiring separate examination, it was held that the testimony of the woman that the acknowledgment was in fact made in the presence of her husband was inadmissible. *Johnston v. Wallace*, 53 Miss. 333, 24 Am. Rep. 699 (*distinguishing* *Allen v. Lenoir*, 53 Miss. 321, where a certificate was successfully impeached on the ground that there had been no acknowledgment).

North Carolina.—Under the laws formerly in force in *North Carolina* the acknowledgment and privy examination of a married woman taken before a judge or a court had the effect of a matter of record, and was not open to collateral attack on account of fraud or incapacity of the grantor. *Woodbourne v. Gorrel*, 66 N. Car. 82; *Paul v. Carpenter*, 70 N. Car. 502; *Doe v. Player*, 72 N. Car. 94. But under the Revised Code, c. 37, § 8, the law is changed and the certificate of privy examination may be impeached for duress, or on account of infancy or other disability of the woman. *Jones v. Cohen*, 82 N. Car. 75; *Ware v. Nesbit*, 94 N. Car. 664; *Epps v. Flowers*, 101 N. Car. 158; *Wynne v. Small*, 102 N. Car. 133. See also *Sellers v. Sellers*, 98 N. Car. 13.

Tennessee.—The certificate of acknowledgment is conclusive, and cannot be contradicted by parol evidence. A court of equity has no jurisdiction to inquire into the regularity of a married woman's separate examination, but the acknowledgment may be set aside for fraud or undue influence. *Campbell v. Taul*, 3 Yerg. (Tenn.) 548; *Finnegan v. Finnegan*, 3 Tenn. Ch. 510; *Shields v. Netherland*, 5 Lea (Tenn.) 193; *Grotenkemper v. Carver*, 9 Lea (Tenn.) 281.

Texas.—A married woman may introduce evidence to show that the acknowledgment of a deed of trust, executed and acknowledged by her and her husband, was obtained by fraud, and that she did not execute the deed willingly. *Westbrooks v. Jeffers*, 33 Tex. 86.

Where there is no charge of fraud or misconduct the fact that the acknowledgment by a married woman was not taken, and the instrument was not explained to her, privily

knowledge by reason of the failure of the person purporting to make the acknowledgment, to appear or to acknowledge the instrument.¹ The courts

and apart from her husband, is not sufficient to defeat her acknowledgment, whether or not the beneficiary is technically an innocent purchaser. *Freiberg v. De Lamar* (Tex. Civ. App., 1894), 27 S. W. Rep. 151. See also *Johnson v. Taylor*, 60 Tex. 360; *Henderson v. Terry*, 62 Tex. 281.

Less than an Actual Duress will avoid the acknowledgment of a conveyance or mortgage by a married woman, providing it be known to the party claiming through it, or where he ought to have inquired for defenses and did not. It is enough if it be shown that the wife acted under moral constraint, that is, by threats, persecution, and harshness of her husband, to force her to set aside her own free will and to comply unwillingly with his wishes. Whenever her acknowledgment is secured in violation and disregard of statutory requirements it is void, and this may be shown by parol proof. *McCandless v. Engle*, 51 Pa. St. 309. See also *Brower v. Callender*, 105 Ill. 88, and title DURESS.

Acknowledgment of Sheriff's Deeds—Pennsylvania.—In *Pennsylvania*, under the law requiring sheriff's deeds to be acknowledged in open court before title would pass, it was held that the court in taking such acknowledgments acted judicially, and that parol evidence was inadmissible to contradict the record of the acknowledgment, which was conclusive evidence of the sale. *Hoffman v. Coster*, 2 Whart. (Pa.) 453; *Bellas v. McCarty*, 10 Watts (Pa.) 13. And the same is true, under the Act of 1809, of acknowledgments in open court by the county treasurer. *Duff v. Wynkoop*, 74 Pa. St. 300.

Certificate Not Conclusive as to Unrequired Recitals.—The officer's certificate of acknowledgment is not conclusive evidence of facts which he is not required by law to certify. *Thompson v. New England Mortg. Security Co.* (Ala., 1895), 18 So. Rep. 315; *Draper v. Bryson*, 17 Mo. 71, 57 Am. Dec. 257; *Williams v. Baker*, 71 Pa. St. 476.

Fraud by Wife.—Where a notary certified to the acknowledgment of a married woman in due form without requiring her personal presence, but upon her own authority, it was held that she could not be permitted to take advantage of her own irregular and wrongful act against parties who, ignorant of the facts, loaned money upon the strength of the security thus acknowledged, but fair and regular upon its face. *McHenry v. Day*, 13 Iowa 445, 81 Am. Dec. 438.

Presumption of Regularity of Acknowledgment.—A purchaser of a homestead is not bound to see that the notary did his duty in taking and certifying the wife's private examination, and when he receives a deed duly executed and acknowledged by husband and wife he has a right to suppose that the wife has freely and with full knowledge consented to the sale. *Pierce v. Fort*, 60 Tex. 464.

1. **Want of Acknowledgment may be Shown.**—*Barnett v. Proskauer*, 62 Ala. 486; *Grider v. American Freehold Land Mortg. Co.*, 99 Ala.

281; *Smith v. Ward*, 2 Root (Conn.) 374, 1 Am. Dec. 80; *Lowell v. Wren*, 80 Ill. 238; *Tatum v. Goforth*, 9 Iowa 247; *Allen v. Le-noir*, 53 Miss. 321. See also *Drury v. Foster*, 2 Wall. (U. S.) 24; *O'Ferrall v. Simplot*, 4 Iowa 381; *Giddens v. Bolling*, 99 Ala. 319 (citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 150); *Le Mesnager v. Hamilton*, 101 Cal. 532; *Williamson v. Carskadden*, 36 Ohio St. 664.

Wife Denying Execution of Deed.—Where a wife in clear and unequivocal testimony denied the execution of a deed, and was corroborated in this by the evidence of her husband, who confessed that he signed the deed in her name, without her knowledge or consent, and also that he made the acknowledgment certified by the commissioner, there being no evidence offered in support of the commissioner's certificate, it was held that the execution of the deed was fully and clearly disproved, and the certificate of the commissioner falsified. *Barnett v. Proskauer*, 62 Ala. 486.

Where an officer, by mistake or fraud, falsely certified to a separate examination and acknowledgment of a married woman to the mortgage of her estate, where she did not sign the mortgage or appear before him, it was held that the instrument could be avoided as to the mortgagee without proof of notice of the fraud, he not being considered a *bona fide* purchaser. *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486.

The Positive and Explicit Denial by the grantor, of the execution and acknowledgment of the deed, has been held to overcome a *prima facie* case made by the certificate of acknowledgment even with the testimony of experts as to the genuineness of the signature. *Borland v. Walrath*, 33 Iowa 130.

Estoppel—Married Women.—While it is well settled that to pass the title of a married woman in the sale of her land, it must be done in the mode prescribed by the statute, this does not preclude the adjustment and enforcement of equities, and where a deed by a married woman has served the purpose of releasing her other estate from a lien created by a deed of trust, she cannot avail herself of a defective certificate of acknowledgment to defeat the deed. *McKinney v. Matthews* (Tex., 1888), 6 S. W. Rep. 793.

It was held in *Michigan* that a homestead mortgage would not be set aside merely because it was acknowledged by the wife in the presence of her husband, there being no evidence that the wife executed the deed under compulsion or influence, or that she did not acknowledge it freely. *Norton v. Nichols*, 35 Mich. 148.

It was held in *Connecticut*, under a statute requiring a deed to be signed by the grantor with his own hand or mark, that a wife's acknowledgment of a deed purporting to be executed by husband and wife, signed by the husband, who also signed her name in her presence, did not estop her from denying

are not in accord upon the question whether or not it may be shown that the officer by whom the acknowledgment was taken acted beyond his jurisdiction.¹

(5) *Impeachment—Nature of Evidence Required.*—The evidence to impeach the certificate must be clear and convincing beyond a reasonable doubt.² It should do more than produce a mere preponderance against the integrity of the certificate in the balancing of probabilities. It should, by its completeness

that it was her deed. *Linsley v. Brown*, 13 Conn. 192.

See also *supra*, this title, *Married Women—Separate Examination*; and *infra*, this title, *Curing Defective Acknowledgments—By Subsequent Acknowledgment*.

Forged Certificate—Indictment.—A certificate of acknowledgment, to be the subject of forgery, must show on its face all the requirements of a valid acknowledgment, and where a certificate fails to recite a material matter, as that the grantor acknowledged the execution of the conveyance, an indictment for forgery will not lie. *People v. Harrison*, 8 Barb. (N. Y.) 560. See also *State v. Dufour*, 63 Ind. 567; *People v. Marion*, 29 Mich. 31. See the title **FORGERY**.

1. **Want of Jurisdiction.**—A certificate, correct in form, may be rebutted where the officer has acted beyond his jurisdiction. *Edinburgh American Land Mortg. Co. v. Peoples* (Ala., 1894), 14 So. Rep. 656.

Compare, as to law in *New York*, *Heilbrun v. Hammond*, 13 Hun (N. Y.) 474; *Mutual L. Ins. Co. v. Corey* (Ct. App.), 48 N. Y. St. Rep. 247, reversing 54 Hun (N. Y.) 493, 27 N. Y. St. Rep. 608; *Jackson v. Colden*, 4 Cow. (N. Y.) 266.

2 **Evidence to Impeach Certificate must be Clear and Convincing—United States.**—Northwestern Mut. L. Ins. Co. v. Nelson, 103 U. S. 544; *Young v. Duvall*, 109 U. S. 573; *Mather v. Jarel*, 33 Fed. Rep. 366.

Alabama.—*Barnett v. Proskauer*, 62 Ala. 486; *Smith v. McGuire*, 67 Ala. 34.

Illinois.—*Spurgin v. Traub*, 65 Ill. 170; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Crane v. Crane*, 81 Ill. 165; *Tunison v. Chamblin*, 88 Ill. 378; *Blackman v. Hawks*, 89 Ill. 512; *Fitzgerald v. Fitzgerald*, 100 Ill. 385; *Strauch v. Hathaway*, 101 Ill. 11, 49 Am. Rep. 193; *Watson v. Watson*, 118 Ill. 56.

Kansas.—*Gabbey v. Forgeus*, 38 Kan. 62.

Minnesota.—*State v. Routh* (Minn., 1895), 63 N. W. Rep. 621. See also *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331.

Nebraska.—*Pereau v. Frederick*, 17 Neb. 117; *Phillips v. Bishop*, 35 Neb. 487; *Barker v. Avery*, 36 Neb. 599.

Ohio.—*Williams v. Robson*, 6 Ohio St. 510; *Ford v. Osborne*, 45 Ohio St. 1.

Rhode Island.—*Earle v. Chace*, 12 R. I. 374.

Tennessee.—*Montgomery v. Hobson*, Meigs (Tenn.) 437.

West Virginia.—*Rollins v. Menager*, 22 W. Va. 461; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622.

Wisconsin.—*Smith v. Allis*, 52 Wis. 337.

See also *Cover v. Manaway*, 115 Pa. St. 339, 2 Am. St. Rep. 552; *Bird v. Adams*, 56 Iowa 292.

After the Lapse of a Considerable Time, strong proof is required to overcome the certificate. *Tunison v. Chamblin*, 88 Ill. 378.

Missouri.—A *prima facie* case made by the certificate of a married woman's acknowledgment in substantial compliance with the statute can be overcome only by very clear and convincing proof of its untruth. *Bohan v. Casey*, 5 Mo. App. 101; *Riecke v. Westenhoff*, 10 Mo. App. 358; *Ray v. Crouch*, 10 Mo. App. 321; *Morrison v. McKee*, 11 Mo. App. 594; *Brocking v. Straat*, 17 Mo. App. 296; *Webb v. Webb*, 87 Mo. 540; *Rust v. Goff*, 94 Mo. 511; *Barrett v. Davis*, 104 Mo. 549; *Pierce v. Feagans*, 39 Fed. Rep. 587.

The testimony of the grantor and the officer tending to contradict the certificate is not sufficient to warrant the setting aside of a finding in favor of the validity of the deed. *Riecke v. Westenhoff*, 10 Mo. App. 358; *Morrison v. McKee*, 11 Mo. App. 594.

It is not necessary in this state, in impeaching the certificate of a married woman's acknowledgment, to show that fraud or imposition was practiced on the grantor. *Steffen v. Bauer*, 70 Mo. 399 (following *Wannell v. Kem*, 57 Mo. 478); *Rust v. Goff*, 94 Mo. 511; *Pierce v. Feagans*, 39 Fed. Rep. 587.

Married Woman's Voluntary Acknowledgment.—Where a married woman duly acknowledged, before a proper officer, that she voluntarily executed a mortgage, and the officer attached the usual certificate of acknowledgment in the form prescribed by statute, it was held that this circumstance was cogent proof of free agency and absence of restraint in the execution of the mortgage, and raised a presumption in favor of its validity, which could be rebutted only by clear proof of fraud, duress, or imposition practiced on the mortgagor, in which the officer or mortgagee participated. *Moog v. Strang*, 69 Ala. 98.

Ignorance of Officer's Character.—Where a married woman signed a mortgage in the presence of a notary public, knowing that her signature in his presence was deemed essential to the validity of the instrument, the fact that she was ignorant of his official character is not sufficient to impeach his certificate of acknowledgment. *Jinwright v. Nelson* (Ala., 1895), 17 So. Rep. 97.

Want of Recollection will Not Defeat Acknowledgment.—Where the certificate of acknowledgment is regular on its face, the fact that the officer or grantor cannot recollect whether the acknowledgment was properly made is not sufficient to overcome the recitals of the certificate. *Wright v. Bundy*, 11 Ind. 398; *Tooker v. Sloan*, 30 N. J. Eq. 394; *Ford v. Osborne*, 45 Ohio St. 1; *Romanes v. Fraser*, 16 Grant's Ch. (Canada) 97. See also *La Société Française, etc., v. Beard*, 54 Cal. 480; *Hammond v. Hopkins*, 143 U. S. 224.

and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent.¹ The fact that the officer in making the certificates acts under his official oath and is liable to indictment and conviction for misconduct, creates a presumption in favor of the regularity of the certificate certainly as strong as any that could be brought against it by the testimony of an interested witness,² and in the absence of proof of fraud and collusion on the part of the officer the uncorroborated testimony of the party purporting to make the acknowledgment is insufficient to overcome the certificate.³

Burden of Proof.—The recitals in the certificate are presumed to be correct,⁴ and the burden of proof rests upon the party undertaking to impeach the certificate to show that it is false.⁵

1. **More Preponderance of Evidence Insufficient to Impeach Certificate.**—*Marston v. Brittenham*, 76 Ill. 611; *McPherson v. Sanborn*, 88 Ill. 150; *Strauch v. Hathaway*, 101 Ill. 11; 40 Am. Rep. 193; *Griffin v. Griffin*, 125 Ill. 430; *Bailey v. Landingham*, 53 Iowa 722; *Hughes v. Coleman*, 10 Bush (Ky.) 246; *Jett v. Rogers*, 12 Bush (Ky.) 564.

Where a husband and wife testified that the latter did not acknowledge a mortgage executed by them, as stated in the certificate of acknowledgment, and two disinterested witnesses testified that she did acknowledge it in their presence, and witnesses of equal credibility were introduced both to prove and disprove the absence of the wife from the place where the acknowledgment purported to have been made, there being more witnesses for than against the fact of *alibi*, it was held, that the certificate would prevail over the testimony adduced to disprove it. *Phillips v. Bishop*, 35 Neb. 487.

2. *Russell v. Baptist Theological Union*, 73 Ill. 337; *Blackman v. Hawks*, 89 Ill. 512; *Morris v. Sargent*, 18 Iowa 90. See also *Hourtienne v. Schnoor*, 33 Mich. 274; *Gilbraith v. Gallivan*, 78 Mo. 452; *Ford v. Osborne*, 45 Ohio St. 1; *Belbaze v. Ratto*, 69 Tex. 636, and *supra*, this title, *Liability of Officer for False Certificate*.

3. **Certificate will stand against Unsupported Testimony of Grantor**—*United States*.—*Mather v. Jaree*, 33 Fed. Rep. 366.

Alabama.—*Smith v. McGuire*, 67 Ala. 34; *Miller v. Marx*, 55 Ala. 322; *Giddens v. Bowling*, 99 Ala. 319.

Illinois.—*Calumet, etc., Canal, etc., Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Lickmon v. Harding*, 65 Ill. 505; *Marston v. Brittenham*, 76 Ill. 611; *Knowles v. Knowles*, 86 Ill. 1; *McPherson v. Sanborn*, 88 Ill. 150; *Blackman v. Hawks*, 89 Ill. 512; *Fitzgerald v. Fitzgerald*, 100 Ill. 385; *Heacock v. Lubuke*, 107 Ill. 396; *Watson v. Watson*, 118 Ill. 56; *Post v. Springfield First Nat. Bank*, 138 Ill. 559; *Oliphant v. Liversidge*, 142 Ill. 160.

Iowa.—*Morris v. Sargent*, 18 Iowa 90.

Michigan.—*Johnson v. Van Velsor*, 43 Mich. 208; *Hourtienne v. Schnoor*, 33 Mich. 274.

Missouri.—*Biggers v. St. Louis Mut. House-Bldg. Co.*, 9 Mo. App. 210. But see *Wannell v. Kem*, 57 Mo. 478.

Nebraska.—*Pereau v. Frederick*, 17 Neb. 117.

New York.—*Mutual L. Ins. Co. v. Corey*, 135 N. Y. 326.

Pennsylvania.—*Oppenheimer v. Wright*, 106 Pa. St. 569; *Citizen's Sav., etc., Assoc. v. Heiser*, 150 Pa. St. 514.

Wisconsin.—*Smith v. Allis*, 52 Wis. 337.

See also *Wilkins v. Moore*, 20 Kan. 538; *Webb v. Burney*, 70 Tex. 322.

The Testimony of a Married Woman, after the Death of Her Husband and the officer who took her acknowledgment, that they misrepresented the effect of the deed, is not sufficient to impeach the instrument. *Northwestern Mut. L. Ins. Co. v. Nelson*, 103 U. S. 544.

4. **Certificate Presumed Correct.**—*Barnett v. Proskauer*, 62 Ala. 486; *Baldwin v. Bornheimer*, 48 Cal. 433; *La Société Française, etc., v. Beard*, 54 Cal. 480; *Russell v. Rumsey*, 35 Ill. 362; *Bird v. Adams*, 56 Iowa 292; *Jett v. Rogers*, 12 Bush (Ky.) 564; *Addis v. Graham*, 88 Mo. 197; *Hammond v. Gordon*, 93 Mo. 223; *Darden v. Neuse, etc., Steamboat Co.*, 107 N. Car. 437; *Dolph v. Barney*, 5 Oregon 191; *Com. v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805; *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552; *Orser v. Vernon*, 14 U. C. C. P. 573. See also *Martin v. Davidson*, 3 Bush (Ky.) 575; *Hughes v. Coleman*, 10 Bush (Ky.) 246; *Tiffany v. McCumber*, 13 U. C. Q. B. 159; *Monk v. Farlinger*, 17 U. C. C. P. 41; *Commercial Bank v. Smith*, 18 U. C. C. P. 214.

5. **Burden of Proof.**—The recitals in the certificate of acknowledgment are *prima facie* true, and it devolves upon the party attacking the acknowledgment to prove their falsity by a preponderance of evidence. *Gabbey v. Forgeus*, 38 Kan. 62; *Wannell v. Kem*, 57 Mo. 478; *Romer v. Conter*, 53 Minn. 171; *Com. v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805; *Morris v. Sargent*, 18 Iowa 90; *Hourtienne v. Schnoor*, 33 Mich. 274.

The certificate of acknowledgment is an official act, done under the obligation of an official oath, and protected by the presumptions the law necessarily indulges in favor of the acts of its own officers. The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence. *Barnett v. Proskauer*, 62 Ala. 486; *Ramsbury v. Campbell*, 55 Md. 227; *Dikeman v. Arnold*, 78 Mich. 455; *Bohan v. Casey*, 5 Mo. App. 101; *Barrett v. Davis*, 104 Mo. 549; *Phillips v. Bishop*, 35 Neb. 487. See also *Northwestern Mut. L. Ins. Co. v. Nelson*, 103

Officer as Witness.—It is held in some states, from considerations of public policy, that the officer who took the acknowledgment is an incompetent witness to contradict the recitals of his official certificate of acknowledgment.¹ By some courts, however, such testimony has been admitted,² and it is freely allowed in favor of the certificate.³

VIII. CURING DEFECTIVE ACKNOWLEDGMENTS—1. By Subsequent Acknowledgment—*a. IN GENERAL.*—A married woman's deed, void on account of defective acknowledgment, may be made valid by her subsequent acknowledgment thereof, in due form, and properly certified.⁴ This is equivalent to a re-execu-

U. S. 544; *Montgomery v. Hobson*, Meigs (Tenn.) 437.

1. **Officer as Witness**—*Colorado*.—Shapleigh v. Hull (Colo., 1895), 41 Pac. Rep. 1108.

Maine.—*Greene v. Godfrey*, 44 Me. 25.

Maryland.—*Central Bank v. Copeland*, 18 Md. 305.

Mississippi.—*Stone v. Montgomery*, 35 Miss. 83; *Allen v. Lenoir*, 53 Miss. 321. See also *Planters' Bank v. Walker*, 3 Smed. & M. (Miss.) 409.

Virginia.—*Harkins v. Forsyth*, 11 Leigh (Va.) 306; *Hockman v. McClanahan*, 87 Va. 33.

Where an officer has certified a married woman's acknowledgment in proper form, his testimony that she did not appear before him and never acknowledged the deed will have little weight to impeach his certificate. *Wilson v. South Park Com'rs*, 70 Ill. 46.

2. *Tatum v. Goforth*, 9 Iowa 247; *Camp v. Carpenter*, 52 Mich. 375; *Mays v. Pryce*, 95 Mo. 603; *Pereau v. Frederick*, 17 Neb. 117; *Garth v. Fort*, 15 Lea (Tenn.) 683; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622. See also *Stevenson v. Brasher*, 90 Ky. 23; *Steffen v. Bauer*, 70 Mo. 399; *Treadwell v. Sackett*, 50 Barb. (N. Y.) 440; *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486.

The officer is a competent witness to prove the incapacity of the party making the acknowledgment, the act of taking acknowledgments being purely ministerial. *Truman v. Lore*, 14 Ohio St. 144.

Where the officer taking the acknowledgment is one of the beneficiaries under the conveyance, he is a competent witness to show that the acknowledgment was not properly taken. *Stevenson v. Brasher*, 90 Ky. 23.

3. **Officer may Testify in Favor of Certificate.**—See the following cases in which the testimony of the officer has been admitted without objection to uphold his certificate of acknowledgment:

United States.—*Pierce v. Feagans*, 39 Fed. Rep. 587.

Alabama.—*Smith v. McGuire*, 67 Ala. 34; *Giddens v. Bolling*, 99 Ala. 319.

Arkansas.—*Meyer v. Gossett*, 38 Ark. 377; *Donahue v. Mills*, 41 Ark. 421.

Kentucky.—*Hughes v. Coleman*, 10 Bush (Ky.) 246.

Michigan.—*Hourtienne v. Schnoor*, 33 Mich. 274; *Johnson v. Van Velsor*, 43 Mich. 208; *Dikeman v. Arnold*, 78 Mich. 455.

Minnesota.—*State v. Routh* (Minn., 1895), 63 N. W. Rep. 621.

Missouri.—*Wannell v. Kem*, 57 Mo. 478; *Barrett v. Davis*, 104 Mo. 549.

New York.—*Hutton v. Webber* (Super. Ct.), 17 N. Y. Supp. 463.

Pennsylvania.—*Com. v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805; *Oppenheimer v. Wright*, 106 Pa. St. 569; *Citizens' Sav., etc., Assoc. v. Heiser*, 150 Pa. St. 514.

South Dakota.—*Cannon v. Deming*, 3 S. Dak. 421.

Texas.—*Norton v. Davis*, 83 Tex. 32.

Virginia.—*Morrison v. Morrison*, 27 Gratt. (Va.) 190.

West Virginia.—*Rollins v. Menager*, 22 W. Va. 461.

Testimony of Officer Inadmissible to Supply a Material Fact.—Where the certificate of a married woman's acknowledgment was defective in failing to state that she was privately examined, it was held that the parol evidence of the magistrate who took the acknowledgment was inadmissible to show a separate examination. *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724. See *Elwood v. Klock*, 13 Barb. (N. Y.) 50.

See also *supra*, this title, *The Certificate—Errors and Omissions*.

Testimony of Notary Admissible to Prove Execution of Deed.—The testimony of a notary who took the acknowledgment is admissible as evidence of the execution of the deed, but not for the purpose of validating his certificate, shown to be defective for want of his official seal, nor to constitute the record thereof notice to a subsequent purchaser. *King v. Russell*, 40 Tex. 124.

A notary who took the acknowledgment is a competent witness to prove what took place at the time of acknowledgment, and the fact of the execution of the deed against a denial by the person named in the certificate as having acknowledged it. *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84.

4. **Defective Acknowledgment Cured by Re-acknowledgment.**—*Cahall v. Citizens' Mut. Bldg. Assoc.*, 61 Ala. 232; *McMullen v. Eagan*, 21 W. Va. 233.

Where a conveyance of a married woman's land was void because executed by virtue of a power of attorney, it was held that her subsequent signature of the instrument, and privy acknowledgment, made with intent to cure the defect, was sufficient to validate the instrument, providing no rights of third parties had intervened. *Halbert v. Hendrix* (Tex. Civ. App., 1894), 26 S. W. Rep. 911; *Halbert v. Bennett* (Tex. Civ. App., 1894), 26 S. W. Rep. 913. See also *Gordon v. Collett*, 107 N. Car. 362; *Ridabock v. Levy*, 8 Paige (N. Y.) 197, 35 Am. Dec. 682.

Where the certificate of acknowledgment

tion of the deed, or making a new deed.¹ If made with intent to cure the original defects, where no rights of third persons have intervened, the acknowledgment will relate back to the date of the original delivery of the conveyance, without any new delivery;² but a defective acknowledgment cannot be cured by a subsequent acknowledgment made after the property has been conveyed to a second grantee.³

b. RATIFICATION BY WIDOW.—A widow may ratify a deed made during coverture, and void by reason of defective acknowledgment, by a subsequent adoption or confirmation.⁴ This may be effected by reacknowledgment,⁵ or may be shown by the receipt and reinvestment of the purchase money;⁶ by the payment of interest on a mortgage;⁷ or by long acquiescence.⁸

of a deed executed by husband and wife, conveying the wife's lands, failed to show separate examination of the wife, and fourteen years later, the coverture still subsisting, she appeared before another officer and acknowledged the deed, and another certificate in proper form was appended thereto, on the same sheet with the first, it was held that the first acknowledgment, if defective, was cured by the second. *Newell v. Anderson*, 7 Ohio St. 12.

Refusal to Reacknowledge.—Where it was impossible to determine from the acknowledgment of a deed of trust whether it was acknowledged by the grantor or the trustee, it was held that the defect might be corrected by reacknowledgment by the grantor, and if she refused to make reacknowledgment, she might be compelled to do so under the provisions of *Rhode Island* Pub. Stat., c. 137, §§ 6, 7. *Sullivan v. Chambers* (R. I., 1895), 31 Atl. Rep. 167.

As to the necessity for and proof of redelivery of deed, see *Goodright v. Straphan*, Cowp. 201; *Smith v. Shackleford*, 9 Dana (Ky.) 476.

1. *McMullen v. Eagan*, 21 W. Va. 233. See also *Roanea v. Archer*, 4 Leigh (Va.) 550.

2. *Cahall v. Citizens' Mut. Bldg. Assoc.*, 61 Ala. 232.

3. *Smith v. Pearce*, 85 Ala. 264, 7 Am. St. Rep. 44; *Balkum v. Wood*, 58 Ala. 642; *Durfee v. Garvey*, 65 Cal. 406; *Beattie v. Mutton*, 14 Grant's Ch. (Canada) 686. See also *Hendon v. White*, 52 Ala. 597; *Moffatt v. Grover*, 4 U. C. C. P. 402.

4. **Defective Acknowledgment Cured by Subsequent Confirmation.**—A married woman's deed, void because of defective acknowledgment, may be validated by her subsequent confirmation of it when a widow, but the confirmation cannot be by parol merely. *Price v. Hart*, 29 Mo. 171. See also *Miller v. Shackleford*, 3 Dana (Ky.) 289.

Where a deputy clerk made out a certificate of a married woman's acknowledgment in his own name, without anywhere naming his principal, and the deed was recorded, it was held that the averment of the woman, in a suit brought by her when discoverd, and *sui juris*, that she united in the conveyance and acknowledged it before the regular deputy who was authorized to take her acknowledgment, cured the insufficiency in the certificate. *Beuley v. Curtis* (Ky., 1892), 18 S. W. Rep. 357.

5. A deed void because made and acknowl-

edged by a married woman may be rendered valid by her subsequent acknowledgment thereof when a widow. *Riggs v. Boylan*, 4 Biss. (U. S.) 445.

A deed by husband and wife not acknowledged by the wife, as required by statute, is void as to her. But if, after the death of her husband, she acknowledges it, the deed shall be good to pass her right in the land, and operate from the time of acknowledgment. *Doe v. Howland*, 8 Cow. (N. Y.) 277, 18 Am. Dec. 445. See also *Jackson v. Stevens*, 16 Johns. (N. Y.) 110. Compare *Chester v. Breitling* (Tex. Civ. App., 1895), 30 S. W. Rep. 464; *Richardson v. Woodstock Iron Co.*, 90 Ala. 266.

6. **A Defective Acknowledgment Cured by Receiving Purchase Money.**—Where husband and wife joined in a bond to convey land, but the wife was not privately examined, and she, after the death of the husband, received the purchase money and reinvested it in other land, it was held that she was estopped from setting up the want of privy examination, so far as to claim dower in the land sold by her husband. *Hodge v. Powell*, 96 N. Car. 64, 60 Am. Rep. 401.

Where a married woman exchanged lands and received a perfect deed, but the certificate of acknowledgment of her own failed to show private examination, and she, discovering the defect nine years later, undertook to assert her title on account of the defective acknowledgment, having in the meanwhile sold the lands received and reinvested the proceeds, it was held that she was estopped to set up the defective acknowledgment. *Shivers v. Simmons*, 54 Miss. 520, 28 Am. Rep. 372. See also *Dalton v. Rust*, 22 Tex. 133; *Talkin v. Anderson* (Tex., 1892), 19 S. W. Rep. 350; *Worthington v. Young*, 6 Ohio 313.

7. *O'Keefe v. Handy*, 31 La. Ann. 832. See also *Dalton v. Rust*, 22 Tex. 133.

8. *Conklin v. Bush*, 8 Pa. St. 514. See also *Spafford v. Warren*, 47 Iowa 47.

Defective Acknowledgment Cured by Lapse of Time.—Where deeds had been recorded for forty years or more, and the record showed that during that time transactions of great importance had been based on them, and no objection had been made to the acknowledgment, it was held that defective acknowledgment was immaterial. *Bucklen v. Hasterlik*, 155 Ill. 423.

See also *Hoboken Land, etc., Co. v. Kerrigan*, 31 N. J. L. 13; *Jackson v. Gilchrist*, 15 Johns. (N. Y.) 89; *Bryan v. Stump*, 8

c. FRAUDULENT ACKNOWLEDGMENT.—An acknowledgment obtained by fraud is incapable of ratification by subsequent confirmation or acknowledgment.¹

2. By Statute—*a. GENERALLY.*—The legislatures of most of the states have enacted statutes declaring valid, acknowledgments and certificates of acknowledgment, defective for non-observance of some statutory requirement, or because taken by an unauthorized officer; and making the record of deeds defectively acknowledged, or not acknowledged at all, notice to subsequent purchasers and encumbrancers.² The operation of these statutes is sometimes

Gratt. (Va.) 241, 56 Am. Dec. 139; and the title ANCIENT DOCUMENTS.

It is incompetent for the person who acknowledged the deed to object to some irregularity in the acknowledgment fifteen years after the time of execution and acknowledgment. Rigler v. Cloud, 14 Pa. St. 361.

1. *Fraudulent Acknowledgment cannot be Ratified.*—Where a husband, without the knowledge or consent of his wife, executed a mortgage on the homestead, and signed or procured some one to sign the name of the wife to the instrument, and then fraudulently procured a notary to certify to its acknowledgment by the wife, and the notary subsequently induced the wife, in the absence of the husband, to sign a paper ratifying the acknowledgment, it was held that such ratification was a nullity, affixing the signature and making the certificate being criminal acts and incapable of ratification. Howell v. McCrie, 36 Kan. 636, 59 Am. Rep. 584.

2. *Defective Acknowledgment Cured by Statute.*—*United States.*—Smith v. Gale, 144 U. S. 509, construing the statute of the Territory of Dakota.

Arkansas.—Elliott v. Pearce, 20 Ark. 508; Apel v. Kelsey, 47 Ark. 413; Breen v. Abraham, 43 Ark. 420; Johnson v. Richardson, 44 Ark. 365; Johnson v. Parker, 51 Ark. 419.

California.—Wallace v. Moody, 26 Cal. 387; Landers v. Bolton, 26 Cal. 393.

Florida.—Summer v. Mitchell, 29 Fla. 179.

Illinois.—Deininger v. McConnel, 41 Ill. 227; Logan v. Williams, 76 Ill. 175. See also Carpenter v. Dexter, 8 Wall. (U. S.) 513; Gillespie v. Reed, 3 McLean (U. S.) 377.

Indiana.—Maxey v. Wise, 25 Ind. 1; Steeple v. Downing, 60 Ind. 478; Cole v. Wright, 70 Ind. 179.

Iowa.—Brinton v. SeEVERS, 12 Iowa 389; Reynolds v. Kingsbury, 15 Iowa 238; Jones v. Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Newman v. Samuels, 17 Iowa 528; Ferguson v. Williams, 58 Iowa 717; Fogg v. Holcomb, 64 Iowa 621; East v. Pugh, 71 Iowa 162; Buckley v. Early, 72 Iowa 289; Henderson v. Robinson, 76 Iowa 603; Collins v. Valteau, 79 Iowa 626.

Maryland.—Hollingsworth v. M'Donald, 2 Har. & J. (Md.) 230, 3 Am. Dec. 545. See also Roman Catholic Clergymen's Corp. v. Hammond, 1 Har. & J. (Md.) 580; Griffith v. Ridgely, 2 Har. & M. (Md.) 418; Dulany v. Tilghman, 6 Gill & J. (Md.) 461.

Michigan.—Brown & Cady, 11 Mich. 535; Donahue v. Klassner, 22 Mich. 252; Buell v. Irwin, 24 Mich. 145; Brown v. McCormick, 28 Mich. 215; Healey v. Worth, 35 Mich. 166; Brooks v. Fairchild, 36 Mich. 231.

Missouri.—Allen v. Moss, 27 Mo. 354; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Ferguson v. Bartholomew, 67 Mo. 212; Wells v. Pressy, 105 Mo. 164. See also Stevens v. Hampton, 46 Mo. 404; Crispen v. Hannavan, 50 Mo. 415, 72 Mo. 548.

Nebraska.—Davis v. Huston, 15 Neb. 28; Weeping Water v. Reed, 21 Neb. 261.

New York.—Van Winkle v. Constantine, 10 N. Y. 422; affirming Constantine v. Van Winkle, 6 Hill (N. Y.) 177.

North Carolina.—Tatom v. White, 95 N. Car. 453; Gordon v. Collett, 107 N. Car. 362.

Ohio.—Barton v. Morris, 15 Ohio 408; Chesnut v. Shane, 16 Ohio 599; Ruffner v. McLenan, 16 Ohio 639; Spinning v. Home Bldg., etc., Assoc., 26 Ohio St. 483. See also Raverty v. Fridge, 3 McLean (U. S.) 230.

Pennsylvania.—Mercer v. Watson, 1 Watts (Pa.) 330, affirmed in Watson v. Mercer, 8 Pet. (U. S.) 88; Jaques v. Weeks, 7 Watts (Pa.) 261; Green v. Drinker, 7 W. & S. (Pa.) 440; Rigler v. Cloud, 14 Pa. St. 361; Barnet v. Barnet, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516; Tate v. Stooltzfoos, 16 S. & R. (Pa.) 35, 16 Am. Dec. 546; Stevens v. Martin, 18 Pa. St. 101; Shrawder v. Snyder, 142 Pa. St. 1; Journeay v. Gibson, 56 Pa. St. 57; Cable v. Cable, 147 Pa. St. 451.

Tennessee.—Montgomery v. Hobson, Meigs (Tenn.) 437; Hughes v. Cannon, 2 Humph. (Tenn.) 589; Rainey v. Gordon, 6 Humph. (Tenn.) 345. See also Green v. Goodall, 1 Coldw. (Tenn.) 404; Denn v. Reid, 10 Pet. (U. S.) 524; Webb v. Den, 17 How. (U. S.) 576.

Texas.—McDannell v. Horrell, 1 Tex. Unrep. Cas. 521; Butler v. Dunagan, 19 Tex. 559; Crayton v. Hamilton, 37 Tex. 269; Waters v. Spofford, 58 Tex. 115, Johnson v. Taylor, 60 Tex. 360; Baker v. Westcott, 73 Tex. 129.

Washington.—Skellinger v. Smith, 1 Wash. Ter. 369; Kenyon v. Knipe, 2 Wash. Ter. 422; Carson v. Railsback, 3 Wash. Ter. 168; Carson v. Thompson, 10 Wash. 295.

Wisconsin.—Williams v. Milwaukee Industrial Exposition Assoc., 79 Wis. 524.

Canada.—Monk v. Farlinger, 17 U. C. C. P. 41; Commercial Bank v. Smith, 18 U. C. C. P. 214; McNally v. Church, 27 U. C. Q. B. 103; Morgan v. Sabourin, 27 U. C. Q. B. 230.

A Purchaser must Take Notice of an act validating acknowledgments. Journeay v. Gibson, 56 Pa. St. 57.

Operation of Curing Acts not Extra-territorial.—A deed to land in *Missouri*, acknowledged in *New York* in 1820, improperly, according to the laws of either *New York* or *Missouri*,

limited to those acknowledgments which have been properly taken, but which

and recorded in *Missouri* in 1822, is not affected by section 35 *et seq.* of c. 109, *Missouri* Rev. Stat. 1865; nor can a curative act passed in *New York*, in 1824, operate extra-territorially to cure such imperfect acknowledgment. *Wright v. Taylor*, 2 Dill. (U. S.) 23.

Acknowledgments Taken in Other States—Connecticut.—Where a deed to land in *Connecticut*, executed and acknowledged in *New York* before a commissioner of *Connecticut*, an officer not authorized by the laws of *New York* to take acknowledgments of deeds to lands lying in that state, was defective under the laws of *Connecticut* because attested by only one witness, it was held that the defect was not cured by the Act of 1855 validating deeds and other conveyances of real estate in *Connecticut*, which had been executed and acknowledged in other states in conformity with the laws of such states relative to the conveyance of lands therein situated. *Farrel Foundry v. Dart*, 26 Conn. 376.

Want of Certificate of Official Character, with an officer's certificate of acknowledgment, of a deed executed without the state, is cured by the *Dakota* Act of 1873. *Smith v. Gale*, 144 U. S. 509.

Where a notary taking an acknowledgment subscribed himself as notary for "——Territory" it was held that this omission, if material, was cured by the *Washington* Act of 1873. *Carson v. Railsback*, 3 Wash. Ter. 168.

Want of Seal, if fatal to the validity of the certificate, may be cured by statute. *Maxey v. Wise*, 25 Ind. 1; *Kenyon v. Knipe*, 2 Wash. Ter. 422.

Certificates void for want of seal may be made valid by statute. *Cole v. Wright*, 70 Ind. 179; *Tidd v. Rines*, 26 Minn. 201; *Barton v. Morris*, 15 Ohio 408; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Williams v. Milwaukee Industrial Exposition Assoc.*, 79 Wis. 524. See also *Detroit v. Detroit, etc.*, R. Co., 23 Mich. 173.

Acknowledgments before Unauthorized Officers may be validated by statute. *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Apel v. Kelsey*, 47 Ark 413; *Hevner v. Matthews* (D. C. App.), 22 Wash. L. Rep. 745; *Logan v. Williams*, 76 Ill. 175; *Davis v. Huston*, 15 Neb. 28; *Carson v. Thompson*, 10 Wash. 295. See also *Bird v. McClellan, etc.*, *Brick Mfg. Co.*, 45 Fed. Rep. 458; *Freeman v. Person*, 106 N. Car. 251. Compare *Bernier v. Becker*, 37 Ohio St. 72.

The *Texas* Act of 1874 cures an acknowledgment void because taken before a notary public of another state at a time when such officers were not authorized by the laws of *Texas* to take acknowledgments of deeds to lands in that state. *Baker v. Westcott*, 73 Tex. 129.

But the operation of this act is limited to the case of acknowledgments taken within the *United States*, and an acknowledgment before a notary of *Mexico* is not cured thereby. *Birdseye v. Rogers* (Tex. Civ. App., 1894), 26 S. W. Rep. 841.

Where the articles of incorporation of a

building association were acknowledged by mistake before a notary public instead of a justice of the peace, as required by statute, it was held that the mistake was cured by the *Ohio* Act of 1859. *Spinning v. Home Bldg., etc., Assoc.*, 26 Ohio 483.

Curing Defects after Lapse of Time—Missouri.—Under §§ 4864 and 4865, *Missouri* Rev. Stat. 1889, a deed, or the copy of the record thereof, is admissible in evidence without proof of execution, although not proved or acknowledged as required by law, provided the deed has been recorded thirty years or more when offered in evidence. *Gatewood v. Hart*, 58 Mo. 261; *Smith v. Madison*, 67 Mo. 694; *Crispen v. Hannavan*, 72 Mo. 548; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352; *Wilson v. Albert*, 89 Mo. 537. See also *Totten v. James*, 55 Mo. 494.

This act was not repealed by the Act of March 28, 1874. *Smith v. Madison*, 67 Mo. 694.

Tennessee.—The *Tennessee* Code of 1884, § 2898, provides that whenever a deed has been registered twenty years or more, the same shall be presumed to have been upon lawful authority; and the probate shall be good though the certificate has not been transferred to the register's book, without regard to the form of the certificate. It was held under this act that after a deed has been registered for twenty years or more the presumption in favor of the validity is conclusive, and all inquiry as to the regularity of acknowledgment, etc., is cut off. *Mathewson v. Spencer*, 4 Sneed (Tenn.) 383; *Bledsoe v. Wiley*, 7 Humph. (Tenn.) 507; *Anderson v. Bewley*, 11 Heisk. (Tenn.) 29; *Seephenon v. Walker*, 8 Baxt. (Tenn.) 289; *Stroud v. McDaniel*, 12 Lea (Tenn.) 617; *Webb v. Den*, 17 How. (U. S.) 576. See also *Green v. Goodall*, 1 Coldw. (Tenn.) 404; *Murdock v. Leath*, 10 Heisk. (Tenn.) 106.

The act applies to the deeds of married women as well as those of other persons. *Mathewson v. Spencer*, 3 Sneed (Tenn.) 513, 4 Sneed (Tenn.) 383; *Seephenon v. Walker*, 8 Baxt. (Tenn.) 289; *Anderson v. Bewley*, 11 Heisk. (Tenn.) 29; *Stroud v. McDaniel*, 12 Lea. (Tenn.) 617; *Webb v. Den*, 17 How. (U. S.) 576. See also, as presumption of regularity of acknowledgment of ancient deeds, *Cable v. Cable*, 146 Pa. St. 451.

See also the title ANCIENT DOCUMENTS.

Defects Not Cured.—A subsequent statute, adopting the form used in an acknowledgment defective according to the law as it stood at the time the deed was recorded, will not cure such defective acknowledgment. *Texas Land Co. v. Williams*, 51 Tex. 51.

Want of Acknowledgment.—The *New Mexico* Act of 1874 (Prince's Comp. Laws 239) cures defective acknowledgments, but does not supply the want of, nor obviate the necessity for, an acknowledgment. *Armijo v. New Mexico Town Co.*, 3 N. Mex. 244.

The *Illinois* Act of 1853 applies to cases where the particulars of an acknowledgment were defectively set forth, not cases where a statement of the fact of acknowledgment was

are insufficient on account of some omission or irregularity in the certificate.¹

b. HOW FAR RETROACTIVE.—These acts generally have a retroactive effect;² but other curative acts have been construed to affect only deeds recorded after the passage of the act in question.³

After Judgment.—A validating statute will not operate upon an acknowledgment which has been adjudged defective prior to the passage of the act, even though the case be still pending on appeal.⁴

Pending Judgment.—But where the act is passed between the time of bringing entirely omitted. *Short v. Conlee*, 28 Ill. 219.

Iowa—Not Acknowledged according to Laws of State.—Section 1966 of the *Iowa Revised Code* (1888) legalizing all conveyances acknowledged or proved in other states according to the laws of such states, does not cure an acknowledgment defective according to the laws of *Iowa*, unless it is shown to be in accordance with the laws of the state where made. *Greenwood v. Jenswold*, 69 Iowa 53.

The certificate as well as the acknowledgment must conform to the laws and usages of the state where made. *Kruger v. Walker* (Iowa, 1894), 59 N. W. Rep. 65.

Defect in Deed.—Where a deed conveying a married woman's lands was duly executed and acknowledged by the husband, but not signed or sealed by the wife, though privately acknowledged by her, it was held that this defect was not cured by the *Ohio* Acts of 1857 and 1859, such instrument not being the wife's deed within the provisions of these acts. *Koltlenbrock v. Cracraft*, 36 Ohio St. 584. See also *Dengenhart v. Cracraft*, 36 Ohio St. 549.

The *Arkansas* Act of March 8, 1883, substantially re-enacted in 1891, has no application to the case of a properly executed and acknowledged deed by husband and wife conveying the wife's land, designed to convey the fee, but which by mistake is made to convey only a dower interest. *Bowden v. Bland*, 53 Ark. 53, 22 Am. St. Rep. 179.

Mistake in Grantor.—The *Kansas* act making the record of instruments recorded prior to Oct. 31, 1868, competent evidence notwithstanding defects in the acknowledgment or execution of the same, will not cure a certificate of acknowledgment reciting that Geo. H. Crane acknowledged a deed signed by Geo. H. Case. *Heil v. Redden* (Kan., 1888), 16 Pac. Rep. 743.

1. Michigan.—The curing Act of 1861 (How. Stat., § 5726) applies only to deeds which have been properly acknowledged, but whose certificates of acknowledgment, though sufficient in substance, are not strictly formal. *Brown v. Cady*, 11 Mich. 535.

It does not cure a certificate defective in a material matter, as want of seal where the statutes require one, or failure to state that the grantor acknowledged the deed. *Buell v. Irwin*, 24 Mich. 145.

The last branch of the statute, relating to the proof of the official character of officers taking acknowledgments in other states, does not apply to *Michigan* commissioners resident in other states. *Buell v. Irwin*, 24 Mich. 145.

This act was not repealed by the Act of 1867

(How. Stat. 5707). *Brown v. McCormick*, 28 Mich. 215. See also, as to this statute, *Brooks v. Fairchild*, 36 Mich. 231; *Healey v. Worth*, 35 Mich. 166; *Donahue v. Klassner*, 22 Mich. 252.

See *supra*, this title, *Amendment—By the Court*.

2. Curing Acts Operate Retrospectively.—The *Iowa* Act of 1858 (Rev. Code 1888, § 1966), curing defective acknowledgments, is retrospective only. *Reynolds v. Kingsbury*, 15 Iowa 238; *Jones v. Berkshire*, 15 Iowa 248, 83 Am. Dec. 412.

The *Illinois* Act of 1829, curing acknowledgments taken by unauthorized officers, is by its express terms retroactive in its operation. *Logan v. Williams*, 76 Ill. 175.

The *Missouri* Act of 1855, providing that conveyances theretofore made, but unacknowledged or defectively acknowledged, shall impart notice when recorded, applies exclusively to conveyances made prior to the time when that act went into effect. *Stevens v. Hampton*, 46 Mo. 404; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533.

See also, for other curative acts held to apply retroactively, *Mercer v. Watson*, 1 Watts (Pa.) 330, affirmed in *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Spinning v. Home Bldg., etc.. Assoc.*, 26 Ohio St. 483.

3. The Illinois Act of 1837, providing that instruments relating to or affecting title to real estate when recorded shall be notice, although not properly proved or acknowledged, is not retrospective in its operation, but is intended only to give effect to the recording of deeds after the passage of the law. *Deininger v. McConnell*, 41 Ill. 227.

The *Ohio* Act of 1858, declaring valid acts done by notaries public after the expiration of their term of office, is not retroactive and will not operate to cure an acknowledgment taken before the act was passed. *Bernier v. Becker*, 37 Ohio St. 72.

4. Defects cannot be Cured after Judgment.—*Wright v. Graham*, 42 Ark. 141; *Gaines v. Catron*, 1 Humph. (Tenn.) 514; *Garnett v. Stockton*, 7 Humph. (Tenn.) 84. See also *McGehee v. McKenzie*, 43 Ark. 156.

There is nothing unconstitutional in a statute curing defective acknowledgments; but where judgment has been rendered on a defective acknowledgment before the enactment of the statute, the act on appeal cannot be construed by retrospect to cure the acknowledgment adjudged defective. *Barnet v. Barnet*, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516.

An act curing defective certificates of acknowledgment cannot affect a judgment rendered prior to the passage of the act. *Ralston v. Moore*, 83 Ky. 571.

suit and judgment, defects in acknowledgment may be cured thereby, as the institution of a suit does not entitle the party to any particular decision, and the case must be decided according to the law as it stands at the time.¹

c. CONSTITUTIONALITY OF CURING ACTS.—The constitutionality of these acts has been frequently assailed on the ground that they interfere with vested rights, or impair the obligation of contracts, but they have been almost uniformly sustained where no rights of third parties are infringed.² The courts so holding have generally based their decisions on the ground that the acts do not operate on the deed or contract itself, thus creating a right that did not previously exist, or altering the terms of an existing contract, but simply affect the mode of proof,³ so that the intention of the contracting parties is carried into effect, and a contract such as a court of chancery ought to enforce is made valid and binding in law.⁴

1. Defects Cured after Suit Brought and before Judgment.—*Green v. Abraham*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365; *Edmunds v. Leavell* (Ky., 1887), 3 S. W. Rep. 134. See also *Totten v. James*, 55 Mo. 494.

2. Curing Acts Constitutional.—*United States*.—*Raverty v. Fridge*, 3 McLean (U. S.) 230; *Watson v. Mercer*, 8 Pet. (U. S.) 88, affirming *Mercer v. Watson*, 1 Watts (Pa.) 330.

Arkansas.—*Green v. Abraham*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365.

Florida.—*Summer v. Mitchell*, 29 Fla. 179. *Indiana*.—*Maxey v. Wise*, 25 Ind. 1.

Iowa.—*Ferguson v. Williams*, 58 Iowa 717. *Maryland*.—*Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76.

Missouri.—*Gatewood v. Hart*, 58 Mo. 261. *Nebraska*.—*Weeping Water v. Reed*, 21 Neb. 261.

North Carolina.—*Gordon v. Collett*, 107 N. Car. 362.

Ohio.—*Barton v. Morris*, 15 Ohio 408; *Chesnut v. Shane*, 16 Ohio 599; *Ruffner v. McLenan*, 16 Ohio 639; *Dengenhart v. Cracraft*, 36 Ohio St. 549.

Pennsylvania.—*Tate v. Stooltzfoos*, 16 S. & R. (Pa.) 35, 16 Am. Dec. 546; *Journeyay v. Gibson*, 56 Pa. St. 57.

Tennessee.—*Hughes v. Cannon*, 2 Humph. (Tenn.) 589.

See also *Randall v. Kreiger*, 2 Dill. (U. S.) 444; *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380; *Dentzel v. Waldie*, 30 Cal. 138; *Henderson v. Robinson*, 76 Iowa 603; *Ross v. Worthington*, 11 Minn. 438, 88 Am. Dec. 95; *Tatom v. White*, 95 N. Car. 453; *Underwood v. Lilly*, 10 S. & R. (Pa.) 97; *Lycoming v. Union*, 15 Pa. St. 166; *Shonk v. Brown*, 61 Pa. St. 320.

3. Curing Acts Affect Mode of Proof Only.—*Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76; *Gatewood v. Hart*, 58 Mo. 261; *Journeyay v. Gibson*, 56 Pa. St. 57.

In *Journeyay v. Gibson*, 56 Pa. St. 57. *Strong, J.*, said: "Such legislative acts are sustainable only because they are supposed not to operate upon the deed, or contract changing it, but upon the mode of proof. It must be admitted that they often produce very harsh results, of which *Mercer v. Watson*, 1 Watts (Pa.) 330, is a notable illustration. They are retroactive statutes, and for this reason they are not to be extended beyond the plain intent of the legislature, and

yet so far as they are remedial, they must be construed as remedial statutes are."

See also *Shonk v. Brown*, 61 Pa. St. 321; *Hughes v. Cannon*, 2 Humph. (Tenn.) 589.

In the absence of any constitutional prohibition, the legislature has power, except as against prior vested rights, to cure defective acknowledgments by retroactive legislation in all cases where the purpose of the acknowledgment is the admission of the instrument acknowledged to record or its use in evidence. *Summer v. Mitchell*, 29 Fla. 179.

4. *Raverty v. Fridge*, 3 McLean (U. S.) 230; *Maxey v. Wise*, 25 Ind. 1; *Gatewood v. Hart*, 58 Mo. 261; *Chesnut v. Shane*, 16 Ohio 599; *Ruffner v. McLenan*, 16 Ohio 639; *Dengenhart v. Cracraft*, 36 Ohio St. 549; *Tate v. Stooltzfoos*, 16 S. & R. (Pa.) 35, 16 Am. Dec. 546. See also *Brinton v. Seevers*, 12 Iowa 389.

Under the *Ohio Act of 1833* (Rev. Stat. 1894, §§ 4144-4145) it was held that an acknowledgment was valid although the magistrate had not affixed his seal to the certificate. *Barton v. Morris*, 15 Ohio 408. In delivering the opinion of the court in this case, *Birchard, J.*, said: "The statute purports to act retrospectively—not to create a title where none existed before, but to make that a good title which the parties themselves meant to make good, by dispensing with a part of the form required of the officer, and by him carelessly and negligently omitted. This statute has been repeatedly under the examination of this court upon the circuit, and has received the sanction of all its members as a law of binding force. It violates the obligation of no contract, divests no vested right; but, on the contrary, supports a contract fairly and honestly made, and such a one as a court of chancery would have enforced."

Upon the same grounds, it was held that the *Act of 1835* (Ohio Rev. Stat. 1894, §§ 41-49) declaring deeds by a husband and wife, previously executed according to law, admissible in evidence, although the magistrate omitted to certify that the contents of the deed had been explained to the wife, was not unconstitutional. *Chesnut v. Shane*, 16 Ohio 599 (reviewing and overruling, as to the constitutionality of this act and the validity of such acknowledgments, *Connell v. Connell*, 6 Ohio 358; *Good v. Zercher*, 12 Ohio 364;

Where acts purporting to validate defective acknowledgments impair vested rights, or affect the rights of strangers to the instrument, they are to that extent void,¹ and they have been held unconstitutional in certain cases where their effect has been to create a title by curing a defect fatal to the validity of the instrument itself;² on this ground some courts have held, in opposition to the great weight of authority, that the legislature has no power to cure defective acknowledgments of married women, acknowledgment being an essential part of a married woman's conveyance.³

d. CURING ACTS CONSTRUED LIBERALLY.—Validating statutes, being remedial in their nature, should be construed liberally.⁴

Meddock v. Williams, 12 Ohio 377; *Silliman v. Cummins*, 13 Ohio 116; *Ruffner v. McLenan*, 16 Ohio 639.

The *Pennsylvania* Act of 1826, providing that no deeds, etc., theretofore executed and acknowledged, shall be held invalid by reason of any omission or informality in setting forth the particulars of the acknowledgment in the certificate, does not violate the Constitution of the *United States* as divesting vested rights or violating the obligations of contracts. *Mercer v. Watson*, 8 Pet. (U. S.) 88, *affirming Watson v. Mercer*, 1 Watts (Pa.) 330. With reference to the latter point, Story, J., speaking for the court, said: "So far, then, as it has any legal operation, it goes to confirm, and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give, and which, from mistake or accident, has not been effected."

1. Curing Acts Void as to Vested Rights.—*McGehee v. McKenzie*, 43 Ark. 156; *Brinton v. Seevers*, 12 Iowa 389; *Newman v. Samuels*, 17 Iowa 528; *Fogg v. Holcomb*, 64 Iowa 621; *Thompson v. Morgan*, 6 Minn. 292; *Green v. Drinker*, 7 W. & S. (Pa.) 440. See also *Meighen v. Strong*, 6 Minn. 177, 80 Am. Dec. 441; *Shonk v. Brown*, 61 Pa. St. 320.

It was held, under the *Iowa* Act of 1888 (Rev. Code 1888, § 1967), that where a purchaser at a sheriff's sale paid his money and received the sheriff's certificate before the passage of the act, but did not procure the deed until afterward, the legislature in curing a defective acknowledgment and thus declaring the title of a third person valid, could not make it paramount and deprive such purchaser of his rights acquired under the sheriff's sale. *Brinton v. Seevers*, 12 Iowa 389. See also *Newman v. Samuels*, 17 Iowa 528.

Where a deed conveying land was defectively acknowledged, but duly recorded, and the grantor afterwards conveyed the same land to another person, and the legislature subsequently passed an act legalizing the defective acknowledgment, it was held that the rights of the parties to the first deed were unaffected by this act, and the subsequent grantee could not claim title superior to the first without proving that he was an innocent purchaser for value. *Fogg v. Holcomb*, 64 Iowa 621.

Dower.—The *Illinois* Act of 1853, declaring that no deed theretofore or thereafter executed shall be held invalid or insufficient in law by reason of any informality or omission in the certificate of acknowledgment,

provided it shows a substantial compliance with the statutory regulations, is unconstitutional and void, so far as it attempts to cure a defective acknowledgment of a deed by husband and wife, which contains no release of the wife's right of dower; a married woman's contingent right of dower being a vested interest of which she cannot be divested by legislative enactment. *Russell v. Rumsey*, 35 Ill. 362. See also *Steele v. Gelatly*, 41 Ill. 39.

2. Curing Acts Creating Title—Sheriff's Deeds.—The *Missouri* statute of 1855, declaring that the record of an instrument in writing, good in itself, but defectively proven or acknowledged, shall operate as constructive notice the same as though the proof or acknowledgment had been regular, is not intended to give validity to the record of an instrument which does not convey title without acknowledgment, and does not apply, therefore, to the record of a defectively acknowledged sheriff's deed, acknowledgment being essential to such a deed in order to pass title. *Ryan v. Carr*, 46 Mo. 483. See the title *SHERIFF'S SALES*.

Tax Deeds.—The *Iowa* Act of 1870, legalizing all acknowledgments of deeds which had been duly recorded, does not apply to tax deeds of which acknowledgment is made by statute a part of the execution of the deed. *Goodykoontz v. Olsen*, 54 Iowa 174. See the article, *TAX TITLES*.

3. Curing Acts Unconstitutional as to Deeds by Married Women.—The *Alabama* Act of 1858, providing that no conveyance by husband and wife executed and acknowledged prior to that date shall be invalid or insufficient in law on account of defects in the certificate of acknowledgment, is, so far as it affects the defective certificate of a married woman's acknowledgment, unconstitutional. *Alabama L. Ins., etc., Co. v. Boykin*, 38 Ala. 510.

The court in this case disapproved the decisions in *Pennsylvania* in favor of a different rule. See *Mercer v. Watson*, 1 Watts (Pa.) 330, *affirmed in Watson v. Mercer*, 8 Pet. (U. S.) 88; *Tate v. Stooltzfoos*, 16 S. & R. (Pa.) 35, 16 Am. Dec. 546.

A deed by husband and wife, void as to the wife on account of defective acknowledgment, is not cured so as to pass her dower by the *Maryland* Act of 1867, although the act renders the deed good as against the husband and his heirs. *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76.

4. Curing Acts should be Liberally Construed.—*California.*—*Wallace v. Moody*, 26 Cal. 387. *Illinois.*—*Logan v. Williams*, 76 Ill. 175.

3. Proof by Subscribing Witnesses.—It is provided by statute in many of the states, that the execution of deeds and other instruments intended to be recorded may be proved by the oath of attesting witnesses; and where an instrument is not acknowledged, or the acknowledgment is defective, this mode of proof may take the place of acknowledgment and have the same effect.¹

ACQUAINTANCE—ACQUAINTED.—Acquaintance is familiar knowledge, a state of being acquainted, or of having intimate or more than slight or superficial knowledge; as, *I know* the man, but have no *acquaintance* with him.²

North Carolina.—*Tatom v. White*, 95 N. Car. 453.

Texas.—*Butler v. Dunagan*, 19 Tex. 559.

See also *Griffith v. Ridgely*, 2 Har. & M. (Md.) 418; *Journey v. Gibson*, 56 Pa. St. 57.

1. Defectively Acknowledged Deed Proved by Subscribing Witness.—Where a deed purported to have been acknowledged before a commissioner of deeds, but there was no certificate by the county clerk of his being such commissioner, it was held that the execution of the deed might be proved by proving the handwriting of the deceased subscribing witness. The court, by McCoun, J., said:

"If a deed has not been acknowledged and certified, to entitle it to be recorded or used as evidence under the statute, it may still be proved in the common-law method, by calling the subscribing witness to the stand, or by any secondary evidence which the rules of law admit of; none of which rules have been abrogated or entirely superseded. It is true that the proof given on the trial in this instance was of a secondary character; but it does not appear that it was in the plaintiff's power to have furnished any better." *Borst v. Empie*, 5 N. Y. 33.

The common-law mode of proving the execution of deeds is not abrogated by the *Missouri* Act of 1868, pertaining to the admissibility in evidence of certified copies of deeds for military bounty lands; and hence, a deed for such lands is admissible in evidence where its execution is proved according to the common-law mode, in the same manner as any other deed not acknowledged or recorded properly, and will be valid between the parties and those having actual notice, and mere trespassers. *Wright v. Taylor*, 2 Dill. (U. S.) 23. See also, generally, *Doe v. Naylor*, 2 Blackf. (Ind.) 32 (citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 443); *Shaffer v. Hahn*, 111 N. Car. 1; *Wilson v. McEwan*, 7 Oregon 87; *Pearl v. Howard*, 1 D. Chip. (Vt.) 173; *Catlin v. Washburn*, 3 Vt. 25; and the title ATTESTATION.

2. Personal Knowledge.—*Worcester's Dict.*, followed in *Wyllis v. Haun*, 47 Iowa 621. And in that case, where a statute required an acknowledgment to state that the person making the acknowledgment was "personally known" to the person taking it, the court distinguished *acquaintance* from personal knowledge, saying: "A mere introduction would not make one *acquainted* with the person introduced." See also the title ACKNOWLEDGMENTS. Compare *Kelly v. Calhoun*, 95 U. S. 710.

Personally Known.—In a certificate of proof of a deed, by testimony as to the handwriting of the subscribing witness thereto, it was stated that the witness called to prove such handwriting "was well *acquainted* with him." It was held that this was a substantial compliance with the requisition of the statute, being equivalent to the declaration that "he personally knew him." *Delauney v. Burnett*, 9 Ill. 454.

Intimate Acquaintance. (See also the title TESTAMENTARY CAPACITY.)—The *California* Code makes competent evidence the opinion of an intimate acquaintance as to the sanity of a person. In construing this phrase the court in *Carpenter's Estate*, 94 Cal. 414, says: "The phrase *intimate acquaintance* cannot include all *acquaintances*. Worcester, under the word *acquaintance*, has the following: '*Acquaintance* expresses less than familiarity; familiarity less than intimacy. *Acquaintance* springs from occasional intercourse; familiarity from daily intercourse; intimacy from unreserved intercourse. *Acquaintance*, having some knowledge; familiarity, from long habit; intimacy, by close connection.'"

In *People v. Levy*, 71 Cal. 618, it is said: "It is often a difficult question to determine whether the witness is sufficiently *acquainted* with the party to entitle him to speak. That the witness should be familiar with the temperament and habits of mind of the person whose soundness is in question, there is no doubt."

Certificate.—"Acquainted," when Used in a Certificate, means having a substantial knowledge of the subject matter of the paper to which the certificate is affixed. *Bohan v. Casey*, 5 Mo. App. 101. In this case it was held immaterial whether an officer taking a married woman's acknowledgment read the paper to her or had her state the contents to to him.

Acquainted means familiarly knowing. *Chauvin v. Wagner*, 18 Mo. 544. And in that case it was held that a certificate of a married woman's acknowledgment was sufficient where it stated that she was *acquainted* with the contents.

Personally Acquainted with.—To be "personally *acquainted* with" and to "know personally" are equivalent phrases. *Kelly v. Calhoun*, 95 U. S. 710. Compare *Wyllis v. Haun*, 47 Iowa 621.

Naturalization—Perjury.—The defendant, upon the application of a foreigner for naturalization, testified that he was *acquainted* with the applicant. Upon his indictment for

ACQUETS AND CONQUETS. (See also the title *COMMUNITY PROPERTY*.)—In the civil law acquets and conquets mean the property jointly acquired by husband and wife.¹

ACQUIESCENCE. (See the titles *ESTOPPEL*; *LACHES*; *LIMITATION OF ACTIONS*; *WAIVER*. And see *ENCYC. PL. AND PR.*, titles *LACHES*; *LIMITATION OF ACTIONS*.)—Acquiescence is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right.²

perjury the applicant testified that he had never known the defendant. It was held that *acquainted* implied mutual *acquaintance*, and that a verdict of guilty could not be set aside. *U. S. v. Jones*, 14 Blatchf. (U. S.) 90.

Fire Insurance.—As to certificate of loss from a magistrate *acquainted* with the assured, see *Etna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, and also the title *FIRE INSURANCE*.

1. *Picotte v. Cooley*, 10 Mo. 318.

2. *Scott v. Jackson*, 89 Cal. 262.

Other Definitions.—"If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in *Leeds v. Amherst*, 2 Ph. 117, 16 L. J. Ch. 5, 10 Jur. 956, is the proper sense of the term *acquiescence*, and in that sense it may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." Per Thesiger, L. J. *De Bussche v. Alt*, 8 Ch. Div. 286, 47 L. J. Ch. 381, 38 L. T. 370.

"This word does not mean simply an active intelligent consent, but will be implied if a person is content not to oppose irregular acts which he knows are being done." Per Cairns, L. C. *Evans v. Smallcombe*, 37 L. J. Ch. 793, L. R. 3 H. L. 249.

Acquiescence Distinguished from Laches.—In *Lux v. Haggin*, 69 Cal. 255, it was held that the *acquiescence* which will bar a complainant from the exercise in his favor of the discretionary jurisdiction of a court of equity, in a suit for an injunction, must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be anticipated to flow, from those acts. The court said: "In the decisions of the reported cases, however, 'laches' has sometimes been employed as the equivalent of 'mere delay,' and sometimes 'laches' or 'gross laches' as the equivalent of *acquiescence*. It is therefore important to consider the context in connection with which either of these expressions has been used by a judge, in order to ascertain in what sense it is employed. Speaking of the distinction between laches and *acquiescence*, Wood remarks: 'While the words "laches" and *acquiescence* are often used as similar

in meaning, the distinction in their import is both great and important. "Laches" imports a merely passive, while *acquiescence* implies active, assent; and while, when there is no statutory limitation applicable to the case, courts of equity would discourage laches, and refuse relief after great and unexplained delay, yet, when there is such a statutory limitation, they will not anticipate it, as they may when *acquiescence* has existed. Laches, in fact, amounts only to that inferior species of *acquiescence* described in the following terms by Lord Kindersley in *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78: 'Mere *acquiescence* (if by *acquiescence* is to be understood only abstaining from legal proceedings) is unimportant; where one party invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations.' (Wood on Limitations, § 62.) In cases of concurrent jurisdiction, or where the statute is express, equity will sometimes refuse relief before the statute has run. 'But,' says the same writer, 'this is only in rare and exceptional cases, where the party can be said to have *acquiesced* in the wrong of which he complains' (§ 59); and the same is said in effect in *Reed v. West*, 47 Tex. 240." Compare *Allen v. McKeen*, 1 Sumn. (U. S.) 276; *Evans v. Smallcombe*, L. R. 3 H. L. 249.

Implied Contract.—*Acquiescence*—that is, assent—is tantamount to an agreement. It is an implied contract, and it requires for its validity the power to contract. *Matthews v. Murchison*, 17 Fed. Rep. 766.

Mere Submission.—In *Allen v. McKeen*, 1 Sumn. (U. S.) 276, it was held that where a college expressed itself as having merely *acquiesced* in an act of legislature, this meant a submission to the legislative will, and not approbation or assent.

Knowledge.—*Acquiescence* and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. *Pence v. Langdon*, 99 U. S. 581; *Scotland L. Assoc. v. Siddal*, 3 De G. F. & J. 74. See also *Redgrave v. Hurd*, 20 Ch. Div. 1, 51 L. J. Ch. 113, 45 L. T. 485, 30 W. R. 251.

Suit—Ultra Vires Acts. (See also the title

ACQUIRED.—This term is frequently used in statutes prescribing rules of property, to denote the property to which the rules shall apply. The construction of the word as thus used will be found in the note.¹

ULTRA VIRES.—*Acquiescence*, or tacit assent to *ultra vires* acts, is defined to mean neglect to promptly and actively condemn the unauthorized act by suit. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159; *Rabe v. Dunlap*, 51 N. J. Eq. 48.

Suit—Easements.—But it has been held that it is not necessary to bring an action in order to show that a person has not "submitted to or *acquiesced* in" an interruption of an easement within section 4, English Prescription Act, 2 & 3 Wm. IV., c. 71. *Acquiescence* under that section is a question of fact. *Bennison v. Cartwright*, 5 B. & S. 1, 117 E. C. L. 1. See also *Glover v. Coleman*, L. R. 10 C. P. 108.

Ancient Lights. (See also the title ANCIENT LIGHTS.)—In order to negative submission to, or *acquiescence* in, an interruption to twenty years' enjoyment of a light, it is not necessary that the party interrupted shall have brought an action or suit, or taken any active steps to remove the obstruction; it is enough to show that he has in a reasonable manner communicated to the party causing the interruption that he does not really submit to or *acquiesce* in it. *Glover v. Coleman*, L. R. 10 C. P. 108. See also *Bennison v. Cartwright*, 5 B. & S. 1, 117 E. C. L. 1.

1. Land Obtained by Descent.—The *Tennessee Code* provides for the devolution of land where the estate was *acquired* by the intestate and he dies without issue. In *In re Miller*, 2 Lea (Tenn.) 60, the court said: "The word *acquired* was used in the broad sense, so as to cover lands which might come to the intestate in any other way than 'by gift, devise, or descent from a parent or the ancestor of a parent.' The case of *Penniman v. Francisco*, 1 Heisk. (Tenn.) 511, was correctly decided, the facts bringing it clearly within the first subdivision of section 2420 of the code. But if the father of the intestate had been dead, there would have been no provision for the further descent of the property in that case except under the second subdivision. The suggestions of the chief justice that the intestate did not *acquire* the title within the section, because she inherited it from her granduncle, was *obiter* not necessary to the decision, and, in the light of a more critical examination upon a state of facts requiring it, incorrect." In *Roberts v. Jackson*, 4 Yerg. (Tenn.) 308, it was held, under the *Tennessee* statute of 1784, which provided for the succession of the parents of an intestate child to real estate "actually purchased or otherwise *acquired*" by him, that the word *acquired* was used in a limited sense, not embracing acquisitions by descent from the parents. To the same effect is *Hoover v. Gregory*, 10 Yerg. (Tenn.) 451.

Property Obtained by Devise.—The charter of a corporation authorized it "to *acquire*, hold, and convey property, real and personal." It was contended that this did not enable the corporation to take by will. The court said: "The grant of power here by the charter is,

'to *acquire*, hold, and convey property, real and personal;' and the point is made that the word *acquire* is not broad enough to include a taking by devise—that the word implies some element of effort on the part of the one who *acquires*. In judicial opinions, and by law writers, the term is not unfrequently used otherwise, and as coming to property by devise or descent, as well as in any other mode. Thus Blackstone says: 'Descent, or hereditary succession, is the title whereby a man, on the death of his ancestor, *acquires* his estate by right of representation as his heir at law.' 2 Blackst. Com. 201. We have no doubt that the power granted to *acquire* property is broad enough to enable the corporation to take by will." *Female Academy v. Sullivan*, 116 Ill. 389.

Community Property. (See also the title COMMUNITY PROPERTY.)—A *Texas* statute provides that property *acquired* by husband or wife during marriage shall be deemed community property. In *Bishop v. Lusk* (Tex. Civ. App., 1894), 27 S. W. Rep. 306, it was held that property held by adverse possession, without paper title, is not *acquired* within the meaning of the statute until the period of limitation has run. Under a similar *Arizona* statute it was held that the word *acquired* was not intended to include a purchase made by the wife with her separate estate. *Liebes v. Steffy* (Arizona, 1893), 32 Pac. Rep. 261.

Separate Property of Married Woman. (See also the title SEPARATE PROPERTY OF MARRIED WOMEN.)—Where a statute provided that the wife should have a separate estate in property *acquired* by her during marriage, it was held that the word *acquired* referred to the actual possession and control of the property rather than to the acquisition of mere title. *Alexander v. Alexander*, 85 Va. 368. See also *Williams v. Lord*, 75 Va. 398; *White v. Waite*, 47 Vt. 507.

Right Acquired.—A clause in a *California* statute prohibited the impairing of rights *acquired* under a provision which the act repealed. The right to resort to an arbitrary presumption of detriment in an action for the conversion of personal property was held not to be a "right *acquired*" within the meaning of the act. *Tulley v. Tranor*, 53 Cal. 274.

After-acquired Property. (See the title FUTURE-ACQUIRED PROPERTY.)

By Deserted Wife—English Statute.—Moneys of a deserted wife not reduced into possession by her husband before desertion, and payable after desertion, are *acquired* by the wife after the desertion within § 21, 20 & 21 Vict., c. 85, *Nicholson v. Drury Bldg. Estate Co.*, 47 L. J. Ch. 192, 7 Ch. Div. 48; *Cooke v. Fuller*, 26 Beav. 99; but rents of the wife's leaseholds received after her desertion by an agent appointed by her before the marriage are not within the word. *Kingsman v. Kingsman*, 50 L. J. Q. B. 81, 6 Q. B. Div. 122. See also *In re Insole*, 35 L. J. Ch. 177, 35 Beav.

ACQUITTAL. (See also ACQUITTED, and the title JEOPARDY.)—The word acquittal is *verbum equivocum*, and may in ordinary language be used to express either the verdict of a jury or the formal judgment of the court that the prisoner go thereof without day.¹

ACQUITTANCE. (See also ACCOUNTABLE RECEIPT, Vol. I., p. 432, and the titles FORGERY; RELEASE; RECEIPT.)—This word denotes a release or written discharge of a sum of money or debt due, usually in the form of a receipt.²

92, L. R. 1 Eq. 470; *In re Coward*, L. R. 50 Eq. 179, 44 L. J. Ch. 384; *Waite v. Worland*, 38 Ch. Div. 135, 59 L. T. 185, 57 L. J. Ch. 655, 36 W. R. 484.

1. *Burgess v. Boetefeur*, 7 M. & G. 481, 49 E. C. L. 481.

“‘To acquit him:’ *acquite* is compounded of *ad*, and the old verbe *quietare*, and signifieth in law to discharge, or keep in quiet, and to see that the tenant be safely kept from any entries, or other molestation for any manner of service issuing out of the land to any lord that is above the mesne. And hereof cometh *Acquittal* and *quietus est* (that is) that he is discharged; and he that is discharged of a felony, etc., by judgment, is said to be *acquitted* of the felony, *acquiescens de felonia*; and if he be drawen in question againe, he may plead *auterfoits acquitte*.” (Co. Litt. 100a).

Former Acquittal and Dismissal of Indictment.—Where the accused was arraigned, a jury impaneled and sworn, and the cause given them in charge, no objection being interposed by the accused to the indictment or other proceedings, it was held that the dismissal of the indictment for an alleged insufficiency, which did not really exist, operated as an *acquittal* of the defendant. *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611.

Former Acquittal—Discharge of Jury.—Where a juror was discharged without the consent of the defendants (in a case of misdemeanor only) because the district attorney was not prepared with evidence to support the prosecution, such a discharge was equivalent to an *acquittal*, and the defendants could never be brought to trial again for the same offense. *People v. Barrett*, 2 Cai. (N. Y.) 304, 2 Am. Dec. 239. So when the accused in a criminal prosecution is put upon trial, on a valid indictment, before a legal jury, and the jury is discharged by the court without good cause, and without the consent of the defendant, he has incurred the first peril, and the discharge of the jury is equivalent to an *acquittal*. *State v. Walker*, 26 Ind. 346. See also *Klock v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.), 676; *Com. v. Cook*, 6 S. & R. (Pa.) 577, 9 Am. Dec. 465; *Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542; and the title JEOPARDY.

Acquittal must be Final.—In *Bailey's Case*, 1 Va. Cas. 261, it was said: “An *acquittal* must be final; so must a conviction. The court have neither *acquitted* nor convicted, for they have sent him hither to be tried for the offense of manslaughter. Here then the opinion of the court is neither an *acquittal* nor a conviction, but merely an opinion that he must be tried before a court having competent jurisdiction of the case, who may

thereafter *acquit* or convict, as the case shall appear before them.”

Appeal by State in Criminal Cases—“Quashed.”

—Under a statute giving the state a right of appeal in certain cases it was contended that the defendant's case did not fall within the statute because of the use of the word *acquittal*, and in his case the warrant was quashed. It was held that an appeal would lie. The court said: “This view of the section is founded upon the use of the word *acquittal* therein. Ordinarily in criminal jurisprudence it means a discharge after a trial, or an attempt to have one, upon its merits; but has *acquittal* as used in our statute no other or different signification than a judgment for defendant on a trial on the facts and merits of the action? * * * The wording of section 298 fairly implies that *acquittal* is not confined in its meaning to a judgment in favor of defendant after a trial on the merits and facts of a case, but may also, and as there used does, have the broader signification of a discharge by a judgment rendered for other reasons. We feel authorized to give it such meaning in section 288.” *Junction City v. Keefe*, 40 Kan. 273.

Pardon Distinguished from Acquittal.—In *Younger v. State*, 2 W. Va. 584, the court said: “To the prisoner a pardon is not equal to an *acquittal*—to which the case supposes he is entitled. His reputation and character are much more affected by the one than the other. A pardon discharges from punishment; an *acquittal*, from guilt. Pardon may rescue him from the penitentiary or a halter, but it cannot redeem him from the infamy of conviction.”

2. “A discharge, *acquittance*, or release—call it what you will—is as valid without a seal as with it.” *Milliken v. Brown*, 1 Rawle (Pa.) 398; *Wentz v. Dehaven*, 1 S. & R. (Pa.) 312.

Forgery—Clearance.—The document called a “clearance,” issued by friendly societies, which purports to be a certificate that the member receiving it has paid all dues and demands up to a certain date, is not an “*acquittance* or receipt for money” within section 23 of 24 & 25 Vict., c. 98. *Reg. v. French*, L. R. 1 C. C. R. 217.

Forgery—Script.—A script certificate in a railway company is not an “accountable receipt” nor an “*acquittance* or receipt” within the meaning of the 11 Geo. IV. and 1 Wm. IV., c. 66, § 10. *Clark v. Newsam*, 1 Exch. 131. See also *West's Case*, 1 Den. C. C. 258.

Forgery—Bill of Parcels.—To a bill of parcels of the following tenor, viz., “Mr. J. L. bought of E. & C.—the above charged to G. C.” the purchaser, J. L., added these words: “By order E. & C.,” it was held that this

ACQUITTED. (See also ACQUITTAL, and the titles JEOPARDY; MALICIOUS PROSECUTION.)—Acquitted means set free or judicially discharged from an accusation; released from a debt, duty, obligation, charge, or suspicion of guilt.¹

addition amounted to an *acquittance* of J. L., and was a forgery within the statute of 1804, c. 620, § 1. *Com. v. Ladd*, 15 Mass. 526.

Forgery—Memorandum.—A memorandum importing that one had paid a sum to another, but not importing any acknowledgment from that other of his having received it, is not such a receipt and *acquittance* as the statute 2 Geo. II., c. 25, § 1, makes it capital to forge and utter. *R. v. Harvey*, 1 Russ. & Ry. 227.

Forgery—Receipt.—A receipt for money as part of the purchase price of a farm is an *acquittance* within the statute of forgery, and an indictment for forgery thereof is good without charging any extrinsic dealings between the parties. The court said: "The word '*acquittance*,' although perhaps not strictly speaking synonymous with receipt, includes it. A receipt is one form of an *acquittance*; a discharge, another. It is not questioned but that a receipt in full is an *acquittance*. Why, therefore, is not a receipt for a part of a demand or obligation an *acquittance pro tanto*? We are aware that lexicographers do not fully agree as to this; but in legal proceedings a receipt is regarded as an *acquittance*. See 2 Bish. Crim. Law, § 557; *Rex v. Martin*, 7 C. & P. 549, 32 E. C. L. 626; *Reg. v. Houseman*, 8 C. & P. 180, 34 E. C. L. 344; *Reg. v. Atkinson*, C. & M. 325, 41 E. C. L. 181; *Com. v. Ladd*, 15 Mass. 526; *Whart. Prec. Ind.* 383." *State v. Shelters*, 51 Vt. 102.

Forgery—Banker's Receipt.—Where A, having possession of a banker's receipt given upon a deposit of money, and conditioned that the money should be repaid on delivery of the receipt, wrote the name of the depositor across the face of the receipt, and delivered it up to the banker, and thereby fraudulently obtained the money, it was held he might be convicted of having forged an *acquittance*. *Reg. v. Atkinson*, 2 Moo. C. C. 278.

Distinguished from Release.—In *Mitchell v. Pratt*, Taney (U. S.) 448, it was held that a paper purporting to be a receipt by a seaman to the master of his vessel for twenty-five cents, "for assault and battery, in full of all dues and demands," with a witness's name to it, and on which are two wafer seals (in the absence of proof that either of the seals is that of the person giving the receipt), cannot operate as a release, in the technical sense of that word, as known to the common law. Such receipt may operate as an *acquittance* given upon the compromise and settlement of an unliquidated and disputed claim for damages for the assault.

1. *Morgan County v. Johnson*, 31 Ind. 467; *Dollaway v. Turrill*, 26 Wend. (N. Y.) 400.

Malicious Prosecution—Acquittal by Jury.—In *Thomas v. De Graffenreid*, 2 Nott & M. (S. Car.) 143, where the declaration in an action

for malicious prosecution set forth that the plaintiff had been *acquitted*, the court said that the word *acquitted* was a word of technical import, and must be understood in its technical sense, to wit, an acquittal on trial by jury; and where the proof showed that the grand jury had rejected the bill, this was held a fatal variance. To the same effect are *Hester v. Hagood*, 3 Hill (S. Car.) 196; *Shock v. M'Chesney*, 2 Yeates (Pa.) 473. And in *Law v. Franks*, Cheves (S. Car.) 9, it was held that an allegation that plaintiff was discharged is not supported by proof of an *acquittal*.

So in *Morgan v. Hughes*, 2 T. R. 231, it is said: "Saying that the plaintiff was 'discharged' is not sufficient; it is not equal to the word *acquitted*, which has a definite meaning. Where the word *acquitted* is used, it must be understood in the legal sense, namely, by a jury on the trial." See also *Jones v. Gwynn*, 10 Mod. 214.

But where the declaration stated "that the plaintiff had been *acquitted* by the grand jury's finding 'no bill,' and that the said prosecution is wholly ended and determined, and he, the said plaintiff, wholly discharged therefrom, as by the records and proceedings thereof remaining in the said court appears," the court held that it was a sufficient statement of the discharge of the plaintiff from the prosecution, and said: "But, secondly, it is contended that the proof did not support the allegation in the declaration; that the declaration alleges that he was *acquitted*, whereas the proof was that the grand jury found no bill against him, which was not in contemplation of law an *acquittal*. And in support of that ground the case of *Thomas v. De Graffenreid*, 2 Nott & M. (S. Car.) 143, is relied on. But that case is very distinguishable from this. In that case it was set forth in the declaration that the plaintiff had been *acquitted*, without specifying in what manner. The court held that *acquitted* was a technical word which meant *acquitted* on trial by petit jury, and being used without any qualification must be understood in its technical sense, and therefore showing that the grand jury had rejected the bill did not support the declaration. But in the case now under consideration it is stated that he was '*acquitted* by the grand jury's finding no bill.' The manner of acquittal is set out in such a way as to show that it was not intended to be used in its technical sense. And although when a technical word is used without any qualification the court will give it its technical meaning, yet when it is accompanied with such qualifications as show that it was intended to be understood in a different sense, it will be taken with such qualifications. And although the declaration may not be drawn in the most technical form, I do not know that the facts

ACRE.—See note 1.

ACROSS.—This word means, in its common acceptation, from one side to the other, unless there is evidence that the parties intended to use it in a different sense.²

could have been set out with more precision. If it had been 'discharged' instead of *acquitted*, it is admitted that it would have been sufficient. And in common parlance, I think *acquitted* is as clearly expressive of the idea intended to be conveyed as 'discharged.' It is frequently used in that sense by the best pleaders, as will be seen by reference to the precedents. Chitty, giving the form of a declaration for maliciously charging the plaintiff of felony before a justice of the peace and causing him to be imprisoned on a warrant until he was discharged by the justice, concludes with saying, 'The said justice adjudged and determined that the said A B (the prisoner) was not guilty of the said supposed offense, and then and there caused the said A B to be discharged out of custody, fully *acquitted* and discharged' (2 Chitty's Plead. 250-1). It is not unusual to find it in all legal proceedings used in its vulgar sense, and it is only when it is used in reference to proceedings which seem to require that it should receive a technical application, and then without any qualification, that the court will be bound to understand it in that sense." *Teague v. Wilks*, 3 McCord (S. Car.) 461. Compare cases cited *supra*.

Civil as well as Criminal Cases.—In *Dolloyway v. Turrill*, 26 Wend. (N. Y.) 400, it was held that the term *acquitted* referred as well to civil as to criminal prosecutions.

Nolle Prosequi Entered.—In *Indiana*, the clerk is not entitled to "extra services" where defendant is *acquitted*. It was held that he was not entitled where a *nolle prosequi* was entered. The court said: "Webster defines *acquitted* thus: 'Set free, or judicially discharged from an accusation; released from a debt, duty, obligation, charge, or suspicion of guilt.' So that when a *nolle prosequi* is entered and the defendant discharged, he is *acquitted* of the prosecution. The proper judgment in such cases is, that the 'defendant go hence acquit,' etc. And we think it very clear that such is the sense in which the word is used in the act." *Morgan County v. Johnson*, 31 Ind. 466.

1. "By the grant of an *acre* of land doth pass so much as is an *acre* by measure in that country, by the ordinary count and measure of the country." Shep. Touch. 95; Co. Litt., 5 B; *O'Donnell v. O'Donnell*, L. R. 13 Ir. 227.

Tax Assessment.—A prosecutor owned ten *acres* of upland and claimed a right of reclamation over twenty *acres* of land under water. It was held that a valuation of the whole "as thirty *acres* of land," at so much per *acre*, did not invalidate the tax. The court said: "So here the term '*acres* of land' must be treated as describing the prosecutor's interests in the land, whatever they were; and the phrase '\$17,500 per *acre*,' as indicating not the value of each *acre* by it-

self, but only a basis of calculation upon which the value of the prosecutor's rights in the whole tract may be computed." *State v. Yard*, 43 N. J. L. 124.

2. Under a grant of a right of way *across* the plaintiff's lot of land, the grantee was held not to have a right to enter at one place, go partly *across*, and then come out at another place on the same side of the lot. *Comstock v. Van Deusen*, 5 Pick. (Mass.) 163.

To the word *across*, unless it is qualified by some prefix, as "diagonally" or "obliquely," there is attached, in ordinary use, but one meaning, and that is a direction opposite to length. This is especially true when it is used in connection with parallel lines. *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 260. Compare *Brown v. Meady*, 10 Me. 395.

"Over" Synonymous with "Across."—The two words "over" and *across* may be used interchangeably, and as having the same meaning. Webster thus defines the word *across*: "From side to side; athwart; crosswise; quite over." *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 598.

Across Land Reserved.—Narrowest Point.—The grantor in a deed reserved to himself the right of passing and repassing with teams, in the most convenient place, *across* the land conveyed. It was held that the term *across* did not necessarily confine the right of way to crossing the lot at its narrowest dimensions. The court said: "The word *across* may mean 'over'; it does not necessarily exclude the idea of passing over a parallelogram in a longitudinal direction. To pass *across* a bridge is a common expression, but does not mean to pass from one side of it to the other." *Brown v. Meady*, 10 Me. 395, 25 Am. Dec. 248. Compare *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 260.

Across, Along, or Upon a Highway.—In *Burt v. Lima, etc., R. Co.* (Supreme Ct.), 21 N. Y. Supp. 432, it was held, where a railroad company was authorized to construct its road *across*, along, or upon any highway, that the occupation and use of the highways contemplated by the statute was to be casual or incidental, and that the grant did not authorize the railroad to build its entire line upon a highway between two villages.

Across the Waters of a Stream.—An act authorized a company to take toll for timber floated *across* the waters of the stream. It was held that this did not mean merely from one side to the other. The court said: "The exception also that the master should have found that the company was only authorized to take tolls for logs or timber floated *across* the waters of the stream is somewhat hypercritical. It cannot be held to mean floating or crossing over from side to side of the

ACT. (See also **ACTING**, and the title **STATUTES**.)—In the legal sense this word may be used to signify the result of a public deliberation; also a decree, edict, law, judgment, resolve, award, determination. When a bill is duly passed by a legislative body it becomes an act of that body; that is, a thing done.¹ Illustrations of its popular use will be found in the note.²

stream, as the word imports: a thing not needed, or within the purview or purpose of the act. The words are found in the same connection in the supplement to the act incorporating the Little Anderson Creek Navigation Company, a precisely similar improvement company, and were adopted by the framer of the act incorporating the Bennett's Branch Improvement Company. The object of this act, as was the Anderson Creek Company, was to improve the descending navigation of the stream for logs and lumber, and not to improve its crossings with lumber, and this is so said in every part of the act but in this single instance. We must construe the expression in subordination to the declared purposes of the act, and in accordance with all its provisions, and so the learned master and court construed it, and they could do no otherwise." *Bennett's Branch Imp. Co.'s Appeal*, 65 Pa. St. 251.

Distinguished from "Upon," "Over," "In."—A charter of a street railway authorized it to construct its tracks "upon" and "over" certain streets, "except in" such as shall be fixed upon by the city council. It was held that this did not prevent the company from laying its tracks *across* one of the excepted streets. The court said: "It will be observed that the prepositions used in the language quoted to describe where the railway or railways may be constructed are 'upon' and 'over,' and that the preposition used for the excepted streets is 'in,' the preposition *across* being nowhere employed. This is significant; for to say of a railway that it is built upon, over, or in a street, which it merely crosses when following the course of another street, is not according to common usage." *State v. Newport St. R. Co.*, 16 R. I. 533; *Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 137.

Across Country.—The contract declared upon, and proved by the memorandum produced, was that the horses were to run four miles "*across* a country." The court said: "That is an expression of which we cannot take judicial notice. The meaning of that expression was a question for the jury, to be decided by them upon the evidence before them. The evidence showed that by this expression the rider is excluded from riding through an open gate." *Evans v. Pratt*, 3 M. & G. 762, 42 E. C. L. 396.

1. *Chumaseo v. Potts*, 2 Mont. 248.

An *act* is a statute or law made by a legislative body. *People v. Tiphaine*, 3 Park. C. Rep. (N. Y. Oyer & T. Ct.) 244.

"**Act," "Bill," and "Law" Discussed.** (See also **BILL**; **LAW**; and the title **STATUTES**.)—In discussing the meaning of the terms *act*, "bill," and "law" as used in constitutional provisions that no *act*, bill, or law shall contain more than one subject, the court in

Sedgwick County v. Bailey, 13 Kan. 608, says: "The language of this constitutional provision differs in some respects in the different states. We shall notice some of these differences. In some of the states the word 'bill' is used, where in others the word *act* or 'law' is used. But, as the question is usually presented to the courts, it can probably make but little if any difference which one of the words is used. Each, as presented to the courts, means the final determination of the legislature upon the particular subject embraced in such 'bill,' *act*, or 'law.' The word *act* is probably the best word to use, for it includes no action of the legislature, or of any person, prior to the final passage of the *act* by the legislature, and it includes the whole of the *act*—nothing more and nothing less. The word 'law' is probably the worst word to use, for a portion of any *act* may be law, as well as the whole of the *act*. 'Law,' however, as here used, is intended to be synonymous with *act*. Our constitution, as well as those of *Ohio*, *Nebraska*, *Pennsylvania*, *New York*, *Wisconsin*, and perhaps some of the other states, uses the word 'bill.' The word 'bill' means the bill as it is first introduced into one of the houses of the legislature, and as it may at anytime be, in any of its stages, until it is finally passed by both houses of the legislature, signed by the officers of each house, signed by the governor, and filed away by the secretary of state, as the highest evidence of what the law is. When the bill is thus filed it is called the 'enrolled bill.' It is then the embodiment of the *act*—the law—that finally passed the legislature, and should contain but one subject, which subject should be clearly expressed in its title."

In *Wahl v. Holt*, 26 Wis. 703, it was held that the word "bill" in a statute was used synonymously with the words "law" or *act*.

In *Southwark Bank v. Com.*, 26 Pa. St. 450, the court said: "A bill is the draft or form of an *act* presented to the legislature, but not enacted. An *act* is the appropriate term for it after it has been acted on by, and passed, the legislature. It is then something more than a draft or form. It has a legal existence as an *act* of the legislative body, because it becomes a law, without further action from any other branch of the government, if the executive take no measure to prevent it."

2. **Act Complained of.**—An English statute provided that an action against a justice of the peace for misconduct in office should be brought within six months after the *act* complained of. Where the *act* complained of was false imprisonment, it was contended that the action might be brought within six months after the quashing of the conviction. The

contention was not allowed. The court said: "In argument it was contended that the six months might be construed to run from the quashing of the conviction; but the commitment is the *act* complained of, not the quashing of the conviction on the application of the party imprisoned. The quashing of the conviction is only a condition to the prosecution of the action, like the delivery of an attorney's bill, or the giving a notice of action; and there is nothing to determine in what order the conditions shall be complied with." *Haylock v. Sparke*, 1 El. & Bl. 471, 72 E. C. L. 471.

Whether "Act" Implies Intention. (See also the titles *LIFE INSURANCE* and *ACCIDENT INSURANCE*).—In *Adkins v. Columbia L. Ins. Co.*, 70 Mo. 31, 35 Am. Rep. 410, where a policy provided against the death of the assured by "his own *act* and intention," it was contended that the word *act* necessarily implied intention. The court said: "While the words 'his own *act* and intention' have been construed to mean no more than the words, 'his own *act*,' on the ground that the word *act* necessarily implies intention (*Chapman v. Republic L. Ins. Co.*, 6 Biss. (U. S.) 238), yet the addition of the word 'intention' shows that the parties were solicitous to avoid all question as to whether the policy was to be avoided by the physical *act* simply of the assured when unaccompanied by any corresponding intellectual purpose or *act* of the mind."

In *Chapman v. Republic L. Ins. Co.*, 5 Fed. Cas. 481, case No. 2606; 6 Biss. (U. S.) 238, 4 Ins. Law J. 511, 7 Chi. Leg. News 186, 5 Bigelow Ins. Cas. 110, the court said: "The word *act* necessarily implies intention, and it seems to me the policy in this case differs in no material import from the one already decided by this court; that is to say, you get just as strong a sentence, and it means practically just as much, to say that the company shall not be liable if the assured comes to his death by his own *act*, sane or insane, as if you say the company shall not be liable if the assured comes to his death by his own *act* and intention, sane or insane."

Act or Device to Prefer a Creditor.—A *Kentucky* statute prohibiting any *act* or device in contemplation of insolvency, it was held that a transfer of choses in action came within these words. *Taylor v. Taylor*, 78 Ky. 470. See also the title *INSOLVENCY*.

Whether the Term Includes both Ministerial and Judicial Acts.—A *Connecticut* statute provided that no justice of the peace should *act* in any cause wherein he was attorney for either party, or had a pecuniary interest. It was held that by the term *act* judicial action alone was not intended, but every act or proceeding in a suit. *Yudkin v. Gates*, 60 Conn. 428. And in *New Hartford v. Canaan*, 52 Conn. 166, it is said: "This language is so exceedingly broad, embracing in terms any *act* and any proceeding (wherein the justice may be interested by reason of being an inhabitant and tax-payer in the town that is a party), that we do not feel at liberty to accept the ideas of the plaintiff's counsel and restrict

its application exclusively to an actual trial in court before the interested magistrate."

"Act" Referring to Section of Statute.—The word *act* is generally used to designate the entire bill with all the parts adopted by a single effort of the legislative will; but the word may refer to a particular section in which it is used when the context indicates that such was the legislative intent. *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498. And to the same effect is *Rawls v. Doc*, 23 Ala. 249.

So in *Chesapeake, etc., R. Co. v. Pack*, 6 W. Va. 402, where in the re-enactment of a code a proviso was found that this *act* should not apply to any city or incorporated town, it was held that this referred to the preceding section. The court said: "The code is itself but one *act* of the legislature. No part of it, less than the whole, is properly designated as an *act*. So that if the proviso that this *act* shall not apply to any city or incorporated town was construed as if it was embodied in the code, the effect would be that no part of the code would apply to the inhabitants of any city or incorporated town. It cannot be supposed to have been the intention of the legislature, in this way, to exclude the body of the statute law of the state from operation in municipalities. To avoid such a conclusion, the legislative intent ordinarily indicated by this form of enactment must be discarded." And see *Scheftels v. Tabert*, 46 Wis. 444.

Real Covenants. (See also the title *REAL COVENANTS*).—"The covenant [*i.e.*, for quiet enjoyment] is that the lessee should hold the premises without any lawful eviction, interruption, etc., by or from the lessor, or by or through her '*acts*, means, right, title, forfeiture, privity, or procurement.' Now the word *acts* means something done by the person against whose *acts* the covenant is made; and the word '*means*' has a similar meaning, something proceeding from the person covenanting." *Spencer v. Marriott*, 1 B. & C. 459, 8 E. C. L. 195, 2 D. & R. 665. See also *Dennett v. Atherton*, L. R. 7 Q. B. 316, 41 L. J. Q. B. 165, 20 W. R. 442; *Stevenson v. Powell*, 1 Bulstr. 182, Dart 884; Sug. V. & P. 602; Elph. 487, 488; 2 Platt 310.

All "reasonable *acts*," in a covenant for further assurance, mean such as the law requires, but do not include an unnecessary *act*. *Warn v. Bickford*, 9 Price 51. See also *Pudsey v. Newsam*, Yelv. 44; Dart 887; Sug. V. & P. 613. Or one that is impracticable. Elph. 493. See also *REASONABLE*.

Malicious Act.—See *MALICIOUS*, and the title *MALICIOUS MISCHIEF*.

Acts of Law.—See *OPERATION OF LAW*.

Ministerial Act.—See *MINISTERIAL*.

Judicial Act.—See *JUDICIAL*.

Local Act.—See *LOCAL*, and the title *STATUTES*.

Legislative Act.—See *LEGISLATIVE*.

Public Act.—See the title *STATUTES*.

Private Act.—See the title *STATUTES*.

Special Act.—See the title *STATUTES*.

ACTING.—See note 1.

ACTION.² (See also CAUSE; SUIT.)—An action is the lawful demand of one's right³ in a court of justice.⁴

1. **Acting Officer.**—The phrase "*acting officer*" is used to designate not an appointed incumbent, but merely a *locum tenens* who is performing the duties of an office to which he himself does not claim title. *Fraser v. U. S.*, 16 Ct. Cl. 514.

Acting Attorney.—An English statute provided that no attorney should recover more than certain sums for appearing or *acting* on behalf of another in the County Court. *In re Clipperton*, 12 Q. B. 693, 64 E. C. L. 693. The court said: "We are further of opinion that the words '*acting* on behalf of any other person' in the County Court include everything that is done by the attorney in regard to a suit in that court, whether before, or at, or after the hearing."

When the word is used in the expression "*acting as attorney*," it means no more than attending, and does not satisfy a statute which requires the attorney to state that he subscribes as such attorney. *Everard v. Poppleton*, 5 Q. B. 181, 48 E. C. L. 181.

Acting as Trustee.—Where a testator left certain property in trust, and declared that if either of the trustees should decline to *act*, the survivor of the trustees so *acting* should appoint other trustees, it was held that when both the trustees wholly declined to *act* in the trust, they had never been trustees so *acting* as to entitle them to appoint other trustees. *Sharp v. Sharp*, 2 B. & Ald. 405.

Consolidation of Railroads—Acting in the Sense of Operating.—Where it was agreed between consolidating railroads that one should be the "*acting and controlling*" company, the court in construing the agreement said: "The word *acting*, in the connection in which it is used above, does not signify, as argued, that this company was to be the 'agent' merely, and for a time, of the other companies. An agent is not, in reference to his principals, the 'controlling' person, but the reverse. *Acting* is used in the sense of operating. This was the operating and controlling company." *Meyer v. Johnston*, 64 Ala. 665.

2. See, for a full treatment of the subject, the title **ACTIONS**, ENCYC. PL. AND PR., Vol. I., p. 108; and for the various *actions*, such as *Assumpsit*, *Debt*, *Detinue*, *Trespass*, etc., see ENCYC. PL. AND PR., under their respective titles.

Pending Action.—See **PENDING**.

Transitory Action.—See **TRANSITORY**.

Subject of Action.—See **SUBJECT**.

Personal Action.—See **PERSONAL ACTION**.

Penal Action.—See ENCYC. PL. AND PR., title **PENALTIES**.

Official Action.—See **OFFICIAL**.

Criminal Action.—See **CRIMINAL ACTION**.

Chose in Action.—See the title **CHOSSES IN ACTION**.

Cause of Action.—See **CAUSE OF ACTION**.

Civil Action.—See **CIVIL**.

Local Action.—See **LOCAL**.

Real Actions.—See **REAL ACTIONS**.

Action for Recovery of Money Only.—See the title **MONEY**.

3. *Co. Litt.* 285 a; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 376, 38 Am. Rep. 518; *People v. Clarke*, 10 Barb. (N. Y.) 150; *Lightfoot v. Grove*, 5 Heisk. (Tenn.) 477; *Bruce v. Fox*, 1 Dana (Ky.) 450; *State v. Newell*, 13 Mont. 304; *Jacoby v. Shafer*, 105 Pa. St. 615; *Foot v. Edwards*, 3 Blatchf. (U. S.) 313.

4. *Taylor v. Kelly*, 80 Pa. St. 98; *McBride's Appeal*, 72 Pa. St. 480; *State v. Newell*, 13 Mont. 304, 3 Black. Com. 116.

Other Definitions.—An *action* is a lawful demand of one's right in the form given by law. *Hall v. Decker*, 48 Me. 255.

Action is a generic term, and means a litigation in a civil court for the recovery of an individual right or the redress of an individual wrong, inclusive, in its proper legal sense, of suits by the crown. *Bradlaugh v. Clarke*, 52 L. J. Q. B. 505. See also *Atty.-Gen. v. Bradlaugh*, 54 L. J. Q. B. 205, 14 Q. B. Div. 667, 52 L. T. 589, 33 W. R. 673.

An *action* is a judicial proceeding which will, if prosecuted effectually, result in a judgment. *People v. Judge*, 13 How. Pr. (N. Y. Supreme Ct.) 398; *People v. Colborne*, 20 How. Pr. (N. Y. Supreme Ct.) 380; *Willey v. Shaver*, 1 Thomp. & C. (N. Y.) 327.

As defined by Webster, an *action* is "a suit of justice; a claim made before a tribunal." *Susquehanna Mut. F. Ins. Co.'s Appeal*, 105 Pa. St. 615.

In *In re Hunter's Will*, 6 Ohio 501, this definition is given by the court: "I should define an *action* to be an abstract legal right in one person to prosecute another in a court of justice; and a suit, the actual prosecution of such right in a court of justice."

An *action* is an instrument whereby a party injured obtains redress for wrongs committed against him either in respect to his contracts, his person, or his property. *Badger v. Gilmore*, 37 N. H. 458.

An *action* is but the legal demand of a right, without regard to the form of the proceedings by which that right may be enforced. Or, as Bracton defines it, *Actio nihil aliud est quam jus prosequendi in iudicio quod alicui debetur*. *Bridgton v. Bennett*, 23 Me. 425.

New York.—An *action* is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. *New York Code Civ. Pro.*, § 3333; *Ketchum v. Buffalo*, 14 N. Y. 370; *Austin v. Rawdon*, 44 N. Y. 71; *Bryan v. Wilkinson*, 16 Civ. Pro. Rep. (N. Y. Ct. App.) 281; *Hallahan v. Herbert*, 57 N. Y. 413; *People v. Sturtevant*, 9 N. Y. 268, 59 Am. Dec. 536.

California.—The definition of the *California Code* is the same as that of *New York Code Civ. Pro.*, § 22. *Hutchinson v. Ainsworth*, 73 Cal. 455, 2 Am. St. Rep. 823.

Kansas.—And so in *Kansas Code*, § 6. *Ames v. Kansas*, 111 U. S. 460.

Distinguished from Suit.—Although the terms "suit" and "action" are frequently used interchangeably,¹ the former is the more comprehensive.²

1. *McPike v. McPike*, 10 Ill. App. 332; *Magill v. Parsons*, 4 Conn. 322; *In re Receivership*, 2 McCrary (U. S.) 180; *Claffin v. Robbins*, 1 Flipp. (U. S.) 605; *Central Pac. R. Co. v. Dyer*, 1 Sawy. (U. S.) 641; *Page v. Brewster*, 58 N. H. 126; *Calderwood v. Calderwood*, 38 Vt. 174; *People v. Colborne*, 20 How. Pr. (N. Y. Supreme Ct.) 381; *In re Hunter's Will*, 6 Ohio 502; *Clarkson v. Manson*, 18 Blatchf. (U. S.) 448; *Dullard v. Phelan*, 83 Iowa 476; *Miller v. Rapp*, 7 Ind. App. 91.

Thus in *Ex p. Milligan*, 4 Wall. (U. S.) 112, it is said: "In any legal sense, *action*, suit, and cause are convertible terms."

And so "*actions* at law and suits at law are synonymous terms; they are one and the same thing." *White v. Washington School Dist.*, 45 Conn. 61.

In *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 11, the court, by Allen, J., said: "The section under consideration provides that no 'suit' commenced, etc., shall abate, etc. The word 'suit' is here used in its modern sense, and as synonymous with *action*. A suit is defined to be 'the prosecution or presentment of some claim, demand, or request. In law language it is the prosecution of some demand in a court of justice.' (3 Story's Com. on Const., § 1719.) The words 'suit' and *action* are used as synonymous in the section of the statute now under consideration. By that section it is provided that 'the court in which any such *action* shall be pending shall substitute the names,' etc. A civil *action* is defined to be a legal demand of one's right; or it is the form of a suit given by law for the recovery of that which is due. Till judgment the suit is called an *action*. (Bouv. L. Dict., tit. Action.) A writ of error is not a suit or *action*, as those words are understood and used." See also *Wilt v. Stickney*, 15 Nat. Bank. Reg. 23. Compare *Wayman v. Southard*, 10 Wheat. (U. S.) 29.

2. *Marion v. Ganby*, 68 Iowa 142; *McPike v. McPike*, 10 Ill. App. 332; *Ulshafer v. Stewart*, 71 Pa. St. 174; *Cornish v. Milwaukee*, etc., R. Co., 60 Wis. 476.

"Suit" is a term of wider signification than *action*, and may include proceedings on a petition. *In re Wallis*, L. R. 23 Ir. 7.

"Suit and *action* are often synonymous, though an *action* may be considered a form of a suit; and the latter is often applied to proceedings in equity, and *actions* to those at law, up to judgment." *Hall v. Bartlett*, 9 Barb. (N. Y.) 300; *Miller v. Rapp*, 7 Ind. App. 91.

After Judgment — Execution. — According to Lord Coke, the word "suit" includes an execution, but the word *action* does not. Thus, if the body of a man be taken in execution, and the plaintiff releases all "suits," the execution is gone; but if he releases all *actions*, the defendant shall remain in execution. Co. Litt. 291 a; *Wayman v. Southard*, 10 Wheat. (U. S.) 29; *People v. Colborne*, 20 How. Pr. (N. Y. Supreme Ct.) 381.

"Now the technical legal termination of

an *action* is the judgment. All subsequent writs, whether of execution or *scire facias*, are new procedures, although founded upon the judgment. A suit till judgment is properly called an *action*, but not after; and therefore a release of all *actions* is regularly no bar to an execution." *Tichenor v. Collins*, 45 N. J. L. 124. See also *Shields v. Lozeau*, 34 N. J. L. 496, 3 Am. Rep. 256.

In *Bolton v. Lansdown*, 21 Mo. 400, it was held, where the saving clause in a statute of limitations provided that "the act shall not apply to *actions* brought before it takes effect," that this did not apply to executions. The court said: "The provision of the 32d article, that 'the act shall not apply to *actions* brought before it takes effect,' is referred to for this purpose, but cannot have the effect, unless we extend the meaning of the word *action* beyond its ordinary signification. It is said in Bacon's Abridgment (vol. i., 46, note b), 'The suit, till judgment, is properly called an *action*, but not after, and therefore a release of all *actions* is regularly no bar of an execution. (Co. Litt. 289 a; Roll. Abr. 291.)"

But under a statute which prescribed six years as the limitation of "*actions* against the sureties of executors, administrators, or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety" (*Alabama Code*, § 3226, subd. 7), the word *actions*, being liberally construed, was held to include a summary execution against the surety, on the return of "No property found" on an execution issued on a decree against his principal. *Martin v. Tally*, 72 Ala. 31.

Equity Proceedings.—Again, "suit" applies to proceedings both at law and in equity, while *action* is properly confined to proceedings at law. *State v. Jennings*, 56 Wis. 120; *Didier v. Davison*, 10 Paige (N. Y.) 515; *People v. Colborne*, 20 How. Pr. (N. Y. Supreme Ct.) 381. But *action* may include proceedings in equity. *Thompson v. Hubbard*, 131 U. S. 150; *Coatsworth v. Barr*, 11 Mich. 199; *Scott v. Smart*, 1 Mich. 297; *Corson v. Ball*, 47 Barb. (N. Y.) 452; *Farnam v. Brooks*, 9 Pick. (Mass.) 243.

"The statute gives them the right to maintain '*actions*.' It does not say *actions* at law; but though the word *actions* is commonly used for suits 'at law,' it does not exclude suits in equity. All the definitions most familiar to lawyers give great latitude to the word. The old definition of Bracton, drawn from the civil law, and that of Lord Coke, have been kept alive and made familiar by constant quotation. An *action*, according to Bracton, is *nihil aliud quam jus prosequendi in judicio quod sibi debetur*; or, according to Lord Coke, 'a legal demand of one's right.' Blackstone (3 Com. 3) considers it 'a remedial instrument of justice, whereby redress is obtained for any wrong committed or right

In the notes will be found many illustrations of the scope of the term "action" as used in various connections, together with examples of various writs and proceedings which have been held to fall within the term, as well as those which have been held not to be included by it.¹

withheld.' Finally, Sellon, the most learned of the English writers on the practice of the court, says that it is 'the method prescribed by different statutes, or by the rules and practice of the respective courts, for the recovery of any debt due, or of an equivalent in damages for any injury sustained.' 1 Sellon's Pr. Intro. 72." *Durant v. Albany County*, 26 Wend. (N. Y.) 86.

1. Suit in Admiralty Court.—In *The Longford*, 14 Prob. Div. 34, it was held that the word *action* did not apply to a suit in the Admiralty Court.

Appeal from Order of Removal in Settlement Case.—In *Hildreth v. Overseers of Poor*, 13 N. J. L. 5, it was held that appeals from orders of removal in settlement cases, and from orders of affiliation and maintenance were within the description "an *action* or suit of a civil nature."

Appeal from Probate. (See *infra*, this note, PROBATE PROCEEDINGS.)—A *Connecticut* statute provided that in an *action* by or against representatives, memoranda of the deceased might be received as evidence. It was held that an appeal from the probate of a will was not an *action* within the meaning of the statute. The court said: "The inquiry turns upon whether such an appeal is an *action*, by or against such representatives, within the meaning of that provision. That such appeal is an *action* within the intent of some statutory provisions (Gen. Statutes, § 794) is certain. 'But this is not an ordinary case, and has never been treated as such in this state, but as a statutory and special proceeding.' *Livingston's Appeal*, 63 Conn. 75. In reference, then, to such a proceeding, was it the intention of the legislature, by the provisions of the statute in question, to change the existing common law in regard to the entries and memoranda of alleged testators? It seems to us not, and that the case of *Bissell v. Beckwith*, 32 Conn. 509, and the opinion of this court by *Baldwin, J.*, in the recent and still unreported case of *Rowland v. Philadelphia, etc., R. Co.*, 63 Conn. 415, abundantly show, first, that the statute should be construed according to the apparent intention of the legislature, to be gathered from the entire language used, in connection with the subject and the purpose of the law; and second, that such construction will not bring such appeal as the present within its purview. There was no error, therefore, in the ruling of the court below on this point." *Barber's Appeal*, 63 Conn. 413.

But in *Stiles's Appeal*, 41 Conn. 329, it was held that a statute providing that in any *action* pending in the Superior Court, if either of the parties shall die, his representative may enter and prosecute or defend, applied to appeals from courts of probate.

As Equivalent to Controversy.—A *West Virginia* statute provides that husband and wife shall not be examined against each other

except "in an *action* or suit" between husband and wife. In *Anderson v. Snyder*, 21 W. Va. 645, it was held that the words "*action* or suit" are to be taken and held as synonymous with "controversy," and not merely as designating the particular mode in which a controversy may be presented to the court, and that the controversy must be between husband and wife.

Attachment.—In *Jacoby v. Shafer*, 105 Pa. St. 615, it is said: "It cannot be pretended that a proceeding by attachment for the purpose of collecting a debt is not an *action* in the full legal sense of the word."

Certiorari.—In *People v. Court of Sessions*, 2 Thomp. & C. (N. Y.) 431, it was held that a certiorari was not an *action* within the provisions of a statute providing that a successor in office should be substituted as party to an *action* upon the termination of his predecessor's term. Compare § 766 N. Y. Code Civ. Pro.

Claim Filed against the Estate of Decedent.—The *Alabama* Code provided that any *action* by or against a personal representative might be prosecuted by or against the successor of such personal representative who might be made a party by motion. It was held that a claim filed under an order of court against the estate of another decedent, and pending in that court for allowance or rejection, was an *action* within the statute. *Reynolds v. Crook*, 95 Ala. 570.

Confession of Judgment.—Where a statute provided for attorneys' fees in suits or *actions*, it was held that the act did not authorize the taxation of an attorney's fee, where a judgment was rendered by confession. *Dullard v. Phelan*, 83 Iowa 476.

Judgment on Bond and Warrant of Attorney.—But in *Farrington v. Freeman*, 2 Edw. Ch. (N. Y.) 572, it was held that judgment obtained through a bond and warrant of attorney was a judgment in a personal *action*. The court said: "An *action* is defined to be the legal demand of one's right; and when it is brought to cover a debt, damages, or personal property, it is called a personal action. * * * Although no suit is pending when a bond and warrant of attorney are given, yet the very language of the latter instrument anticipates and recognizes the proceedings to be had by virtue of it as an action at law." But compare *Livingston v. Harris*, 11 Wend. (N. Y.) 332.

Contempt.—In *Johnston v. Com.*, 1 Bibb (Ky.) 600, it was held that proceedings for contempt were not an *action*. The court said: "The proceedings for contempts are not in their nature actions. * * * The person offending is not to be forever concluded of any right. There is not the presence of the three persons constituting a judgment; the award of punishment is made upon no consideration of a record before the court,

it is but an order or rule upon the person; and the entry is without an *ideo consideratum est*."

Contested Election.—A contested sheriff's election before a justice of a county court was held not *action* within the meaning of a *North Carolina* statute entitling the successful party to costs. *Patterson v. Murray*, 8 Jones (N. Car.) 278.

Criminal Proceedings.—In *Cannan v. Phillips*, 2 Sneed (Tenn.) 190, the court apparently confines the term *action* to civil proceedings. See also *People v. Green*, 1 Idaho 238; *U. S. v. Ten Thousand Cigars*, 1 Woolw. (U. S.) 125. But in *Weeks v. Forman*, 16 N. J. L. 243, it is said: "I conclude, therefore, that *action* is here used in the broader sense known to our law, which would include information, complaint, conviction, etc. It means no more than that the magistrate may hear, try, and determine any complaint or information of a breach of the law, convict the offender thereof, and thereupon adjudge the appropriate fine or amercement."

An *Oregon* act to prevent and punish gambling, made gambling a misdemeanor punishable by fine, and imprisonment until such fine was paid. The same act provided that all fines and forfeitures arising thereunder should be recovered by an "*action at law*," to be brought in the name of the state. It was held that a proceeding by indictment was an *action at law* within the meaning of this statute. *State v. Carr*, 6 Oregon 134.

Divorce Case.—In a statute providing for change of venue, a divorce case was held an *action*. *Evans v. Evans*, 105 Ind. 204.

Eminent Domain.—In *Valentine v. Boston*, 20 Pick. (Mass.) 201, it was held that proceedings to assess damages sustained by an owner of land in consequence of a highway being laid out over it were not an *action*.

Ex Parte Proceedings. (See *infra*, this note, PROBATE PROCEEDINGS.)—"An *action* is a lawful demand of one's right." Co. Litt. 285 a; 2 Institutes 40. "And such demand may be made judicially in an *ex parte* proceeding or application." *Bruce v. Fox*, 1 Dana (Ky.) 451.

Foreign Attachment was held a "suit" or *action* within the provision of an insurance policy. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310. And in *Allen v. Partlow*, 3 S. Car. 418, proceedings by foreign attachment were held to fall within the term *action*.

Habeas Corpus.—As to habeas corpus, see *State v. Newell*, 13 Mont. 305, and the title HABEAS CORPUS.

Insolvency Proceedings.—In *Belfast v. Fogler*, 71 Me. 403, it was held that proceedings in insolvency do not constitute an *action* within the meaning of that word as used in the *Maine* statute, saving pending *actions* from the effect of repealing statutes. See also *Webster v. Androscoggin County*, 63 Me. 27.

Mandamus. (See also the title MANDAMUS).—A proceeding by mandamus is an *action at law* within the meaning of a statute which provided that whenever any *action at law* should be tried by the Superior Court with-

out a jury, the court should, upon the motion of either party, find the facts upon which its judgment was rendered, and make the finding a part of the record. *State v. New Haven, etc., Co.*, 41 Conn. 134.

In *People v. Colborne*, 20 How. Pr. (N. Y. Supreme Ct.) 380, mandamus was held an *action*. But compare *Com. v. Lancaster County*, 6 Binn. (Pa.) 8.

And in *Chumaseo v. Potts*, 2 Mont. 268, it is said that mandamus is not an *action*. The court said: "Burrill, in his Law Dictionary, in defining the term *action*, says: 'It is further to be observed that there are many judicial proceedings, conducted nearly in the same form as *actions*, before the same tribunals, and with the same general objects, viz., the enforcement of some legal right or remedy, which, nevertheless, are not technically considered as *actions*, nor so denominated. Of this description are the proceedings at law by writ of error, *scire facias*, mandamus, certiorari, habeas corpus, and the like.'"

So in *People v. Sage*, 3 How. Pr. (N. Y. Supreme Ct.) 57, it was held that a mandamus was not an *action* within the meaning of the statute providing that a court shall substitute the name of a successor in office upon the application of such successor or of the adverse party. The court said: "Is the proceeding by mandamus to be regarded as an *action*? If it is, the statute is imperative that the names of the successors to the defendants shall, upon the application of such successors, be substituted. The term '*action*' means a legal demand of one's right, or, as it has been defined, it is 'the right of prosecuting to judgment for what is due to one's self.' The party complaining commences his action in his own name, and as a matter of right; but the writ of mandamus is only issued in the name of the people. It may be granted or withheld in the discretion of the court. Before a party is entitled to have it granted, he must show not only that he has a specific legal right to have the thing asked for done, but also that he is without a specific legal remedy."

Mechanic's Lien.—A proceeding in a justice of the peace's court under a mechanic's lien law was held an *action* in *People v. Judge*, 13 How. Pr. (N. Y. Supreme Ct.) 400.

Penalty—Suit by Crown.—In *Bradlaugh v. Clarke*, L. R. 8 App. Cas. 354, the meaning of the term *action* is most elaborately considered. The case involved the construction of a penal statute, allowing a penalty of £500, "to be recovered by action in one of her Majesty's Superior Courts at Westminster," upon any member of the House of Commons, voting as such in the House, or sitting during any debate after the Speaker has been chosen, without having made and subscribed the oath thereby appointed. The question was whether this statute could be sued on by a common informer, or whether the crown alone could sue. The argument was wholly over the construction of the word *action* as used in the statute. It was held that the crown alone could sue, and that an *action* did not lie by a common informer. As Selborne,

L.C., went into the subject very minutely, we quote at length from his opinion: "I am also satisfied, after full consideration, that the word *action* is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the crown, and therefore not furnishing any sufficient ground for implying a right of *action* in a common informer. That it is used as *nomen generalissimum* in this particular statute seems probable, from the fact that it stands there alone without having superadded to it a number of other technical terms which are usually found associated with it in earlier statutes. Lord Coke (Coke Litt. 284b, 285a) adopts Bracton's definition of an *action*: '*Actio nihil aliud est quam jus prosequendi in iudicio quod alicui debetur.*'

*** In the third Institute he says: 'The king may have an *action* for such wrong as is done to himself, and whereof none other can have any *action* but the king, without being apprised by indictment, presentment, or other matter of record, as a *quare impedit*, *quare incumbravit*, a writ of attain, of debt, detinue of ward, escheat, *scire facias pur repleader patent*, etc. So also Fitzherbert: 'The king shall have an *action* of trespass.' In Comyn's Digest, '*Action*' (B), the term is applied to various rights of suit by the crown, writ of right, writ of escheat, and other civil remedies, including debt and trespass; and in '*Action*' (D) it is extended even to *placita corone*, or criminal proceedings, as it is also in Bacon's Abridgment ('*Actions* in General,' A). In the same abridgment it is said: 'The king, though the head and chief of his kingdom, may redress any injuries he may receive from his subjects by such usual common-law *actions* as are consistent with the royal prerogative and dignity.' And in Chitty, 'Prerogative,' p. 245: 'The general rule is that the king may waive his prerogative remedies and adopt such as are assigned to his subjects; he may maintain the usual common-law actions, as trespass *quare clausum fregit*, or for taking his goods.' These statements of the law are in accordance with the language of the statute 31 Eliz., c. 5, 'Concerning Informers,' which speaks of '*Actions*, suits, bills, indictments, and informations,' with express reference to 'any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is, or shall be, limited to the queen, her heirs or successors only.' Considering the nature of the subject with which that statute deals, I am not surprised at the reference which the appellant made to it in his argument at your lordship's bar. The conclusion to which I have been brought is that there is no difficulty in applying any part of the language of the clause in the Act of 1866, which creates the penalty sued for in the present *action*, to a suit by the crown; and, therefore, that no part of that language affords any sufficient ground for implying an intention on the part of the legislature to give a common informer, as well as the crown, a right of *action* for that penalty."

Petition for Location of a Highway.—In *Webster v. Androscoggin County*, 63 Me. 27, it was held that the word *actions* in a

Maine statute, saving pending *actions* from the effect of future statutes, does not include a petition for the location of a highway pending before the county commissioners. The court said: "Is a petition for the location of a highway, pending before a board of county commissioners, an *action* pending, within this statute? A 'right of *action*' has been defined in the Roman law as *jus prosequendi in iudicio sibi debetur*." Coke declared that 'an *action* is a legal demand of a man's right.' And the *action* itself has been long considered to be the prescribed mode of enforcing a right in the proper tribunal. The pending petition is denominated a 'case' in section 6. But by R. S., c. 81, § 2, 'all civil *actions* except *scire facias* and other special writs shall be commenced by original writs,' etc., thus confining *actions* to courts of law. We think, therefore, that the word *actions* in c. 1, § 3, does not include petitions pending before the board of county commissioners, for the location of highways, and that the right of appeal was taken away from these appellants by the change of the statute above mentioned." See also *Belfast v. Fogler*, 71 Me. 403; *In re Wallis*, L. R. 23 Ir. 7.

Probate Proceedings. (See *supra*, this note, *Appeal from Probate*.)—A *Wisconsin* statute provides for change of venue where an impartial trial cannot be had in the county where the *action* is brought. It was held that this provision applied to the trial of issues of fact raised on appeal from the decision of the County Court in respect to admitting a will to probate. The court said: "It is true the word *action* is generally used in the chapter, but we do not suppose any restricted or technical meaning is to be given to that term as here used. It is broad enough in its signification to include this proceeding for the probate of a will." *Jackman Will Case*, 27 Wis. 412. But *In re Hunter's Will*, 6 Ohio 502, it was held that the application for probate of a will was not an *action*. The court said: "The application to make probate of a will is not included in the definition either of an *action* or suit. It belongs neither to the common-law nor equity jurisdiction conferred upon the courts of common pleas, but appertains to the ecclesiastical jurisdiction of the English courts, which is specially conferred upon our courts of common pleas as courts of probate. The proceeding to make probate of a will is *ex parte*, not adversary. No process is required to notify any whose interests are to be affected. No one is necessarily before the court other than the party applying to prove the will. No judgment is given. The order of probate is not conclusive upon the subject of it, for the statute law expressly provides a way in accordance with the common usages of chancery to contest and vacate the probate, if allowed. If rejected, another application may be made, and probate established on new and better proof."

In *McBride's Appeal*, 72 Pa. St. 480, it was held that the proceeding before the Orphans' Court in *Pennsylvania* for the distribution of the estate of a deceased wife was an *action*. See also *Taylor v. Kelly*, 80 Pa. St. 98.

Proceedings against the Executor or Administrator of a judgment debtor under the New York Code were held not to be an *action*, in *Mills v. Thursby*, 2 Abb. Pr. (N. Y. Supreme Ct.) 432.

Removal Acts.—As to what constitutes a civil suit or *action* which may be removed from the state to the United States courts, see ENCYC. PL. AND PR., title REMOVAL OF CAUSES.

Replevin.—An action of replevin to recover damages is an *action* within the meaning of the Stat. 24 Geo. II., c. 44, which requires a plaintiff to demand a copy of the warrant of a justice under which an officer (defendant) acted before he brings his *action*. *Pearson v. Roberts*, Willes 668.

Scire Facias.—*Scire facias* is an *action*. *People v. Clarke*, 10 Barb. (N. Y.) 150; *Smyth v. Ripley*, 33 Conn. 311; *Ensworth v. Davenport*, 9 Conn. 392; *Fenner v. Evans*, 1 T. R. 268; *Grey v. Jones*, 2 Wils. 251. See also *Chestnut v. Chestnut*, 77 Ill. 350.

In *Gibbons v. Goodrich*, 3 Ill. App. 590, it was held that *scire facias* to revive a judgment is an *action* within the meaning of the statute of limitations requiring all *actions* to be commenced within sixteen years.

In *Pulteney v. Townson*, 2 W. Bl. 1227, the question was whether *scire facias* was an *action* within the statute of 17 Car. II., which required bail upon writs of error. It was held that it was most clearly a personal *action*.

In *Potter v. Titcomb*, 13 Me. 36, *scire facias* was held to be an *action* subject to the statute of that state abolishing special pleading in civil *actions*.

In *Gonnigal v. Smith*, 6 Johns. (N. Y.) 106, it is said that *scire facias* is a new *action*, and requires a new warrant of attorney.

In *Greenway v. Dare*, 6 N. J. L. 305, it is said further, *scire facias* is a new and independent *action* referring to the former proceedings, but wholly distinct from them.

In *Kirkland v. Krebs*, 34 Md. 93, the court says: "To the *scire facias* the defendant has a right to plead, and although generally termed a judicial writ it is classed and recognized by all the authorities as an *action*."

In *Fenner v. Evans*, 1 T. R. 267, a *scire facias* had been issued to revive a judgment entered prior to the Act of 17 Geo. III., c. 26, and execution had been taken out upon it. Upon a rule obtained to set aside the *scire facias* and execution, the question arose whether this proceeding was within the second section of that act, providing "that no *action* shall be brought on any such judgment already entered, etc." The court held that *scire facias* was an *action* within that section of the statute, and set aside both the writ and execution.

But in *Heath v. Bates*, 70 Ga. 636, it was held that a *scire facias* was not an *action* or suit, and that a former suit could not be pleaded in abatement to it. The court said: "In *Bouvier's Law Dict.*, *verbo Action*, we find the distinction clearly marked out between an *action* in its legal sense and a suit of *sci. fa.* 'Actions,' he says, 'are to be distinguished from those proceedings, such as a

writ of error, *scire facias*, mandamus, and the like, where, under the form of proceedings, the court, and not the plaintiff, appears to be the actor.' Citing *Com. v. Lancaster County*, 6 Binn. (Pa.) 9. A *scire facias* not being a suit or *action*, it follows that the pendency of a former suit cannot be pleaded in abatement to it, and hence the defense was properly disallowed by the court below." See, as supporting this view, *Crisman v. People*, 8 Ill. 351; *Challenor v. Niles*, 78 Ill. 78; *Tichenor v. Collins*, 45 N. J. L. 124.

Set-Off. (See also the title SET-OFF; and ENCYC. PL. AND PR., tit. SET-OFF.)—In *Millet v. Watkins*, 4 Bush (Ky.) 642, it was held that a set-off was neither, in the common or legal acceptation of the word, a suit nor an *action*; but in *Warfield v. Gardner*, 79 Ky. 586, it is said that by virtue of the code then in force the word *action* was to be construed to embrace a demand for a set-off or counterclaim.

It has generally been held, however, that although a set-off is in the nature of a cross *action*, and in the place and stead of a cross *action*, it is not an *action*. *Taylor v. New York*, 82 N. Y. 19.

The provision of the *New York Code* that no *action* on a judgment rendered by a justice of the peace shall be brought in the same county within five years after its rendition, does not prevent parties thereto, and especially an assignee thereof, from using such judgment as a defense, set-off, or counterclaim. *Clark v. Story*, 29 Barb. (N. Y.) 295.

So, notwithstanding the provision of the *New York Code* that "no *action* shall be brought upon a judgment rendered in any court of this State, except a court of justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party," it was held in an *action* upon contract, for goods sold and delivered, that the defendant might, without obtaining leave of court, set up in his answer, by way of set-off or counterclaim, a judgment recovered by him against the plaintiff before the suit brought by the latter was commenced. *Wells v. Henshaw*, 3 Bosw. (N. Y.) 625.

Although by reason of the charter of a city no suit can be maintained upon a claim against it until after presentation to, and demand of payment from, an officer thereof, it was yet held that the claim may be set off in a suit against its owner by the city. *Taylor v. New York*, 82 N. Y. 10.

Notwithstanding the statute in *Virginia* (1 Va. Rev. Code 1819, p. 320, c. 85, § 23) prohibiting an *action* for clerk's fees until a return by the sheriff or sergeant, such fees were allowed as a set-off in *Craigen v. Lobb*, 12 Leigh (Va.) 630, the court citing *Martin v. Winder*, Doug. 199, note, and *Bulman v. Birkett*, 1 Esp. 449.

Under a statute providing that no attorney shall commence or maintain an *action* for the recovery of any fees, charges, or disbursements for business done by him until the expiration of one month after the delivery of a bill therefor, it has nevertheless been held that an attorney may set off his bill, although

ACTION ON THE CASE. (See ENCYC. OF PL. AND PR., title TRESPASS ON THE CASE.)

ACTIO PERSONALIS MORITUR CUM PERSONA.—(See ENCYC. OF PL. AND PR., titles EXECUTORS AND ADMINISTRATORS; SURVIVAL OF ACTIONS.)—A personal action dies with the person.

ACTIVE TRUST. (See also the title TRUSTS AND TRUSTEES.)—Trusts are divided into two kinds: simple or passive, and active or special. In the former the trustee is passive and performs no duties, and the trust is therefore purely technical. In the latter he is active, being an agent to execute the donee's will, and the trust is operative.¹

it was not delivered a month before the commencement of the action; but it ought, if possible, to be delivered in time enough to be taxed, and at least should be delivered sufficiently early to prevent the plaintiff from being taken by surprise at the trial. *Brown v. Tibbits*, 11 C. B. N. S. 855, 103 E. C. L. 855, 31 L. J. C. P. 206; *Martin v. Winder*, Doug. 199, note; *Bulman v. Birkett*, 1 Esp. 449. See *Harrison v. Turner*, 10 Q. B. 482, 59 E. C. L. 481, and *per Parke, B., Lester v. Lazarus*, 2 C. M. & R. 669.

The Maine Process to Obtain Damages for Floating Land was held to be an *action*. *Hall v. Decker*, 48 Me. 255.

Used as Equivalent to a Right of Action.—Where a statute provided that an *action* for the death of a father should survive to the children upon the death of the widow, it was held that by *action* was meant right of *action*. *David v. Southwestern R. Co.*, 41 Ga. 224.

Voluntary Submission to Court.—Judgment in a controversy voluntarily submitted without

action by agreement of the parties is not a judgment in an *action*. *Lang v. Ropke*, 1 Duer (N. Y.) 701.

Writ of Error.—A writ of error has been held not to be an *action* within the provision of a statute permitting poor persons to sue *in forma pauperis*. *Moore v. Cooley*, 2 Hill (N. Y.) 412; *McDonald v. New York Sav. Bank*, 2 How. Pr. (N. Y.) 35.

In *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 11, a writ of error was held not to be an *action* within a statute providing that *action* should not abate under certain circumstances. But in *Ulshafer v. Stewart*, 71 Pa. St. 170, a writ of error was held an *action*.

"A proceeding in error is not properly an *action* within the meaning of the Code, and there is no express provision for reviving or continuing such proceedings in favor of or against the successor in interest of a party, or the representatives of a deceased party." *Black v. Hill*, 29 Ohio St. 88.

1. *Vaux v. Parke*, 7 W. & S. (Pa.) 25. *Perry on Trusts*, § 18.

ACT OF GOD.

By ARCHIBALD R. WATSON.

I. DEFINITIONS, 584.

II. THE EXPRESSIONS "INEVITABLE ACCIDENT" AND "PERILS OR DANGERS OF THE SEA OR RIVER" CONSIDERED, 587.

III. ACT OF GOD AS AFFECTING THE PERFORMANCE OF CONTRACTS, 588.

1. *Obligation Imposed by Express Contract*, 588.
 - a. *In General*, 588.
 - b. *Where the Contract Has Reference to the Continued Existence of a Particular Person or Thing*, 590.
2. *Obligation Implied by Law*, 592.

IV. ACT OF GOD AS AFFECTING THE LIABILITY OF COMMON CARRIERS, 592.

1. *Upon Their Contracts as Insurers*, 592.
 - a. *In General*, 592.
 - b. *Negligence of Carrier as a Co-operative Cause*, 595.
 - c. *Burden of Proof*, 597.
2. *Upon Their Contracts to Deliver within a Reasonable Time*, 598.
3. *Upon Their Contracts to Perform Certain Stipulated Acts*, 599.

V. ACT OF GOD AS AFFECTING THE PERFORMANCE OF CONDITIONS, 599.

1. *Conditions Precedent*, 599.
2. *Conditions Subsequent*, 600.
3. *Conditions Annexed to Bonds*, 600.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ACCIDENT; ACCIDENT (IN EQUITY); BILLS OF LADING; BONDS; COLLISIONS (IN MARITIME LAW); COMMON CARRIERS; CONDITIONS; CONTRACTS; COVENANTS; ESTATES; IMPOSSIBLE CONTRACTS; INEVITABLE ACCIDENT; LANDLORD AND TENANT; LEASES; PROXIMATE CAUSE; RECOGNIZANCES; REPLEVIN; SALES; SHIPS AND SHIPPING.

I. DEFINITIONS.—The expression "act of God" in the various connections in which it will be considered does not admit of satisfactory or accurate conception in the form of a definition,¹ though attempts to define it, of more or less ingenuity, have been and continue to be made. In a certain sense, every occurrence is mediately or immediately an act of God,² but it is with such happenings only as may have a legal significance that this article will deal. It will be found that the various definitions of the phrase differ rather in their mode of expression than in the substance of their meaning.

Lord Mansfield's Definition.—According to Lord Mansfield, by act of God is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as the violence of the winds or seas, lightning, or other natural accident.³

1. Harper, J., in *Ewart v. Street*. 2 Bailey (S. Car.) 157, 23 Am. Dec. 132.

2. Green, J., in *Gordon v. Buchanan*, 5 Verg. (Tenn.) 81.

3. Lord Mansfield in *Proprietors, etc., v.*

Wood, 3 Esp. 127, and *Forward v. Pittard*, 1 T. R. 27. See also 2 Greenl. Ev. (14th ed.), § 209. Commenting on the above definition, the court in *Fergusson v. Brelt*, 12 Md. 9, 71 Am. Dec. 582, said: "This definition is

Other Definitions.—Again, it has been stated that the term “act of God” involves “some notion of an accident from natural causes, impossible to be foreseen, and therefore impossible to be guarded against.”¹ Still again, it is said

about as accurate and specific as, perhaps, any that could be given. It excludes all circumstances produced by human agency, so that if divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge the carrier. To relieve him, the act of God must be the immediate cause of the loss, and without which it would not have occurred.”

This definition has been adopted in other cases. *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 397; *Reaves v. Waterman*, 2 Spears (S. Car.) 197, 42 Am. Dec. 364.

Lightning, Tornadoes, Sudden Squalls—Exclusively Natural Violence.—In *Friend v. Woods*, 6 Gratt. (Va.) 189, 52 Am. Dec. 119, the court cites with approval a note to the case of *Coggs v. Bernard*, 1 Smith's Lead. Cas. (8th ed.) 199, where the American decisions are reviewed, and a definition given to the expression “act of God.” Here losses were ascribed to the act of God which “were occasioned exclusively by the violence of nature; by that kind of force of the elements which human ability could not have foreseen nor prevented; such as lightning, tornadoes, sudden squalls of wind.”

In *Williams v. Branson*, 1 Murph. (N. Car.) 417, 4 Am. Dec. 562, citing *Abbot 169*, Taylor, J., said that if a shallow were occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss was attributable to the act of God or the perils of the sea.

Freshets—Changes of Channel—Deposits of Snags.—Frequent freshets, the continual changes of the channel, and deposits of snags thereby, arise immediately from no human agency and can be guarded against by no human skill, and hence come within the class of occurrences known as acts of God. *Smyrl v. Niolon*, 2 Bailey (S. Car.) 421, 23 Am. Dec. 146.

The Freezing of a Canal or a River upon which a common carrier was transporting goods has been held to be an act of God. *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *Lowe v. Moss*, 12 Ill. 477; *West v. Steamboat Berlin*, 3 Iowa 532; *Vail v. Pacific R. Co.*, 63 Mo. 230; *Harris v. Rand*, 4 N. H. 259, 17 Am. Dec. 421; *Worth v. Edmonds*, 52 Barb. (N. Y.) 40. See also *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Allen v. Mercantile Mut. Ins. Co.*, 44 N. Y. 437, 4 Am. Rep. 700; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235.

Occurrences which might have been Anticipated.—But some authorities have held that the freezing of a canal or river does not constitute such an act of God as will excuse a carrier from resulting loss, on the ground that, at least in most cases, such an occurrence might have been anticipated. *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 365, 41 Am. Rep. 696. See also *Cooper v. Young*, 22 Ga. 272, 68 Am. Dec. 502; *Engster v.*

West, 35 La. Ann. 119, 48 Am. Rep. 232; *O'Conner v. Forster*, 10 Watts (Pa.) 418.

Snowstorm.—A snowstorm of such violence as to prevent the movement of trains has been held to be an act of God. *Black v. Chicago, etc., R. Co.*, 30 Neb. 197; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

Unprecedented Flood.—In *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594, an unprecedented flood was held to constitute an act of God. And see further:

England.—*Nichols v. Marsland*, 2 Exch. Div. 1, L. R. 10 Exch. 255; *Withers v. North Kent R. Co.*, 27 L. J. Exch. 417.

California.—*Tenney v. Miners' Ditch Co.*, 7 Cal. 335; *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413; *Wolf v. St. Louis Ind. Water Co.*, 10 Cal. 541; *Richardson v. Kier*, 34 Cal. 63, 91 Am. Dec. 681; *Campbell v. Bear River, etc., Water, etc., Co.*, 35 Cal. 679; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.

Delaware.—*Higgins v. Chesapeake, etc., Canal Co.*, 3 Harr. (Del.) 411.

Georgia.—*Wallace v. Clayton*, 42 Ga. 443.

Illinois.—*Illinois Cent. R. Co. v. Bethel*, 11 Ill. App. 17.

Louisiana.—*Bietry v. New Orleans*, 22 La. Ann. 149.

Maine.—*China v. Southwick*, 12 Me. 238.

Massachusetts.—*Shrewsbury v. Smith*, 12 Cush. (Mass.) 177.

Minnesota.—*Gates v. Southern Minnesota R. Co.*, 28 Minn. 110.

New Jersey.—*Morris Canal, etc., Co. v. Ryerson*, 27 N. J. L. 457.

New York.—*Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Sheldon v. Sherman*, 42 N. Y. 484, 1 Am. Rep. 569.

Pennsylvania.—*Lehigh Bridge Co. v. Lehigh Coal, etc., Co.*, 4 Rawle (Pa.) 9, 26 Am. Dec. 111; *Bell v. McClintock*, 9 Watts (Pa.) 119, 34 Am. Dec. 507; *Lovering v. Buck Mountain Coal Co.*, 54 Pa. St. 291; *Pittsburg, etc., R. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 98; *Baltimore, etc., R. Co. v. Sulphur Springs Ind. School Dist.*, 96 Pa. St. 65.

South Carolina.—*Lipford v. Charlotte, etc., R. Co.*, 7 Rich. (S. Car.) 409.

Texas.—*International, etc., R. Co. v. Halloren*, 53 Tex. 46.

Vermont.—*Lapham v. Curtis*, 5 Vt. 371, 26 Am. Dec. 310.

Ordinary Freshet.—An ordinary freshet is not an act of God in the legal sense which protects a man against responsibility for the nonperformance of his contract. *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153. Similarly it has been held that when an ordinary rain so loosens the earth upon the sides of a railway cut as to cause a landslide, it is not such an occurrence as can be embraced within the class called “acts of God.” *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435.

1. The court, in *Ewart v. Street*, 2 Bailey (S.

that by "act of God" is to be understood "any accident produced by physical causes which are irresistible; such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness."¹ Some authorities are content

Car.) 157, 23 Am. Dec. 132, while declaring that it was "difficult to define accurately the sort of accident which comes under the denomination "act of God," said that the act "seems to involve some notion of an accident from natural causes, impossible to be foreseen, and therefore impossible to be guarded against; such are the instances of storms, lightning, and tempests, enumerated by Lord Mansfield in *Forward v. Pittard*, 1 T. R. 33. Such is the instance of a shoal or bank unknown to navigators, or suddenly formed in the ocean."

In *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, a flood of such extraordinary character that it could not have been foreseen or provided against was held to be an act of God.

Loss by Collision.—It has been necessary but rarely to determine the question whether a loss of goods by collision is within the exception of an act of God, for the reason that, generally, upon the shipment of goods a bill of lading is given, containing the exception of "perils of the sea and dangers of the river," or equivalent expressions. This point, however, has expressly arisen on several occasions, and has been decided in the negative. *Plaisted v. Boston, etc., Steam Nav. Co.*, 27 Me. 132; *Mershon v. Hobensack*, 22 N. J. L. 372, 46 Am. Dec. 587; *Lawrence v. McGregor, Wright (Ohio)* 193.

In *Hutchinson on Carriers*, § 184, it is said: "Nor can a collision be claimed as the act of God; for no collision upon land can take place without the direct intervention of man, and if happening between vessels at sea in a tempest which made it inevitable, the tempest would be the *vis major*, and not the collision." Compare *Hays v. Kennedy*, 41 Pa. St. 378, 80 Am. Dec. 627.

It was decided in *Plaisted v. Boston, etc., Steam Nav. Co.*, 27 Me. 132, 46 Am. Dec. 587, that the owners of a steamboat were liable for injury caused to the cargo by a collision, though no fault existed on the part of the carriers or their servants. The court first considered the question whether the disaster, as an inevitable accident, could be regarded as an act of God, and in that way the carrier exonerated; but the conclusion was reached that the two things, "act of God," and "inevitable accident," were by no means synonymous. The court said: "The accident in the case at bar as presented is no more referable to the act of God than is every event that occurs under his providence; and the collision having had its origin from the agency of man, without any concussion from any extraordinary violence of the elements, it must, in the absence of any modification of the general rule by the previous agreement of the parties, be held that the defendants are liable for the loss of the goods shipped by the plaintiff."

1. *Nisbet, J.*, in *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393.

Lightning, Earthquakes, Tempests.—The term "act of God," said the court, in *Central Line of Boats v. Lowe*, 50 Ga. 511, "covers only natural accidents, such as lightning, earthquakes, tempests, and the like."

Sudden Gust of Wind.—The damage caused by a sudden gust of wind has been held attributable to the act of God. *Nugent v. Smith*, 1 C. P. Div. 423; *The Lady Pike*, 2 Biss. (U. S.) 141; *Gillett v. Ellis*, 11 Ill. 579.

Sudden Failure of Wind.—It seems that the sudden failure of wind may be regarded as much an act of God as the sudden violence of the wind. Thus, where a vessel was beating up the Hudson against a light wind, and while near the shore and on the point of changing tack, the wind suddenly failed, by reason of which the vessel drifted on the shore and soon sunk, it was held that the sudden failure of wind was an act of God, and the loss consequent thereupon was not chargeable to the carrier. *Colt v. M'Mechen*, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200.

Loss by Lightning—Fire from Other Cause.—In 3 Kent Com. (13th ed.) 217, it is said that a loss by lightning is within the exception of the act of God, but a loss by fire proceeding from any other cause is chargeable upon the ship-owner. See also *Gilmore v. Carman*, 1 Smed. & M. (Miss.) 279, 40 Am. Dec. 96. It has been held, however, that when a fire from burning woods was driven by a tornado into a town, and destroyed a lot of freight cars, the loss did result from an act of God. *Pennsylvania R. Co. v. Fries*, 87 Pa. St. 234.

Great Chicago Fire.—In *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613, it was held that a loss arising from the great fire in Chicago was not one arising from the act of God. Here it is said that by the act of God is meant something superhuman, or something in opposition to the act of man.

Vessel Striking on Rock.—In *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235, Swift, C. J., said: "Under the term 'act of God' are comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent." Applying this reasoning to the case at bar the same judge said: "If the situation of the rock was not generally known, and the master did not actually know it, then if he conducted properly in other respects, and no fault was imputable to him, his striking on the rock would be an act of God, an unavoidable accident, and he would not be liable for the loss." It would seem, however, to be the better doctrine to consider such accidents as more properly included in the class denominated "dangers or perils of the sea or river." And it has been expressly so held. In *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 521, the court decided that where a boat is wrecked upon a sunken log in the river bed, such loss is classed among the dangers of the river, and cannot properly be denominated a loss from the act of God, the

with the bare observation that an act of God is merely something superhuman, in contradistinction to the act of man.¹

II. THE EXPRESSIONS "INEVITABLE ACCIDENT" AND "PERILS OR DANGERS OF THE SEA OR RIVER" CONSIDERED.—To the non-definable character of the term "act of God" is perhaps due the confounding with it of various other phrases, of somewhat similar import.²

"Inevitable Accident" and "Act of God" Distinguished.—Thus it has been frequently maintained that the term "inevitable accident" is synonymous with "act of God."³ While it is clear that though every act of God is an inevitable accident, every inevitable accident is not an act of God.⁴

human agency directing the boat against the log being the immediate and direct cause of the loss. The court said: "Certainly it may have been, in some sense, by the act of God that the tree was thrown from its erect position and became fixed at the place where the boat struck it. But then it was not the act of God which caused the boat to impinge upon that log. The act of God was, at most, but a remote agency in the production of the loss; while the human act of directing the boat against the log was the immediate and direct cause of the loss." See also *Sprowl v. Kellar*, 4 Stew. & P. (Ala.) 382; *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716. In *Bentley v. Bustard*, 16 B. Mon. (Ky.) 643, it was held that an accident occasioned by a vessel striking upon known or unknown obstructions is attributable to dangers of the river or perils of the sea, as the case may be, if in spite of reasonable care and skill the vessel was driven there by the natural force of wind and tempest.

1. The expression "act of God" is held to exclude all idea of human agency. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention, or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to acts of God. *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Central Line of Boats v. Lowe*, 50 Ga. 509; *Louisville, etc., R. Co. v. Hedger*, 9 Bush (Ky.) 645; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Friend v. Woods*, 6 Gratt. (Va.) 189, 52 Am. Dec. 119; *Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Dec. 452.

In 2 *Parsons on Contracts* (5th ed.) 159, it is said: "We take the true definition of the 'act of God' to be, a cause which operates without any aid or interference from man. For if the cause of loss was wholly human, or became destructive by human agency and co-operation, then the loss is to be ascribed to man, and not to God, and to the carrier's negligence; because it would be dangerous to the community to permit him to make a defense which might so frequently be false and fraudulent."

2. There is some conflict as to whether losses occasioned by hidden obstructions in a river, such as rocks, logs, or sawyers, are attributable to acts of God, or whether such disas-

ters are only included in "dangers of the river." In *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515, it was held that while ordinarily a common carrier is liable for all losses not occasioned by the act of God or public enemies, he may limit his liability so as to exclude "dangers of the river," which mean all hidden obstructions in the river, such as rocks, logs, sawyers, etc., which could not be foreseen or avoided by human prudence. See also *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; *Sprowl v. Kellar*, 4 Stew. & P. (Ala.) 382; *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516; *Bentley v. Bustard*, 16 B. Mon. (Ky.) 643.

Louisiana Code—Construction of "Fortuitous Event."—Art. 1933 of the *Louisiana Civil Code* provides that where by a fortuitous event or irresistible force the debtor is hindered from giving or doing what he has contracted to give or to do, or is from the same causes compelled to do what the contract bound him not to do, no damages can be recovered for the inexecution of the contract. "Fortuitous event" in this connection has been construed to mean the same as "act of God." *Engster v. West*, 35 La. Ann. 119, 48 Am. Rep. 232.

3. In *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609, the court, quoting the statement of Judge Story to the effect that by the act of God is meant inevitable accident or casualty (Story on Bailments 25), makes a similar statement, holding the two phrases "inevitable accident" and "act of God" to be synonymous. For authority to the effect that "inevitable accident" and "unavoidable accident" have the same meaning as "act of God," see *Whitesides v. Thurlkill*, 12 Smed. & M. (Miss.) 599; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393.

4. For example, the court, in *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 582, said: "Damage done by lightning is an inevitable accident, and is also an act of God; but the collision of two vessels in the dark is an inevitable accident, but it is not an act of God, such as the stroke of lightning, nor is it so considered by the authorities."

In *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 293, it was said: "The expressions 'act of God' and 'inevitable accident' have sometimes been used in a similar sense and as equivalent terms. But there is a distinction. That may be an inevitable accident which no foresight or precaution of the carrier could prevent; but the phrase 'act of God' denotes natural accidents that could not happen by

"Perils of the Sea" and "Act of God" Distinguished.—The expression "perils or dangers of the sea or river" has in like manner, and with even greater inaccuracy, been used interchangeably with the phrase "act of God."¹

III. ACT OF GOD AS AFFECTING THE PERFORMANCE OF CONTRACTS.—1. Obligation Imposed by Express Contract—*a.* IN GENERAL.—It is a well-established rule of law that where a person creates a charge or obligation upon himself by express contract he will not be permitted to excuse himself therefrom by pleading an act of God rendering performance impracticable.²

the intervention of man, as storms, lightning, and tempest. The expression excludes all human agency."

Lord Mansfield, in *Proprietors, etc., v. Wood*, 4 Dougl. 287, 26 E. C. L. 353, said: "The general principle is clear. The act of God is natural necessity, as winds and storms, which arise from natural causes, and is distinct from inevitable accident." To the same effect see *Plaisted v. Boston, etc., Steam Nav. Co.*, 27 Me. 132, 46 Am. Dec. 587.

The distinction between the terms "act of God" and "inevitable accident" is clearly made in *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 400. "If the defendants are common carriers," said the court, in this case, "the question must be, merely, What are the liabilities of common carriers? The answer is, For all losses, even inevitable accidents, except they arise from the act of God or the public enemy. 2 T. R. 34, 2 Ld. Raym. 918."

In *Central Line of Boats v. Lowe*, 50 Ga. 511, the court declared that there was "doubtless a distinction between an 'act of God' and an 'unavoidable accident'. The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man."

Distinguishing between the expression "act of God" and the words "the dangers of the river which are unavoidable," which appeared in a bill of lading exhibited in the case, it was said, by Green, J., in *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 81: "The exception in this bill of lading of 'the dangers of the river which are unavoidable,' narrows down the liability of the owner of the boat. Many disasters which would not come within the definition of the act of God would fall within the exception in this receipt, such, for instance, as losses occasioned by hidden obstructions in the river, newly placed there, and of a character that human skill and foresight could not have discovered and avoided."

1. In *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235, Gold, J., seemed to regard the meaning of the term "dangers of the sea" as equivalent to that of "acts of God"; for where the vessel transporting the goods of the plaintiff ran upon a rock, and the goods were thereby damaged, the judge observed: "The defendants are indeed, by an express exception in the bill of lading, excused, so far as regards losses caused by 'dangers of the sea'. This exception, however, does not seem at all to qualify their liability; for by 'dangers of the sea' are meant no other than inevitable perils or accidents upon that ele-

ment; and by such perils or accidents common carriers are *prima facie* excused, whether there is any such express exception or not." And in *Tuckerman v. Stephens, etc., Transp. Co.*, 32 N. J. L. 320, the court was of opinion that the expressions "perils of the sea" and "act of God" were only different terms for the same thing.

In *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745, the phrases "inevitable accident" and "dangers of the seas" were held to be practically synonymous.

2. No Defence in Case of Express Contract—*England.*—*Shubrick v. Salmond*, 3 Burr. 1637; *Brecknock, etc., Nav. Co. v. Pritchard*, 6 T. R. 750; *Hadley v. Clarke*, 8 T. R. 259; *Beatson v. Schank*, 3 East 233.

Alabama.—*M'Gehee v. Hill*, 4 Port. (Ala.) 170, 29 Am. Dec. 277.

Connecticut.—*School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

Illinois.—*Bacon v. Cobb*, 45 Ill. 52; *Bunn v. Prather*, 21 Ill. 217; *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 63.

Kentucky.—*Singleton v. Carroll*, 6 J. J. Marsh. (Ky.) 527, 22 Am. Dec. 95.

Massachusetts.—*Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

Michigan.—*Dewey v. Union School Dist.*, 43 Mich. 480, 38 Am. Rep. 206.

Mississippi.—*Jemison v. McDaniel*, 25 Miss. 83.

Missouri.—*Davis v. Smith*, 15 Mo. 467.

New Jersey.—*Trenton Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373.

New York.—*Ames v. Belden*, 17 Barb. (N. Y.) 515; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518.

Pennsylvania.—*Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

And see *Robson v. Mississippi River Logging Co.*, 61 Fed. Rep. 893; *Ryan v. Rogers*, 96 Cal. 349.

Paradine v. Jane, Alleyn 27, is frequently referred to as a leading case on this subject, discussing, as it does, not only the general rule, but the reason therefor, exceptions thereto, and illustrations thereof. Here it was held that when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against this by his contract; therefore, if a lessee covenants to repair, the circumstance of the premises being destroyed by lightning, or thrown down by an inevitable flood of water or an irresistible tornado, will not effect his discharge.

In *School Dist. No. 1 v. Dauchy*, 25 Conn.

Destruction of Vessel Chartered; Covenant to Return.—Thus where the defendants had chartered a vessel, and given bond for its return in good order at a certain time, they were not released from their liability on the bond, upon destruction of the vessel, notwithstanding the fact that the loss occurred by an act of God.¹

Destruction of Premises—Covenant to Repair.—And where a tenant has covenanted to repair, and the premises are destroyed by lightning, flood, or other act of God, he must nevertheless perform his covenant, and rebuild if necessary.²

530, 68 Am. Dec. 371, it was contended on the part of the defendant that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. But the court said: "This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case which we will mention. The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law."

In *Dewey v. Union School Dist.*, 43 Mich. 480, 38 Am. Rep. 206, the defendants were sued by one who had been engaged to teach school for ten months at a fixed compensation of so much per month, for salary accruing during a period of several months when the school was closed on account of an epidemic of small-pox. The defendant pleaded, among other things, that the suspension was the effect of an overruling necessity, or, in other words, the act of God, which suspended the contract for the time being. The supreme court, in considering this question, said: "Beyond controversy, the closing of the schools was a wise and timely expedient, but the defense interposed cannot rest on that. * * * It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools." For a very similar case, see *Gear v. Gray* (Ind. App., 1894), 37 N. E. Rep. 1059; also *Barker v. Hodgson*, 3 M. & S. 267, where it was held that an infectious disease at a port, which prevented commercial intercourse, did not discharge or qualify the covenant in the charter party.

The plaintiff sued the defendant for work done towards the erection of a mill, the structure, when partially completed, having been washed away by a freshet. The argument of the plaintiff was to the effect that recovery should be had for the amount contracted to be paid, although the work was not done, if its completion was prevented by an act of God. The court, however, said: "There is no such principle. He might, in such case, be entitled on a *quantum meruit* count to recover for what materials had been furnished, and the work which he had done, if it was worth anything." *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 154.

Where, by the terms of the contract sued on, one party was to deliver, "as early next fall

as the same will be dry enough to house, unavoidable accidents only excepted," the failure of crops, on account of unusual drought during the cropping season, was held not to be such an accident as would excuse the nonperformance of the contract. *M'Gehee v. Hill*, 4 Port. (Ala.) 170, 29 Am. Dec. 277.

Where a charter party required the keeping of a certain number of men on board as the crew, it was held to be no excuse that some of the crew deserted and others died. The party was bound to provide against such contingencies. *Beatson v. Schank*, 3 East 233.

In *Ames v. Belden*, 17 Barb. (U. S.) 515, it was held that the act of God cannot be pleaded in excuse of the performance of an express covenant when compensation in damages may be awarded.

To Excuse Performance of a Contract, the instrument itself must make some suitable provision. *Bacon v. Cobb*, 45 Ill. 52.

1. *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1. A case involving the same principle was that of *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 366, in which it was held that where there had been a written promise to pay for the rigging of a vessel ninety days after its first return trip, the promise was enforceable, though the vessel was lost at sea; and the court further held that the money was payable ninety days after the time usually required for such a trip.

2. *Paradine v. Jane*, Alleyn 27.

"When a tenant has covenanted to repair, and the buildings are destroyed by fire, or lightning, or the act of God as it is termed, the tenant must rebuild upon the demised premises. The reason is obvious. He has contracted expressly to do it, and it is possible for him to restore that which has been destroyed, and if he does not do it he must respond in damages. By rebuilding, it will answer the covenant to repair, and he cannot avoid his obligation by reason of the destruction of the building, even without fault on his part. It is the contract, and he must perform it. It is possible for him to comply, and the law will not excuse performance." *Scott, J.*, in *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 63.

In *Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552, the lessee of a mill, having covenanted, in addition to the rents reserved, to make certain improvements and deliver the mill with such improvements at the end of his term in proper tenantable repairs, and the mill during the term having been destroyed by an unexpected and extraordinary movement of the ice, three arbitrators, to whom the matter was referred, awarded that the lessee should pay the rent, notwithstanding

One of Two Alternative Obligations.—It has been held, however, that where one of two alternative obligations becomes impossible of performance by an act of God, the obligor, having been deprived of his election, is excused from the performance of the other.¹

Reason of Rule.—Although the rule of law holding the obligation imposed by an express contract to be unaffected by a subsequent act of God may, not infrequently, seem harsh in its operation,² the rule itself has its foundation in what has been denominated "good sense and inflexible honesty."³ For, where one of two innocent persons must sustain a loss, it is but just that the law should cast it upon him who has agreed to sustain it, or rather, should leave it "where the agreement of the parties has put it."⁴

b. WHERE THE CONTRACT HAS REFERENCE TO THE CONTINUED EXISTENCE OF A PARTICULAR PERSON OR THING—Rule Stated—Subsequent Death of Person or Destruction of Thing Discharges Obligation.—It has long been conceded that where a contract is entered into, of a continuing character, or to be performed at a future time, dependent upon the continued existence of a particular person or thing, or the continuing ability of the obligor to perform, subsequent death, destruction, or disability will excuse the obligor from compliance with the terms of the contract.⁵

ing the destruction of the mill, and should perform the other covenants contained in the lease, and the Court of Appeals expressed an opinion that the arbitrators had not mistaken the law.

"No rule of law," said the court in *Trenton Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 374, "is more firmly established by a long train of decisions than this: that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenant to repair a house, though it be burned by lightning or thrown down by enemies, yet he is bound to repair it." See also *Walton v. Waterhouse*, 2 Wm. Saund. 422 a, note 2.

Brecknock, etc., Nav. Co. v. Pritchard, 6 T. R. 750, was an action upon a covenant to build a bridge and keep it in repair; the defendant pleaded that the bridge was carried away by the act of God, in a great and extraordinary flood, although well built and in good repair. The plea was held bad on demurrer. See also *Police Jury v. Taylor*, 2 La. Ann. 272; *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115.

1. *Smith v. Durell*, 16 N. H. 344, 41 Am. Dec. 732.

2. A singular concession, it would seem, was made to obviate the harsh operation of this rule, in 2 Selw. N. P. 393, alluded to by the court in *Singleton v. Carroll*, 6 J. J. Marsh. (Ky.) 527, 22 Am. Dec. 95, where a lease, by indenture, was made of a meadow, bounded on one side by a river, and the lessee undertook to sustain and repair the banks to prevent the water from overflowing them, upon pain of forfeiting a sum of money, and by a sudden flood the banks were destroyed; it was adjudged that, although he was excused from the penalty because the injury was occasioned by the act of God, and therefore inevitable, he was bound to repair in convenient time because of his covenant.

3. *Whelpley, J., in Trenton Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373. Here it was said: "The cases make no distinction between accidents which could have been foreseen when the contract was entered into, and those which could not have been foreseen. Between accidents by the fault of the contractor, and those where he is without fault, they all rest upon the simple principle: such is the agreement, clear and unqualified, and it *must* be performed, no matter what the cost, if performance be not absolutely impossible."

4. *Whelpley, J., in Trenton Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373. See also *Shubrick v. Salmond*, 3 Burr. 1637; *Brecknock, etc., Nav. Co. v. Pritchard*, 6 T. R. 750; *Hadley v. Clarke*, 8 T. R. 259; *Paradine v. Jane, Alleyne* 27; *Shaw, C.J., in Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

In *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 64, Scott, J., said: "The reason given for the rule is, that if an event happen which will occasion loss to one or the other contracting parties, yet the party who contracts that the event shall not happen, although he may be unable to perform his contract by reason of the act of God, he shall stand the risk and make good the loss. The party contracting assumes the responsibility for the consequences that may follow, if for any cause whatever he may be unable to perform his contract."

5. **Contract Dependent upon Continued Existence of Subject Matter.**—*England.*—*Paradine v. Jane, Alleyne* 26; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Hall v. Wright*, 1 El. Bl. & El. 746, 96 E. C. L. 745; *Robinson v. Davison*, L. R. 6 Exch. 269; *Baily v. De Crespigny*, L. R. 4 Q. B. 185; *Taylor v. Caldwell*, 3 B. & S. 826, 113 E. C. L. 824.

United States.—*Howe Sewing-Mach. Co. v. Rosensteel*, 24 Fed. Rep. 583.

Illinois.—*Walker v. Tucker*, 70 Ill. 527.

To Illustrate: A person who hires a slave, and covenants to return him at the end of the year; is discharged from his obligation if the slave, without any fault on the part of the hirer, dies before the expiration of the year.¹ In like manner, if one agrees to spend labor upon a specific subject, the property of another, as to shoe his horse or slate his dwelling-house, if the horse dies, or the house is destroyed before the work is done, performance of the contract

Maine.—*Knight v. Bean*, 22 Me. 531; *White v. Mann*, 26 Me. 361.

Michigan.—*Shear v. Wright*, 60 Mich. 159.

New York.—*Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415..

North Carolina.—*Allen v. Baker*, 86 N. Car. 91, 40 Am. Rep. 444; *Siler v. Gray*, 86 N. Car. 566.

Pennsylvania.—*Scully v. Kirkpatrick*, 79 Pa. St. 324, 21 Am. Rep. 62.

In *Chitty on Contracts* (11th Am. ed.) 1076 it is said: "In contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that, if the performance becomes impossible from the perishing of the person or thing, that shall excuse such performance."

It is a general rule that death does not absolve a man from his contracts, but that they must be performed by his personal representatives, or their nonperformance compensated for out of his estate; however, it is a well-established exception to this rule, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 579.

Where a father had engaged and contracted to pay for tuition for his son, who by supervening illness was prevented from attending and receiving the contemplated instruction, the father was for this reason excused from the performance of his contract to pay for the prospective tuition. *Stewart v. Loring*, 5 Allen (Mass.) 306, 81 Am. Dec. 747.

Contracts for Personal Services.—Contracts for personal services, whether of the contracting party or a third person, requiring skill, and which can be performed only by the particular individual named, are not, in their nature, of absolute obligation under all circumstances. Both parties must be supposed to contemplate, as one of the conditions of the contract, the continuance of the ability of the person whose skilled services are the subject of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the

covenantor becomes disabled, the obligation to perform becomes extinguished. *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 67; *People v. Manning*, 8 Cow. (N. Y.) 297, 18 Am. Dec. 451; *Jones v. Judd*, 4 N. Y. 411; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Wolfe v. Howes*, 24 Barb. (N. Y.) 174; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Robinson v. Davison*, L. R. 6 Exch. 269; *Boast v. Firth*, L. R. 4 C. Pl. 1.

In *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 67, it was proved that the defendant had entered into a contract with the plaintiff to perform certain manual labor for a stipulated period; that the defendant was prevented by sickness from beginning the work at the contemplated time, which disability continued during much the greater portion of the term. The plaintiff brought suit for failure to comply with the contract of services, but the court held that in a contract for the performance of personal manual labor requiring health and strength it must have been understood to be subject to the implied condition that health and strength remain to the party agreeing to perform the labor, and hence no recovery against the defendant was allowed to be had.

In *Robinson v. Davison*, L. R. 6 Exch. 269, where the defendant had contracted that his wife should play the piano for the plaintiff at a certain concert, and she was prevented by illness, it was held that the husband was not liable in damages for breach of the contract. "The parties must have known," said the court, "that their contract could not be fulfilled unless the defendant's wife was in a state of health to attend and play at the concert on the day named."

In *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 580, it appeared that the plaintiff had been employed as clerk and agent of the defendant's intestate, in his business in New York and Philadelphia, for three years at a stipulated salary. The employer died during the term, and the plaintiff brought assumpsit against the administrators of the decedent for failure to carry out the contract. The court held that the death of the employer terminated the contract, upon the ground that the contract had been entered into upon the basis of the continued existence of both parties during the period of employment. See also *Knight v. Bean*, 22 Me. 531, in which the opinion was expressed that if one person should agree to attend and wait upon another personally for a year, and the person to be waited upon and attended should die before the expiration of the time, the other party would be absolved from his undertaking.

1. *Young v. Bruces*, 5 Litt. (Ky.) 324.

becomes impossible, and the obligor is released;¹ and the same rule was applied where an artist, who had contracted to paint a certain picture, became subsequently incapacitated from loss of sight.²

Reason of Rule.—The liability of an obligor in a contract having reference to the continued existence of a particular person or thing does not in strictness constitute an exception to the general rule as to the liability of obligors in express contracts, but results from a reasonable construction of the contract with reference to its subject matter.³

2. Obligation Implied by Law.—Where the law creates a duty or charge, and the party is disabled by an act of God, without any fault in himself, from performing it, and has no remedy over, then the law will excuse him,⁴ as in the case of waste when the premises are destroyed by tempest.⁵

Reason of Rule.—The distinction between the effect of the act of God upon the obligation of an express contract, and that of one which the law implies, has been held to rest upon the unwillingness of the law to at once create, impose, and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence.⁶

IV. ACT OF GOD AS AFFECTING THE LIABILITY OF COMMON CARRIERS—

1. Upon Their Contracts as Insurers—*a.* IN GENERAL—**Rule Stated.**—A common carrier, liable as an insurer for the property intrusted to him for the purpose

1. Opinion of the court in *Lord v. Wheeler*, 1 Gray (Mass.) 282.

2. *Hall v. Wright*, 1 El. Bl. & El. 746, 96 E. C. L. 745.

3. *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 579.

In *Pollock on Contracts* (2d Am. ed.), p. 366*, it is said, quoting from the judgment of the court in *Bailey v. De Crespigny*, L. R. 4 Q. B. 185: "'Where it is an answer to a complaint of an alleged breach of contract, that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract.' This * * * well shows the modern tendency * * * to reduce all the rules on this subject to rules of construction."

Substantial Performance.—This construction results from the fact that destruction of the thing or death of the person with reference to which the contract is made renders the performance thereof impossible. However, though literal and precise performance is rendered impossible, if substantial compliance may still be had it will be required. In 2 *Parsons on Contracts* (3d ed.) 185 the rule is laid down, which is cited with approval in *Eugster v. West*, 35 La. Ann. 119, 48 Am. Rep. 232, that "the nonperformance of a contract is not excused by the act of God where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible." Thus, where the defendant had contracted to carry a man from New York to San Francisco, the part of the voyage from San Juan del Sur to be made in a particular vessel, which was lost, it was held that if the loss or wrecking of the vessel was the act of God, it was the duty of the defendant to use all reasonable means in endeavoring to supply another vessel. The main thing was the agreement to carry the plaintiff from New York to San Francisco,

and though the vessel in which a part of the trip was to be made was lost, the contract might have been substantially complied with by the provision of another vessel for the purpose. *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333. See also *White v. Mann*, 26 Me. 361; *Ward v. Vanderbilt*, 1 Keyes (N. Y.) 70.

4. *England.*—*Paradine v. Jane*, Alleyn 27; *River Wear Comrs. v. Adamson*, 1 Q. B. Div. 548; *Shubrick v. Salmond*, 3 Burr. 1637; *Brecknock, etc., Nav. Co. v. Pritchard*, 6 T. R. 750; *Hadley v. Clarke*, 8 T. R. 259.

Connecticut.—*School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

Illinois.—*Scott, J., in Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 63.

Kentucky.—*Singleton v. Carroll*, 6 J. J. Marsh. (Ky.) 527, 22 Am. Dec. 95.

New York.—*Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

Pennsylvania.—*Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

In *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 441, Shaw, C. J., said: "The distinction is now well settled between an obligation or duty imposed by law, and that created by covenant or act of the party. When the law creates a duty, and the party is disabled from performing it, without any default of his own, the law will excuse him; as in waste to a tenement, if the same be destroyed by a tempest or enemies, the lessee is excused. But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

5. *Paradine v. Jane*, Alleyn 27; *Shaw, J., in Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

6. *Ellsworth, J., in School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

of transportation, is, nevertheless, excused from responsibility for losses which are caused by an act of God.¹

1. **Carrier Exonerated when Loss Results from the Act of God.**—*England*.—*Forward v. Pittard*, 1 T. R. 27; *Amies v. Stevens*, 1 Stra. 128; *Riley v. Horne*, 5 Bing. 217, 15 E. C. L. 422; *Fenwick v. Schmalz*, L. R. 3 C. P. 313.

United States.—*The Maggie Hammond*, 9 Wall. (U. S.) 435; *Pendall v. Rench*, 4 McLean (U. S.) 259; *Strouss v. Wabash*, etc., R. Co., 17 Fed. Rep. 209; *Gleeson v. Virginia Midland R. Co.*, 5 Mackey (D. C.) 356.

Alabama.—*Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; *Sprowl v. Kellar*, 4 Stew. & P. (Ala.) 382; *Smith v. Western R. Co.*, 91 Ala. 455, 24 Am. St. Rep. 929.

California.—*Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211.

Connecticut.—*Clark v. Richards*, 1 Conn. 54; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Richards v. Gilbert*, 5 Day (Conn.) 415; *Converse v. Brainerd*, 27 Conn. 607.

Georgia.—*Wallace v. Clayton*, 42 Ga. 443; *Richmond*, etc., R. Co. v. *White*, 88 Ga. 805.

Kentucky.—*Hall v. Renfro*, 3 Metc. (Ky.) 51.

Maine.—*Emery v. Hersey*, 4 Me. 411, 16 Am. Dec. 268.

Maryland.—*Boyle v. McLaughlin*, 4 Har. & J. (Md.) 291; *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 582.

Massachusetts.—*Hastings v. Pepper*, 11 Pick. (Mass.) 41.

Mississippi.—*Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609.

Missouri.—*Daggett v. Shaw*, 3 Mo. 264, 25 Am. Dec. 439; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Davis v. Wabash*, etc., R. Co., 89 Mo. 340.

Nebraska.—*Black v. Chicago*, etc., R. Co., 30 Neb. 197.

New Hampshire.—*Moses v. Norris*, 4 N. H. 304.

New Jersey.—*New Brunswick Steamboat*, etc., Transp. Co. v. *Tiers*, 24 N. J. L. 697, 64 Am. Dec. 396.

New York.—*Colt v. M'Mechen*, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; *Elliott v. Roswell*, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306; *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Howe v. Oswego*, etc., R. Co., 56 Barb. (N. Y.) 121; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 571, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500.

North Carolina.—*Harrell v. Owens*, 1 Dev. & B. (N. Car.) 273.

Pennsylvania.—*Lea v. Stroud*, cited in 2 Binn. (Pa.) 74; *Harrington v. McShane*, 2 Watts (Pa.) 443, 27 Am. Dec. 321; *Gordon v. Little*, 8 S. & R. (Pa.) 533, 11 Am. Dec. 632; *Sullivan v. Philadelphia*, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; *Livezey v. Philadelphia*, 64 Pa. St. 106, 3 Am. Rep. 578; *Philadelphia*, etc., R. Co. v. *Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787.

South Carolina.—*Campbell v. Morse*, Harp. (S. Car.) 469; *Patton v. Magrath*, Dudley (S. Car.) 159, 31 Am. Dec. 552; *M'Clures v.*

1 C. of L.—38.

Hammond, 1 Bay (S. Car.) 99, 1 Am. Dec. 598; *Harrington v. Lyles*, 2 Nott & M. (S. Car.) 88; *Ewart v. Street*, 2 Bailey (S. Car.) 157, 23 Am. Dec. 131; *Reaves v. Waterman*, 2 Spears (S. Car.) 197, 42 Am. Dec. 364; *Slater v. South Carolina R. Co.*, 29 S. Car. 96.

Tennessee.—*Craig v. Childress*, Peck (Tenn.) 270, 14 Am. Dec. 751; *Nashville*, etc., R. Co. v. *David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; *Nashville*, etc., R. Co. v. *King*, 6 Heisk. (Tenn.) 269; *Southern Express Co. v. Glenn*, 16 Lea (Tenn.) 472; *Jones v. Walker*, 5 Yerg. (Tenn.) 427; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 847; *Louisville*, etc., R. Co. v. *Wynn*, 88 Tenn. 320.

Vermont.—*Spencer v. Daggett*, 2 Vt. 92; *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489.

Virginia.—*Murphy v. Staton*, 3 Munt. (Va.) 239.

West Virginia.—*McGraw v. Baltimore*, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

Wisconsin.—*Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Dec. 452; *Strohn v. Detroit*, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114.

In *Patton v. Magrath*, Dudley (S. Car.) 159, 31 Am. Dec. 552, the court, in considering the liability of common carriers for loss of or damage to goods intrusted to their care, laid down the generally recognized rule of law to the effect that the said liability extended to all cases, unless the loss occurred through the depredations of public enemies, or some act of Providence, against which human strength and care could not guard. "The sudden shifting of the channel," said the court, "or the recent introduction of a hidden sawyer or snag, which are among the natural incidents of our rivers, have been, when unknown, always holden within the latter exception."

In *Forward v. Pittard*, 1 T. R. 27, after the delivery of a certain amount of hops to a common carrier for transportation, a fire broke out about one hundred yards away from their place of storage, and, notwithstanding efforts to extinguish it, the flames finally reached the place of storage, consuming the building with the hops contained therein. With reference to the liability of a carrier, and also to the exception in the carrier's favor where the loss results from an act of God, Lord Mansfield, who delivered the opinion of the court, said: "Now what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests."

The Freeing of Goods in Transit.—Where

Act of God must be Proximate Cause.—To exonerate the carrier, however, the act of God must be the immediate and proximate cause of the loss, and not the indirect or remote cause.¹

When Act of God the Remote or Indirect Cause.—Thus it has been held that although a hard frost may be considered an act of God, yet damage to goods on board a steam-vessel, by the leaking of a pipe which was burst by the frost, is a loss

there is no negligence on the part of the carrier, it seems that injury to the goods in transit by freezing will be attributed to the act of God. *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276; *Wolf v. American Express Co.*, 43 Mo. 422, 94 Am. Dec. 406; *Vail v. Pacific R. Co.*, 63 Mo. 230; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696.

What Constitutes an Act of God—A Question of Law.—What is or is not an act of God that will excuse a common carrier for a loss happening in consequence of it is generally a question of law. *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 396.

1. Carrier Exonerated only when Loss is Due Directly to Act of God.—*United States*.—*Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176.

Alabama.—*Sprowl v. Kellar*, 4 Stew. & P. (Ala.) 382; *Coosa River, etc., Co. v. Barclay*, 30 Ala. 120; *Steele v. McTyler*, 31 Ala. 667, 70 Am. Dec. 516.

Connecticut.—*Converse v. Brainerd*, 27 Conn. 607.

New Jersey.—*New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 397.

New York.—*Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 571, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *McArthur v. Sears*, 21 Wend. (N. Y.) 190.

North Carolina.—*Backhouse v. Sneed*, 1 Murph. (N. Car.) 173.

Pennsylvania.—*Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234, 72 Am. Dec. 698.

Illustrations.—The fact that a violent storm produced an unusually low tide, during which the defendant's barge was sunk by contact with a bulkhead which at ordinary low tide was too far below the surface of the water for the accident to occur, does not excuse a common carrier from responsibility. Under these circumstances, the projecting bulkhead, placed in position by human agency, is the proximate cause of the injury; the storm, strictly an act of God, being only the remote cause of the loss. *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 397.

In *Smith v. Sheppard* (Abbot on Ship. pt. 3, ch. 4, § 1), a vessel was lost by striking a floating mast attached to a vessel which had been sunk by getting on a bank that had suddenly and unexpectedly been made dangerous by an extraordinary flood. Coming in contact with the mast attached to the sunken ship, the defendant's vessel was forced by it upon the bank altered suddenly by the

flood, and was wrecked. The flood which changed the bank was the ultimate cause of the misfortune, but it was held to be too remote. The immediate cause of the loss was the coming in collision with a floating mast which some one had attached to the sunken vessel. To the same effect see *Proprietors, etc., v. Wood*, 4 Dougl. 290; *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Merritt v. Earle*, 31 Barb. (N. Y.) 38; *Hays v. Kennedy*, 41 Pa. St. 378, 80 Am. Dec. 627.

Where horses had been lost by the sinking of a river steamboat carrying them, the immediate cause of the accident being the contact of the steamboat with the mast of a sloop which had been sunk in a squall two days before, which mast protruded above the water fifteen feet or more at low water, and was plainly visible the day before as well as the day of the accident, the loss cannot be attributed to an act of God, so as to exempt the carrier from liability. Though the squall which sunk the sloop upon which the steamboat was wrecked was an act of God, it was but the remote or secondary cause of the accident. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292.

Blythe v. Denver, etc., R. Co., 15 Colo. 333, 22 Am. St. Rep. 403, was an action brought against a railway company for damage to goods in its hands as a common carrier. It appeared that several cars, including the express car, were blown from the track by a gale into such a position that all of the goods must have been thrown into one corner at the top, and the car immediately took fire and burned so rapidly that the messenger escaped with difficulty. It also appeared that all this time the wind was so violent as to make it almost impossible to stand or walk, or to see for the dust in the air raised by the gale. It was held that the proximate cause of the loss was the act of God, and not the failure of the company to remove the goods from the car after it had been overturned.

In *Adams Express Co. v. Jackson*, 92 Tenn. 327, it was laid down as the rule that the act of God which will excuse a common carrier must be the proximate and not merely the remote cause. Hence the Johnstown flood, having occurred and been known before a shipment was undertaken, could not excuse the carrier from liability for loss occurring in the course of transportation, voluntarily undertaken with full knowledge of the situation.

"The act of God which excuses the carrier," said Daniel, J., in *Friend v. Woods*, 6 Gratt. (Va.) 189, 52 Am. Dec. 119. "must, therefore, I think, be a direct and violent act of nature."

for which the carrier may be held liable.¹ And if a cargo is injured by a storm at sea, during a deviation from the usual course by the master of the vessel, it has been maintained that the deviation is a sufficiently proximate cause of the loss to enable the freighter to recover.²

Act of God only One of Several Causes.—Nor is it an excuse if the act of God from which the loss results is but one of several causes, the combined operation of which produced the loss.³

b. NEGLIGENCE OF CARRIER AS A CO-OPERATIVE CAUSE—Carrier Not Exempted.—Where the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God;⁴ or, as it has been

1. *Siordet v. Hall*, 4 Bing. 607, 15 E. C. L. 87.

2. Where a master had deviated from the usual course of his voyage, and damage was occasioned by tempestuous weather, in itself the act of God, the court held that the proximate cause of the loss was the wrongful act of the master in deviating from his proper course, for which he was responsible. *Davis v. Garrett*, 6 Bing. 716, 19 E. C. L. 212; and see 3 Kent's Com. (13th ed.) 210.

3. 2 Redfield Law of Railways (6th ed.), § 6, note 2; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 571, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234, 72 Am. Dec. 698.

If **Divers Causes Concur in the Loss**, the act of God being one, but not the immediate or proximate cause, such an act of God does not discharge the carrier. *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 397.

The act of God, to excuse the carrier, must be the sole and immediate cause of the loss. That it is the remote cause is not enough. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 293.

4. *England*.—*Nugent v. Smith*, 1 C. P. Div. 428.

California.—*Seigel v. Eisen*, 41 Cal. 109.

Connecticut.—*Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Converse v. Brainerd*, 27 Conn. 607.

Georgia.—*Richmond, etc., R. Co. v. White*, 88 Ga. 805.

Illinois.—*Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

Massachusetts.—*Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645.

Missouri.—*Armentrout v. St. Louis, etc., R. Co.*, 1 Mo. App. 158; *Wolf v. American Express Co.*, 43 Mo. 422, 97 Am. Dec. 406; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Vail v. Pacific R. Co.*, 63 Mo. 230.

New Jersey.—*New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—*Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am.

Dec. 426; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Lamb v. Camden, etc., R., etc., Co.*, 46 N. Y. 288, 7 Am. Rep. 327; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500.

North Carolina.—*Backhouse v. Sneed*, 1 Murph. (N. Car.) 173.

South Carolina.—*Charleston, etc., Steamboat Co. v. Bason, Harp. (S. Car.)* 262; *Campbell v. Morse, Harp. (S. Car.)* 468.

Tennessee.—*Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594.

West Virginia.—*McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 365, 41 Am. Rep. 696.

Wisconsin.—*Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Dec. 452.

In *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235, an action was brought against the owner of a vessel for injury to a quantity of salt shipped thereon, the injury resulting from the vessel's striking against a rock lying in the channel of the Providence river. The defendants introduced evidence to prove that the location of the rock was not generally known and that there had been no negligence on their part, imputing the injury to inevitable accident or act of God. The jury found a verdict for the defendants, whereupon the plaintiffs moved for a new trial. On argument of the motion, which was granted, the court observed with reference to the case: "If the rock on which this vessel struck had been generally known, then it was the duty of the master to have known and avoided it, and the loss would be imputable to his negligence. If the situation of the rock was not generally known, and the master did not actually know it, then, if he conducted properly in other respects, and no fault was imputable to him, his striking on the rock would be an act of God, an unavoidable accident, and he would not be liable for the loss."

The loss or damage to perishable articles in consequence of the weather, will not excuse the carrier, if it could have been prevented by due care and diligence. The carrier must show not only that it did all that was usual, but all that was necessary to be done under the circumstances. *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235; *Philleo v. Sandford*, 17 Tex. 230.

Whenever the common carrier is exempt from liability for loss because of an act of God, he must be free from any previous negligence or misconduct by which that loss or damage may have been occasioned. For

expressed, "where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause he is still responsible."¹ A carrier by water is not excused from liability from loss by an act of God operating upon an unseaworthy vessel, nor would it avail him to show that the same loss might have occurred had the vessel been staunch and sound.²

though the immediate or proximate cause of a loss in any given instance may have been what is termed an act of God, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own he is not excused. *Patton, J., in McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 365, 41 Am. Rep. 696.

1. *Amies v. Stevens*, 1 Stra. 128; *Siordet v. Hall*, 4 Bing. 607, 15 E. C. L. 87; *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516; *Peck v. Weeks*, 34 Conn. 145; *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Dunson v. New York Cent., etc., R. Co.*, 3 Lans. (N. Y.) 265; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Livezey v. Philadelphia*, 64 Pa. St. 106, 3 Am. Rep. 578; *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787; *Campbell v. Morse, Harp. (S. Car.)* 468.

In *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 407, *Wagner, J.*, said: "The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause he is still responsible." See also *Amies v. Stevens*, 1 Stra. 128; *Siordet v. Hall*, 4 Bing. 607, 15 E. C. L. 87.

Delay as Co-operative Negligence.—There is some conflict of authority upon the question whether or not mere unnecessary delay, without other negligence, on the part of the carrier, consequent upon which is injury to or loss of the goods in transit by an act of God, is on the part of the carrier such participation in the cause of the disaster as will render him responsible in damages therefor. Some decisions, upon the principle that a common carrier is responsible for only the proximate, and not the remote, causes of his negligence, have held the carrier not liable under such circumstances. *Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Caldwell v. Southern Express Co.*, 1 Flip. (U. S.) 85; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695. And see *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611; *Gillespie v. St. Louis, etc., R. Co.*, 6 Mo. App. 554; *McPadden v. New York Cent. R.*

Co., 44 N. Y. 478, 4 Am. Rep. 705; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696.

Some authorities, however, holding that the act of God which excuses the carrier must be not only the proximate but the sole cause of the loss, maintain that a delay on the part of the carrier is of itself such negligence as will render him liable for loss by an act of God to which the goods would not have been subjected but for the delay. *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426. And see *Dunson v. New York Cent., etc., R. Co.*, 3 Lans. (N. Y.) 265; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Conduct v. Grand Trunk R. Co.*, 54 N. Y. 500.

In *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415, the carrier received certain goods for transportation, but unnecessarily delayed them, in consequence of which delay they were injured by a flood. The carrier was held liable for the loss, though the flood was the proximate cause of the injury. It seems, however, that the carrier was held liable in this case partly on account of the fact that ordinary care on his part after the delay occurred would have prevented the loss. Where perishable property, such as potatoes, is received by a common carrier at a season when very low temperature may be reasonably apprehended, great diligence should be used in forwarding such property with dispatch and haste; and where, by a delay of two or three days, the property is damaged by freezing, the carrier may be held liable for the injury. *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611; *Wood v. Chicago, etc., R. Co.*, 68 Iowa 491, 56 Am. Rep. 861; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696. And see *Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 305.

2. *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *Elmer, J.*, in *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 397; *Hart v. Allen*, 2 Watts (Pa.) 114.

In *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37, the carriers received and stored goods in a steamboat supported on a dock by a chain; the boat had two large apertures in her bottom. The chain slipped, and the boat was lowered into the water and immediately sunk. The court held in this case that, as there was no proof of any act of God which could have affected any vessel able to float at all, the act of God which shook the dock from under the vessel could not be regarded as the immediate cause of the damages.

A carrier is bound to provide a carriage or vessel in all respects adequate to the purpose, with a conductor or crew of competent

Qualification of Rule.—But if it can be established that the same loss not only might but must have happened had there been no fault on the part of the carrier, his negligence may be disregarded and the injury attributed solely to the act of God.¹

c. BURDEN OF PROOF—Burden upon Carrier to Show that Loss was Occasioned by Act of God.—When the fact of loss or damage to goods has been established, the burden of proof rests upon the carrier to show that the loss or damage was occasioned by an act of God.²

Whether Carrier must Show Affirmatively the Absence of Negligence.—It has been held that when this fact has been proved it amounts to a *prima facie* exoneration, and that the carrier is not required to go further and show affirmatively the absence of all negligence, the burden of proof of such negligence resting upon the other party.³ On the contrary, it has also been maintained that in setting

skill or ability, and failing in these particulars, though the loss be occasioned by the act of God, the carrier may not set up a providential calamity to protect himself against what may have arisen from his own folly. *Hart v. Allen*, 2 Watts (Pa.) 114.

1. Loss Wholly Independent of Carrier's Fault.—A carrier will not be held responsible for loss occasioned by an act of God, even though he is in default, if he can show that the loss was wholly independent of his default, and not only might but must have happened in any aspect of the case. *Collier v. Valentine*, 11 Mo. 299, 49 Am. Dec. 81; *Smith v. Whitman*, 13 Mo. 358; *Hill v. Sturgeon*, 28 Mo. 328; *Nettles v. South Carolina R. Co.*, 7 Rich. (S. Car.) 190, 62 Am. Dec. 409.

In *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 404, the court seems to be of the opinion that although human negligence may have been a contributory cause of the injury occasioned principally by an act of God, if it can be established with certainty that the same loss would have happened had there been no negligence or default, or, as it was expressed in *Davis v. Garrett*, 4 M. & P. 540, 6 Bing. 716, "not only that the same loss might have happened, but that it must have happened," then the act of God would excuse the carrier from liability. "But," continues the court in *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394, "where one of the natural results of the negligence was to expose the goods to the very peril that occurred and proved the means of loss, it will be very unsafe to speculate upon the possibility that the same peril might have produced the loss without any negligence. In such a case the fact of negligence justly precludes the carrier from setting up the peril as an inevitable accident. To allow him to do this would expose the owner to the very difficulties the law, which deems the carrier an insurer against every cause of loss but two of a definite and specific character, was designed to guard against."

In *Davis v. Garrett*, 6 Bing. 716, 19 E. C. L. 212, the plaintiff put on board the defendant's barge lime to be conveyed from Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest

arose and the lime became wet. The barge took fire thereby and the whole was lost. It was held that the defendant was liable, and the cause of the loss was sufficiently proximate to entitle the plaintiff to recover. See the observations of Tindal, C.J., in this case.

If the act of God was of such an overwhelming and destructive character as by its own force, and independently of the particular negligence alleged or shown, to produce the injury, there would be no liability, though there was some negligence on the part of the carrier. To create liability it must have required the combined effect of the act of God and the concurring negligence of the party to produce the injury. *Baltimore, etc., R. Co. v. Sulphur Springs Ind. School Dist.*, 96 Pa. St. 65, 2 Am. & Eng. R. Cas. 166, 42 Am. Rep. 529.

Carrier Disregarding Directions of Shipper.—When a common carrier receives goods to be carried in a particular manner and position, he is bound to carry them in that way; and if, by a disregard of the directions, the goods are lost or damaged, the burden will be on him to prove that the loss was in no degree attributable to his breach of contract, but was occasioned solely by the act of God, or some other cause for the result of which the carrier is not liable. *Hastings v. Pepper*, 11 Pick. (Mass.) 41.

2. Burden upon Carrier to Show that Loss was Due to Act of God.—*United States*.—*Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176.

California.—*Agnew v. Steamer Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87.

Georgia.—*Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Van Winkle v. South Carolina R. Co.*, 38 Ga. 32.

Indiana.—*Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304.

New York.—*Dunson v. New York Cent. R. Co.*, 3 Lans. (N. Y.) 265.

Pennsylvania.—*Leonard v. Hendrickson*, 18 Pa. St. 40, 55 Am. Dec. 587; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343.

South Carolina.—*Smyrl v. Niolon*, 2 Bailey (S. Car.) 421, 23 Am. Dec. 146.

Tennessee.—*Craig v. Childress*, Peck (Tenn.) 270, 14 Am. Dec. 751.

Virginia.—*Murphy v. Staton*, 3 Munf. (Va.) 239; *Friend v. Woods*, 6 Gratt. (Va.) 189, 52 Am. Dec. 119.

3. Memphis, etc., R. Co. v. Reeves, 10

up an act of God, or other cause of loss for which the carrier is not responsible in the absence of negligence on his part, it is necessary to establish at the same time the fact that all due care and diligence were exercised by the common carrier.¹

2. Upon Their Contracts to Deliver within a Reasonable Time—Law Implies Promise to Deliver within Reasonable Time.—In addition to the undertaking to be responsible as insurers for the property committed to their charge, the law implies an undertaking on the part of common carriers to deliver the property within a reasonable time.²

Wall. (U. S.) 189; Wertheimer v. Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; Denton v. Chicago, etc., R. Co., 52 Iowa 161, 35 Am. Rep. 263; Baltimore, etc., R. Co. v. Brady, 32 Md. 333; Mayo v. Preston, 131 Mass. 304; Davis v. Wabash, etc., R. Co., 89 Mo. 340; Lamb v. Camden, etc., R., etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; Magnin v. Dinsmore, 56 N. Y. 173; Colton v. Cleveland, etc., R. Co., 67 Pa. St. 211, 5 Am. Rep. 424.

After the damage to goods in the hands of a common carrier has been established, the burden of proof is upon the carrier to show that the injuries were occasioned by an act of God, or some act or peril which the law recognizes as constituting an exemption, and then it is still competent for the owner of the goods to show that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. Wolf v. American Express Co., 43 Mo. 421, 97 Am. Dec. 406.

The American editor of Smith's Leading Cases, in a note to the case of Coggs v. Bernard, p. 199, states the law as follows: "If the carrier prove that the injury or loss was occasioned by one of those occurrences which are termed acts of God, *prima facie* he discharges himself, and the *onus* of proving that the alleged cause or agency would not have produced the loss or injury without his negligence or defective means is thrown upon the plaintiff. But if the plaintiff can prove such negligence and defective means on his part as that, without their co-operation, the violence of nature might not have resulted in occasioning a loss, he shall recover. The true way of looking at this is, not that the carrier discharges his peculiar liability by showing an act of God, and is then made responsible as an ordinary agent for negligence, but that the intervention of negligence breaks the carrier's line of defense, by showing that the injury or loss was not directly caused by the act of God, or, more correctly speaking, was not the act of God."

When from the plaintiff's own evidence it appears that the act of God caused the injury to the goods, the carrier is exonerated from liability unless the plaintiff can show the participation of the carrier in some act of negligence which co-operated with the act of God to produce the loss. Davis v. Wabash, etc., R. Co., 89 Mo. 340. But when it appears that a loss caused by an act of God might have been avoided by the exercise of reasonable caution, the burden is upon the

carrier to show that he exercised such care and caution as a prudent person would have employed. Davis v. Wabash, etc., R. Co., 13 Mo. App. 449.

1. Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Grey v. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Adams Express Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Berry v. Cooper, 28 Ga. 543; Wallace v. Clayton, 42 Ga. 443; Central Line of Boats v. Lowe, 50 Ga. 509; Richmond, etc., R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446; Richmond, etc., R. Co. v. White, 88 Ga. 805; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Brown v. Adams Express Co., 15 W. Va. 812.

In respect to the burden of proof in cases involving the exoneration of a common carrier from liability by an act of God, the court in Davis v. Wabash, etc., R. Co., 89 Mo. 340, stated the rule in effect to be: When the burden is cast upon the carrier to exempt himself from liability, it must make a case in which no negligence of its own appears. In that event the carrier is excused, unless the plaintiff shows, or it appears from the facts in the case, that the carrier's negligence caused or co-operated to produce the loss complained of. If it appears from the plaintiff's own evidence that the act of God caused the injury to the goods, the carrier is exonerated from liability, unless the plaintiff shows that the carrier was guilty of some specific negligence which actually co-operated to produce the loss. See also Read v. St. Louis, etc., R. Co., 60 Mo. 206.

In Bell v. Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398, it was held that the carrier must prove seaworthiness before an act of God can be set up as a defense; but that if the loss is *prima facie* attributable to an inevitable accident, and the owner of the goods alleges unseaworthiness, the *onus probandi* lies on him.

2. Law Implies Undertaking to Deliver within Reasonable Time.—In the absence of an express contract, no rule of law exists specifying the time within which delivery must be made, but the authorities generally agree that there is an implied promise to deliver within a reasonable time, and what is a reasonable time must depend upon the circumstances of each particular case. A carrier who fails to deliver the goods entrusted to him within a reasonable time is liable in damages for the delay. Vicksburg, etc., R.

How Excused by Act of God.—But an act of God will excuse the performance of this contract in the same manner as it relieves the carrier from responsibility upon the implied contract of insurance.¹

3. Upon Their Contracts to Perform Certain Stipulated Acts.—The liability of a common carrier upon an express contract to perform certain stipulated acts is not changed or modified by an act of God.²

Contracts of Carriers, and Contracts in General.—It will be observed that the rules on this subject which apply to the contracts of common carriers are in no wise different from those affecting the contracts of parties in general. The carrier's liability as an insurer results from the undertaking which the law implies—it is an implied contract, and affected by an act of God in the same manner as other implied contracts; and the same may be said of the contract to deliver within a reasonable time; and where the carrier has expressly undertaken to do a certain thing, his liability, as affected by an act of God, is the same as that of all other obligors in express contracts.³

IV. ACT OF GOD AS AFFECTING THE PERFORMANCE OF CONDITIONS—1. Conditions Precedent.—A right, depending upon a condition precedent, does not accrue unless the condition be performed, although the performance becomes impossible by an act of God.⁴

Co. v. Ragsdale, 46 Miss. 458; *Dawson v. Chicago*, etc., R. Co., 79 Mo. 296; *Empire Transp. Co. v. Wallace*, 68 Pa. St. 302, 8 Am. Rep. 178; *Nettles v. South Carolina R. Co.*, 7 Rich. (S. Car.) 190, 62 Am. Dec. 409; *East Tennessee, etc., R. Co. v. Nelson*, 1 Coldw. (Tenn.) 272; *McGraw v. Baltimore*, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; *Nudd v. Wells*, 11 Wis. 407. See also the title COMMON CARRIERS.

1. Delay Caused by Low Water.—A common carrier by water has been held excused from liability for delay in delivering goods caused by the low stage of water in a navigable river. *Bennett v. Byram*, 38 Miss. 17, 75 Am. Dec. 90; *Silver v. Hale*, 2 Mo. App. 557.

By Snowstorm.—In *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315, it was held that a common carrier could not be held responsible for delay in transporting freight, where the delay was occasioned by a snowstorm which hindered the carrier in the performance of his duty, as such storm was an act of God.

By Freezing of Canal.—It has been held that a common carrier is not liable for loss from delay due to the freezing of a canal upon which the goods were being transported. *Beckwith v. Frisbie*, 32 Vt. 559; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Empire Transp. Co. v. Wallace*, 68 Pa. St. 302, 8 Am. Rep. 178.

2. When a carrier has made an express contract to carry and deliver within a specified time, he is bound to fulfil his contract. Nothing will excuse him, and he is liable for any delay, no matter from what cause it may have arisen. *Beatson v. Schank*, 3 East 233; *Harmony v. Bingham*, 1 Duer (N. Y.) 209; *Collier v. Swinney*, 16 Mo. 484; *Tirrell v. Gage*, 4 Allen (Mass.) 245; *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19; *Texas Pac. R. Co. v. Nicholson*, 61 Tex. 491; *The Ship Harriman*, 9 Wall. (U. S.) 161; *Wood v. Chicago*, etc., R. Co., 68 Iowa 491, 56 Am.

Rep. 861. And see *Dodge v. Van Lear*, 5 Cranch (C. C.) 278.

In *Barret v. Dutton*, 4 Campb. 333, it was held that the freezing of the Thames, which rendered it impossible to load the ship, did not excuse the performance of the charter party. *Gibbs, C.J.*, said: "There was an absolute undertaking by the freightor of this ship to load and discharge her in thirty days, and whether it was or was not possible for him to do so from the state of the weather is quite immaterial."

It was held in *Shubrick v. Salmond*, 3 Burr. 1637, that though contrary winds and bad weather would not allow of the captain's proceeding with his vessel to her port in South Carolina, as he had agreed to do, the covenantor was nevertheless liable.

A contract to deliver at a port implies delivery at a wharf or the like, and such delivery is not excused by prevention by ice, *Hodgdon v. New York*, etc., R. Co., 46 Conn. 277; *Aylward v. Smith*, 2 Lowell (U. S.) 192; nor by low water, *Parker v. Winlow*, 7 El. & Bl. 942, 90 E. C. L. 940.

A carrier who, by a bill of lading, agrees to deliver goods with the privilege of reshipping them at a particular place, is not authorized to stop short of that place; but if he does so, and the property is lost by storm, he is nevertheless liable. *Cassilay v. Young*, 4 B. Mon. (Ky.) 265, 39 Am. Dec. 505.

Contracts to be Responsible for Acts of God.—A common carrier may, by express contract, insure against loss by act of God, and then it will be held bound by its contract. *Southern Express Co. v. Glenn*, 16 Lea (Tenn.) 472.

3. See *supra*, this title, *Act of God as Affecting the Performance of Contracts*.

4. Where the substance of the agreement between the plaintiff and defendant was that the defendant would convey to the plaintiff certain trees, provided the plaintiff would execute and deliver notes therefor within a reasonable time, the plaintiff, after the lapse of a reasonable time, has no right of action

2. Conditions Subsequent.—Where a condition subsequent annexed to an estate becomes impossible of performance, by an act of God, the condition is void and the estate absolute.¹

3. Conditions Annexed to Bonds.—If the condition annexed to a bond becomes impossible of performance, by an act of God, its performance will be excused and the obligation discharged.² In the case of obligations taken in judicial proceedings, such as recognizances and replevin bonds, where, as in the latter instance, the condition is to deliver a living animal, the obligors are released if the animal die before the specified day, or if, in the former instance, the person whose appearance is to discharge the obligation dies before the appointed time or is physically unable to appear.³

ACT OF INSOLVENCY. (See also ACT, and the title INSOLVENCY.)—As regards banks, an act of insolvency is one which shows the bank to be insolvent, such as nonpayment of its circulating notes, bills of exchange, or certifi-

against the defendant for failure to convey title to the trees in question, although the plaintiff was prevented from complying with the terms of sale by the sickness of his wife and by a freshet in a river beyond which the defendant resided. The court was of opinion that these occurrences were not such as to have prevented compliance, but held that it was altogether unnecessary to consider this question, on account of the familiar and well-established rule of law that a right, depending upon a condition precedent, does not accrue unless the condition be performed, although the performance becomes impossible by the act of God. *Mizell v. Burnett*, 4 Jones (N. Car.) 249, 69 Am. Dec. 744. To the same effect, it was held in *Remy v. Olds* (Cal., 1893), 34 Pac. Rep. 216, that when it is necessary for a party suing for breach of contract to show performance on his part before he can recover, it is not sufficient for him to prove an act of God preventing performance.

1. *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Sumpkin, J., in Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Merrill v. Emery*, 10 Pick. (Mass.) 507; *Whitney v. Spencer*, 4 Cow. (N. Y.) 39; *Jones v. Chesapeake, etc., R. Co.*, 14 W. Va. 514.

In *Nunnery v. Carter*, 5 Jones Eq. (N. Car.) 370, 78 Am. Dec. 231, it appeared that a certain amount of personalty had been given by will to the testator's son, on condition that he should support his mother, the testator's wife, during her life. The mother died before the testator's death, and the question arose whether or not the bequest was avoided on account of the impossibility of performing the condition. The court, while seeming to be of the opinion that technically the condition was precedent, held that "in reality and legal effect" it was subsequent, and, as such, could not, by becoming an impossible one, prevent the legacy from taking effect.

The court, in *People v. Kingston, etc., Turnpike Road Co.*, 23 Wend. (N. Y.) 193, 35 Am. Dec. 551, placed corporate grants upon the same footing as individual grants, and held that in cases of conditions subsequent, if impossible to be performed, or rendered impossible by the act of God, the

grantee is excused from the performance, and the estate is absolute.

2. Conditions Annexed to Bonds Generally.—*People v. Manning*, 8 Cow. (N. Y.) 297, 18 Am. Dec. 451; *Carpenter v. Stevens*, 12 Wend. (N. Y.) 590.

3. Conditions Annexed to Bonds Taken in Judicial Proceedings.—*Scott, J., in Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 63; *Schwartz v. Saunders*, 46 Ill. 22; *People v. Manning*, 8 Cow. (N. Y.) 297, 18 Am. Dec. 451; *Carpenter v. Stevens*, 12 Wend. (N. Y.) 590.

People v. Manning, 8 Cow. (N. Y.) 297, 18 Am. Dec. 451, was an action of debt on a recognizance entered into by the defendants, conditioned for the appearance of one Chapman, on a day named therein, at a certain place, to answer for certain trespass and contempt for which he had been arrested. When the day came Chapman was violently ill and confined to his house and bed, unable to be moved, and so continued until a subsequent day, when he died. The court held that the recognizance in this case was like a bond with a condition a compliance with which has become impossible by the act of God, in which case the nonperformance is excused.

In *Carpenter v. Stevens*, 12 Wend. (N. Y.) 590, after judgment for the return of an animal in an action of replevin, suit was brought on the replevin bond, to which was pleaded, by way of defense, that before the judgment in the original action was rendered the animal died, without the party's fault. This plea was held to be a valid defense of the action on the bond, as the death of the animal was regarded as an act of God.

In *Baldwin v. New York L. Ins., etc., Co.*, 3 Bosw. (N. Y.) 543, one of the conditions of a life insurance policy was that the insured should not go south of Virginia, which condition was subsequently modified by an indorsement on the back of such policy that the insured might reside anywhere in the United States, on condition that he was to be north of the southern boundary of Virginia by a certain date. The insured went south and was taken ill, being thereby prevented from going north before the date mentioned in the indorsement, and died south of Virginia. It was held that the policy was not thereby void.

cates of deposit; failure to make good the impairment of capital, or to keep good its reserve; in fact, any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit.¹

ACTUAL—ACTUALLY. (*Compare* CONSTRUCTIVE.)—Actual is something real in opposition to constructive or speculative, something existing in fact.²

1. *In re* Manufacturers' Nat. Bank, 1 Cent. L. J. 19.

National Bank Act.—In *Irons v. Manufacturers' Nat. Bank*, 6 Biss. (U. S.) 301, it was held that by the term *act of insolvency* as used in the National Bank Act, was clearly meant an act which would be an *act of insolvency* on the part of an individual banker, not simply such an act as authorizes the comptroller to appoint a receiver. The court said: "That is, the closing of the doors, refusal to pay depositors on demand, refusal to go on in the due course of business to transact its business as a bank, and discharge its liabilities to its creditors."

Closing Doors and Suspending Business.—"Whatever may be the rule as to when a bank may be said to be insolvent, the closing of its doors and suspension of its business must be deemed *prima facie* evidence of insolvency, and it is clear that such an act is an *act of insolvency*," as the term is used in the *Michigan* law. *Stone v. Dodge*, 96 Mich. 525.

2. *State v. Wells*, 31 Conn. 210. See also *Astor v. Merritt*, 111 U. S. 213.

This word *actual* is not unusual in legal phraseology, and is used as the opposite of "constructive." Thus we speak of *actual* possession, *actual* notice, *actual* fraud. *McIntyre v. Sherwood*, 82 Cal. 141.

The word *actual* does not, usually, advance the meaning. Speaking generally, a thing is not more itself because it is spoken of as "actual," nor is it an act more done or enjoined because it is said, or required, to be *actually* done. Thus the phrase "*actual* seizure" in § 1 English Mer. Law Amendt. Act 1856 (19 & 20 Vict., c. 97) means no more than "seizure." *Gladstone v. Padwick*, 40 L. J. Exch. 154, L. R. 6 Exch. 203.

"In law, it is true, the words *actual* and 'constructive' are the antitheses of each other when used in reference to treasons, notices, possessions, frauds, and in some other cases." *In re* Strawbridge, 39 Ala. 383.

Actual Annual Income.—A testator bequeathed all his real and personal estate to trustees in trust for his wife, with directions to sell and convert the same into money, and declared that his real estate, directed to be sold, should in equity be considered as converted into personalty as from the time of his decease, and that the *actual* annual income for the time being of his unconverted real and personal estate should be considered income for the purposes of his will, and be applied accordingly. It was held that the widow was entitled to the *actual* dividends becoming due after testator's death in the case of all the securities, except such as in their nature bore interest *de die in diem*. *Unwin v. Eykyn*, W. N. (66) 269.

Actual Bias. (See also the title JURY AND JURY TRIAL.)—"Actual bias" is the existence

of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party. *People v. Wells*, 100 Cal. 229.

Actual Confinement.—*Actual* confinement, in a statute relating to insolvent debtors, means either an *actual* imprisonment or "being upon the limits," the limits being simply by a fiction of law an extension of the prison walls. *In re* Moschberger, 10 N. J. L. J. 121, 12 N. J. L. 85.

Actual Contest.—The plaintiffs asserted that an "*actual* contest" was made in the probate court, and the counsel for the defendant claimed that there had been no "*actual* contest." The court said: "This depends upon what is meant by the term '*actual* contest.' The natural import of the words, considered in connection with the context and subject matter of the question, is that the proceedings to prove the will were not entirely *ex parte*." *Turnbull v. Richardson*, 69 Mich. 409.

Actual Cash Payment. (See the title LIMITED PARTNERSHIP.)—The provision of a statute requiring a limited partner to contribute in "*actual* cash payments" is not violated by a payment in checks of third persons, it being conceded that they represented cash, and that the amount actually went into the firm business. *Hogg v. Orgill*, 34 Pa. St. 344.

Contra.—Authorizing a firm to apply for its benefit, and as part of its capital, United States bonds payable to bearer in the hands of a bailee, is not "an *actual* cash payment as capital" by a special partner, even though subsequently the bonds are applied for the benefit of the firm, and realize more than the necessary amount in cash. *Haggerty v. Foster*, 103 Mass. 17. See also *Pierce v. Bryant*, 5 Allen (Mass.) 91; *Haviland v. Chace*, 39 Barb. (N. Y.) 283.

Actual Change of Possession. (See also the titles CHATTEL MORTGAGES; FRAUDULENT SALES AND CONVEYANCES; GIFTS.)—The statute of frauds to prevent sales and gifts in fraud of creditors requires "*actual* and continued change of possession." This phrase means an open, public change of possession, which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment debtor has ceased. He must cease from the apparent as well as real ownership. *Topping v. Lynch*, 2 Robt. (N. Y.) 484, approved in *Steele v. Benham*, 84 N. Y. 634. See also *Camp v. Camp*, 2 Hill (N. Y.) 629; *Randall v. Parker*, 3 Sandf. (N. Y.) 73; *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785; *Brunswick v. McClay*, 7 Neb. 137; *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500.

Where a vendor remains in possession of

personalty as the agent of the vendee, there is not such an "actual change of possession" as the statute requires to prevent a presumption of a fraudulent sale. *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785.

Where a mortgagee goes into a saloon and takes nominal possession of the tables, the mortgaged property, and puts them in charge of the bartender, where they are subsequently used by the mortgagor, there is not an "actual and continued change of possession" under a chattel mortgage. *Brunswick v. McClay*, 7 Neb. 137.

Actual Control, Care, or Management.—The *Texas* Code does not mean by these words actual possession. A person in constructive possession of an animal upon the range may, as an agent and the like, exercise "actual control, care, or management" without even reducing the animal into actual possession, and may thus constitute the owner within the meaning of the law. *Moore v. State*, 8 Tex. App. 496.

Actual Cost.—In *Alfonso v. U. S.*, 1 Fed. Cas. 398, No. 188, the court, in referring to the Revenue Act of 1799, said: "I adhere to the doctrine laid down in the cases cited at the bar, *U. S. v. Sixteen Packages of Goods*, Fed. Cas. No. 16,303, 2 Mason (U. S.) 48; and *Tappan v. U. S.* Fed. Cas. 13, 749, 2 Mason (U. S.) 393, 11 Wheat. (U. S.) 423: that actual cost in that section means the actual price paid for the goods by the party in the case of a real bona fide purchase, and not merely the market value of the goods." See also *U. S. v. Twenty-six Cases, etc.*, 1 Cliff. (U. S.) 591.

In *People v. Budd*, 7 N. Y. Crim. Rep. 189, it was held that the provisions of a statute restricting charges for trimming and shoveling to the leg of the elevator, in the process of handling grain, to the actual cost, were intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling and the ordinary items of operating, and that the owners could not separate the charges for the various parts of the same service, and charge for the use of the steam-shovel furnished by them for elevating the grain, together with the sum which had been agreed upon between them and the laborers who shoveled the grain to the leg of the elevator.

Under a lease between two railroad companies whereby, when extra trains were required, the lessee was to be allowed "the actual cost of running the same," it was held that by the term "actual cost" was meant what was actually paid out. *Lexington, etc., R. Co. v. Fitchburg R. Co.*, 9 Gray (Mass.) 226.

Actual First Cost.—The parties entered into an agreement that the plaintiff was to manufacture all goods sold by defendant, at an advance of eleven per cent. upon the actual first cost. Before this agreement was reduced to writing, certain estimates were made as to the actual first cost. The defendant contended that these estimates were to govern the actual first cost. The court said: "Had the question been left open by the agreement, I am not satisfied that the evidence discloses any agreement by the plaintiff to fix the actual first cost; but I do not inquire further as to this, being of the opinion that the parties

have, by their agreement, precluded themselves from showing anything inconsistent with the natural meaning of the words 'actual first cost'; and thus I agree to the conclusion arrived at by the learned chief justice. Mr. Shepley argued that 'actual first cost' meant no more than 'cost.' In one sense that may be so; but the use of the three words as found in the agreement so emphasizes the meaning as to increase the difficulties in the company's way of showing a meaning differing from the natural and ordinary one." *Black v. Toronto Upholstering Co.*, 15 Ont. 646.

Actual Damages. (See also the titles DAMAGES; EXEMPLARY DAMAGES.)—Actual damages are those which the injured party is entitled to recover for wrong received and injuries done, where none were intended. *Ross v. Leggett*, 61 Mich. 453, 1 Am. St. Rep. 608. The court in giving this definition was drawing a distinction between actual and "punitive," "exemplary," or "vindictive" damages. The *Mississippi* Code provides that the defendant in an attachment may recover actual damages suffered where the attachment was wrongful. In *Marqueze v. Southeimer*, 59 Miss. 440, the court said: "By actual damages we understand to be meant those actually sustained as the direct result of the wrongful attachment, and certainly traceable to it as a cause, and not such as are uncertain, contingent, speculative, and conjectural, or the result of the act of another person responsible for his own wrong."

So in *Wilson v. Young*, 31 Wis. 580, the court said: "By the term 'actual damages' I understand is meant all damages which the law gives as compensation for the injuries sustained, as distinguished from those which may be given in proper cases by way of example and punishment."

The actual damages sustained by the patentee are, according to the fourteenth section of the Act of July 4, 1836 (5 U. S. Stat. at Large 123), to be the sum fixed by the verdict. *Stephens v. Felt*, 2 Blatchf. (U. S.) 37.

Actual Dedication. (See also the title DEDICATION.)—In *Longworth v. Cincinnati*, 48 Ohio St. 646, the court said: "Actual dedication, we take it, means unconditional dedication."

Actual Delivery. (See also the title SALES.)—Actual delivery consists in the giving real possession of the things sold, to the vendee, or his servants or special agents who are identified with him in law, and represent him. *Bolin v. Huffnagle*, 1 Rawle (Pa.) 19.

Actual Determination.—A judgment of affirmance by default is not an actual determination. *McMahon v. Rauh*, 47 N. Y. 67. See also *Caughey v. Smith*, 47 N. Y. 244; *Frank v. Benner*, 3 Daly (N. Y.) 422. A *re-mittitur* controls the court below, and a judgment in pursuance of it cannot be said to be an actual determination. *Wilkins v. Earle*, 42 How. Pr. (N. Y. Ct. App.) 255.

Actually Dwells.—In *Hay River v. Sherman*, 60 Wis. 59, it was held that a pauper who was supported at a particular house actually dwelt there. The court said: "The place where he actually lodges and takes his meals must come within the meaning of the

words '*actually dwells*.' The statute is not, 'who *actually dwells and* has his home therein,' but 'who *actually dwells or* has his home * * * therein.' It contemplates that a person may have what may be called 'his home,' and yet be a subject of public charge; but, ordinarily, he is not so fortunate. Hence, to cover all cases, the disjunctive is used with the sweeping words '*actually dwells* * * * therein.' The substance of the statute was taken from *Massachusetts*, though changed in phraseology and arrangement. There, instead of using the disjunctive, the words are 'who *actually dwells and* has his home within,' etc. This change is significant."

Actually Employed—Attorney.—Where 6 and 7 Vict., c. 73, § 12, required that an applicant for admission as an attorney shall be *actually* employed during the whole time of service under the articles in the business of an attorney, it was held that a period of eleven months, during which the clerk had been absent through sickness, could not be counted as service, as he had not been *actually* employed as an attorney or solicitor during the whole of the five years. *Ex p. Moses*, L. R. 9 Q. B. 1.

Actually Employed—Capital.—A corporation was not taxable for any capital "not *actually* employed" in the state of *Michigan*. It was contended that under this exemption a steamboat lying at Toledo, Ohio, and unproductive, was not taxable. The court said: "Looking at the whole subject, I think the term '*actually employed*' has no reference to the actual use of the property purchased by the company, but is merely designed to distinguish the Michigan investment from the Indiana investment. Because the capital of a company or an individual has been used to purchase a steamboat, it cannot in any just sense be regarded as employed in every part of the world where the vessel may navigate, nor as unemployed when she is in ballast, or losing money, or laid up. The capital of an individual is regarded as employed or invested at the place where the owner does business. The capital of a New York or Boston merchant is employed in New York or Boston, no matter where his ships may be. This is the view taken by the Supreme Court of the United States in *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596, where New York vessels employed in the California trade were held exempt from taxation in California." *Michigan Southern*, etc., R. Co. v. Auditor Gen., 9 Mich. 452.

Actually Engaged.—"In law, it is true, the words *actual* and *constructive* are the antitheses of each other, when used in reference to treasons, notices, possessions, frauds, and in some other cases. But here they are law terms—terms of art. This is not the manner in which the words of a statute are to be taken, unless that is evidently intended, which is not the case here. These words must be taken * * * in their 'natural import'—according to the common use of them.' And what is the natural import of '*actually engaged*,' according to the common use of them? When we say in common parlance of a man, that he is *actually* engaged in farming or planting, does it necessarily imply that he

must give his constant personal supervision to his farm or plantation? Does it mean anything more than that such a man has a farm or plantation in active operation on his own account, whether he conducts its daily affairs through an overseer or in person? The words embrace both cases. And so of many, if not most, other pursuits and occupations. The words '*actually engaged*,' in common parlance, mean 'really or truly engaged;' engaged 'in fact,' and, according to the same law of common use, are the opposite or antithesis of 'seemingly' or 'pretendedly' or 'feignedly engaged.' In the common acceptance of the words, the same man may be *actually* engaged in two or more pursuits or occupations at the same time." *In re Strawbridge*, 39 Ala. 383.

Actual Expenses.—In *Matter of Van Kleeck's Estate* (Surrogate Ct.), 20 N. Y. Supp. 85, it was held that an administrator was entitled to an allowance for the time occupied in a trial, under a provision confining allowances by a surrogate to *actual* expenses.

Actual Force—Robbery.—*Actual* force means personal violence that occurs where injury is done to the person or where there is a struggle to obtain possession of the property. *Long v. State*, 12 Ga. 293.

"Constructive force" is a putting in fear. *Long v. State*, 12 Ga. 293. See also the title ROBBERY.

Actual Force—Insolvency Laws.—A *Pennsylvania* statute provides that an insolvent shall not be discharged until he has been confined sixty days, if he is in custody by virtue of a judgment in an action founded on *actual* force. In *Dimmick's Case*, 2 Pa. Dist. Rep. 842, the court said: "The offense for which the petitioner was mulcted in damages was the removal of a sewing-machine. It is not pretended that he used any more force than was necessary for this purpose. True, he was angry, but there is no evidence that his anger manifested itself in any acts of violence, nor does the plaintiff, who was present at the removal, testify that she was put in fear. This is not enough. To constitute *actual* force within the meaning of the act, 'the force must be such as to put one standing in defense of possession, in fear of personal injury.' *Widmier's Case*, 10 Phila. (Pa.) 81. See also *Graeff's Petition*, 2 Pa. Dist. Rep. 369."

Actual Fraud. (See also the title FRAUD.)—In *Jefferson County Nat. Bank v. Streeter*, 106 N. Y. 186, it was held that the words *actual* fraud are only satisfied where *actual* complicity or a conscious purpose on the part of the creditor to accomplish a known fraud is shown.

"*Actual* fraud implies deceit, artifice, trick, design, some *direct* active operation of the mind. *Constructive* fraud is *indirect*, and may be implied from some other act, or omission to act, which may be, in moral contemplation, entirely innocent; but which, without the explanation or actual proof of its innocence, is evidence of fraud." *People v. Kelly*, 35 Barb. (N. Y.) 457. Fraud may be *actual* or *constructive*. *Actual* fraud consists in any kind of artifice by which another is deceived. *Constructive* fraud consists in any act of

omission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. *Jackson v. Jackson*, 47 Ga. 109.

Actually in Session.—By a *United States* statute a marshal is entitled to fees for his attendance upon court while *actually* in session. It was held that a marshal is entitled to fees when, in accordance with a statute, he adjourns the court by virtue of an order directed to him by the judge. The court said: "We think the court should be deemed *actually* in session within the meaning of the law, not only when the judge is present in person, but when, in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge." *U. S. v. Pitman*, 147 U. S. 671.

Actual Notice. (See also the title NOTICE.)—Notice is *actual* when one either has knowledge of a fact, or is conscious of having the means of knowledge although he may not use them. *Speck v. Riffin*, 40 Mo. 405; *Maupin v. Emmons*, 47 Mo. 304; *Vaughn v. Tracy*, 22 Mo. 417; *Lemay v. Poupenez*, 35 Mo. 71; *Roberts v. Moseley*, 64 Mo. 507; *Musick v. Barney*, 49 Mo. 458; *Masterson v. West End Narrow Gauge R. Co.*, 5 Mo. App. 64; *Porter v. Sevey*, 43 Me. 519; *Hull v. Noble*, 40 Me. 459; *Wilson v. Miller*, 16 Iowa 111; *Musgrove v. Bonser*, 5 Oregon 313, 29 Am. Rep. 737; *Curtis v. Mundy*, 3 Met. (Mass.) 405; *Williamson v. Brown*, 15 N. Y. 359; *Brinkman v. Jones*, 44 Wis. 498; *May v. Chapman*, 16 M. & W. 361.

Actual notice is such as is proved to have been given to a party directly and personally, or such as he is presumed to have received personally, because the evidence within his knowledge was sufficient to put him upon inquiry; and *actual* notice may be proved by the facts of the case from which it can be inferred. *Johnson v. Dooly*, 72 Ga. 297.

Actual notice does not require positive and certain knowledge, such as seeing the deed; but that is sufficient notice which is such as men usually act upon in the ordinary affairs of life. When it is shown that purchasers are affected with a knowledge of such circumstances, then the foundation is laid from which the inference of *actual* notice may be drawn. *Beatie v. Butler*, 21 Mo. 323. See also *Curtis v. Mundy*, 3 Met. (Mass.) 405; *Vaughn v. Tracy*, 22 Mo. 415; *Masterson v. West End Narrow Gauge R. Co.*, 5 Mo. App. 64.

The *Kansas* Code, concerning the opening-up of judgments rendered upon service by publication, provides as one condition that the party shall "make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no *actual* notice thereof in time to appear in and make his defense." To constitute the *actual* notice specified in the statute, it is not necessary that the defendant be fully informed as to the time of commencing suit, the court in which it is commenced, the property that has been attached, the exact amount claimed, the

day named for answer, or other details of the action. It is enough that he is distinctly and clearly notified that a suit has been commenced and is pending against him, and notified from such a source and within such a time that by the exercise of ordinary and reasonable care and prudence he can ascertain all details and make his defense. *Beckwith v. Douglas*, 25 Kan. 234.

Actual Notice and Actual Knowledge.—In *Cowan v. Withrow*, 111 N. Car. 310, it was held that *actual* notice is not synonymous with *actual* knowledge or personal notice. That is to say, if the agent has *actual* notice the principal is charged with notice.

"The *actual* notice required by the statute [a registry statute] is not synonymous with *actual* knowledge. * * * We think the true rule is that notice must be held to be *actual* when the subsequent purchaser has *actual* knowledge of such facts as would 'put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to *actual* notice of the right or title in conflict with that which he is about to purchase.'" *Brinkman v. Jones*, 44 Wis. 519.

Actual Occupancy. (See also OCCUPANCY; POSSESSION.)—In *People v. Campbell* (Supreme Ct.), 22 N. Y. Supp. 458, it was held that the erection of a hunting lodge, to be occasionally used for hunting by one who makes no claim of ownership, does not constitute an *actual* occupancy within the meaning of a statute requiring notice of a tax sale to be served upon a person in *actual* occupancy of the land.

By *actual* occupant, in designating the individual against whom an action of ejectment might be brought, was intended no more than the "tenant in possession," as that term was used in the former practice. Occupant is he that has possession, one who has the *actual* use or possession of a thing. A soldier of the United States, claiming to be in charge, under superior officers, of real property, as property of the United States, is not the *actual* occupant, and an action cannot be maintained against him. *People v. Ambrecht*, 11 Abb. Pr. (N. Y. Supreme Ct.) 97. An owner of land is not in the *actual* occupancy of the same, within the meaning of § 49 of the act concerning private corporations (*Kansas* Gen. Stat., ch. 23, p. 203), unless he is an *actual* resident thereon. *Hunt v. Smith*, 9 Kan. 145.

To create an *actual* occupancy, within the meaning of the statute respecting the sale of land for taxes, it is not necessary that the part *actually* occupied, of a lot of land sold for taxes, should be occupied professedly as a part of such lot. If such part is occupied as a part of another lot, it is equally an occupancy, and is as effectual as if it were occupied as a part of the lot sold. *Smith v. Sanger*, 3 Barb. (N. Y.) 360.

Actually Occupied.—A person rented a house in which he resided. He let out beds by the night. It was held that a person who lives in a house, and merely lets out parts of it in the manner described, does not cease to be the *actual* occupier. *Rex v. St. Giles*, etc., 4 Ad. & El. 497, 31 E. C. L. 118; *Rex v. Pakefield*, 4 Ad. & El. 612, 31 E. C. L. 152. A let

a shed contiguous to a passage-way between the shed and A's store, and received the rent, knowing that the shed was used for gaming. It was held that A did not *actually* occupy the shed. *Com. v. Dean*, 1 Pick. (Mass.) 387.

Actually Open for Business.—An insurance policy upon a store provided that the owner should keep a set of books, and keep them in a fire-proof safe at night and at all times when the store was not *actually* open for business. It was held that the books need not be kept in a safe from sunrise to sunset. The court said: "A store is *actually* open for business when it is lighted up and the merchant or his clerk is there ready, able, and desirous to sell goods, or do anything else that constitutes a part of the work or labor of conducting the mercantile business. A store is as much 'open for business' while the merchant is waiting for customers, during his customary business hours, as it is when the customers are present. An essential and indispensable part of the daily business was *actually* in progress when the fire broke out. The clerk was writing up the day's business in the books, in accordance with the custom and usage in country stores, where the salesman does duty as bookkeeper also, country merchants rarely employing professional bookkeepers. This work was going on in strict compliance with the covenant exacted from the plaintiffs by the defendant; and if the defendant desired to prohibit the plaintiffs from complying with this covenant by doing the work in the store after sunset, in accordance with the custom and usage of country merchants, it should have inserted a stipulation in the policy to that effect." *Jones v. Southern Ins. Co.*, 38 Fed. Rep. 23.

Actual Ouster. (See also OUSTER.)—By *actual* ouster is not meant a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenants to participate in the profits. *Burns v. Byrne*, 45 Iowa 285.

Actual Record. (See also the titles RECORD; RECORDING ACTS.)—The *Georgia* Code provides that a mortgage shall have no precedence over liens obtained prior to the *actual* record of the mortgage. Upon the phrase "*actual* record," the court in *Benson v. Green*, 80 Ga. 232, said: "This section of the code refers to the *actual* record; and we think that means the spreading of the mortgage on the record, not the filing of it with the clerk."

Actual Residence. (See also DOMICIL; RESIDENCE.)—*Actual* residence is personal presence in a place. *Culbertson v. Floyd County*, 52 Ind. 368; *Sears v. Boston*, 1 Met. (Mass.) 250.

Although a party may derive his title to different tracts of land from different sources, yet if the tracts adjoin one another and are all in one inclosure, and there is no one but the owner residing thereon, such residence is an *actual* residence upon all the tracts. *Wharton v. Bunting*, 73 Ill. 16.

In *Burton v. Perry*, 146 Ill. 71, it was held that *actual* residence as used in a statute of limitation did not apply to an unlawfully acquired possession.

Actual Residence Distinguished from Legal

Residence.—The *Kentucky* Code provided that a plaintiff to a divorce suit must prove a residence of one year in the state. In *Tipton v. Tipton*, 87 Ky. 245, the court said: "There is a broad distinction between legal and *actual* residence. A legal residence (domicil) cannot, in the nature of things, coexist in the same person in two states or countries. He must have a legal residence somewhere. He cannot be a cosmopolitan. The succession to movable property, whether testamentary or in case of intestacy, except as regulated by statute; the jurisdiction of the probate of wills; the right to vote; the liability to poll-tax, and to military duty, and other things—all depend upon the party's legal residence or domicil. For these purposes he must have a legal residence. The law will, from facts and circumstances, fix a legal residence for him, unless he voluntarily fixes it himself. His legal residence consists of fact and intention; both must concur; and when his legal residence is once fixed, it requires both fact and intention to change it. As contradistinguished from his legal residence, he may have an *actual* residence in another state or country. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purposes above indicated, may be merely ideal, but his *actual* residence must be substantive. He may not *actually* abide at his legal residence at all, but his *actual* residence must be his abiding-place."

Actual Service.—A requirement that one shall be *actually* served with notice does not preclude service by publication. *Martin v. Burns*, 80 Tex. 676.

Actual Seizin.—"Seizin in fact, or in deed, as Lord Coke calls it, or *actual* seizin, means possession of the freehold by the *pedis positio* of one's self or one's tenant or agent, or by construction of law, as in case of a commonwealth's grant, a conveyance under the statute of uses, or doubtless of grants or devise, where there is no *actual* adverse occupancy. Seizin in law is a right to the possession of the freehold, when there is no adverse occupancy thereof, such as exists in the heir after descent of lands upon him before actual entry by himself or his tenant. 2 Minor Inst. 107, citing 3 Th. Coke Litt. and other authorities there cited. See also 4 Kent Com. 486, n. (a); 1 Lomax Dig. 5-64." *Carpenter v. Garrett*, 75 Va. 129.

Actual Seizure.—An execution debtor was possessed of a mansion-house and grounds, and also of a farm, which, with the exception of two outlying fields, adjoined the grounds and formed part of one block with them. The farm was in the debtor's occupation, although the accounts were kept distinct. The farm-house was a mile distant from the mansion-house in a direct line. On the 19th of May a writ of *fi. fa.* was executed at the mansion-house by the under-sheriff, who informed persons in charge there, including the steward of the estate, that all the goods on the estate were seized; and a man was left in possession. No act of seizure was done at the farm-house or upon the farm on that day, the under-sheriff intending what he had done to be a seizure of the whole; but on the fol-

lowing day a man was put in possession at the farm-house. The goods on the farm were claimed by assignees under a bill of sale which was made for an antecedent debt, and for the purpose of giving it a preference over the execution, and which was executed on the evening of the 19th after the seizure at the mansion-house was completed. At the time of the execution of the bill of sale it was known to the solicitor of the assignees that the judgment creditor had threatened to seize, and that a writ of *fi. fa.* on the same judgment had been executed in another county; and it was believed by him, but not known, that a writ had been delivered to the sheriff of the county in which the goods lay. It was held that what was done on the 19th of May amounted to an *actual* seizure of the goods on the farm and at the farm-house. *Gladstone v. Padwick*, L. R. 6 Exch. 203.

Actual Settler.—"I have before explained who may be an *actual* settler to demand a warrant—namely, one who has gone upon and occupied land with a *bona-fide* intention of an actual present residence; although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement. But *actual* settlement intended by the ninth section (Act 3d April, 1792-3, Smith's Laws Penn. 209) consists in clearing, fencing, and cultivating, two acres of ground, at least, on each hundred acres, erecting a house thereon for the habitation of man, and a residence of five continued years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of improvements, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso which declares that 'if such *actual* settler shall be prevented from making such *actual* settlement.'" Per Washington, J., in *Balfour v. Meade*, 1 Wash. (U. S.) 26.

A *Texas* school land statute gives to *actual* settlers residing upon such land the prior right of purchase. It was held that *actual* residence was necessary. The court said: "An *actual* settler upon land is one who has *actually* established his residence upon it, and not one who has inclosed it and cultivated it, intending at some future time to live upon it. The use of the word *actual* would seem to have been intended to prohibit the courts from extending the meaning of the word 'settlers' by construction, and to confine the benefits of the provisions to those only who come within the literal meaning of the term." *Baker v. Millman*, 77 Tex. 46; and see also *Bratton v. Cross*, 22 Kan. 678.

So as to what constitutes "settlement" under a *Texas* homestead law, the court, in *Busk v. Lowrie*, 86 Tex. 132, said: "The language of the statute was used by the legislature for a definite purpose, which was to secure real *bona-fide* settlers upon the land. The word *actually* is used in the sense of being a real, and not a constructive or virtual, settlement. The courts of this state have so construed the same language used in pre-emption laws."

In *Swan v. Busby*, 5 Tex. Civ. App. 63, it was held that *actual* residence upon land is necessary to constitute one an "*actual* settler" within the *Texas* statute of 1887. The court cited *Baker v. Millman*, 77 Tex. 46; *Metzler v. Johnson*, 1 Tex. Civ. App. 137; *Atkeson v. Bilger*, 4 Tex. Civ. App. 99; *Burleson v. Durham*, 46 Tex. 152.

In the saving clause of a resolution of congress, granting certain lands to a railroad, when platted and surveyed, "expressly saving and reserving all rights to *actual* settlers," it was held that the words "*actual* settlers" did not refer to any other settlers than those who were *actual* settlers before and at the time of the filing of the plat, and those subsequently settling could acquire no rights. *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 459.

Actually Sold.—Under a *Nebraska* statute the county treasurer was entitled to additional fees where lands were *actually* sold for delinquent taxes. It was held that the failure to collect the purchaser's bid precluded the treasurer from recovering this additional compensation. The court said: "When are lands *actually* sold at a tax sale so as to entitle the treasurer to his fees? Clearly, when the sale is completed; when he has collected from the purchaser the amount of the bid." *Miles v. Miller*, 5 Neb. 272. See also *Fiedeldey v. Diserens*, 26 Ohio St. 312.

Actual Time.—A prisoner was sentenced to the penitentiary for life. The governor afterwards commuted his sentence in the following words: "to nine years of *actual* time in the penitentiary." It was held that by *actual* time in this commutation was meant nine full years in the penitentiary, and that the prisoner was not entitled to the good-conduct reduction of time. The court said: "To construe the commutation in accordance with the contention of counsel for the petitioner would be a palpable violation of that elementary rule of construction, viz., that effect will be given when possible to all of the terms and conditions of the instrument in question. In our view, the term 'nine years of *actual* time in the penitentiary' must be held to mean nine years exclusive of any reduction on account of good time. The demurrer to the petition will be sustained, and the petition dismissed." *In re Hall*, 34 Neb. 206.

Actual Use.—A *United States* statute exempted from customs duties wearing apparel in *actual* use. In *Astor v. Merrit*, 111 U. S. 213, it was held that this does not require that the wearing apparel should be *actually* worn. The court said: "The word *actual*, in the lexicon, has as a meaning 'real' as opposed to 'nominal,' as well as the meaning of 'present.' 'In use' is defined to be 'in employment'; 'out of use' to be 'not in employment'; 'to make use of, to put to use,' to be 'to employ, to derive service from.' These definitions aid in showing that it is too narrow a construction of the words "*in actual use*," as applied to this case, to say that they require that the wearing apparel should have been *actually* worn."

Church property in *actual* use was exempted from taxation by a *Pennsylvania* statute. It was held that *actual* use meant exclusive

use, and that a mere concurrent or alternate occupation by the church did not come within the requirement of the exemption. *Philadelphia v. Barber*, 160 Pa. St. 127.

Actual Military Service. (See also the title NUNCUPATIVE WILLS.)—The privilege of making nuncupative wills is given to soldiers in *actual* military service. The will of a soldier made while in the barracks is not privileged. *Drummond v. Parish*, 3 Curt. 522; *In re Phipps*, 2 Curt. 368; *In re Johnson*, 2 Curt. 341; *In re Pery*, 2 L. T. 335. And so where an officer died while on a tour of inspection of the troops which he commanded, it was held that he was not in *actual* military service. *In re Hill*, 1 Rob. 276. So a sergeant with his regiment at Malta, under orders for the West Indies, was held not to be in *actual* military service. *In re Norris*, 3 Notes of Ecc. Cas. 197. A soldier passing from one regiment to another, both being in *actual* service against the enemy, was held to be in *actual* military service. *Herbert v. Herbert*, D. & Sw. 10. A soldier joining a regiment with a view of marching against the enemy, was held to be in *actual* military service. *In re Thorne*, 4 S. & T. 36. A soldier who has received a mortal wound on the battle-field is entitled to make a nuncupative will. *In re Farquhar*, 4 Notes of Ecc. Cas. 651; *In re Churchill*, 4 Notes of Ecc. Cas. 47; *In re Prendergast*, 5 Notes of Ecc. Cas. 92.

The term "service," in its restricted sense, is the exercise of military functions in the enemy's country in the time of war, or the exercise of military functions in the soldier's own state or country in case of insurrection or invasion; and in this sense the words of the statute, "*actual* military service," should be understood. *Van Deuzer v. Gordon*, 39 Vt. 111.

"But having marched into the enemy's country, from which he never returned, being encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters, and not at the time of writing occupied with any present movement of the troops, but was apparently on some service detached from his own regiment, we cannot say that he was not a soldier in *actual* service." *Leathers v. Greenacre*, 53 Me. 573.

Actual military service is confined to those who are on an expedition. A soldier at home on furlough cannot make a valid nuncupative will within the provision made in favor of soldiers in *actual* military service. *In re Smith's Will*, 6 Phila. (Pa.) 104. See also *Gould v. Safford*, 39 Vt. 498.

A person in the naval service of the United States is not within the *actual* military service within an attachment statute. *Abrahams v. Bartlet*, 18 Iowa 513.

Actual Value. (See also VALUE.)—In *Cummings v. Merchants' Nat. Bank*, 101 U. S. 162, it is said: "The phrases 'salable value,' 'actual value,' 'cash value,' and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose."

"The expressions 'actual value,' 'market value,' or 'market price,' when applied to

any article, mean the same thing. They mean the price or value of the article established or shown by sales, public or private, in the way of ordinary business. Century Dictionary; Anderson's Law Dictionary; *Murray v. Stanton*, 99 Mass. 348; *Cliquot's Champagne*, 3 Wall. (U. S.) 114." *Sanford v. Peck*, 63 Conn. 493.

Actual Cash Value.—As a basis for taxation *actual* cash value means the price at which any piece of real estate, or personal or movable property, would sell for cash in the ordinary course of business, free from all incumbrances, otherwise than by a forced sale. *Morgan, etc., R., etc., Co. v. Board of Reviewers*, 41 La. Ann. 1156, 33 Am. & Eng. R. Cas. 438. See also the title TAXATION.

Same—Insurance.—So where the term was used in an insurance policy it was held that *actual* cash value meant the sum of money the insured goods would have brought for cash, at the market price at the time when and the place where they were destroyed. *Mack v. Lancashire Ins. Co.*, 2 McCrary (U. S.) 211. See also *Wolfe v. Howard Ins. Co.*, 7 N. Y. 583.

In *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 336, 9 Am. St. Rep. 598, the trial court instructed the jury to estimate the plaintiff's damages according to the "fair cash value" of the property destroyed. The policy required that the estimate should be the *actual* cash value of the property. It was therefore contended that the instruction of the court was erroneous. The appellate court refused to sustain this contention, saying: "Between these two forms of expression we are unable to perceive any practical difference. The *actual* cash value of property is the price which it will bring in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price. The *actual* cash-value, then, is the fair or reasonable cash price for which the property can be sold in the market. We see, therefore, no impropriety in explaining the 'actual cash value' as meaning the 'fair cash value,' or in using the two phrases as practically synonymous." And see the titles FIRE INSURANCE; MARINE INSURANCE. See also *Wolfe v. Howard Ins. Co.*, 7 N. Y. 583.

Actual Market Value.—Within the provisions of a revenue law that goods shall be assessed at the *actual* market value, it was held that the words "*actual* market value" included the costs of boxing, packing, and covering in all cases where the merchandise in question was actually purchased in the boxes, packages, and coverings, and is usually so purchased and sold for shipment into foreign markets. *Cobb v. Hamilton*, 5 Fed. Cas. 1128, No. 2922, citing *Barnard v. Morton*, 2 Fed. Cas. 837, No. 1005; *Grinnell v. Lawrence*, 11 Fed. Cas. 54, No. 5831; *Belcher v. Linn*, 24 How. (U. S.) 535; *Knight v. Schell*, 24 How. (U. S.) 530; *Wilson v. Maxwell*, Fed. Cas. No. 17834.

The market value of goods is the price at which the owner of them, or the producer of them, holds them for sale—the price at which they are freely offered in the market; such price as he is willing to receive if the goods are sold in the ordinary course of trade; the

ACTUS DEI.—See the title ACT OF GOD.

ADD.—The word "add" means to join or unite, as one thing to another, or as several particulars, so as to increase the number, augment the quantity, enlarge the magnitude, or so as to form into one aggregate.¹

ADDITION—ADDITIONAL.—These words denote the idea of joining or uniting one thing to another.²

price which the purchaser must pay to get the goods. That is the *actual* market value. 3109 Cases of Champagne, 1 Ben. (U. S.) 241. See also 1209 Quarter Casks, etc., of Sherry Wine, 2 Ben. (U. S.) 249; Six Cases of Silk Ribbons, 3 Ben. (U. S.) 536.

Actual Total Loss.—See the title ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE), Vol. I., p. 4.

Actual Possession.—See POSSESSION, and the title ADVERSE POSSESSION.

Actually Dangerous.—See DANGEROUS.

Actual Place of Abode.—See PLACE.

Actually Due and Payable.—See DUE.

Actually Chargeable.—See CHARGEABLE.

1. Webster's Dictionary, followed in Hancock County v. State, 119 Ind. 476. In this case it was held, where the legislature speaks of *adding* to a tax a penalty of ten per cent, that it was intended to increase the tax by that amount, and that the penalty attaches to and becomes a part of the tax.

Adding New Parties.—An Alabama statute permits the complaint to be amended by "striking out and *adding* new parties." This was held not to warrant the striking out of a sole plaintiff's name and substituting another. The court said: "It is impossible for us to say that the legislature, when it used the words '*adding* new parties,' meant substituting a different party altogether." Leaird v. Moore, 27 Ala. 328.

2. The term *additional* embraces the idea of joining or uniting one thing to another, so as thereby to form an aggregate. We add by bringing things together. "*Additional* security" is that security which, united with or joined to the former, is deemed to make it as an aggregate sufficient as a security from the beginning. State v. Hall, 53 Miss. 644.

Where a court orders a bond to be given "in *addition* to" the one originally taken, such additional bond does not supersede the original one. Walter v. McSherry, 21 Mo. 76.

In Addition.—"The words '*in addition*' do not ordinarily mean 'exclusive of,' but are diametrically opposed to the idea of diminution or abatement, but signify an increase of or accession to." Macdonald v. Trojan Button Fastener Co. (Supreme Ct.), 29 N. Y. St. Rep. 867.

Repairs—Additions.—It was agreed between partners that expenses for repairing were to be paid out of the profits, but *additions* by one of the partners. It was held that a new foundation, for a new engine put in the mill in place of an old one displaced, built because the foundation of the old engine would have been insufficient for the new one, must be considered an *addition* and not as repairs. Dummell v. Henderson, 23 N. J. Eq. 175.

Mill and Additions.—In Hill v. Townsend,

69 Ala. 286, there was a sale of a "mill and its *additions*." It was held that the word *additions* as used in the contract did not embrace detached articles of personal property purchased to aid in the operation of the mill, such as oxen, carts, etc.

Mill—In Policy of Insurance.—An insurance policy covered a "planing-mill building and *addition* and machinery therein." The engine room from which the motive power of the mill was furnished was situated twenty-two feet from the mill building, connected therewith by a shaft for the transmission of power, and a spout through which shavings were forced to the engine room. A roadway passed between the buildings. It was held that the word *addition* covered the engine room and engine. Home Mut. Ins. Co. v. Roe, 71 Wis. 33.

Mechanic's Lien Law. (See also the title MECHANIC'S LIEN.)—A New Jersey statute declares that "an *addition* erected to a former building shall be a building for the purpose of this act." It was held that a piazza was an *addition* within the meaning of this section. Whitenack v. Noe, 11 N. J. Eq. 321. In Updike v. Skillman, 27 N. J. L. 133, it is said: "An '*addition* erected to a former building,' to constitute a building within the meaning of the mechanic's lien law (Nix. Dig. 487, § 5), must be a lateral *addition*. It must occupy ground without the limits of the building to which it constitutes an *addition*; so that the lien shall be upon the building formed by the *addition*, and the land upon which it stands." In this case it was held that a new story on an old building was not an *addition* within the act.

Any Addition of Building.—Where the owner of two adjoining messuages conveys one of them, and it is agreed by him and his grantee that if the latter shall make "any *addition* of building" westwardly, he shall not extend it northwardly beyond a certain line, the grantee is not thereby restricted from raising his building higher, though by so doing he interrupts the access of light and air to the windows of the grantor's house. Atkins v. Bordman, 2 Met. (Mass.) 457, 37 Am. Dec. 100.

All Future Erections or Additions.—"The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order 'all future erections or *additions*' to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to, * * * and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term." Holbrook v. Chamberlin, 116 Mass. 162.

ADDRESS OF LETTERS. (See also the title **LETTERS**.)—The subject of sufficiency or mistake in the address of a letter containing notice of dishonor will be fully treated under the title **BILLS AND NOTES**. As to notices generally, see the title **NOTICE**. At this point it is proposed to give some general illustrations as to sufficient and insufficient addresses, which will be found set out in the notes.¹

1. Domicil or Residence.—It is not necessary that notice should be addressed to the place of the party's domicil. If addressed to the place of his actual residence it is sufficient. *Young v. Durgin*, 15 Gray (Mass.) 264. Thus a notice may be sent to a senator, addressed to him at Washington, when the senate is in session. *Chouteau v. Webster*, 6 Met. (Mass.) 1, 39 Am. Dec. 705.

Residence or Place of Business.—Notice may be addressed either to the residence or the place of business of the person to be notified. *Columbia Bank v. Lawrence*, 1 Pet. (U. S.) 578; *U. S. Bank v. Carneal*, 2 Pet. (U. S.) 549; *Williams v. U. S. Bank*, 2 Pet. (U. S.) 96; *Van Vechten v. Pruyn*, 13 N. Y. 549; *Cuyler v. Nellis*, 4 Wend. (N. Y.) 398; *Reid v. Payne*, 16 Johns. (N. Y.) 218; *Montgomery County Bank v. Marsh*, 7 N. Y. 481; *Morton v. Westcott*, 8 Cush. (Mass.) 425; *Exchange, etc., Co. v. Boyce*, 3 Rob. (La.) 307; *Adams v. Wright*, 14 Wis. 408; *Stedman v. Gooch*, 1 Esp. 3.

But in *Van Vechten v. Pruyn*, 13 N. Y. 549, 2 Ames Cas. 438, it was held, where the residence of an indorser of a note was in the same village as that in which the note was held, and he was at home three days in the week, that it was insufficient to direct the notice to his place of business in a distant city, there being no evidence that the notice actually reached him.

Sufficient Address.—The full name of the party to whom the notice is to be sent, and the name of the town or city, is a sufficient address. *True v. Collins*, 3 Allen (Mass.) 440.

A notice addressed to "W. E. Rose, Columbia, S. C." was held sufficient. *Benedict v. Rose*, 16 S. Car. 629.

"Where the party to be charged has added to his signature the name of a place, it is sufficient in addressing the notice to follow the signature and name given." 2 Ames Cas. Bills and Notes, p. 849. See *Mann v. Moors*, R. & M. 249, 21 E. C. L. 429; *Burmester v. Barron*, 17 Q. B. 828, 79 E. C. L. 828.

Where a mistake is made in the address, but the notice is nevertheless duly received, it will be sufficient, *Walter v. Haynes*, R. & M. 149, 21 E. C. L. 402; unless the error in the address is calculated to mislead the party to be notified, *Story Promissory Notes* (7th ed.), § 347.

Mistake.—A notice addressed to Darcy instead of Davey is insufficient. *Davey v. Jones*, 42 N. J. L. 28.

A Mistake in the Name of the Post-office to which a notice of protest is directed does not render the notice inoperative, where it appears that the post-office is as well known by one name as the other; a notice directed to Geddesburgh, when it should have been Geddes, was accordingly holden good. *Geneva Bank v. Howlett*, 4 Wend. (N. Y.) 329.

Mistake—Directions Too General.—The address must not be too general, and notice of dishonor sent to a large city, addressed to an indorser by his surname only, is insufficient. 2 Ames Cas. Bills and Notes, p. 849; *Walter v. Haynes*, R. & M. 149, 21 E. C. L. 402; *True v. Collins*, 3 Allen (Mass.) 440.

So it is not sufficient to direct a notice generally to a parish, county, or township in which there are a number of post-offices. *Bénel v. Tournillon*, 6 Rob. (La.) 500; and see also *True v. Collins*, 3 Allen (Mass.) 438.

Mistake in Address—Estoppel.—A party may be estopped from taking advantage of a mistake in a letter addressed to him, where such mistake was caused by the manner of his own writing. *Manufacturers', etc., Bank v. Hazard*, 30 N. Y. 226; *Hewitt v. Thompson*, 1 M. & Rob. 541.

Two Towns of the Same Name.—Where there are two towns of the same name, an address to be sufficient must name the state as well as the town. *Beckwith v. Smith*, 22 Me. 125, 38 Am. Dec. 290.

Death of Party upon Whom Notice is to be Served.—Upon the death of the indorser a notice directed to the legal representatives of J. M. B., deceased, was held sufficient where no legal representatives had been appointed at the time of dishonor. *Boyd v. City Sav. Bank*, 15 Gratt. (Va.) 501.

The legal representative of a dead man is his administrator or executor, and, therefore, a notice addressed through the mail to the "legal representative" of Hardeman, deceased, the indorser, in due time, to the last residence of the deceased, is good, though it does not appear that the legal representative ever received it. *Pillow v. Hardeman*, 3 Humph. (Tenn.) 538, 39 Am. Dec. 195.

But if a representative has been appointed, he should be addressed by name. *Smalley v. Wright*, 40 N. J. L. 471.

It has been held that notice addressed to the estate of the deceased is insufficient, as the term might apply to heirs at law as well as to the personal representatives. *Massachusetts Bank v. Oliver*, 10 Cush. (Mass.) 557.

Where the sender of the notice is unaware of the death of the addressee, a notice addressed in the name of the deceased is sufficient. *Stewart v. Eden*, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222; *Barnes v. Reynolds*, 4 How. (Miss.) 114; *Maspero v. Pedesclaux*, 22 La. Ann. 227; *Cosgrave v. Boyle*, 6 Can. Supreme Ct. 178.

An Agreement to Employ the Plaintiff in a particular capacity cannot be inferred from the direction upon a letter addressed by the defendant to the plaintiff in that character, the letter itself relating to the quantum of salary only. *Chiodi v. Waters*, 1 Stark. 335, 2 E. C. L. 132.

ADEMPTION OF LEGACIES

By CHARLES SUMNER LOBINGIER, M.A., LL.M.

- I. INTRODUCTORY—SCOPE OF ARTICLE, 610.**
- II. DEFINITION, 611.**
- III. DISTINCTIONS, 611.**
- IV. MODES OF ADEMPTION, 613.**
 - 1. *By Portions, on the Analogy of Advancements, 613.*
 - a. *By Persons in Loco Parentis, 613.*
 - (1) *The Doctrine Stated Generally, 613.*
 - (2) *The Doctrine Analyzed and its Qualifications Discussed, 614.*
 - (a) *Gift must be a Testator, 614.*
 - (b) *Testator must be in Loco Parentis, 614.*
 - (c) *Advanced Portion must be a Gift, 616.*
 - (d) *Gift must be made to Legatee, 616.*
 - (e) *Legacy must be Certain as to Amount and Time of Accrual, 616.*
 - (f) *Gift must be of a Substantial Amount, 617.*
 - (g) *Advanced portion must be Ejusdem Generis, 618.*
 - (h) *The Gift must be Subsequent to the Testament, 620.*
 - (i) *No Direction in Testament Necessary, 620.*
 - (j) *Advanced Portion only Presumed to be Intended to Adeem: Rebuttal of the Presumption, 620.*
 - (k) *Adeemption Operates pro Tanto only, 622.*
 - (3) *The Doctrine Criticised, 622.*
 - (4) *Statutory Modifications of the Doctrine, 623.*
 - b. *Advances to Strangers, 623.*
 - 2. *By Alienation, 623.*
 - a. *Sales and Gifts, 623.*
 - b. *Conveyances of Real Estate—Surrender of Leases, 626.*
 - c. *Pledges and Mortgages, 627.*
 - d. *Loss, Destruction, etc., 627.*
 - 3. *By Transformation, Alteration, and Conversion, 627.*
 - 4. *By Removal, 628.*
 - 5. *By Acquisition, 629.*
- V. REVIVAL OF ADEEMED LEGACIES, 631.**

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *LEGACIES AND DEVISES*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ABATEMENT OF LEGACIES*; *ADVANCEMENTS*; *ANNUITIES*; *EXECUTORS AND ADMINISTRATORS*; *HOTCHPOT*; *LEGACIES AND DEVISES*; *SUCCESSION*; *WILLS*.

I. INTRODUCTORY—SCOPE OF ARTICLE.—The treatment of this subject will conform to the limits marked out by the definitions given in the succeeding section. It will be strictly a discussion of ademptions, and will not extend to advancements,¹ revocation of wills,² or the satisfaction of legacies.³

1. See the title *ADVANCEMENTS*.

2. See the title *LEGACIES AND DEVISES*.

3. See the title *WILLS*.

Each of these topics may be investigated under its appropriate title elsewhere in this work.

II. DEFINITION.—The term “ademption,” as its etymology implies,¹ literally means removal or extinction;² and the phrase “ademption of legacies” denotes the obliteration of testamentary bequests, either by the voluntary act of the testator or by the loss or destruction of the thing bequeathed, and without the consent of the legatee.³

Confined to Legacies.—Ademption is applied to legacies alone; and as the latter term is confined to bequeathed personal property, ademption must be similarly restricted. It is never properly used concerning devises of real estate.⁴

Not Applicable to Intestate Succession.—A legacy, too, presupposes the making of a testament; and the term “ademption,” therefore, is not applicable in cases of intestate succession.

III. DISTINCTIONS.—The term “ademption” has been so often confused with certain others, which either denote analogous doctrines, or belong to other branches of the law and express corresponding rules there, that it is necessary at the outset to keep clearly in mind the distinction between these various terms and the exact scope of the phrase which forms the subject of this treatise.

Ademption and Satisfaction Distinguished.—Ademption is probably most often confused with satisfaction; and while these two terms have sometimes been used loosely and interchangeably, each has now come to possess a distinct meaning, which has been awarded it by eminent judicial authority. The term “satisfaction” is used to denote the extinction of a legacy which the testator has bound himself to bestow, and the result is effected jointly by the act of the testator and the consent of the legatee.⁵ Ademption, as has already been shown,

1. From *adimere*, to take away.

2. In Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 141, it was said: “The radical error of the auditor consists in his having given Mrs. Miller credit, in settling the account of the legatees of John Gill, for a bequest which had no existence, and which was *extinguished*; this being the true idea conveyed by the technical phrase ‘ademed.’”

3. **Ademption of Legacies Defined.**—The phrase “ademption of legacies,” while both ancient and of common occurrence, has been seldom satisfactorily defined either by judges or text writers. Most of the attempted judicial definitions omit some important element of the doctrine which the phrase is used to express, and contain only one phase of it. See, for example, the following: “Ademption is the extinction or satisfaction of a legacy by some act of a testator, which is equivalent to a revocation of the bequest, or indicates the intention to revoke; and the rule is applied where the testator is a parent of the legatee, or stands *in loco parentis*.” Burnham v. Comfort, 108 N. Y. 539, 2 Am. St. Rep. 462, repeated in *In re Turfner's Estate* (Surrogate Ct.), 23 N. Y. Supp. 139. This is really a definition of ademption by advanced portions, and does not cover those forms of ademption which take place by alienation, transformation, removal, etc. See *infra*, this title, *Modes of Ademption*. Perhaps as near an approach to a comprehensive and accurate definition as has been made by the courts is the following, from Cozzens v. Jamison, 12 Mo. App. 456: “Ademption is the technical term used to describe the act by which a testator pays in his lifetime to his legatee a general legacy which, by his will,

he had proposed to give him at death; or else the act by which a specific legacy has become inoperative on account of the testator having parted with the subject.”

4. **Ademption not Predicable of Devises.**—See Burnham v. Comfort, 108 N. Y. 535, 2 Am. St. Rep. 462, where the court, by Gray, J., says: “The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty. Story Eq. Jur., § 1111; 2 Wms. Exrs. (5th Am. ed.) 1202; 1 Roper on Leg. 365; Davys v. Boucher, 3 Y. & C. 397; Langdon v. Astor, 16 N. Y. 34.” See also Clark v. Jetton, 5 Sneed (Tenn.) 236; Weston v. Johnson, 48 Ind. 6; Marshall v. Rench, 3 Del. Ch. 256; Hansbrough v. Hooe, 12 Leigh (Va.) 316, 37 Am. Dec. 659. But see an article in 33 American Law Register and Review, 779, 781, for an attempt to extend the meaning of ademption to devises of real property.

5. **Satisfaction Distinguished from Ademption.**—This application of the word, though now well established, is comparatively recent. The first careful judicial distinction between the words “ademption” and “satisfaction” appears to have been made in Chichester v. Coventry, L. R. 2 H. L. Cas. 71, where Lord Romilly presents the following exhaustive discussion: “I think that a full view of the cases, and a consideration of the doctrine on this subject, do not justify the observation that there exists no distinction between ademption and satisfaction, an observation which is not, so far as I have been able to examine the cases, to be found in any other case on the subject, and which, if adopted, would often entangle the court in this difficulty, that it would be hard to dis-

takes place regardless of the legatee's consent.¹ In some of the *New York* cases ademption has been treated as applicable only to specific, and satisfaction only to general, legacies.² But this distinction has not been generally adopted; and in view of the high standing of the courts which have established the distinction first mentioned, it seems likely that their terminology will prevail, and it is in this sense that the words will be used in the following pages.

Ademption and Revocation of Wills Distinguished.—The doctrine of ademption, if not the term itself, has sometimes been confused with the analogous rule of revocation of wills by subsequent conveyances. Revocation, however, is predicable only of devises of real property, and, as has already been shown, the rule of ademption operates only upon personality.³

Ademption and Advancements Distinguished.—The term "advancements" is not infrequently used in judicial opinions to express one form of ademption, viz., that which takes place by virtue of a gift from the testator to the legatee. But this use of the term "advancements" is unauthorized, as the latter is

cover how any question of election could ever arise; and accordingly the vice-chancellor in this case below expressed himself as unable to understand how election was or could be dealt with in the case of *Thynne v. Glengall*, 2 H. L. Cas. 131. I venture to think that the distinction is marked, and that it is recognized in all the decided cases on the subject. It appears to me to be accurately expressed by the legal terms *ademption* and *satisfaction*. The general question was, I think, well expressed by Lord Cranworth during the argument, when he said, that in cases where it arises the second instrument must be read as if the maker of that instrument had expressed in it that he intended the benefit thereby given to be taken in substitution for the benefit given by the former instrument. In truth, in both cases, the second gift is given in substitution for the former benefit. The distinction between ademption and satisfaction lies in this: in ademption the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently, when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word *ademption*, because the bequest or devise contained in the will is thereby *adeemed*, that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant; and if he gives benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant or whether they will take under the will. Therefore this distinction is manifest. In cases of satisfaction the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, and the persons intended to be benefited by the bequest or devise—in other words, the objects of the

bequest—must be the same. In cases of ademption they may be, and frequently are, different. The cases of *Durham v. Wharton*, 3 Cl. & F. 146, and of *Thynne v. Glengall*, 2 H. L. Cas. 131, afford striking and leading instances of each of these two cases."

In the later case of *Tussaud v. Tussaud*, 9 Ch. Div. 380, it was observed by Cotton, L. J.: "It must be remembered that the case is one, not of ademption, but of satisfaction; and the two classes of cases are pointedly distinguished in the case of *Chichester v. Coventry*, L. R. 2 H. L. Cas. 71. In a case of ademption, where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator, when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is therefore easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation. We mention this to show that many decisions, where, in cases of ademption, differences between the two provisions have been held insufficient to prevent the presumption against double portions from applying, cannot be considered as authorities in the present case."

See, to the same effect, *Cooper v. McDonald*, L. R. 16 Eq. 267; and see *Pomeroy Eq. Jur.*, § 524, where the author discusses the distinction on the basis of these English authorities.

1. See *supra*, this title, *Definition*.

2. *Langdon v. Astor*, 3 Duer (N. Y.) 551; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Burnham v. Comfort*, 37 Hun (N. Y.) 220.

3. See *supra*, this title, *Definition*. And see *Kirk v. Eddowes*, 8 Jur. 532, where Vice-Chancellor Wigram, commenting upon a passage from Roper on Legacies, observes that the writer has not "sufficiently kept in view the distinction between ademption and revocation."

properly used only in relation to a gift made to a distributee by an ancestor who dies intestate.¹

IV. MODES OF ADEMPTION—1. By Portions, on the Analogy of Advancements—
a. BY PERSONS IN LOCO PARENTIS—(1) The Doctrine Stated Generally.—Having thus defined the doctrine of ademption and considered its general characteristics, it is next in order to discuss the circumstances under which the rule operates, and the facts which will justify a court in holding that a legacy has been adeemed. Probably the most common form of ademption is that which takes place when the amount of the legacy is paid by the testator; but there is a marked difference in this particular between a bequest by one who owes a parental duty to the legatee and one who is a mere stranger. The rule governing the first of these cases involves an important, much discussed, and sometimes misunderstood proposition of law, viz.: Where (*a*) a testator (*b*) standing in loco parentis (*c*) makes a gift (*d*) to his legatee of a (*e*) certain (*f*) considerable amount, (*g*) substantially identical in kind with (*h*) a prior bequest, the courts will, (*i*) without direction in the testament, (*j*) presume, unless a contrary intention be shown, that such gift was intended to be applied as a part of the legacy; and the latter will be treated as (*k*) adeemed *pro tanto* or *in toto*, according as it exceeds or merely equals the gift.²

The Reasons for the Rule, as quaintly stated by Lord Hardwicke, are: "This court inclines against double portions: another good one; the court considers it as a performance of what was intended to be done, and paying the debt of nature which he owed his child."³

1. Ademption Distinguished from Advancements.—Davis v. Whittaker, 38 Ark. 449; Cawfield v. Brown, 45 Ala. 552; Marshall v. Rench, 3 Del. Ch. 254; Turpin v. Turpin, 88 Mo. 340; Thompson v. Carmichael, 3 Sandf. Ch. (N. Y.) 120; Hays v. Hibbard, 3 Redf. (N. Y.) 28; Burnham v. Comfort, 37 Hun (N. Y.) 220; Lawrence v. Mitchell, 3 Jones (N. Car.) 190; Allen v. Allen, 13 S. Car. 528, 36 Am. Rep. 716.

2. Ademption by Advanced Payments—England.—This is a very ancient principle of the law of legacies, the adjudications concerning it being traceable for more than two hundred years. See Jenkins v. Powell, 2 Vern. 115, citing Elkenhead's Case, 2 Vern. 256; Scotton v. Scotton, 1 Stra. 235; Hartop v. Whitmore, 1 P. Wms. 681; Watson v. Lincoln, Ambl. 325; Ellison v. Cookson, 1 Ves. Jr. 108; Hinchcliffe v. Hinchcliffe, 3 Ves. Jr. 516; Trimmer v. Bayne, 7 Ves. Jr. 515; Suisse v. Lowther, 2 Hare 424; Kirk v. Ed-dowes, 3 Hare 509, 8 Jur. 530; Grave v. Salisbury, 1 Bro. C. C. 425; Debeze v. Mann, 2 Bro. C. C. 166, 1 Cox 346; Ward v. Lant, Prec. Ch. 182; Clarke v. Burgoine, Dick. 353; Ferris v. Goodburn, 4 Jur., N. S. 847; Platt v. Platt, 3 Sim. 503; Durham v. Wharton, 3 Cl. & F. 146; Montague v. Montague, 15 Beav. 565; Thynne v. Glengal, 2 H. L. Cas. 153; Hopwood v. Hopwood, 7 H. L. Cas. 747; Dawson v. Dawson, L. R. 4 Eq. 516; Cooper v. MacDonald, L. R. 16 Eq. 268; Sidney v. Sidney, L. R. 17 Eq. 65; Leighton v. Leighton, L. R. 18 Eq. 458. Compare Ex p. Pye, 18 Ves. Jr. 151; Carver v. Bowles, 2 R. & M. 301; Lawson v. Stitch, 1 Atk. 507; Biggleston v. Grubb, 2 Atk. 48.

Alabama.—May v. May, 28 Ala. 141; Roberts v. Weatherford, 10 Ala. 72.

Connecticut.—Cowles v. Cowles, 56 Conn. 240.

Georgia.—Rogers v. French, 19 Ga. 316; Clayton v. Akin, 38 Ga. 320, 95 Am. Dec. 393.

Illinois.—Hayward v. Loper, 147 Ill. 51.

Indiana.—Clendenen v. Clymer, 17 Ind. 155; Roquet v. Eldridge, 118 Ind. 151; Robins v. Swain (Ind. App., 1892), 32 N. E. Rep. 792.

Maine.—Low v. Low, 77 Me. 37.

Maryland.—Wallace v. DuBois, 65 Md. 160.

Massachusetts.—Paine v. Parsons, 14 Pick. (Mass.) 320.

Mississippi.—Gilliam v. Chancellor, 43 Miss. 449, 5 Am. Rep. 498.

New Jersey.—Sims v. Sims, 10 N. J. Eq. 163; Van Houten v. Post, 32 N. J. Eq. 709, 33 N. J. Eq. 344; Webb v. Jones, 36 N. J. Eq. 163.

New York.—Langdon v. Astor, 16 N. Y. 9, 3 Duer (N. Y.) 477; Hine v. Hine, 39 Barb. (N. Y.) 507; Degraaf v. Teerpenning, 52 How. Pr. (N. Y. Supreme Ct.) 313; Benjamin v. Dimmick, 4 Redf. (N. Y.) 7; Matter of Turfler's Estate, 1 Misc. Rep. (N. Y. Surrogate Ct.) 58, 23 N. Y. Supp. 135.

North Carolina.—Howze v. Mallett, 4 Jones Eq. (N. Car.) 194; Williams v. Batchelor, 74 N. Car. 557.

Pennsylvania.—Zeiter v. Zeiter, 4 Watts (Pa.) 212, 28 Am. Dec. 698; Miner v. Ather-ton, 35 Pa. St. 528; Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 139.

South Carolina.—Allen v. Allen, 13 S. Car. 525, 36 Am. Rep. 716; Richardson v. Richardson, Dudley (S. Car.) 184.

Virginia.—Hansbrough v. Hooe, 12 Leigh (Va.) 316, 37 Am. Dec. 659. Compare Kean v. Welch, 1 Gratt. (Va.) 403.

3. Reason for the Rule.—Watson v. Lincoln, Ambl. 325.

A recent expression of the same reasons by the Supreme Court of Maryland is as follows: "It is a rule adopted by courts of

The Presumption seems to be equally strong where a gift is made through a third party acting at the instance of the testator as when made directly by the testator.¹

(2) *The Doctrine Analyzed and its Qualifications Discussed.*—It will be observed that the various elements which comprise the proposition of law embodying this doctrine have been separately stated and numbered above.³ Each of these elements forms an essential feature of the rule as it has been gradually developed and rounded out by the authorities, and each will now be discussed in detail and in the light of the authorities.

(a) *Giver must be a Testator.*—At the outset it must be clearly understood that ademption is predicable only of a gift by one who has made a will or testament; it does not apply to gifts by an intestate,³ because ademption is a branch of the law of legacies and presupposes the making of a valid instrument of testamentary bequest. The term "advancements" applies to gifts under corresponding circumstances, made by a decedent who has left no will; but it is limited strictly to intestate succession, and is not properly used of gifts by one who has made a prior bequest.⁴

The doctrine of "advancements," therefore, while presenting many analogies to the topic here discussed, is treated elsewhere.⁵

(b) *Testator must be in Loco Parentis.*—A most important element of the rule of ademption by advanced portions is that the testator must be one who owes a parental duty to the legatee, or, in the language of the courts, the former must stand *in loco parentis* to the latter.⁶

equity to prevent a child from getting a double portion, an inequality which it is fair to presume the testator did not intend." Wallace v. DuBois, 65 Md. 153.

In *Pym v. Lockyer*, 5 Myl. & C. 35, Lord Chancellor Cottenham thus elaborates upon the reason for the rule: "The presumption of equity is against double portions, because it is not thought probable, when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision, therefore, is presumed to be intended as a substitution for, and not as an addition to, that first given; but, when the gift is a mere bounty, there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts. The first question to be asked is, whether the sums given are to be considered as portions, or as mere gifts; and upon this subject certain rules have been laid down, all intended to ascertain and to work out the intention of the giver. In the case of a parent, a legacy to a child is presumed to be intended to be a portion; because providing for the child is a duty which the relative situation of the parties imposes upon the parent: but that duty which is imposed upon a parent may be assumed by another, who, for any reason, thinks proper to place himself, in that respect, in the place of a parent; and, when that is so, the same presumption arises against his intending a first gift to take effect as well as a second; because both, in such cases, are considered to be portions."

1. *Piper v. Barse*, 2 Redf. (N. Y.) 19, where a conveyance was made to a legatee by strangers, but for a consideration moving

from the testator, the purpose being to avoid the necessity and expense of a second conveyance.

See also *Ravenscroft v. Jones*, 32 Beav. 669, where Sir John Romilly admits that the gift may be made to the legatee "directly or indirectly."

2. See *supra*, this title, *The Doctrine Stated Generally*.

3. *Davis v. Whittaker*, 38 Ark. 449; *Turpin v. Turpin*, 88 Mo. 340; *Allen v. Allen*, 13 S. Car. 512, 36 Am. Rep. 716.

So by statute in *New York*. See *Hays v. Hibbard*, 3 Redf. (N. Y.) 28; *Thompson v. Carmichael*, 3 Sandf. Ch. (N. Y.) 120; *Burnham v. Comfort*, 37 Hun (N. Y.) 220.

"The distinction between the doctrine of advancements and the ademption of legacies should not be overlooked." 2 *Woerner Law of Administration* 1216.

4. *Advancements.*—"The doctrine of advancements applies only in cases of intestacy." *Allen v. Allen*, 13 S. Car. 528, 36 Am. Rep. 716.

"The doctrine of bringing advancements into hotchpot applies only in cases of intestacy." *Turpin v. Turpin*, 88 Mo. 340.

"The doctrine of advancements is peculiarly applicable to the distribution of the estates of intestates." *Davis v. Whittaker*, 38 Ark. 449.

And see *Green v. Speer*, 37 Ala. 532; *Cawfield v. Brown*, 45 Ala. 552; *Marshall v. Rench*, 3 Del. Ch. 254; *Huggins v. Huggins*, 71 Ga. 66; *Lawrence v. Mitchell*, 3 Jones (N. Car.) 190; *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 274; *McFall v. Sullivan*, 17 S. Car. 504; *Vachell v. Jeffereys*, Prec. Ch. 170.

5. See the title *ADVANCEMENTS*.

6. See *supra*, this title, *The Doctrine*

Circumstances Necessary to Constitute the Relation.—The qualification itself is universally recognized, but, as is well remarked in one of the cases, "the chief difficulty in its application seems to have arisen from the inquiry, 'What are circumstances sufficient to invest the testator with the assumed relation of parent to the legatee?'"¹ Perhaps the most successful attempt at a definition of this phrase is the following, made by an eminent English jurist in a comparatively recent case:² "A person *in loco parentis* means a person taking upon himself the duty of a father of a child to make a provision for that child. It is clear that in that case the presumption can only arise from the obligation, and therefore in that case the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else." The phrase, therefore, applies *ex vi termini* to a father,³ and may include a grandfather who has made settlements upon his grandchildren,⁴ and probably also an aunt⁵ or an uncle,⁶ though the latter has been excluded.⁷

Under the test announced above,⁸ a mother is not within the rule;⁹ a grandfather is probably not included,¹⁰ but it seems that a grandmother may be.¹¹

Father of Illegitimate Child—Common-law Rule.—At common law the father of an illegitimate child did not stand *in loco parentis* to such child.¹²

Common Law Modified by Statutes of Affiliation.—But under the test heretofore stated the rule would probably now be different as a result of statutes of affiliation, because by these there arises not merely a moral but also a legal obligation to support the child.¹³

Testator's Housekeeper.—A testator does not *per se* stand *in loco parentis* to his

Stated Generally, and cases cited in note 2, *passim*.

1. Gill's Estate, 1 Pars. Eq. Cas. (Pa.) 141.

2. Sir George Jessel, M.R., in *Bennet v. Bennet*, 10 Ch. Div. 474.

The quotation in the text is the concluding part of the discussion. Previously, in the opinion, the master of the rolls thus asks and answers the question: "Now what is the meaning of the expression 'a person *in loco parentis*'? I cannot do better than refer to the definition of it given by Lord Eldon in *Ex p. Pye*, 18 Ves. Jr. 140, referred to and approved of by Lord Cottenham in *Powys v. Mansfield*, 3 Myl. & C. 359. Lord Eldon says it is a person 'meaning to put himself *in loco parentis*; in the situation of the person described as the lawful father of the child.' Upon that Lord Cottenham observes, 'But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any of such offices or duties by one not the father, to infer an intention of such person to assume also the duty of providing for the child.'"

See also *In re Pollock*, 28 Ch. Div. 552, where the same test of assumption of obligation seems to be adopted by Lord Selborne.

3. **Father.**—*Bennet v. Bennet*, 10 Ch. Div. 474; *Shudal v. Jekyll*, 2 Atk. 516.

4. **Grandfather who Makes Settlements upon Grandchildren.**—*Pym v. Lockyer*, 5 Myl. &

C. 29. Here Lord Chancellor Cottenham said: "I am of opinion that the grandfather had, as to the pecuniary provision for the children of this family, put himself *in loco parentis*."

5. **Aunt.**—*In re Pollock*, 28 Ch. Div. 552.

6. **Uncle has been Included.**—*Powys v. Mansfield*, 3 Myl. & C. 359; *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 139.

7. **Uncle has been Excluded.**—*Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 16.

In *Dunham v. Averill*, 45 Conn. 87, 29 Am. Rep. 642, the court observes: "No such relation is shown to have existed between the legatee and the testator as will admit of the application of the law concerning advancements [*sic*], these being the giving, by anticipation, the whole or part of what it is supposed children will be entitled to on the death of their parents."

8. By Sir George Jessel, M.R., in *Bennet v. Bennet*, L. R. 10 Ch. Div. 474.

9. **Mother.**—*Bennet v. Bennet*, 10 Ch. Div. 478.

10. **Grandfather.**—*Swails v. Swails*, 98 Ind. 515. But see contrary *dicta* in *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 16; *Van Houten v. Post*, 32 N. J. Eq. 712; *Grigsby v. Wilkinson*, 9 Bush (Ky.) 94.

11. **Grandmother.**—*Teynham v. Webb*, 2 Ves. 198.

12. **Natural Children.**—*Ex p. Pye*, 18 Ves. Jr. 140; *Grave v. Salisbury*, 1 Bro. C. C. 425; *Smith v. Strong*, 4 Bro. C. C. 493; *Wetherby v. Dixon*, 19 Ves. 407, *Cooper* 279.

13. See the title **BASTARDY**. And compare the test of the relationship stated by the master of the rolls in *Bennet v. Bennet*, 10 Ch. Div. 474.

housekeeper so as to effect an ademption of a legacy to her by a subsequent gift of a house and lot, there being no evidence of intention to adeem.¹

Proof of the Relation.—The assumption of the parental relation may be proven by extrinsic parol evidence, and need not be collected from the face of the testament.²

(c) **Advanced Portion must be a Gift.**—Where the portion advanced to the legatee is something to which the latter is entitled from the testator, the rule of ademption of course does not apply,³ for the transaction then becomes merely the liquidation of an indebtedness.

The Presumption of an Intent to Adeem is raised only where no obligation exists on the part of the testator to make the advance.⁴

(d) **Gift must be Made to Legatee.**—Nor does the doctrine of ademption obtain where the gift is made to another than the legatee, however close the donee's relationship to the latter. For example, a subsequent gift to the legatee's husband will not operate as an ademption of the prior bequest;⁵ though it seems that a contrary rule has been observed in cases of intestate succession, and that advancements to a son-in-law have been treated as advancements to his wife.⁶

(e) **Legacy must be Certain as to Amount and Time of Accrual.**—In an early English case it was stated by eminent authority that "there is no case where the devise has been of a residue (that is uncertain, and at the time of the testator's death may be more or less) in which a subsequent portion given has been held to be an ademption."⁷ The rule thus formulated has continued to be one of the im-

1. *Housekeeper*.—Sprenkle's Appeal (Pa., 1888), 15 Atl. Rep. 773.

2. *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 141; *Powys v. Mansfield*, 3 Myl. & C. 359; *Pym v. Lockyer*, 5 Myl. & C. 29. In this last case Lord Chancellor Cottenham says: "Whether the donor had, for this purpose, assumed the office of a parent, so as to invest his gift with the character of a portion, may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence from the nature and terms of the gift. If the former be alone relied upon, it may prevail, although it should appear that the donor did not assume all the duties of a parent, or effectually perform those which he had undertaken: the question being, merely, whether the facts proved fairly lead to the conclusion that he intended to provide a portion for the child, and not merely to bestow a gift. Upon this point, *Powys v. Mansfield*, 3 Myl. & C. 359, founded upon *Carver v. Bowles*, 2 R. & M. 301, and many other cases, is conclusive. Such evidence of general conduct towards the child is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments containing the gifts or in extrinsic circumstances; and, as part of such extrinsic circumstances, the general conduct of the donor towards the family, and particularly towards the other children of it, may, very properly, be included in the consideration of his objects and intentions." Compare *Monck v. Monck*, 1 Ball. & B. 298.

3. *Clark v. Jetton*, 5 Sneed (Tenn.) 235. Compare *Baugh v. Read*, 1 Ves. Jr. 257.

4. See *supra*, this title, *The Doctrine Stated Generally*, and cases cited in note 2 thereto.

Compare *Bird's Estate*, 132 Pa. St. 164, and *White v. Moore*, 23 S. Car. 456, where money advanced for the purpose of education was not allowed to reduce the share of a child. See also *Cooner v. May*, 3 Strobb. Eq. (S. Car.) 185.

5. **Subsequent Gift to Legatee's Husband.**—*Ravenscroft v. Jones*, 32 Beav. 669. In this case Sir John Romilly, M.R., said: "I admit that if the money had been given to the daughter, either directly or indirectly, or settled partly for her benefit, I might then infer that it was intended as an advance to her. But there is nothing of the sort here. It was given apparently to the husband himself to do him good in his business. That is not an advance to her, and I think it is not an ademption. I am not aware of any case which goes to that extent, and I do not think it advisable to extend the doctrine of ademption further."

See to the same effect *Hart v. Johnson*, 81 Ga. 734; *Rains v. Hays*, 6 Lea (Tenn.) 303, 40 Am. Rep. 39. Compare *Duckworth v. Butler*, 31 Ala. 164; and see *Yundt's Appeal*, 13 Pa. St. 575; *Kreider v. Boyer*, 10 Watts (Pa.) 54. In this last case, alleged parol declarations by the testator tending to show that a loan to the son-in-law was intended as an advanced portion to the daughter were held inadmissible.

6. **Advancements to Son-in-Law.**—*Dilley v. Love*, 61 Md. 603; *Barber v. Taylor*, 9 Dana (Ky.) 84; *Nelson v. Bush*, 9 Dana (Ky.) 104. But see *Rains v. Hays*, 6 Lea (Tenn.) 303, 40 Am. Rep. 39.

7. *Lord Hardwicke in Farnham v. Phillips*, 2 Atk. 215; *Freemantle v. Bankes*, 5 Ves. Jr. 79; *Barrett v. Bickford*, 1 Ves. Sr. 519. But see *quære* to the contrary by the master of the rolls in *Bengough v. Walker*, 15 Ves. Jr.

portant qualifications of the doctrine here under discussion, and later cases fully support the principle that the bequest must be of an amount definite and certain, or a subsequent gift will not adeem it.¹

Departure from Early English Rule.—But in so far as the early English announcement above referred to excluded from the operation of the rule of ademption all those testaments which provided for bequests of a residuary amount, the cases thus holding can no longer be regarded as of unquestioned authority, since they have been overruled in England;² and this departure has been followed by several courts in this country.³

Early Rule Prevails in Some Jurisdictions.—Still there are other jurisdictions in which the early doctrine apparently prevails, even since the change of the law in *Great Britain*, and where it is held that the bequest of the residue of an estate is not a case where the rule of ademption can operate.⁴

A Qualification subsidiary to the foregoing is that the rule of ademption does not obtain where the bequest is contingent and the subsequent gift certain.⁵

(f) Gift must be of a Substantial Amount.—Another limitation upon the doctrine—one which has crept in by virtue of more recent adjudications—is that the gift which will work an ademption must be of a substantial amount and not entirely disproportionate to the amount of the legacy. Thus, payments of insignificant sums of money⁶ or small presents⁷ to the legatee will not be considered by the courts in estimating the amount of the legacy. In *Indiana*,

512; and *Devese v. Poutet*, Prec. Ch. 240, note, where the legacy was of a residue left after the payment of a debt charged on the estate, the amount being uncertain.

1. *Clark v. Jetton*, 5 Sneed (Tenn.) 229; *Hays v. Hibbard*, 3 Redf. (N. Y.) 30; *Clendenning v. Clymer*, 17 Ind. 159; *Davis v. Whittaker*, 38 Ark. 449; *Monestier's Estate*, 16 Phila. (Pa.) 332; *Garrett's Appeal*, 15 Pa. St. 212; *Grigsby v. Wilkinson*, 9 Bush (Ky.) 91; *Duncan v. Clay*, 13 Bush (Ky.) 51.

2. **Early Doctrine Overruled in England.**—See *Thynne v. Glengall*, 2 H. L. Cas. 131; *Montefiore v. Guedalla*, 6 Jur., N. S. 329. In the latter case the court says: "It was contended in the argument, that all doubt on the subject is removed by the decision in the case of *Thynne v. Glengall*, 2 H. L. Cas. 131, the argument being that satisfaction and ademption are on the same footing in this court, by reason of the doctrine against double portions. I think the principle is the same in both cases, viz., that a parent does not intend to perform the duty twice of providing for a child. Seeing, then, that satisfaction and ademption rest on the same grounds, this court is not bound to apply the rule as to satisfaction, which is established by *Thynne v. Glengall*, 2 H. L. Cas. 131, to ademption, particularly as the previous cases, from which a contrary doctrine has been derived, are far from conclusive. Of the two cases of *Freemantle v. Bankes*, 5 Ves. Jr. 79, and *Farnham v. Phillips*, 2 Atk. 215, it appears that the former was heard as a short cause; and the latter could hardly be considered of much authority, as Lord Hardwicke himself expressed doubts as to the correctness of the doctrine then laid down. (His lordship then referred to the several cases of *Watson v. Lincoln*, Amb. 326; *Rickman v. Morgan*, 1 Bro. C. C. 63, 2 Bro. C. C. 394; and *Bengough v. Walker*, 15

Ves. Jr. 507.) On the whole, I think, the point must depend on the intention of the testator; and although the uncertainty of the amount of the residue ought to be taken into consideration, yet it ought not to decide the question. Here the terms of the residuary gift raise a strong presumption in favor of ademption, and the slight difference between the trusts of the residue and the trusts of the settlement is not sufficient to rebut that presumption." Compare *Meinertzen v. Walters*, L. R. 7 Ch. 670; *Beckton v. Barton*, 27 Beav. 99; *In re Peacock's Estate*, L. R. 14 Eq. 236; *Stevenson v. Mason*, L. R. 17 Eq. 78; *Keys v. Gilmore*, 8 Irish Eq. 290; *Vickers v. Vickers*, 37 Ch. Div. 525.

3. *Miner v. Atherton*, 35 Pa. St. 536; *Monestier's Estate*, 16 Phila. (Pa.) 332; *Van Houten v. Post*, 32 N. J. Eq. 709; *Matter of Turfler's Estate*, 1 Misc. Rep. (N. Y. Surrogate Ct.) 58, 23 N. Y. Supp. 135; *Allen v. Allen*, 13 S. Car. 527, 36 Am. Rep. 716.

4. **Bequest of Residue of Estate.**—*Davis v. Whittaker*, 38 Ark. 449; *Clendenning v. Clymer*, 17 Ind. 159; *Grigsby v. Wilkinson*, 9 Bush (Ky.) 95; *Duncan v. Clay*, 13 Bush (Ky.) 51; *Hays v. Hibbard*, 3 Redf. (N. Y.) 30; *Clark v. Jetton*, 5 Sneed (Tenn.) 235.

5. **Where Bequest Contingent and Subsequent Gift Certain.**—*Clark v. Jetton*, 5 Sneed (Tenn.) 235; *Bellasis v. Uthwatt*, 1 Atk. 428; *Spinks v. Robins*, 2 Atk. 491. But see *Powys v. Mansfield*, 3 Myl. & C. 359, where the contingency was the possibility of the birth of issue, and the legacy was held to be adeemed.

6. **Insignificant Sums of Money.**—*Schofield v. Heap*, 27 Beav. 98; *Watson v. Watson*, 33 Beav. 574. Compare *Matter of Crawford*, 113 N. Y. 560.

7. **Small Presents.**—*Watson v. Watson*, 33 Beav. 574.

even the payment at various times of amounts aggregating in all one-ninth of the entire bequest was held not to effect an ademption.¹

(g) **Advanced Portion must be Ejusdem Generis.**—The gift which will work an ademption of the prior legacy must be substantially one of the same class of property with the legacy itself, or, to use a technical term, it must be *ejusdem generis*.² Thus it was held at an early day that a pecuniary legacy to a son was not adeemed by a subsequent gift of a stock of jewelry;³ nor is such a bequest extinguished by a conveyance of real property to the legatee;⁴ nor by the furnishing of the legatee's house at the expense of the testator.⁵ So it has been held that such articles as "jewelry, guns, pistols, tricycles, and scientific instruments" were not *ejusdem generis* with a gift of "furniture, goods, and chattels."⁶

A subsequent gift of money to bind out the legatee as an apprentice was refused allowance as a partial ademption of the latter's legacy.⁷

1. Gift One-ninth Part of Legacy—No Ademption.—*State v. Crossley*, 69 Ind. 208. The amount of the legacy here was nine hundred dollars, and the legatee acknowledged the receipt in all of one hundred dollars. The court said: "It seems to us that the one hundred dollars given the relatrix by the testator, in his lifetime, under this evidence, cannot be regarded as an ademption of a like amount of her legacy, under his will, for the reason that the evidence utterly fails to show that the testator, in making such gift, intended that it should operate as such an ademption. The rule upon this point, as we understand it, is that where one who has made his will, giving a legacy to a child, afterward, during life, gives a portion to or makes provision for such child, it will be deemed, even if not so expressed, an ademption or satisfaction of such legacy, if the circumstances indicate that intention, if it is not less than the legacy, if it is certain and of the same general nature; but if the difference between the gift *inter vivos* and the legacy named in the will be large and important, then the presumption of an intention to substitute the portion for the legacy ought not to and will not be allowed to prevail. *Weston v. Johnson*, 48 Ind. 1; *Story Eq.*, § 1111; *Stokesberry v. Reynolds*, 57 Ind. 425. It cannot be questioned or denied, we think, that there is much confusion and uncertainty, both in the reported cases and in the legal text-books, in regard to the question we are now considering. This has arisen in part, perhaps, from an inapt use of words, or from giving or attempting to give to words of a technical import and use their plain and ordinary meaning. Thus the word 'portion,' which is so often used with reference to the gift *inter vivos*, which shall operate as an ademption of a given legacy, is clearly a word of technical import when used in that connection. It is generally used for the purpose of indicating or signifying that part of a person's estate which a child would be entitled to upon the death of such person, but which has been given to the child by such person, while living, as an advancement or provision. Where, as is this case, there is great disparity between the gift made *inter vivos* and

the legacy to the child bequeathed in the will, the amount of the legacy being largely in excess of the amount of the gift, it seems to us that the gift cannot be regarded as either a portion or an advancement, within the legal meaning of those terms, which will operate either as an ademption or a satisfaction *pro tanto* of the legacy, unless the testator, in making the gift, declare his intention, or unless the circumstances clearly indicate such intention, that such gift shall so operate. On this point, therefore, we conclude, as we began, with the opinion that the evidence in the record fails to show that the testator intended, in giving said sum of one hundred dollars to the relatrix, under the circumstances, that such gift should operate as an ademption or satisfaction of a like amount of the legacy bequeathed to her in his will."

2. See *supra*, this title, *The Doctrine Stated Generally*, and cases cited in note 2, *passim*. And see particularly *Grave v. Salisbury*, 1 Bro. C. C. 425; *Bengough v. Walker*, 15 Ves. Jr. 512; *Paine v. Parsons*, 14 Pick. (Mass.) 320; *Days v. Boucher*, 3 Y. & C. 411; *Jones v. Mason*, 5 Rand. (Va.) 592, 16 Am. Dec. 761; *Watson v. Watson*, 33 Beav. 574.

3. Pecuniary Legacy to Son not Adeemed by Gift of Stock of Jewelry.—*Holmes v. Holmes*, 1 Bro. C. C. 555.

4. Pecuniary Legacy not Adeemed by Conveyance of Realty.—*Bengough v. Walker*, 15 Ves. Jr. 512 (*dictum*); *Dugan v. Hollins*, 4 Md. Ch. 141; *Waters v. Howard*, 8 Gill (Md.) 262; *Swoopes's Appeal*, 27 Pa. St. 61. Compare *Grave v. Salisbury*, 1 Bro. C. C. 425; *Sprengle's Appeal* (Pa., 1888), 15 Atl. Rep. 773.

5. Pecuniary Legacy not Adeemed by Furnishing of Legatee's House.—*Monestier's Estate*, 16 Phila. (Pa.) 332.

6. *Manton v. Tabois*, 30 Ch. Div. 92.

7. Expense of Binding Legatee as Apprentice.—*Roome v. Roome*, 3 Atk. 181. The rule is otherwise if the purpose of the bequest is to bind out the legatee as an apprentice. *Rosewell v. Bennet*, 3 Atk. 77. The master of the rolls says in the opinion in the former case: "The plaintiff's counsel insist, that as the thousand pounds was given to bind the defendant out apprentice, that the testator having afterwards done this himself, it is a partial ademption, and ought to be taken

Qualifications.—But it is said also that the gift by way of advancement need not be in all respects identical with the legacy,¹ and that the courts will not regard slight circumstances of difference.² For example, a bequest of money has been held adeemed by a subsequent gift of stock.³

Intention of Testator Controlling.—The question of what gifts are *ejusdem generis*, frequently becomes one of the intention of the testator, and such intention, rather than the character of the property, will determine.⁴

Accomplishment by Testator of Purpose for which Legacy is Given.—Where the legacy is given for a specified purpose, the accomplishment thereof by the testator is also an ademption;⁵ and in this connection the rule of *ejusdem generis* is often applied. A bequest of a certain sum for the purpose of putting out the son of the testator as an apprentice was held to be adeemed *pro tanto* by subsequent expenditures in putting him out as a clerk in the Navy Office.⁶ So the bequest of a certain sum for the purpose of liquidating a church debt is adeemed if the testator subsequently pays the debt himself.⁷ But a legacy for the erection of a church building, not to be paid until the property should be free from debt, has been held not to be adeemed by contributions from the testator during his lifetime.⁸

out of the portion; and they have compared this to the case of a person's giving A a thousand pounds by will to build him a house; if the testator in his lifetime lays out that sum upon a house for A, it is a satisfaction, and A shall not have the thousand pounds under the will; and that as the defendant in the present case has had the thing intended, he shall not have the legacy. But I think the present case differs from that which has been cited, because the thousand pounds is not given for the putting him out as an apprentice only, but for other purposes, maintenance, etc.; neither are the executors obliged to expend such sums as shall be necessary for apprenticing him, out of the thousand pounds, but they may do it out of the interest and produce of it. The defendant, besides, might have chosen some other business, or perhaps none at all. Therefore those cases wherein ademption has been allowed must be confined to such instances where a testator gives a legacy for one particular purpose only, and after that applies a sum of money to the same purpose."

1. **Gift and Legacy need not be in All Respects Identical.**—Hine v. Hine, 39 Barb. (N. Y.) 510. Compare Barclay v. Wainwright, 3 Ves. Jr. 466.

2. Hartopp v. Hartopp, 17 Ves. Jr. 196.

3. **Bequest of Money Adeemed by Gift of Stock.**—Phillips v. Phillips, 34 Beav. 19; Bengough v. Walker, 15 Ves. Jr. 507. Compare Lawes v. Lawes, 20 Ch. Div. 81, 89, which, however, was a case of satisfaction, the father having given a bond for the payment of the legacy.

4. **Question of Intention.**—Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761; May v. May, 28 Ala. 157, the court in the latter case saying: "It is objected that the advancements and bequests are not *ejusdem generis*. This makes no difference, if it were the intention of the testator to substitute the one, in whole or in part, for the other. Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761, and cases there cited. But the

objection is not well founded in fact. The portions given off are of the very property of the testator's estate which would have been subject to division among the legatees had the testator died the day before he made the advancements. Be this, however, as it may, if it was the intention of the testator to execute his will, in part, by placing the older children in possession of something like the shares which would fall to them under the will, then the legacies are adeemed, *pro tanto*. The following cases show that the intention is to be looked to, and will prevail, whether the thing given by the will and that advanced be of the same kind or not: Hoskins v. Hoskins, Prec. Ch. 263; Chapman v. Salt, 2 Vern. 646; Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761; Rickman v. Morgan, 1 Bro. C. C. 63, 2 Bro. C. C. 394, 15 Ves. 507. The objection, that the gift to Moore and wife by the will differs from that made by the testator when he gave off to them their respective portions, is fully met by this view. He was making provision for these grown and married children, to meet their then exigencies, rather than withhold their shares until after his death."

5. **Bequests for Specific Purposes.**—Taylor v. Tolen, 38 N. J. Eq. 97; Hine v. Hine, 39 Barb. (N. Y.) 507; Debeze v. Mann, 2 Bro. C. C. 166, 1 Cox 346; 1 Rev. Rep. 57; Trimmer v. Bayne, 7 Ves. Jr. 516; Powel v. Cleaver, 2 Bro. C. C. 499; Pankhurst v. Howell, L. R. 6 Ch. 136. Compare Monck v. Monck, 1 Ball & B. 303.

6. Rosewell v. Bennet, 3 Atk. 77. But see Roome v. Roome, 3 Atk. 181, where the legacy was given for other purposes as well as for binding out the legatee as an apprentice, and subsequent expenditures for the latter purpose were held not to work an ademption.

7. Taylor v. Tolen, 38 N. J. Eq. 97, where the bequest was for twenty-five hundred dollars and the debt paid only twenty-one hundred dollars.

8. Keiper's Appeal, 124 Pa. St. 193. The

Object of Gift Different from Purpose Expressed in Will.—And generally where the object of the gift is not the same as the purpose expressed in the testament, there will be no ademption.¹

(h) **The Gift must be Subsequent to the Testament.**—Another important qualification of the doctrine of ademption by gifts in the nature of advances is that it applies only to such as are made subsequently to the testament.² And where the gift was made subsequently to the will, but the latter was afterwards confirmed in its full amount by a codicil, no ademption was allowed.³ Even where a small portion of the gift, which consisted of a series of deposits, was made after the will, nothing was allowed by way of ademption *pro tanto*.⁴

(i) **No Direction in Testament Necessary.**—The basis of the doctrine of ademption by portions is the implied intention of the testator.⁵ It is not, therefore, necessary to look to the terms of the testament itself for any authority to put the rule into operation.

When Testament Provides for Ademption.—Sometimes, however, that instrument does provide for an ademption,⁶ and then, of course, no question of intent can arise.

When Testament Contains Provisions against Ademption.—Not infrequently, also, a will contains provisions against ademption; and these, of course, are fully respected and prevent the operation of the rule.⁷

(j) **Advanced Portion only Presumed to be Intended to Adeem: Rebuttal of the Presumption.**—The propositions discussed in the foregoing pages might, in one sense, be termed a rule of evidence rather than of substantive law, for the professed guide of the courts in applying it is the intent of the testator;⁸ and the ascertainment of this intent involves an examination of evidence. Now the fact of an advance portion having been given is but one element, though a most important one, of the evidence from which the testator's intent is to be derived. Proof of the advance gift raises a presumption that it was intended to reduce proportionately the amount of the legacy.⁹

theory of the court in this case seems to have been that while contributions were made towards the building fund, a proper construction of the will permitted the amount of the legacy to be applied on the church debt.

1. *Debeze v. Mann*, 1 Cox 346, 1 Rev. Rep. 57; *Pankhurst v. Howell*, L. R. 6 Ch. 136, where the testator bequeathed two hundred pounds to his wife to be paid ten days after his decease, and subsequently gave her two hundred pounds ready money; it was held that the legacy was not adeemed.

2. *Zeiter v. Zeiter*, 4 Watts (Pa.) 214, 28 Am. Dec. 698; *Kreider v. Boyer*, 10 Watts (Pa.) 54; *Jacques v. Swasey*, 153 Mass. 596; *Stichenoth v. Toph*, 23 Wkly. L. Bull. (Ohio) 126; *Strother v. Mitchell*, 80 Va. 149; *In re Lyon's Estate*, 70 Iowa 375; *Yundt's Appeal*, 13 Pa. St. 575, 53 Am. Dec. 496; *Taylor v. Cartwright*, L. R. 14 Eq. 167; *In re Peacock's Estate*, L. R. 14 Eq. 236.

This rule does not seem to have obtained at an early period. In *Upton v. Prince*, Cas. temp. Talb. 71, the legacy was reduced to the extent of the prior gift under circumstances which do not seem distinguishable from those in the foregoing cases.

3. *Chapman v. Allen*, 56 Conn. 152.

4. *Matter of Crawford*, 113 N. Y. 560, modifying and affirming 47 Hun (N. Y.) 636. *Peckham, J.*, in the opinion says: "We also think that there was no ademption of the legacies to Mrs. Crawford by the gift of the

money. We are not able to see how a legacy can be adeemed by a gift made before the execution of the will in which the legacy was given. The small deposit which was made subsequent to the making of the will was but carrying out a purpose entertained long prior thereto; and the legacy contained in the will was not, as we think, adeemed *pro tanto* by the deposit mentioned."

5. See *supra*, this title, *The Doctrine Stated Generally*, and cases cited in note 2, *passim*.

6. *Garrett's Appeal*, 15 Pa. St. 215.

7. See, for example, *Security Co. v. Brinley*, 49 Conn. 48; *Lee v. Boak*, 11 Gratt. (Va.) 185.

8. **Intent of Testator Controls.**—*Cowles v. Cowles*, 56 Conn. 240; *Dunham v. Averill*, 45 Conn. 87, 29 Am. Rep. 642; *Rogers v. French*, 19 Ga. 316; *Ware v. People*, 19 Ill. App. 196; *Sims v. Sims*, 10 N. J. Eq. 163; *Van Houten v. Post*, 32 N. J. Eq. 709, 33 N. J. Eq. 344; *Jones v. Mason*, 5 Rand. (Va.) 592, 16 Am. Dec. 761. See, for an illustration of the rule, *Richardson v. Eveland*, 126 Ill. 37.

Since the application of the rule would have diminished the proportion of two of the legatees and doubled the portion of a third, the court, in the absence of other evidence, assumed that the testator intended not to adeem. *Hopwood v. Hopwood*, 22 Beav. 488.

9. See *supra*, this title, *The Doctrine Stated Generally*, and cases cited in note 2.

Presumption may be Rebutted by Parol.—But the presumption thus raised may be rebutted by parol evidence to the contrary,¹ and the operation of the rule of ademption thus prevented.

Other Evidence Admissible to Confirm the Presumption.—And so, too, in promotion of the search for the real intention of the testator, after evidence has been admitted to repel the presumption that the legacy was intended to be adeemed, other evidence is admissible to confirm the presumption.²

What the Evidence may Include.—Such evidence may include the declarations of the testator himself.³ This is true in *New Jersey* of declarations not made in

1. **Presumption Rebuttable by Parol**—*England*.—*Shudal v. Jekyll*, 2 Atk. 516; *Robinson v. Whitley*, 9 Ves. Jr. 577; *Debeze v. Mann*, 1 Cox 346; *Kirk v. Eddowes*, 3 Hare 509; *Powel v. Cleaver*, 2 Bro. C. C. 499; *Powys v. Mansfield*, 3 Myl. & C. 359; *Thellusson v. Woodford*, 4 Madd. 420; *Hopwood v. Hopwood*, 7 H. L. Cas. 728.

Alabama.—*May v. May*, 28 Ala. 153.

Connecticut.—*Johnson v. Belden*, 20 Conn. 322 (a case of advancement).

Georgia.—*Rogers v. French*, 19 Ga. 316.

Indiana.—*Clendening v. Clymer*, 17 Ind. 155.

Kentucky.—*Timberlake v. Parish*, 5 Dana (Ky.) 350.

Maryland.—*Parks v. Parks*, 19 Md. 323; *Cecil v. Cecil*, 20 Md. 72, 81 Am. Dec. 626 (these two cases, however, not being technical ademptions).

Mississippi.—*Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498.

New Jersey.—*Van Houten v. Post*, 33 N. J. Eq. 344.

New York.—*Langdon v. Astor*, 16 N. Y. 34; *Matter of Townsend*, 5 Dem. (N. Y.) 151.

Pennsylvania.—*Zeiter v. Zeiter*, 4 Watts (Pa.) 212, 28 Am. Dec. 698; *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 141; *Miner v. Atherton*, 35 Pa. St. 536.

South Carolina.—*Allen v. Allen*, 13 S. Car. 525, 36 Am. Rep. 716.

Virginia.—*Jones v. Mason*, 5 Rand. (Va.) 577, 16 Am. Dec. 761.

2. *Sims v. Sims*, 10 N. J. Eq. 163; *Tillotson v. Race*, 22 N. Y. 122; *Richards v. Humphreys*, 15 Pick. (Mass.) 133; *Phillips v. Phillips*, 34 Beav. 21.

3. **Testator's Declarations Admissible.**—*Rosewell v. Bennet*, 3 Atk. 77; *Zeiter v. Zeiter*, 4 Watts (Pa.) 214, 28 Am. Dec. 698; *Johnson v. Belden*, 20 Conn. 322 (a case of advancement); *Wallace v. DuBois*, 65 Md. 160; *Richards v. Humphreys*, 15 Pick. (Mass.) 133. In this last case the court says: "If the money is advanced or paid by the father under such circumstances as not to raise a presumption of satisfaction of the legacy, parol evidence may be offered to show that such was his intention."

In *Kirk v. Eddowes*, 3 Hare 509, 8 Jur. 532, Vice-Chancellor Wigram says: "The declarations by the testator, which accompany the transaction, have been objected to. Why should they not be admitted? They are of the essence of the transaction, the true nature of which cannot be known without them. The rule which excludes the evidence of the

intention in the case of a gift by an instrument in writing does not apply. It cannot be contended, on the part of Mrs. Kirk, that payment to her husband of the amount of the legacy at her instance would not have precluded her from claiming under her father's will, or, in other words, that the advance would not have adeemed the legacy. If that is not so, it must be contended that an advance by the testator to a legatee, under an agreement in writing that he shall accept the advance in satisfaction of the legacy, will leave the legatee at liberty to claim the legacy, notwithstanding the advance; and if such an argument be not, in the case supposed, admissible, it must be under some rule which requires that such a transaction should not be valid unless reduced into writing. That, however, cannot be contended for. The evidence does not touch the will: it proves only that the gift did take place after the date of the will; and, upon that, the court is called upon to decide, whether the legacy was or not thereby adeemed. There does not appear to be any ground for rejecting the evidence upon the hypothesis supposed. But how does the question stand upon authority? The cases of *Monck v. Monck*, 1 Ball & B. 298; *Rosewell v. Bennet*, 3 Atk. 77; *Thellusson v. Woodford*, 4 Madd. 420; *Bell v. Coleman*, 5 Madd. 22; *Biggleston v. Grubb*, 2 Atk. 48; *Hoskins v. Hoskins*, Prec. Ch. 263; *Chapman v. Salt*, 2 Vern. 646; *Powel v. Cleaver*, 2 Bro. C. C. 499; *Grave v. Salisbury*, 18 Ves. 152, 1 Bro. C. C. 425, and *Ex p. DuBost*, 18 Ves. Jr. 140, are all authorities in favor of the admission of the evidence; and of these, the cases of *Rosewell v. Bennet*, 3 Atk. 77; *Biggleston v. Grubb*, 2 Atk. 48, and *Monck v. Monck*, 1 Ball & B. 298, are referred to with approbation by the lord chancellor of Ireland in *Hall v. Hill*, 1 D. & W. 94. Admitting, then, that parol evidence is inadmissible to prove that a will or other instrument was intended not to have a particular effect, still I think the court in the case supposed would feel bound to admit the evidence. This subject has been elaborately considered in 1 Roper on Legacies 341; but the writer has not, I think, sufficiently kept in view the distinction between ademption and revocation. But it has been said that a distinction exists in the present case, because, in the cases cited, the advance was made to the legatee himself, whereas, in the case before the court, it was made to the husband of the legatee. That, however, does not render the evidence inadmissible.

the legatee's presence,¹ but not in *Connecticut*, where a contrary rule prevails by force of statute.² In *New York* it is held that the declarations must have been contemporaneous with the making of the gift;³ but a different rule has been announced in *Illinois*.⁴ Charges on the testator's books have been held in *Massachusetts* to be legal proof of advanced portions;⁵ but in *New York* the rule prevails that the books are admissible only in connection with evidence *aliunde*.⁶ Declarations are not competent for the purpose of converting a loan by the testator to his son-in-law into an advancement to his daughter.⁷

The Silence of the Legatee, when the testator states that a portion of the bequest has been paid, does not constitute assent by the former, if the facts disclose that there has been no such payment.⁸

A Subsequent Unfulfilled Promise of a further gift is not sufficient to repel the presumption that the first gift was intended to adeem the legacy.⁹

(k) **Ademption Operates pro Tanto only**.—There is some early support for the view that a legacy is completely adeemed by a subsequent gift, even though the amount of the latter be much smaller than the bequest.¹⁰ But this doctrine has long since been repudiated; and the rule now prevailing is that the legacy, if greater than the gift, is reduced only to the extent of the latter.¹¹

A Presumption Merely.—Like the doctrine of ademption itself, the qualification that it operates *pro tanto* seems also to be only a presumption; but it is one which is not rebutted by evidence that the legatee expressed to the testator a preference for receiving a smaller amount down, rather than waiting for the entire legacy, even though the smaller amount was actually paid.¹²

Manner of Estimating the Reduction.—In estimating the amount of the reduction to be made, the value of the advanced gift at the time of making it must be taken.¹³

(3) **The Doctrine Criticised**.—The rule of ademption by advanced portions, though now, allowing for its many qualifications and limitations, firmly settled, has been the subject of considerable adverse comment. An eminent authority spoke of it as "a sort of artificial rule in the application of which illegitimate children have been very harshly treated, upon an artificial notion that the

and in more than one of the cases in which the evidence has been admitted the same circumstance occurred."

1. *Van Houten v. Post*, 32 N. J. Eq. 709. This, however, hardly accords with the expressions in *Sims v. Sims*, 10 N. J. Eq. 163, to the effect that "parol testimony is admitted * * * not to raise but to confirm a presumption."

2. *Chapman v. Allen*, 56 Conn. 152.

3. *DeGraaff v. Terpenning*, 14 Hun (N. Y.) 301. But compare *May v. May*, 28 Ala. 153, where the question is left open by the court.

4. *Richardson v. Eveland*, 126 Ill. 37; *citing* *Richards v. Humphreys*, 15 Pick. (Mass.) 133; *Howze v. Mallett*, 4 Jones Eq. (N. Car.) 194, 1 Pomeroy Eq. 564.

5. *Paine v. Parsons*, 14 Pick. (Mass.) 318.

6. *Lawrence v. Linsey*, 68 N. Y. 108; *Marsh v. Brown*, 18 Hun (N. Y.) 319; *Benjamin v. Dimmick*, 4 Redf. (N. Y.) 7.

7. *Yundt's Appeal*, 13 Pa. St. 575, 53 Am. Dec. 496; *Kreider v. Boyer*, 10 Watts. (Pa.) 54. And see *supra*, this title, *Gift must be Made to Legatee*.

8. *Jacques v. Swasey*, 153 Mass. 600.

9. *Nevin v. Drysdale*, L. R. 4 Eq. 517.

10. **Early Doctrine**.—*Ex p. Pye*, 18 Ves. Jr. 151, where Lord Eldon, commenting on the doctrine of ademption, says: "In some cases it has gone a length, consistent with the prin-

ciple, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision, by which he means to satisfy it; and though at the time of making the will he thought he could not discharge that debt with less than £10,000, yet by a change of his circumstances, and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of £5000." Compare *Hartop v. Whitmore*, 1 P. Wms. 681; *Clarke v. Burgoine*, Dick. 353. Reports of the two latter cases are declared by Lord Cottenham to have been erroneous. See *Pym v. Lockyer*, 5 Myl. & C. 27, 39.

11. **Pro Tanto Rule Prevails**.—*Pym v. Lockyer*, 5 Myl. & C. 29; *Kirk v. Eddowes*, 3 Hare 509; *Montefiore v. Guedalla*, 6 Jur., N. S. 330; *Clendening v. Clymer*, 17 Ind. 155; *Weston v. Johnson*, 48 Ind. 1 (case of devise); *Wallace v. DuBois*, 65 Md. 159; *Richards v. Humphreys*, 15 Pick. (Mass.) 135; *Benjamin v. Dimmick*, 4 Redf. (N. Y.) 9; *Gill's Estate*, 1 Pars. Eq. Cas. (Pa.) 140; *Miner v. Ather-ton*, 35 Pa. St. 536; *Allen v. Allen*, 13 S. Car. 525, 36 Am. Rep. 716.

12. *In re Pollock*, 28 Ch. Div. 552.

13. *Watson v. Watson*, 33 Beav. 576.

father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions."¹

Rule not to be Extended.—This criticism, although not impairing the general validity of the doctrine, discloses the attitude of the courts towards it, and becomes important, when new phases of the doctrine arise, in determining how far it should be extended. The prevailing view appears to be that the rule should be confined within strict limits, and not carried further than the decisions have already gone.²

(4) **Statutory Modifications of the Doctrine.**—In some jurisdictions the common-law rule of ademption has been so modified as to require the testator's intention to adeem to be expressed in writing.³

b. ADVANCES TO STRANGERS.—Thus far the effect of subsequent gifts, where the legatee is one to whom the testator owes a parental duty, has been considered.

No Presumption of Intention to Reduce the Legacy.—A different rule prevails where no such relation exists and both the legacy and the gift are made by one who does not technically stand *in loco parentis*. Under these circumstances no presumption arises that the gift was intended to be applied in reduction of the legacy.⁴ Accordingly, a legacy to one's housekeeper, who is also a relative by marriage, is not adeemed by a subsequent purchase for her by the testator of a house and lot, there being no evidence of an intention on the testator's part to place himself *in loco parentis*.⁵

2. By Alienation—*a.* SALES AND GIFTS—General Rule as to Existence of Subject of Bequest.—"The law is settled that a legacy is adeemed if the specific thing does not exist at the testator's death."⁶ The foregoing terse announcement of the law is a summary of a long line of adjudications, and expresses the principle upon which rest several distinct forms of ademption.

Sale of Property Bequeathed.—It is one of the results of this doctrine that the

1. Lord Eldon in *Ex p. Pye*, 18 Ves. Jr. 151. See also 2 Williams on Executors (7th Am. from 9th Eng. ed. 642), where the author says: "An artificial doctrine prevails in courts of equity, the establishment of which has excited the regret and censure of more than one eminent modern judge, though it has also met with approbation from other high authorities." And see 2 Woerner Law of Administration, § 448, where it is mentioned as "an arbitrary doctrine prevailing in courts of equity." See also *Evans v. Beaumont*, 4 Lea (Tenn.) 603, where the court says: "By these rules an arbitrary presumption is made against the child, or one standing in the place of a child, that a double portion is not intended, and the party only entitled to take the latter or compelled to elect between the two, while the stranger has no such difficulty in his way, and is presumed to be entitled to the bounty of the testator in both cases, until his right is disproven. We can but feel that a rule, as said by Lord Thurlow, that rests on the principle that a father has less affection for his child than a stranger, is not soundly based in reason, and not such as should be upheld by judicial adoption in our state. It is based on a logic that may be specious, but certainly is not found to have any foundation in the nature of the case, nor does it tend to reach the ends of either legal or natural justice. See 2 Story Eq. Jur., §§ 1100, 1110."

2. *Rogers v. French*, 19 Ga. 316; *Watson v. Watson*, 33 Beav. 574, where Sir John Romilly, M.R., observes that the rule is technical, and one not to be extended, and that it more often defeats the intention than gives effect to it.

3. See, for example, California Civ. Code, § 1351. These and other statutory changes of the rule can best be examined by the practitioner in connection with the enactments in force in each particular jurisdiction.

4. **No Presumption where Bequest is to a Stranger.**—*Allen v. Allen*, 13 S. Car. 525, 36 Am. Rep. 716. In this case the court says: "In case of a legacy to a stranger (and in this respect even grandchildren are regarded as strangers) no such presumption arises, and unless there is proof showing that the subsequent advance was intended as a satisfaction of the legacy, there will be no ademption, and the legatee will be entitled to both." *Ex p. Pye*, 18 Ves. Jr. 140; *Richardson v. Richardson*, Dudley (S. Car.) 184. Compare *Ex p. Pye*, 18 Ves. Jr. 140; *Shudal v. Jekyll*, 2 Atk. 516; *Powel v. Cleaver*, 1 Bro. C. C. 499; *Chancey's Case*, 1 P. Wms. 408.

5. *Sprenkle's Appeal* (Pa., 1888), 15 Atl. Rep. 773.

6. *Pattison v. Pattison*, 1 Myl. & K. 12*. See, to the same effect, *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246*; *Humphreys v. Humphreys*, 2 Cox 185; *Ford v. Ford*, 23 N. H. 212; *Beck v. McGillis*, 9 Barb. (N. Y.) 35.

sale by the testator of the property previously bequeathed adeems the legacy, if the latter be a specific one.¹

Subject Matter of Bequest Replaced by Other Property of Like Character.—This doctrine seems to obtain even though the property bequeathed and sold is afterward replaced by other property of a similar character. Thus the surrender of promissory notes which form the subject of a bequest, and the reconveyance to the testator of the property for which they had been given, adeems the legacy, even though the testator afterward sells the property and takes other notes for the same.²

So where a husband bequeathed certain long annuities to his wife, but subsequently sold them and with the proceeds purchased more annuities, which differed from the others only by being terminable three months earlier, the legacy was held to have been adeemed.³

1. Ademption by Sale of Property.—Ashburner v. Macguire, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246* (where Lord Chancellor Thurlow says: "The testator, after making his will, sold his stock, which made it as if it had never existed; the legacy is adeemed according to all the cases"). Pattison v. Pattison, 1 Myl. & K. 12; In re Gibson, L. R. 2 Eq. 669; Macdonald v. Irvine, 8 Ch. Div. 101; Gale v. Gale, 21 Beav. 349. This doctrine is confirmed by the following authorities: Updike v. Tompkins, 100 Ill. 411; Tolman v. Tolman, 85 Me. 317; Brady v. Brady (Md., 1894), 28 Atl. Rep. 515; White v. Winchester, 6 Pick. (Mass.) 48; Unitarian Soc. v. Tufts, 151 Mass. 76; Byrne v. Hume, 86 Mich. 546; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; Blackstone v. Blackstone, 3 Watts. (Pa.) 335, 27 Am. Dec. 359; Welch's Appeal, 28 Pa. St. 363; Godard v. Wagner, 2 Strobb. Eq. (S. Car.) 1; Hood v. Haden, 82 Va. 588, citing Morris v. Garland, 78 Va. 215. See also, among the earlier English cases, Sleech v. Thorington, 2 Ves. 561; Drinkwater v. Falconer, 2 Ves. 623; Humphreys v. Humphreys, 2 Cox 185; Birch v. Baker, Moseley 374.

Starbuck v. Starbuck, 93 N. Car. 183, contains the following statement of the rule: "Specific legacies are said to be adeemed when, in the lifetime of the testator, the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form, so that it does not remain, at the time the will goes into effect, *in specie*, to pass to the legatees. If the subject matter of such legacies ceases to belong to the testator, or is so changed as that it cannot be identified as the same subject matter, during his lifetime, then they are adeemed—gone—and never become operative. This is so because the thing given is gone, and nothing remains in that respect upon which the will can operate. Snowden v. Banks, 9 Ired. (N. Car.) 373; Tayloe v. Bond, Busb. Eq. (N. Car.) 5; Anthony v. Smith, Busb. Eq. (N. Car.) 188; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; Williams on Exrs. 1132; Redf. on Wills, pt. 2, 528."

2. Tolman v. Tolman, 85 Me. 317.

3. Pattison v. Pattison, 1 Myl. & K. 12.

Bequest of Proceeds.—But where the proceeds of the sale of property were bequeathed, and

after the sale was made the proceeds were reinvested, but they were still traceable and there was no substitution, it was held that the legatees were entitled to the bequest, and that there was no ademption. Nooe v. Vannoy, 6 Jones Eq. (N. Car.) 185. Compare Clark v. Browne, 2 S. & G. 524, where a gift of "whatever sum may be received from my claim on A B" was held not to be adeemed by the testator's acquisition of it in his lifetime, where he separated it and did not mingle it with the general mass of his property. And see McNaughton v. McNaughton, 34 N. Y. 201, where the court, by Porter, J., says: "The bequest was of the proceeds of his real estate, and in that sense it was specific; but it was in no sense a specific bequest of the proceeds of the farm which he afterward sold. If the latter had been its character, it may well be questioned whether the sale would have operated as an ademption of the gift. Coleman v. Coleman, 2 Ves. Jr. 639; Ogle v. Cook, cited in Collins v. Wake-man, 2 Ves. Jr. 686; Havens v. Havens, 1 Sandf. Ch. (N. Y.) 324; Gardner v. Printup, 2 Barb. (N. Y.) 83; Pierrepont v. Edwards, 25 N. Y. 128." See further, Warren v. Wigfall, 3 Desaus. (S. Car.) 47.

The Direction in a Will that the Proceeds of a certain mortgage owned by the testatrix should be used to pay an existing mortgage against her estate was held to require the application to the purpose indicated, of certain railroad bonds in which the proceeds had been invested. Hopkins v. Gouraud (Super. Ct.), 23 N. Y. Supp. 189.

Unexecuted Intention.—Where a testator, residing in Jamaica, who had bequeathed a part of a larger sum, then in the hands of agents in England, afterwards removed to Philadelphia, and seven days before his death in that city wrote to his Jamaica agent, directing him to order the English agents to invest all the moneys in their hands, the fact that the latter had invested the funds of their own accord prior to the receipt of the letter from the Jamaica agent was not regarded as an ademption of the legacy. Basan v. Brandon, 8 Sim. 171. Here the vice-chancellor said: "A mere unexecuted intention to change the state of a fund, which the testator might have revoked, and which, in fact, was never carried into execution, can-

Doctrine Operates *pro Tanto* only.—The doctrine of ademption by alienation operates *pro tanto* only; so where but a part of a legacy has been alienated, the remainder still passes to the legatee.¹ Accordingly, where a will and testament devises real estate and bequeaths personalty, a subsequent conveyance of the real estate will not result in adeeming the legacy.²

Intention of Testator—English Rule.—There is some early English authority for the view that the question whether or not a legacy has been adeemed does not depend upon the supposed intention of the testator, but is to be determined solely according to the strict rule requiring the property bequeathed to remain *in specie* and a part of the testator's estate.³ There are, however, English cases to the contrary.⁴

United States Rule.—In the *United States* the doctrine of the latter line of cases has been generally followed; and in deciding questions of ademption the courts here have been disposed to observe the same rule which prevails elsewhere in the construction of wills and testaments, and to hold legacies adeemed only where the testator apparently so intended.⁵

It is Held in England that the sale, by order of court, of shares of stock belonging to a lunatic, and which he had bequeathed, works an ademption of the legacy.⁶

not in any sense be considered as an ademption."

So a Legacy of the Amount of the Bond and mortgage, to be collected three years after the decease of a testator's wife and divided among certain legatees, was held not to be adeemed by the fact that the testator subsequently took from the obligors an assignment of another bond and mortgage, of equal amount, in lieu of the first. *Stilwell v. Doughty*, 2 Bradf. (N. Y.) 311, citing *Baker v. Rayner*, 2 Russ. 125; *Smith v. Fitzgerald*, 3 Ves. & B. 52. But *Stilwell v. Doughty*, 2 Bradf. (N. Y.) 311, was criticised and disapproved in *Georgia Infirmary v. Jones*, 37 Fed. Rep. 754.

1. Ademption *pro Tanto*.—*Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Rep. 456; *Warren v. Taylor*, 56 Iowa 182, citing *Zimmerman v. Zimmerman*, 23 Pa. St. 375; *Swails v. Swails*, 98 Ind. 514, citing *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; *Brown v. Thorndike*, 15 Pick. (Mass.) 388; *Skerrett v. Burd*, 1 Whart. (Pa.) 246; *Carter v. Thomas*, 4 Me. 341; *Hoitt v. Hoitt*, 63 N. H. 475.

Most of the above are cases involving devises, and holding that a revocation by a partial conveyance of the devised estate is *pro tanto* only; they serve to illustrate, however, the analogous doctrine which has become well settled in regard to personal estate.

2. Warren v. Taylor, 56 Iowa 182. In this case the court said: "Although the will, by the act of the testator, ceased to be operative, or rather never became operative, as to the real estate * * *, this did not work a revocation as to his personal estate. Where a testator undertakes to dispose of both personal and real estate, and he subsequently conveys the real estate, it will not, in general, work a revocation of his will as to the personal property of which he dies seized. The conveyance of a part of the estate devised works a revocation *pro tanto* only."

3. Question of Testator's Intent.—*Ashburner*

v. Macguire, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246*; *Stanley v. Potter*, 2 Cox 180. In the latter case Lord Chancellor Thurlow says: "I do not think that the question in these cases turns on the intention of the testator. The idea of proceeding on the *animus adimendi* has introduced a degree of confusion in the cases which is inexplicable, and I can make out no precise rule from them upon that ground."

4. Petteward v. Petteward, Rep. temp. Finch 152; *Ormie v. Smith*, 1 Eq. Cas. Abr. 302, Gilb. Rep. 82, 1 Vern. 681; *Pollock's Case*, Ld. Raym. 335; *Castleton v. Fanshaw*, 1 Eq. Abr. 298; *Coleman v. Coleman*, 2 Ves. Jr. 640; *Basan v. Brandon*, 8 Sim. 171; *Shaftsbury v. Shaftsbury*, 2 Vern. 747; *Jenkins v. Jones*, L. R. 2 Eq. 323.

5. See Patton v. Patton, 2 Jones Eq. (N. Car.) 494, where the bequeathed property had been sold by an agent without the knowledge of the testator, and the sale was held not to effect an ademption, the inquiry of the court being largely one as to the testator's intention. Compare *Blake's Succession*, 43 La. Ann. 845, where the court, in construing a similar question, says: "The testator's intention is his will. This is the first rule of interpretation, to which all others are reduced. The intention must be enforced as far as it can be done legally." See also *Swails v. Swails*, 98 Ind. 511; *White v. Winchester*, 6 Pick. (Mass.) 48.

In *Beall v. Blake*, 16 Ga. 119, the court, in commenting on the view of Lord Thurlow in *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246*, observes that in *England* the rule is changed by statute (1 Vict., c. 26, § 23), and says: "The effect of these enactments must be, in a great measure, if not altogether, to suppress Lord Thurlow's innovation and to make the old rule of its pristine breadth—to make it a rule without exception—the old rule that the testator's intention gives law to his will."

6. Jones v. Green L. R. 5 Eq. 555; *In re*

Doctrine not Applicable to General or Demonstrative Legacies.—The doctrine of ademption, however, applies only to specific legacies or those which are identified and limited to particular objects;¹ it does not obtain in the case of general or demonstrative legacies.² The distinction between these two classes of legacies, and the determination of what ones are specific and what general, is an extensive subject in itself, and belongs rather to the general discussion of legacies, where it may be consulted.³

b. CONVEYANCES OF REAL ESTATE—SURRENDER OF LEASES.—As was stated at the outset of this article, the doctrine of ademption is limited strictly to legacies of personal estate; it does not properly apply to devises of real property.⁴ Hence a discussion of the effect of a subsequent conveyance of devised real estate, though analogous to the doctrine of ademption, is to be sought elsewhere.⁵

Subsequent Conveyances.—It is sufficient here to observe that a similar result, known in the law of wills as revocation, follows a subsequent conveyance of devised property, and that, to the extent of the portion thus alienated, the will is inoperative.⁶ The variations and amplifications of this doctrine may be found in the discussion of wills and their revocation.

Leasehold Interests and Terms for Years.—The doctrine of ademption, however, applies to legacies of leasehold interests and terms for years.

Common-law Rule.—And at common law the legacy of a specific interest of this class is adeemed if the testator subsequently surrenders the lease;⁷ but even at common law this was not true in the case of a general legacy;⁸ nor where the terms of the testament included property to be acquired in the future;⁹ nor where the interest bequeathed was merely an equitable one.¹⁰

Statutory Modifications.—And in many of the states of the *Union*, as well as in *England*, the foregoing rule has been changed by legislative enactment so as to limit the doctrine of ademption to those cases where, under corresponding circumstances, the revocation of a will would be effected. The subject should,

Freer, 22 Ch. Div. 622. In the former of these two cases, the vice-chancellor says: "The order in lunacy was plain. There might, no doubt, have been a direction accompanying the order, that the proceeds of the shares were to belong to the same persons as were the owners of the original shares. But the order contains no such provision. What, then, is the result? All the authorities show that the conversion must be treated as a lawful conversion, exactly as if the testator had himself converted the shares into consols. Such an act on his part would clearly have adeemed the gift."

1. *Langdon v. Astor*, 3 Duer (N.Y.) 543.

2. **Rule Restricted to Specific Legacies.**—*Byrne v. Hume*, 86 Mich. 546; *Giddings v. Seward*, 16 N.Y. 367; *Boykin v. Boykin*, 21 S. Car. 513.

3. See the title LEGACIES AND DEVISES.

4. See *supra*, this title, *Definition*.

5. See the titles LEGACIES AND DEVISES; WILLS.

6. **Revocation by Subsequent Conveyances.**—*Pope v. Bullock*, Cro. Jac. 49 (one of the earliest cases); *Emery v. Union Soc.*, 79 Me. 334; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; *Webster v. Webster*, 105 Mass. 538; *Cozzens v. Jamison*, 12 Mo. App. 452; *Hattersley v. Bissett*, 51 N. J. Eq. 597; *Philson v. Moore*, 23 Hun (N.Y.) 152; *Burnham v. Comfort*, 108 N. Y. 535, 2 Am. St. Rep. 462; *Thompson v. Thompson*, 2 Strobb. (S. Car.) 48. The reason, as stated

by Lord Hardwicke in *Sparrow v. Hardcastle*, 7 T. R. 412, note, is that "the estate is gone, and the will has lost the subject of its operation."

7. **Ademption by Surrender of Lease.**—*Abney v. Miller*, 2 Atk. 593, where Lord Hardwicke says: "I will consider it, in the first place, as if it had been an express legacy, or gift of the term, to the three *cestui que trusts*; for, suppose he had said, I give and bequeath both the leases to my mother, etc., equally, share and share alike, and afterwards the testator renews the leases, what would have been the effect in point of law? There is no doubt but, in this case, it would have been an ademption or revocation; and even if the executrix had assented, the legatees could never have recovered the term upon the renewal by an ejectment, for the thing itself is annihilated and gone." Compare *Hone v. Medcraft*, 1 Bro. C. C. 261; *Cooper v. Mantell*, 22 Beav. 223; *Rudstone v. Anderson*, 2 Ves. 418; *Porter v. Smith*, 16 Sim. 251.

8. **General Legacy.**—*Stirling v. Lydiard*, 3 Atk. 199. Compare *Digby v. Legard*, Dick. 500.

9. **Property to be Acquired in Future.**—*James v. Dean*, 11 Ves. Jr. 383. See also *Slatter v. Noton*, 16 Ves. Jr. 199; *Colegrave v. Manby*, 6 Madd. 53.

10. **Bequest of Equitable Interest.**—*Carte v. Carte*, 3 Atk. 174.

therefore, be investigated by the practitioner in the light of statutes in force in his own jurisdiction.

c. PLEDGES AND MORTGAGES.—It seems that the mere pledging or pawning of the bequeathed property does not operate as an ademption;¹ but the mortgage of real estate which has been devised is a revocation, though *pro tanto* only, of the will.² It is, however, not an entire revocation, even where the mortgage is executed to the devisee.³ And under a statute limiting revocation by subsequent conveyance to cases where the testator so intended, it seems that a subsequent mortgage of the devised property is not even an ademption *pro tanto*.⁴

d. LOSS, DESTRUCTION, ETC.—The voluntary disposition of property after its bequest will, as we have seen, effect an ademption of the legacy; and the result is not different where the alienation of the thing bequeathed is without the agency of the testator, and even contrary to his wishes.

Ademption not Confined to Cases of Voluntary Disposition of Property.—In this particular at least, the view taken in the more modern decisions, that ademption by alienation takes place only in accordance with the intention of the testator, certainly does not apply; for the loss or destruction of the property, however much resisted by the testator, leaves the legatee shorn of his bequest.⁵

Instances of Application of Rule.—Thus, where certain specific chattels were bequeathed, and the testator, after insuring them, took them with him on a sea voyage, and the vessel was lost, and the goods and the testator with it, the court held that the legatee was not entitled to the insurance money which the executors had meanwhile collected for the loss of the goods, the latter constituting a total ademption of the legacy.⁶

So, under a specific legacy of certain cows, none of which were living at the time of the testator's death, nothing passed to the legatee.⁷

But where the testator bequeathed shares in an insurance company, which, after the making of the testament, lost its capital stock but subsequently replaced it, and the testator filled up a portion of his shares, the latter were held to pass to the legatee.⁸

3. By Transformation, Alteration, and Conversion—General Rule.—It has been shown above that the doctrine of ademption requires, in order to make the legacy effective, that the bequeathed property should exist *in specie* at the time of the testator's death.⁹

1. Pledge of Property Bequeathed. — Ashburner v. Macguire, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246*.

2. Mortgages.—McTaggart v. Thompson, 14 Pa. St. 149; Stubbs v. Houston, 33 Ala. 555.

3. Baxter v. Dyer, 5 Ves. Jr. 656, overruling Harkness v. Bayley, Prec. Ch. 514; McTaggart v. Thompson, 14 Pa. St. 149; Stubbs v. Houston, 33 Ala. 555.

4. Stubbs v. Houston, 33 Ala. 555.

5. Loss or Destruction of Subject of Bequest.—Durrant v. Friend, 5 D. & S. 343; Brady v. Brady (Md., 1894), 28 Atl. Rep. 515; Kunkel v. Macgill, 56 Md. 123. The court in the latter case said: "If the legacy is to be considered specific, then, in the event of the testator's parting with the thing or property bequeathed, or if from any cause it should be lost or destroyed, the legacy fails."

In Updike v. Tompkins, 100 Ill. 406, Walker, J., for the court, said: "The doctrine is firmly settled, and uniform in its application, that where a specific article is bequeathed, its sale, loss, or destruction cannot be replaced by substituting another article in its stead."

6. Property Lost at Sea—Legatee not Entitled to the Insurance.—Durrant v. Friend, 5 D. & S. 343.

7. Brady v. Brady (Md., 1894), 28 Atl. Rep. 515.

8. Havens v. Havens, 1 Sandf. Ch. (N. Y.) 324. In this case the court reasons as follows: "If, as is contended, there was a revocation here, it must be placed on the ground of intention. But there is nothing from which to infer such an intention. The value of the stock was gone, and the testator's filling it up would rather argue a design to keep his bequest good. It is like the case in the old books, where the testator bequeaths a ship, and afterwards, by piecemeal, repairs or renews it, so that there remains little or nothing of the old matter or stuff; his will is not by this presumed to be changed, and it is deemed to be the same ship in law. (Swinb. on Wills, p. 7, § 20; Godolph. Orph. Leg. 401.) It is argued that this is not the same stock which the testator bequeathed. I think otherwise, and that it is identically the same, to the extent of the forty shares."

9. See *supra*, this title, *Sales and Gifts*. And

Result of Strict Application of the Rule.—It will be seen that the strict application of this rule operates to extinguish the legacy not only in cases where the testator has parted with property, as is shown in the foregoing section, but also where there has been such a change in its form as leaves it no longer the specific thing which was bequeathed. It was long ago observed by an eminent judge, that "where the testator alters the form so as to alter the specification of the subject—as by making wool into cloth, or a piece of cloth into a garment—there the legacy is adeemed because the subject-matter cannot be restored to its former state."¹

Change from One Species in Legal Classification to Another.—A similar rule prevails, of course, where, though the property has undergone no change as the result of a mechanical operation such as just illustrated, it is converted by the testator from one species in legal classification into another; as, for example, where a testator who had bequeathed "all my debentures" subsequently exercised an option given him by the company who had issued them, and converted them into debenture stock, it was held that nothing passed to the legatee.² So where a testator bequeathed certain shares described as standing in the names of his trustees, to be transferred into his own name, but the transfer was never made, and the shares were paid off by the company and reinvested according to the testator's desire, it was held that the legacy was adeemed.³

Change Effected by Legislative Enactment.—But ademption does not result where the change in the legal character and classification of the property is effected through legislative enactment.⁴

Conversion without Knowledge of Testator.—And in this connection, as in the case of alienation, it is held that if the conversion of the property from one form into another is without the testator's knowledge or intention, or is tortious, it will not have the effect to adeem the legacy; as, where certain bequeathed chattels were converted into money during a period when the testator was of unsound mind, it was held that his legatee was nevertheless entitled to the money.⁵

A Change in Articles of Partnership, a portion of whose profits had been bequeathed by one of the partners, was held not to be such a transformation of the subject of the legacy as to work an ademption.⁶

4. By Removal—General Rule when the Property is Localized by the Instrument.—Where the language of the testament is such as to localize the subject of the legacy, it

see particularly *Pattison v. Pattison*, 1 Myl. & K. 12; *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246*; *Humphreys v. Humphreys*, 2 Cox 185; *Ford v. Ford*, 23 N. H. 212; *Beck v. McGillis*, 9 Barb. (N. Y.) 35.

1. Lord Chancellor Thurlow in *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246.

2. *In re Lane*, 14 Ch. Div. 856. Here the vice-chancellor said: "It appears to me that this will is not sufficient to pass the new thing which the testator acquired, and which he took in exercise of his option instead of the thing which he had bequeathed by his will. I hold it to be a substantially different thing from that which he gave, and that it does not answer the description contained in the will."

3. *Harrison v. Jackson*, 7 Ch. Div. 339. Compare *Partridge v. Partridge*, Cas. temp. Talb. 226.

4. **Change by Operation of Law.**—*Partridge v. Partridge*, Cas. temp. Talb. 226; *Bronsdon v. Winter*, Ambl. 56 (both cases involving the conversion of South Sea stock into annuities by operation of law). See also *Wal-*

ton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; *Ludlam's Estate*, 13 Pa. St. 192; *Maynard v. Mechanics' Nat. Bank*, 1 Brewst. (Pa.) 483 (where bequeathed stock was changed from state to national bank stock as the result of an act of congress). Compare *Oakes v. Oakes*, 9 Hare 666. *In re Pitkington's Trusts*, 6 N. R. 246; *Sheffield v. Coventry*, 2 R. & M. 317; *Bringham v. Cuthbert*, 6 Binn. (Pa.) 398.

5. *Jenkins v. Jones*, L. R. 2 Eq. 323. Here the vice-chancellor said: "I think that, as it was by no act of the testator that the chattels were converted, for he never intended any conversion, but intended that the specific legatee should have his farming stock, I ought to refuse the motion to vary the certificate."

6. *Backwell v. Child*, Ambl. 260. In this case, one of the partners by will gave one ninth of one twelfth of the profits to his other partners, and on the expiration of the partnership renewed it with the same individuals, giving them a greater interest than under the former articles. It was held that they were entitled to one ninth of the testator's interest.

is the general rule that the removal of the goods during the testator's lifetime results in ademption,¹ even where the removal was occasioned by the expiration of the testator's lease.²

Bequest of Bank Deposit—Effect of Withdrawal.—So, in a recent *nisi prius* case in *Pennsylvania*, it was held that a specific bequest of money deposited in a bank was adeemed by its withdrawal therefrom before the testator's death.³

Removal by Fraud, etc.—It was said in one of the early cases that "if the goods had been removed by fraud or practice on purpose to disappoint the legacy, or by a tortious act, unknown to the testator, that might have entitled her to relief."⁴ So where the testator bequeathed certain property which he had in his capital message, but which he was prevented from occupying by the refusal of his tenant to admit him, it was held that the property passed under the bequest.⁵

Removal by Necessity.—It has been said that the "removal of goods for a necessary purpose" will not result in adeeming a legacy of the same.⁶

Temporary Removal.—It has also been laid down that if the removal of the subject of the bequest is only temporary, and with the intention of returning it, the legacy will still pass.⁷

When the Element of Locality is Unimportant.—And where the circumstances were such as to exclude the notion that the element of locality had any necessary connection with the bequest, the doctrine of ademption has been held not to apply;⁸ as where there was a bequest of plate and linen in a certain house, but which were usually removed by the testator from one house to another, and happened to be at his country house—the one not described—when he died, they were held to pass to the legatee.⁹ So a bequest of "all my interest in my house at [naming the location], the furniture, books, pictures, wines, etc.," was held not to be confined in its operation to the particular articles which might be at the particular locality described.¹⁰ And where the language of the testament was, "I give to my wife all my household furniture," etc., "and all other effects of the like nature, and all wines," etc., "which shall at my decease be in or about my dwelling-house," the court inferred that the testator meant to make two sentences, and that the limitation to his "dwelling-house" applied only to the latter part, leaving the furniture, etc., which had been removed, to pass nevertheless to the legatee.¹¹

5. By Acquisition—General Rule.—Quite the opposite of the principle upon which legacies are held to be adeemed by alienation, but somewhat analogous to the grounds of ademption because of the removal or transformation of the thing bequeathed, is the rule that where the subject of the legacy is, at the

1. *Houlding v. Cross*, 1 Jur., N. S. 250; *Spencer v. Spencer*, 21 Beav. 548; *Blagrove v. Coore*, 27 Beav. 138; *Green v. Simons*, 1 Bro. C. C. 129, note; *Beaufort v. Dundonald*, 2 Vern. 739; *Shaftsbury v. Shaftsbury*, 2 Vern. 747; *Heseltine v. Heseltine*, 3 Madd. 276.

2. *Colleton v. Garth*, 6 Sim. 19*.

3. *Bell's Estate*, 8 Pa. Co. Ct. Rep. 454.

4. *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

5. *Rawlinson v. Rawlinson*, 3 Ch. Div. 302.

6. Lord Hardwicke in *Moore v. Moore*, 1 Bro. C. C. 127. See also the remarks of the same judge in *Chapman v. Hart*, 1 Ves. 271.

7. Sir John Romilly, M.R., in *Spencer v. Spencer*, 21 Beav. 548.

8. See *Cunningham v. Ross*, 2 Cas. temp. Lee 272.

9. *Land v. Devaynes*, 4 Bro. C. C. 537.

10. *Norris v. Norris*, 2 Coll. C. C. 719, 10

Jur. 629. Here Knight Bruce, V.C., says: "There may be room to suspect or conjecture that, in using the expressions 'the furniture, books, pictures, wines, etc.,' the testator had in his mind only such effects, within the description, as were then, or as at his death might be, in the dwelling-house then occupied by him; especially when their place in the will is observed. But the expressions themselves have not necessarily so restricted a meaning—have not necessarily any local reference. It would, I think, be giving too much weight to the use of the definite article, and the particular position of the phrase, so to confine the construction. The language must, I conceive, be taken to have been used generally, not with regard to any particular place, nor with regard only to such 'furniture, books, pictures, wines, etc.,' as he had when he made his will."

11. *Domville v. Taylor*, 32 Beav. 604.

time of making the testament, in the hands of another than the testator, a subsequent acquisition of it by the latter effects an ademption of the legacy.¹

Collection of Promissory Note.—Thus, a bequest of money due on a promissory note is adeemed upon a subsequent collection thereof by the testator.²

Money on Deposit—Unliquidated Claims.—The same principle applies to a legacy of money on deposit³ or of unliquidated claims.⁴

Foreclosure of Mortgage.—So the foreclosure of a mortgage by the testator adeems his prior bequest thereof.⁵

Collection of Insurance Policies.—And where a testator who had bequeathed his entire interest in two policies of insurance afterwards collected the proceeds thereof and invested them in securities, it was held that the legacy failed by reason of such collection.⁶

Doctrine Confined to Specific Legacies.—The doctrine of ademption by acquisition applies, of course, to specific legacies only, and does not obtain in the case of general and demonstrative or pecuniary bequests.⁷ This, again, necessitates the determination as to which class the legacy in question belongs—a discussion of which will be found elsewhere in this work.⁸

Distinction between Cases of Enforced and Voluntary Payments.—In some of the authorities, especially the earlier ones, a distinction is sought to be drawn between payments made by the debtor voluntarily and without action on the part of the testator, and payments which the latter requires or compels. In the decisions above referred to, it was held that enforced payments only, and not those voluntarily made by the debtor, would result in ademption.⁹ But at an

1. **General Rule in Case of Ademption by Acquisition.**—This doctrine is very old. Statements of it are found in *Crockett v. Crockett*, 2 P. Wms. 164; *Rider v. Wager*, 2 P. Wms. 328. See also the following English authorities: *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246*; *Bodrick v. Stevens*, 3 Bro. C. C. 431; *Fryer v. Morris*, 9 Ves. Jr. 360; *Barker v. Rayner*, 5 Madd. 209, on appeal 2 Russ. Ch. 123; *Gardner v. Hatton*, 6 Sim. 93. See also *Birch v. Baker*, *Moseley* 375; *Harrison v. Jackson*, 7 Ch. Div. 339. The doctrine is supported by the following American authorities: *Georgia Infirmary v. Jones*, 37 Fed. Rep. 750; *White v. Winchester*, 6 Pick. (Mass.) 48; *Ford v. Ford*, 23 N. H. 212; *Wyckoff v. Perrine*, 37 N. J. Eq. 118; *Beck v. McGillis*, 9 Barb. (N. Y.) 59; *Abernethy v. Catlin*, 2 Dem. (N. Y.) 341; *Gilbreath v. Alban*, 10 Ohio 64; *Smith's Appeal*, 103 Pa. St. 559; *Hoke v. Hermann*, 21 Pa. St. 301; *Ludlam's Estate*, 13 Pa. St. 192; *Cogdell v. Widow*, 3 Desaus. (S. Car.) 384 (*dictum*).

2. *Fryer v. Morris*, 9 Ves. Jr. 360; *Abernethy v. Catlin*, 2 Dem. (N. Y.) 341; *Hoke v. Hermann*, 21 Pa. St. 301 (where the note itself, and not merely the amount due thereon, is mentioned in the testament).

3. *Smith's Appeal*, 103 Pa. St. 559.

4. *Georgia Infirmary v. Jones*, 37 Fed. Rep. 750.

5. *Beck v. McGillis*, 9 Barb. (N. Y.) 58. Compare *Gardner v. Hatton*, 6 Sim. 93*. See *Yardley v. Holland*, L. R. 20 Eq. 428, where the testator's purchase of the equity of redemption was held to revoke a devise of his interest in the mortgaged premises.

6. *Barker v. Rayner*, 5 Madd. 209, on appeal 2 Russ. Ch. 123. Lord Eldon, in delivering the opinion on appeal, is careful to distinguish this from a case where the pro-

ceeds are bequeathed. See *supra*, this title, *Sales and Gifts*.

7. *Fryer v. Morris*, 9 Ves. Jr. 360.

For a recent example see *Ives v. Canby*, 48 Fed. Rep. 718, where a bequest of "\$2000 of the South Ward bonds of Chester, Pennsylvania," by one who owned bonds of that class to the amount of \$10,000, was held not to be adeemed by the payment of the bonds. Compare *Corbin v. Mills*, 19 Gratt. (Va.) 438.

8. See the title LEGACIES AND DEVISES.

9. See *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White & Tudor Lead. Cas., pt. 1, 246*, where Lord Thurlow, in attacking this doctrine, makes the following statement: "As to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognized by Lord Talbot and Lord Hardwicke. It is, that where a debt is bequeathed and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed; but if paid in without suit or demand there is no intention to adeem; and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment."

In *Coleman v. Coleman*, 2 Ves. Jr. 639, the lord chancellor comments on the foregoing as follows: "It has been said that the distinction is exploded. The application of the distinction may often fail extremely in the particular case; but where the testator is compelled to receive payment of the debt, a pretty strong presumption arises that there is no variation of intention; where he goes of himself, no necessity urging him, and destroys the form of the thing specifically given, that is a good ground of argument the other way. I think Lord Camden decided very rightly." See also *Thomond v. Suffolk*, 1 P. Wms. 461, where the lord

early period this distinction was questioned; and the rule seems now to prevail that payments, however procured, if accepted by the testator, leave nothing to pass to the legatee.¹

Limitations of the Rule.—There are, however, some other limitations upon the rule which are now generally recognized. The mere renewal, by permission of the testator, of notes which have been bequeathed, is not an ademption of the legacy;² nor does the exchange of one class of evidences of a bequeathed indebtedness for another have that result.³ So the transfer of bequeathed stock standing in the name of trustees, into the testator's name, has been held not to effect an ademption.⁴

V. REVIVAL OF ADEEMED LEGACIES—Subsequent Codicil Confirming the Will.—A legacy which has once been adeemed by a gift made after execution of the will is not revived by a subsequent codicil confirming the will in general terms.⁵

General Legacy Made Specific by Later Instrument.—Where a testator, having made a general bequest, by a subsequent instrument makes it specific, the ademption of the specific legacy alone will not revive the general one.⁶

Intention of Testator.—But this rule does not apply, of course, where the codicil discloses a manifest intention to renew the legacy. In such case it will pass entire notwithstanding a gift made in the interval between the will and the codicil.⁷ And the existence of a codicil, though not decisive of the question, will not be ignored where other circumstances indicate that the testator intended the legatee to have a double portion.⁸

chancellor seems to recognize an exception to the rule of ademption if the subject of the legacy "be paid in to the testator unasked for." This doctrine has also found some support in the United States. See *Stout v. Hart*, 7 N. J. L. 424, where the English cases are cited and approved; but even the *New Jersey* rule now seems to be contrary to the foregoing. See *Wyckoff v. Perrine*, 37 N. J. Eq. 122.

1. *Ashburner v. Macguire*, 2 Bro. C. C. 108, 2 White and Tudor Lead. Cas., pt. 1, 246*, where Lord Thurlow, in a vigorous judgment, rejects the attempted exception *in toto*. *Wyckoff v. Perrine*, 37 N. J. Eq. 122. And see generally the authorities cited *supra*, this title, *By Acquisition*, note 1.

2. **Renewal of Notes.**—*Ford v. Ford*, 23 N. H. 212. Compare *Gardner v. Printup*, 2 Barb. (N. Y.) 83.

3. **Change of Character of Evidence of Indebtedness.**—*Erwin's Succession*, 33 La. Ann. 63. In *Stilwell v. Doughty*, 2 Bradf. (N. Y.) 311, the assignment of another bond and mortgage was accepted by the testator in lieu of the one bequeathed. The doctrine of this case was *disapproved* in *Georgia Infirmary v. Jones*, 37 Fed. Rep. 750.

4. *Dingwell v. Askew*, 1 Cox 127.

5. *Drinkwater v. Falconer*, 2 Ves. 623. Here the court said: "A lapsed legacy, by devisee's dying in life of testator, could not be made good by such direction in a codicil, nor, by parity of reason, could a legacy adeemed, which is as much gone as a legacy lapsed."

In *Powys v. Mansfield*, 3 Myl. & C. 359, Lord Cottenham says: "The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied, formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, and so revoke any codicil

by which a legacy given by the will had been revoked, and undo every act by which it may have been adeemed or satisfied. The cases are consistent with this rule, as *Drinkwater v. Falconer*, 2 Ves. 623; *Monck v. Monck*, 1 Ball & B. 298; *Booker v. Allen*, 2 R. & M. 270. And the case of *Roome v. Roome*, 3 Atk. 181, is not an authority against these decisions, because the codicil was not considered in that case as reviving an adeemed legacy, it having been decided that there was no ademption; but the codicil was referred to as an additional proof that no ademption was intended. And as to the argument that the codicil must, at any rate, be evidence of an intention that both sums should be paid, the same answer may be given which has been given to a similar argument in other cases, namely, that the testator, if he knew the rule of law, must have known that the codicil would not revive the adeemed legacy, and therefore it was unnecessary for him to mention it. The probability, however, is that his attention being directed to the only object of the codicil, the words of confirmation of the will were introduced as words of course, without any reference to the legacy in question." See, to the same effect, *Booker v. Allen*, 2 R. & M. 270; *Crosbie v. MacDougal*, 4 Ves. Jr. 611; *Montague v. Montague*, 15 Beav. 565; *Cowper v. Mantell*, 22 Beav. 231; *Hopwood v. Hopwood*, 7 H. L. Cas. 727.

The Same Rule Prevails in the United States.—*Ware v. People*, 19 Ill. App. 200; *Paine v. Parsons*, 14 Pick. (Mass.) 318; *Unitarian Soc. v. Tufts*, 151 Mass. 76; *Langdon v. Astor*, 16 N. Y. 37; *Howze v. Mallett*, 4 Jones Eq. (N. Car.) 194; *Alsop's Appeal*, 9 Pa. St. 374.

6. *Hertford v. Lowther*, 7 Beav. 110.

7. *Dunham v. Averill*, 45 Conn. 86, 29 Am. Rep. 642.

8. *Ravenscroft v. Jones*, 4 De G., J. & S. 224, *affirming* 32 Beav. 669.

ADEQUACY.—"Adequacy" means sufficiency; sufficiency for a particular purpose.¹

ADEQUATE.—The term "adequate" signifies sufficient for the purpose required.²

1. Webster's Dict., followed in Pennsylvania, etc., R. Co. v. Mason, 109 Pa. St. 299, 58 Am. Rep. 722. In this case it was held that in an action to recover for a death caused by the explosion of a boiler it was not error to charge the jury that the railroad company was bound to maintain the machinery in such condition as to be "reasonably and *adequately* safe for the deceased to be upon and use."

2. Pennsylvania, etc., R. Co. v. Mason, 109 Pa. St. 299, 58 Am. Rep. 722.

Adequate Cause—Texas Code. (See also the title HOMICIDE.)—The expression "*adequate* cause," as used in the definition of manslaughter in the Texas Penal Code, means "such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Boyett v. State, 2 Tex. App. 100.

In Orman v. State, 24 Tex. App. 495, it is said: "Any condition or circumstance which is capable of creating sudden passion, rendering the mind incapable of cool reflection, may be *adequate* cause; and where the evidence shows a number of conditions or circumstances tending either singly or collectively to show *adequate* cause, the jury should not be restricted by the charge to a consideration of a single condition or circumstance, but should be directed to consider them all in determining the question of *adequate* cause. Williams v. State, 15 Tex. App. 617; Neyland v. State, 13 Tex. App. 536; Mills v. State, 18 Tex. App. 487; Howard v. State, 23 Tex. App. 265." This is approved in Bonner v. State, 29 Tex. App. 223. See also Cochran v. State, 28 Tex. App. 422; Hawthorne v. State, 28 Tex. App. 212.

Same—Other Causes than Those Set Out in Code.—In West v. State, 2 Tex. App. 476, it was held that there may be other *adequate* causes for sudden passion besides those instanced in article 599 of the Penal Code. The court said: "If the deceased attacked the defendant, and, after shooting at him, he, the deceased, unequivocally retreated and quit the combat as far as he could, and the defendant then, under the immediate influence of sudden passion, produced in his mind by the violent assault made upon him by McNelly, fired upon and killed McNelly, then he would not be guilty of murder, but of manslaughter."

"If this conduct on the part of the deceased had the effect to produce sudden passion in the mind of West, rendering it incapable of cool reflection, and if the killing was done under the immediate influence of that passion, then the killing would only be manslaughter. As to whether the killing was done under the immediate influence of sudden passion, rendering the mind incapable of cool reflection, arising from an *adequate* cause, were questions of fact for the jury, and should have been submitted to them."

"It may be that the judge below took the view of Paschal's Digest, article 2254, that there could be no '*adequate* cause for passion' beyond those stated in that article. If so, he was in error. Our Supreme Court says, 'Articles 2251, 2252, 2253, and 2254, Paschal's Digest, are explanatory of article 2250. We do not understand that these explanations and examples are legislative restrictions, and that in no case can a homicide be reduced from murder to manslaughter unless the party can bring himself within the rules and examples given. We regard the law rather as giving instances or examples by which the mind could be rendered incapable of cool reflection, but that, at least, we must bring each case to the test to be found in article 2250, Paschal's Digest.' Johnson v. State, 43 Tex. 615."

Same—Circumstances of Each Case.—What amount of injury must be inflicted to produce the *adequate* cause specified in the statute, cannot be fixed by any definite general rule, but must depend upon the particular circumstances of each case. The amount of the injury is therefore a question of fact for the determination of the jury, under proper instructions from the court. Williams v. State, 7 Tex. App. 396. See also Eanes v. State, 10 Tex. App. 421.

Same.—Assault and battery is an *adequate* cause. Reed v. State, 9 Tex. App. 319; Texas Penal Code, art. 597.

Adequate Provocation. (See also the title HOMICIDE.)—The court in State v. Bulling, 105 Mo. 225, a homicide case, said: "This court has held that 'legal,' 'lawful,' *adequate*, and 'reasonable,' when used as adjectives qualifying 'provocation,' are synonyms, and as a general rule, with very few exceptions, it takes an assault or personal violence to constitute this provocation."

Adequate Crossings.—In Gray v. Burlington, etc., R. Co., 37 Iowa 119, it was said: "The law nowhere defines what constitutes the other *adequate* crossings which the statute authorizes, nor has it been determined, so far as we can discover, by judicial construction. * * * Then, as an *adequate* crossing is to be constructed, and such crossing is not defined as matter of law, it must be determined as a question of fact."

Adequate Remedy at Law.—See the title EQUITY JURISDICTION.

Adequate Consideration.—See INADEQUATE CONSIDERATION—VALUABLE CONSIDERATION.

In contracts, see the title CONTRACT

As to sales and transactions by those in fiduciary positions, see the titles ATTORNEY AND CLIENT; PARENT AND CHILD; HUSBAND AND WIFE; TRUSTS AND TRUSTEES; TAX SALES; SHERIFF'S SALES; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; and UNDUE INFLUENCE.

As to inadequacy giving rise to suspicion

AD FILUM AQUÆ. (See also the titles ACCRETION; ALLUVION; BOUNDARIES; RIPARIAN RIGHTS; NAVIGABLE WATERS.)—To the thread of the stream; to the middle of the stream.¹

ADHERING. (See also the title TREASON.)—The use of this word has been confined to the expression "adhering to the king's enemies," or "the enemies of the United States," in the description of the crime of treason.²

ADIT.—An adit is an entrance or passage; a term used in mining to denote the opening by which a mine is entered or by which the water or ore is carried away; also called the drift.³

ADJACENT. (See also ADJOINING.)—Adjacent has been defined as lying near to but not actually touching, in the vicinity or neighborhood of. The term, however, is sometimes used as synonymous with "adjoining."⁴

of fraud, see the title FRAUDULENT SALES AND CONVEYANCES.

In equity, see the titles SPECIFIC PERFORMANCE; RESCISSION.

As to sale of lands, see the title VENDOR AND PURCHASER.

1. Bouvier Law Dict.

Alluvion, whether it effects an accretion to the shore, or whether it forms islands, alters the position of the original *filum aquæ*, and it will always be located by taking the middle of a line drawn at right angles from bank to bank, no matter how recently the bank may be formed. *Miller v. Hepburn*, 8 Bush (Ky.) 326; *Clark v. Campau*, 19 Mich. 329; *Knight v. Wilder*, 2 Cush. (Mass.) 202, 48 Am. Dec. 660; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Stolp v. Hoyt*, 44 Ill. 220; *Deerfield v. Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; *Bonewits v. Wygant*, 75 Ind. 41.

2. *Adhering* to the king's enemies must of necessity be against the king; and, therefore, if an Englishman assist the French, being at war with England, and fight against the king of Spain, who is an ally of the king of England, this is treason, as *adhering* to the king's enemies against the king,—for the king's enemies are hereby strengthened and encouraged,—and so is within the express words of 25 Edw. III., of "*adhering* to the king's enemies." *Vaughan's Case*, 2 Salk. 634.

Rebels, being citizens, are not enemies within the meaning of the Constitution; hence a conviction for treason, in promoting a rebellion, cannot be sustained under that branch of the constitutional definition which speaks of "*adhering* to their enemies, giving them aid and comfort." *U. S. v. Greathouse*, 2 Abb. (U. S.) 364.

3. Webster's Dictionary, followed in *Gray v. Truby*, 6 Colo. 278. And in that case it was held that an *adit* run along a lode where the same may in any manner be discovered is equivalent to a discovery shaft, whether the depth of ten feet from the surface be reached or not.

A Colorado statute provided that "an *adit* of at least ten feet in, along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft." It was held that as to the ten feet required it may be either open or under cover, or open in part and under cover in part. *Electro-Magnetic, etc., Co. v. Van Auken*, 9 Colo. 204.

4. *U. S. v. Northern Pac. R. Co.*, 29 Alb. L. J. 24; *State v. Kansas City*, 50 Kan. 522; *Camp Hill Borough*, 142 Pa. St. 517.

Adjacent Distinguished from Adjoining.—The state granted one a tract of land *adjacent* to the military boundary. In *Henderson v. Long*, 11 Fed. Cas. 1084, No. 6354, it was held that *adjacent* did not mean adjoining, but it meant "that it shall be in the neighborhood, or convenient, or near to the place mentioned in the act."

Same—Consolidation of Cities.—In *State v. Kansas City*, 50 Kan. 522, it was held that where the consolidation of *adjacent* cities is authorized, it is not necessary that the cities join one another. The court said: "It is not necessary, under the terms of the act, that the cities should have actually joined each other at the time of the consolidation; it is enough if they were *adjacent*, and that term has been defined as lying near to but not actually touching. Webster's Unabridged Dictionary; *Henderson v. Long*, 1 Cooke (Tenn.) 128; *New York v. Hart*, 16 Hun (N. Y.) 380; *U. S. v. Northern Pac. R. Co.*, 29 Alb. L. J. 24."

Adjacent in the Sense of Adjoining or Contiguous—Change of Venue.—In *Miller v. Cabell*, 81 Ky. 184, it was held that where change of venue was authorized to an *adjacent* county, the change must be to an adjoining county. The court said: "The word *adjacent* in penal statutes has sometimes been construed, and very properly, as meaning near by although not adjoining; but the evident meaning of the statutes before us is to confine the parties to the trial of the cause in the county in which the action is brought, or to an adjoining county, unless some available objection is made or consent given."

Same—Adjacent Lots.—A statute provided that *adjacent* lots might be annexed to a borough. It was held that the word *adjacent* was used "in its primary sense as adjoining or contiguous." But it was also held that a number of contiguous properties might be annexed in a proceeding, though some of them did not adjoin the borough. *Camp Hill Borough*, 142 Pa. St. 517.

Under the Act of 3d of April, 1832, for the opening of streets, etc., in New Orleans, which provides that a contribution to pay the expense of opening shall be assessed on the lots and premises *adjacent* to and fronting that part of the street so opened, straightened, or improved, it was held that the only

ADJACENT SUPPORT.—See the title LATERAL AND SUBJACENT SUPPORT.

lots subject to assessment were those to which a new front was given or added to by the new street. "We think," said the court, "the word *adjacent*, applied to lots, is synonymous with the word 'contiguous.' In another and more general relation it might have a more extended meaning; but in the sense in which it is used—to wit, to discriminate as to locality from other lots—we can only give this meaning to it in a statute like this, which undertakes to divest a right of property, and is consequently subjected to strict rules of interpretation." *In re Municipality for Opening Roffignac Street*, 7 La. Ann. 76.

Same—Adjacent to Land under Water.—An act prohibited a grant of land under water to any persons other than the proprietors of *adjacent* lands. By the use of the word *adjacent* it was held that it was intended to restrict the grant to owners of land bordering upon or adjoining the water. The court said: "The interpretations given to the word *adjacent* by Walker are, 'lying close,' 'bordering upon something.' The legislature evidently intended to restrict the grant to the owners of the lands bordering upon, or adjoining, the water covering the subject of the proposed patent." *People v. Schermerhorn*, 19 Barb. (N. Y.) 556. But in *New York v. Hart*, 16 Hun (N. Y.) 380, it was held that the term "*adjacent owner*," as used in the act to designate the persons entitled to purchase land under water, is not limited to the owner of the land lying next to it, *e.g.*, the owner of the land between high and low water line, but means the owner of the upland which is bounded by the river.

Where a party enters without right upon land under water, and fills it up, he does not thus become the proprietor of *adjacent* lands. In such a case the court said: "As between him and the state, it still legally remained land under water, to be dealt with as such." *People v. Land Office Com'rs*, 135 N. Y. 447.

The fact that the owner of land bounded by a navigable river has conveyed to a railroad company for the use of its road a strip of land along the water front, over which its route lies, does not deprive him of the character of riparian owner, within the meaning of the statute in reference to grants of lands under water, nor does it give to the company that character; although the title granted to the company is a fee, it holds and can only use the land for the purposes of its road. *New York Cent., etc., R. Co. v. Aldridge*, 135 N. Y. 83. See also *Saunders v. New York Cent., etc., R. Co.*, 135 N. Y. 613.

Street Improvements.—A city charter provided that for street improvements the city might levy a special tax on the property abutting on such street, and according to the amount and cost of the work done "in front of or *adjacent* to such lands." In *Clapton v. Taylor*, 49 Mo. App. 118, the court said: "The word *adjacent* in the foregoing section of the charter has reference to the work done on the street within a certain length,

which is to be levied as a tax on the abutting property, according as the number of front feet is to the price of the whole work, both immediately in front and *adjacent*."

Turnpike Act.—A turnpike act provided a penalty for turning off the pike and passing the gates on *adjacent* ground with the intent to defraud the company of toll. It was held that turning off a little more than half a mile from the gate was turning off on ground *adjacent* to the gate. The court said: "The word *adjacent* means lying close or near, and is used relatively to the gates on the turnpike, which are ten miles apart." *Carrier v. Schoharie Turnpike Co.*, 18 Johns. (N. Y.) 57.

Adjacent to Railroad Line.—A *United States* statute granted to a railroad the right to take timber from *adjacent* lands for the construction of the road. It was contended that the word *adjacent* limited the right to take timber on lands near the road-bed in the construction of which the timber was used. The court said: "The license to take timber is not, by the language of the act, limited to what is necessary for the construction of such portion of the road as is *adjacent* to the place from which the timber is taken, but extends to the construction of the entire 'railroad.'" *U. S. v. Denver, etc., R. Co.*, 150 U. S. 11.

Same—Not Equivalent to Adjoining.—Hoyt, J., in *U. S. v. Northern Pac. R. Co.*, 29 Alb. L. J. 24, construing the word *adjacent* in the company's charter, which granted the privilege of cutting timber from *adjacent* public lands for use in the construction of the work, held that it had a broader meaning than "adjoining," and was synonymous with "neighboring," and said: "Congress, in enacting section 2 of defendant's charter, saw fit to use the word *adjacent*; and in determining the intent of this section we must investigate the meaning of the word *adjacent* as there used. Sometimes it has a meaning given it which is synonymous with the word 'adjoining,' but it is as often applied in a more extended sense, as in the 'vicinity' or the 'neighborhood' of, while 'adjoining' and 'contiguous' are never used in such enlarged sense. Congress, then, having selected from several synonymous words the one having, as applied to the subject in the section in which it is used, the broadest meaning and most extended signification of the whole, must be held to have intended the broadest rather than the more restricted signification to be given to it in the interpretation of said section; and therefore to hold that this section restricted the defendant to lands adjoining or contiguous to the line of the road, would be contrary to all rules of interpretation; while if we apply the usual rules we must hold that its rights are extended by this section, beyond lands adjoining or contiguous to its line of road, to lands anywhere in the vicinity or neighborhood of its said line of road. Was the land in question in the neighborhood of defendant's line of road, within the meaning of section 2? The de-

ADJOINING. (See also ABUT—ABUTTER; ADJACENT; CONTIGUOUS; and the titles ABUTTING OWNERS; SPECIAL ASSESSMENTS.)—Contiguous; touching; in actual contact with.¹

sign of this question was to allow the company to take timber from public lands to build its road, and when we once concede that under this section the defendant is authorized to go beyond adjoining lands, as the use of the word *adjacent* compels us to do, it must follow that the use of the more enlarged word was for the benefit of the Northern Pacific Railroad Company, and it must be so construed by the court as to effect the object of its enactment. And we are of opinion that timber land nearest to the line of the road must be held to be neighboring timber land, even although there may intervene large tracts of land not timbered. If this be so, then under the facts of these cases, as above stated, the lands from which the timber in question was cut were in the neighborhood of the line of the road where it was used, and therefore *adjacent* thereto, within the meaning of section 2 of the charter of the defendant Northern Pacific Railroad Company. Besides, under the facts proven in these cases, the lands in question would probably come within a more restricted use of the word *adjacent*, for the line of defendant's road runs for several hundred miles through a country almost entirely destitute of timber, and the belt upon which this timber in question was cut was the first timber land near said road reached by it in the course of its construction; therefore though this timber be more than one hundred miles from the line of defendant's road, we are of the opinion that it must under the circumstances be held to be '*adjacent* thereto,' within the meaning of section 2 of defendant's charter."

In *U. S. v. Denver, etc., R. Co.*, 31 Fed. Rep. 889, it is said: "In a standard dictionary an illustration of the larger meaning of the word is given in this form: 'Things are *adjacent* when they lie near to each other without actually touching; as *adjacent* fields, *adjacent* villages, etc.' It seems unreasonable to say that in this connection the word refers to the government subdivisions lying next the right of way; and, if we should so declare, it would be difficult to point out what subdivisions are meant. Accepting the larger meaning of the word, the right to take timber from public lands under these acts extends naturally some distance from the right of way, and probably within ordinary transportation by wagon." To the same effect is *U. S. v. Lynde*, 47 Fed. Rep. 300.

Same—Dependent on Facts of Case.—"What is *adjacent* land, within the meaning of the statute, must depend on the circumstances of each particular case. Where the *adjacent* ends and the non-*adjacent* begins, may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, my impression is that the term *adjacent* ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially

benefited by its construction." *U. S. v. Chaplin*, 31 Fed. Rep. 896. But compare the dictum in this case with *U. S. v. Denver, etc., R. Co.*, 150 U. S. 11, set out above.

Same—Half a Mile Distant.—The owner of property half a mile distant from a railroad is not an *adjacent* occupant or proprietor within a statute permitting such occupant to recover damages from a railroad for injuries arising from the failure of the railroad to fence, as provided by statute. *Continental Imp. Co. v. Phelps*, 47 Mich. 300.

Adjacent Streets.—A street railroad's charter authorized the company to erect power and car houses in the "streets *adjacent* to M. street, west of the hill." It was held that as there was no street touching M. west of the hill, the word *adjacent* was to be construed as meaning the neighboring parallel streets. *Brooklyn Heights Co. v. Brooklyn (Brooklyn City Ct.)*, 18 N. Y. Supp. 876.

Ditches.—An *Ohio* statute permitted the township trustees to construct ditches or watercourses within the township upon petition of *adjacent* owners. It was held that one might petition though the ditch was confined to his own land. The court said: "Furthermore, it is said that the petition must be filed by a person owning lands *adjacent* to the proposed ditch, or the ditch to be cleaned, and that Perkins's lands are not *adjacent*. But this legislation had for its foundation the public health, welfare, and convenience, which may be promoted as well where the drain is confined to one owner as where it extends to the lands of several owners, and by the terms of the act one owner may petition. And the word *adjacent* was properly used as including lands through which a ditch passes, as well as those lying near to the ditch." *Kent v. Perkins*, 36 Ohio St. 639.

1. Ground cannot properly be said to *adjoin* a house unless it be absolutely contiguous, without anything between them. *Rex v. Hodges, M. & M.* 41, 22 E. C. L. 330.

Adjoining means "touching." *McCullough v. Absecon Beach Land, etc., Co.*, 48 N. J. Eq. 187.

Distinguishing from Adjacent. (See also ADJACENT.)—The word *adjoining*, in its etymological sense, means touching or contiguous, as distinguished from lying near or "*adjacent*." *Rex v. Hodges, M. & M.* 341, 22 E. C. L. 330; *Peverelly v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 59; *Holmes v. Carley*, 31 N. Y. 289; *Matter of Ward's Petition*, 52 N. Y. 397; *Walton v. St. Louis, etc., R. Co.*, 67 Mo. 58. But compare *Dann v. Pitt, & Allen (New Bruns.)* 385.

"Mr. Crabbe, in his *English Synonyms*, classifies together '*adjacent*,' '*adjoining*,' and '*contiguous*;' and, after giving the etymology of these words, illustrates the difference between them in the following manner: 'What is adjacent may be separated by the intervention of some third

ADJOURN—ADJOURNMENT. (For a full treatment of the subject of adjournment of courts, see 1 ENCYC. OF PL. AND PR. 238; for adjournment by jus-

object: "They have been beating up for volunteers at York, and the towns adjacent, but nobody will list" (Granville). What is *adjoining* must touch in some part: "As he happens to have no estate *adjoining*, equal to his own, his oppressions are often borne without resistance" (Johnson). What is contiguous must be fitted to touch entirely on one side: "We arrived at the utmost boundaries of a wood, which lay contiguous to a plain" (Steele). Lands are adjacent to a house or town; fields are *adjoining* to each other; houses contiguous to each other." *Peverelly v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 69.

Same—Local Assessments. (See also the title SPECIAL ASSESSMENTS.)—In *Matter of Ward's Petition*, 52 N. Y. 398, it was held that a statute providing for the assessment of the expense of widening a street upon the *adjoining* property authorized an assessment of only property contiguous to the street.

The appellant owned premises separated from a street by a wall five feet high, belonging, together with the land on which it stood, to another person. The appellant had no direct access from his premises to the street, but in order to reach it he had to pass for a short distance down a public footpath, or over other intervening land. It was held that the appellant was not the owner of premises "fronting, *adjoining*, or abutting" on the street within the meaning of section 150 of the Public Health Act, 1875, and therefore was not liable to contribute to the expenses of sewerage and paving the street under that section. *Lightbound v. Higher Bebington Local Board*, 14 Q. B. Div. 849.

A was the owner of three houses fronting a street called York place, and *adjoining* or abutting at the rear upon a footpath at the end of a street called St. Julian street, which formed a *cul-de-sac*. The ground at the back of these houses was five feet above the level of St. Julian street, and the wall, which was the property of A, was about twelve feet high on the outside. There was no access from A's premises to St. Julian street. It was held that his premises *adjoined* or "abutted on" St. Julian street, and consequently that he was chargeable with his proportion of the expenses of paving, etc., that street. *Newport Urban Sanitary Authority v. Graham*, 9 Q. B. Div. 183.

The word *adjoining* as used in acts authorizing the improvement of public streets and the assessment of part of the cost thereof on the property *adjoining*, is to be taken as meaning such property as is in immediate contact with the street improved; when there is an intervening public space, such property, although it may be adjacent to, is not *adjoining*, the improvement. *Johnson v. District of Columbia*, 6 Mackey (D. C.) 27. The court here said: "The word *adjoining* implies a closer relation than 'adjacent,' which is not inconsistent with the idea of

something intervening; while *adjoining* necessarily implies contact. The verb is defined by Webster: 'To lie or be next to, or in contact; to be contiguous, as a farm adjoining to the highway;' and Blackstone is given as the authority for this example."

Same—Change of Venue.—In *Raab v. State* 7 Md. 483, this word received a judicial construction in accordance with the foregoing definition. The constitution of the state authorized the removal of an indictment from the court of one county to that of an *adjoining* county. Raab, being indicted in Baltimore city, claimed this right of removal, and the case was transmitted to the court of Anne Arundel county as an *adjoining* county. On his conviction there, a motion in arrest was interposed, on the ground that Anne Arundel was not *adjoining* Baltimore city, which is a county in law. The northern boundary of Anne Arundel county is the south bank of the middle branch of the Patapsco river; and the line of Baltimore county began at that bank and included all the river and extended many miles to the north. When Baltimore city was carved out of Baltimore county, its southern boundary stopped at the north bank of the river, thus leaving either the entire river or the southern half of it still in Baltimore county, which constituted, as the court held, an intervening jurisdiction between the boundaries of Baltimore city and Anne Arundel county, and prevented them from being *adjoining* jurisdictions within the meaning of the constitution.

Same—Adjoining the Ocean.—"The word *adjoining* implies a closer relation than 'adjacent.' The latter word, uncontrolled by the context or subject matter, is not inconsistent with the idea of something intervening. But the primary meaning of the word *adjoining* is to lie next to, to be in contact with, excluding the idea of any intervening space. *Johnson v. District of Columbia*, 6 Mackey (D. C.) 21; *People v. Schermerhorn*, 19 Barb. (N. Y.) 556; *Matter of Ward's Petition*, 52 N. Y. 395; *State v. United New Jersey R., etc., Co.*, 43 N. J. L. 110. In *State v. Brown*, 27 N. J. L. 13, the Supreme Court, in construing the words 'lands *adjoining* the shore line' of tidal waters, held that these words signified lands reaching to the edge of the water at ordinary high water. The description of the premises in the Corlies survey, with the superadded words 'bounded on the ocean,' and the map accompanying the recorded survey indicating a line on the ocean, conclusively establish the easterly line of the Corlies survey upon the line of ordinary high water in the ocean. Under such a description title is conveyed to ordinary high-water mark, with all the incidents of riparian ownership." *Yard v. Ocean Beach Assoc.*, 49 N. J. Eq. 306.

Same—Law of Burglary. (See also the title BURGLARY.)—In *Devoe v. Com.*, 3 Met. (Mass.) 326, the court held the words "ad-

tice of the peace, see 1 ENCYC. OF PL. AND PR. 274; for adjournments by referees and arbitrators, see 1 ENCYC. OF PL. AND PR. 274; for adjournments of *quasi-*

joining to or occupied with" a dwelling to mean something more, as used in a statute against burglary, than contiguous or adjacent. The court said: "The words '*adjoining*' to or occupied with' are to be taken in connection, and tend to explain each other. They mean something more than adjacent or contiguous, which they might be if there were a solid wall between, or were in another occupation. They are words well calculated to bring the case within the common-law description of burglary, before cited from 2 East P. C. 492; viz., outhouses *adjoining* to the dwelling-house and occupied as part thereof." To the same effect see *People v. McGra*, 1 Mich. (N. P.) 28.

Same—Separated by a Narrow Walk.—In the case of *Rex v. Hodges*, M. & M. 341, 22 E. C. L. 330, the prisoner was indicted, on the 7th and 8th George IV., c. 29, § 38, for stealing pear-trees described, in one of the counts of the indictment, as growing on ground *adjoining*, etc., to a dwelling-house. It was held that *adjoining* imported "actual contact," and therefore that ground separated from a house by a narrow walk and paling with a gate in it was not within the meaning of the act.

Same—Separated by a Street.—In *Lucas v. Hunter*, 153 Pa. St. 293, it was held that a mechanic's lien filed against houses situated in three blocks, and apportioned among the blocks and among the houses in each block, was invalid, as the statute allowed a lien for two or more *adjoining* houses, and buildings separated by a public street are not *adjoining*.

Separated by a Small Stream.—In *Board of Health v. Lee*, 1 Exch. Div. 336, a house was held to *adjoin* a street, although separated by a small stream, when connected with the street by two bridges.

Arson.—An indictment charging the defendant with an attempt to set fire to an outbuilding *adjoining* the dwelling-house, was held not to be supported by evidence that the building was near to, but not in contact with, the dwelling-house. The court said: "The motion for the discharge of the respondent should have been granted. There was a variance between the indictment and the proof. The outbuilding did not *adjoin* the dwelling-house. *Adjoining* is a synonym for 'adjacent to,' 'contiguous.' It was not adjacent to or contiguous, that is, in contact with the house. *Arkell v. Commerce Ins. Co.*, 69 N. Y. 192; *Rex v. Hodges*, M. & M. 341, 23 E. C. L. 330; *Peverelly v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 59, 2 Russ. Cr. 557, 561." *State v. Downs*, 59 N. H. 321. It will be observed that the court, while making in its decision the distinction of the cases set out *supra* between "adjacent" and *adjoining*, says in the course of its opinion that they are synonymous.

In the Sense of Near—Description of Lot.—Where the question on trial was as to the boundary of a town lot, and the deed under which one of the parties claimed contained

two descriptions, one saying it *adjoined* a certain other lot, and another giving a different description, it was held that the court did not err in leaving it to the jury to decide which description they thought was intended by the parties to the deed—whether the parties in using the word *adjoining* might not have meant "near," as the word is sometimes used in common parlance. *Massey v. Belisle*, 2 Ired. (N. Car.) 170.

Same—Adjoining a City.—But in *Truax v. Pool*, 46 Iowa 256, it was held that a homestead situated eighty rods from the boundary line of a city was not within the city charter which provided that land laid off into town lots *adjoining* to the present boundaries of the city should be a part of the city. The court said: "But appellants say that *adjoining* does not mean to touch, but to be near to. In support of this position they cite *Blanchard v. Bissell*, 11 Ohio St. 96, in which it was held that an unincorporated town plat was contiguous to a city, although separated by a navigable river more than eighty rods wide. But the distinction between that case and this is, to our mind, entirely plain. The question in that case arose upon the annexation of certain territory which included an unincorporated village. The city by its charter extended to the middle of the river. The court said: 'The annexation consists in an extension of the original boundaries so as to include the whole of the river, and a considerable tract of land on its southeast side. There is no territory intervening between that which is annexed and the original city limits. All the parts of the annexed territory are in immediate contact with each other.' We are of the opinion that the words '*adjoining* to the present boundaries,' as used in the charter of Davenport, do not simply mean near to, but next to."

Same—Eminent Domain.—"The next question is as to the meaning of the word *adjoining*; for the act only authorizes the condemnation of lands *adjoining* the road, etc. The defendants claim that it means 'near;' the prosecutors, that it means 'touching,' 'in contact with.' The latter is the proper signification, and it is the more readily to be adopted in this case because it thus restricts the grant of eminent domain, which is never to be extended by unnecessary implication." *State v. United New Jersey R., etc., Co.*, 42 N. J. L. 112.

Distinguished from Appertaining.—In *Miller v. Mann*, 55 Vt. 475, it was held that a deed conveying a house and lands *adjoining* did not convey a small island in a river back of the land. The court said: "It is also claimed that this expression 'lands *adjoining*' is equivalent to the expression 'and all lands thereto appertaining.' The words *adjoining* and 'appertaining' are not synonymous. As descriptive words in a deed, *adjoining* usually imports contiguity; 'appertaining,' use, occupancy. One thing may appertain to another without *adjoining* or touching it. Proof that pieces of land *adjoin* would not be

judicial officers, boards, etc., see 1 ENCYC. OF PL. AND PR. 248, and, in this work, the titles MEETINGS; SCHOOLS; for continuances, see ENCYC. OF PL. AND PR., title CONTINUANCES; as to the power of judges, see the title JUDGE; for adjournment of sheriff's sales, see the title SHERIFF'S SALES; for adjournment of tax sales, see the title TAX SALES; for adjournment of legislature, see the titles LEGISLATURE; STATUTES.)—An adjournment is the suspension of the session of a judicial tribunal or other official body, until a day certain, or indefinitely where the adjournment is without day.¹

proof that one appertained to the other. Neither in literal meaning, nor as used in deeds, are they equivalent. Under the rules of construction applicable to deeds, in an action of trespass, the term 'lands adjoining' was too indefinite to make the grant extend beyond the *medium filum* of the main channel of the river. The term cannot be construed literally, as there is no limit to *adjoining* land."

Synonymous with Contiguous. See *Josh v. Josh*, 5 C. B. N. S. 454, 94 E. C. L. 454

Escape—House of Correction.—In *Com. v. Curley*, 101 Mass. 24, it was held that the whole enclosed yard of a house of correction, suitably fenced and protected, though divided by a public street, was *adjoining* and appurtenant to the house, within the meaning of those terms as used in a statute providing against escapes.

Adjoining Municipality.—An Ontario statute required that before the final passing of a by-law requiring the assent of the ratepayers, a copy thereof should be published in a public newspaper either within the municipality or in the county town, or published in an *adjoining* local municipality. A by-law of the township of South Norwich was published in the village of Norwich, in the county of Oxford, which does not touch the boundaries of South Norwich, but is completely surrounded by North Norwich which does touch said boundaries. It was held, affirming the decisions of the Court of Appeal, that as the village of Norwich was geographically within the *adjoining* municipality, the statute was sufficiently complied with by the said publication. *Huson v. South Norwich Tp.*, 21 Can. Supreme Ct. 669.

Touching at the Corners.—In *Holmes v. Carley*, 31 N. Y. 289, it was held that two towns contiguous at either of the corners thereof were *adjoining* towns.

English Land Act.—This statute provides in substance that superfluous lands taken by corporations under eminent domain shall be first offered by the promoters to the *adjoining* owners before being otherwise disposed of. The word *adjoining* in this connection has received construction; where, by agreement, a wall has been built on land dividing the property of an individual from that of a railway company, and the individual and the company are, by the same agreement, the joint owners of the land on which the wall is built, that circumstance does not affect the individual so as to prevent him from being considered an *adjoining* owner. *London, etc., R. Co. v. Blackmore*, L. R. 4 H. L. 610. Lessees of lands sepa-

rated from railroad land by a private road, of which they had the exclusive right of user during their tenancies, were held to be owners of "immediately *adjoining* land." *Coventry v. London, etc., R. Co.*, L. R. 5 Eq. 104. See also *Hooper v. Bourne*, 3 Q. B. Div. 258, L. R. 5 App. Cas. 1; *Hobbs v. Midland R. Co.*, 20 Ch. Div. 418.

"Adjoining" in the Sense of "Fronting."—By a provision of a city charter the expense of constructing sidewalks was to be assessed against parcels of land *adjoining* said sidewalks. The constitution provided for the assessment of lands "fronting" on sidewalks. It was held that the word *adjoining* as used in the charter was the equivalent of the word "fronting" as used in the constitution. *Scott County v. Hinds*, 50 Minn. 204.

Adjoining Synonymously with Along.—In *Walton v. Cincinnati, etc., R. Co.*, 67 Mo. 58, it was held that the words "along" and *adjoining*, as appeared from the context, were used synonymously in the statute, both words implying contiguity, contact.

1. 1 ENCYC. OF PL. AND PR. 238.

An *adjournment* is a putting off until another time or place. *People v. Martin*, 5 N. Y. 26; *Wilson v. Lott*, 5 Fla. 302.

Adjournment Not Necessarily to a Day Certain—Suspension.—"It is true that the primary signification of the term *adjourn* is to put off or defer to another day specified. But it has acquired also the meaning of suspending business for a time,—deferring, delaying. Probably, without some limitation, it would, when used with reference to a sale like the present, or any judicial proceeding, properly include the fixing of the time to which the postponement was made." *La Farge v. Van Wagenen*, 14 How. Pr. (N. Y. Supreme Ct.) 58. The court in this case refused to set aside a sale where the officer had *adjourned* the sale generally without fixing a particular day, but had advertised the *adjournment* with the *adjourned* day of sale in a newspaper.

Adjournment—A Part of the Session.—An *adjournment* is no more than a continuance of the session from one day to another, as the word itself signifies. 1 Black Com. 186, quoted in the dissenting opinion of Wright, C.J., in *Cheyney v. Smith* (Arizona, 1890), 23 Pac. Rep. 685; and in *People v. Draper*, 28 Hun (N. Y.) 3; *Trammell v. Bradley*, 37 Ark. 379.

In *Lansford Borough*, 141 Pa. St. 138, the court quoted the above definition of Blackstone, and said: "The *adjournment* of the commissioners is analogous to the *adjournment* of a court. The session is, in law, continuous. The *adjournment* from day to day

is a matter of convenience, of which parties, jurors, and witnesses are bound to take notice."

An *adjourned* session is considered as the same session as that at which the *adjournment* was made. *Mechanics' Bank v. Withers* 6 Wheat. (U. S.) 106.

Same—Power of Court.—In *Van Dyke v. State*, 22 Ala. 57, it was held that the court had power to vacate at an *adjourned* term an erroneous judgment rendered during the regular term. The court said: "The *adjourned* term, as its name manifestly imports, is but a continuation of the previous term, and although it is continued for the trial of the causes on a particular division, it by no means follows that the power of the court over the business which has been done and the entries made is taken away. It is the same term prolonged; and although prolonged for purposes specified in the order, and although the court, as a matter of justice to the counsel and suitors, would not take up any causes not set for trial at such *adjourned* term, yet as its session or term has not finally closed, it has power over its record to make it conform to the truth and to see that injustice is not done by allowing an erroneous judgment to stand against a party, but should, as in the case before us, *mero motu*, vacate it, and set down the cause for a rehearing at the regular succeeding term. If the term has not closed and the court is still in session, it is not concluded by its previous order, but has power to rescind it; for so long as the term continues, this power necessarily results. It is not like the case of a special distinct term held after the regular term has been brought to a final close. In such case the court would be concluded by the final *adjournment*." See also, to the same effect, *Wilson v. Lott*, 5 Fla. 302.

Adjournment Distinguished from Recess.—A *New York* statute provided that the jury should be admonished at each *adjournment* of the court that they must not converse among themselves on any subject connected with the trial. It was held that an *adjournment* from day to day was meant, or one for some length of time, and not a recess taken during a single day's session. *People v. Draper*, 28 Hun (N. Y.) 3.

Adjourned Held Equivalent to Postpone.—In a *New Jersey* statute prescribing the length of time for which a justice may grant *adjournments*, the term *adjourn* was held equivalent to "postpone." The court said: "If there could be any doubt upon the import of the term *adjourn*, it is explained in the subsequent clause of the section. There the word 'postpone' is used to signify precisely the same thing. The definition of this word, according to Johnson, is to put off, to delay. It will read, according to this definition: The justice may put off, may delay, the trial for any time not exceeding fifteen days." *Bisham v. Tucker*, 2 N. J. L. 238.

When Adjournment is Complete.—A reception of a verdict after the crier had announced the *adjournment*, but before the judge had left the bench, and while counsel was present, was held no error. The court said: "What is an

adjournment? It is an act, not a declaration. In the proper order of procedure the announcement of the crier precedes, and does not follow, *adjournment*. It is but a proclamation to those in attendance, of the time to which the court intends to *adjourn*, and gives notice of the formal act of *adjournment*. But *adjournment* is the act of separation and departure, and until this has fairly taken place the act is incomplete. The fact of giving the order of *adjournment*, and the act of rising to the feet preparatory to separation, is not actual *adjournment*, if the judges are yet on their bench, and those remain who are concerned in the business before them. The court is not yet fully dissolved, and can recall the order of *adjournment*. The parties before them are yet subject to their orders. Such was this case. Just as the crier had finished pronouncing the *adjournment*, and as the judges had risen to their feet, the jury entered with their verdict. The counsel were present, the judges still on their bench, and the members of the bar yet within it. The judges immediately resumed their seats and directed the prothonotary to take the verdict, which he did, and recorded it in the presence of the counsel of both parties. Under these circumstances the receiving of the verdict was good, whether the counsel objected or did not." *Person v. Neigh*, 52 Pa. St. 200.

Additional Term, Special Term, and Adjourned Term.—In *Harris v. Gest*, 4 Ohio St. 473, Thurman, C. J., distinguishes an *adjourned* term from the additional term, provided for by section 5 of the *Ohio* Act of January 31, 1854 (52 Ohio L. 10). In the case of the former the sitting after the *adjournment* is a prolongation of the regular term, and in contemplation of law there is but one term; but the latter is a distinct term, and not a prolongation of the regular term. So special terms provided for by many of the statutes must be distinguished from an *adjourned* term, as it is apparent that the same difference exists between them and the *adjourned* term as between the additional term of the *Ohio* statute and the *adjourned* term.

Distinction between Prorogation and Adjournment or Continuance of Parliament.—"The diversity between a prorogation and an *adjournment* or continuance of the parliament is, that by the prorogation in open court there is a session, and then such bills as passed in either house, or by both houses, and had no royal assent to them, must, at the next assembly, begin again." *Bac. Abr.*, title Court of Parliament F, quoted in *Wetmore v. Story*, 22 Barb. (N. Y.) 494, and in that case the court said that the same doctrine applied to the common council of New York city.

Extension of Term.—The Constitution of *Arkansas* provided that "every order or resolution in which the concurrence of both houses of the general assembly may be necessary, except question of *adjournment*, shall be presented to the governor, and before it shall take effect be approved by him." It was held that a resolution of the legislature extending a session did not require the approval of the governor. The court said:

ADJUDGED.—Deemed, decided, determined, held, declared. Usually applied to the declaration or sentence of a court.¹

"Is the matter of the concurrent resolution a question of *adjournment*, as contemplated by the constitution? 'An *adjournment*,' says Mr. Blackstone, 'is no more than a continuance of the session from one day to another, as the word itself signifies.' The concurrent resolution had for its sole object the continuance of the session from the ninth of March, 1881, when it would have otherwise expired, till the nineteenth of the same month. This is clearly germane to the matter of *adjournment*, and the resolution did not require the approval of the governor. This was the construction put upon the constitution by the legislative department, in a matter regulating its proceedings, and also by the executive." *Trammell v. Bradlev*, 37 Ark. 379.

Concurrent Act of Both Houses.—*Adjournment*, as used in the *South Carolina Constitution* with relation to the governor's approval of acts, means an *adjournment* by the concurrent act of both houses of the general assembly. *Corwin v. Comptroller Gen.*, 6 Rich. (S. Car.) 390.

1. *Edwards v. Hellings*, 99 Cal. 215.

Judgment.—Where a judgment read, "Whereupon, etc., it is considered by the court here that the said Z. P. be confined and imprisoned at hard labor in the state prison for the term of ten years," on objection that he was not by the court *adjudged* guilty of a misdemeanor, the court said: "Our statute does not require such language to be introduced either into the annunciation or record of the sentence. No judgment of the form contended for can anywhere be found. The word *adjudged* is here used by the legislature, perhaps not very aptly, as synonymous with 'deemed,' which latter word is frequently found in correspondent places. They have so employed the word *adjudged* in the act respecting lotteries, Rev. Laws 272, § 1: 'All lotteries shall be and are hereby *adjudged* to be common and public nuisances.'" *State v. Price*, 11 N. J. L. 217.

Verdict—Disqualifying Witness.—Where a statute disqualifies as a witness any person who "shall, upon conviction, be *adjudged* guilty of perjury," a person is not rendered incompetent until by judgment sentence has been pronounced upon him; a verdict of guilty alone is not sufficient. In this case the court said: "The learned counsel for the plaintiff in error contends that there is no difference in meaning between the words 'deemed' and *adjudged* used in the penal enactments of the Revised Statutes, and urges that the word *adjudged* in the section under consideration should be read as if written 'deemed.' It is, perhaps, enough to say that it, in fact, reads *adjudged*, and that whatever difference there is between the two terms is in favor of our interpretation of the statute. Moreover, the phrase 'deemed' is not in its meaning, when used in legislative expression, so much more favorable to the plaintiff in error as to turn us from our view of the question. 'To damn' or 'condemn' is 'to deem, think, or judge any one to be guilty, to be criminal; to give

judgment, or sentence, or doom of guilt; to *adjudge* or declare the penalty or punishment.' (Rich. Dict. in voce *Damn*.) And 'Judge not, that ye be not judged,' of our New Testament, is 'Nyle ye *deme*, that ghe be not *demed*,' of Wicliffe." *Blaufus v. People*, 69 N. Y. 107.

Act of Court.—In *Searight v. Com.*, 13 S. & R. (Pa.) 301, it was held that the jury could not convict one of two defendants and acquit the other, and direct the latter to pay costs. The court said: "But the Act of the 18th of March, 1818, which directs that a jury fee of four dollars be included in the costs of prosecution, uses the word *adjudged*, which can be predicated only of an act of the court."

Adjudged Invalid.—In *Webb v. Bidwell*, 15 Minn. 479, it was held that the words "*adjudged* invalid," as used in a tax statute, embraced only a judgment of a court of competent jurisdiction.

The Sum Adjudged.—The sum *adjudged* to be paid on a conviction "refers to the sum in which the party is convicted, and does not include the costs." *Reg. v. Warwickshire*, 6 El. & Bl. 837.

"I think the sum *adjudged* means the sum in respect of which the order of adjudication is made." *Ricardo v. Board of Health*, 2 H. & N. 264.

Exclusion of Chinese—Adjudged in the Sense of Found, Decided.—A United States statute provided that any Chinese person convicted and *adjudged* to be unlawfully in the United States should be imprisoned, etc. It was held that the proceeding was summary, and that the statute was of a political and not a criminal nature, and could not be made the basis of an indictment. The court said: "What is termed 'being convicted and *adjudged*' means 'found,' 'decided' by the commissioner representing not the criminal law, but the political department of the government." *U. S. v. Hing Quong Chow*, 53 Fed. Rep. 234.

Pleading.—In *Edwards v. Hellings*, 99 Cal. 215, it was held that in an action upon a judgment the complaint must show that a final judgment has been recovered, and that an allegation that in the prior action the court *adjudged* that the defendant should pay a certain sum of money, without the use of the word "judgment," was insufficient. The court said: "But we cannot imagine how the most accomplished pleader could manage to plead a judgment without using the word 'judgment'; and there is no apparent reason why he should try to do it. In the complaint in the case at bar there is no averment of any judgment; the only allegation touching that matter being that in an action, the nature of which is not stated, the court at some stage of the action not specified *adjudged* that the defendants therein 'should pay' to the plaintiff a certain sum of money. Now a judgment is 'the final determination of the rights of the parties'; and a complaint upon a judgment must show that the thing sued on was such a final determination. Such final

ADJUDICATA.—See the title RES ADJUDICATA.

ADJUDICATE—ADJUDICATION.—To adjudicate is to give judgment; an adjudication is a settlement by judgment, and a judgment is in its nature a conclusion of litigation.¹

ADJUNCTS.—Adjuncts are words used to modify or describe other words in a sentence. If they modify the subject or object, they consist of adjective words, phrases, or sentences. If they modify the predicate, they consist of adverbial words, phrases, or sentences. They are primary and secondary; the former attend upon the principal parts of a sentence, and the latter upon other adjuncts.²

ADJUST—ADJUSTMENT. (See also SETTLE.)—The word “settle,” when applied to a liquidated account or demand, means to pay it. The word “adjust,” when used in reference to a liquidated claim, has the same meaning, though perhaps not quite so clearly. In reference to an unliquidated claim or demand, the word “adjust” means to determine what is due; to settle; to ascertain; as, to adjust a claim, a demand, or a right.³

determination is averred by the use of the word ‘judgment’; but the word *adjudged*, while sometimes used together with ‘considered,’ ‘ordered,’ ‘determined,’ ‘decreed,’ etc., as one of the operative words of a final judgment, is also applicable to interlocutory orders and adjudications of a court. It is synonymous with ‘decided,’ ‘determined,’ etc. If, in a case tried without a jury, the judge should make his written findings, which would be his decision, it would be proper to say that he thereby *adjudged* so and so; but his findings would not be a judgment. In this case, therefore, there is no averment of a judgment, and consequently no averment of a cause of action.”

Condition in a Bond.—A bond given to obtain an injunction of a judgment at law was conditioned that the defendant in the judgment should pay ‘all sums of money, damages, and costs that should be *adjudged* against him, if the injunction should be dissolved. The injunction was dissolved, and the decree was that the bill be dismissed, and that the complainant pay the costs of the injunction suit. It was held that the sureties on the bond were not liable to pay to the defendant in the injunction suit the amount of the judgment enjoined, nor the costs of that suit, unless he had first paid them to the officers entitled to them. The court said: “It is clear that, within the terms of the condition of this bond, the amount of the judgment at law was not *adjudged* against Lane, upon the dissolution of the injunction, and therefore the securities were not bound for its payment.” *Corder v. Martin*, 17 Mo. 43.

Duly Adjudged.—See DULY.

1. *Irwin v. U. S.*, 23 Ct. of Cl. 154. In this case it was held, where Congress had directed the Court of Claims that they should make an “*adjudication* according to law” in respect to a certain claim, and also report the same to Congress, that final judgment must be rendered. The court said: “The question, however, is complicated by the addition at the end of the statute, of the words ‘and report the same to Congress.’ These words, it is urged, destroy the power to enter final judgment, and place the court in a position

analogous to that occupied by them in cases referred under the Bowman Act, 1883, wherein we act simply in aid of the Congress, and have not judicial power. If this contention be correct, the force and effect of the word *adjudicate* is destroyed. That word is evidently carefully selected, and must be assumed to have been chosen by the law-makers with deliberate intent that we should give to it the full legal effect to which it is entitled. That legal effect is to hear these claims upon the evidence, to enter judgment thereupon from which an appeal will lie, and not simply to prepare for the advice of Congress and in aid of that body a report which carries with it no definite legal result.”

“The English use of the term *adjudication* is to express the act of giving judgment.” Tomlinson. “*Adjudicate*: To determine in the exercise of judicial power; synonymous with ‘adjudge’ in its strictest sense. *Adjudication*: A solemn or deliberate determination by judicial power.” Abbott’s L. Dict. Quoted in *Street v. Benner*, 20 Fla. 713.

Adjudication of Bankruptcy.—See *In re Patterson*, 1 Ben. (U. S.) 518. Also the title BANKRUPTCY.

Former Adjudication.—See the title RES ADJUDICATA.

2. *Bourland v. Hildreth*, 26 Cal. 233.

3. *State v. Staub*, 61 Conn. 553.

“*Adjust* means ‘to settle or bring to a satisfactory state, so that parties are agreed in the result; as, to *adjust* accounts.’” (Webster’s Dictionary.) *State v. Moore*, 40 Neb. 861; *New York v. Hamilton F. Ins. Co.*, 39 N. Y. 45.

Adjusted means fitted, made accurate. *Washington County v. St. Louis, etc.*, R. Co., 58 Mo. 372.

Adjust and Settle. (See also SETTLE.)—“Within certain limitations in ordinary use, the words *adjust* and ‘settle’ have different meanings. They are not infrequently used in the sense of ‘paying.’ They are synonyms, and in some of their uses are equivalents of ‘to fix; to arrange;’ in others, ‘to determine; to establish; to regulate.’” *Lynch v. Nugent*, 80 Iowa 429.

Patents.—The word *adjustment* in a patent

ADMEASUREMENTS.—See note 1.

ADMEASUREMENTS OF DOWER.—See the title DOWER.

ADMINISTER.—To give, to dispense, to furnish, to direct and cause to be taken, as to administer medicine.² The word "minister" is said to be derived

claim was held to mean the mechanical means of making the *adjustment*. Page *v.* Holmes Burglar Alarm Tel. Co., 17 Blatchf. (U. S.) 485.

Open Account.—In *Townes v. Birchett*, 12 Leigh (Va.) 201, it is said of a letter in which the writer asked to have his accounts settled and *adjusted*, that by this was meant settled and a balance struck, and that the word denoted that the writer understood the account to be open at that time.

Insurance. (See also the various insurance titles.)—A policy provided that payment of losses should be made in sixty days from the date of *adjustment*. The court said: "The counsel for the appellants insists that the word *adjustment* is inaccurately used in this connection; that it is only appropriate in the settlement of marine losses, and then not by means of the action of parties themselves. This is not impossible. In the preceding condition, * * * the words 'loss or damage' are not used with legal precision. * * * But the condition gives the company sixty days from the date of the '*adjustment*' of the preliminary proofs of loss by the parties' before the loss is payable. To *adjust*, in its fair meaning, is to settle or bring to a satisfactory state, so that the parties are agreed in the result. (Webster.) And that this is a fair reading in the present case is evident from the use of the words 'by the parties' at the close of the condition. The preliminary proofs are to be *adjusted* by the parties. The parties are to act upon them by negotiation, by statements on the one side, demands for correction or addition on the other, by compliance with such requests, until the parties agree. If they do not agree, it can hardly be termed an *adjustment* by the parties, although the law may itself determine the sufficiency of such proofs." *New York v. Hamilton F. Ins. Co.*, 39 N. Y. 45, quoted in *Barber v. Fire, etc., Ins. Co.*, 16 W. Va. 676.

Adjustable Stern Dock.—A contract to construct an "*adjustable stern dock*" does not require a dock which is automatically *adjustable*, but one which is *adjustable* by cutting away and filling in its gates so that they will conform to the contour of the hull of the vessel; especially where the term is treated as a technical one, and the experts agree upon that definition of it. *International Bow, etc., Co. v. U. S.*, 60 Fed. Rep. 523.

1. A condition of sale providing that "the *admeasurements* are presumed to be correct," and negating allowance for errors, does not imply that there has been an actual *admeasurement* prior to sale; the condition means that if the quantity stated is incorrect, neither party is to have any claim. *Cordingley v. Cheesebrough*, 31 L. J. Ch. 617, 3 Giff. 496.

2. *La Beau v. People*, 34 N. Y. 233; *People v. Quin*, 50 Barb. (N. Y.) 134; *Blackburn v. State*, 23 Ohio St. 146.

Administering is defined to be giving, dispensing. *People v. Quin*, 50 Barb. (N. Y.) 134.

Administering Poison—Deception. (See also the title POISONS AND POISONING.)—In *Blackburn v. State*, 23 Ohio St. 146, it was held that neither fraud nor deception is a necessary ingredient in the act of *administering* poison. The court said: "To force poison down one's throat, or to compel him by threats of violence to swallow it, is an *administering* of poison. Neither deception nor breach of confidence is a necessary ingredient in the act. It matters not whether the poison be put into the hand or into the stomach of the party whose life is to be destroyed by it. If the poison reaches the stomach or body of the deceased, and does its work of death there, it is immaterial whether force or fraud was the means by which the guilty agent effected his object. In either case it is an *administering* of poison, within the meaning of the act. We think counsel are wrong in assuming that the word *administer* always and necessarily implies service. If it does, it often implies service to a very unwilling master. Such is the case when the law is *administered* to a criminal. The word 'minister' is said to be derived from the same root as the Latin word *manus*, the hand. Etymologically, therefore, the word *administer* would seem applicable to anything that could be done by the hand, to or for another. We think also that the court was right in instructing the jury, as in substance and effect it did, that it is immaterial whether the party taking the poison took it willingly, intending thereby to commit suicide, or was overcome by force or overreached by fraud."

Same—Leaving the Poison with Intent that it shall be Taken.—In *La Beau v. People*, 34 N. Y. 233, it was held that putting poison in a certain place with the intent that a certain person should take it, if it is so taken is *administering* it. The court said: "It was certainly never intended to confine this offense to the manual *administering* of the poison to a person. So construed it would be substantially without effect, and would not reach the large class of offenders at whom it was aimed. The word *administer* has a far more extended meaning. Webster defines it, among other things, to mean 'to furnish, to give, to *administer* medicine, to direct and cause it to be taken.' As used in this statute it was obviously intended to cover this whole ground—making it penal to furnish or cause it to be furnished and taken, to give or cause it to be taken. And it embraced and was intended to embrace every mode of giving it or causing it to be taken. A penal statute should be construed according to its plain import, to give it life according to its apparent purpose. In both letter and spirit I think the statute embraces this case."

So, putting poison into coffee is *administering* it. *Johnson v. State*, 92 Ga. 36.

from the same root as the Latin word *manus*, the hand. Etymologically, therefore, the word "administer" would seem applicable to anything that could be done by the hand, to or for another.¹ To administer is to fulfil the functions of an administrator.²

ADMINISTRATION. (See also the titles DEBTS OF DECEDENTS; EXECUTORS AND ADMINISTRATORS; FOREIGN EXECUTORS AND ADMINISTRATORS; LEGACIES AND DEVISES; PROBATE AND LETTERS OF ADMINISTRATION; REVOCATION (PROBATE AND ADMINISTRATION).)—The management of the estate of a deceased person who has left no executor.³

A person who supplies a woman with a drug for her to take, which she takes in his absence, *administers* it. *R. v. Wilson*, 26 L. J. M. C. 18, D. & B. 127, followed in *R. v. Farrow*, D. & B. 164.

Same—As to What County the Crime is Committed In.—It was held in *Robbins v. State*, 8 Ohio St. 131, that where poison is prescribed in one county and under directions taken in another, and the party dies in the latter county, the crime is committed in the county where the person is poisoned. The court said: "To determine this, it becomes necessary to inquire what constitutes the act of *administering* poison within the meaning of the statute. If it consisted in simply giving or prescribing the poison, there would be great force in this exception. But the term *administer* as used in the statute has acquired a legal signification, importing not simply the prescribing or giving of the drug, but directing and causing it to be taken. Webster, in his Dictionary (quarto), says that 'to *administer* medicine is to direct and cause it to be taken.'"

Same—Must be Taken into the Stomach.—The poison is not *administered* unless it is taken into the stomach. Taking into the mouth alone is not sufficient. *Rex v. Cadman*, Carr. Supp. 237; *Rex v. Harley*, 4 C. & P. 369, 19 E. C. L. 424. To the same effect is *Sumpster v. State*, 11 Fla. 256. In this last case poison was put into a pot of food intended for the consumption of the victim and his family, but was discovered before any part had been taken into the stomach. It was held that this was not an *administering* of poison.

Same—Mississippi Statute.—"It is contended that a new trial should be awarded upon the ground that the proof did not show that 'the poison or medicine was *administered* under pretense that it was a medicine.' The statute affords no pretense for this exception. It declares that 'if any slave, free negro, or mulatto shall prepare or *administer* to any person or persons any medicine whatever with intent to kill,' etc. According to the evidence, arsenic was *administered*, which is not only a medicine, but a poison. And such is the case with many articles used as medicines, depending upon the quantity in which they are given. The word *administer*, as used in the statute, does not mean that the article given in order to effect the felonious intent must be given or *administered* under pretense that it is a medicine. The manifest intention of the legislature was to punish any preparation, giving or *administration* of any substance known as a medicine with intent to

kill." *Sarah v. State*, 28 Miss. 276, 61 Am. Dec. 544.

Administering Drugs with Intent to Produce Abortion.—See the title ABORTION.

Intoxicating Liquors.—A law permitting physicians to *administer* spirituous liquors whenever they deem it necessary contemplates the *administering* of liquor as medicine. *Brinson v. State*, 89 Ala. 110. The court said: "*Administer* here means 'to give, as a dose; to direct or cause to be taken, as medicine' (Imperial Dict.). *La Beau v. People*, 33 How. Pr. (N. Y. Supreme Ct.) 69. This is emphasized by the subsequent word 'prescribe,' which means to 'direct as a remedy' (Worcester's Dict.). The statute clearly contemplates the *bona fide* *administering* of such liquors as a medicine in cases of necessity, not otherwise."

1. *Blackburn v. State*, 23 Ohio St. 162.

2. *Lanier v. Irvine*, 21 Minn. 447. See also ADMINISTRATION.

Administrator's Bond.—In *Barbour v. Robertson*, 1 Litt. (Ky.) 93, the words "well and truly *administer* according to law" in an administrator's bond were held to apply to the disposition of the estate in behalf of the creditors only, and not to bind the sureties for the proper distribution of the surplus among the distributees. See also *Moore v. Waller*, 1 Marsh. (Ky.) 488. Compare *Sanford v. Gilman*, 44 Conn. 464; and see the title EXECUTORS AND ADMINISTRATORS.

3. *Crossan v. McCrary*, 37 Iowa 684. In this case it is said: "The word *administration* means, as here used [in statute declaring that *administration* shall not be originally granted after five years], the management of the estate of a decedent, and expresses the jurisdiction assumed by the proper probate court over it. This jurisdiction is assumed by the appointment of the administrator; when that is done, *administration* is said to have been granted. It does not refer simply to the act of appointment of the administrator, although that act is included in the thought expressed, for *administration*, management of the estate, is assumed by the appointment."

Administration consists in the due application of the thing to be administered to the contemplated purpose or purposes. *Todd v. Willis*, 66 Tex. 714.

A Comprehensive Term.—In *Martin v. Ellerbe*, 70 Ala. 338, the court said: "In relation to the admissibility in evidence of the record of the decree of the court of chancery against the administrator-in-chief and the appellant as surety of the intestate, we do not conceive that it depends upon the inquiry

ADMINISTRATIVE.—See note 1.

whether there is such technical privity or connection between an administrator-in-chief and an administrator *de bonis non* as will render, in all cases, judgments or decrees against, or the acts or admissions of the former, binding upon or evidence against the latter, as they might be if the one were clothed only with the rights, and claimed only in succession to the other. By the common law the two *administrations* were separate, distinct, independent of each other. The one was not the mere successor to or continuation of the other. Each was, of itself, an immediate, full *administration*. The administrator-in-chief, by the terms of the grant to him, was clothed with title to, and the duty and authority of administering, all the goods and chattels, rights and credits, which were of the testator or intestate at the time of his death. The administrator *de bonis non*, by the terms of the grant to him, was confined, limited in authority to the goods and chattels, rights and credits, of the testator or intestate, which were unadministered—it was *de bonis non administratis*. The import of the terms of the respective grants clearly indicates the distinction between them, and, so far as regards the administrator *de bonis non*, directs attention as to what act of the administrator-in-chief, or what was done while his authority was of force, within the line of his duty, was an *administration*. The term *administration*, in this respect, is of comprehensive meaning. It includes more than the mere collection of the assets, the payment of debts and legacies, and distribution to the next of kin. It involves all which may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights; and it includes all which may be done, and rightfully done, in relation to adverse claims to assets, which have come to the possession of the administrator as the property of the testator or intestate."

Expenses of, in Statute.—In *Lester v. Mathews*, 56 Ga. 656, the court said: "Plaintiff further alleges that the consent verdict, which is appended to the declaration, and which sets out the fees to be paid to proponent's counsel 'after expenses of *administration*,' meant, by the expression 'expenses of *administration*,' the fee of plaintiff and his associates, and that the fees of his associates and much of his own were paid by said administrators under the verdict, and so receipted for, with the consent of all parties, and that all are thereby estopped from denying that the balance of his claim is payable under the verdict as expenses of *administration*; and adds a prayer that if the consent verdict does not include the fee under the term 'expenses, etc.,' it be corrected and made to express it. * * * But it is claimed that this debt is due as expenses of *administration*, and that this suit is brought upon the consent verdict to ascertain the amount of this fee as part of such expenses, and to compel the administrators to pay it as such. We do not think such a fee

embraced in the meaning of those words. It is there said the parties so meant the words to be understood, and it is asked that to support this declaration the consent verdict or decree be amended so as to embrace fees. This cannot be done in this proceeding. It was done on a motion for a new trial in *Lucas v. Lucas*, 30 Ga. 191; but in the same case it is said that except in case of such a motion the verdict or judgment or decree can only be rectified by bill. Inasmuch as now a party is never forced into equity when he can have equity relief granted at law, we think it might be rectified on a proper case made between proper parties, with distinct pleadings either in equity or at law; but in a suit at law to recover the money, to mix up such equitable relief with the parties now in court in this case, would be an anomaly indeed; in the language of the chief justice, in another case, it would be a legal hermaphrodite."

Special administration is where only specific effects of the deceased are committed to the administrator. *In re Senate Bill*, 12 Colo. 193.

1. Executive or Administrative.—In *Atty.-Gen. v. Boston*, 142 Mass. 200, it was held that the board of aldermen of the city were authorized to pass an order directing the removal of a sidewalk, and that such an order was not "executive or administrative" within the meaning of the *Massachusetts* statute vesting the executive power of the city government in the mayor. The court said: "It is to be considered, if this is so, whether the order to remove the sidewalk here in question has been passed by the proper authority. That the aldermen had formerly the powers of surveyors of highways appears by the Stat. of 1854, c. 448, § 41. Under the Stat. of 1885, c. 266, § 6, the executive power of the city government is vested in the mayor, 'to be exercised through the several officers and boards of the city in their respective departments, under his general supervision and control; and the contention of the informant is, that the power to dispense with or remove the sidewalk is executive or administrative strictly, both these words being used in the statute. But the power to determine whether public convenience requires the construction of a sidewalk, and equally so its removal, involves the exercise of judgment not administrative only, and the exercise of the power is judicial in its character, although expressed in a legislative form. The power so to repair a highway that it shall be fit for travel within the lines marked out for travel as established, is executive; but that of determining what shall be the lines of travel, is legislative. The board of aldermen may not be able to control executive action of the mayor by prescribing the time within which the removal shall take place; but this portion of the order may fairly be interpreted as imposing upon the proper officer, the superintendent of streets, acting under his official superior, the mayor, the duty of doing it within the time named, if it can be so done with proper regard to other executive duties of a similar character."

ADMIRALTY JURISDICTION.

By EDMUND RANDOLPH WILLIAMS.

I. DEFINITION, 645.

II. HISTORY AND DEVELOPMENT, 645.

III. COURTS OF ADMIRALTY IN THE UNITED STATES, 647.

1. *District Courts*, 647.
2. *Circuit Court of Appeals and Supreme Court*, 647.
3. *State Courts*, 648.

IV. JURISDICTION, 648.

1. *General Nature*, 648.
2. *Waters within the Jurisdiction*, 649.
 - a. *High Seas*, 649.
 - b. *Navigable Waters*, 649.
 - (1) *General Rule*, 649.
 - (2) *Internal Rivers and Waters*, 651.
3. *Persons Subject to the Jurisdiction*, 652.
4. *What Vessels are within the Jurisdiction*, 654.
5. *Subject Matter of Jurisdiction*, 656.
 - a. *Maritime Torts*, 656.
 - (1) *In General*, 656.
 - (2) *Death by Wrongful Act*, 658.
 - b. *Maritime Contracts*, 660.
 - (1) *General Principles*, 660.
 - (2) *Building Contracts*, 663.
 - (3) *Mortgages*, 664.
 - c. *Petitory and Possessory Actions*, 665.
 - d. *Prize Causes*, 666.
 - e. *Crimes*, 668.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *ADMIRALTY*, I *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, p. 249.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *AVERAGE*; *BOTTOMRY AND RESPONDENTIA*; *CHARTER PARTY*; *COLLISION (IN MARITIME LAW)*; *CONFLICT OF LAWS*; *DEMURRAGE*; *JETTISON*; *MARINE INSURANCE*; *MARITIME LIENS*; *MASTERS OF VESSELS*; *NAVIGABLE WATERS*; *NAVIGATION*; *PILOTS*; *REVENUE LAWS*; *SALVAGE*; *SEAMEN*; *SHIPS AND SHIPPING*; *TOWAGE*; *UNITED STATES COMMISSIONERS*; *UNITED STATES COURTS*; *WHARVES*.

I. DEFINITION.—The court of admiralty is distinguished from the courts of law and equity as the tribunal having jurisdiction of maritime causes, contracts, torts, injuries, and offenses, and administering the maritime law.¹

II. HISTORY AND DEVELOPMENT.—The admiralty is a court of ancient origin, traceable back in English jurisprudence to the reign of Edward the First,² and

1. 2 Parsons on Maritime Law 508.

2. *Antiquity*.—Co. Litt., 11 C., 260 b; Zouch on Admiralty Jurisdiction 114; Godolphin on Admiralty Jurisdiction 22; Exton Admiralty

Jurisdiction 3; Selden De Dom. Maris, lib. 2, cap. 16, p. 161.

Judge Story, in the celebrated case of *De Lovio v. Boit*, 2 Gall. (U. S.) 398, in which

exercising a jurisdiction coeval and coextensive with that of other foreign maritime courts;¹ indeed, by some authorities it is said to have existed long before that time.²

Limits and Extent of Jurisdiction.—Owing to the jealousy of the common law, the ancient jurisdiction of the high court of admiralty in England was limited by courts and Parliament.³ At the present time, however, the jurisdiction of admiralty is more extensive.⁴ The courts of vice-admiralty which existed in the American colonies, administered by deputies of the governor or proprietary, under royal patent, exercised without hindrance a jurisdiction as broad as has ever been claimed for the ancient English admiralty.⁵ And it is now settled, after much controversy, that the jurisdiction of the courts of admiralty in the United States is not to be limited to that of the English admiralty at the time of the Revolution, but is as extensive as that jurisdiction ever was.⁶

he contended for the jurisdiction of admiralty as now established in the United States, after a wavering and uncertain line of authorities, has gathered together much of the ancient learning relating to admiralty. In regard to its antiquity he said: "If it be not of immemorial antiquity, as Lord Coke supposes, it is almost certain that its origin may be safely assigned in some anterior age. (Godolphin on Admiralty Jurisdiction 29; Selden De Dom. Maris, lib. 2, cap. 14-24; 1 Valin Comm. 1.) There is strong probability of its existence in the reign of Richard the First, since the Laws of Oleron, which were compiled and promulgated by him on his return from the Holy Land, have always been deemed the laws of the admiralty, and could not have been fully enforced in any other court. (Selden De Dom. Maris, lib. 2, cap. 24; Godolphin on Admiralty Jurisdiction 143.)"

Laws of Oleron.—By the Laws of Oleron, the jurisdiction of admiralty was explicitly asserted over maritime crimes and offenses, and over torts in ports within the ebb and flow of the tide, as well as upon the high seas. These laws were continued in the time of King John, and certain ordinances added to them; they were promulgated anew in the reign of Henry III., and received their ultimate confirmation in the twelfth year of Edward III. 2 Brown Adm. 40.

History of the English Admiralty.—As to the history of the admiralty in England, see De Lovio v. Boit, 2 Gall. (U. S.) 398; Benedict's Admiralty Practice (3d ed.); 2 Brown's Civil and Admiralty Law.

1. Zouch on Admiralty Jurisdiction 88; Selden Ad Fletam, c. 8, s. 5.

In De Lovio v. Boit, 2 Gall. (U. S.) 400, Story, J., said: "The forms of its proceedings were borrowed from the civil law; and the rules by which it was governed were, as is everywhere avowed, the ancient laws, customs, and usages of the seas. In fact there can scarcely be the slightest doubt that the admiralty of England, and the maritime courts of all the other powers of Europe, were formed upon one and the same common model; and that their jurisdiction included the same subjects as the consular courts of the Mediterranean."

in the countries of Southern Europe the judges who had cognizance of maritime

causes were denominated consuls, and the courts consular courts. 2 Brown Adm. 30.

2. Coke Litt. 260; 2 Brown Adm. 25.

3. See Benedict's Admiralty (3d ed.), p. 58; The Jerusalem, 2 Gall. (U. S.) 345.

It was strenuously asserted by Lord Coke that the admiralty was not a court of record, had no power to impose a fine, and that it could not take a recognizance or stipulation in aid of its general jurisdiction. Tomlinson's Case, 12 Co. 104. But this right has been regained. Hook v. Moreton, 1 Ld. Raym. 397.

During the reign of Edward III. a considerable encroachment was made by the courts of common law upon the jurisdiction exercised by the Court of Admiralty as an outcome of the jealousy entertained toward the latter. See Zouch on Admiralty Jurisdiction 36. And by the Act of 15 Rich. II., ch. 3, a further limitation was put upon the jurisdiction. Not until a comparatively late date was the exclusive jurisdiction in prize causes allowed. Lindo v. Rodney, Doug. 613, note.

4. 3 & 4 Vict., c. 65. And by the English Admiralty Court Act of 1861 the admiralty jurisdiction is, in some respects, more extensive than in the United States. By the seventh section of the act, jurisdiction is given over any claims for damages done by any ship.

5. The commissions of the vice-admirals in the colonies in North America, insular and continental, conferred a much larger jurisdiction than existed in England when such commissions were granted. Waring v. Clarke, 5 How. (U. S.) 454. See in Benedict's Adm. 69 the text of a commission granting Vice-Admiral Lord Cornbury jurisdiction in "all civil and maritime causes and * * * business civil and maritime whatsoever," arising in "the maritime parts whatsoever" of New York, New Jersey, and Connecticut. This is a larger power than any English judge dared to claim at that time (1701).

6. De Lovio v. Boit, 2 Gall. (U. S.) 398; New England M. Ins. Co. v. Dunham, 11 Wall. (U. S.) 1; Cope v. Vallette Dry Dock, 10 Fed. Rep. 142; The Huntress, Davies (U. S.) 82.

Extent of Jurisdiction in United States.—It was contended that the extent of the admiralty jurisdiction under the constitution was to be limited by that of the English

III. COURTS OF ADMIRALTY IN THE UNITED STATES—1. District Courts.—

The Constitution of the United States confers upon the courts of the United States cognizance of all cases of admiralty and maritime jurisdiction.¹ In pursuance of this authority the Judiciary Act of 1789 gave the district courts of the United States exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction—to the exclusion, not only of all other federal courts, but of all state courts,² except as therein expressly provided.

2. Circuit Court of Appeals and Supreme Court.—By the Act of Congress of March 3, 1891, an appeal lies from the final decision of the district courts in admiralty cases, irrespective of the amount in controversy, direct to the Circuit Court of Appeals;³ and in the exercise of this jurisdiction the court may review questions of both law and fact, and is not limited to questions of law, as was the Supreme Court prior to the act.⁴ Appeals and writs of error may be taken from the district courts direct to the Supreme Court in all cases where the jurisdiction of the court is in issue from the final decision in prize causes; in cases of conviction of a capital or otherwise infamous offense; and cases involving the construction of the Constitution of the United States, the constitutionality of any law or treaty of the United States, or where the constitution

High Court of Admiralty, and in accordance with this contention arose the attempt to limit the jurisdiction to the navigable waters wherein the tide ebbs and flows. This limitation, put upon the English admiralty by the statute of 13 and 14 Richard II., has not been maintained. In *Waring v. Clarke*, 5 How. (U. S.) 441, the jurisdiction of the United States District Court was asserted over a collision on the upper Mississippi, and it was held that cases of maritime and admiralty jurisdiction were not to be limited by the consideration of what were such cases under the English admiralty. As also in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. In the former case will be found a discussion of the admiralty jurisdiction in England and its relation to that under the constitutional grant.

1. Constitutional Grant.—U. S. Const., art. 3, § 2.

Therefore any state law which, for a cause of action clearly maritime, attempts to give a remedy at common law in a state court, by proceeding *in rem* against the vessel specified as debtor, is in conflict with the exclusive jurisdiction of the district court, and is void. *Stewart v. Potomac Ferry Co.*, 12 Fed. Rep. 296; *Terrell v. The Schooner B. F. Woolsey*, 4 Fed. Rep. 552.

Circuit Courts—Revised Statutes.—Jurisdiction was given the circuit courts in seizures for slave-trading, and in condemnation of property used by persons in insurrection. See U. S. Rev. Stat., §§ 71, 5308.

Jurisdiction under Act of Confederation.—As to the jurisdiction of the courts of admiralty in the United States under the Act of Confederation, see *Penhallow v. Doane*, 3 Dall. (U. S.) 54; *U. S. v. Peters*, 5 Cranch (U. S.) 115; *Talbot v. Three Brigs*, 1 Dall. (U. S.) 95; *Miller v. The Ship Resolution*, 2 Dall. (U. S.) 19; *Ross v. Rittenhouse*, 2 Dall. (Pa.) 160, 1 Yeates (Pa.) 443; *U. S. v. Bright*, 1 Whart. (Pa.) Dig. (2d ed.) 143.

2. 1 U. S. Stat. at L. 77; U. S. Rev. Stat., §§ 363, 371; *The Moses Taylor v. Hammons*,

4 Wall. (U. S.) 411; *The Steamboat Ad. Hine v. Trevor*, 4 Wall. (U. S.) 555; *The Belfast*, 7 Wall. (U. S.) 624; *Martin v. Hunter*, 1 Wheat. (U. S.) 337; *Cohens v. Virginia*, 6 Wheat. (U. S.) 314; *Slocum v. Mayberry*, 2 Wheat. (U. S.) 9; *Waring v. Clarke*, 5 How. (U. S.) 451; *Ashbrook v. The Steamer Golden Gate*, Newb. Adm. 296; *Phegley v. Steamboat David Tatum*, 33 Mo. 461.

By virtue of the constitutional grant, the United States courts are possessed of all the power of admiralty courts, whether considered as district or prize courts. *Glass v. The Sloop Betsy*, 3 Dall. (U. S.) 6; *Penhallow v. Doane*, 3 Dall. (U. S.) 54; *Jennings v. Carson*, 1 Pet. Adm. 1, 2 Pet. Adm. 474, 4 Cranch (U. S.) 5, note. And see *Carson v. Jennings*, 1 Wash. (U. S.) 129; *The Amiable Nancy*, 1 Paine (U. S.) 111.

3. 26 Stat. at L., c. 517, § 4.

Formerly, the circuit courts of the United States had jurisdiction of cases in admiralty on appeal from the district courts, but by the act referred to above this jurisdiction was taken away.

4. By the Act of Congress of Feb. 16, 1875, it was provided "that the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately," and that the Supreme Court upon appeal shall be limited to a determination of the question of law. In *The Havilah*, 48 Fed. Rep. 684, it was held that, although the Act of 1891 declared that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error" shall regulate appeals and writs of error to the Circuit Court of Appeals, yet the former act did not apply to appeals in admiralty from the existing circuit courts to that court, and that the same might be heard without separate findings of fact and of law.

or a law of any state is claimed to be in contravention of the Constitution of the United States.¹ But in all other cases the appeal is direct to the Circuit Court of Appeals, whose decision is final;² excepting that this court may at any time certify to the Supreme Court any question or proposition of law concerning which it desires the instruction of that court for its proper decision.³

3. State Courts.—The admiralty jurisdiction of the state courts was superseded by the establishment of the district courts as courts of admiralty.⁴

Common-law Remedies.—But under the clause of the Judiciary Act, "leaving to suitors in all cases the rights of a common-law remedy when the common law is competent to give it," the suitor may proceed *in rem* in the admiralty or *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the state or federal courts.⁵

So a suit *in personam* by seamen for wages is maintainable at common law, and therefore may be brought in a state court,⁶ as also may a proceeding *in personam* growing out of a collision.⁷

But common-law remedies are not available to enforce maritime liens by proceedings *in rem*, and consequently the original jurisdiction to enforce such a lien is in the district courts.⁸

IV. JURISDICTION—1. General Nature.—The question of what are causes of a maritime nature, jurisdiction of which is conferred upon the United States district courts by the Constitution and the Judiciary Act, is determinable from the general maritime law.⁹ It may be said generally that a cause of a mari-

1. 26 Stat. at L., c. 517, § 5.

The appeal to the Supreme Court in such cases must be only upon an issue as allowed; so that after final judgment the party against whom it is rendered must elect whether he will take his writ of error or appeal to the court upon the question on which he is entitled to go to the Supreme Court alone, or to the Circuit Court of Appeals upon the whole case. *McLish v. Roff*, 141 U. S. 661.

2. 26 Stat. at L., c. 517, § 6.

3. 26 Stat. at L., c. 517, § 6.

4. *Nicholson v. State*, 3 Har. & M. (Md.) 109; *The Ship Portland v. Lewis*, 2 S. & R. (Pa.) 201.

The civil courts of *Louisiana* are without jurisdiction in admiralty and maritime cases. *Berwin v. Steamship Matanzas*, 19 La. Ann. 384.

5. *The Steamboat Ad. Hine v. Trevor*, 4 Wall. (U. S.) 555; *The Belfast*, 7 Wall. (U. S.) 644; *Taylor v. Carryl*, 20 How. (U. S.) 583; *De Lovio v. Boit*, 2 Gall. (U. S.) 398; *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; *American Steamboat Co. v. Chace*, 16 Wall. (U. S.) 522.

Territorial Courts.—While, within the states, admiralty jurisdiction can be exercised in those courts only which are established in pursuance of the third article of the constitution, this limitation does not extend to the territories. Congress may vest admiralty jurisdiction in courts created by a territorial legislature. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. (U. S.) 511. *Compare American Ins. Co. v. Johnson, Blatchf. & H. Adm.* 10. But an Act of Congress investing territorial courts with jurisdiction "in all cases arising under the laws and constitution of the United States" does not embrace cases of admiralty and maritime jurisdiction; they do not arise under the constitution. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. (U. S.) 511.

6. *Leon v. Galceran*, 11 Wall. (U. S.) 185.

7. *Schoonmaker v. Gilmore*, 102 U. S. 118.

State laws conferring admiralty jurisdiction upon state courts are unconstitutional and void only to the extent that they infringe the Judiciary Act of Congress of 1789, giving the national courts exclusive jurisdiction of all cases in admiralty arising on waters navigable from the sea by vessels of ten or more tons burden, saving to suitors the right of a common-law remedy, where the common law is competent to give it. The *Kentucky* statute giving the state court jurisdiction in case of collision between two boats, in a personal action, simply modifies the common-law remedy, and is within the reservation. It confers an additional jurisdiction, but not strictly an admiralty jurisdiction, and is constitutional. *Stewart v. Harry*, 3 Bush (Ky.) 438.

8. *The Belfast*, 7 Wall. (U. S.) 644; *The Lottawanna*, 21 Wall. (U. S.) 558; *Terrell v. The Schooner B. F. Woolsey*, 4 Fed. Rep. 552.

The Saving Clause in the Judiciary Act of 1789, securing to suitors a common-law remedy where the common law is competent to give it, does not give them a remedy at common law, but a common-law remedy. A proceeding *in rem* is a civil-law remedy, and when used in the common-law courts is provided for by statute. *Berwin v. Steamship Matanzas*, 19 La. Ann. 384.

An Action in a State Court against a steamboat, in her own name, is an attempt to exercise admiralty jurisdiction. *Griswold v. The Steamboat Otter*, 12 Minn. 465.

9. What are Causes of Maritime Nature.—*The Seneca*, 3 Wall. Jr. (C. C.) 395; *The Barge Leonard*, 3 Ben. (U. S.) 263; *Martin v. Hunter*, 1 Wheat. (U. S.) 335.

In *Ex p. Easton*, 95 U. S. 68, Clifford, J., said that the nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of Con-

time nature must relate to the business of commerce or navigation, and this, whether it arises out of contract or out of a liability from some other source.¹

2. Waters within the Jurisdiction—*a.* HIGH SEAS.—The term "high seas" in the English admiralty jurisdiction is comprehensive, and includes all the waters affected by the ebb and flow of the tide, and therefore subject to the jurisdiction. The term "high seas," however, is generally used to designate the open sea or ocean subject to admiralty jurisdiction.²

In Criminal Statutes.—In criminal statutes the phrase is used in contradistinction to landlocked ports, bays, and harbors, which, though subject to tidal ebb and flow, are within the jurisdiction of the governments of the surrounding countries.³

***b.* NAVIGABLE WATERS—(1) General Rule.**—In the early development of the admiralty jurisdiction in the United States, it was maintained that this jurisdiction existed where the ocean tide ebbed and flowed, and there was sufficient depth of water for navigation, beginning at low-water mark,⁴ though the water be *infra corpus comitatus*.⁵

Waters Navigable by Vessels Used in Commerce.—Since the case of *The Genesee Chief*, deciding upon the validity of the Act of 1845, the words "navigable waters" have been substituted for "tide-waters," and the jurisdiction of the courts of admiralty by a long line of decisions is held to extend to all waters connecting with other states or countries, and navigable by vessels used in commerce.⁶ But

gress and the decisions of this court, and by the usages prevailing in the courts of the states at the time the Federal Constitution was adopted.

The decisions of the courts of common law in *England*, under the statutes of 13 and 15 Rich. II., upon the jurisdiction of the admiralty, are not binding upon the courts of the *United States*. *Steele v. Thacher*, Ware (U. S.) 91. On the other hand, the *United States* courts do not claim to exercise all the powers of admiralty courts under the civil law. *Bags of Linseed*, 1 Black (U. S.) 108.

Judge Story said that the words "admiralty" and "maritime jurisdiction" include "all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea." *De Lovio v. Boit*, 2 Gall. (U. S.) 468.

In *Stevens v. The Sandwich*, 1 Pet. Adm. 233, Winchester, J., said: "Within the cognizance of this jurisdiction are all affairs relating to vessels of trade and the owners thereof, as such; and all matters which concern owners, proprietors of ships, as such; * * * whatever is of a maritime nature, either by way of navigation upon the seas, or negotiation at or beyond the sea, in the way of marine trade or commerce."

1. Causes of Maritime Nature must Relate to Commerce or Navigation.—*People v. The Steamer America*, 34 Cal. 676.

In Contracts, Subject Matter Determines; in Torts, the Locality.—In respect to contracts the jurisdiction depends on the subject matter, viz., whether maritime or not; in respect to torts, on locality, viz., whether committed on the high seas, or in ports within the flow and reflux of the tide, or not. *Waring v. Clarke*, 5 How. (U. S.) 441; *De Lovio v. Boit*, 2 Gall. (U. S.) 465; *Thomas v. Lane*, 2 Sumn. (U. S.) 1; *Thackarey v. The American Boat Farmer*, Gilp. (U. S.) 529.

2. *Waring v. Clarke*, 5 How. (U. S.) 441; *Montgomery v. Henry*, 1 Dall. (U. S.) 49; *Johnson v. Twenty-one Bales, etc.*, 2 Paine (U. S.) 611.

3. *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76; *U. S. v. Wilson*, 3 Blatchf. (U. S.) 435; *U. S. v. Grush*, 5 Mason (U. S.) 290.

The Great Lakes are not "high seas" within the meaning of the U. S. Act of July 29, 1850, punishing the burning of vessels. *Miller's Case*, Brown Adm. 156.

4. *The Steamboat Thomas Jefferson*, 15 Wheat. (U. S.) 428; *Peyroux v. Howard*, 7 Pet. (U. S.) 324; *Waring v. Clarke*, 5 How. (U. S.) 441; *U. S. v. Wilson*, 3 Blatchf. (U. S.) 435; *The Steamboat New World v. King*, 16 How. (U. S.) 469.

And it was held that the jurisdiction existed, although the downward fresh-water current was not perceptibly set back, if there was a regular rise and fall in the water corresponding with the tidal effect. *Jackson v. The Steamboat Magnolia*, 20 How. (U. S.) 296. So in *U. S. v. Coombs*, 12 Pet. (U. S.) 72, the court gave as its opinion "that in cases purely dependent upon the locality of the act done, the jurisdiction is limited to the sea, and to tide-waters, as far as the tide flows; and that it does not reach beyond high-water mark."

5. *De Lovio v. Boit*, 2 Gall. (U. S.) 398; *U. S. v. Hamilton*, 1 Mason (U. S.) 152. Long Island Sound is a part of the high seas. *The Sloop Martha Anne*, Olc. Adm. (U. S.) 18. So also is the mouth of a tidal river a mile and a half wide. *U. S. v. Smith*, 3 Wash. (U. S.) 78.

6. *Fretz v. Bull*, 12 How. (U. S.) 466; *The Daniel Ball*, 10 Wall. (U. S.) 563; *Escanaba, etc.*, Transp. Co. v. Chicago, 107 U. S. 682; *Miller v. New York*, 109 U. S. 385; *The Montello*, 20 Wall. (U. S.) 441; *The Eagle*, 8 Wall. (U. S.) 15; *Jackson v. The Steamboat Magnolia*, 20 How. (U. S.) 296; *Walsh v.*

this act, purporting to extend the jurisdiction of the courts of admiralty of the United States to the Great Lakes and navigable waters connecting therewith, is held to be inoperative, and the jurisdiction upon such waters declared to exist independent of the act.¹

Rogers, 13 How. (U. S.) 283; The Steamboat New World v. King, 16 How. (U. S.) 469; Ure v. Coffman, 19 How. (U. S.) 56; New York, etc., Steamship Co. v. Calderwood, 19 How. (U. S.) 245; Holmes v. Oregon, etc., R. Co. 5 Fed. Rep. 75; U. S. v. Macomb, 5 McLean (U. S.) 286; Raymond v. The Schooner Ellen Stewart, 5 McLean (U. S.) 269; Scott v. The Propeller Young America, Newb. Adm. 101; McGinnis v. The Steamboat Pontiac, Newb. Adm. 130; Eads v. The Steamboat H. D. Bacon, Newb. Adm. 274; Little Rock, etc., R. Co. v. Brooks, 39 Ark. 109; Chisholm v. Northern Transp. Co., 61 Barb. (N. Y.) 363.

In *The Propeller Genesee Chief*, 12 How. (U. S.) 443, the jurisdiction of admiralty over navigable waters generally was first established, and the doctrine limiting the jurisdiction to waters where the tide ebbed and flowed, which had existed for so many years, was *overruled*. This was a case of collision on Lake Ontario, and consequently involved the construction of the Act of 1845, purporting to extend the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same. The constitutionality of the act being questioned, it was contended by counsel that Congress had the right to enact the law within its authority to regulate commerce. In disposing of this contention, Taney, C.J., said: "The law, however, contains no regulations of commerce; nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. It is entitled 'An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same;' and the enacting clause conforms to the title. * * * It is evident, therefore, from the title as well as the body of the law, that Congress, in passing it, did not intend to exercise their power to regulate commerce, nor to derive their authority from that article of the Constitution. And if the constitutionality of this law is supported as a regulation of commerce, we shall impute to the legislature the exercise of a power which it has not claimed under that clause of the Constitution, and which we have no reason to suppose it deemed itself authorized to exercise." But the jurisdiction was established as extending to all public and navigable waters used as highways of commerce, independent of the act, and this has been adopted since by a long list of cases. The reason for the limitation of the jurisdiction in *England* was accounted for by the fact that in that country there were no streams navigable beyond the ebb and flow of the tide, and that, therefore, in *England* tide-water and navigable water were synonymous terms. In concluding the opinion as to the jurisdiction, Taney, C.J., said: "There is certainly nothing in the ebb

and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it. * * * It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States. We are the more convinced of the correctness of the rule we have laid down, because it is obviously the one adopted by Congress in 1789, when the government went into operation; for the ninth section of the Judiciary Act of 1789, by which the first courts of admiralty were established, declares that the district courts 'shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.' The jurisdiction here is made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the constitution."

In *Fretz v. Bull*, 12 How. (U. S.) 466, a case heard at the same time as *The Genesee Chief*, the jurisdiction as declared in that case was *affirmed*. This was a case of collision on the Mississippi above the effect of tide.

1. *The Act of 1845*, which was to extend the jurisdiction to certain cases upon the lakes and navigable waters connecting the same, was enacted on the assumption that the jurisdiction of the admiralty was limited to tide-waters, and, therefore, since this assumption has been declared a false one, and the jurisdiction held to extend to all navigable waters, it is inoperative and ineffectual with the exception of the clause giving to either party the right to trial by jury. The

Navigable waters, within the meaning of the Act of Congress, as accepted now, are those which are navigable in fact and which are used or capable of being used as highways for commerce, and when by themselves or by connecting with other waters they form a continual highway by which commerce may be carried on with other states or countries.¹

Canals Connecting Navigable Waters are within this jurisdiction.²

(2) *Internal Rivers and Waters*.—The jurisdiction extends to all public navigable waters, even to such waters, harbors, sounds, or navigable rivers as are wholly within a state or only navigable therein; and that the collision or tort complained of happened within the body of a county, or above the tide, does not affect the jurisdiction.³

Jurisdiction Not Dependent upon Power of Congress to Regulate Commerce.—It was once intimated that matters arising upon voyages between ports of the same state were not cognizable by the courts of admiralty,⁴ but it is now declared that

jurisdiction over these waters is declared to exist under the Act of 1789. In declaring this act inoperative as stated, Nelson, J., said in *The Eagle*, 8 Wall. (U. S.) 15, *overruling* *Allen v. Newberry*, 21 How. (U. S.) 244: "The original purpose of the act, therefore, has ceased, and is of no effect; and, in order to give it any, instead of construing it as extending the jurisdiction in admiralty, it must be construed as limiting it—the very reverse of its object and intent as expressed on its face." *Franconet v. The Propeller F. W. Backus*, Newb. Adm. 1. So the admiralty jurisdiction on the western lakes and rivers is not limited to cases within U. S. Act of Feb. 20, 1845 (5 Stat. at L. 726), but resort may be had to the Act of 1789 to sustain the jurisdiction. *The Flora*, 1 Biss. (U. S.) 29. See also *Revenue Cutter No. 1*, Brown Adm. 76; *The Isabella*, Brown Adm. 96; *The General Cass*, Brown Adm. 334; *The Illinois*, Brown Adm. 497; *Gillet v. Pierce*, Brown Adm. 553.

1. *The Daniel Ball*, 10 Wall. (U. S.) 557; *The Steamboat Ad. Hine v. Trevor*, 4 Wall. (U. S.) 555.

The Mississippi River.—The admiralty jurisdiction has been clearly established upon the whole length and breadth of the Mississippi, and all other public rivers, as far as they are navigable from the ocean for vessels of ten tons burden. Salvage services are as much the subject of such jurisdiction as damages from a collision. *Williams v. The Barge Jenny Lind*, Newb. Adm. 443.

The Fox and Wolf Rivers in Wisconsin, above Oshkosh, and between that place and Winneconne, are held not to be public navigable waters of the United States, within the admiralty jurisdiction. *Morse v. Home Ins. Co.*, 30 Wis. 496.

The Saginaw River is within the admiralty jurisdiction. The facts that it lies wholly within one state (Michigan), and is a stream tributary merely to the lakes, do not prevent this. *The General Cass*, Brown Adm. 334.

2. *Scott v. The Propeller Young America*, Newb. Adm. 101; *The B. and C.*, 18 Fed. Rep. 543; *The Steam Ferry Boat Roslyn*, 8 Ben. (U. S.) 455; *The Avon*, Brown Adm. 170; *Malony v. Milwaukee*, 1 Fed. Rep. 611. As to the Welland Canal, see *The Oler*, 2 Hughes (U. S.) 12; or the Illinois and Michigan Canal, *Ex p. Boyer*, 109 U. S. 629.

In *The Steam Barge Monitor*, 9 Ben. (U. S.) 78, the jurisdiction of the Admiralty Court over cases of collision upon inland canals was upheld upon authority.

The fact that under a contract of affreightment part of the service was to be performed on the Erie Canal, and by a boat built without any means of locomotion in herself, did not exclude the admiralty from having jurisdiction of a libel by a consignee for a failure to deliver part of the cargo. *The Canal Boat E. M. McChesney*, 8 Ben. (U. S.) 150.

3. **Waters Wholly Within a State or Only Navigable Therein**.—*Jackson v. The Steamboat Magnolia*, 20 How. (U. S.) 296; *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. (U. S.) 215; *Waring v. Clarke*, 5 How. (U. S.) 441; *St. John v. Paine*, 10 How. (U. S.) 557; *Newton v. Stebbins*, 10 How. (U. S.) 586; *The Steamboat New York v. Rea*, 18 How. (U. S.) 223.

As has been seen, in *Waring v. Clarke*, 5 How. (U. S.) 464, it was held that the question of jurisdiction was unaffected by the fact that the locality of the collision was *infra corpus comitatus*, provided it occurred in waters where the tide ebbed and flowed. And now, since the term "navigable waters" has been substituted for "waters in which the tide ebbs and flows," the proposition as stated must hold. It was so held in *The Propeller Commerce*, 1 Black (U. S.) 574.

A suit for damages for an assault committed by a master upon a seaman while on board ship is within the jurisdiction of an admiralty court of the United States, although the vessel was, at the time, lying within the body of a county. *Roberts v. Skolfield*, 3 Ware (U. S.) 184.

Salvage.—Courts of admiralty in the United States have jurisdiction over claims for salvage upon waters within the ebb and flow of the tide, though within the body of a state. *The Wave*, Blatchf. & H. Adm. 235; *The Brig John Gilpin*, Olc. Adm. 77.

4. *Allen v. Newberry*, 21 How. (U. S.) 244; *The Troy*, 4 Blatchf. (U. S.) 355. So in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344, although this question did not actually arise, it was intimated that admiralty did not have jurisdiction over matters of internal commerce; and so in *Allen v. Newberry*, 21 How. (U. S.) 244. These cases, however, were decided in view

admiralty has jurisdiction in cases of contracts and torts irrespective of whether the matter to which they relate arises from commerce between the states or wholly within a state, since the extent of admiralty jurisdiction does not depend upon the power of Congress to regulate commerce, as was contended at one time.¹

So a Contract of Affreightment, although for transportation between ports and places within the same state, provided it be for transportation upon navigable waters, is within the admiralty jurisdiction.²

3. Persons Subject to the Jurisdiction—General Rule.—The jurisdiction of admiralty depends upon the subject matter, and whenever a suit is of such a nature as to fall into the jurisdiction by this test, the fact that the vessel or the parties belong to a foreign nation, or that the matters complained of occurred in foreign waters, is immaterial, provided the property is within the jurisdiction, and the jurisdiction of the persons is acquired.³

Not Bound to Interfere in Controversies between Foreigners.—Courts of admiralty are not bound to take jurisdiction of controversies arising out of matters between foreigners, yet they may exercise it lawfully, and will do so in conformity with the law of nations or the *lex loci contractus*,⁴ unless debarred by

of the Act of 1845 as regulating commerce— which Congress could not do within the state. See *Nelson v. Leland*, 22 How. (U. S.) 50, where the test of admiralty jurisdiction, where a voyage was partly upon waters within the jurisdiction and partly on others, was held to be the main character of the voyage, and employment of the vessel. The mere fact that one or both ports were within or without maritime waters was not conclusive. See *The Steamboat Orleans v. Phœbus*, 11 Pet. (U. S.) 175; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *The Robert Morris*, 1 Wall Jr. (C. C.) 33.

1. *The Propeller Commerce*, 1 Black (U. S.) 574; *The Belfast*, 7 Wall. (U. S.) 624; *Ex p. Boyer*, 109 U. S. 629; *The Tolchester*, 42 Fed. Rep. 180; *U. S. v. Burlington, etc., Ferry Co.*, 21 Fed. Rep. 331. So in *The Gate City*, 5 Biss. (U. S.) 200, it was held that a vessel plying between several points on the Mississippi river, on opposite sides, and within a distance of six miles, is amenable to the admiralty, even though her main business be that of a ferryboat between points on opposite sides of the river.

2. *The Belfast*, 7 Wall. (U. S.) 624, overruling *Maguire v. Card*, 21 How. (U. S.) 248; *The Elmira Shepherd*, 8 Blatchf. (U. S.) 341; *Carpenter v. The Schooner Emma Johnson*, 1 Clif. (U. S.) 633.

3. Parties Subject to Foreign Government—Matters Happening in Foreign Waters.—*The Sailor's Bride*, Brown Adm. 68; *The Champion*, Brown Adm. 520; *The Diana*, Lush. 539; *The Courier*, Lush. 541; *The Griefswald*, Swab. 430; *The City of Carlisle*, 39 Fed. Rep. 807; *The Eagle*, 8 Wall. (U. S.) 15; *The Bee, Ware* (U. S.) 332; *The Barque Havana*, 1 Sprague (U. S.) 402; *Mason v. Ship Blaireau*, 2 Cranch (U. S.) 240.

An admiralty court of the United States may have jurisdiction in a case of collision occurring in the North Sea between two foreign vessels. *The Bark Jupiter*, 1 Ben. (U. S.) 536; *The Belgenland*, 14 Phila. (Pa.) 512. 114 U. S. 355.

4. Discretion in Exercising Jurisdiction in Matters between Foreigners.—*Flanders Maritime Law*, § 281; *The Golubchick*, 1 Wm. Rob. 143; *The Evangelistria*, 2 Prob. Div. 241; *The Sailor's Bride*, Brown Adm. 68; *The Steamship Russia*, 3 Ben. (U. S.) 471; *The Champion*, Brown Adm. 520; *The Belgenland*, 114 U. S. 355; *The Bark Jupiter*, 1 Ben. (U. S.) 536; *Commercial Transp. Co. v. Fitzhugh*, 1 Black (U. S.) 574; *The Belfast*, 7 Wall. (U. S.) 624; *The Steamship Russia*, 3 Ben. (U. S.) 471; *The Maggie Hammond*, 9 Wall. (U. S.) 435; *Thomassen v. Whitwell*, 9 Ben. (U. S.) 113; *Neptune Steam Nav. Co. v. Sullivan Timber Co.*, 37 Fed. Rep. 159; *The Noddleburn*, 12 Sawy. (U. S.) 129.

This is the Practice in the Courts of Admiralty in England and other European countries as well as in those of the United States. See *The Griefswald*, Swab. 430. So in the case of *The Johann Frederich*, 1 Wm. Rob. 36, jurisdiction was retained where a Danish ship was sunk by a Bremen ship. Dr. Lushington said: "An alien friend is entitled to sue in our courts on the same footing as a British-born subject, and if the foreigner in this case has been resident here, and the cause of action had arisen *infra corpus comitatus*, no objection could have been taken. * * * All questions of collision are questions *communis juris*, but in case of mariners' wages whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the laws of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. * * * If, then, parties must wait until the vessel that has done the injury has returned to its own country, their remedy might be altogether lost, for she might never return, and if she did, there is no part of the world to which they might not be sent for their redress."

The Jurisdiction was Early Maintained in a case of claim for salvage. *The Two Friends*,

treaty;¹ but, as a general rule, special ground should appear to induce the court to deny its aid to a foreign suitor when the controversy arises under the common law of nations, and the court has jurisdiction over the ship or the party charged.²

Supplies to Domestic Ships in Foreign Ports, and Vice Versa.—So admiralty courts have jurisdiction *in rem* for supplies furnished ships of their own nation in foreign ports, and foreign ships in home ports.³

Controversies between Foreign Seamen.—But courts of admiralty as a rule will not take cognizance of libels of foreign seamen against ships of their own nation.

1 C. Rob. 228. In this case an American ship was taken by the French, and afterward rescued and carried to England by her crew. Several of the ship's crew, however, were British-born subjects, and this gave some weight in determining the case. Sir William Scott said: "I can see no inconvenience that would arise if a British court of justice were to hold pleas in such cases; or, conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. Salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by sound discretion, acting on general principles, and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined."

In the Case of a Bottomry Bond jurisdiction was exercised, though both parties were subjects of a foreign power. The Jerusalem, 2 Gall. (U. S.) 191; The Gratitudine, 3 C. Rob. 240; The Jacob, 4 Rob. 250.

Collisions.—A court of admiralty may take jurisdiction of a libel for a collision on the high seas, between vessels of different nationalities, and although the exercise of jurisdiction is a matter of discretion, special grounds should appear to induce its denial. The Belgenland, 114 U. S. 355.

Subject of United States in Service of Foreign Vessel.—United States statutes conferring admiralty jurisdiction do not apply to claims of bad treatment suffered by an American serving as a seaman on a Norwegian vessel. The Welhaven, 55 Fed. Rep. 80.

Extent of Remedy.—That courts of admiralty, in cases in which the parties are citizens of the same foreign country, give no further remedy than the party would have possessed in the foreign jurisdiction, see The Infanta, Abb. Adm. 263.

1. **Treaties.**—The Burchard, 42 Fed. Rep. 608; The Elwine Kreplin, 9 Blatchf. (U. S.) 438; *Ex p.* Newman, 14 Wall. (U. S.) 152; The Welhaven, 55 Fed. Rep. 80; The Marie, 49 Fed. Rep. 286; The Salomoni, 29 Fed. Rep. 534; *In re* Ross, Petitioner, 140 U. S. 453.

When under a treaty the parties thereto have the right to appoint consular agents who shall have the right to sit as judges and

arbitrate in such differences as may arise between the captains and crews belonging to their respective nations, without the interference of the local authorities, if no such agents are appointed the district court is not bound thereby from assuming jurisdiction. The Amalia, 3 Fed. Rep. 652.

2. **Special Grounds should Appear to Induce Court to Decline to Act.**—The Belgenland, 114 U. S. 355.

A British vessel was libeled for seamen's wages at a port where there was no British consul. The nearest British consul had declined to interfere. Two of the libelants were Americans. It was held that the court had jurisdiction of the case. The Karoo, 49 Fed. Rep. 651.

Where the libellant, an American citizen, sued as assignee of a British ship for damages caused by a collision in the English Channel between the British vessel and a German steamer, and the latter refused to appear in an action instituted against him in a British court, it was held that the case presented no grounds on which the court should decline jurisdiction. Chubb v. Hamburg American Packet Co., 39 Fed. Rep. 431.

And in The Topsy, 44 Fed. Rep. 631, it was held that where a foreign subject libels a vessel belonging to a foreign nation, for wages, in a United States court, and the vessel, pending the suit, leaves the port without any certain destination, and the libellant has left the vessel, the court should not, at the request of the foreign nation, refuse to take jurisdiction.

The fact that the injury complained of, false imprisonment in a foreign jail, was proven by the official intervention of the consul on false allegation, does not distinguish it from any other wrong. Patch v. Marshall, 1 Curt. (U. S.) 452.

3. The Brig Nestor, 1 Sumn. (U. S.) 73; The Brig Napoleon, Olc. Adm. 208; Graham v. Hoskins, Olc. Adm. 224; Davis v. Leslie, Abb. Adm. 123; Bucker v. Klorkgeter, Abb. Adm. 402; Willendson v. Försköket, 1 Pet. Adm. 197; The Carolina, 14 Fed. Rep. 424; The Infanta, Abb. Adm. 263; The Montapedia, 14 Fed. Rep. 427; Thomson v. The Nanny, Bee Adm. 217; The Carolina, 14 Fed. Rep. 424.

So where a subject of Hayti shipped there for a voyage to New York, the master giving security to return him to the port at which he shipped, it was held that he could not sue in New York for his wages, no special cause for his suing or for his leaving the vessel being shown. The Pacific, Blatchf. & H. Adm. 187.

ality for wages, or of other controversies between foreign shipmasters and seamen.¹ Yet, where the voyage has been completed or abandoned, or the seamen have been wrongfully discharged, or there are circumstances showing cruelty or great hardship, the courts will seldom decline to take jurisdiction.²

Foreigners of Different Governments—No Common Forum.—And where the suit is between foreigners of different governments, who therefore have no common forum, the jurisdiction should not be declined.³

When Differences Adjusted by Consuls.—The court will refuse to take jurisdiction of a libel for injuries inflicted by the master of a foreign vessel upon a foreign seaman, where the matter has been settled through the interposition of the respective consuls.⁴

Protest of Consul.—Due consideration should be given to the wishes of a consul of the country of the parties, and his protest may be good ground for declining jurisdiction.⁵

Distribution of Proceeds of Sale of Foreign Vessel.—Where the court has seized and sold a foreign vessel under its process, it cannot refuse to distribute the proceeds according to the rights of the parties.⁶

Consideration that should Influence Court in Exercising Jurisdiction or Not.—The principle upon which the court is to determine whether to exercise jurisdiction is the consideration whether the rights of the parties would best be promoted by retaining the cause or by remitting it to a foreign tribunal.⁷

4. What Vessels are within the Jurisdiction—General Rule.—All ships or vessels are *prima facie* subject to the jurisdiction of the admiralty, as a rule of general international law; but ships of war belonging to a foreign friendly nation are not subject to seizure by the courts of admiralty of other countries;⁸ nor are vessels belonging to, or engaged in, the service of a city government.⁹

1. Foreign Seamen.—In *The Belgenland*, 114 U. S. 363, Bradley, J., in this connection said: "The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul or minister is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed, or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. * * * On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to his wishes as to taking jurisdiction."

2. Voyage Completed or Abandoned—Or Circumstances of Cruelty or Hardship.—*The Pawshick*, 2 Low. (U. S.) 142; *The Jerusalem*, 2 Gall. (U. S.) 193; *The Hermine*, 3 Sawy. (U. S.) 80; *Thompson v. The Ship Catharina*, 1 Pet. Adm. 104; *The Bark Lilian M. Vigus*, 10 Ben. (U. S.) 385; *Willendson v. The Försöket*, 1 Pet. Adm. 197; *Gonzales v. Minor*, 2 Wall. Jr. (C. C.) 348; *Weiberg v. The Brig St. Oloff*, 2 Pet. Adm. 428; *Bucker v. Klorkgeter*, Abb. Adm. 402; *Davis v. Leslie*, Abb. Adm. 123; *Limland v. Stephens*, 3 Esp. 269; *Hulle v. Heightman*, 4 Esp. 75; *Sigard v. Roberts*, 3 Esp. 71.

It was held that where there had been a

deviation which, by the law of the foreign country, would entitle the seaman to his discharge, the admiralty courts of the United States would take jurisdiction of a libel for his wages. *Moran v. Baudin*, 2 Pet. Adm. 415.

3. *The City of Carlisle*, 5 L. R. A. 52; *Bernhard v. Creene*, 3 Sawy. (U. S.) 230; *The Noddleburn*, 2 Sawy. (U. S.) 129; *The Belgenland*, 114 U. S. 355.

4. *Camille v. Couch*, 40 Fed. Rep. 176.

5. *The Becherdass v. Ambaidass*, 1 Low. (U. S.) 569.

In *The Agincourt*, 2 Prob. Div. 239, where the consul of the country of the parties declined to give his consent to the proceedings, the court refused to interfere.

A foreign seaman, seeking to prosecute an action for his wages in a foreign port, in the courts of the United States, should procure the official sanction of the commercial or political representative of the country to which he belongs; or, in the absence of such approval, good reasons should be shown for allowing his suit. *The Infanta*, Abb. Adm. 263; *Graham v. Hoskins*, Olc. Adm. 224. This, however, is not absolutely and invariably necessary. *Bucker v. Klorkgeter*, Abb. Adm. 402.

6. *Covert v. The British Brig Wexford*, 3 Fed. Rep. 577.

7. *The Steamship Russia*, 3 Ben. (U. S.) 476; *One Hundred and Ninety-four Shawls*, Abb. Adm. 317.

8. *Long v. The Tampico*, 16 Fed. Rep. 497. This rule is one of general international law. *The Constitution*, 4 Prob. Div. 39.

9. *Vessels Engaged in Service of a Municipality.*

What is a Vessel.—There are numerous decisions as to what constitutes a vessel as subject to maritime law. As a general rule, the fact that the thing in question is not propelled by oars, sails, or steam power, and is engaged only in harbors and docks, and is moved from place to place by tugs, does not prevent its being a vessel within the admiralty jurisdiction.¹

Instances.—A steam-dredge is held to be a vessel;² as is also a light-boat;³ a raft;⁴ a barge without sails or rudder;⁵ a floating elevator;⁶ a bath-house built on boats;⁷ canal-boats;⁸ and wharf-boats.⁹ A floating dry-dock permanently moored is held not to be a ship in the admiralty law;¹⁰ nor is a marine pump, although capable of floating;¹¹ nor is a floating hotel a vessel.¹²

A boat in an unfinished condition, or one wholly unfit for navigation, is not a vessel.¹³

—The *Fidelity*, 16 Blatchf. (U. S.) 569, 9 Ben. (U. S.) 333.

This exemption extends to vessels of private individuals when in government service. The *Athol*, 1 Wm. Rob. 374; The *Thomas A. Scott*, 10 L. T. N. S. 726.

1. What Constitutes a Vessel as Subject to Maritime Law.—The *Alabama*, 22 Fed. Rep. 449; The *Pioneer*, 30 Fed. Rep. 296; *Aitcheson v. The Endless Chain Dredge*, 40 Fed. Rep. 253.

The True Criterion by which to determine whether any water craft or vessel is subject to admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion. The *General Cass*, Brown Adm. 334.

"Vessel" is Defined by United States Rev. Stat., § 3, as including "every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation by water."

A Wreck Abandoned but Subsequently Appropriated and repaired is a vessel within the admiralty jurisdiction. The *Progresso*, 46 Fed. Rep. 292.

An Old Steamboat from which the boiler, wheel, engine, and machinery have been removed, and which has been changed into a pleasure barge, having no independent means of propulsion, but intended to be towed by a towboat and to be used in the transportation of excursion parties, being useless for the transportation of passengers, is a vessel within the maritime law. The *City of Pittsburgh*, 45 Fed. Rep. 699.

2. Dredge.—The *Starbuck*, 61 Fed. Rep. 502; The *Floating Elevator Hezekiah Baldwin*, 8 Ben. (U. S.) 556; The *Alabama*, 22 Fed. Rep. 449; The *Pioneer*, 30 Fed. Rep. 206.

Tug.—A tug of less than four tons burden engaged in towing canal-boats is engaged in aiding commerce, and is within the admiralty jurisdiction. The *Ella B.*, 24 Fed. Rep. 508.

3. Light-boat.—*Briggs v. A Light-boat*, 7 Allen (Mass.) 287.

4. Raft.—*Muntz v. A Raft of Timber*, 15 Fed. Rep. 555; *Fifty Thousand Feet of Timber*, 2 Low. (U. S.) 64; The *F. & P. M. No. 2*, 33 Fed. Rep. 511; *A Raft of Spars*, Abb. Adm. 485.

In *U. S. v. One Raft of Timber*, 13 Fed. Rep. 796, it was held that a raft was a vessel

under U. S. Rev. Stat., § 4233, and must carry lights.

A raft manned by a pilot, crew, and cook, and used as a convenient mode of bringing logs to market, was held to be a vessel so as to give admiralty jurisdiction *in rem*. *Seabrook v. Raft of Railroad Cross-Ties*, 40 Fed. Rep. 596. There are *dicta* to the contrary, however, as in *Tome v. Four Cribs of Lumber*, Taney (U. S.) 533. In this case the action was a possessory one, instituted in a court of admiralty by the owners of the lumber, to recover it from a party who was seeking to hold it for salvage services. It was held that the remedy of the owners to regain the possession was an ordinary action of replevin.

In *Gastrel v. A Cypress Raft*, 2 Woods (U. S.) 213, the raft was made up of timber cut from lands the title to which was in dispute. It was held that admiralty did not have jurisdiction to try the title to the logs.

5. Barge.—*Disbrow v. The Walsh Bros.*, 36 Fed. Rep. 607; *Wood v. Two Barges*, 46 Fed. Rep. 204; *The Dick Keys*, 1 Biss. (U. S.) 408. But see *Jones v. Coal Barges*, 3 Wall. Jr. (C. C.) 53.

6. Floating Elevator.—The *Alabama*, 22 Fed. Rep. 449.

7. Bath-house Built on Boats.—The *Steam-tug M. R. Brazos*, 10 Ben. (U. S.) 435; *Public Bath No. 13*, 61 Fed. Rep. 692. Not, however, when permanently moored. *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625.

8. Canal-boat.—The *Canal-Boat Kate Tremaine*, 5 Ben. (U. S.) 60; The *Volunteer*, Brown Adm. 159; *Buckley v. Brown*, 3 Wall. Jr. (C. C.) 199.

9. Wharf-boat.—The *Old Natchez*, 9 Fed. Rep. 476.

10. Floating Dock Permanently Moored.—*Cope v. Vallette Dry Dock*, 10 Fed. Rep. 142.

A suit to recover the possession and delivery of a floating dry-dock with a floating pump, which is not a vessel, or constructed and used in navigation or commerce, cannot be maintained in admiralty. *Snyder v. Floating Dry Dock*, 22 Fed. Rep. 685.

11. Marine Pump Capable of Floating.—The *Big Jim*, 61 Fed. Rep. 503.

12. Floating Hotel.—The *Steamboat Hendrick Hudson*, 3 Ben. (U. S.) 419.

13. Boat in Unfinished Condition.—*Yarnberg v. Watson*, 13 Oregon 11; The *Steamboat Vermont*, 6 Ben. (U. S.) 115. See The *Eliza*

5. Subject Matter of Jurisdiction.—a. MARITIME TORTS—(1) *In General*.—

A maritime tort is one that occurs upon the high seas or public navigable water, whether a wrongful act or omission, and the court of admiralty has jurisdiction of the suit to recover damages therefor.¹

The Test of Jurisdiction in Tort is the locality, not the nature of the act. The tort complained of must have occurred on the water to be within the admiralty jurisdiction; so where it arises upon the water, but is consummated upon the land, it is not within the jurisdiction.² Also suits for damage for injuries to

Ladd 3 Sawy. (U. S.) 519; Northrup v. The Pilot, 6 Oregon 298.

1. **Maritime Tort Defined.**—Holmes v. Oregon, etc., R. Co., 5 Fed. Rep. 75; Mauro v. Almeida, 10 Wheat. (U. S.) 486; The Sloop Martha Anne, Olc. Adm. 18; The Kirkland, 3 Hughes (U. S.) 641.

The Jurisdiction of Admiralty embraces the whole subject matter of damages on the high seas. The Volant, 1 Wm. Rob. 387.

In The Calista, Hawes, 14 Fed. Rep. 493, where a custom-house officer, engaged in keeping tally of a cargo discharged from a vessel into a lighter at the port of New York, was struck and injured by a barrel improperly hoisted by order of the mate, it was held that damages were recoverable in admiralty by libeling the vessel.

Damage by Leakage.—In Wood v. Canal Boat Wilmington, 5 Hughes (U. S.) 205, the libellant hired a barge for the storage and transportation of grain in a harbor. The master of the barge was bound by the contract to keep the barge in repair. He failed to do so, and allowed it to leak, and the grain was thereby damaged. It was held that the libellant could proceed *in rem* against the barge to recover such damages, he having been compelled to pay the same to the owners of the grain.

Abduction of Child.—In Plummer v. Webb, 4 Mason (U. S.) 380, it was held that a father might maintain a suit in admiralty for a tortious abduction of his minor son on a voyage on the high seas. See, to the same effect, Tillmore v. Moore, 4 Fed. Rep. 231; Steele v. Thacher, Ware (U. S.) 91.

Negligence of Employee of Charterer.—When, through the negligence of the stevedore employed by the charterer of a ship to unload her, an insufficient rope was provided, and a bale of cotton fell, striking and injuring one of the stevedore's workmen, it was held that the case was not cognizable in admiralty, nor could a state statute make it so; and that, moreover, the ship could not be liable in any event, as the negligence was that of the employee of the charterer. The Mary Stewart, 5 Hughes (U. S.) 312.

Assaults upon or Injuries by Seamen.—A proceeding *in rem* against the vessel does not lie, under Admiralty Rule XVI., at the instance of seamen who have been assaulted and cruelly treated by the officers. The remedy is by action *in personam*. Smith v. The Ship Challenger, 2 Wash. Ter. 447. But in Todd v. The Tulchen, 14 Phila. (Pa.) 550, it was held that a person who is employed to repair a vessel and is injured by it when it starts may proceed *in rem* to recover damages, he being then a passenger.

2. **Locality of Tort the Criterion.**—Johnson v. Chicago, etc., Elevator Co., 119 U. S. 388; The Commercial Transp. Co. v. Fitzhugh, 1 Black (U. S.) 579; U. S. v. Davis, 2 Sumn. (U. S.) 482; Thomas v. Lane, 2 Sumn. (U. S.) 9; The C. Accame, 20 Fed. Rep. 642; Steele v. Thacher, Ware (U. S.) 93; U. S. v. Magill, 1 Wash. (U. S.) 463; *In re* The Steam Propeller Epsilon's Petition, 6 Ben. (U. S.) 381; The Schooner Maud Webster, 8 Ben. (U. S.) 547.

In The Neil Cochran, Brown Adm. 164, which was a libel for injury to a bridge, Sherman, J., said: "From that case, supported by the clearest and most convincing reasoning, the following propositions are deducible: First. The jurisdiction of the admiralty over marine torts depends upon locality—the high seas or other navigable waters within admiralty cognizance. Second. The origin of the wrong must not only be on navigable water, but the substance and consummation of the injury must also be on navigable water. Third. The fact that an injury is done by a vessel is of no weight in determining the question of jurisdiction, locality being the test. Fourth. If the negligence which occasions the injury is upon navigable waters, but the whole damage resulting therefrom is upon the land, admiralty has no jurisdiction. Fifth. The negligence of itself furnishes no cause of action; it is *damnum absque injuria*; the whole or substantial cause of action, both negligence and resulting damage, must be upon navigable water to constitute a maritime tort. In the light of these propositions what shall be said of the case at bar? Clearly this: That the origin of the wrong was upon navigable water, but that the whole damage resulting therefrom was done upon the land, the bridge being attached to and a part of the land."

In The Professor Morse, 23 Fed. Rep. 803, the maritime railway claimed to have been injured was not at the time of the injury a floating structure, and therefore not within the admiralty jurisdiction.

In The Arkansas, 17 Fed. Rep. 383, the libellants owned an oil depot on the levee near the Mississippi river, and, during a flood, a steamboat in the water over what ordinarily was land negligently ran into the depot and injured it. It was held that this was not a tort of which admiralty had jurisdiction.

Injury to Boom.—A boom constructed to detain logs passing down a navigable river is a structure pertaining to the adjacent land, as much as a wharf or building erected therein, and assuming that it extends no

bridges,¹ or wharves,² caused by vessels, are not cognizable by courts of admiralty. On the other hand, if the tort is consummated on the water, the fact that the negligent or otherwise tortious act originated on land does not prevent cognizance of the wrong by the court of admiralty.³

Injury to Vessel by Bridge or Draw.—Although admiralty has not jurisdiction

farther out than the landowner, with due regard to navigation, might properly extend it, a wrongful injury to it is not a marine injury, and cannot be redressed in a court of admiralty. *The Brig City of Erie v. Canfield*, 27 Mich. 479.

The Wrongful Arrest on Shore of Deserting Seamen by the procurement of the master does not constitute a maritime tort. *Bain v. Sandusky Transp. Co.*, 60 Fed. Rep. 912.

Injury to Person.—An injury done to one while standing on a wharf, by a bale of cotton which fell upon him from a ship's tackle alongside, cannot be redressed in admiralty. *The Mary Stewart*, 10 Fed. Rep. 137.

Where the libellant was engaged in repairing a vessel which lay at a wharf, and while on a ladder connecting the bulwark of the vessel with the wharf, the ladder slipped, owing to the negligence of the master, and the libellant was thrown on the wharf and injured, it was held that a court of admiralty had no jurisdiction. *The H. S. Pickands*, 42 Fed. Rep. 239.

In *Leathers v. Blessing*, 105 U. S. 626, it was held that the admiralty had jurisdiction in case of an injury received on board a vessel through the negligence of the master, although the vessel had completed her voyage and was moored at a wharf where she was about to discharge her cargo. See also *Anderson v. The E. B. Ward, Jr.*, 38 Fed. Rep. 44.

Fire on Shore from Steamboat.—Where a vessel took fire at a wharf, from the negligence of the officers, and the fire spread and consumed certain storehouses on the wharf, it was held not to be a case of admiralty proceeding, because the injury complained of occurred on the land, and not on the water. *The Plymouth*, 3 Wall. (U. S.) 33.

In *Ex p. Phenix Ins. Co.*, 118 U. S. 610, where a steamboat, in going up a navigable river, set fire to a town, and property was burned far exceeding the value of the boat and her freight, and suits were brought in the state court for damages, it was held that the admiralty court had no jurisdiction of a proceeding under the Limited Liability Act, and that if the provisions of that act could be invoked under the circumstances, they must be invoked elsewhere.

Capture on Land — Transportation.—Where a citizen of San Francisco was seized in that city by a member of a "vigilance committee," transported to the bark *Yankee* at sea, and carried in the bark to the Sandwich Islands, it was held that different torts were committed, by different persons, in different places, and that the tort committed by the master of the bark was within the jurisdiction of admiralty as a marine tort. *Barque Yankee v. Gallagher*, 1 McAll. (U. S.) 467.

1. **Bridges.**—*Milwaukee v. The Curtis*, 37 Fed. Rep. 705; *The Neil Cochran*, Brown Adm. 164; *The John C. Sweeney*, 55 Fed. Rep. 540; *Boston v. Crowley*, 38 Fed. Rep. 202; *The Mary Stewart*, 5 Hughes (U. S.) 314.

2. **Wharves.**—An action will not lie in admiralty against a vessel to recover damage done by her to a wharf projecting into a navigable river. *The Ottawa*, Brown Adm. 356; *Russel v. The Brig Empire State*, Newb. Adm. 541. In the former case the following language is used: "Upon a careful consideration of the question, and of the authorities bearing upon it, I must hold that a wharf is but an improvement or extension of the shore; that it is real estate, and that an injury done to it, whether through negligence or design, no matter by what agency, is an injury done wholly on land and not on the water, and, therefore, does not constitute a marine tort." This case was distinguished from that of the *Philadelphia*, etc., *R. Co. v. Philadelphia*, etc., *Steam Towboat Co.*, 23 How. (U. S.) 209, which was a libel *in personam* by the towboat company for an obstruction to navigation on navigable waters, an injury having resulted therefrom to one of the boats of the company. The obstruction was no part of a bridge or wharf, but a pile used in the construction of a bridge, which pile had been abandoned after the completion of the work.

Allegation in Libel as to Pier.—A libel to recover damages for injury to a pier by overloading it, which states that the pier is within navigable waters from the ocean and within the ebb and flow of the tide, and does not show that the pier is part of the land and is not a floating structure, is not liable to exception as failing to state a case within the jurisdiction of the admiralty. *New York v. Highland*, 6 Ben. (U. S.) 289.

3. When the substance of the tort is committed on the high seas, where it then has its consummation, if it be all one continued act the jurisdiction of the admiralty will attach to the whole matter, though part of it may have taken place on land, and within the body of a county. *Steele v. Thacher*, Ware (U. S.) 91; *Plummer v. Webb*, 4 Mass. 380.

In *The City of Lincoln*, 25 Fed. Rep. 835, a wharf loaded with steel blooms which had been discharged from the steamship gave way beneath the weight, throwing the blooms into the water. As in this case the injury was caused wholly by the water into which the blooms were thrown, it was held that if the breaking down of the wharf occurred through the wharfinger's negligence, such negligence was a marine tort of which a court of admiralty had jurisdiction. See also *Vose v. Allen*, 3 Blatchf. (U. S.) 289.

over an injury to a bridge by a vessel, the jurisdiction does exist over an injury done to a vessel on navigable water by a bridge or draw.¹

Not Confined to Wrongs Resulting from Direct Force.—The jurisdiction is not confined to wrongs or injuries committed by direct force, but includes wrongs suffered in consequence of the negligence or malfeasance of others, when the remedy at common law is by an action on the case.²

Claim for Personal Injuries Connected with Other Matters.—When a claim for damages for personal wrongs is connected, as an incident, with other matters properly appertaining to the cognizance of admiralty, the court will take jurisdiction of both causes of action.³

Substantial Rights—Nominal Damages.—A court of admiralty regards only substantial rights, and consequently will not entertain a suit for merely nominal damages not involving any subject matter beyond such claim.⁴

Taking Property at Sea.—The jurisdiction extends to the wrongful taking of property at sea, and the court has jurisdiction whenever and wherever such property may be found within its territorial jurisdiction.⁵

(2) **Death by Wrongful Act.**—The Supreme Court of the United States, after a review of the numerous conflicting decisions in the lower courts, has held that in the absence of federal or state legislation giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for death caused by wrongful act or negligence on the high seas or navigable waters, in accordance with the principle now well established, that by the common law no civil action lies for an injury which results in death.⁶

1. *Greenwood v. Westport*, 60 Fed. Rep. 560; *Oregon City Transp. Co. v. Columbia St. Bridge Co.*, 53 Fed. Rep. 549; *Etheridge v. Philadelphia*, 26 Fed. Rep. 43; *Boston v. Crowley*, 38 Fed. Rep. 202; *Assaute v. Charleston Bridge Co.*, 40 Fed. Rep. 765; *Hill v. Board of Chosen Freeholders*, 45 Fed. Rep. 261.

The Test is the Locality of the Thing Injured, and not the thing inflicting the injury. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. (U. S.) 209; *The Steamboat Ad. Hine v. Trevor*, 4 Wall. (U. S.) 555; *The Rock Island Bridge*, 6 Wall. (U. S.) 213; *Atlee v. Northwestern Union Packet Co.*, 21 Wall. (U. S.) 389.

No Maritime Lien.—The proceeding in such a case is *in personam* and not *in rem*, as a maritime lien can exist only upon things which are the subjects of commerce on the high seas or navigable waters, not upon anything which is fixed and immovable, as a bridge, wharf, etc. *The Rock Island Bridge*, 6 Wall. (U. S.) 213.

2. *Leathers v. Blessing*, 105 U. S. 626; *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. (U. S.) 209.

Injuries to Passengers.—Admiralty has jurisdiction of personal wrongs and torts committed on the high seas, by the master of a ship, upon passengers. It is immaterial whether such torts are committed by direct force, as trespasses, or are consequential injuries. *Chamberlain v. Chandler*, 3 Mason (U. S.) 242; *Rucker's Case*, 4 C. Rob. 60.

Negligence in Care of Seamen.—Misconduct or neglect by the officers in the treatment of a seaman after he is wounded in the service of the ship becomes a different and additional cause of action against the ship.

Brown v. Overton, 1 Sprague (U. S.) 462; *Moseley v. Scott*, 5 Am. L. Reg. N. S. 599.

3. *Thomas v. Gray, Blatchf. & H. Adm.* 493.

4. *Barnett v. Luther*, 1 Curt. (U. S.) 434.

5. 528 Pieces of Mahogany, 2 Low. (U. S.) 323; *The Amiable Nancy*, 3 Wheat. (U. S.) 546; *L'Invincible*, 1 Wheat. (U. S.) 258; *American Ins. Co. v. Johnson, Blatchf. & H. Adm.* 9. The wrongful taking of a cargo. *The Dauntless*, 7 Fed. Rep. 366.

6. *The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201.

Several Earlier Decisions were to the Contrary.—In *The Sea Gull*, Chase Dec. (U. S.) 145, Chase, C.J., although recognizing that at common law no redress can be had by the surviving representatives for injuries occasioned by the death of one through the wrong of another, held that such recovery could be had in admiralty. He said: "It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." See also *The Highland Light*, Chase Dec. (U. S.) 150, where reference was made to a *Maryland* statute conferring this right of action.

In *Hollyday v. The Steamer David Reeves*, 5 Hughes (U. S.) 89, Norris, J., followed these cases in the same circuit, although he recognized that the doctrine was contrary to common law and the admiralty decisions in *England*. See also *The Manhasset*, 18 Fed. Rep. 918; *The Steamboat Chas. Morgan*, 2 Flipp. (U. S.) 274.

The Harrisburg.—These cases were carefully considered and *overruled* in *The Harrisburg*, 119 U. S. 213, Chief Justice Waite after an elaborate review of the early de-

And in *England* this jurisdiction is denied the courts of admiralty.¹

Where there are State Statutes.—Where, by a state statute, however, a right of action is conferred upon the personal representatives of a deceased person to recover damages for his death when caused by the wrongful act, neglect, or default of another, if the tort has occurred on any navigable waters, the courts of admiralty have jurisdiction. This is no departure from the general rule that state laws can neither extend nor restrict the jurisdiction of the admiralty courts, for such a statute merely creates a right, which is separate from the remedy to be enforced in the proper tribunal.²

Libel—Statute Creating Lien.—But although a right of action be given, no libel can be sustained unless the statute expressly creates a lien therefor;³ and indeed it has been held that state statutes creating liens in such cases are

cisions, and the laws of other countries, delivering the opinion of the court as stated in the text. He said: "The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

In *The Alaska*, 130 U. S. 201, a distinction was sought to be drawn between that case and that of *The Harrisburg*, 119 U. S. 199, on the ground that in the one case the vessel was owned in Pennsylvania, while in the other the vessel was a British one. Blatchford, J., said: "In the case of *The Harrisburg*, the alleged negligence which resulted in the death occurred in a sound of the sea embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the state of Massachusetts. The question involved and decided in that case was, whether the admiralty courts of the United States could take cognizance of a suit to recover damages for the death of a human being on the high seas or on waters navigable from the sea, caused by negligence, in the absence of an act of Congress or a statute of a state, giving a right of action therefor. That question was answered by this court in the negative, and the decision entirely covers the present case."

1. *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59; *Monaghan v. Horn*, 7 Can. Supreme Ct. 409.

2. **Right of Action Conferred by State Statute.**

—*Holmes v. Oregon*, etc., R. Co., 6 Sawy. (U. S.) 262; *The Clatsop Chief*, 7 Sawy. (U. S.) 274; *The Garland*, 5 Fed. Rep. 924; *American Steamboat Co. v. Chace*, 16 Wall. (U. S.) 522; *Chase v. American Steamboat Co.*, 9 R. I. 419; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *The Highland Light*, *Chase Dec.* (U. S.) 150; *The City of Norwalk*, 55 Fed. Rep. 98, *affirmed* in 61 Fed. Rep. 364; *The Transfer No. 4*, 9 C. C. A. 521; *The Premier*, 59 Fed. Rep. 797; *American Steamboat Co. v. Chace*, 16 Wall. (U. S.) 532; *The Hudson*, 8 Fed. Rep. 167.

In *Holmes v. Oregon*, etc., R. Co., 5 Fed. Rep. 75, after reviewing several of the above cases, Dedy, J., said: "The question of whether the state or national tribunals have jurisdiction does not depend upon the state or national origin of the right or title in question. If the plaintiff's citizenship is different from that of the defendant he has a right to sue in the Circuit Court of the United States, whether the right he asserts is of state or national origin. For the same reason, if a right is of admiralty jurisdiction, it is cognizable in the district courts without reference to the residence of the parties or the origin of the right. The maxim that the state cannot enlarge the jurisdiction or control the process of the national courts is admitted. But, certainly, it may increase the cases in such courts by enlarging the class of persons or things included in their jurisdiction."

In the *Long Island*, etc., Transp. Co.'s Petition, 5 Fed. Rep. 599, an action for injury resulting in death which happened within the limits of New York state, Choate, D. J., after referring to cases holding that a suit for damages in such cases survives, said: "But, however it may be in respect to the original jurisdiction of admiralty courts, I see no valid reason why the right of a person to whom, under the municipal law governing the place of the transaction and the parties to it, the title to the chose in action survives, or a new right to sue is given for damages resulting from a tort, the admiralty courts, in the exercise of their jurisdiction *in personam* over marine torts, should not recognize and enforce the right so given."

3. *The Corsair*, 145 U. S. 335; *Welsh v. The North Cambria*, 39 Fed. Rep. 615; *Ole-son v. The Ida Campbell*, 34 Fed. Rep. 432; *The Sylvan Glen*, 9 Fed. Rep. 335.

inoperative on the ground that states have no power to interfere with the admiralty system of laws;¹ yet there are cases in which such statutes have been upheld and enforced.²

b. MARITIME CONTRACTS—(1) *General Principles*—**Subject Matter Controls**.—The jurisdiction of the courts of admiralty in the case of torts is dependent upon locality. Not so, however, in the case of contracts: here it depends chiefly upon the subject matter,—the nature of the service or engagement,—and is limited to such subjects as are purely maritime, and which relate to commerce or navigation upon the high seas or navigable waters.³

To Give a Maritime Character to Services, they must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation, directly by labor on the vessel, or in the sustenance and relief of those who conduct her operations at sea.⁴ So stipulations of a merely personal nature

1. *Welsh v. The North Cambria*, 40 Fed. Rep. 655; *The Manhasset*, 18 Fed. Rep. 918.

2. *The St. Nicholas*, 45 Fed. Rep. 671; *The Oregon*, 45 Fed. Rep. 62; *The Garland*, 5 Fed. Rep. 924; *In re Long Island, etc.*, Transp. Co.'s Petition, 5 Fed. Rep. 599; *The H. E. Willard*, 52 Fed. Rep. 387; *The City of Norwalk*, 55 Fed. Rep. 98. See also the title **MARITIME LIENS**.

3. **Subject Matter of Contract Determines Jurisdiction**.—*Ex p.* *Easton*, 95 U. S. 72; *The Steamboat Thomas Jefferson*, 10 Wheat. (U. S.) 428; *The General Smith*, 4 Wheat. (U. S.) 438; *The Aurora*, 1 Wheat. (U. S.) 96; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *De Lovio v. Boit*, 2 Gall. (U. S.) 398; *The Sloop Mary*, 1 Paine (U. S.) 671; *The Schooner Volunteer*, 1 Sumn. (U. S.) 551; *The Schooner Tribune*, 3 Sumn. (U. S.) 144; *Davis v. A New Brig, Gilp*. (U. S.) 473; *Waterbury v. Myrick, Blatchf. & H.* (U. S.) 34; *Zane v. The Brig President*, 4 Wash. (U. S.) 453; *Gardner v. The Ship New Jersey*, 1 Pet. Adm. 223.

In The Jerusalem, 2 Gall. (U. S.) 348, Story, J., said: "The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognized by Mr. Justice Buller; that the jurisdiction as to contracts depends not upon the locality, but upon the subject matter, of the contract."

In Thackarey v. The American Boat Farmer, Gilp. (U. S.) 534, *Hopkinson, J.*, said: "The general result to which my inquiry into this subject has brought me is, that as to torts, injuries, and offenses, locality gives jurisdiction; but as to contracts, there must be something more. It is not enough that the service performed or to be performed is on the high sea, or on tide-water: it must in its subject matter be maritime; it must have some relation to trade and commerce; some connection with a vessel employed in trade; with her equipment, her preservation, or the preservation of her crew. Thus a carpenter, a surgeon, a steward, all contribute, in their several ways, to the preservation of a ship or her crew. But if the master should take with him a servant, whose sole business should be to shave him or comb his hair, or another to amuse him with a violin, the service would be performed on the high sea, but would it be a maritime contract or service?"

In the early cases, contracts relating to interior navigation and trade not on tide-waters were held not to be within the jurisdiction of admiralty. *The Steamboat Orleans v. Phœbus*, 11 Pet. (U. S.) 183. But, as we have seen, this doctrine was overruled, and "navigable waters" substituted for "tide-waters." See *supra*, this title, **Navigable Waters**.

The Weighing and Inspecting of a Cargo constitute a maritime service. *The E. A. Baisley*, 13 Fed. Rep. 703.

The Removal of Ballast from a foreign vessel while in port, for the purpose of putting her in condition, is a maritime service. *Roberts v. The Bark Windermere*, 2 Fed. Rep. 722.

But the Storage of Balls is not a service pertaining to the ship's navigation. *Hubbard v. Roach*, 2 Fed. Rep. 393.

Lockage.—A claim for lockage in a public navigable river is cognizable in a court of admiralty. *Monongahela Nav. Co. v. The Steam Tug "Bob Connell"*, 1 Fed. Rep. 218.

Contract Not Maritime where Made.—A contract maritime in its nature and effect will be enforced by the United States admiralty courts, though not considered a maritime contract in the country where it was made. A maritime lien is not essential to give admiralty jurisdiction. This was held as to a steamship's failure to fulfil a contract of charter to make "all convenient speed," etc. *Maury v. Culliford*, 4 Woods (U. S.) 118.

Not Necessary that Breach Occur during the Voyage.—In *The Pacific*, 1 Blatchf. (U. S.) 569, it was held that if a contract is maritime in its nature and subject, it is not essential, in order to give jurisdiction to the admiralty *in rem*, that the vessel should have entered on the performance, or that the breach should have occurred in the course of the voyage.

Set-off does Not Oust the Court of its Jurisdiction.—In *Dexter v. Munroe*, 2 Sprague (U. S.) 39, it was held that the fact that a respondent to a suit upon a maritime contract has claims against the libellant which might properly be allowed in other courts by way of set-off, does not oust the district court of its jurisdiction, or preclude it from proceeding to investigate and decide the cause before it.

4. *Gurney v. Crockett*, Abb. Adm. 490; *Cox*

not relating to maritime service are not cognizable in admiralty.¹

Contract must, in its Essence, be Maritime.—A contract of a special nature is not cognizable in the admiralty merely because the consideration of the contract is maritime service, but the whole contract must in its essence be maritime, or for compensation for maritime service.²

Preliminary Contracts.—There is no jurisdiction in admiralty over preliminary agreements leading to maritime contracts.³ So admiralty has not jurisdiction of a contract to procure insurance,⁴ or of a suit to reform a policy of marine insurance by an antecedent contract.⁵

An Additional Agreement Not a Maritime Contract will not oust the jurisdiction of the admiralty.⁶

Contracts of Partnership in the purchase of a vessel are not maritime.⁷

Nor are Matters of Account between part owners of a vessel within the jurisdiction.⁸

But Cases of Licitation or Sale, for the purposes of partition, are within the admiralty jurisdiction.⁹

Bottomry, Charter Parties, Maritime Insurance, Salvage, Pilotage, Wharfage, Towage, Demurrage.—The jurisdiction has been held to extend to contracts of bottomry and *respondentia*,¹⁰ of affreightment¹¹ and the transportation of passen-

v. Murray, Abb. Adm. 340. See the title **SEAMEN**.

1. *Alberti v. The Brig Virginia*, 2 Paine (U. S.) 115.

A claim by one against the owners of a vessel for service in purchasing her, and in traveling on her looking after the owners' interest, but having no control over or concern in the navigation of the vessel, is not within the jurisdiction of admiralty. *Doolittle v. Knobeloch*, 39 Fed. Rep. 40.

2. *Plummer v. Webb*, 4 Mason (U. S.) 380.

3. *The Schooner Tribune*, 3 Sumn. (U. S.) 144.

4. *Marquardt v. French*, 53 Fed. Rep. 603.

5. *Andrews v. Essex F.*, etc., Ins. Co., 3 Mason (U. S.) 6; *Williams v. Providence Wash. Ins. Co.*, 56 Fed. Rep. 159; *Dean v. Bates*, 2 Woodb. & M. (U. S.) 87.

Marine Insurance.—A suit brought upon a policy of marine insurance, where the loss occurred outside of the express limit of the policy, and the complaint is based upon alleged false and fraudulent negotiations leading up to the making of the policy, is not within the admiralty jurisdiction. *Williams v. Providence Wash. Ins. Co.*, 56 Fed. Rep. 159.

6. *Rosenthal v. The Louisiana*, 37 Fed. Rep. 264.

Indeed, if the Main Purpose of the Contract is maritime, it is treated as an entirety, and the jurisdiction extends to give a remedy for a breach of incidental stipulations, although they are not such, independently considered, as would give rise to a remedy in admiralty. *The Pacific*, 1 Blatchf. (U. S.) 569.

7. *Turner v. Beacham*, Taney (U. S.) 583.

8. *Vandewater v. Mills*, 19 How. (U. S.) 82; *Kellum v. Emerson*, 2 Curt. (U. S.) 79; *The Steamboat Orleans v. Phœbus*, 11 Pet. (U. S.) 175; *Grant v. Poillon*, 20 How. (U. S.) 162; *Ward v. Thompson*, 22 How. (U. S.) 330; *Dean v. Bates*, 2 Woodb. & M. (U. S.) 87; *Davis v. Child*, Davies (U. S.) 71; *The Larch*, 3 Ware (U. S.) 28; *Pettit v. The Charles*

Hemje, 5 Hughes (U. S.) 359; *Duryee v. Elkins*, Abb. Adm. 529; *The H. E. Willard*, 53 Fed. Rep. 599.

No action can be maintained in a court of admiralty, by one ship-owner against another, to collect a balance to be determined in favor of the libelant on the settlement of the joint accounts of the parties. *Martin v. Walker*, Abb. Adm. 579.

Where certain parties join together to carry on an adventure in trade for their mutual benefit, one contributing a vessel, and the other his skill, labor, experience, etc., and there is to be a communion of profit on a fixed ratio, it is a contract over which a court of admiralty has no jurisdiction. *Ward v. Thompson*, 22 How. (U. S.) 330. See also *Vandewater v. Mills*, 19 How. (U. S.) 82.

Master as Co-owner.—In *Dexter v. Munroe*, 2 Sprague (U. S.) 39, where the libelant was master and also a co-owner of a whaling vessel, it was held that after the voyage had been made up, and the amount due for his pay ascertained, and the proceeds of the voyage placed in the hands of the other owners, the libelant was entitled to recover, in admiralty, the amount due to him as master, notwithstanding his co-ownership.

9. *The Steamboat Orleans v. Phœbus*, 11 Pet. (U. S.) 175; *Willings v. Blight*, 2 Pet. Adm. 288; *The Ship Annie H. Smith*, 10 Ben. (U. S.) 110; *Fox v. Paine*, *Crabbe* (U. S.) 271. See also the title **SHIPS AND SHIPPING**.

10. **Bottomry and Respondentia.**—*The Brig Draco*, 2 Sumn. (U. S.) 157.

11. **Affreightment.**—*Lands v. A Cargo of 227 Tons of Coal*, 4 Fed. Rep. 478; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Morewood v. Enequist*, 23 How. (U. S.) 491.

The fact that contracts of affreightment are personal contracts does not prevent them from being maritime contracts. *The Queen of the Pacific*, 61 Fed. Rep. 213.

Where a master contracted to carry charcoal to the place of destination, there to sell

gers,¹ of charter party,² of maritime insurance,³ salvage,⁴ pilotage,⁵ wharfage,⁶ towage,⁷ and for demurrage.⁸

Care of Vessel.—The claim of one for services rendered under a contract requiring him to keep the vessel in a place of safety, and to that end to move and navigate her from place to place as circumstances demanded, is cognizable in admiralty.⁹

it and account to the libellant for the price at a given rate per barrel, it was held that there had been a transfer of the title to the charcoal, to the schooner, and that this was not a maritime contract. *Krohn v. The Julia*, 37 Fed. Rep. 369.

1. Transportation of Passengers.—The *Moses Taylor v. Hammons*, 4 Wall. (U. S.) 411; *Cobb v. Howard*, 3 Blatchf. (U. S.) 524; *Brackett v. The Brig Hercules*, Gilp. (U. S.) 184.

So in the *Aberfoyle*, 1 Blatchf. (U. S.) 360, it was held that ships engaged in carrying for hire passengers on the high seas stand on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandise, the passage money being equivalent to the freight.

Incidental Stipulations.—The courts of admiralty have jurisdiction of an action for a breach of a contract, although the breach relates wholly to incidental stipulations. *The Pacific*, 1 Blatchf. (U. S.) 569; *The Aberfoyle*, 1 Blatchf. (U. S.) 360.

As to Passengers' Baggage.—In *Walsh v. The Steamboat H. M. Wright*, Newb. Adm. 494, it was held that courts of admiralty have jurisdiction of actions brought by passengers on vessels on navigable waters, to recover the value of lost or stolen baggage.

2. Charter Party.—*The Oregon*, 55 Fed. Rep. 666; *The Fifeshire*, 11 Fed. Rep. 743; *The Baracoa*, 44 Fed. Rep. 102.

3. Maritime Insurance.—*New England M. Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1.

When the loss complained of occurred outside the express limits of the policy, and the complaint is based upon alleged false and fraudulent negotiations, the courts of admiralty have not jurisdiction. *Williams v. Providence Wash. Ins. Co.*, 56 Fed. Rep. 159.

4. Salvage.—*Houseman v. The Schooner North Carolina*, 15 Pet. (U. S.) 40; *McMullin v. Blackburn*, 59 Fed. Rep. 177.

A Contract to Pay a Fixed Amount of Compensation for salvage service, in any event, does not affect the jurisdiction of admiralty, nor the lien given by the maritime law for salvage service. *The Roanoke*, 50 Fed. Rep. 574.

An Agreement of Consortiumship between the masters of two vessels engaged in the business known as "wrecking," is a contract enforceable in admiralty against property or proceeds in the custody of the court. *Andrews v. Wall*, 3 How. (U. S.) 568.

5. Pilotage.—*Hobart v. Droган*, 10 Pet. (U. S.) 108; *Gottfried v. Miller*, 104 U. S. 521; *The Wave*, Blatchf. & H. Adm. 235; *Banta v. McNeil*, 5 Ben. (U. S.) 74; *Ex p. McNeil*, 13 Wall. (U. S.) 236; *The Brig America*, 1 Low. (U. S.) 177; *The Schooner Anne*, 1 Mason (U. S.) 508

6. Wharfage.—*Ex p. Easton*, 95 U. S. 68; *Gardner v. The Ship New Jersey*, 1 Pet. Adm. 223; *Ex p. Lewis*, 2 Gall. (U. S.) 483; *The Phebe, Ware* (U. S.) 265; *The Canal Boat Ann Ryan*, 7 Ben. (U. S.) 20; *The Bark Alaska*, 3 Ben. (U. S.) 391; *Jeffersonville v. The Steam Ferry-boat John Shallcross*, 35 Ind. 19.

7. Towage.—*The Canal-Boat W. J. Walsh*, 5 Ben. (U. S.) 72; *The Steamer May Queen*, 1 Sprague (U. S.) 588; *Russel v. The Asa R. Swift*, Newb. Adm. 553.

8. Demurrage.—*Brown v. Certain Tons of Coal*, 34 Fed. Rep. 913.

9. The Maggie P., 32 Fed. Rep. 300; *Wishart v. The Jos. Nixon*, 43 Fed. Rep. 926.

In the case first cited the court said: "The broad proposition is asserted that the claim in question, as set forth in the libel, does not arise out of a maritime contract, and this is the sole question to be at present determined. The case principally relied upon is that of *Gurney v. Crockett*, Abb. Adm. 490, in which it was held that a person employed to visit a vessel at anchor from time to time, to see to her safety, etc., was not entitled to sue in admiralty to recover compensation for his services, as they were not rendered in execution of a maritime contract, although it was conceded in that case that, if it had been the duty of the watchman to get the vessel under way, and navigate her from one anchorage to another, in the same port, he might have sued in admiralty for such services, as they are of a maritime nature. The cases of *Phillips v. The Ship Thomas Scattergood*, Gilp. (U. S.) 3; *The Amstel*, Blatchf. & H. Adm. 215; *Cox v. Murray*, Abb. Adm. 341; and *M'Dermott v. The S. G. Owens*, 1 Wall. Jr. (U. S.) 370, have also been cited, and they are of the same general character as *Gurney v. Crockett*, Abb. Adm. 490. With reference to all of those cases it may be said that the tests therein applied to determine whether the contracts involved were maritime, were tests that have very generally been pronounced to be inadmissible and indecisive by later decisions, in some instances, of the same courts in which those decisions were pronounced. Thus the case of *Gurney v. Crockett*, decided in 1849, in the southern district of New York, was *overruled*, in effect, in the same district, by the case of *Roberts v. The Bark Windermere*, decided May, 1880. *Vide* 2 Fed. Rep. 722. The other later cases to which reference is made as establishing a more liberal interpretation of the term 'maritime contract' are the following: *New England M. Ins. Co. v. Dunham*, 11 Wall. (U. S.) 26; *The Geo. T. Kemp*, 2 Low. (U. S.) 482; *The Bark Onore*, 6 Ben. (U. S.) 564; *The Erinagh*, 7 Fed. Rep. 231; *The Senator*, 21 Fed. Rep. 191;

Storage of Grain in Ship.—An agreement to hold a cargo in storage during the winter, and if not discharged by the shippers upon the opening of navigation to transport it, is not a maritime contract.¹

The Claim of a Stevedore for services rendered in loading and unloading a vessel is clearly for a maritime service, essential to the purpose of the voyage and within the jurisdiction of courts of admiralty, although there are decisions to the contrary.²

(2) **Building Contracts.**—By the decisions of the courts in the *United States*, contracts for the building of vessels are not maritime, and consequently are not within the admiralty jurisdiction.³

In re The Ship Trimountain, 5 Ben. (U. S.) 250; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Wivanhoe*, 26 Fed. Rep. 927."

1. *The Pulaski*, 33 Fed. Rep. 383.

2. **The Nature of Stevedore's Services Considered.**—*The Gilbert Knapp*, 37 Fed. Rep. 209; *The Mattie May*, 45 Fed. Rep. 899; *The Sloop Canton*, 1 Sprague (U. S.) 437.

There are a number of cases in which it has been denied that the services of a stevedore in loading and unloading a vessel are maritime. See the following cases arranged in the order of their decree: *The Amstel*, Blatchf. & H. Adm. 215; *The Bark Joseph Cunard*, Olc. Adm. 120; *Cox v. Murray*, Abb. Adm. 341; *The A. R. Dunlap*, 1 Low. (U. S.) 361; *Paul v. The Bark Ilex*, 2 Woods (U. S.) 229; *Hubbard v. Roach*, 2 Fed. Rep. 393; *The Brig E. A. Barnard*, 2 Fed. Rep. 712; *The Ole Oleson*, 20 Fed. Rep. 384.

In *The Gilbert Knapp*, 37 Fed. Rep. 209, the above cases are carefully considered. Jenkins, J., said: "It may therefore fairly be said that the decisions denying the maritime nature of a stevedore's contract all rely upon the views expressed by Judge Betts in *The Amstel*, Blatchf. & H. (U. S.) 215. * * * 'It is but one decision of which the others are the echoes.'" And in *The George T. Kemp*, 2 Low. (U. S.) 477; *The A. R. Dunlap*, 1 Low. (U. S.) 361, is expressly overruled.

The weight of authority and the later decisions sustain the maritime nature of such service. *The Williams*, Brown Adm. 225; *The George T. Kemp*, 2 Low. (U. S.) 477; *The Senator*, 21 Fed. Rep. 191; *Roberts v. The Bark Windermere*, 2 Fed. Rep. 722; *The Canada*, 7 Fed. Rep. 119; *The Hattie M. Bain*, 20 Fed. Rep. 389; *Florez v. The Scotia*, 35 Fed. Rep. 916; *The Wyoming*, 36 Fed. Rep. 495; *The Gilbert Knapp*, 37 Fed. Rep. 209; *The Main*, 51 Fed. Rep. 954, overruling *Paul v. The Bark Ilex*, 2 Woods (U. S.) 229; *The Mattie May*, 45 Fed. Rep. 899.

In *The Canada*, 7 Fed. Rep. 119, in regard to such services, Deady, J., said: "A voyage cannot be begun or ended without the stowing or discharge of cargo. To receive and deliver the cargo are as much a part of the undertaking of the ship as its transportation from one port to another. Indeed, it is an essential part of such transportation. Freight is not due or earned until the cargo is, at least, placed on the wharf at the end of the ship's tackle. To say that the final delivery or discharge of the cargo is not a maritime service, because it is, or may be, performed partly on shore, is simply begging the ques-

tion, as it is the nature of the service, and not the place where rendered, that determines its character in this respect."

The Supreme Court has never directly passed upon the question, but in *New England M. Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1, which held that a policy of marine insurance is a maritime contract, it was laid down as the established doctrine that the question whether a contract was maritime or not maritime depended, not on the place where the contract was made, but on the subject matter of the contract; if that was maritime, the contract was maritime. And this case has been followed in a number of the cases cited as sustaining the maritime nature of contracts for stevedores' services.

In *The Wivanhoe*, 26 Fed. Rep. 927, a contract of a compress company to compress the cargo of cotton and to put it on board was held to be a maritime contract.

And in *The Bark Onore*, 6 Ben. (U. S.) 564, it was held that the admiralty has jurisdiction of a contract made between the master of a ship and a cooper to put the cargo of the ship in landing order, the services being rendered partly on the ship and partly on the wharf, but before the delivery of the cargo.

3. *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393; *Edwards v. Elliott*, 21 Wall. (U. S.) 532; *Morewood v. Enequist*, 23 How. (U. S.) 494; *Steamer Petrel v. Dumont*, 28 Ohio St. 602; *Mitchell v. The Steamboat Magnolia*, 45 Mo. 67; *Feish v. Steamboat Magnolia*, 45 Mo. 69; *Turnbull v. The Enterprize*. Bee Adm. 345.

As early as 1781 this was held. In *Clinton v. The Brig Hannah*, Bee Adm. 419, Hopkinson, J., said: "The practice of former times doth not justify the admiralty's taking cognizance of their suits."

In *Cunningham v. Hall*, 1 Cliff. (U. S.) 43, it was held that admiralty had not jurisdiction of an action against a shipbuilder, for damages sustained through defects in the construction of the vessel, discovered after she had been delivered and sent to sea.

As to the jurisdiction to enforce liens created by local law, see the title **MARITIME LIENS**.

Liens for Repairs.—The admiralty has jurisdiction where the master of a vessel borrows money to repair damages done to it on the high seas. *The Rainbow*, Bee Adm. 116; *The Emily*, 17 Wall. (U. S.) 666.

Completed in Water.—Where a hull, completed at the place of launching, received a

Building Materials and Supplies.—Nor are contracts to furnish supplies therefor within the jurisdiction.¹

So it has been held that a contract for the machinery of a vessel is not enforceable in admiralty, where the machinery was supplied for the completion of the construction of the vessel, and the vessel was not completed for the purpose for which she was intended,² but if the contract is made for supplies after the vessel has been launched and received, it is held to be a maritime contract.³

Such has been the course of the decisions of the courts in the *United States*, notwithstanding the opinion of civilians that maritime contracts include contracts for maritime services in the building or repairing the ship.⁴

The admiralty has a general jurisdiction of suits by materialmen, *in personam* and *in rem*; but where the proceeding is *in rem* to enforce a specific lien, the party must establish the existence of the lien. And in case of repairs made, or necessities furnished, to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may maintain a suit *in rem* in admiralty to enforce his right; but in respect to repairs and necessities in the port or state to which the ship belongs, the local law governs, and no lien is implied unless it is recognized by that law.⁵

A Contract to Repair on Land, as on ways in a shipyard, has been held to be beyond the jurisdiction of courts of admiralty.⁶

Liens Created by Local Law.—The existence of liens created by state or local laws does not create maritime liens or confer jurisdiction on the courts of admiralty.⁷

(3) **Mortgages.**—The mortgage of a ship, other than a bottomry agreement, is not a maritime contract, and courts of admiralty cannot take cognizance of questions between the mortgagee and the owner, as a suit to enforce such mortgage.⁸

small cargo of flour as ballast, and was towed with her spars on deck to another port, where her masts were stepped and the vessel put in condition for navigation, it was held that the work was done in building the vessel, and that admiralty had no jurisdiction. *The Iosco*, Brown Adm. 495.

1. **Building Materials.**—*Young v. The Ship Orpheus*, 2 Cliff. (U. S.) 29; *Waddell v. The Steamboat Daisy*, 2 Wash. Ter. 76; *Sinton v. The Steamboat R. R. Roberts*, 46 Ind. 476.

2. *The Paradox*, 61 Fed. Rep. 860. Here the court said: "The case seems to me to be entirely within the decisions of *Roach v. Chapman*, 22 How. (U. S.) 129; *In re Glenmont*, 32 Fed. Rep. 703; *The Pioneer*, 30 Fed. Rep. 206; *The Iosco*, Brown Adm. 495, 131 Fed. Cas. 7060; *Wilson v. Lawrence*, 82 N. Y. 409; in which cases all the suggestions and arguments of the libelants seem to me to be met and overruled." See also *Globe Iron Works Co. v. The Steamer John B. Ketcham*, 100 Mich. 583.

3. *The Manhattan*, 46 Fed. Rep. 797.

4. Dig. Lib. 42, Lit. 6, arts. 26, 34; *Consulat de la Mer*, ch. 32. See also opinion of Story, J., in *De Lovio v. Boit*, 2 Gall. (U. S.) 475.

Benedict, in his work on admiralty practice, points to the authority of the civilians and jurists, and contends for this jurisdiction. Benedict's Admiralty (3d ed.), § 271.

5. *The General Smith*, 4 Wheat. (U. S.) 438; *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409; *Peyroux v. Howard*, 7 Pet. (U. S.) 324;

Boon v. The Canal-Boat Hornet, *Crabbe* (U. S.) 426; *Rodd v. Heartt*, 21 Wall. (U. S.) 558; *The Brig Nestor*, 1 Sumn. (U. S.) 73; *Reppert v. Robinson*, Taney (U. S.) 492; *The Jerusalem*, 2 Gall. (U. S.) 349; *Davis v. A New Brig, Gilp*. (U. S.) 473; *Mitchell v. The Steamboat Magnolia*, 45 Mo. 67; *Peish v. The Magnolia*, 45 Mo. 69; *The Manhattan*, 46 Fed. Rep. 797; *Tree v. The Brig Indiana*, *Crabbe* (U. S.) 479; *The Electron*, 48 Fed. Rep. 689; *Jutte v. Davis*, 47 Fed. Rep. 592.

A contract to furnish vessels for the period of a year with all the provisions they may require while in port, where the supplies are to be furnished, is not a maritime contract. *Diefenthal v. Hamburg-Amerikanische Packet Co.*, 46 Fed. Rep. 397.

Credit Given to Consignee.—In *Pritchard v. The Lady Horatia*, Bee Adm. 167, it was held that admiralty has not jurisdiction of a contract made on land for repairs of a ship, if the owners are represented on the spot by a consignee who has funds.

A Contract to Purchase Salt is not a maritime contract. *Peck v. Laughlin*, 14 Phila. (Pa.) 531.

For a full treatment of this subject see the title MARITIME LIENS.

6. *Ransom v. Mayo*, 3 Blatchf. (U. S.) 70. Compare *Bradley v. Bolles*, Abb. Adm. 569; *Wortman v. Griffith*, 3 Blatchf. (U. S.) 528.

7. *Roach v. Chapman*, 22 How. (U. S.) 129; *Edwards v. Elliott*, 21 Wall. (U. S.) 532.

8. *Bogart v. The Steamboat John Jay*, 17 How. (U. S.) 399; *Rodd v. Heartt*, 21 Wall. (U.

A mortgagee cannot sustain a libel to reach the proceeds of the sale,¹ but when the court already has jurisdiction he may interfere by petition, and the court may apply the proceeds to his claim.² Admiralty does not exercise jurisdiction in matters of account merely.³

c. PETITORY AND POSSESSORY ACTIONS.—The courts of admiralty in *England* have made a distinction between cases where the possession only was concerned, and those in which a question of title was involved, although at present this discrimination does not exist.⁴ In the *United States* the distinction between these classes of cases has never been recognized, admiralty entertaining jurisdiction in cases involving not only the question of possession, but that of title also.⁵

S.) 588; *The William D. Rice*, 3 Ware (U. S.) 134; *Dean v. Bates*, 2 Woodb. & M. (U. S.) 87; *Britton v. The Venture*, 21 Fed. Rep. 928; *The C. C. Trowbridge*, 14 Fed. Rep. 874; *Deely v. The Ernest and Alice*, 2 Hughes (U. S.) 70; *Kellum v. Emerson*, 2 Curt. (U. S.) 79; *The Ella J. Slaymaker*, 28 Fed. Rep. 767. But see *The Hilarity*, Blatchf. & H. Adm. 90.

Upon Questions of Mortgage the Court of Admiralty has no jurisdiction; whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, the decision of the question belongs to other courts; they are not within the jurisdiction or province of courts of admiralty, which never decide on questions of property between the mortgagee and owner. Sir John Nicholl in *The Neptune*, 3 Hagg. Adm. 129. In *England* at present the jurisdiction is exercised by virtue of 3 and 4 Vict., c. 65.

In *Bogart v. The Steamboat John Jay*, 17 How. (U. S.) 402, commenting upon the want of jurisdiction in the Admiralty Court in such cases, Wayne, J., said: "This is not so because such jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. * * * Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose." In this case the court would neither order sale nor make a judicial transfer of the property.

In *Morgan v. Tapscott*, 5 Ben. (U. S.) 252, where the owners of a majority interest in a ship gave a mortgage on it to secure advances, and the mortgage becoming due, the mortgagee took possession of the interest mortgaged, and claimed to hold the ship as majority owner, and the master, who was a part owner in the vessel, with another part

owner ejected the mortgagee, who thereupon filed a possessory libel against them and the vessel, to recover possession of the ship: it was held that the court had no jurisdiction of the action.

Where the lender takes an hypothecation of the vessel, with a clause stipulating that he shall not bear maritime risk, it is held that the admiralty has no jurisdiction, although the loan is such that without this stipulation it would have had jurisdiction. *Maitland v. The Brig Atlantic*, Newb. Adm. 514.

A Contract for a Loan made in port, to enable the borrower to buy a vessel, is not maritime. *The Perseverance*, Blatchf. & H. Adm. 385.

Mortgagee's Rights in Case of Collisions.—In *The Grand Republic*, 10 Fed. Rep. 398, it was held that the mortgagee of a vessel sunk by a collision is entitled, for the protection of his interest, to come in on petition as colliellant in a libel filed by the owners against the offending vessel.

1. *Schuchardt v. Babbidge*, 19 How. (U. S.) 239.

2. *Leland v. The Ship Medora*, 2 Woodb. & M. (U. S.) 92; *Remnants in Court*, Olc. Adm. 382; *Andrews v. Wall*, 3 How. (U. S.) 568.

In *Furniss v. The Brig Magoun*, Olc. Adm. 55, it was held that the mortgagee of a vessel can intervene in a suit by a bottomry holder against the vessel, and contest the validity of the bottomry bond, or its priority of lien, as against the mortgage.

3. *Grant v. Poillon*, 20 How. (U. S.) 162; *Minturn v. Maynard*, 17 How. (U. S.) 477; *The Schooner Ocean Belle*, 6 Ben. (U. S.) 253.

Account between Owners and Agents.—In *Minturn v. Maynard*, 17 How. (U. S.) 477, where a libel was filed *in personam* against the owner by their general agent or broker, for the balance of an account for money paid and expended, in paying for supplies, repairs, etc., with commissions, the libel was dismissed for want of jurisdiction.

4. In *England* this jurisdiction was at one time abandoned owing to jealous interference of courts of law, but by 3 and 4 Vict., c. 65, § 4, it was restored. See *The Aurora*, 3 Rob. Adm. 133; *The Warrior*, 2 Dod. 288; *Radley v. Eggesfield*, 2 Saund. 259a; *Edmondson v. Walker*, 1 Show. 172.

5. *Ward v. Peck*, 18 How. (U. S.) 267; *The Schooner Tilton*, 5 Mason (U. S.) 465; *Rose v. Himely*, 4 Cranch (U. S.) 241; *Tunno*

Equitable Title.—Admiralty, however, has no jurisdiction of such suit to enforce a merely equitable title as against the legal owners.¹

Foreigners.—As a general rule, however, courts of admiralty will not take jurisdiction of possessory suits between foreigners.²

d. PRIZE CAUSES.—In the *United States* there is no distinction between the instance and the prize courts of admiralty in their organization, as in *England*, where a special commission must issue for the prize court; ³ but at a very early period it was held that the district courts, as courts of admiralty, had jurisdiction under the constitutional grant and the judiciary act of all admiralty and maritime causes, sitting either as prize or instance courts.⁴ The courts of admiralty, as prize courts, may hold in the country of an ally, but they cannot exercise jurisdiction in neutral territory.⁵

Captures on Land and Inland Waters.—The jurisdiction of the district courts as admiralty courts in the *United States* does not extend to captures made on land, although made with the assistance of the naval forces.⁶ And by the act

v. The Betsina, 5 Am. L. Reg. 406; *The Director*, 26 Fed. Rep. 708; *Snyder v. A Floating Dry Dock*, 22 Fed. Rep. 685; *Thurber v. The Sloop Fannie*, 8 Ben. (U. S.) 429; 528 *Pieces of Mahogany*, 2 Low. (U. S.) 323.

1. *The Steamer Eclipse*, 135 U. S. 599; *Hill v. The Yacht Amelia*, 6 Ben. (U. S.) 475; *The Perseverance*, Blatchf. & H. Adm. 385; *Ward v. Thompson*, 22 How. (U. S.) 330; *Kellum v. Emerson*, 2 Curt. (U. S.) 79; *The G. Ruesens*, 23 Fed. Rep. 403; *Kynoch v. The Propeller S. C. Ives*, Newb. Adm. 205; *Wen-berg v. A Cargo of Mineral Phosphate*, 15 Fed. Rep. 285.

Specific Performance.—The courts of admiralty have not jurisdiction to enforce the specific performance of an agreement relating to maritime affairs. *Davis v. Child, Davies* (U. S.) 71; *Andrews v. Essex F., etc., Ins. Co.*, 3 Mason (U. S.) 6; *Kynoch v. The Propeller S. C. Ives*, Newb. Adm. 205.

2. **Possessory Suits between Foreigners.**—*The Martin of Norfolk*, 4 Rob. Adm. 293; *The See Reuter*, 1 Dod. 22. Sir William Scott, in *The Johann & Seegmund*, Edw. Adm. 242, said: "The court, with the consent of the parties and of the accredited agent of the country to which they belong, certainly does hold plea of causes between foreigners, arising on the *jus gentium*; but this, I think, is a case which cannot be so considered, because, whatever may have been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal laws of different countries; and therefore by entertaining this suit I might deprive the parties of those rights to which they are entitled by the law of their own country, as administered in those courts to which they are directly and properly amenable."

3. *Ex p. Lynch*, 1 Madd. 20; *Lindo v. Rodney*, 2 Doug. 613, note.

4. *Glass v. The Sloop Betsey*, 3 Dall. (U. S.) 6; *The Ship Admiral U. S.*, 3 Wall. (U. S.) 609; *Penhallow v. Doane*, 3 Dall. (U. S.) 54; *The Ship Emulous*, 1 Gall. (U. S.) 563; *Prize Cases*, 2 Black (U. S.) 635; *The City of Panama*, 101 U. S. 453; *U. S. v. Weed*, 5 Wall. (U. S.) 62; *Bingham v. Cabbot*, 3 Dall. (U. S.) 19; *The Amiable Nancy*, 1 Paine (U. S.) 111; *Mahoon v. Gloucester*, 2 Pet. Adm. 403; *The Amy Warwick*, 2 Sprague (U. S.) 123; *La*

Amistad De Rues, 5 Wheat. (U. S.) 385; *The Flying Fish*, 2 Gall. (U. S.) 374; *Brown v. U. S.*, 8 Cranch (U. S.) 137; *The Schooner Adeline*, 9 Cranch (U. S.) 244; *Jennings v. Carson*, 1 Pet. Adm. 1; *The Johanna Tholen*, 6 C. Rob. 72. See U. S. Stat. at L., p. 759.

In *Lindo v. Rodney*, 2 Doug. 613, note, Lord Mansfield said: "The end of a prize court is to suspend the property till condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if upon the most summary examination there don't appear a sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may, and must, force every person interested to defend, and every person interested may force him to proceed to condemn, without delay."

Prize—Derelict.—Cotton picked up at sea by a cruiser of the United States, under circumstances which showed that it had recently been abandoned either by an enemy or by a neutral engaged in breaking the blockade of an enemy's port, was held to be prize rather than derelict. *Seventy-eight Bales of Cotton*, 1 Low. (U. S.) 11.

Prize Courts in Foreign Countries.—The president of the United States has no authority to establish a prize court in a conquered country; and any sentence of condemnation passed by a court so established is a nullity. *Jecker v. Montgomery*, 13 How. (U. S.) 498.

5. *The Flad Oyen*, 1 Rob. Adm. 135; *Glass v. The Sloop Betsey*, 3 Dall. (U. S.) 6; *The Estrella*, 4 Wheat. (U. S.) 298.

6. *U. S. v. Winchester*, 99 U. S. 372; *The Two Friends*, 1 C. Rob. 228.

The difference is important, as cases in admiralty are tried without a jury, while in cases at law the parties are entitled to a jury. *U. S. v. The Schooner Betsey*, 4 Cranch (U. S.) 443; *The Sarah*, 8 Wheat. (U. S.) 391.

Recapture on Land.—In *Davison v. Seal-skins*, 2 Paine (U. S.) 324, it was held that in the case of a piratical taking the court might have jurisdiction, although the retaking was upon land; and when goods were taken by pirates and sold upon land, they might be recovered from the receiver by suit in ad-

of Congress the jurisdiction is prohibited over captures on inland waters.¹

But it seems that if the capture is started where the prize goods were afloat, the fact that when captured they were stored in a warehouse on a wharf does not oust the court of its jurisdiction.²

Captures on the High Seas and in Port.—The courts of admiralty have jurisdiction of vessels captured on the high seas as well as in port, and it is not essential to this jurisdiction that the property captured should be within its actual control.³

The Prize Courts of a Belligerent may take jurisdiction of property captured by its cruisers while such property is in a foreign neutral port,⁴ and the jurisdiction exists though possession of the property be subsequently lost.⁵

Questions of Forfeiture and Penalties for violation of revenue acts and navigation laws are within the admiralty jurisdiction.⁶

Ransom Bills are recoverable in admiralty.⁷

miralty, on the ground that if a court of admiralty has jurisdiction of the principal thing, it has also of the incident, though that incident would not of itself be within the admiralty jurisdiction.

1. By Act of Congress July 2, 1864, c. 225 (see § 7 U. S. Stat. at L. 377), it is provided that no seizures upon the inland waters of the United States shall be decreed to be maritime prizes, but all property so seized must be turned over to the proper officer. Prior to this act jurisdiction was claimed over captures on the Mississippi river. *U. S. v. 269½ Bales of Cotton, 1 Woolw.* (U. S.) 236. See *The Cotton Plant, 10 Wall.* (U. S.) 577, which was a case of capture on the Roanoke river in North Carolina.

2. 1253 Bags of Rice, 103 Casks of Rice, *Blatchf. Pr. Cas.* (U. S.) 211; *U. S. v. Fifty-one Dozen Pieces of Merchandise, 2 Sprague* (U. S.) 100.

3. *The Ship Emulous, 1 Gall.* (U. S.) 563; *Jennings v. Carson, 1 Pet. Adm. 1; 2 Pet. Adm. 474; 4 Cranch* (U. S.) 5, note; *The Amy Warwick, 2 Sprague* (U. S.) 123.

4. *The Arabella and the Madeira, 2 Gall.* (U. S.) 368; *The Zavalla, Blatchf. Pr. Cas.* 173; *Hudson v. Guestier, 4 Cranch* (U. S.) 293, 6 *Cranch* (U. S.) 281; *The Sophie, 6 C. Rob. 138; The Henrick and Maria, 4 C. Rob. 35.*

5. **So where a Prize is Carried into a Foreign Port** and there given over on security, the courts of the captor's country still have jurisdiction. *The Peacock, 1 W. Rob. 185.*

Duty of Captor.—Taney, C. J., said, in *Jecker v. Montgomery, 13 How.* (U. S.) 516: "As a general rule, it is the duty of the captor to bring the property within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture by ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property. But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot,

without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States."

The Right of Adjudicating on All Captures and questions of prize belongs exclusively to the courts of the captor's country; but it is an exception to the general rule, that where the captured vessel is brought, or voluntarily comes, *infra prasidia* of a neutral power, that power has a right to inquire whether its own neutrality has been violated by the cruiser which made the capture. *The Estrella, 4 Wheat.* (U. S.) 298.

6. **Loss after Jurisdiction Acquired.**—After a vessel has been seized and libeled and a forfeiture claimed, the Court of Admiralty does not lose its jurisdiction to condemn the vessel, by losing possession of it. *U. S. v. The Schooner Little Charles, 1 Brock.* (U. S.) 347.

Lost at Sea.—And so it has been held that the Court of Admiralty may proceed to adjudication even though the prize be lost at sea. *The Susanna, 6 Rob. Adm. 48.*

7. *U. S. v. Schooner Sally, 2 Cranch* (U. S.) 406; *U. S. v. The Steamship The Queen, 11 Blatchf.* (U. S.) 416.

In *The Brig Alerta v. Moran, 9 Cranch* (U. S.) 359, it was held that the United States District Court had jurisdiction to restore to the original Spanish owner, in amity with the United States, the property captured by a French vessel whose force had been increased in the United States.

Violation of Passenger Act.—An act forbidding the master of a vessel to carry more than a certain number of passengers, and prescribing a penalty for the violation thereof, cannot be enforced against the master of a vessel by a civil proceeding in admiralty. *The Scotia, 39 Fed. Rep. 429.* And under the U. S. Rev. Stat., § 4499, providing that vessels violating the law relating to the carrying of passengers "may be seized and proceeded against by way of libel," the district court can have no jurisdiction until seizure. *U. S. v. The Frank Silvia, 45 Fed. Rep. 641.*

7. *Keane v. The Brig Gloucester, 2 Dall.*

e. CRIMES.—The courts of admiralty in *England* have jurisdiction of all crimes and offenses committed on British vessels on the high seas and without the body of a county, the criminal jurisdiction of the common-law courts not extending beyond low-water mark.¹

And in the *United States* an extensive jurisdiction over crimes committed upon the high seas is conferred on the district courts, but where the punishment is capital the jurisdiction is given to the circuit courts.²

Offenses within a State.—Offenses committed on navigable waters within the jurisdiction of a state are not cognizable by the United States courts,³ but to be within the jurisdiction the crime must have been actually committed on the high seas.⁴

Jurisdiction Dependent on Statute.—This jurisdiction does not exist independently of statutory provisions, for it is a fundamental doctrine that the federal courts of inferior jurisdiction cannot take cognizance of criminal offenses without express provision of positive law, and it cannot therefore extend to cases not expressly provided for.⁵

(U. S.) 36; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

1. *Reg. v. Keyn*, 2 Exch. Div. 63.

The criminal jurisdiction of the admiralty courts was by 4 and 5 William IV., c. 36, transferred to the Central Criminal Court.

2. U. S. Rev. Stat., §§ 5339, *et seq.*

"High Seas."—In *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 94, Story, J., held that the words "high seas" in a penal act meant "any waters on the sea coast, which are without the boundaries of low-water mark; although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government." See also *U. S. v. Pirates*, 5 Wheat. (U. S.) 184; *U. S. v. Gordon*, 5 Blatchf. (U. S.) 18.

Foreigners on Ships of Other Countries are subject to the criminal laws of the country in respect to offenses committed on board those ships. *Reg. v. Sattler, Dears. & B. C. C.* 525; *Reg. v. Anderson*, 1 L. R. C. C. 161; *Reg. v. Lesley*, Bell C. C. 220; *U. S. v. Holmes*, 5 Wheat. (U. S.) 417.

And if the Vessel Has No National Character, but is sailing in the possession of pirates, without any foreign flag, the courts of the United States may take jurisdiction. *U. S. v. Furlong*, 5 Wheat. (U. S.) 183.

In Foreign Ports.—In an early case it was held that the United States courts had no jurisdiction over crimes committed in a foreign port, although on an American vessel. See *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76. But this defect in the law was remedied by the Act of Congress March 3, 1825, c. 67, § 5, which provides that if any offense shall be committed on board of any vessel belonging to a citizen of the United States, while in a foreign port, by any of the crew or passengers or other person belonging to the ship, upon any such person, the circuit court shall have jurisdiction as if the offense had occurred on the high seas, provided that if the offender shall be tried and acquitted or convicted in the foreign state he shall not be tried again.

Guano Island.—By Act of August 18, 1856, § 6, it is provided that all crimes on this island shall be deemed to have been com-

mitted on the high seas, on board a merchant ship belonging to the United States. See *Jones v. U. S.*, 137 U. S. 202; *Key v. U. S.*, 137 U. S. 224.

3. *U. S. v. Bevans*, 3 Wheat. (U. S.) 336; *U. S. v. Grush*, 5 Mason (U. S.) 290; *U. S. v. Robinson*, 4 Mason (U. S.) 307; *U. S. v. Wilson*, 3 Blatchf. (U. S.) 436.

In a libel by the United States against a vessel for breach of the revenue laws, an allegation that her master attempted to land Chinese laborers at a port of the United States does not charge a crime. *The Haytian Republic*, 57 Fed. Rep. 508.

4. *U. S. v. M'Gill*, 4 Dall. (U. S.) 426. In this case the mortal blow was given on the high seas, but the death in consequence occurred on land.

5. *U. S. v. Wilson*, 3 Blatchf. (U. S.) 436; *U. S. v. Hudson*, 7 Cranch (U. S.), 32; *Ex p. Bollman*, 4 Cranch (U. S.) 75; *U. S. v. Coolidge*, 1 Wheat. (U. S.) 415.

In *U. S. v. Wilson*, 3 Blatchf. (U. S.) 437, Betts, J., delivering the opinion of the court, said: "The Constitution of the United States declares (art. 3, § 2) that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'; and it is now indisputable that, by force of the constitutional provision, the civil jurisdiction of the courts of the United States, in maritime causes of contract or tort, embraces tidewaters within the bays, inlets of the sea and harbors along the sea-coast of the country, and in navigable rivers. *Steamboat Thomas Jefferson*, 10 Wheat. (U. S.) 428; *Steamboat Orleans v. Phœbus*, 11 Pet. (U. S.) 175; *The U. S. v. Coombs*, 12 Pet. (U. S.) 72; *Waring v. Clarke*, 5 How. (U. S.) 441; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. But it is a fundamental doctrine, in respect to the federal courts of inferior jurisdiction, that they cannot take cognizance of criminal offenses of any grade, without the express appointment or direction of positive law. To enable them to exercise the functions bestowed by the Constitution over crimes and misdemeanors, there must be a designation,

ADMISSION.—See note 1.

by positive law, both of the offense and of the tribunal which shall take cognizance of it. The *U. S. v. Hudson*, 7 Cranch (U. S.) 32; *Ex p. Bollman*, 4 Cranch (U. S.) 75; The *U. S. v. Coolidge*, 1 Wheat. (U. S.) 415; Whart. Cr. Law, 76-80. Congress has, by the statute referred to, defined the crime of destroying a vessel. The act must be done wilfully and feloniously, by a person not an owner, and on the high seas. The place where the offense is committed becomes thus an essential element in the description of the crime. The mere fact that the accused wilfully destroyed the vessel, being upon waters within the jurisdiction of the United States, does not subject him to prosecution and punishment under this act, unless the vessel was at the time on the high seas."

But in *U. S. v. Coolidge*, 1 Gall. (U. S.) 488, Judge Story rendered a decision in the Circuit Court in favor of this jurisdiction independently of statute. He says: "The result of my opinion is: 1. That the Circuit Court has cognizance of all offenses against the United States. 2. That what those offenses are depends upon the common law applied to the sovereignty and authorities confided to the United States. 3. That the Circuit Court, having cognizance of all offenses against the United States, may punish them by fine and imprisonment, where no punishment is specially provided by statute. I have considered the point as one open to be discussed, notwithstanding the decision in *United States v. Hudson & Goodwin*, February term, 1812, [7 Cranch 32], which certainly is entitled to the most respectful consideration; but having been made without argument, and by a majority only of the court, I hope that it is not an improper course to bring the subject again in review for a more solemn decision, as it is not a question of mere ordinary import, but vitally affects the jurisdiction of the courts of the United States—a jurisdiction which they cannot lawfully enlarge or diminish. I shall submit, with the utmost cheerfulness, to the judgment of my brethren, and if I have hazarded a rash opinion, I have the consolation to know that their superior learning and ability will save the public from any injury by my error. That decision, however broad in its language, has not, as I conceive, settled the question now before the court, so far as it respects offenses of admiralty and maritime jurisdiction. The Constitution has given to the judicial power of the United States the jurisdiction as 'to all cases of admiralty and maritime jurisdiction,' and this jurisdiction of course comprehends criminal as well as civil suits. The admiralty is a court of extensive criminal as well as civil jurisdiction, and has immemorially exercised both. At least no legal doubt of its criminal authority has ever been successfully urged.

By the law of the admiralty, offenses for which no punishment is specially prescribed are punishable by fine and imprisonment; and as offenses of admiralty jurisdiction are exclusively cognizable by the United States, it follows that all such offenses are offenses against the United States. We have adopted the law of the admiralty in all civil causes cognizable by the admiralty: must it not also be adopted in offenses cognizable by the admiralty? It will perhaps be said that express jurisdiction is given in civil cases of admiralty jurisdiction, but not in criminal cases. This is true in terms; but I contend that criminal cases are necessarily included in the grant of cognizance of all 'crimes and offenses cognizable under the authority of the United States;' for crimes and offenses within the admiralty jurisdiction are not only cognizable, but cognizable *exclusively* under the authority of the United States. And Congress, in punishing certain offenses upon the high seas, which are neither piracies nor felonies, have undoubtedly acted upon the conviction that such offenses were of admiralty and maritime jurisdiction. Whatever room, therefore, there may be for doubt as to what common-law offenses are offenses against the United States, there can be none as to admiralty offenses."

In the Supreme Court the opinion in this case (*U. S. v. Coolidge*, 1 Wheat. (U. S.) 415) was delivered by Johnson, J., who said: "Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the attorney-general has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision in the case of the *United States v. Hudson & Goodwin*, or draw it into doubt. They will, therefore, certify an opinion to the Circuit Court in conformity with that decision."

1. **Does Not Include Revocation.**—Where courts are given power "relating to the admission of guardians," this does not include power of revocation. The court said: "The powers and duties there spoken of are 'relative to the admission of guardians.' Now the term *admission* is of plain and certain import, and can justly by no means be made to comprehend a revocation. Moreover, these powers and duties may be exercised in the county where the minor resides, or has real or personal estate; and if, therefore, one of these powers is that of revocation, the very unsafe and inadmissible conclusion follows that the letters of guardianship may be granted in one county and the revocation take place in another." *Tenbrook v. M'Colm*, 10 N. J. L. 335.

ADMISSIONS.

By A. S. H. BRISTOW.

I. DEFINITION AND CHARACTER, 670.

II. TO WHOM ADMISSIONS MAY BE MADE, 675.

III. BY WHOM ADMISSIONS MAY BE MADE, 675.

1. *Generally*, 675.
2. *Parties to the Record*, 678.
3. *Real Parties*, 679.
4. *Privies*, 680.
5. *Agents*, 690.
 - a. *Generally*, 690.
 - b. *Attorneys*, 698.
 - c. *Husband and Wife*, 700.
 - d. *Parties Referred to for Information*, 701.
6. *Principal against Surety*, 702.
7. *Persons Jointly Interested*, 703.
 - a. *Generally*, 703.
 - b. *Partners*, 708.
 - c. *Co-conspirators*, 711.
8. *Strangers*, 713.

IV. WHAT ADMISSIONS ARE RECEIVABLE, 713.

1. *Generally*, 713.
2. *Parol Admissions in Pais*, 716.
3. *Documentary Admissions*, 717.
4. *Judicial Admissions*, 719.

V. MODE AND REQUISITES OF PROOF, 721.

VI. WEIGHT OF EVIDENCE, 723.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ACCOUNTS; AGENCY; APPLICATION OF PAYMENTS; ATTORNEY AND CLIENT; BOUNDARIES; CONFESSIONS; CONTRACTS; DOCUMENTARY EVIDENCE; ESTOPPEL; HEARSAY EVIDENCE; LIMITATIONS OF ACTIONS; PARTNERSHIP; PAYMENT; RECITALS; SALES; WARRANTY; WITNESSES.

I. DEFINITION AND CHARACTER.—An admission is a concession or voluntary acknowledgment made by a party, of the existence or truth of certain facts.¹

1. Bouv. L. Dict.

Admissions and Confessions Distinguished.—

"In our law the term *admission* is usually applied to *civil transactions*, and to those matters of fact in criminal cases which do not involve criminal intent; the term *confession* being generally restricted to acknowl-

edgments of guilt." 1 Greenl. Ev. (14th ed.), § 170. See Howell's State Trials, 764. Also the title CONFESSIONS.

Instances of Admissions in Criminal Causes.—

At the trial of an information against an officer in the army for false muster, it is sufficient to prove that he acted in the char-

Admissions may be classified as direct,¹ incidental,² and those arising by way of implication from assumed character,³ from conduct,⁴ or from

acter mentioned in the information, without proving his commission from the king. *Rex v. Gardner*, 2 Campb. 513.

In *State v. Burton*, 94 N. Car. 947, it was held that the rule that an admission may be implied from the silence of a party applies to a prosecutor.

1. *Bouv. L. Dict.*

Direct Admissions, called also express admissions, are those which are made in direct terms.

2. **Incidental Admissions** are those made in some other connection or involved in the admission of some other fact. *Bouv. L. Dict.*; 1 *Greenl. Ev.*, § 194. For instances see *Maltby v. Christie*, 1 *Esp.* 342; *Rankin v. Horner*, 16 *East* 193; *Marshall v. Cliff*, 4 *Campb.* 133; *Holt v. Squire*, R. & M. 282, 21 *E. C. L.* 439; *Nealley v. Greenough*, 25 *N. H.* 325; *New York Ice Co. v. Parker*, 8 *Bosw. (N. Y.)* 688; *Gay v. Lloyd*, 1 *Greene (Iowa)* 78, 46 *Am. Dec.* 499; *Cromelien v. Mauger*, 17 *Pa. St.* 169.

Where the Assignees of a Bankrupt brought an action against an auctioneer to recover the proceeds of sales of the bankrupt's goods, it was held that the defendant's advertisement of the sale in which he described the goods as "the property of —, a bankrupt," was a conclusive admission of the fact of bankruptcy. *Maltby v. Christie*, 1 *Esp.* 342.

If an Administrator Concedes a Judgment against himself he thereby admits that he holds assets of the estate. *Whart. Ev.* (3d ed.), § 1113.

Payment of Money into Court.—It has been held that the payment of money into court admits every fact that the plaintiff must prove in order to recover. 1 *Greenl. Ev.* (14th ed.), § 205; *Bacon v. Charlton*, 7 *Cush. (Mass.)* 581; *Huntington v. American Bank*, 6 *Pick. (Mass.)* 340. See also *Whart. Ev.* (3d ed.), § 1114.

For further decisions on the question of payment of money into court, see *infra*, this title. *Judicial Admissions.*

An Offer by an Owner of Land to sell it at a certain price is competent evidence against him as to the value of the land. *Springer v. Chicago*, 135 *Ill.* 552.

Statements of the Liabilities of a Corporation by the treasurer, in which no mention is made of his claim for salary, are competent as admissions that the corporation was not indebted to him at the time they were made. *Sears v. Kings County El. R. Co.*, 152 *Mass.* 151.

3. **Admissions Implied from Assumed Character.**—1 *Greenl. Ev.* (14th ed.), § 195; *Bevan v. Williams*, cited in *Radford v. M'Intosh*, 3 *T. R.* 635; *Rex v. Borrett*, 6 *C. & P.* 124, 25 *E. C. L.* 312; *Peacock v. Harris*, 10 *East* 104; *Dickinson v. Coward*, 1 *B. & Ald.* 677; *Lipscombe v. Holmes*, 2 *Campb.* 441; *Trowbridge v. Baker*, 1 *Cow. (N. Y.)* 251; *Cummin v. Smith*, 2 *S. & R. (Pa.)* 440; *Pritchard v. Walker*, 3 *C. & P.* 212, 14 *E. C. L.* 274; *Rex*

v. Gardner, 2 *Campb.* 513; *Whart. Ev.* (3d ed.), §§ 1151, 1153.

In *Berryman v. Wise*, 4 *T. R.* 366, an action was brought by an attorney for words spoken of him in his profession. It was held that where the defendant had charged him with swindling and had threatened to have him struck off the roll of attorneys, such threat imported an admission that the plaintiff was an attorney. Compare *Smith v. Taylor*, 1 *B. & P. N. R.* 196.

In 1 *Greenl. Ev.* (14th ed.), § 195, it is said: "This general rule is more frequently applied against a person who has thus recognized the character or office of another, but it is conceived to embrace in its principle any representations or language in regard to himself."

4. **Admissions Implied from Conduct.**—*Whart. Ev.* (3d ed.), § 1081; 1 *Greenl. Ev.* (14th ed.), § 196; *Lobb v. Lobb*, 26 *Pa. St.* 327; *Peele v. Merchants' Ins. Co.*, 3 *Mason (U. S.)* 82; *Moore v. Dunn*, 42 *N. H.* 471; *Snell v. Bray*, 56 *Wis.* 156; *Lynn v. Thomson*, 17 *S. Car.* 129; *May v. Hewitt*, 33 *Ala.* 161.

The Entry of a Charge against a particular person, or making a bill in his name, is evidence that credit was furnished on his account. *Thomson v. Davenport*, 9 *B. & C.* 78, 17 *E. C. L.* 335; *Storr v. Scott*, 6 *C. & P.* 241, 25 *E. C. L.* 378.

Omitting a Debt in a Schedule of Debts due an insolvent is evidence against him that it was not due. *Nicholls v. Downes*, 1 *M. & Rob.* 13; *Tilghman v. Fisher*, 9 *Watts (Pa.)* 441.

Commercial Paper.—In *Wilkinson v. Lutwidge*, 1 *Stra.* 648, it was held in an action against the acceptor of a bill that it was not necessary to prove the hand of the drawer, the acceptance being a sufficient acknowledgment of the drawer. *Robinson v. Yarrow*, 7 *Taunt.* 455. See *Helmsley v. Loader*, 2 *Campb.* 450.

In *Critchlow v. Parry*, 2 *Campb.* 182, it was held that where a person indorses a note he admits all antecedent indorsements. See generally the titles ACCOMMODATION PAPER; BILLS AND NOTES.

Acting under a Commission of Bankruptcy is evidence that it was duly issued. Like *v. Howe*, 6 *Esp.* 20.

An Attempt to Suborn Perjury is evidence that the party's cause is unjust. *Moriarty v. London, etc., R. Co.*, L. R. 5 *Q. B.* 314.

Payment of Money is evidence that the receiver is the proper person to receive it, but not that the payer is the proper person to pay it. *Chapman v. Beard*, 3 *Anstr.* 942; *James v. Biou*, 2 *Sim. & S.* 600.

The Suppression of Documents is an admission that they are unfavorable to the party suppressing them. *James v. Biou*, 2 *Sim. & S.* 600; *Eldridge v. Hawley*, 115 *Mass.* 410.

Letters Written by or at the instigation of a party to an action, to third persons, warning them not to aid the other party, or to testify, or urging them to testify to a particular

silence and acquiescence.¹ But in order that an admission may be inferred

state of facts, are in the nature of admissions by conduct, and are admissible in evidence. *Snell v. Bray*, 56 Wis. 156.

B owed A on an individual account and also on a partnership account. The latter account B had refused to pay. Finally he made a payment of more than enough to pay his individual debt, and A, no objection being made, applied the balance on the partnership account. It was held to be an implied admission on B's part of a liability to pay that account. *Corliss v. Grow*, 58 Vt. 702.

On an issue as to whether a landlord or his tenant was to keep a platform in repair, it is evidence against the former that after an injury caused by a defect he repaired the platform. *Readman v. Conway*, 126 Mass. 374.

Where injuries complained of were alleged to have been caused by the insufficiency of a passageway for water, evidence that subsequently to the accident defendant enlarged said passageway is relevant as an admission that it was originally too small. *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412.

1. Admissions Implied from Silence and Acquiescence.—*England*.—*Doe v. Forster*, 13 East 405; *Oakapple v. Copous*, 4 T. R. 361; *Doe v. Biggs*, 2 Taunt. 109; *Hudson v. Harrison*, 3 Brod. & B. 97, 7 E. C. L. 364; *Thomas v. Thomas*, 2 Campb. 649; *Doe v. Woombwell*, 2 Campb. 559.

Alabama.—*McCulloch v. Judd*, 20 Ala. 703.

Georgia.—*Block v. Hicks*, 27 Ga. 522; *McLendon v. Shackleford*, 32 Ga. 474; *Moye v. State*, 66 Ga. 740.

Illinois.—*Mix v. Osby*, 62 Ill. 193.

Iowa.—*Des Moines Sav. Bank v. Colfax Hotel Co.*, 88 Iowa 4.

Maryland.—*Batturs v. Sellers*, 5 Har. & J. (Md.) 117, 9 Am. Dec. 492.

Massachusetts.—*Com. v. Call*, 21 Pick. (Mass.) 515, 32 Am. Rep. 284; *Boston, etc., R. Corp. v. Dana*, 1 Gray (Mass.) 83. See *Greenfield Bank v. Crafts*, 2 Allen (Mass.) 269.

Michigan.—*Evans v. Montgomery*, 95 Mich. 497.

Missouri.—*Manion Blacksmith, etc., Co. v. Carreras*, 19 Mo. App. 162.

New Hampshire.—*Bailey v. Wood*, 17 N. H. 365.

New York.—*Smith v. Hill*, 22 Barb. (N. Y.) 656.

North Carolina.—*Andres v. Lee*, 1 Dev. & B. Eq. (N. Car.) 318.

Pennsylvania.—*McClenkan v. McMillan*, 6 Pa. St. 366.

Tennessee.—*Queener v. Morrow*, 1 Coldw. (Tenn.) 123.

Texas.—*Mitchell v. Napier*, 22 Tex. 120.

Compare *Peele v. Merchants' Ins. Co.*, 3 Mason (U. S.) 81; *Talcott v. Harris*, 93 N. Y. 569; *Hill v. Bishop*, 2 Ala. 320.

Declarations of Party Not in Interest.—The declarations of a party who is not identified in interest with another party or who is opposed in interest to him are not competent evidence against that other party, unless

they are made in his presence and not contradicted by him.

Alabama.—*Downing v. Woodstock Iron Co.*, 93 Ala. 262; *Mitcham v. Schuessler*, 98 Ala. 635; *H. B. Claflin Co. v. Rodenberg*, 101 Ala. 213; *Bradford v. Haggerthy*, 11 Ala. 698; *Hunt v. Johnson*, 96 Ala. 130; *Alexander v. Handley*, 96 Ala. 220; *Warten v. Strane*, 82 Ala. 311.

Arkansas.—*Johnson v. Brock*, 23 Ark. 282.

Colorado.—*Hughes v. Spruance*, 15 Colo. 208.

Georgia.—*Phillips v. Trowbridge Furniture Co.*, 86 Ga. 699; *Phillips v. O'Neal*, 85 Ga. 142; *Virgin v. Dunwoody*, 93 Ga. 104; *Alston v. Grantham*, 26 Ga. 374.

Illinois.—*Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; *Knobloch v. Romeis*, 34 Ill. App. 577; *Oliphant v. Liversidge* (Ill., 1891), 27 N. E. Rep. 921; *Coates v. Harmon*, 32 Ill. App. 204; *Smith v. Mohler*, 24 Ill. App. 407; *Tewkesbury v. Beckwith*, 46 Ill. App. 323.

Indiana.—*Tobin v. Young*, 124 Ind. 507; *Walker v. Steele*, 121 Ind. 436.

Iowa.—*Corbel v. Beard* (Iowa, 1894), 60 N. W. Rep. 636.

Kansas.—*Ehrhard v. McKee*, 44 Kan. 715.

Maryland.—*Nusbaum v. Thompson*, 11 Md. 557; *Green v. Sprogle*, 16 Md. 579; *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515.

Massachusetts.—*Fearing v. Kimball*, 4 Allen (Mass.) 125, 81 Am. Dec. 690; *Farrell v. Weitz*, 160 Mass. 28.

Michigan.—*Merritt v. Stebbins*, 86 Mich. 342; *Busch v. Wilcox*, 82 Mich. 315, 21 Am. St. Rep. 563; *Osborne v. Bell*, 62 Mich. 214; *Carter v. Hill*, 81 Mich. 275; *Radley v. Seider*, 99 Mich. 431; *Buckingham v. Tyler*, 74 Mich. 101; *Bronson v. Leach*, 74 Mich. 713; *Kinney v. Folkerts*, 78 Mich. 687.

Missouri.—*Sutter v. Lackmann*, 39 Mo. 91.

New Hampshire.—*Bailey v. Woods*, 17 N. H. 365; *Woods v. Allen*, 18 N. H. 28; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753.

New Jersey.—*Hoyt v. Hoyt*, 27 N. J. Eq. 399.

New York.—*Manwarren v. Mason* (Supreme Ct.), 29 N. Y. Supp. 915; *Root v. Borst*, 142 N. Y. 62; *Garnsey v. Rhodes*, 138 N. Y. 461; *Ogden v. Peters*, 15 Barb. (N. Y.) 560; *Colburn v. Marsh*, 68 Hun (N. Y.) 269; *Brumfield v. Pottier, etc., Mfg. Co. (City Ct.)*, 20 N. Y. Supp. 615; *Artcher v. McDuffie*, 5 Barb. (N. Y.) 147; *Wilson v. Pope*, 37 Barb. (N. Y.) 321; *Shipman v. Frech (C. Pl.)*, 3 N. Y. Supp. 932; *People v. Woodman (C. Pl.)*, 4 N. Y. Supp. 554; *Hoguet v. Berkman* (Supreme Ct.), 6 N. Y. Supp. 214; *Crounse v. Fitch*, 1 Abb. App. Dec. (N. Y.) 475.

North Carolina.—*Devries v. Phillips*, 63 N. Car. 207; *Green v. Harris*, 3 Ired. (N. Car.) 210.

Ohio.—*Voss v. Murray*, 59 Ohio St. 19.

Oregon.—*Osmun v. Winters*, 25 Oregon 260.

Pennsylvania.—*Cain v. Cain*, 140 Pa. St. 144; *Kintzel v. Kintzel*, 133 Pa. St. 71; *Tarr v. Robinson*, 158 Pa. St. 60; *Harrington v. Bronson*, 161 Pa. St. 296; *Mueller's Estate*,

from silence and acquiescence in the language or conduct of others it must appear that such language was fully understood, or the conduct fully known, by the party acquiescing;¹ that the truth thus stated or acted upon

159 Pa. St. 590; *Evans v. McKee*, 152 Pa. St. 89; *Parry v. Parry*, 130 Pa. St. 94; *Smith v. Eyre*, 161 Pa. St. 115; *Stauffer v. Young*, 39 Pa. St. 455.

South Carolina.—*Watson v. Young*, 30 S. Car. 144.

Texas.—*Atwood v. Brooks* (Tex., 1890), 16 S. W. Rep. 535; *Shiner v. Abbey*, 77 Tex. 1; *Johnson v. Richardson*, 52 Tex. 481; *Dwyer v. Bassett*, 1 Tex. Civ. App. 513; *Moody v. Gardner*, 42 Tex. 411.

See also *Pool v. State* (Tex. Crim. App., 1893), 23 S. W. Rep. 891; *Moelering v. Smith*, 7 Ind. App. 451; *Alexander v. Handley*, 96 Ala. 220.

Where the Party Makes a Reply Wholly or Partially.—Where the party consents to make a reply to declarations made to him, he thereby puts the matter on a much stronger ground against him than would mere silence, and both declaration and reply must be submitted in evidence. *Mattocks v. Lyman*, 16 Vt. 120.

If a statement is made in the hearing of another in regard to facts affecting his rights, and he makes a reply wholly or partially admitting their truth, then the declaration and reply are both admissible: the reply, because it is the act of the party, who will not be presumed to admit anything affecting his own interests or his own rights, unless compelled to it by the force of truth; and the declaration, because it may give meaning and effect to the reply. *Com. v. Kenney*, 12 Met. (Mass.) 237, 46 Am. Dec. 672. See also *Queener v. Morrow*, 1 Coldw. (Tenn.) 123. *Compare Braley v. Braley*, 16 N. H. 426. See *infra*, this title, *Mode and Requisites of Proof*.

The Possession of Documents sometimes affects parties with an implied admission of the statements contained in them. *Com. v. Jeffries*, 7 Allen (Mass.) 561, 83 Am. Dec. 712; *Rex v. Watson*, 2 Stark. 140, 3 E. C. L. 351.

If the Rules of a Club be contained in a book kept by the master of the club and accessible to the members, every member of the club must be taken to be acquainted with them. *Raggett v. Musgrave*, 2 C. & P. 556, 12 E. C. L. 260. See *Alderson v. Clay*, 1 Stark. 405, 2 E. C. L. 157.

Unanswered Letters.—But the possession of unanswered letters is not an admission of the truth of their contents. *Fairlie v. Denton*, 3 C. & P. 103, 14 E. C. L. 225; *Richards v. Frankum*, 9 C. & P. 221, 38 E. C. L. 89; *Meguire v. Corwine*, 3 MacArthur (D. C.) 81; *Sullivan v. McMillan*, 26 Fla. 543; *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Fearing v. Kimball*, 4 Allen (Mass.) 125, 81 Am. Dec. 690; *Zeigler v. Henry*, 77 Mich. 480; *Willett v. People*, 27 Hun (N. Y.) 469; *Waring v. U. S. Telegraph Co.*, 44 How. Pr. (N. Y. C. Pl.) 69; *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508. *Compare Dutton v. Woodman*, 9 Cush. (Mass.) 262, 57 Am.

1 C. of L.—43.

Dec. 46; *Gaskill v. Skene*, 14 Q. B. 664, 68 E. C. L. 664.

In *Fenno v. Weston*, 31 Vt. 345, it was held that the failure to reply to a letter furnishes evidence of a lighter character than silence when the same facts are directly stated to the party. *Aldis, J.*, in giving the opinion of the court in this case said: "Men use the tongue much more readily than the pen. Almost all men will reply to and deny or correct a false statement verbally made to them. It is done on the spot and from the first impulse. But when a letter is received making the same statement, the feeling, which readily prompts the verbal denial, not unfrequently cools before the time and opportunity arrive for writing a letter. Other matters intervene. A want of facility in writing, or an aversion to correspondence, or habits of dilatoriness may be the real causes of the silence. As the omission to reply to letters may be explained by so many causes not applicable to silence when the parties are in personal conversation, we do not think the same weight should be attached to it as evidence." See also *Dutton v. Woodman*, 9 Cush. (Mass.) 255, 57 Am. Dec. 46.

Where the Original Letter is Answered, it is made competent evidence so far as is necessary to understand the reply. *Trischet v. Hamilton Mut. Ins. Co.*, 14 Gray (Mass.) 456. See *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

And in *Higgins v. Dellinger*, 22 Mo. 397, it was held that if a party consents to give an explanation, it becomes evidence, although drawn from him by a false suggestion.

Where there is a Partial Reply Only.—The omission of a party to reply to statements in a letter about which he has knowledge, and which, if not true, he would naturally deny when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true. *Fenno v. Weston*, 31 Vt. 345.

Where there has been Correspondence.—So where there has been a correspondence between parties in regard to some subject matter, and one of the parties writes a letter to the other making statements in regard to such subject matter, of which the latter has knowledge and which he would naturally deny if not true, and he wholly omits to answer such letter, such silence is admissible as evidence tending to show the statements to be true. *Fenno v. Weston*, 31 Vt. 345.

1. Essentials of Admissions Inferable from Silence and Acquiescence.—*Martin v. Capital Ins. Co.*, 85 Iowa 643; *Com. v. Kenney*, 12 Met. (Mass.) 237, 46 Am. Dec. 672; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123. See also *Abbot v. Third School Dist.*, 7 Me. 118.

Especially is this true when the person against whom the admission is used is a foreigner. In that case it should be shown that the conversation was explained to him

was within his knowledge,¹ and that the circumstances were such as naturally to call for some action or reply.²

by an interpreter, so that he should be able to understand fully the statements to which he ought to have replied. *Wright v. Maseras*, 56 Barb. (N. Y.) 521.

Declarations made by one claiming a right of way, concerning such right, in the presence of the owner of the estate, but not heard by him by reason of deafness, are inadmissible in evidence against him. *Tufts v. Charlestown*, 4 Gray (Mass.) 537.

Where declarations were offered in evidence as having been made in the presence of a party who was partially intoxicated, and not contradicted by him, it was properly left to the jury to ascertain whether the party was too much intoxicated to understand the statements when made. *State v. Perkins*, 3 Hawks (N. Car.) 377.

Statements made by a third person standing thirty feet away from the plaintiffs are not admissible in evidence against him, where it is not shown that he could or did hear what was said. *Martin v. Capital Ins. Co.*, 85 Iowa 643.

But in *Neile v. Jakle*, 2 C. & K. 709, 61 E. C. L. 709, it was held that a statement made in the plaintiff's hearing, although not in his presence, is evidence against him.

1. *Hayslep v. Gymer*, 1 Ad. & El. 16 2, 28 E. C. L. 60; *Com. v. Kenney*, 12 Met. (Mass.) 237, 46 Am. Dec. 672; *Edwards v. Williams*, 2 How. (Miss.) 846; *Territory v. Big Knot on Head*, 6 Mont. 242.

2. **Circumstances must Call for Some Action.**—*Alabama*.—*Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *Abercrombie v. Allen*, 29 Ala. 281.

California.—*Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

Florida.—*Carter v. Bennett*, 4 Fla. 283.

Georgia.—*Rolfe v. Rolfe*, 10 Ga. 143; *Giles v. Vandiver*, 91 Ga. 192.

Illinois.—*Slattery v. People*, 76 Ill. 217; *Mix v. Osby*, 62 Ill. 193.

Indiana.—*Broyles v. State*, 47 Ind. 251; *Pierce v. Goldsberry*, 35 Ind. 317.

Iowa.—*Churchill v. Fulliam*, 8 Iowa 45.

Massachusetts.—*Com. v. Harvey*, 1 Gray (Mass.) 487; *Hildreth v. Martin*, 3 Allen (Mass.) 373; *Com. v. Densmore*, 12 Allen (Mass.) 538; *Drury v. Hervey*, 126 Mass. 519; *Com. v. Kenney*, 12 Met. (Mass.) 237, 46 Am. Dec. 672.

Mississippi.—*Edwards v. Williams*, 2 How. (Miss.) 846.

Missouri.—*St. Louis Fourth Nat. Bank v. Nichols*, 43 Mo. App. 385; *State v. Hamilton*, 55 Mo. 520.

New Hampshire.—*Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753.

Rhode Island.—*State v. Boyle*, 13 R. I. 537.

Tennessee.—*Queener v. Morrow*, 1 Coldw. 123.

Vermont.—*Vail v. Strong*, 10 Vt. 457; *Gale v. Lincoln*, 11 Vt. 152; *Brainard v. Buck*, 23 Vt. 573; *Pierce v. Pierce*, 66 Vt. 369.

See also *State v. Hamilton*, 55 Mo. 520; *U. S. v. Kuhn*, 4 Cranch (C. C.) 401.

It was stated in *Whitney v. Houghton*, 127

Mass. 527, that the circumstances must be such that the natural and reasonable inference for silence is that the party admitted the truth of the statement.

In giving the opinion in *Com. v. Kenney*, 12 Met. (Mass.) 237, 46 Am. Dec. 672, Shaw, C.J., said: If a party is "restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from that silence."

Statement Made in the Course of Judicial Hearing.—If a statement is made in the course of any judicial hearing, the person against whom it is made cannot interfere and deny it when and how he pleases, though a party; it would be to charge the witness with perjury, and inconsistent alike with decorum and with the rules of law. And hence no presumption of acquiescence arises under such circumstances. *Melen v. Andrews*, M. & M. 336, 22 E. C. L. 329; *Com. v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672. See *Blackwell Durham Tobacco Co. v. McElwee*, 96 N. Car. 71, 60 Am. Rep. 404; *Broyles v. State*, 47 Ind. 251. Compare *Blanchard v. Hodgkins*, 62 Me. 121.

Accepting Benefits—Implied Obligation to Pay.—If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he will be considered as admitting an obligation to pay a reasonable compensation therefor. *Morris v. Burdett*, 1 Campb. 218; *Abbot v. Third School District*, 7 Me. 118.

Landlord and Tenant.—Where a landlord permits the tenant to expend money in improvements, it has been held to be evidence of his consent to such improvements. *Doe v. Allen*, 3 Taunt. 78; *Doe v. Pye*, 1 Esp. 366; *Neale v. Parkin*, 1 Esp. 229. See also *Stanley v. White*, 14 East 332.

Among Merchants, if an Account Current be Sent from one to the other, who receives it and makes no objection within a reasonable time, its correctness is admitted. *Sherman v. Sherman*, 2 Vern. 276; *Willis v. Jernegan*, 2 Atk. 252; *Corps v. Robinson*, 2 Wash. (U. S.) 388; *McCulloch v. Judd*, 20 Ala. 703; *Brown v. Brown*, 16 Ark. 202; *Coe v. Hutton*, 1 S. & R. (Pa.) 398; *McBride v. Watts*, 1 McCord (S. Car.) 384. Compare *Darlington v. Taylor*, 3 Grant's Cas. (Pa.) 195; *Churchill v. Fulliam*, 8 Iowa 45. See the title ACCOUNTS.

Attorney's Bill.—But it is said that a bill rendered by an attorney for services is not an admission of their value against the attorney. *Gartner v. Beller*, 54 Mich. 333.

The Entries in a Book containing a record of the proceedings of a society, produced at the meetings and open to the inspection of all the members, are admissible in evidence against a defendant after he has been proven to be a member of the society. *Alderson v. Clay*, 1 Stark. 405, 2 E. C. L. 157. See also *Allen v. Coit*, 6 Hill (N. Y.) 318.

Caution to be Used.—In *Moore v. Smith*, 14 S. & R. (Pa.) 393, Duncan, J., said: "Nothing can be more dangerous than this kind of

II. TO WHOM ADMISSIONS MAY BE MADE.—Admissions may be made to the adverse party, or his agent, or to a third person.¹ But they will not be so readily implied from silence and acquiescence in the language or conduct of a stranger as in the case of a person interested.²

III. BY WHOM ADMISSIONS MAY BE MADE—1. Generally.—As a general rule, the admissions of a party to the record, or of one identified in interest with him, are, as against such parties, admissible in evidence.³ There must be

evidence; it should always be received with caution, and never ought to be, unless the evidence is of direct declarations of that kind which naturally calls for contradiction; some assertion made to the man, with respect to his right, which, by his silence, he acquiesces in." See also *Child v. Grace*, 2 C. & P. 193, 12 E. C. L. 84.

Declarations by a Stranger.—The cases make a distinction between declarations made by a party and by a stranger, it being held that uncontradicted statements made by an interested party will be deemed admissions in many cases, where they would be refused if made by a stranger. *Child v. Grace*, 2 C. & P. 193, 12 E. C. L. 84; *Larry v. Sherburne*, 2 Allen (Mass.) 35; *Hildreth v. Martin*, 3 Allen (Mass.) 373; *Com. v. Densmore*, 12 Allen (Mass.) 538; *Com. v. Kenney*, 12 Met. (Mass.) 237, 46 Am. Dec. 672; *Moore v. Smith*, 14 S. & R. (Pa.) 388; *Hackett v. Callender*, 32 Vt. 106.

In *Larry v. Sherburne*, 2 Allen (Mass.) 35, Bigelow, J., said: "There are many cases where the intervention of a third person may properly be deemed unnecessary, and his statements be regarded as immaterial and impertinent."

1. *Brown v. Matthews*, 79 Ga. 1; *Carpenter v. Tucker*, 98 N. Car. 316; *Gregory v. Com.*, 121 Pa. St. 611, 6 Am. St. Rep. 804; *Porter v. Nelson*, 121 Pa. St. 638. See *Brown v. Calumet River R. Co.*, 125 Ill. 600; *Giles v. Vandiver*, 91 Ga. 192; *Bentley's Appeal*, 99 Pa. St. 504.

Where the plaintiff assigned judgments to the defendant absolutely, but, as he claimed, for convenience of collection, it was held in a suit to recover the money, that conversations of a witness with defendant both before and after the assignment, as to the ownership of the money and the procurement of the assignment, though not mentioned to the plaintiff, were receivable as admissions of the defendant. *Schwartz v. Hersker*, 140 Pa. St. 550.

2. *Porter v. Nelson*, 121 Pa. St. 638; *Gregory v. Com.*, 121 Pa. St. 611, 6 Am. St. Rep. 804; *Bentley's Appeal*, 99 Pa. St. 504. See *supra*, this title, *Definition and Character*.

3. *Spargo v. Brown*, 9 B. & C. 935, 17 E. C. L. 525. See also *Robinson v. Hutchinson*, 31 Vt. 443.

Admissions against Interest.—Admissions against interest are receivable against the party making them.

United States.—*Goldsborough v. Baker*, 3 Cranch (C. C.) 48.

Alabama.—*Polly v. McCall*, 37 Ala. 20; *Humes v. O'Bryan*, 74 Ala. 64.

Arkansas.—*Phelan v. Bonham*, 9 Ark. 389; *Southern Ins. Co. v. White*, 58 Ark. 277.

California.—*Moore v. Campbell*, 72 Cal. 251; *White v. Merrill*, 82 Cal. 14; *Robinson v. Dugan* (Cal., 1894), 35 Pac. Rep. 902.

Colorado.—*Holman v. Boston Land, etc., Co.*, 20 Colo. 7; *Denver, etc., R. Co. v. Wilson*, 4 Colo. App. 355; *Wilson v. Morris*, 4 Colo. App. 242.

Connecticut.—*White v. Reed*, 15 Conn. 457; *Bassett v. Shares*, 63 Conn. 39.

Georgia.—*Jones v. Morgan*, 13 Ga. 515; *Harvey v. Anderson*, 12 Ga. 69.

Illinois.—*Friberg v. Donovan*, 23 Ill. App. 58; *Cramer v. Gregg*, 40 Ill. App. 442.

Indiana.—*Grand Rapids, etc., R. Co. v. Diller*, 110 Ind. 223; *Thistlewaite v. Thistlewaite*, 132 Ind. 355; *Miller v. Cook*, 124 Ind. 101; *Doan v. Dow*, 8 Ind. App. 324.

Iowa.—*Kelly v. Norwich F. Ins. Co.*, 82 Iowa 137; *Winebrenner v. Brunswick-Balke-Collender Co.*, 82 Iowa 741.

Maryland.—*Kershner v. Kershner*, 36 Md. 309.

Massachusetts.—*Hubbell v. Bissell*, 2 Allen (Mass.) 196; *Green v. Gould*, 3 Allen (Mass.) 465; *Vinal v. Burrill*, 16 Pick. (Mass.) 401; *Dole v. Young*, 24 Pick. (Mass.) 250; *Abbott v. Andrews*, 130 Mass. 145; *Hosmer v. Groat*, 143 Mass. 16; *Patch v. Boston*, 146 Mass. 52; *Manilla v. Houghton*, 154 Mass. 465.

Michigan.—*Evans v. Montgomery*, 95 Mich. 497.

Minnesota.—*Potter v. Mellen*, 41 Minn. 487; *Hosford v. Rowe*, 41 Minn. 245; *Lindhjen v. Mueller*, 42 Minn. 307; *Baker v. Taylor*, 54 Minn. 71.

Missouri.—*Wiseman v. St. Louis, etc., R. Co.*, 30 Mo. App. 516; *Carver v. Huskey*, 79 Mo. 509; *Meier v. Meier*, 105 Mo. 411.

Nebraska.—*Bartlett v. Cheesebrough*, 32 Neb. 339.

New Hampshire.—*Pike v. Wiggin*, 8 N. H. 356; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Pendexter v. Carleton*, 16 N. H. 482.

New York.—*Bronson v. Wiman*, 8 N. Y. 182; *Potter v. Ogden*, 136 N. Y. 384; *Holmes v. Roper*, 141 N. Y. 64; *Larrison v. Payne* (Supreme Ct.), 5 N. Y. Supp. 221; *Bingham v. Hyland* (Supreme Ct.), 6 N. Y. Supp. 75; *Skelly v. New York El. R. Co. (C. Pl.)*, 27 N. Y. Supp. 304; *McAndrews v. Santee*, 57 Barb. (N. Y.) 193; *Mason v. Rapple*, 66 Barb. (N. Y.) 180; *Clason v. Baldwin*, 56 Hun (N. Y.) 326; *Marvin v. Richmond*, 3 Den. (N. Y.) 58; *Doyle v. St. James' Church*, 7 Wend. (N. Y.) 178.

North Carolina.—*State v. Bryson*, 2 Winst. (N. Car.) 86; *Tredwell v. Graham*, 88 N. Car. 208.

Pennsylvania.—*McGill v. Ash*, 7 Pa. St. 397; *Wilson v. Wilson*, 137 Pa. St. 269; *Silvis v. Ely*, 3 W. & S. (Pa.) 420.

some evidence, however, of the identity of the person making the admissions

Rhode Island.—*State v. Littlefield*, 3 R. I. 124.

South Carolina.—*Hodges v. Tarrant*, 31 S. Car. 608.

Tennessee.—*Pillow v. Thomas*, 1 Baxt. (Tenn.) 120.

Texas.—*Ellis v. Stone*, 4 Tex. Civ. App. 157; *Hardy v. DeLeon*, 5 Tex. 211; *Wells v. Fairbank*, 5 Tex. 582; *Clapp v. Engledow*, 72 Tex. 252; *Davis v. State*, 75 Tex. 420; *Heidenheimer v. Johnson*, 76 Tex. 200; *Galveston, etc., R. Co. v. Hertzog*, 3 Tex. Civ. App. 296; *Rodriguez v. Espinosa* (Tex. Civ. App., 1894), 25 S. W. Rep. 669.

Vermont.—*Hill v. Powers*, 16 Vt. 516; *McCann v. Hallock*, 30 Vt. 233; *Goodnow v. Parsons*, 36 Vt. 46; *Bennett v. Camp*, 54 Vt. 36; *Orr v. Clark*, 62 Vt. 136.

Wisconsin.—*Hunter v. Gibbs*, 79 Wis. 70.

Thus Declarations in Disparagement of a Person's Title to property are receivable in evidence against him. *Meier v. Meier*, 105 Mo. 411; *Ellen v. Ellen*, 18 S. Car. 489; *Elgin v. Beckwith*, 119 Ill. 367; *Knorr v. Raymond*, 73 Ga. 749.

Advancements—Gifts.—On the trial of an issue as to whether some of the heirs of the decedent had received property from him as an advancement, statements of the deceased, made several years after the transaction took place, are not receivable on the ground that they are against the interest of the person making them, since, so far as the interests of the deceased were concerned, it was immaterial whether the transfer of the money and property was by way of gift or advancement. *Thistlewaite v. Thistlewaite*, 132 Ind. 355. See, generally, the titles ADVANCEMENTS; GIFTS.

Declarations by a Tenant for Life, in possession of the proceeds of a trust fund, by which declarations she virtually admits that her estate, in these proceeds, is limited to her own life, are against her interest; for the reason that, presumptively, a person in possession of property, apparently as owner, is such owner not for life only, but in fee. *Lamar v. Pearre*, 90 Ga. 377.

Ante-nuptial Agreement.—A man who owned a large estate, who had been once married, and who had six children living, entered into an ante-nuptial contract, prior to a second marriage. He was over seventy years of age, and the proposed wife was thirty-nine years of age. The contract provided that the wife should, upon his death, have absolutely one seventh of all his estate in lieu of the one third interest to which by law she would be entitled, and also that, in case the husband should survive the wife, the same interest in his estate should, upon his death, go to her heirs and personal representatives. It was held that, as it was to be presumed, from the disparity of ages, that the husband would die first, and as it would be for his interest to retain the larger control of his property allowed by the contract, a declaration by him that this had been annulled would be receivable after his death as evidence that such was the fact, being

a declaration against interest. *Hosford v. Rowe*, 41 Minn. 245.

They must be against Interest at the Time.—*Young v. Perkins*, 29 Minn. 173; *Gordon v. Shurtliff*, 8 N. H. 260; *Ware v. Ware*, 8 Me. 42; *Burton v. Scott*, 3 Rand. (Va.) 399.

Declarations made by one likely to become heir of an estate, in the lifetime of the intestate, as to the condition of his property, will not, after death, be received in evidence. *Morton v. Massie*, 3 Mo. 482.

Marriage.—When an admission of marriage is made under circumstances that show it to be against interest, it is evidence against the party making it with the same force and effect as any other admission against interest. *Greenawalt v. McEnelley*, 85 Pa. St. 352; *Forney v. Hallacher*, 8 S. & R. (Pa.) 159, 11 Am. Dec. 590.

In an action for criminal conversation the declaration of the defendant that he knew A B was married to the plaintiff, and that with full knowledge of that fact he had seduced her affections and debauched her, may be given in evidence in proof of the marriage. *Forney v. Hallacher*, 8 S. & R. (Pa.) 159, 11 Am. Dec. 590.

Admissions of marriage by the plaintiff are competent evidence in support of a plea in abatement for the nonjoinder of her husband. *Laughlin v. Eaton*, 54 Me. 156.

Self-serving Declarations: Res Gestæ.—The declarations of a party are not evidence for himself unless they constitute part of the *res gestæ*.

United States.—*James v. Stookey*, 1 Wash. (U. S.) 330.

Alabama.—*Berney v. State*, 69 Ala. 220; *Harrison v. Mock*, 16 Ala. 616; *Blann v. Beal*, 5 Ala. 357; *Wells v. Bransford*, 28 Ala. 200; *Martin v. Williams*, 18 Ala. 190; *Kennedy v. Meador*, 1 Stew. & P. (Ala.) 220; *Gordon v. Clapp*, 38 Ala. 357.

Arkansas.—*Hazen v. Henry*, 6 Ark. 86; *Martin v. Tucker*, 35 Ark. 279.

California.—*Rice v. Cunningham*, 29 Cal. 492; *Riley v. Martinelli*, 97 Cal. 575; *Hausman v. Hausling*, 78 Cal. 283.

Connecticut.—*Saugatuck Cong. Soc. v. East Saugatuck School Dist.*, 53 Conn. 478; *Burns v. Fredericks*, 37 Conn. 86; *North Stonington v. Stonington*, 31 Conn. 412.

Georgia.—*Heard v. McKee*, 26 Ga. 332; *Arthur v. Gordon County*, 67 Ga. 220; *Huggins v. Huggins*, 71 Ga. 66; *Kelly v. McGehee*, 67 Ga. 364; *Shaw v. McDonald*, 21 Ga. 395; *Lanier v. Huguley*, 91 Ga. 791; *Howard v. Savannah, etc., R. Co.*, 84 Ga. 711; *Brown v. Upton*, 12 Ga. 505.

Illinois.—*Craig v. Miller*, 103 Ill. 605; *Rollins v. Duffy*, 14 Ill. App. 69.

Indiana.—*Bement v. May*, 135 Ind. 664; *Schmidt v. Packard*, 132 Ind. 398; *Henline v. Jacoby*, 62 Ind. 298; *Scobey v. Armington*, 5 Ind. 514; *Hall v. Hall*, 34 Ind. 314.

Iowa.—*Murray v. Cone*, 26 Iowa 276; *McCormick Harvesting Mach. Co. v. Jacobson*, 73 Iowa 546.

Kentucky.—*Wright v. Haddock*, 7 Dana (Ky.) 253; *Talbot v. Talbot*, 2 J. J. Marsh.

with the party in question, in order to render them admissible.¹

(Ky.) 3; *Tipper v. Com.*, 1 Metc. (Ky.) 6; *Tucker v. Hood*, 2 Bush (Ky.) 85.

Maine.—*Handly v. Call*, 30 Me. 9.

Maryland.—*Hagan v. Hendry*, 18 Md. 177; *Miller v. State*, 8 Gill (Md.) 141.

Massachusetts.—*Carter v. Gregory*, 8 Pick. (Mass.) 165; *Jacobs v. Whitcomb*, 10 Cush. (Mass.) 255; *Nutting v. Page*, 4 Gray (Mass.) 581; *Emerson v. Lowell Gas Light Co.*, 6 Allen (Mass.) 146, 83 Am. Dec. 621; *Heywood v. Heywood*, 10 Allen (Mass.) 105; *Johnson v. Trinity Church Soc.*, 11 Allen (Mass.) 123; *Lawrence v. Wilson*, 160 Mass. 304; *Com. v. Kent*, 6 Met. (Mass.) 221; *Old South Soc. v. Wainwright*, 156 Mass. 115.

Michigan.—*Hogsett v. Ellis*, 17 Mich. 351; *Eldredge v. Sherman*, 79 Mich. 484; *Welch v. Palmer*, 85 Mich. 310.

Missouri.—*Mulliken v. Greer*, 5 Mo. 489; *Darrett v. Donnelly*, 38 Mo. 492; *Moore v. Sauborin*, 42 Mo. 490; *Procter v. Loomis*, 35 Mo. App. 482; *Hensgen v. Mullally*, 23 Mo. App. 613; *Sira v. Wabash R. Co.*, 115 Mo. 127; *Hammond v. Beeson*, 112 Mo. 190; *Blount v. Hamey*, 43 Mo. App. 644.

New Hampshire.—*Wiggin v. Plumer*, 31 N. H. 251; *Judd v. Brentwood*, 46 N. H. 430.

New Jersey.—*Hoyt v. Hoyt*, 27 N. J. Eq. 399.

New York.—*Smith v. Kerr*, 1 Barb. (N. Y.) 155; *Crounse v. Fitch*, 1 Abb. App. Dec. (N. Y.) 475; *Erben v. Lorillard*, 19 N. Y. 299; *Hayden v. Pierce*, 71 Hun (N. Y.) 593; *Matter of Bronson's Estate* (Supreme Ct.), 22 N. Y. Supp. 96; *Sheldon v. Sheldon* (Supreme Ct.), 11 N. Y. Supp. 477; *Schwab v. Heindel* (C. Pl.), 9 N. Y. Supp. 521; *Barrelle v. Pennsylvania R. Co.* (Supreme Ct.), 4 N. Y. Supp. 127; *Rittenhouse v. Creveling* (Supreme Ct.), 14 N. Y. Supp. 85.

North Carolina.—*State v. Jefferson*, 6 Ired. (N. Car.) 305; *White v. Green*, 5 Jones (N. Car.) 47; *Jones v. Henry*, 84 N. Car. 320; *Enloe v. Sherrill*, 6 Ired. (N. Car.) 212.

Ohio.—*Burrige v. Geauga Bank*, *Wright* (Ohio) 688.

Pennsylvania.—*Graham v. Hollinger*, 46 Pa. St. 55; *Crooks v. Bunn*, 136 Pa. St. 368; *Feig v. Meyers*, 102 Pa. St. 10; *Tisch v. Utz*, 142 Pa. St. 186; *Rouch v. Zehring*, 59 Pa. St. 74.

South Carolina.—*Darby v. Rice*, 2 Nott & M. (S. Car.) 596; *McSween v. McCown*, 23 S. Car. 342; *Nettles v. Harrison*, 2 McCord (S. Car.) 230.

Tennessee.—*Mullins v. Lyles*, 1 Swan (Tenn.) 337.

Texas.—*Powell v. State*, 44 Tex. 63; *Masterson v. Jordan* (Tex. Civ. App., 1893), 24 S. W. Rep. 549; *Smith v. Wilson*, 1 Tex. Civ. App. 115.

Vermont.—*State v. Tatro*, 50 Vt. 483; *Baird v. Fletcher*, 50 Vt. 603; *Barber v. Bennett*, 62 Vt. 50.

Virginia.—*Effinger v. Kennedy*, 24 Gratt. (Va.) 116.

West Virginia.—*Corder v. Talbott*, 14 W. Va. 277.

Wisconsin.—*Jilsun v. Stebbins*, 41 Wis. 235; *Finch v. Phillips*, 41 Wis. 387.

Thus the declarations of a party in support of his own title are not admissible, even in

rebuttal. *Brown v. Brown*, 5 Ala. 508; *Ray v. Jackson*, 90 Ala. 513; *Blount v. Hamey*, 43 Mo. App. 644.

Except as explanatory of possession, or as part of the *res gesta*. *Ozmore v. Hood*, 53 Ga. 114; *Garr v. Shaffer* (Ind., 1894), 36 N. E. Rep. 208; *Low v. Schaffer*, 24 Oregon 239; *Garber v. Doersom*, 117 Pa. St. 162; *Trinity County Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 671; *Bennett v. Camp*, 54 Vt. 36.

Admissions against interest cannot be explained away by proof of counter self-serving declarations. *Nutter v. O'Donnell*, 6 Colo. 253; *Harding v. Clark*, 15 Ill. 30.

But self-serving declarations may sometimes be received when they are given in conjunction with admissions against interest. *Bailey v. Pardridge*, 35 Ill. App. 121; *Lippus v. Columbus Watch Co.* (Supreme Ct.), 13 N. Y. Supp. 319.

Gestures.—In *Bowie v. Maddox*, 29 Ga. 285, 74 Am. Dec. 61, it was held that gestures are but acted language, and are no more admissible than declarations in favor of the party making them.

Strangers.—As a general rule, the admissions of strangers to a suit are not competent evidence.

California.—*Kilburn v. Ritchie*, 2 Cal. 145, 16 Am. Dec. 326.

Colorado.—*St. Kevin Min. Co. v. Isaacs*, 18 Colo. 400.

Connecticut.—*Knapp v. Hanford*, 6 Conn. 170.

Georgia.—*Chastain v. Robinson*, 30 Ga. 55.

Illinois.—*Montgomery v. Brush*, 121 Ill. 513.

Iowa.—*Ibbittson v. Brown*, 5 Iowa 532.

Kentucky.—*Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449.

Maryland.—*Atwell v. Miller*, 11 Md. 348, 69 Am. Dec. 206; *Berry v. Waring*, 2 Har. & G. (Md.) 103.

Massachusetts.—*Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95.

Minnesota.—*Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37.

Missouri.—*Bain v. Clark*, 39 Mo. 252.

New Hampshire.—*Forsaith v. Stickney*, 16 N. H. 575.

New Jersey.—*Faulkner v. Whitaker*, 15 N. J. L. 438.

New York.—*Hoguet v. Berkman* (Supreme Ct.), 6 N. Y. Supp. 214; *Macaulay v. Palmer* (Supreme Ct.), 6 N. Y. Supp. 402; *Rice v. Daly* (Supreme Ct.), 20 N. Y. Supp. 941; *Turnier v. Lathers* (Supreme Ct.), 13 N. Y. Supp. 500; *Kirkpatrick v. Briggs*, 78 Hun (N. Y.) 518.

Pennsylvania.—*Com. v. Eberle*, 3 S. & R. (Pa.), 9; *Mitchell v. Welch*, 17 Pa. St. 339, 55 Am. Dec. 557; *Hill v. Meyers*, 43 Pa. St. 170.

Texas.—*Eddy v. Lowry* (Tex. Civ. App., 1894), 24 S. W. Rep. 1076; *O'Brien v. Hilburn*, 22 Tex. 616.

Vermont.—*Churchill v. Smith*, 16 Vt. 560. For exception to this rule, see *infra*, this article, *Strangers*.

1. *Reynolds v. Staines*, 2 C. & K. 745, 61

2. **Parties to the Record.**—As a general rule, admissions of a party to the record are competent evidence against him.¹ At common law the admissions of a party to the record were receivable in evidence in all cases,² but this rule has been modified both in *England* and in this country to this extent—that where a suit is brought in the name of a merely nominal party, his admissions are not receivable to defeat an innocent beneficial party.³

E. C. L. 745; *J. Obermann Brewing Co. v. Adams*, 35 Ill. App. 540; *Arthur v. Arthur*, 38 Kan. 691.

Thus, in an action against S. it was proved that a witness went to a tavern and asked a waiter if S. was there, and on a person coming out to the witness the latter asked him who he was, and he said his name was S.; it was held that this was some proof that this person was S., and that the consultation between the witness and this person was receivable in evidence. *Reynolds v. Staines*, 2 C. & K. 745, 61 E. C. L. 745.

Evidence of a Conversation by Telephone between plaintiff and some one at defendant's place of business is not admissible as against the defendant, in the absence of proof as to who was the person with whom plaintiff talked. *J. Obermann Brewing Co. v. Adams*, 35 Ill. App. 540.

Where admissions recited by the witness and attributed by him to several persons would not be receivable as a whole unless all of them were made by one of the persons named, and the witness neither states that they were all made by him, nor specifies any which he, as distinguished from the other declarants, did make, the whole should be rejected. *Smith v. Williams*, 89 Ga. 9.

1. *Black v. Lamb*, 12 N. J. Eq. 108; *Loomis v. Wadhams*, 8 Gray (Mass.) 557; *Smith v. Palmer*, 6 Cush. (Mass.) 513; *Beatty v. Davis*, 9 Gill (Md.) 211.

In *Campbell v. Day*, 16 Vt. 558, it was held that whether the party who made the admission has any interest in the suit, or is a merely nominal party, is a question of fact for the jury to find.

2. *Bauerman v. Radenius*, 7 T. R. 659; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Franklin Bank v. Cooper*, 36 Me. 180; *Hagan v. Sherman*, 5 Mich. 60; *Helm v. Steele*, 3 Humph. (Tenn.) 472; *Sargeant v. Sargeant*, 18 Vt. 376.

3. *Henderson v. Wild*, 2 Campb. 561; *Sargeant v. Sargeant*, 18 Vt. 376; *Head v. Shaver*, 9 Ala. 791; *Eitelgeorge v. Mutual House Bldg. Assoc.*, 69 Mo. 52; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Hough v. Barton*, 20 Vt. 455. See *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Payne v. Rogers*, 1 Doug. 407; *Skaife v. Jackson*, 3 B. & C. 421, 10 E. C. L. 137. But compare *Blackwin, J.*, in *Moriarty v. London, etc., R. Co.*, L. R. 5 Q. B. 320.

Thus, if, after the partnership between A and B has been dissolved, and notice has been given that all debts due the partnership shall be paid to B, A collusively gives a receipt for a debt due A and B from C, dated anterior to the dissolution of the partnership, the receipt is void, and an action may still be maintained against C for the debt in the name of A and B. *Henderson v. Wild*, 2 Campb. 561.

Where suit is brought in the name of the assignor, his admissions after the assignment cannot prejudice the assignee. *Butler v. Millett*, 47 Me. 492; *Dazey v. Mills*, 10 Ill. 67; *Moyers v. Inman*, 2 Swan (Tenn.) 80; *Head v. Shaver*, 9 Ala. 791.

In *Welch v. Mandeville*, 1 Wheat. (U. S.) 233, Story, J., said: "They [courts of law] will not give effect to a release procured by the defendant under a covenous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment."

Trustees.—The admissions of a trustee having no beneficial interest in the property conveyed to him cannot be given in evidence to defeat a deed of trust executed solely for the benefit of others, unless they are made by the authority of the *cestui que trust*. *Eitelgeorge v. Mutual House Bldg. Assoc.*, 69 Mo. 52; *Beatty v. Davis*, 9 Gill (Md.) 211; *Graham v. Lockhart*, 8 Ala. 26; *Thompson v. Drake*, 32 Ala. 99; *Magill v. Kauffman*, 4 S. & R. (Pa.) 317, 8 Am. Dec. 713; *Waterman v. Wallace*, 13 Blatchf. (U. S.) 128; *Sargeant v. Sargeant*, 18 Vt. 371. See *Fargason v. Edrington*, 49 Ark. 207. Compare *Helm v. Steele*, 3 Humph. (Tenn.) 472.

In giving the opinion of the court in *Graham v. Lockhart*, 8 Ala. 26, Goldthwaite, J., said: "It is true that most of the American cases are upon assigned choses in action, but the principle on which they proceed is, that one having no interest in the suit ought not to be permitted to defeat or affect it by his admissions; this seems equally applicable to a trustee, who is invested with the legal title to a specific chattel solely for the benefit of others."

In *Chisolm v. Newton*, 1 Ala. 371, it was held that the admissions of the nominal plaintiff, made after the commencement of the suit, could not be given in evidence to defeat the action. See *Sykes v. Lewis*, 17 Ala. 261; *Beatty v. Davis*, 9 Gill (Md.) 211.

Guardian, Prochein Amy, etc.—The admissions of a guardian made before the commencement of his trust, or of a *prochein amy* made before the commencement of the suit, will not be admissible against the wards or infant respectively, though the name of such guardian or *prochein amy* appears on the record. 1 Greenl. on Ev., § 179; *Webb v. Smith*, R. & M. 106, 21 E. C. L. 392; *Cowling v. Ely*, 2 Stark. 366, 3 E. C. L. 447; *Hammer v. Pierce*, 5 Harr. (Del.) 304; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 535; *Moore v. Butler*, 48 N. H. 161; *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376; *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. Rep. 59. See *Fraser v. Marsh*, 2 Stark. 41, 3 E. C. L. 308; *Matthews v. Dowling*, 54 Ala. 202.

3. Real Parties.—Evidence of the admissions of the real party in interest in a suit is admissible against the nominal party.¹ For example, it has been held that the admissions of the *cestui que trust* of a bond where action is instituted by the obligee therein, are receivable in evidence. And the same has been held in the case of the declarations² of a deputy sheriff in an action

In *Westenfelder v. Green*, 24 Oregon 448, it was held that where a guardian, under and by virtue of his appointment, takes possession of certain land claimed by his wards, his declarations that he holds the land for third persons are inadmissible to defeat his wards' claims of title by adverse possession.

Nor can the guardianship be proved by the declarations of an alleged guardian. *Ellis v. Stone*, 4 Tex. Civ. App. 157.

But it is said that where the admission is made *bona fide* in order to facilitate the trial, it will be received in the same way as the admission of the attorney in the cause. 2 Whart. Ev., § 1208.

Executors, Administrators, etc.—The admissions of an executor or administrator will be received against the estate only when they are made while he is clothed with his trust and is acting within the scope of his duties. *Gooding v. U. S. Life Ins. Co.*, 46 Ill. App. 307; *Prudential Ins. Co. v. Fredericks*, 41 Ill. App. 419; *McArthur v. Carrie*, 32 Ala. 75, 70 Am. Dec. 529; *Whiton v. Snyder*, 88 N. Y. 299; *Plant v. McEwen*, 4 Conn. 544; *Moore v. Butler*, 48 N. H. 161; *McKeown v. Harvey*, 40 Mich. 226; *Planters', etc., Bank v. Neel*, 74 Ga. 576; *Dent v. Dent*, 3 Gill (Md.) 482; *Mangun v. Webster*, 7 Gill (Md.) 81; *Mattoon v. Clapp*, 8 Ohio 248; *Hueston v. Hueston*, 2 Ohio St. 488; *Lobb v. Lobb*, 26 Pa. St. 327. See *Lawrence v. Wilson*, 160 Mass. 304; *Emerson v. Thompson*, 16 Mass. 429; *Atkins v. Sanger*, 1 Pick. (Mass.) 192; *Hill v. Buckminster*, 5 Pick. (Mass.) 391; *Faunce v. Gray*, 21 Pick. (Mass.) 243; *Wilson v. Terry*, 9 Allen (Mass.) 214; *Heywood v. Heywood*, 10 Allen (Mass.) 105; *Allen v. Allen*, 26 Mo. 327; *Halyburton v. Kershaw*, 3 Desaus. (S. Car.) 105.

In *England* an exception is made in the case of admissions by a nominal party, such as releases, which are specially pleaded, instead of being given in evidence under the general issue; it being held that where such release is pleaded in bar the courts sitting *in banco* will grant only equitable relief on motion, and that otherwise the admission must be allowed to have its effect. *Alner v. George*, 1 Campb. 392; *Legh v. Legh*, 1 B. & P. 447; *Skaife v. Jackson*, 3 B. & C. 421, 10 E. C. L. 137; *Payne v. Rogers*, 1 Doug. 407. See also *Gibson v. Winter*, 5 B. & Ad. 96, 27 E. C. L. 47; *Craib v. D'Aeth*, cited in *Bauerman v. Radenius*, 7 T. R. 666 (b), note; *Innell v. Newman*, 4 B. & Ald. 419.

This distinction, however, is not recognized in this country, the courts holding that where a release by a nominal plaintiff is pleaded in bar, the plaintiff may plead a prior assignment of the cause of action by way of replication. *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Andrews v. Beecker*, 1 Johns. Cas. (N. Y.) 411; *Littlefield v. Storey*,

3 Johns. (N. Y.) 425; *Dawson v. Coles*, 16 Johns. (N. Y.) 51; *Raymond v. Squire*, 11 Johns. (N. Y.) 47; *Owing v. Low*, 5 Gill & J. (Md.) 134.

Admissions of Nominal Party Used against Him in Subsequent Suit.—Though the admissions of the nominal party cannot bind the parties in interest, they may be evidence against such nominal party when sued *suo jure*. 1 Greenl. Ev. (14th ed.), § 179; *Moyers v. Inman*, 2 Swan (Tenn.) 80. See *Plant v. McEwen*, 4 Conn. 544; *Moore v. Butler*, 48 N. H. 161; *Eaton v. New England Tel. Co.*, 68 Me. 63.

1. *Clark v. Carrington*, 7 Cranch (U. S.) 308; *Bowen v. Snell*, 11 Ala. 379; *McLemore v. Nuckolls*, 1 Ala. Sel. Cas. 591; *Power v. Savannah, etc., R. Co.*, 56 Ga. 471; *Bayley v. Bryant*, 24 Pick. (Mass.) 198; *Tyler v. Ulmer*, 12 Mass. 163; *Richardson v. Field*, 6 Me. 305; *Savage v. Balch*, 8 Me. 27; *Bigelow v. Foss*, 59 Me. 162. See also *Snowball v. Goodricke*, 4 B. & Ad. 541, 24 E. C. L. 112; *Bowsher v. Calley*, 1 Campb. 391; *Underhill v. Wilson*, 6 Bing. 697, 19 E. C. L. 208; *North v. Miles*, 1 Campb. 390. Compare *Dickinson v. Clarke*, 5 W. Va. 280.

In an action by a subsequently attaching creditor against the officer for applying the property attached in satisfaction of the execution of a prior attaching creditor, it was held that the admissions of the latter, who had given the officer a bond of indemnity against the consequences of such application, were receivable in evidence for the purpose of proving that the prior attachment was void, he being the real party in interest. *Bayley v. Bryant*, 24 Pick. (Mass.) 198. See also *Dowden v. Fowle*, 4 Campb. 38; *Young v. Smith*, 6 Esp. 121; *Proctor v. Lainson*, 7 C. & P. 629, 32 E. C. L. 663; *Dyke v. Aldridge*, cited in *Bauerman v. Radenius*, 7 T. R. 661.

In *Rex v. Hardwick*, 11 East 578, it was held that, in a suit against a parish, the admissions of the rated parishioners might be received in evidence, the parishioners being the parties really interested in the suit. See *Reg. v. Adderbury East*, 5 Q. B. 187, 48 E. C. L. 187.

But this doctrine seems to be repudiated in this country. Thus, in *Landaff's Petition*, 34 N. H. 164, it was held that the declarations of an inhabitant are not competent evidence against the town in which he resides. See *Davis v. Rochester*, 66 Hun (N. Y.) 629; *Watertown v. Cowen*, 4 Paige (N. Y.) 510.

In an action by the master of a ship for freight, the declarations of the owner, for whose benefit the action is brought, are evidence for the defendant. *Smith v. Lyon*, 3 Campb. 465.

2. Admissions of Cestui que Trust.—Hanson

against the sheriff,¹ and of the actual beneficiary in an insurance policy taken in the name of another.²

4. **Privies.**—The admissions of a person in disparagement of his title, but not in contradiction of a record title,³ are competent evidence against those claiming under or through him so far as there is identity of interest.⁴

v. Parker, 1 Wils. 257. See *Harrison v. Vallance*, 1 Bing. 45, 8 E. C. L. 394.

But the admissions of the *cestui que trust* are not admissible in evidence to defeat the estate of the trustee where the latter is not the mere trustee of the former. *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; *Dillard v. Dillard*, 2 Strobh. (S. Car.) 89. See also *Doe v. Wainwright*, 3 Nev. & P. 598.

In *Com. v. Kreager*, 78 Pa. St. 477, it was held that the declarations of a *cestui que trust* could not be received as evidence of the trust.

In *Ryan v. Merriam*, 4 Allen (Mass.) 77, it was held that the declarations of one who is neither a party to the record nor a witness are incompetent for the purpose of showing that he is the real party in interest in the action.

1. **Admissions of Deputy Sheriff.**—*Snowball v. Goodricke*, 4 B. & Ad. 541, 24 E. C. L. 112; *Drake v. Sykes*, 7 T. R. 113; *Yabsley v. Doble*, 1 Ld. Raym. 190; *Tyler v. Ulmer*, 12 Mass. 163; *Savage v. Balch*, 8 Me. 27.

2. *Bell v. Ansley*, 16 East 141.

3. **Admissions in Disparagement of Title.**—*Whart. Ev.* (3d ed.), § 1157; *Dodge v. Freedman's Sav., etc., Co.*, 93 U. S. 379; *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41; *Jackson v. Shearman*, 6 Johns. (N. Y.) 19; *Jackson v. Vosburgh*, 7 Johns. (N. Y.) 186; *Jackson v. Miller*, 6 Cow. (N. Y.) 751; *Gibney v. Marchay*, 34 N. Y. 301; *Yates v. Yates*, 76 N. Car. 142; *Roberts v. Roberts*, 82 N. Car. 29; *Carpenter v. Hollister*, 13 Vt. 552, 37 Am. Dec. 612. See also *Hodge v. Thompson*, 9 Ala. 131; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88.

The Admissions of a Grantor, who is still living, made while holding the land, and having title of record thereto, unless in relation to the extent and character of his possession, cannot be admitted against the grantee to defeat the title. *Carpenter v. Hollister*, 13 Vt. 552, 37 Am. Dec. 612. See *Wood v. Willard*, 36 Vt. 82, 84 Am. Dec. 659; *Paine v. M'Intier*, 1 Mass. 69.

4. *England.*—*Walker v. Broadstock*, 1 Esp. 458; *Doe v. Seaton*, 2 Ad. & El. 171, 29 E. C. L. 62; *Doe v. Pettett*, 5 B. & Ald. 223, 7 E. C. L. 75; *Doe v. Jones*, 1 Campb. 367; *Doe v. Rickarby*, 5 Esp. 4; *Doe v. Cole*, 6 C. & P. 359, 25 E. C. L. 438; *Maddison v. Nuttall*, 6 Bing. 226, 19 E. C. L. 65; *Doe v. Austin*, 9 Bing. 41, 23 E. C. L. 256; *Davies v. Pierce*, 2 T. R. 53.

United States.—*Bowen v. Chase*, 98 U. S. 254; *In re Clark*, 9 Blatchf. (U. S.) 380.

Alabama.—*Brewer v. Brewer*, 19 Ala. 481; *Hart v. Kendall*, 82 Ala. 144; *Lide v. Lide*, 32 Ala. 449; *Raines v. Raines*, 30 Ala. 425; *Pearce v. Nix*, 34 Ala. 183; *Moses v. Dunham*, 71 Ala. 173; *Arthur v. Gayle*, 38 Ala. 259; *Webster v. Smith*, 10 Ala. 429; *Alexander v. Caldwell*, 55 Ala. 517; *Baucum v.*

George, 65 Ala. 259; *Beasley v. Clarke*, 102 Ala. 254; *Wisdom v. Reeves* (Ala., 1895), 81 So. Rep. 13.

Arizona.—*Rush v. French*, 1 Arizona 100.

Arkansas.—*Allen v. McGaughey*, 31 Ark. 253.

California.—*Lestrade v. Barth*, 19 Cal. 660; *Gallagher v. Williamson*, 23 Cal. 332, 83 Am. Dec. 114; *Frink v. Roe*, 70 Cal. 296; *Bollo v. Navarro*, 33 Cal. 459; *Wright v. Carillo*, 22 Cal. 595; *Davis v. Drew*, 58 Cal. 152; *McFadden v. Wallace*, 38 Cal. 57; *Wormouth v. Johnson*, 58 Cal. 621; *People v. Blake*, 60 Cal. 497; *Kneeland v. Wilson*, 12 Cal. 241; *Lord v. Thomas* (Cal., 1894), 36 Pac. Rep. 372; *Adams v. Grand Lodge*, 105 Cal. 321.

Connecticut.—*Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116; *Rogers v. Moore*, 10 Conn. 13; *Potter v. Waite*, 55 Conn. 236; *Ramsbottom v. Phelps*, 18 Conn. 283; *Peck, etc., Co. v. Atwater Mfg. Co.*, 61 Conn. 31; *Pierce v. Roberts*, 57 Conn. 31.

Georgia.—*Horn v. Ross*, 20 Ga. 210, 65 Am. Dec. 621; *Meek v. Holton*, 22 Ga. 491; *Cloud v. Dupree*, 28 Ga. 170; *Lamar v. Pearre*, 90 Ga. 377; *West v. Bolton*, 23 Ga. 531; *Harrell v. Culpepper*, 47 Ga. 635; *Ozment v. Anglin*, 60 Ga. 242; *Lewis v. Adams*, 61 Ga. 559; *Settle v. Alison*, 8 Ga. 201; *Yonn v. Pittman*, 82 Ga. 637.

Illinois.—*Waggoner v. Cooley*, 17 Ill. 239; *Randegger v. Ehrhardt*, 51 Ill. 101; *Hanley v. Erskine*, 19 Ill. 265; *Riggs v. Powell*, 142 Ill. 453; *Mueller v. Rebhan*, 94 Ill. 143; *Penn v. Oglesby*, 89 Ill. 110.

Indiana.—*Compton v. Fleming*, 8 Blackf. (Ind.) 153; *King v. Wilkins*, 11 Ind. 347; *Kuhns v. Gates*, 92 Ind. 66; *Bunberry v. Brett*, 18 Ind. 343; *Slade v. Leonard*, 75 Ind. 171; *Bevins v. Cline*, 21 Ind. 37; *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735; *McSweeney v. McMillen*, 96 Ind. 298; *Kenney v. Phillipy*, 91 Ind. 511; *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. Rep. 860.

Iowa.—*Taylor v. Lusk*, 9 Iowa 444; *Robinson v. Robinson*, 22 Iowa 428; *Benson v. Lundy*, 52 Iowa 267; *Davis v. Melson*, 66 Iowa 715.

Kansas.—*Anderson v. Kent*, 14 Kan. 207.

Kentucky.—*Jackson v. Holloway*, 14 B. Mon. (Ky.) 108; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283.

Louisiana.—*Brown v. Stroud*, 34 La. Ann. 374; *Lejeune v. Barrow*, 11 La. Ann. 501.

Maine.—*Dale v. Gower*, 24 Me. 563; *McLanathan v. Patten*, 39 Me. 142; *Beedy v. Macomber*, 47 Me. 451; *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486; *Wentworth v. Wentworth*, 71 Me. 72.

Maryland.—*Dilley v. Love*, 61 Md. 603; *Gaither v. Martin*, 3 Md. 146; *Robinett v. Wilson*, 8 Gill (Md.) 179; *Clary v. Grimes*, 12 Gill & J. (Md.) 31; *Weems v. Disney*, 4 Har. & M. (Md.) 156; *Dorsey v. Dorsey*, 3 Har. & J. (Md.) 410, 6 Am. Dec. 506; *Keener*

Assignor and Assignee.—In the case of an assignment of a chattel or chose in

v. Kauffman, 16 Md. 296; *Hale v. Monroe*, 28 Md. 98.

Massachusetts.—*Plimpton v. Chamberlain*, 4 Gray (Mass.) 320; *Blake v. Everett*, 1 Allen (Mass.) 248; *Hyde v. Middlesex County*, 2 Gray (Mass.) 267; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Rowell v. Doggett*, 143 Mass. 483; *Bridge v. Eggleston*, 14 Mass. 250; *White v. Loring*, 24 Pick. (Mass.) 319; *Brattle Square Church v. Bullard*, 2 Met. (Mass.) 363; *Pickering v. Reynolds*, 119 Mass. 111; *Davis v. Spooner*, 3 Pick. (Mass.) 284; *White v. Loring*, 24 Pick. (Mass.) 319.

Minnesota.—*Olson v. Swensen*, 53 Minn. 516; *Baker v. Taylor*, 54 Minn. 71; *Taylor v. Hess* (Minn., 1894), 58 N. W. Rep. 824.

Mississippi.—*Brown v. McGraw*, 12 Smed. & M. (Miss.) 268; *Graham v. Busby*, 34 Miss. 272; *Walker v. Marseilles*, 70 Miss. 283; *Levy v. Holberg*, 71 Miss. 66.

Missouri.—*Wilson v. Albert*, 89 Mo. 537; *Murray v. Oliver*, 18 Mo. 405; *Gamble v. Johnson*, 9 Mo. 605; *Wood v. Hicks*, 36 Mo. 326; *Cavin v. Smith*, 24 Mo. 221; *Dickerson v. Chrisman*, 28 Mo. 134; *Criddle v. Criddle*, 21 Mo. 522; *Potter v. McDowell*, 31 Mo. 62; *Johnson v. Quarles*, 46 Mo. 423.

Nebraska.—*Cunningham v. Fuller*, 35 Neb. 58.

New Hampshire.—*Pike v. Hayes*, 14 N. H. 19, 40 Am. Dec. 171; *Smith v. Powers*, 15 N. H. 546; *Badger v. Story*, 16 N. H. 168; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371; *Hurlburt v. Wheeler*, 40 N. H. 73; *Morrill v. Foster*, 33 N. H. 379; *Bell v. Woodward*, 47 N. H. 539; *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Smith v. Forrest*, 49 N. H. 230; *Putnam v. Osgood*, 52 N. H. 148; *Hunt v. Haven*, 56 N. H. 87; *State v. Vale Mills*, 63 N. H. 4.

New Jersey.—*Eaton v. Cook*, 25 N. J. Eq. 55; *Edwards v. Derrickson*, 28 N. J. L. 39; *Den v. Kip*, 26 N. J. L. 351.

New York.—*Pitts v. Wilder*, 1 N. Y. 525; *Enders v. Sternbergh*, 2 Abb. App. Dec. (N. Y.) 31; *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; *Fetherly v. Waggoner*, 11 Wend. (N. Y.) 599; *Smith v. McNamara*, 4 Lans. (N. Y.) 169; *Keator v. Dimmick*, 46 Barb. (N. Y.) 158; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Rose v. Adams*, 22 Hun (N. Y.) 389; *Gibney v. Marchay*, 34 N. Y. 301; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Lyon v. Ricker*, 141 N. Y. 225; *Chadwick v. Fonner*, 69 N. Y. 404; *Baird v. Slaughter* (Supreme Ct.), 8 N. Y. Supp. 603; *Baird v. Baird* (N. Y., 1895), 40 N. E. Rep. 222; *Swan v. Morgan* (Supreme Ct.), 34 N. Y. Supp. 829.

North Carolina.—*Carraway v. Cox*, 8 Ired. (N. Car.) 79; *Guv v. Hall*, 3 Murph. (N. Car.) 150; *Johnson v. Patterson*, 2 Hawks (N. Car.) 183, 11 Am. Dec. 756; *Harshaw v. Moore*, 12 Ired. (N. Car.) 247; *Cansler v. Fite*, 5 Jones (N. Car.) 424; *May v. Gentry*, 4 Dev. & B. (N. Car.) 117; *McCanless v. Reynolds*, 67 N. Car. 268; *Headen v. Womack*, 88 N. Car. 466; *Magee v. Blankenship*, 95 N. Car. 563; *Gidney v. Logan*, 79 N. Car. 217; *Gidney v. Moore*, 86 N. Car. 484; *Hughes v. Boone*, 102 N. Car. 137.

Ohio.—*Ritchy v. Martin*, Wright (Ohio) 441.

Pennsylvania.—*Gibblehouse v. Stong*, 3 Rawle (Pa.) 437; *Biddle v. Moore*, 3 Pa. St. 161; *Pierce v. McKeehan*, 3 Pa. St. 136; *Weidman v. Kohr*, 4 S. & R. (Pa.) 174; *Hugus v. Walker*, 12 Pa. St. 173; *Williard v. Williard*, 56 Pa. St. 119; *Sergeant v. Ingersoll*, 15 Pa. St. 343; *St. Clair v. Shale*, 20 Pa. St. 105; *Dawson v. Mills*, 32 Pa. St. 302; *Gordner v. Hefley*, 49 Pa. St. 163; *Pringle v. Pringle*, 59 Pa. St. 289; *Hunt's Appeal*, 100 Pa. St. 590; *Magee v. Raiguel*, 64 Pa. St. 110; *Dawson v. Mills*, 32 Pa. St. 302; *Gracie's Estate*, 158 Pa. St. 521.

South Carolina.—*Renwick v. Renwick*, 9 Rich. (S. Car.) 50; *McClendon v. Wells*, 20 S. Car. 514; *Ellen v. Ellen*, 18 S. Car. 489.

Tennessee.—*Peoples v. Devault*, 11 Heisk. (Tenn.) 431; *Dunn v. Eaton*, 92 Tenn. 743.

Texas.—*Hurt v. Evans*, 49 Tex. 311; *Wilson v. Simpson*, 80 Tex. 279; *Schmidt v. Huff* (Tex., 1892), 19 S. W. Rep. 131; *Extence v. Stewart* (Tex. Civ. App., 1894), 26 S. W. Rep. 896; *Slocum v. Putnam* (Tex. Civ. App., 1894), 25 S. W. Rep. 52; *Hays v. Hays*, 66 Tex. 606; *Coughran v. Alderete* (Tex. Civ. App., 1894), 26 S. W. Rep. 109; *Fellman v. Smith*, 20 Tex. 99; *Branch v. Makeig* (Tex. Civ. App., 1895), 28 S. W. Rep. 1050.

Utah.—*Harrington v. Chambers*, 3 Utah 94.

Vermont.—*Denton v. Perry*, 5 Vt. 382; *Beecher v. Parmele*, 9 Vt. 352, 31 Am. Dec. 633; *Hale v. Rich*, 48 Vt. 217; *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29; *Alger v. Andrews*, 47 Vt. 238 (*overruling Hines v. Soule*, 14 Vt. 99).

Virginia.—*Walthol v. Johnson*, 2 Call (Va.) 275; *Dooley v. Baynes*, 86 Va. 644.

West Virginia.—*Fry v. Feamster*, 36 W. Va. 454; *Houston v. McCluney*, 8 W. Va. 136; *State v. Andrews*, 39 W. Va. 35.

Wisconsin.—*Pritchard v. Pritchard*, 69 Wis. 373; *Roebke v. Andrews*, 26 Wis. 312.

See also *Ford v. Haskell*, 32 Conn. 489; *Cline v. Jones*, 111 Ill. 563; *Monmouth First Nat. Bank v. Strang*, 138 Ill. 347; *Bristol v. Dann*, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122; *Beach v. Wise*, 1 Hill (N. Y.) 612.

Compare Clarke v. Waite, 12 Mass. 439; *White v. Moss*, 92 Ga. 244.

Thus the Admissions of the Grantor of Land will be receivable against the grantee. *Allen v. McGaughey*, 31 Ark. 253; *Alexander v. Caldwell*, 55 Ala. 517; *Stanley v. Green*, 12 Cal. 164; *Sneed v. Woodward*, 30 Cal. 430; *Bollo v. Navarro*, 33 Cal. 466; *Phelps v. McGloan*, 42 Cal. 298; *McFadden v. Ellmaker*, 52 Cal. 348; *Moss v. Dearing*, 45 Iowa 530; *Headen v. Womack*, 88 N. Car. 468; *Jackson v. Myers*, 11 Wend. (N. Y.) 533; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170, 40 Am. Dec. 232. See also *Tompkins v. Crane*, 50 Cal. 478.

Declarations by the Locator of a Mining Claim, made during the time she claimed the title, that she expected to hold the premises because the prior locator was a nonresident, are admissible against her grantees, as it is an admission by her of a prior location, which may be valid notwithstanding the prior

action, such identity of interest exists between assignor and assignee where, at

locator's nonresidence. *Rush v. French*, 1 Arizona 99.

In *Tompkins v. Crane*, 50 Cal. 478, it was held that the declarations must be made concerning the real estate conveyed.

Also, the Admissions of the Ancestor will be received against the heir. *Doe v. Pettett*, 5 B. & Ald. 223, 7 E. C. L. 75; *Lewis v. Adanis*, 61 Ga. 559; *McSweeney v. McMillen*, 96 Ind. 298; *Plimpton v. Chamberlain*, 4 Gray (Mass.) 320; *Baker v. Haskell*, 47 N. H. 479; *Jackson v. M'Call*, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Hunt's Appeal*, 100 Pa. St. 590.

A deed of land, executed and acknowledged by the grantor, was delivered by him to two of the three grantees therein named, by whom it was retained for some time, without being recorded, and was then given back by them, without the knowledge or consent of the third grantee, to the grantor, by whom the same was destroyed, and the grantor subsequently died. It was held that the grantor's declaration that he had made such a deed was admissible in evidence, after his death, against his heirs or devisees. *Hodges v. Hodges*, 2 Cush. (Mass.) 455.

In the Same Way the Admissions of the Testator will be received against a devisee. *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Ackley v. Ackley* (Supreme Ct.), 21 N. Y. Supp. 877.

On a bill filed to contest the validity of a will the declarations and admissions of a deceased devisee are admissible in evidence against another devisee who has succeeded by will or devise to the interest of the deceased devisee. *Mueller v. Rebhan*, 94 Ill. 142. See *Wallis v. Luhring*, 134 Ind. 447.

Declarations of an Intestate are also receivable against the administrator. *Smith v. Smith*, 3 Bing. N. Cas. 29, 32 E. C. L. 25; *Keifer v. Carusi*, 7 D. C. 156; *Rowland v. Philadelphia, etc., R. Co.*, 63 Conn. 415; *Bevins v. Cline*, 21 Ind. 37; *Nash v. Gibson*, 16 Iowa 305; *Penn v. Oglesby*, 89 Ill. 110; *Fellows v. Smith*, 130 Mass. 378; *Dale v. Gower*, 24 Me. 563; *Smith v. Maine*, 25 Barb. (N. Y.) 33; *Albert v. Ziegler*, 29 Pa. St. 50; *Gordner v. Heffley*, 49 Pa. St. 163; *Johnston v. McCain*, 145 Pa. St. 531; *Burckmyer v. Mairs*, *Riley* (S. Car.) 208; *Dooley v. McEwing*, 8 Tex. 306; *Boone v. Thompson*, 17 Tex. 605.

Admissions made by an intestate are receivable against one who claims under his administrator. *Bush v. Barron*, 78 Tex. 5.

The Declarations of the Husband to the effect that certain slaves in his possession were held by him as trustee for his wife, and not as his individual property, are admissible evidence against his administrator in an action against the widow to recover the slaves. *Lide v. Lide*, 32 Ala. 449.

The Admissions of a Former Administrator may be received against his successor. *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735.

In *Tyres v. Kennedy*, 126 Ind. 523, it was held that the declarations of a mortgagor against his title, made before execution of the mortgage, are admissible as against the

mortgagee. See *Harshaw v. Moore*, 12 Ired. (N. Car.) 247.

Declarations of the Mortgagee under whom the defendant claims, that the mortgage was paid off, are admissible evidence on the part of the plaintiff. *Walhol v. Johnson*, 2 Call (Va.) 275; *McClendon v. Wells*, 20 S. Car. 514.

The admissions of a mortgagee as to the consideration of the mortgage are admissible in evidence against his privies by representation. *Parkhurst v. Higgins*, 38 Hun (N. Y.) 113. See also *Merrick v. Hulbert*, 15 Ill. App. 606.

For the Purpose of Showing the True Boundary Line of land, declarations of the mortgagor in possession are admissible against one claiming under a foreclosure of the mortgage. *Flagg v. Mason*, 141 Mass. 64.

Also, the Declarations of the Landlord may be received against the lessee. *Crease v. Barrett*, 1 C. M. & R. 932.

Judgment Debtor.—The rule has also been applied to the declarations of a judgment debtor against the execution purchaser. *Walker v. Elledge*, 65 Ala. 51; *Jackson v. DuBose*, 87 Ga. 761; *King v. Wilkins*, 11 Ind. 347; *Ross v. Hayne*, 3 Greene (Iowa) 211; *Pickering v. Reynolds*, 119 Mass. 111; *Putnam v. Osgood*, 52 N. H. 148; *Outcalt v. Ludlow*, 32 N. J. L. 239; *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29 (*overruling* *Hines v. Soule*, 14 Vt. 99). See *Avery v. Clemons*, 18 Conn. 306, 46 Am. Dec. 323; *Pomeroy v. Bailey*, 43 N. H. 118; *Martel v. Somers*, 26 Tex. 552; *Mulholland v. Elliston*, 1 Coldw. (Tenn.) 307, 78 Am. Dec. 495. Compare *Vandyke v. Bastedo*, 15 N. J. L. 224; *Taylor v. Marshal*, 14 Johns. (N. Y.) 204.

Thus, in a replevin suit against a sheriff the admissions of an execution defendant made while in possession of the property levied on, that it belonged to the plaintiff in replevin, and was held under him by hiring, is admissible in evidence. *King v. Wilkins*, 11 Ind. 347. See *Sweet v. Wright*, 57 Iowa 510.

Vendor.—In an action to recover possession of property where both parties claim under the same person, one under an execution sale and the other by deed made prior to such sale, it is competent in order to establish the *bona fides* of the deed to prove declarations of the vendor made before suit was commenced and before the contract of sale, admitting an indebtedness to the grantee. *McCanless v. Reynolds*, 67 N. Car. 268.

The Statement of a Deceased Person made to a third party, to the effect that he had made a gift and had delivered the property to the party who claimed to be the donee, is competent evidence to prove that fact. *Pritchard v. Pritchard*, 69 Wis. 373.

An Acknowledgment of a Trust at any time amounts to an admission which may be given in evidence against the trustees' heirs. *Williard v. Williard*, 56 Pa. St. 119.

In *Dubose v. Young*, 14 Ala. 139, it was held that admissions of indebtedness made by a debtor in a deed of trust, to secure the

the time of acquiring his title, the assignee has actual notice, or the circum-

creditor, are evidence of the fact of indebtedness against one who was not at the time a creditor of the grantor.

Under the *Georgia* Code, § 3776, which provides that "the declarations or entries of a person since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case," declarations of a deceased person, in disparagement of his title to land, made while in possession thereof, are receivable in evidence, not only against himself and those claiming under him, but also for or against strangers. *McLeod v. Swain*, 87 Ga. 156.

But in *Carroll v. Frank*, 28 Mo. App. 69, it was held that unsworn declarations by one in possession of chattels, as to the character of his holding, are not admissible against third persons who do not claim under him.

The Declarations of One of Several Owners of a water-power, in the hearing of the others, as to their relative rights, are competent evidence as against a person claiming under either. *Crippen v. Morss*, 49 N. Y. 63.

It was held in *Grant v. Levan*, 4 Pa. St. 393, that an admission by one during his tenancy, under whom one of the plaintiffs claims, affects such plaintiff only.

Recitals in Deeds.—A deed containing a recital of another deed is evidence of the recited deed against the grantor, and all persons claiming by title derived from him subsequently. *Penrose v. Griffith*, 4 Binn. (Pa.) 231; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 24; *Grubb v. Grubb*, 74 Pa. St. 25; *Allen v. Allen*, 45 Pa. St. 468.

Boundaries.—It is always proper, in controversies involving lines, corners, and boundaries of land, to receive in evidence what the owner may have admitted in regard to them. *Austin v. Andrews*, 71 Cal. 98; *Stumpf v. Osterhage*, 111 Ill. 82; *Daggett v. Shaw*, 5 Met. (Mass.) 223; *Flagg v. Mason*, 141 Mass. 64; *Davis v. Sherman*, 7 Gray (Mass.) 201; *Niles v. Patch*, 13 Gray (Mass.) 254; *Lemmon v. Hartsook*, 80 Mo. 13; *Smith v. Powers*, 15 N. H. 546; *Pike v. Hayes*, 14 N. H. 19, 40 Am. Dec. 171; *State v. Vale Mills*, 63 N. H. 4; *Cansler v. Fite*, 5 Jones (N. Car.) 424; *Roberts v. Preston*, 100 N. Car. 243; *Halstead v. Mullen*, 93 N. Car. 252; *Weidman v. Kohr*, 4 S. & R. (Pa.) 174; *Dawson v. Mills*, 32 Pa. St. 302; *Gratz v. Beates*, 45 Pa. St. 495; *Davis v. Jones*, 3 Head (Tenn.) 603. See *Payne v. Crawford*, 102 Ala. 387.

In *Ozment v. Anglin*, 60 Ga. 242, it was held in ejectment by one deriving title from one of several tenants in common, after a voluntary partition by them, that previous admissions of one of said cotenants as to the boundary were admissible.

Declarations must be against Interest.—An admission, to be receivable in evidence, must be in disparagement of declarant's title, and not in proof of it.

United States.—*Grimes Dry Goods Co. v. Malcolm*, 58 Fed. Rep. 670.

Alabama.—*Cox v. Easley*, 11 Ala. 362; *Perry v. Graves*, 12 Ala. 246.

Arkansas.—*Leach v. Fowler*, 22 Ark. 143.

California.—*Fischer v. Bergson*, 49 Cal. 295; *Ord v. Ord*, 99 Cal. 523; *Stanley v. Green*, 12 Cal. 148; *Bedell v. Scoggins* (Cal., 1895), 40 Pac. Rep. 954.

Colorado.—*Davis v. Johnson*, 4 Colo. App. 545.

Connecticut.—*Smith v. Martin*, 17 Conn. 399; *Scripture v. Newcomb*, 16 Conn. 588.

Georgia.—*Lewis v. Adams*, 61 Ga. 559; *Jaffray v. Brown*, 91 Ga. 57.

Illinois.—*Treadway v. Treadway*, 5 Ill. App. 478; *Hart v. Randolph*, 142 Ill. 521; *Francis v. Wilkinson*, 147 Ill. 370.

Indiana.—*Creighton v. Hoppis*, 99 Ind. 369; *Brown v. Kenyon*, 108 Ind. 283.

Kentucky.—*Dixon v. Labry* (Ky., 1895), 29 S. W. Rep. 21.

Maine.—*Holmes v. Sawtelle*, 53 Me. 179.

Maryland.—*Dorsey v. Dorsey*, 3 Har. & J. (Md.) 410, 6 Am. Dec. 506.

Massachusetts.—*Ware v. Brookhouse*, 7 Gray (Mass.) 45; *Edgerton v. Wolf*, 6 Gray (Mass.) 453; *Flagg v. Mason*, 8 Gray (Mass.) 556; *Clark v. Houghton*, 12 Gray (Mass.) 38; *McGough v. Wellington*, 4 Allen (Mass.) 502.

Michigan.—*Wilson v. Wilson*, 6 Mich. 9; *Ward v. Ward*, 37 Mich. 253; *Bower v. Earl*, 18 Mich. 367.

Mississippi.—*Whitfield v. Whitfield*, 40 Miss. 352.

Missouri.—*Watson v. Bissell*, 27 Mo. 220; *Sutton v. Casselleggi*, 5 Mo. App. 111; *Tucker v. Tucker*, 32 Mo. 464; *Turner v. Belden*, 9 Mo. 797; *Perry v. Roberts*, 17 Mo. 36.

New Hampshire.—*Smith v. Powers*, 15 N. H. 546; *Newell v. Horn*, 47 N. H. 379.

New York.—*Graves v. King*, 15 Hun (N. Y.) 367; *Jackson v. Cris*, 11 Johns. (N. Y.) 437; *Sanford v. Sanford*, 61 Barb. (N. Y.) 293; *Tabor v. Van Tassel*, 86 N. Y. 642; *Cromer v. Pinckney*, 3 Barb. Ch. (N. Y.) 466; *Phillips v. McCombs*, 53 N. Y. 494; *Foot v. Beecher*, 78 N. Y. 155; *Flannery v. Van Tassel*, 127 N. Y. 631; *Williams v. Williams*, 142 N. Y. 156.

North Carolina.—*Den v. Herring*, 3 Dev. (N. Car.) 340; *Austin v. King*, 91 N. Car. 286; *Hedrick v. Gobble*, 63 N. Car. 48; *Melvin v. Bullard*, 82 N. Car. 33; *Roberts v. Roberts*, 82 N. Car. 29; *Bynum v. Thompson*, 3 Ired. (N. Car.) 578.

Ohio.—*Cheeseman v. Kyle*, 15 Ohio St. 15.

Oregon.—*State v. Byam*, 23 Oregon 568; *Low v. Schaffer*, 24 Oregon 239.

Pennsylvania.—*Riddle v. Dixon*, 2 Pa. St. 372, 44 Am. Dec. 207; *Alden v. Grove*, 18 Pa. St. 377; *Feig v. Meyers*, 102 Pa. St. 10.

Texas.—*McDow v. Rabb*, 56 Tex. 154; *Smith v. Gillum*, 80 Tex. 120; *Schmidt v. Huff* (Tex., 1892), 19 S. W. Rep. 131; *Wallace v. Berry*, 83 Tex. 328; *Morris v. Balkham*, 75 Tex. 111, 16 Am. St. Rep. 874; *Byers v. Wallace* (Tex., 1895), 29 S. W. Rep. 760.

Vermont.—*Putnam v. Fisher*, 52 Vt. 191, 36 Am. Rep. 746; *Hackett v. Amsden*, 59 Vt. 553; *Swerdferger v. Hopkins* (Vt., 1894), 31 Atl. Rep. 153.

Virginia.—*Masters v. Varner*, 5 Gratt. (Va.) 169, 50 Am. Dec. 114.

stances are such as to make it his duty to take notice, of the true state of the assignor's title.¹

West Virginia.—*Corbleys v. Ripley*, 22 W. Va. 154, 46 Am. Rep. 502; *Crothers v. Crothers* (W. Va., 1895), 20 S. E. Rep. 927.

Wisconsin.—*Jilsun v. Stebbins*, 41 Wis. 235.

See also *Shipley v. Fox*, 69 Md. 572; *Avery v. Moore*, 34 Ill. App. 115; *Reese v. Murnan*, 5 Wash. 373.

Admissible to Show Character of Claim Asserted.

—But such declarations are admissible to show the character of the claim asserted by the declarant, though not to prove title. *Kirkland v. Trott*, 66 Ala. 417; *Walker v. Blassingame*, 17 Ala. 813; *Hayne v. Hermann*, 97 Cal. 259; *Wormouth v. Johnson*, 58 Cal. 621; *Avery v. Clemons*, 18 Conn. 306, 46 Am. Dec. 323; *Taylor v. Just*, 9 Iowa 446; *Stephens v. Williams*, 46 Iowa 540; *McConnell v. Hannah*, 96 Ind. 102; *Gaar v. Shaffer* (Ind., 1894), 38 N. E. Rep. 811; *Wood v. Foster*, 8 Allen (Mass.) 24, 85 Am. Dec. 681; *Osgood v. Eaton*, 63 N. H. 355; *Mooring v. McBride*, 62 Tex. 309; *Williamson v. Williams*, 11 Lea (Tenn.) 355. See *Thomas v. Wheeler*, 47 Mo. 363; *Mississippi County v. Vowels*, 101 Mo. 225; *Harper v. Morse*, 114 Mo. 317; *Sutton v. Casselleggi*, 5 Mo. App. 111; *Outcalt v. Ludlow*, 32 N. J. L. 239; *Bennett v. Biddle*, 150 Pa. St. 420; *Curtis v. Wilson* (Tex. Civ. App., 1892), 21 S. W. Rep. 787; *Stone v. O'Brien*, 7 Colo. 458; *Hardy v. Moore*, 62 Iowa 65; *Frank v. Thompson* (Ala., 1894), 16 So. Rep. 634.

Statements by a party in possession of certain property, that the business was his, and was run in his father's name for protection only, were held to be inadmissible, as being something more than merely explanatory of the possession. *Sweet v. Wright*, 57 Iowa 510.

Declarations against Interest Not to be Contradicted by Declarations in Favor of Interest.—Evidence of a grantor's declaration in disparagement of his title, made while he was the owner of the land and upon it, introduced by a party claiming adversely to the grantee, cannot be explained or contradicted by evidence of such grantor's declarations made on other occasions in behalf of the same title, whether the last declarations were made before or after the conveyance to the grantee. *Royal v. Chandler*, 79 Me. 265, 1 Am. St. Rep. 305. See *Pickering v. Reynolds*, 119 Mass. 111; *Hayden v. Stone*, 121 Mass. 413; *Wilson v. Woodruff*, 5 Mo. 42, 31 Am. Dec. 194.

That declarations by the ancestor against his title are in evidence against his heirs, will not render admissible in their favor other declarations made by him at a different time in support of his title. *Lewis v. Adams*, 61 Ga. 559. See *Fellows v. Smith*, 130 Mass. 378.

Where property claimed by the wife was taken under execution against the husband, evidence of his statements, made before the taking, that it was the separate property of the wife, was admitted, but evidence of his contradictory statements made since the

taking, offered in rebuttal, was rejected. *Hackett v. Amsden*, 59 Vt. 553.

Admissions of a Party in Possession Not Receivable against One Holding by a Superior Title.—The admissions of a life tenant are not evidence against the remainderman. *Papenick v. Bridgewater*, 5 El. & Bl. 166, 85 E. C. L. 166; *Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68; *Tyler v. Old Colony R. Co.*, 157 Mass. 336; *Hill v. Roderick*, 4 W. & S. (Pa.) 221.

One holding as tenant or otherwise cannot by his declarations or admissions affect his landlord's title. *Gordon v. Ritenour*, 87 Mo. 54; *Mooring v. McBride*, 62 Tex. 309. See *Hanley v. Erskine*, 19 Ill. 265.

However, in *Doe v. Litherland*, 4 Ad. & El. 784, 31 E. C. L. 179, it was held that in the common-law action of ejectment the admission of the tenant in possession can be produced as against the landlord.

An admission by one during his tenancy, under whom one of the plaintiffs claims, affects such plaintiff only. *Grant v. Levan*, 4 Pa. St. 394.

Admissions of Children in their father's lifetime cannot be received to affect his estate. *Campau v. Dubois*, 39 Mich. 274. See *Morton v. Massie*, 3 Mo. 482.

Admissions as to Value of Property.—In an action to enjoin the operation of an elevated railroad in front of plaintiff's premises, and for damages, evidence that a former owner of the premises had placed the same with a broker for sale and fixed the price for it, was held not to be admissible on the question of value. *Mercadante v. Manhattan, etc., R. Co.* (Supreme Ct.), 31 N. Y. Supp. 540.

1. Assignment of Chattel or Chose in Action—England.—*Beauchamp v. Parry*, 1 B. & Ad. 89, 20 E. C. L. 351.

Alabama.—*Jones v. Norris*, 2 Ala. 526; *Jennings v. Blocker*, 25 Ala. 415; *Fralick v. Presley*, 29 Ala. 462, 65 Am. Dec. 413; *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628; *Garner v. Bridges*, 38 Ala. 276; *Murphy v. Butler*, 75 Ala. 381.

Georgia.—*Doughty v. McMillan*, 92 Ga. 818.

Illinois.—*Myers v. Kinzie*, 26 Ill. 36; *Venum v. Thompson*, 38 Ill. 143.

Indiana.—*Bunberry v. Brett*, 18 Ind. 343.

Kentucky.—*Carrel v. Early*, 4 Bibb (Ky.) 270.

Maine.—*Hatch v. Dennis*, 10 Me. 244; *Parker v. Marston*, 34 Me. 386; *McLanathan v. Patten*, 39 Me. 142; *White v. Chadbourne*, 41 Me. 149; *Fisher v. True*, 38 Me. 534.

Missouri.—*Blancjour v. Tutt*, 32 Mo. 576.

Pennsylvania.—*Magee v. Raiguel*, 64 Pa. St. 110; *Gibblehouse v. Stong*, 3 Rawle (Pa.) 456; *Kellogg v. Krauser*, 14 S. & R. (Pa.) 137, 16 Am. Dec. 480.

South Carolina.—*Lan v. Lee*, 2 Rich. (S. Car.) 168; *Crawley v. Tucker*, 4 Rich. (S. Car.) 560.

Tennessee.—*Peoples v. Devault*, 11 Heisk. (Tenn.) 431.

Admission must be Made while Title is in the Party—Concurrence of Successor in Title—Fraud on Creditors.—It is a rule applicable to all cases of admissions against proprietary

Vermont.—Hayward Rubber Co. v. Duncklee, 30 Vt. 39; Downs v. Belden, 46 Vt. 674; Alger v. Andrews, 47 Vt. 241.

See also Horton v. Smith, 8 Ala. 73, 42 Am. Dec. 628; Davidson v. Young, 38 Ill. 145; Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114; Sharp v. Maxwell, 30 Miss. 590; Place v. Gould, 123 Mass. 347; Brown v. McGraw, 12 Smed. & M. (Miss.) 267; Waring v. Warren, 1 Johns. (N. Y.) 340; Crary v. Sprague, 12 Wend. (N. Y.) 41; Sprague v. Kneeland, 12 Wend. (N. Y.) 161.

Compare the following *New York* cases in which the admissions of a vendor of personal property were held inadmissible against the vendee on the ground that they were merely hearsay evidence. Hurd v. West, 7 Cow. (N. Y.) 752; Whitaker v. Brown, 8 Wend. (N. Y.) 490; Worrall v. Parmelee, 1 N. Y. 519; Bristol v. Dann, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122; Tabor v. Van Tassel, 86 N. Y. 642; Topping v. Van Pelt, Hoffm. Ch. (N. Y.) 545. See Booth v. Sweezy, 8 N. Y. 276; Simpson v. McKay, 3 Hun (N. Y.) 316.

Bennett, J., in delivering the opinion of the court in Hayward Rubber Co. v. Duncklee, 30 Vt. 29, said: "Admissions made by the assignor of a chattel or personal contract prior to the assignment, and when the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of the transfer, bind the assignee."

In Alger v. Andrews, 47 Vt. 238, and Downs v. Belden, 46 Vt. 674, cited above, while the parties against whom the admissions were received appear to have had no notice of prior claims, yet they were not *bona fide* purchasers.

Bona Fide Purchasers.—But such admissions cannot be received against a *bona fide* purchaser without notice. Smith v. DeWruitz, 1 R. & M. 212, 21 E. C. L. 419; Dodge v. Freedman's Sav., etc., Co., 93 U. S. 379; Deasey v. Thurman, 1 Idaho 775; Jones v. Witter, 13 Mass. 304; Brisbane v. Pratt, 4 Den. (N. Y.) 63; Paige v. Cagwin, 7 Hill (N. Y.) 361, 42 Am. Dec. 68; Smith v. Schanck, 18 Barb. (N. Y.) 344; Tousley v. Barry, 16 N. Y. 497; Foster v. Beals, 21 N. Y. 249; Schenck v. Warner, 37 Barb. (N. Y.) 258; Edington v. Mutual L. Ins. Co., 67 N. Y. 193; Von Sachs v. Kretz, 72 N. Y. 554; Clews v. Kehr, 90 N. Y. 633. Compare Woodruff v. Westcott, 12 Conn. 134.

Where an Assignment is Merely Colorable or without consideration, leaving the assignors, or any of them, the real owners of the thing assigned, with a present interest therein, the declarations of the interested assignors are admissible against the assignee. McKean v. Adams C. Pl., 32 N. Y. Supp. 281.

The Admissions of a Former Holder of Negotiable Paper are not admissible in evidence against an assignee for value receiving the paper before maturity and without notice of such admissions.

England.—Smith v. DeWruitz, R. & M. 212, 21 E. C. L. 419; Beauchamp v. Parry,

1 B. & Ad. 89, 20 E. C. L. 351; Barough v. White, 4 B. & C. 325, 10 E. C. L. 345, explained in Woolway v. Rowe, 1 Ad. & El. 114, 28 E. C. L. 52; Shaw v. Broom, 4 D. & R. 730, 16 E. C. L. 220.

United States.—Dodge v. Freedman's Sav., etc., Co., 93 U. S. 379.

Arkansas.—Patton v. Gee, 36 Ark. 506.

Connecticut.—Roe v. Jerome, 18 Conn. 138. *Massachusetts.*—Wilson v. Bowden, 113 Mass. 422.

Mississippi.—Brown v. McGraw, 12 Smed. & M. (Miss.) 268.

Missouri.—Murray v. Oliver, 18 Mo. 405; Blanchard v. Tutt, 32 Mo. 576.

New York.—Smith v. Schanck, 18 Barb. (N. Y.) 344.

Pennsylvania.—Eckert v. Cameron, 43 Pa. St. 120.

South Carolina.—Crayton v. Collins, 2 McCord (S. Car.) 457.

Tennessee.—Drennon v. Smith, 3 Head (Tenn.) 389.

See also Paige v. Cagwin, 7 Hill (N. Y.) 361, 42 Am. Dec. 68; Kent v. Walton, 7 Wend. (N. Y.) 256; Osborn v. Robbins, 37 Barb. (N. Y.) 481; Whitaker v. Brown, 8 Wend. (N. Y.) 490; Bristol v. Dann, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122; Warner v. McGary, 4 Vt. 507; Washburn v. Ramsdell, 17 Vt. 299. Compare Stoner v. Ellis, 6 Ind. 152; Millsaps v. Merchants', etc., Bank, 71 Miss. 361; Sally v. Gooden, 5 Ala. 78.

In Butler v. Damon, 15 Mass. 223, it was held, in an action by the indorsee of a negotiable note against the maker, that the declarations of the indorser are not admissible in evidence to defeat the action, although it appears by the admission of the plaintiff that the indorser retains an interest in the note.

Notice of Defect.—But a party who acquires title to a bill or note by indorsement, delivery, or otherwise, before due, but with express notice of any defect or incumbrance, is so far identified with the previous owner that his declarations or admissions while owner may be received against such party. Glanton v. Griggs, 5 Ga. 425.

So also where a party takes an illegal note with notice. Sharp v. Smith, 7 Rich. (S. Car.) 3.

Demand Stale or Suspicious.—Where the demand is already stale or infected with suspicion at the time it is negotiated, the admissions of the assignor are competent evidence against the assignee.

England.—Kent v. Lowen, 1 Campb. 177; Peckham v. Potter, 1 C. & P. 232, 11 E. C. L. 377; Beauchamp v. Parry, 1 B. & Ad. 89, 20 E. C. L. 351; Harrison v. Vallance, 1 Bing. 45, 8 E. C. L. 394.

Illinois.—Williams v. Judy, 8 Ill. 282, 44 Am. Dec. 699; Curtiss v. Martin, 20 Ill. 557; Hanchett v. Kimbark, 118 Ill. 121; Kane v. Torbit, 23 Ill. App. 311; Sandifer v. Hoard, 59 Ill. 246.

Indiana.—Blount v. Riley, 3 Ind. 471; Stoner v. Ellis, 6 Ind. 152.

interests, that the admission must have been made while the title was in the person making it, neither before it was acquired nor after it was transferred,¹

Louisiana.—Pilcher v. Kerr, 7 La. Ann. 144.
Maine.—Merrick v. Parkman, 18 Me. 407;
 Hatch v. Dennis, 10 Me. 244; Shirley v.
 Todd, 9 Me. 83; Eaton v. Corson, 59 Me. 510.
Massachusetts.—Bond v. Fitzpatrick, 4
 Gray (Mass.) 92; Harris v. Brooks, 21 Pick.
 (Mass.) 195, 32 Am. Dec. 254.

Missouri.—Robb v. Schmidt, 35 Mo. 290.
New York.—Brisbane v. Pratt, 4 Den. (N.
 Y.) 63.

Ohio.—Hollister v. Reznor, 9 Ohio St. 1.
Tennessee.—Drennon v. Smith, 3 Head
 (Tenn.) 389.

Vermont.—Warner v. McGary, 4 Vt. 507;
 Wheeler v. Walker, 12 Vt. 427; Miller v.
 Bingham, 29 Vt. 82; Hayward Rubber Co.
 v. Dunklee, 30 Vt. 29.

See also Carpenter v. Hollister, 13 Vt. 552.
Compare Shober v. Jack, 3 Mont. 351, and
 the following *New York* cases: Senator Lott
 in Paige v. Cagwin, 7 Hill (N. Y.) 361, 42
 Am. Dec. 68; Beach v. Wise, 1 Hill (N. Y.)
 612; Stark v. Boswell, 6 Hill (N. Y.) 405, 41
 Am. Dec. 752; Jermain v. Denniston, 6 N.
 Y. 276; Kent v. Walton, 7 Wend. (N. Y.) 256;
 Whitaker v. Brown, 8 Wend. (N. Y.) 490;
 Bristol v. Dann, 12 Wend. (N. Y.) 142, 27
 Am. Dec. 122; Smith v. Schanck, 18 Barb.
 (N. Y.) 344; Von Sachs v. Kretz, 72 N. Y.
 554; Clews v. Kehr, 90 N. Y. 633.

Where the payee of a note payable to him-
 self or bearer said on the day after it bore
 date, he then having the note in his pos-
 session, that it was given for a gaming con-
 sideration, it was held in an action by the
 bearer that such declarations were competent
 to go to the jury to show that the note was
 given for such consideration. Sharp v.
 Smith, 7 Rich. (S. Car.) 3. See Snelgrove v.
 Martin, 2 McCord (S. Car.) 241.

In Parker v. Marston, 34 Me. 386, the
 declarations of the payee of an undorsed note
 were held to be receivable against a
 subsequent holder.

But it has been held that the Admissions of the
 Assignor of a Promissory Note not negotiable by
 the law merchant, if made before the assign-
 ment, are admissible in a suit by the as-
 signee against the maker. Abbott v. Muir,
 5 Ind. 444. See Millsaps v. Merchants', etc.,
 Bank, 71 Miss. 361.

Also it has been held, that the Admissions of the
 Obligor of a Bond, while he was owner of it,
 that it was given for an illegal consideration,
 are competent evidence against his assignee.
 Murray v. Oliver, 18 Mo. 405; Brown v. Mc-
 Graw, 12 Smed. & M. (Miss.) 260. See
 Brindle v. McIlvaine, 10 S. & R. (Pa.) 282.
Compare Booth v. Sweeney, 8 N. Y. 276.

In an action of trespass brought against
 an officer for attaching goods claimed by the
 plaintiff under a sale from the debtor, the
 officer claiming to hold the goods on the
 ground that the sale to the plaintiff was in
 fraud of the rights of the creditors, the de-
 clarations and acts of the plaintiff's vendor
 made or done prior to the sale, and intro-
 duced to show that the sale was made with
 a fraudulent design, are admissible in evi-

dence, provided there is at the same time
 evidence that the vendee participated in the
 fraud. Gallagher v. Williamson, 23 Cal. 331,
 83 Am. Dec. 114; Moses v. Dunham, 71 Ala.
 173; Tibbals v. Jacobs, 31 Conn. 428; Hall v.
 Bishop, 78 Ind. 372; Putnam v. Osgood, 52
 N. H. 148; Fisher v. True, 38 Me. 534;
 White v. Chadbourne, 41 Me. 149; McDowell
 v. Goldsmith, 6 Md. 319, 71 Am. Dec. 305;
 Taylor v. Robinson, 2 Allen (Mass.) 562; Fos-
 ter v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec.
 400; Bridge v. Eggleston, 14 Mass. 245;
 Waterbury v. Sturtevant, 18 Wend. (N. Y.)
 353; Howe v. Brundage, 1 Thomp. & C. (N.
 Y.) 429; Vidvard v. Powers, 34 Hun (N. Y.)
 221; Flagler v. Schoeffel, 40 Hun (N. Y.) 182;
 Satterwhite v. Hicks, Busb. (N. Car.) 105;
 Head v. Halford, 5 Rich. Eq. (S. Car.) 128;
 Hinson v. Walker, 65 Tex. 104. See Wyckoff
 v. Carr, 8 Mich. 44; Mahone v. Williams, 39
 Ala. 202.

Where the defense, in an action by the
 indorsee of a bill against the acceptor, was
 that the acceptance was procured by fraud
 and was without consideration; and in sup-
 port of this defense the defendant offered
 in evidence the declarations of the former
 holder of the bill, since dead, made while it
 was in his hands; it was held that such de-
 clarations were admissible for that purpose,
 but not to affect the plaintiff, unless such
 holder, from whom the plaintiff received it,
 had knowledge of the fraud at the time he
 received it. Roe v. Jerome, 18 Conn. 138.

Declarations of a Bankrupt against Assignee.—
 The declarations of a bankrupt, made before
 the bankruptcy, are admissible as evidence
 against his assignee in bankruptcy. Small-
 combe v. Bruges, 13 Price 136; *In re* Clark,
 9 Blatchf. (U. S.) 379; Compton v. Fleming,
 8 Blackf. (Ind.) 153; Goodrich v. Wilson,
 119 Mass. 429; Von Sachs v. Kretz, 72 N. Y.
 554. See also Barbe v. Terrell, 54 Ga. 146;
 Weinrich v. Porter, 47 Mo. 293; Adams v.
 Davidson, 10 N. Y. 309. *Compare* Bullis v.
 Montgomery, 3 Lans. (N. Y.) 255; Vidvard
 v. Powers, 34 Hun (N. Y.) 221; Truax v.
 Slater, 86 N. Y. 630; Jones v. East Society,
 etc., 21 Barb. (N. Y.) 161.

1. Admissions before Title was Acquired.—
 Murphy v. Butler, 75 Ala. 381; Garner v.
 Bridges, 38 Ala. 276; Pierce v. Roberts, 57
 Conn. 31; Taylor v. Lusk, 9 Iowa 446; An-
 derson v. Kent, 14 Kan. 207; Bridge v. Eg-
 gleston, 14 Mass. 251; Noyes v. Morrell, 108
 Mass. 396; Stockwell v. Blamey, 129 Mass.
 312; Campau v. Dubois, 39 Mich. 274; Bullis
 v. Montgomery, 50 N. Y. 352; McIntyre v.
 Costello (Supreme Ct.), 6 N. Y. Supp. 397;
 Edington v. Mutual L. Ins. Co., 67 N. Y.
 185; Morris v. Wells (Supreme Ct.), 7 N. Y.
 Supp. 61; Eckert v. Cameron, 43 Pa. St. 120;
 Payne v. Craft, 7 W. & S. (Pa.) 458; Alex-
 ander v. Jennings, 10 Lea (Tenn.) 419;
 Snow v. Starr, 75 Tex. 411; Burton v. Scott,
 3 Rand. (Va.) 399.

Admissions after Title has been Transferred.—
England.—Shaw v. Broom, 4 D. & R. 730,
 16 E. C. L. 220.

United States.—*U. S. v. A Lot of Jewelry*, 13 Blatchf. (U. S.) 60; *Venable v. U. S. Bank*, 2 Pet. (U. S.) 107; *Tierney v. Corbett*, 2 Mackey (D. C.) 264; *Many v. Jagger*, 1 Blatchf. (U. S.) 372; *Palmer v. Cassin*, 2 Cranch (C. C.) 66; *Orr v. Needles*, 67 Fed. Rep. 990.

Alabama.—*McKenzie v. Hunt*, 1 Port. (Ala.) 37; *Clemens v. Loggins*, 1 Ala. 622; *Price v. Decatur Branch Bank*, 17 Ala. 374; *Julian v. Reynolds*, 8 Ala. 680; *Gregory v. Walker*, 38 Ala. 26.

Arkansas.—*State v. Jennings*, 10 Ark. 428; *Humphries v. McCraw*, 9 Ark. 91; *Patton v. Gee*, 36 Ark. 506; *Gullett v. Lamberton*, 6 Ark. 109; *Smith v. Hamlet*, 43 Ark. 320; *Crow v. Watkins*, 48 Ark. 169.

California.—*Kilburn v. Ritchie*, 2 Cal. 148, 56 Am. Dec. 326; *Paige v. O'Neal*, 12 Cal. 484; *Cohn v. Mulford*, 15 Cal. 50; *Jones v. Morse*, 36 Cal. 207; *Tompkins v. Crane*, 50 Cal. 478; *Garlick v. Bowers*, 66 Cal. 122; *Walden v. Purvis*, 73 Cal. 518; *Silva v. Serpa*, 86 Cal. 241; *Ross v. Wellman*, 102 Cal. 1.

Connecticut.—*Nichols v. Hotchkiss*, 2 Day (Conn.) 121.

Georgia.—*Howard v. Snelling*, 32 Ga. 195; *Patrick v. McWilliams*, 23 Ga. 348; *Gill v. Strozier*, 32 Ga. 688; *Adair v. Adair*, 38 Ga. 46; *Cornett v. Fain*, 33 Ga. 219; *Howell v. Howell*, 47 Ga. 492; *Harrell v. Culpepper*, 47 Ga. 635; *Monroe v. Napier*, 52 Ga. 385; *Marion v. Hoyt*, 72 Ga. 117; *Powell v. Brunner*, 86 Ga. 531; *Blalock v. Miland*, 87 Ga. 573; *Bowden v. Achor* (Ga., 1895), 22 S. E. Rep. 254.

Illinois.—*Hessing v. McCloskey*, 37 Ill. 341; *Gridley v. Bingham*, 51 Ill. 153; *Rust v. Mansfield*, 25 Ill. 336; *Edwards v. Hamilton*, 19 Ill. App. 340; *Miner v. Phillips*, 42 Ill. 123; *Vennum v. Thompson*, 38 Ill. 143; *Dunaway v. School Directors*, 40 Ill. 247; *Myers v. Kinzie*, 26 Ill. 36; *Bunker v. Green*, 48 Ill. 243; *Simpkins v. Rogers*, 15 Ill. 397; *Randegger v. Ehrhardt*, 51 Ill. 101; *Phillips v. South Park Com'rs*, 119 Ill. 626; *Bentley v. O'Bryan*, 111 Ill. 53; *Miller v. Meers* (Ill., 1895), 40 N. E. Rep. 577; *Milling v. Hillenbrand* (Ill., 1895), 40 N. E. Rep. 941.

Indiana.—*Wynne v. Glidewell*, 17 Ind. 446; *Hubble v. Osborn*, 31 Ind. 249; *Burkholder v. Casad*, 47 Ind. 418; *McSweeney v. McMullen*, 96 Ind. 298; *Campbell v. Coon*, 51 Ind. 76; *Daniels v. McGinnis*, 97 Ind. 550; *Proctor v. Cole*, 104 Ind. 373; *Thistlewaite v. Thistlewaite*, 132 Ind. 355; *Robbins v. Spencer* (Ind., 1895), 40 N. E. Rep. 263.

Iowa.—*McCormicks v. Fuller*, 56 Iowa 43; *Benson v. Lundy*, 52 Iowa 265; *Gray v. Earl*, 13 Iowa 188; *Bixby v. Carskaddon*, 63 Iowa 165; *Allen v. Kirk*, 81 Iowa 658.

Kansas.—*Sumner v. Cook*, 12 Kan. 162; *Crust v. Evans*, 37 Kan. 263.

Kentucky.—*Scott v. Hall*, 6 B. Mon. (Ky.) 285; *Scott v. Coleman*, 5 Litt. (Ky.) 349, 15 Am. Dec. 71; *Sharp v. Wickliffe*, 3 Litt. (Ky.) 10, 14 Am. Dec. 37; *Christopher v. Covington*, 2 B. Mon. (Ky.) 357; *Ring v. Gray*, 6 B. Mon. (Ky.) 368; *Meriweather v. Herran*, 8 B. Mon. (Ky.) 162; *Gatlif v. Rose*, 8 B. Mon. (Ky.) 629; *Beall v. Barclay*, 10 B. Mon.

(Ky.) 261; *Short v. Tinsley*, 1 Metc. (Ky. 397, 71 Am. Dec. 482; *Brashear v. Burton*, 3 Bibb (Ky.) 9, 6 Am. Dec. 634; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283.

Louisiana.—*Dowdy v. Sullivan*, 19 La. Ann. 448; *Ford v. Mills*, 46 La. Ann. 331.

Maine.—*Fisher v. True*, 38 Me. 536; *McLellan v. Longfellow*, 34 Me. 552; *Pierce v. Faunce*, 37 Me. 63; *Gillighan v. Tebbetts*, 33 Me. 360; *Russell v. Doyle*, 15 Me. 112.

Maryland.—*Cooke v. Cooke*, 29 Md. 538; *Hurn v. Soper*, 6 Har. & J. (Md.) 276; *Worthington v. Worthington* (Md., 1890), 20 Atl. Rep. 911; *Lark v. Linstead*, 2 Md. Ch. 162.

Massachusetts.—*Bartlet v. Delprat*, 4 Mass. 702; *Tapley v. Forbes*, 2 Allen (Mass.) 20; *Tyler v. Mather*, 9 Gray (Mass.) 177; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; *Gates v. Mowry*, 15 Gray (Mass.) 564; *Clarke v. Waite*, 12 Mass. 440; *Taylor v. Robinson*, 2 Allen (Mass.) 562; *Dunn v. Snell*, 15 Mass. 481; *Chase v. Horton*, 143 Mass. 118; *Holbrook v. Holbrook*, 113 Mass. 74; *Baker v. Briggs*, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; *Roberts v. Medbery*, 132 Mass. 100; *Warren v. Carey*, 145 Mass. 78; *Hayden v. Stone*, 121 Mass. 413.

Michigan.—*Dawson v. Hall*, 2 Mich. 390; *Lewis v. Rice*, 61 Mich. 97.

Minnesota.—*Howland v. Fuller*, 8 Minn. 50; *Burt v. McKinstry*, 4 Minn. 204; *Derby v. Gallup*, 5 Minn. 119; *Beard v. Minneapolis First Nat. Bank*, 41 Minn. 153; *Kurtz v. St. Paul*, etc., R. Co. (Minn., 1895), 63 N. W. Rep. 1.

Mississippi.—*Taylor v. Webb*, 54 Miss. 36; *Ferriday v. Selser*, 4 How. (Miss.) 506.

Missouri.—*Mulliken v. Greer*, 5 Mo. 489; *Garland v. Harrison*, 17 Mo. 282; *Davis v. Evans*, 102 Mo. 164; *Cavin v. Smith*, 24 Mo. 221; *Dillon v. Chouteau*, 7 Mo. 386; *Stewart v. Thomas*, 35 Mo. 202; *Wilson v. Woodruff*, 5 Mo. 40, 31 Am. Dec. 194; *Weinrich v. Porter*, 47 Mo. 293; *McLaughlin v. McLaughlin*, 16 Mo. 242; *Renshaw v. Steamboat Pawnee*, 19 Mo. 532; *Current River Lumber Co. v. Cravens*, 54 Mo. App. 216; *Thomas v. Thomas*, 107 Mo. 459; *Farrar v. Snyder*, 31 Mo. App. 93.

Nebraska.—*Farmers' L. & T. Co. v. Montgomery*, 30 Neb. 33; *Williams v. Eikenberry*, 25 Neb. 721, 13 Am. St. Rep. 517.

Nevada.—*Hirschfeld v. Williamson*, 18 Nev. 66.

New Hampshire.—*Tilton v. Emery*, 17 N. H. 536; *Wilson v. Hanson*, 20 N. H. 375.

New Jersey.—*Cadmus v. Vreeland*, 28 N. J. Eq. 356; *Kinna v. Smith*, 3 N. J. Eq. 14.

New York.—*Hanna v. Curtis*, 1 Barb. Ch. (N. Y.) 263; *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; *Phoenix v. Dey*, 5 Johns. (N. Y.) 412; *Norton v. Woods*, 5 Paige (N. Y.) 249; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; *Sprague v. Kneeland*, 12 Wend. (N. Y.) 161; *Taylor v. Marshal*, 14 Johns. (N. Y.) 204; *Varick v. Briggs*, 6 Paige (N. Y.) 323; *Ogden v. Peters*, 15 Barb. (N. Y.) 560; *Smith v. Exchange F. Ins. Co.*, 40 N. Y. Super. Ct. 492; *Eckford v. DeKay*, 8 Paige (N. Y.) 89; *Peck v. Crouse*, 46 Barb. (N. Y.) 151; *Root v. Wadhams*, 35 Hun (N. Y.) 57; *People v. Dayton*, 50 How.

unless where there is concurrence on the part of the successor in

Pr. (N. Y. Supreme Ct.) 143; *Jones v. Jones* (Supreme Ct.), 17 N. Y. Supp. 905; *Chadwick v. Fonner*, 69 N. Y. 404; *Holmes v. Roper*, 141 N. Y. 64; *Sanford v. Ellithorp*, 95 N. Y. 48; *Vrooman v. King*, 36 N. Y. 477; *Hutchins v. Hutchins*, 98 N. Y. 56; *Duane v. Paige* (Supreme Ct.), 31 N. Y. Supp. 310.

North Carolina.—*Wooten v. Outlaw*, 113 N. Car. 281; *Hicks v. Forrest*, 6 Ired. Eq. (N. Car.) 528; *Den v. Saunders*, 6 Ired. (N. Car.) 382; *Harshaw v. Moore*, 12 Ired. (N. Car.) 247; *Williams v. Clayton*, 7 Ired. (N. Car.) 442; *Kirby v. Masten*, 70 N. Car. 541; *Burbank v. Wiley*, 79 N. Car. 501; *Burroughs v. Jenkins*, Phil. Eq. (N. Car.) 33; *Headen v. Womack*, 88 N. Car. 468.

Pennsylvania.—*Packer v. Gonsalus*, 1 S. & R. (Pa.) 526; *Patton v. Goldsborough*, 9 S. & R. (Pa.) 47; *Posten v. Posten*, 3 W. & S. (Pa.) 127; *Bailey v. Clayton*, 20 Pa. St. 295; *Ferguson v. Staver*, 33 Pa. St. 411; *Pringle v. Pringle*, 59 Pa. St. 281; *Hartman v. Diller*, 62 Pa. St. 37; *Pier v. Duff*, 63 Pa. St. 59; *McLaughlin v. McLaughlin*, 91 Pa. St. 462.

South Carolina.—*Crayton v. Collins*, 2 McCord (S. Car.) 457; *Agnew v. Adams*, 26 S. Car. 101; *Newman v. Wilbourne*, 1 Hill Eq. (S. Car.) 10.

Tennessee.—*Vance v. Smith*, 2 Heisk. (Tenn.) 343; *Caraway v. Caraway*, 7 Coldw. (Tenn.) 245; *McCasland v. Carson*, 1 Head (Tenn.) 117; *McClellan v. Cornwell*, 2 Coldw. (Tenn.) 298.

Texas.—*Garrahy v. Green*, 32 Tex. 202; *Thompson v. Herring*, 27 Tex. 282; *Grooms v. Rust*, 27 Tex. 231; *Wilson v. Simpson*, 68 Tex. 306; *Dallas Nat. Bank v. Davis*, 78 Tex. 362; *Copp v. Swift* (Tex. Civ. App., 1894), 26 S. W. Rep. 438; *Walker v. Cole*, 5 Tex. Civ. App. 179; *Smith v. Gillum*, 80 Tex. 120; *Bullock v. Smith*, 72 Tex. 545; *Beville v. Jones*, 74 Tex. 148; *Hilburn v. Harrell* (Tex. Civ. App., 1895), 29 S. W. Rep. 925; *Hinson v. Walker*, 65 Tex. 106; *Smith v. Dunman* (Tex. Civ. App., 1895), 29 S. W. Rep. 432; *D'Arrigo v. Texas Produce Co.* (Tex. Civ. App., 1895), 31 S. W. Rep. 713.

Vermont.—*Hayward Rubber Co. v. Duncklee*, 30 Vt. 29; *Bullard v. Billings*, 2 Vt. 309; *Downs v. Belden*, 46 Vt. 674; *Washburn v. Ramsdell*, 17 Vt. 299; *Hough v. Barton*, 20 Vt. 455; *Brackett v. Wait*, 6 Vt. 411.

Virginia.—*Strother v. Mitchell*, 80 Va. 149; *Thornton v. Gaar*, 87 Va. 315; *Moorman v. Arthur*, 90 Va. 455; *Ginter v. Breeden*, 90 Va. 565.

West Virginia.—*Houston v. McCluney*, 8 W. Va. 136; *Fry v. Feamster*, 36 W. Va. 454; *Casto v. Fry*, 33 W. Va. 449.

Wisconsin.—*Norton v. Kearney*, 10 Wis. 443.

Compare *Whitwell v. Winslow*, 132 Mass. 307; *Perkins v. Towle*, 59 N. H. 583.

When materials are furnished for a building under contract with the owner, and such owner subsequently sells the premises, admissions made by him after he has parted with his title are not competent evidence in an action against the purchaser for the en-

forcement of a mechanic's lien for such materials. *Current River Lumber Co. v. Cravens*, 54 Mo. App. 216.

The admissions of a grantor, after he has conveyed the land, as to its boundaries, are not admissible against the grantee, though such admissions concern other land owned by the grantor at the time they are made, and bounded by the lines in dispute. *Hills v. Ludwig*, 46 Ohio St. 373.

In *Thornton v. Gaar*, 87 Va. 315, it was held that the declarations of a grantor as to the voluntary character of his bond and trust deed, made after their execution, are not competent to affect the title of the grantee; but, where there is other independent evidence to the same effect, the admission of such declarations is harmless error.

In *Warren v. Carey*, 145 Mass. 78, it was held that the declarations of one who has parted with his title to land are incompetent evidence, even though under the deed he is one of the *cestuis que trustent*.

In *Padgett v. Lawrence*, 10 Paige (N. Y.) 170, 40 Am. Dec. 232, it was held that the admissions of an owner of land, made subsequent to the docketing of a judgment against him, are not admissible as evidence against a purchaser under such judgment, although they were made previous to the sale by the sheriff.

In *Taylor v. Central Pac. R. Co.*, 67 Cal. 615, it was held that a vendor's declarations were properly rejected where the time when and the circumstances under which they were made did not appear.

Statements Explanatory of Possession.—It was held in *Mobile Sav. Bank v. McDonnell*, 89 Ala. 435, 18 Am. St. Rep. 137, that the declarations of a person who continues in possession of land after he has sold and conveyed to another by deed duly recorded, to the effect that he is holding as agent of his grantee, are competent evidence for the latter in a contest with creditors who attack the conveyance on the ground of fraud.

Admissions of Payee of Note after Parting with His Interest.—Admissions by the payee of a note after parting with his interest are not competent evidence against the assignee.

England.—*Pocock v. Billing*, 2 Bing. 269, 9 E. C. L. 409; *Shaw v. Broom*, 4 D. & R. 730, 16 E. C. L. 220.

Connecticut.—*Scripture v. Newcomb*, 16 Conn. 588.

Illinois.—*Thorp v. Goewey*, 85 Ill. 611.

Indiana.—*Fleming v. Newman*, 5 Blackf. (Ind.) 220; *Lister v. Boker*, 6 Blackf. (Ind.) 439.

Kentucky.—*Crane v. Gunn*, 4 B. Mon. (Ky.) 10; *Bartlett v. Marshall*, 2 Bibb (Ky.) 467.

Maine.—*Hackett v. Martin*, 8 Me. 77; *Matthews v. Houghton*, 10 Me. 420; *Russell v. Doyle*, 15 Me. 112.

Massachusetts.—*Eastman v. Wright*, 6 Pick. (Mass.) 316; *Parker v. Grout*, cited in *Brown v. Maine Bank*, 11 Mass. 157.

Missouri.—*Cleaveland v. Davis*, 3 Mo. 331; *Porter v. Rea*, 6 Mo. 47; *Robb v. Schmidt*, 35 Mo. 290.

New York.—*Osborn v. Robbins*, 37 Barb.

title;¹ and except that where there is independent evidence of a design between the predecessor in title and his successor to defraud creditors, the admissions of the former made after parting with the title are receivable against the latter.²

(N. Y.) 481; *Truax v. Slater*, 86 N. Y. 630; *Van Aernam v. Granger* (Supreme Ct.), 33 N. Y. Supp. 885.

South Carolina.—*DeBruhl v. Patterson*, 12 Rich. (S. Car.) 363.

Vermont.—*Washburn v. Ramsdell*, 17 Vt. 299; *Sargeant v. Sargeant*, 18 Vt. 371.

See also *Stoner v. Ellis*, 6 Ind. 152; *Lister v. Boker*, 6 Blackf. (Ind.) 439; *Cleveland v. Davis*, 3 Mo. 331; *Andrews v. Beecker*, 1 Johns. Cas. (N. Y.) 411; *Raymond v. Squire*, 11 Johns. (N. Y.) 47.

Compare *Miller v. Bingham*, 29 Vt. 82.

In *Whittier v. Vose*, 16 Me. 403, it was held that the declarations of a payee of a negotiable note, made while he retains it in his possession, are admissible in evidence, although he may previously have written thereon his indorsement to a third person, in whose name the action is brought.

Assignment for Benefit of Creditors—Admissions of Assignor.—The admissions of the assignor made after an assignment for the benefit of creditors are not competent evidence to impeach the assignment. *Myers v. Kinzie*, 26 Ill. 36; *Wynne v. Glidewell*, 17 Ind. 446; *Bartlett v. Marshall*, 2 Bibb (Ky.) 470; *Burt v. McKinstry*, 4 Minn. 204; *Glenn v. Grover*, 3 Md. 212; *Heywood v. Reed*, 4 Gray (Mass.) 574; *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Peck v. Crouse*, 46 Barb. (N. Y.) 151; *Lewis v. Long*, 3 Munf. (Va.) 136; *Bates v. Ableman*, 13 Wis. 644.

Attachment Proceedings—Admissions of Debtor.—Admissions made by a debtor after an attachment of his property are not admissible to defeat the attachment lien in favor of the plaintiff in a replevin suit claiming that the debtor purchased the goods from her by false representations of his financial condition. *Tarr v. Smith*, 68 Me. 97. See *Renshaw v. Steamboat Pawnee*, 19 Mo. 532; *James v. Taylor*, 93 Ga. 275.

Admission of Indebtedness as against Prior Creditor.—It has been held that an admission of indebtedness is not competent evidence as against a previous creditor. *Taylor v. Huntsville Branch Bank*, 14 Ala. 633; *Hooper v. Edwards*, 18 Ala. 280. *Compare* *Strong v. Wheeler*, 5 Pick. (Mass.) 410; *Lambert v. Craig*, 12 Pick. (Mass.) 199.

A Letter Written by a Distributee after Assigning his share of the estate is not admissible for any purpose in a suit to settle the estate. *Strother v. Mitchell*, 80 Va. 149.

Insurance Policy—Admissions of Assured after Issuance.—Declarations by the assured as to his health, made after the issuing of a policy upon his life in favor of his wife, cannot affect her rights, and are not competent evidence in an action brought by her on the policy. *McGinley v. U. S. Life Ins. Co.*, 8 Daly (N. Y.) 390. See *Mobile L. Ins. Co. v. Morris*, 3 Lea (Tenn.) 101, 31 Am. Rep. 631.

Declarations of Vendor of Chattel after Sale.—In *Hunter v. Jones*, 6 Rand. (Va.) 541, it was

held that the declarations of a vendor of a chattel, made after the sale, are good evidence against the vendee if they accord with the acknowledgments of the vendee himself previously made.

1. Effect of Concurrence of Successor in Title.—*Myers v. Kinzie*, 26 Ill. 36; *Randegger v. Ehrhardt*, 51 Ill. 101; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Lark v. Linstead*, 2 Md. Ch. 162; *Taylor v. Webb*, 54 Miss. 36; *Sutter v. Lackmann*, 39 Mo. 91. See *Orr v. Needles*, 67 Fed. Rep. 990; *D'Arrigo v. Texas Produce Co.* (Tex. Civ. App., 1895), 31 S. W. Rep. 713.

When the Admissions Relate to the Intentions of the assignors—the secret operations of their minds—and not to anything they said to the assignees, the fact that one of the assignees was present and heard the admissions without denying the truth will not make them binding upon the assignees or evidence against them. *Peck v. Crouse*, 46 Barb. (N. Y.) 151.

2. Design to Defraud Creditors.—When there is other evidence of a common design to defraud creditors, the admissions of a predecessor in title are competent evidence against his grantee, assignee, etc.

United States.—*U. S. v. Griswold*, 7 Sawy. (U. S.) 311; *In re Clark*, 9 Blatchf. (U. S.) 380; *Winchester, etc., Mfg. Co. v. Creary*, 116 U. S. 161; *Jones v. Simpson*, 116 U. S. 609. See *Orr v. Needles*, 67 Fed. Rep. 990.

Alabama.—*Jones v. Norris*, 2 Ala. 526.

Arkansas.—*Bowden v. Spellman*, 59 Ark. 251.

California.—*Spanagel v. Dellinger*, 38 Cal. 279; *Hutchings v. Castle*, 48 Cal. 152.

Connecticut.—*Tibbals v. Jacobs*, 31 Conn. 428.

Indiana.—*Caldwell v. Williams*, 1 Ind. 405; *Ewing v. Gray*, 12 Ind. 64; *Wiler v. Manley*, 51 Ind. 169; *Tedrowe v. Esher*, 56 Ind. 443; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Kennedy v. Divine*, 77 Ind. 490; *Daniels v. McGinnis*, 97 Ind. 549.

Iowa.—*Allen v. Kirk*, 81 Iowa 658; *DeFrance v. Howard*, 4 Iowa 524.

Maine.—*Dennison v. Benner*, 41 Me. 332. *Maryland*.—*Brooks v. Dent*, 1 Md. Ch. 523; *Hall v. Hinks*, 21 Md. 406.

Massachusetts.—*Aldrich v. Earl*, 13 Gray (Mass.) 578; *Alexander v. Gould*, 1 Mass. 165; *O'Neil v. Glover*, 5 Gray (Mass.) 144; *Horrigan v. Wright*, 4 Allen (Mass.) 514.

Michigan.—*Dawson v. Hall*, 2 Mich. 390.

Mississippi.—*Farmers' Bank v. Douglass*, 11 Smed. & M. (Miss.) 469.

Missouri.—*Boyd v. Jones*, 60 Mo. 454.

New Hampshire.—*Perkins v. Towle*, 59 N. H. 583.

New York.—*Savage v. Murphy*, 8 Bosw. (N. Y.) 75; *Jackson v. Myers*, 11 Wend. (N. Y.) 533; *Lee v. Huntoon*, Hoffm. Ch. (N. Y.) 447; *Cuyler v. McCartney*, 33 Barb. (N. Y.) 165; *Flagler v. Schoeffel*, 40 Hun (N. Y.) 182; *McKean v. Adams* (C. Pl.), 32 N. Y. Supp. 281.

5. Agents—*a*. GENERALLY—Not Admissible to Prove Agency.—It may be laid down as a general principle that the declarations of a person assuming to act as the agent of another are not admissible in evidence to prove his agency,¹

North Carolina.—*Kirby v. Masten*, 70 N. Car. 541; *Blair v. Brown*, 116 N. Car. 631.

But Such Admissions will Not be Received where there is no other evidence of fraud.

Alabama.—*Bilberry v. Mobley*, 21 Ala. 277; *Hodge v. Thompson*, 9 Ala. 131; *Strong v. Brewer*, 17 Ala. 706; *Mobley v. Barnes*, 26 Ala. 718; *Weaver v. Yeatmans*, 15 Ala. 539; *Smith v. Rogers*, 1 Stew. & P. (Ala.) 317; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491.

Arkansas.—*Clinton v. Estes*, 20 Ark. 216.

California.—*Jones v. Morse*, 36 Cal. 205; *Spanagel v. Dellinger*, 38 Cal. 279; *Hutchings v. Castle*, 48 Cal. 152; *Visher v. Webster*, 13 Cal. 58; *Paige v. O'Neal*, 12 Cal. 483.

Georgia.—*James v. Kerby*, 29 Ga. 684; *Bush v. Rogan*, 65 Ga. 320.

Illinois.—*Cochran v. McDowell*, 15 Ill. 10; *Francis v. Wilkinson*, 147 Ill. 370; *Wheeler v. McCarristen*, 24 Ill. 40.

Indiana.—*Kieth v. Kerr*, 17 Ind. 284; *Garner v. Graves*, 54 Ind. 188.

Louisiana.—*Groves v. Steel*, 2 La. Ann. 480, 46 Am. Dec. 551; *Erwin v. Kentucky Bank*, 5 La. Ann. 1.

Maine.—*Littlefield v. Getchell*, 32 Me. 390.

Massachusetts.—*Roberts v. Medbery*, 132 Mass. 100.

Minnesota.—*Zimmerman v. Lamb*, 7 Minn. 421; *Shaw v. Robertson*, 12 Minn. 445.

Mississippi.—*Taylor v. Webb*, 54 Miss. 36.

Missouri.—*Enders v. Richards*, 33 Mo. 598; *Weinrich v. Porter*, 47 Mo. 293.

North Carolina.—*Gidney v. Logan*, 79 N. Car. 217; *Burbank v. Wiley*, 79 N. Car. 501.

New York.—*Williams v. Williams*, 142 N. Y. 156; *Hubbell v. Alden*, 4 Lans. (N. Y.) 214.

South Carolina.—*Kittles v. Kittles*, 4 Rich. (S. Car.) 422.

Tennessee.—*Holmark v. Molin*, 5 Coldw. (Tenn.) 482.

Texas.—*Banks v. Martin* (Tex., 1892), 18 S. W. Rep. 964.

Vermont.—*Shepherd v. Hayes*, 16 Vt. 486.

Virginia.—*Vaughan v. Winckler*, 4 Munf. (Va.) 136.

Wisconsin.—*Bogert v. Phelps*, 14 Wis. 95.

In *Wyckoff v. Carr*, 8 Mich. 44, it was held that where an assignment for the benefit of creditors is attacked as fraudulent, it is competent for the creditors attacking it to prove the declarations of the assignor, made after the assignment was delivered, but before the schedules were made out and attached, and while the assignor was engaged in preparing them.

In *Jones v. Hurlburt*, 39 Barb. (N. Y.) 403, it was held that evidence to show a conspiracy (independent of the assignee's declarations), in order to render those declarations admissible, must be so strong that the court would set aside a verdict against it.

The Fact that the Grantee Subsequently Assents to and joins in the fraudulent undertaking, will not render such declarations of the grantor, made prior to their confed-

eration, competent to overthrow the deed. *Boyd v. Jones*, 60 Mo. 454.

Where the Vendor Remained in the Possession of property after the execution of a conveyance thereof, his statements are admitted in evidence against the vendee in an action by the creditor for fraud in the conveyance, the fact that the grantor remained in possession being a circumstance tending to establish such fraud. *Oatis v. Brown*, 59 Ga. 711; *Williams v. Hart*, 65 Ga. 201; *Jones v. King*, 86 Ill. 226; *Tedrowe v. Esher*, 56 Ind. 443; *Blake v. Graves*, 18 Iowa 312; *Stewart v. Thomas*, 35 Mo. 202; *Weinrich v. Porter*, 47 Mo. 294; *Boyd v. Jones*, 60 Mo. 471; *Outcalt v. Ludlow*, 32 N. J. L. 239; *Gregory v. Frothingham*, 1 Nev. 253; *Kirby v. Masten*, 70 N. Car. 541; *Gidney v. Logan*, 79 N. Car. 217; *Adams v. Davidson*, 10 N. Y. 309; *Richardson v. Mounce*, 19 S. Car. 477; *Spaulding v. Albin*, 63 Vt. 148; *Selsby v. Redlon*, 19 Wis. 17; *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785. See *Roeber v. Bowe*, 30 Hun (N. Y.) 381.

In *McCormicks v. Fuller*, 56 Iowa 43, it was held that the declarations of a vendor in possession of property to which he has parted with his right are not admissible in evidence to affect the rights of his vendee, against whom no charge of fraud is made.

It was held in *Tibbals v. Jacobs*, 31 Conn. 428, that the principle which makes the retention of possession of personal chattels by a vendor a badge of fraud, does not apply to the retention of real estate by a grantor. See *Vrooman v. King*, 36 N. Y. 477.

1. Not Admissible to Establish Fact of Agency.

Alabama.—*Rhodes v. Lowry*, 54 Ala. 4; *Galbreath v. Cole*, 61 Ala. 139; *Wailes v. Neal*, 65 Ala. 59.

Arkansas.—*Howcott v. Kilbourn*, 44 Ark. 213.

California.—*Grisby v. Clear Lake Water Works*, 40 Cal. 396; *Savings, etc., Soc. v. Gerichten*, 64 Cal. 521; *Smith v. Liverpool, etc., Ins. Co.* (Cal., 1895), 40 Pac. Rep. 540.

Colorado.—*Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Union Coal Co. v. Edman*, 16 Colo. 438.

Connecticut.—*Fitch v. Chapman*, 10 Conn. 8.

Georgia.—*Colquitt v. Thomas*, 8 Ga. 268; *Mapp v. Phillips*, 32 Ga. 72.

Illinois.—*Osgood v. Pacey*, 23 Ill. App. 116; *Chicago, etc., R. Co. v. Fox*, 41 Ill. 106; *Porter v. Robertson*, 34 Ill. App. 74; *Reynolds v. Ferree*, 86 Ill. 570; *Fairbank Canning Co. v. Weill*, 35 Ill. App. 366; *Erie, etc., Despatch v. Cecil*, 112 Ill. 180; *Proctor v. Tows*, 115 Ill. 138.

Indiana.—*Wabash, etc., Canal v. Bledsoe*, 5 Ind. 133; *Coon v. Gurley*, 49 Ind. 199; *Breckenridge v. McAfee*, 54 Ind. 141.

Iowa.—*Wiggins v. Leonard*, 9 Iowa 194; *McPherrin v. Jennings*, 66 Iowa 622; *Wood Mowing, etc., Mach. Co. v. Crow*, 70 Iowa 340.

Kansas.—*Streeter v. Poor*, 4 Kan. 353;

nor are they competent to establish the extent of the agency.¹

Declarations of Agent Acting within His Authority.—But after the fact of agency is established by other evidence, it is a well-settled rule that the declarations of an agent, made while acting within the scope of his authority,² and during the

Howe Mach. Co. v. Clark, 15 Kan. 492; McCormick v. Roberts, 36 Kan. 552.

Louisiana.—Dawson v. Landreaux, 29 La. Ann. 363.

Massachusetts.—Brigham v. Peters, 1 Gray (Mass.) 139; Mussey v. Beecher, 3 Cush. (Mass.) 517; McGregor v. Wait, 10 Gray (Mass.) 72, 69 Am. Dec. 305; Haney v. Donnelly, 12 Gray (Mass.) 361; Richmond Iron Works v. Hayden, 132 Mass. 190; Bowker v. Delong, 141 Mass. 315.

Michigan.—Hatch v. Squires, 11 Mich. 185; McCammon v. Detroit, etc., R. Co., 66 Mich. 442; Bacon v. Johnson, 56 Mich. 182.

Minnesota.—Woodbury v. Larned, 5 Minn. 339; Sencerbox v. McGrade, 6 Minn. 484; Lowry v. Harris, 12 Minn. 255.

Mississippi.—Kinnare v. Gregory, 55 Miss. 612; Memphis, etc., R. Co. v. Cocke, 64 Miss. 713.

Missouri.—Craighead v. Wells, 21 Mo. 404; Caldwell v. Henry, 76 Mo. 254; Peck v. Ritchey, 66 Mo. 114.

New Hampshire.—Wendell v. Abbott, 45 N. H. 349.

New Jersey.—Gifford v. Landrine, 37 N. J. Eq. 127.

New Mexico.—Kirchner v. Laughlin (N. Mex., 1890), 23 Pac. Rep. 175.

New York.—Watkins Second Nat. Bank v. Miller, 2 Thomp. & C. (N. Y.) 104; Ellis v. Messervie, 11 Paige (N. Y.) 467; Seymour v. Matteson, 42 How. Pr. (N. Y. Supreme Ct.) 495.

North Carolina.—Royal v. Sprinkle, 1 Jones (N. Car.) 505; Grandy v. Ferebee, 68 N. Car. 356; Francis v. Edwards, 77 N. Car. 271.

Pennsylvania.—Clark v. Baker, 2 Whart. (Pa.) 340; Chambers v. Davis, 3 Whart. (Pa.) 40; Robeson v. Schuykill Nav. Co., 3 Grant's Cas. (Pa.) 187; Hough v. Doyle, 4 Rawle (Pa.) 292; Jordan v. Stewart, 23 Pa. St. 244; Long v. North British, etc., Ins. Co., 137 Pa. St. 335, 21 Am. St. Rep. 879; Woodwell v. Brown, 44 Pa. St. 121; Grim v. Bonnell, 78 Pa. St. 152; Whiting v. Lake, 91 Pa. St. 349; Central Pennsylvania Tel., etc., Co. v. Thompson, 112 Pa. St. 118.

South Carolina.—Renneker v. Warren, 17 S. Car. 139.

Texas.—Latham v. Pledger, 11 Tex. 439; Noel v. Denman, 76 Tex. 306.

In *Munroe v. Stutts*, 9 Ired. (N. Car.) 49, it was held that where the declarations of one alleged to be an agent are offered in evidence it is incumbent on the judge to determine at least so far as to say whether there is such *prima facie* evidence of agency as to render the acts and declarations of the proposed witness those of the plaintiff. See also *Peck v. Ritchey*, 66 Mo. 114; *Pinnix v. McAdoo*, 68 N. Car. 56; *Grandy v. Ferebee*, 68 N. Car. 356.

In *Stewartson v. Watts*, 8 Watts (Pa.) 392, it was held that where some evidence of the existence of the relations of principal and

agent has been given, the acts and declarations of the agent respecting the subject matter of his authority are admissible in evidence. See *Cole v. Bean*, 1 Arizona 377. Compare *Brigham v. Peters*, 1 Gray (Mass.) 139.

In *Small v. Williams*, 87 Ga. 681, it was held that the sayings of an alleged agent *dum fervet opus*, whilst not evidence to prove his agency, may be looked to on the question whether he was acting as agent, there being other sufficient evidence to establish his agency.

Whether there is Sufficient Proof of Agency to warrant the admission of the acts and declarations of the agent in evidence, is a preliminary question for the court. *Cliquot's Champagne*, 3 Wall. (U. S.) 114.

In *Chattanooga, etc., R. Co. v. Davis*, 89 Ga. 708, it was held that where a railroad company has taken the benefit of a deed made to it, the sayings of the person who procured the deed in its behalf, made at the time the deed was executed, to the effect that he was acting as the agent of the company, are admissible in evidence.

Statements of Another Agent as to Agency.—Agency cannot be proved by the declaration of another agent of the same principal made to a witness, unless it appears that the latter agent was authorized by the principal to make the declaration, or that it was made as a part of the *res gesta* in the performance of some duty appertaining to his agency. *Hirsch v. Oliver*, 91 Ga. 554.

Error Cured by Subsequent Proof of Authority.—In *Rowell v. Klein*, 44 Ind. 291, 15 Am. Rep. 235, it was held that the general rule is that the agency must be established before the declarations of the agent are admissible; but if, after the declarations have been admitted, the agency is sufficiently proved, this cures the error. See *Rhodes v. Lowry*, 54 Ala. 4; *Woodbury v. Larned*, 5 Minn. 339; *McCormick v. Roberts*, 36 Kan. 552.

Admissions of Alleged Agent Incompetent to Disprove Agency of Another.—In *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197, it was held that the declarations of an agent cannot be received on behalf of his principal to prove that a third party was not also the principal's agent.

1. Not Admissible to Prove Extent of Agency.—*Carter v. Burnham*, 31 Ark. 212; *Coon v. Gurley*, 49 Ind. 199; *Stollenwerck v. Thacher*, 115 Mass. 224; *Lohnes v. North America Ins. Co.*, 121 Mass. 439; *Grover, etc., Sewing Mach. Co. v. Polhemus*, 34 Mich. 247; *Bacon v. Johnson*, 56 Mich. 182; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315.

2. Acting within Authority.—*United States. Sundry Goods, etc., v. U. S.*, 2 Pet. (U. S.) 358; *Mechanics' Bank v. Columbia Bank*, 5 Wheat. (U. S.) 336; *Anvil Min. Co. v. Humble*, 153 U. S. 540; *Lee v. Munroe*, 7 Cranch (U. S.) 366.

Alabama.—Ricketts v. Birmingham St. R. Co., 85 Ala. 600; Mitcham v. Schuessler, 98 Ala. 635; Williams v. Schackelford, 16 Ala. 318; Huntsville Belt Line, etc., R. Co. v. Corpening, 97 Ala. 681; Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15.

Arkansas.—Ft. Smith Oil Co. v. Slover, 58 Ark. 168.

California.—Bullock v. Consumers' Lumber Co. (Cal., 1892), 31 Pac. Rep. 367; Green v. Ophir Copper, etc., Min. Co., 45 Cal. 522; Jepsen v. Beck, 78 Cal. 540.

Colorado.—Edmunds v. Curtis, 8 Colo. 605. *Connecticut*.—Charter v. Lane, 62 Conn. 121; Willard v. Buckingham, 36 Conn. 401; Thill v. Perkins Electric Lamp Co., 63 Conn. 478.

Georgia.—Banks v. Gidrot, 19 Ga. 421; Georgia R. Co. v. Smith, 76 Ga. 634; Claflin v. Ballance, 91 Ga. 411; Hematite Min. Co. v. East Tennessee, etc., R. Co., 92 Ga. 268; Akers v. Kirke, 91 Ga. 590.

Illinois.—Chicago, etc., R. Co. v. Coleman, 18 Ill. 298, 68 Am. Dec. 544; Central Warehouse Co. v. Sargeant, 40 Ill. App. 438; Cook v. Hunt, 24 Ill. 536; St. Louis Nat. Stock Yards v. Tibbler, 39 Ill. App. 422; Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co., 149 Ill. 272; Holley v. Knapp, 45 Ill. App. 372; Bensley v. Brockway, 27 Ill. App. 410; Merchants' Dispatch Transp. Co. v. Laysor, 89 Ill. 43.

Indiana.—Rahm v. Deig, 121 Ind. 283; Cleveland, etc., R. Co. v. Closser, 126 Ind. 348; Rowell v. Klein, 44 Ind. 293, 15 Am. Rep. 235; Adams Express Co. v. Harris, 120 Ind. 73, 16 Am. St. Rep. 315; Mutual Ben. L. Ins. Co. v. Cannon, 48 Ind. 265; Ohio, etc., R. Co. v. Levy, 134 Ind. 343; Lafayette, etc., R. Co. v. Ehman, 30 Ind. 83; Alexandria Bldg. Co. v. McHugh (Ind. App., 1895), 39 N. E. Rep. 877.

Iowa.—Deere v. Bagley, 80 Iowa 197; McPherrin v. Jennings, 66 Iowa 622; Peden v. Chicago, etc., R. Co., 78 Iowa 131; State Bank v. Kellog, 81 Iowa 124; Des Moines, etc., Land, etc., Co. v. Polk County Homestead, etc., Co., 82 Iowa 663; Gault v. Sickles, 85 Iowa 266; Pray v. Farmers' Incorporated Co-operative Creamery (Iowa, 1893), 56 N. W. Rep. 443.

Kansas.—Swenson v. Aultman, 14 Kan. 273; Kilpatrick-Koch Dry Goods Co. v. Kahn, 53 Kan. 274.

Maine.—Philbrook v. Clark, 77 Me. 176.

Maryland.—Franklin Bank v. Pennsylvania, etc., Steam Nav. Co., 11 Gill & J. (Md.) 28, 33 Am. Dec. 687.

Massachusetts.—Cooley v. Norton, 4 Cush. (Mass.) 93; Rowe v. Canney, 139 Mass. 41; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; Wellington v. Boston, etc., R. Co., 158 Mass. 185; Robinson v. Fitchburg, etc., R. Co., 7 Gray (Mass.) 92; Weeks v. Needham, 156 Mass. 289; McGregor v. Wait, 10 Gray (Mass.) 72, 69 Am. Dec. 305; Creed v. Creed, 161 Mass. 107; Blanchard v. Blackstone, 102 Mass. 343; Wakefield v. South Boston R. Co., 117 Mass. 544; Ft. Payne Coal, etc., Co. v. Webster (Mass., 1895), 39 N. E. Rep. 786.

Michigan.—Pittsburgh, etc., Iron Co. v. Kilpatrick, 92 Mich. 252; McCammon v. Detroit, etc., R. Co., 66 Mich. 442.

Minnesota.—Halverson v. Chicago, etc., R.

Co. (Minn., 1894), 58 N. W. Rep. 871; Van Doren v. Bailey, 48 Minn. 305.

Missouri.—Midland Lumber Co. v. Kreeger, 52 Mo. App. 418.

Nebraska.—Bowman v. Griffith, 35 Neb. 361; Wood River Bank v. Kelley, 29 Neb. 590.

New Hampshire.—Batchelder v. Emery, 20 N. H. 167; Webster v. Clark, 30 N. H. 245; Demeritt v. Meserve, 39 N. H. 521; Low v. Connecticut, etc., Rivers R. Co., 45 N. H. 370.

New Jersey.—Agricultural Co. v. Potts, 55 N. J. L. 158.

New York.—Hay v. Platt, 66 Hun (N. Y.) 488; Ballard v. Hitchcock Mfg. Co. (Supreme Ct.), 15 N. Y. Supp. 405; Walter A. Wood Mowing, etc., Mach. Co. v. Pearson (Supreme Ct.), 19 N. Y. Supp. 485; Mallory v. Perkins, 9 Bosw. (N. Y.) 572; McElwee Mfg. Co. v. Trowbridge, 68 Hun (N. Y.) 28; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Wright v. Rensens, 133 N. Y. 298; Anderson v. Rome, etc., R. Co., 54 N. Y. 334; Wakefield Rattan Co. v. Tappan (Supreme Ct.), 24 N. Y. Supp. 430; Wakefield Rattan Co. v. Tappan (Supreme Ct.), 30 N. Y. Supp. 38; Elsner v. Prudential Ins. Co. (Brooklyn City Ct.), 34 N. Y. Supp. 246; Morgan v. Short (C. Pl.), 34 N. Y. Supp. 10; Flour City Nat. Bank v. Grover (Supreme Ct.), 34 N. Y. Supp. 496; Miller v. King (Supreme Ct.), 32 N. Y. Supp. 332.

North Carolina.—Branch v. Wilmington, etc., R. Co., 88 N. Car. 573.

Ohio.—Hogg v. Zanesville Mfg. Co., Wright (Ohio) 139.

Oregon.—Nichols v. Southern Pac. Co., 23 Oregon 123.

Pennsylvania.—Farmers' Bank v. McKee, 2 Pa. St. 318; Harrisburg Bank v. Tyler, 3 W. & S. (Pa.) 373; Robeson v. Schuykill Nav. Co., 3 Grant's Cas. (Pa.) 187; Stockton v. Demuth, 7 Watts (Pa.) 39, 32 Am. Dec. 735; Reed v. Dick, 8 Watts (Pa.) 479; Stewart v. Huntingdon Bank, 11 S. & R. (Pa.) 267, 14 Am. Dec. 628; Baker v. Westmoreland, etc., Natural Gas Co., 157 Pa. St. 593; Woodwell v. Brown, 44 Pa. St. 121; Green v. North Buffalo Tp., 56 Pa. St. 110; Huntingdon R., etc., Co. v. Decker, 82 Pa. St. 119; American Steamship Co. v. Landreth, 102 Pa. St. 132, 48 Am. Rep. 196.

South Carolina.—Mars v. Virginia Home Ins. Co., 17 S. Car. 514; Moore v. Dickinson, 39 S. Car. 441; Simmons Hardware Co. v. Greenwood Bank (S. Car., 1894), 19 S. E. Rep. 502.

South Dakota.—Plymouth County Bank v. Gilman, 3 S. Dak. 170; La Rue v. St. Anthony, etc., Elevator Co., 3 S. Dak. 637.

Texas.—Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125; Latham v. Pledger, 11 Tex. 439; San Antonio, etc., R. Co. v. Cockrill, 72 Tex. 613; Salado College v. Davis, 47 Tex. 131; Belo v. Fuller, 84 Tex. 450; Western Union Tel. Co. v. Bennett, 1 Tex. Civ. App. 558; Western Union Beef Co. v. Kirchevalle (Tex. Civ. App., 1894), 26 S. W. Rep. 147; Slocum v. Putnam (Tex. Civ. App., 1894), 25 S. W. Rep. 52; Laredo Electric Light, etc., Co. v. U. S. Electric Lighting Co. (Tex. Civ. App., 1894), 26 S. W. Rep. 310; Goodbar v. City Nat. Bank, 78 Tex. 461; Atchison, etc., R. Co. v. Bryan (Tex. Civ. App., 1894), 28 S.

continuance of his agency,¹ in regard to transactions depending at the very

W. Rep. 98; *Gilmour v. Heinze* (Tex., 1892), 19 S. W. Rep. 1075.

Virginia.—Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268, 18 Am. Rep. 681.

West Virginia.—Eastburn v. Norfolk, etc., R. Co., 34 W. Va. 681.

Compare *Clay v. Swett*, 4 Bibb (Ky.) 255. See *Jones v. Jones*, 120 N. Y. 589; *Grubey v. Illinois Nat. Bank*, 133 Ill. 79; *Updyke v. Wheeler*, 37 Mo. App. 680; *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412; *Central R., etc., Co. v. Skellie*, 86 Ga. 686.

"An Authority to Make an Admission is not necessarily to be implied from an authority previously given in respect to the thing to which the admission relates." 1 Greenl. Ev., § 114. See *Osgood v. Bringolf*, 32 Iowa 265; *Verry v. Burlington, etc., R. Co.*, 47 Iowa 550.

An Admission by an Agent in His Individual Capacity is not competent evidence against the principal. *Bernstein v. Bernstein*, 11 Ill. App. 238.

An Agent Appointed to Take Care of the Principal's Property cannot bind the principal by admissions as to how the latter acquired it. *Winchester, etc., Mfg. Co. v. Creary*, 116 U. S. 161.

The Price Put on a Commodity by an Agent Appointed to Sell it is evidence of its value as against the principal. *Banks v. Gidrot*, 19 Ga. 421.

An Agent to Construct a Building can bind his employer by his admissions explaining certain payments relating thereto. *Cook v. Hunt*, 24 Ill. 535. See also *Hudspeth v. Allen*, 26 Ind. 165.

An Agent to Receive Money has no authority to make any declarations in relation thereto which can affect his principal. *Hyland v. Sherman*, 2 E. D. Smith (N. Y.) 234; *Gould v. Tatum*, 21 Ark. 329; except an admission of payment, *Click v. Hamilton*, 7 Rich. (S. Car.) 65.

Where a Person Authorized Another to Send Goods to His Agent, the admissions of the agent of such receipt are admissible in evidence against the principal. *Webster v. Clark*, 30 N. H. 245. *Compare* *Griffith v. Turner*, 4 Gill (Md.) 111.

The Declarations of a Bank Cashier as to the ownership of stock, made at the time of a payment on account of the stock by a third person, is competent evidence against the bank on the question of ownership. *Xenia Bank v. Stewart*, 114 U. S. 224.

An Architect is the Owner's Agent in directing operations, and his conversations respecting them with the contractor are generally admissible in evidence in an action against the owner for price of work and materials. *Wright v. Reusens*, 133 N. Y. 298.

Agent to Weigh and Receive Corn.—The declarations of one whom the testimony showed to be the agent of the defendant in weighing and receiving corn purchased, regarding its quality and the probability of its being accepted by defendant, were properly admitted in a suit for refusing to accept the corn. *Rahm v. Deig*, 121 Ind. 283.

Local Freight Agent—Declarations as to through Freight Business.—In an action against

a railroad company for the penalty for delay in shipment of local freight, it was held error to admit the declarations of a station agent to the effect that the company, during a certain season, used most of its cars in transporting through freight; his agency being unconnected with the through freight business. *Branch v. Wilmington, etc., R. Co.*, 88 N. Car. 573.

Agent for Care and Custody of Goods.—The declarations of an agent of a vendee, whose agency is limited to the care and custody of goods after they have passed to the possession of the vendee, are not admissible in evidence to show that the purchase by the vendee was fraudulent. *Hutchings v. Castle*, 48 Cal. 152.

Corporation Agents and Employees.—A conversation between a chief civil engineer, in charge of repairs, and the division road master, is competent evidence on the question of whether a railroad was in proper repair at the time of an accident. *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412.

As the business of corporations can be carried on only through their agents, the admissions of the agents will be looked upon as their admissions. 2 Wharton on Law of Evidence, § 1170; *Abbott v. '76 Land, etc., Co.*, 87 Cal. 323; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Mfg. Co.*, 27 Fla. 157; *Chicago, etc., R. Co. v. Coleman*, 18 Ill. 298, 68 Am. Dec. 544; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa 364; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Costigan v. Michael Transp. Co.*, 38 Mo. App. 219; *St. Louis Paint Mfg. Co. v. Mephram*, 30 Mo. App. 15; *Joseph v. Mady Clothing Co.*, 13 Mont. 195; *Sewanee Min. Co. v. McMahon*, 1 Head (Tenn.) 582; *Superintendent of Poor v. Superintendent of Poor*, 44 N. Y. 22.

Public Officers.—Public officers may bind their constituents when acting under the rules as laid down in the text. *Sharon v. Salisbury*, 29 Conn. 113; *Mitchell v. Rockland*, 41 Me. 363, 66 Am. Dec. 252; *Walker v. Dunsbaugh*, 20 N. Y. 170; *Green v. North Buffalo Tp.*, 56 Pa. St. 110; *Harrington v. Lincoln*, 4 Gray (Mass.) 563; *Burgess v. Wareham*, 7 Gray (Mass.) 345; *Blackmore v. Boardman*, 28 Mo. 420. See *Stone v. Poland* (Supreme Ct.), 11 N. Y. Supp. 498; *State v. Olson*, 55 Minn. 118.

A county is not bound by the statement of its attorney-general that it will pay a certain debt. *Holten v. Lake County*, 55 Ind. 194.

In an action by a lot owner, for damage done by water thrown from a public street on his land, by a ditch dug by a city, declarations made by the street commissioner while digging the ditch are admissible in evidence against the municipality. *Sistare v. Heckscher* (Supreme Ct.), 18 N. Y. Supp. 475.

1. During Continuance of Agency.—*Baldwin v. Ashby*, 54 Ala. 82; *Levy v. Mitchell*, 6 Ark. 138; *Wiggins v. Leonard*, 9 Iowa 194; *Davis v. Whitesides*, 1 Dana (Ky.) 177, 25 Am. Dec. 138; *Reynolds v. Rowley*, 2 La. Ann. 890; *Polleys v. Ocean Ins. Co.*, 14 Me. 141; *Coo-*

time,¹ may be given in evidence against his principal as a part of the *res gestæ*;

ley v. Norton, 4 Cush. (Mass.) 93; North v. Metz, 57 Mich. 612; Doe v. Robinson, 24 Miss. 690; Caldwell v. Garner, 31 Mo. 131; Vail v. Judson, 4 E. D. Smith (N. Y.) 165; Williams v. Williamson, 6 Ired. (N. Car.) 281, 45 Am. Dec. 494; Sewanee Min. Co. v. McMahon, 1 Head (Tenn.) 582; Bigham v. Carr, 21 Tex. 142.

In *Lewis v. Metcalf*, 53 Kan. 219, it was held that after the authority of an agent has been revoked, and actual notice of revocation has been given to a party dealing with him, the admissions of such agent thereafter made are not binding on his principal.

1. Concerning Transactions Then Depending.—

England.—Biggs v. Lawrence, 3 T. R. 454; Langhorn v. Allnut, 4 Taunt. 519; Mortimer v. McCallan, 6 M. & W. 58; Garth v. Howard, 8 Bing. 451, 21 E. C. L. 341; Fairlie v. Hastings, 10 Ves. Jr. 123.

United States.—Cliquot's Champagne, 3 Wall. (U. S.) 114; Mechanics' Bank v. Columbia Bank, 5 Wheat. (U. S.) 326; Flint v. Norwich, etc., Co., 7 Blatchf. (U. S.) 536; Sundry Goods, etc., v. U. S., 2 Pet. (U. S.) 358; Northwestern Union Packet Co. v. Clough, 20 Wall. (U. S.) 540; Xenia Bank v. Stewart, 114 U. S. 224.

Alabama.—Strawbridge v. Spann, 8 Ala. 820; Ricketts v. Birmingham St. R. Co., 85 Ala. 600; Bohannon v. Chapman, 13 Ala. 641; Williams v. Shackelford, 16 Ala. 318; Rhodes v. Lowry, 54 Ala. 4; Baldwin v. Ashby, 54 Ala. 82.

Arkansas.—Ft. Smith Oil Co. v. Slover, 58 Ark. 168.

California.—Gerke v. California Steam Nav. Co., 9 Cal. 251, 70 Am. Dec. 650; Neely v. Naglee, 23 Cal. 152; Birch v. Hale, 99 Cal. 299; Hewes v. Germain Fruit Co. (Cal., 1895), 39 Pac. Rep. 853.

Colorado.—Edmunds v. Curtis, 8 Colo. 605; Union Pac. R. Co. v. Hepner, 3 Colo. App. 313.

Connecticut.—Perkins v. Burnet, 2 Root (Conn.) 30; Toll Bridge Co. v. Betsworth, 30 Conn. 380; Ford v. Haskell, 32 Conn. 489; Willard v. Buckingham, 36 Conn. 401; Rockwell v. Taylor, 41 Conn. 59.

Georgia.—Robinson v. Lane, 19 Ga. 337; Southern Express Co. v. Duffey, 48 Ga. 358; Newton Mfg. Co. v. White, 53 Ga. 395; Adams v. Humphreys, 54 Ga. 496; Chattanooga, etc., R. Co. v. Davis, 89 Ga. 708; Galceran v. Noble, 66 Ga. 367; Johnson v. East Tennessee, etc., R. Co., 90 Ga. 810.

Illinois.—Chicago, etc., R. Co. v. Coleman, 18 Ill. 298, 68 Am. Dec. 544; Miles v. Andrews, 153 Ill. 262; Citizens' Gaslight, etc., Co. v. Granger, 10 Ill. App. 201; Montgomery v. McGuire, 25 Ill. App. 31; Whiteside v. Margarel, 51 Ill. 507; Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co., 149 Ill. 272; Chicago, etc., R. Co. v. Lee, 60 Ill. 501; Rouse v. Mohr, 29 Ill. App. 321; Mix v. Osby, 62 Ill. 193; Ehrler v. Worthen, 47 Ill. App. 550.

Indiana.—Toledo, etc., R. Co. v. Goddard, 25 Ind. 185; Lafayette, etc., R. Co. v. Ehlman, 30 Ind. 83; Heller v. Crawford, 37 Ind.

279; Rowell v. Klein, 44 Ind. 293, 15 Am. Rep. 235; Pavey v. Winthrope, 87 Ind. 379; Rahn v. Deig, 121 Ind. 284; Ohio, etc., R. Co. v. Stein, 133 Ind. 243.

Iowa.—Howe Mach. Co. v. Snow, 32 Iowa 433; McPherrin v. Jennings, 66 Iowa 622.

Kansas.—Swenson v. Aultman, 14 Kan. 273; St. Louis, etc., R. Co. v. Weaver, 35 Kan. 413.

Kentucky.—Roberts v. Burks, Litt. Sel. Cas. (Ky.) 411, 12 Am. Dec. 325; Louisville, etc., R. Co. v. Foley, 94 Ky. 220; Covington, etc., R. Co. v. Ingles, 15 B. Mon. (Ky.) 637.

Maine.—Gooch v. Bryant, 13 Me. 386; Lamb v. Barnard, 16 Me. 364; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598; Burnham v. Grand Trunk R. Co., 63 Me. 298.

Maryland.—Bradford v. Williams, 2 Md. Ch. 1; Franklin Bank v. Pennsylvania Steam Nav. Co., 11 Gill & J. (Md.) 28, 33 Am. Dec. 687; Thomas v. Sternheimer, 29 Md. 268.

Massachusetts.—Cooley v. Norton, 4 Cush. (Mass.) 93; Parker v. Green, 8 Met. (Mass.) 142; Baring v. Clark, 19 Pick. (Mass.) 220; Blanchard v. Blackstone, 102 Mass. 343.

Michigan.—Sisson v. Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252; Ablard v. Ft. Wayne, etc., R. Co. (Mich., 1895), 62 N. W. Rep. 172; Patterson v. Wabash, etc., R. Co., 54 Mich. 92; O'Neil v. Deerfield Tp., 86 Mich. 610.

Minnesota.—Van Doren v. Bailey, 48 Minn. 305.

Missouri.—Price v. Thornton, 10 Mo. 135; Kleiber v. People's R. Co., 107 Mo. 240; Hawk v. Applegate, 37 Mo. App. 32; Beardslee v. Steinmesch, 38 Mo. 168; Robinson v. Walton, 58 Mo. 380; Peck v. Ritchey, 66 Mo. 114.

Nebraska.—McCormick v. Demary, 10 Neb. 515.

New Hampshire.—Demeritt v. Meserve, 39 N. H. 521; Burnside v. Grand Trunk R. Co., 47 N. H. 554.

New Jersey.—Halsey v. Lehigh Valley R. Co., 45 N. J. L. 27.

New York.—Higgins v. Soloman, 2 Hall (N. Y.) 482; Price v. Powell, 3 N. Y. 322; McCotter v. Hooker, 8 N. Y. 497; Thalhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155, 6 Cow. (N. Y.) 90; Mott v. Kip, 10 Johns. (N. Y.) 478; Fogg v. Child, 13 Barb. (N. Y.) 246; Sandford v. Handy, 23 Wend. (N. Y.) 260; Anderson v. Rome, etc., R. Co., 54 N. Y. 334; Gutches v. Gutches, 66 Barb. (N. Y.) 483; Merchants' Bank v. Griswold, 72 N. Y. 472, 28 Am. Rep. 159; Hitchings v. St. Louis, etc., Transp. Co., 68 Hun (N. Y.) 33; Morgan v. Short (C. Pl.), 34 N. Y. Supp. 10; Flour City Nat. Bank v. Grover (Supreme Ct.), 34 N. Y. Supp. 496.

North Carolina.—Smith v. North Carolina R. Co., 68 N. Car. 107; Howerton v. Latimer, 68 N. Car. 370; McComb v. North Carolina R. Co., 70 N. Car. 180; State v. Lemon, 92 N. Car. 790.

Ohio.—Globe Ins. Co. v. Boyle, 21 Ohio St. 119.

Pennsylvania.—Hough v. Doyle, 4 Rawle (Pa.) 291; Hannay v. Stewart, 6 Watts (Pa.) 487; Stockton v. Demuth, 7 Watts (Pa.) 39, 32 Am. Dec. 735; Spalding v. Susquehanna County Bank, 9 Pa. St. 28; Wheeler v. Ham-

and it is the same whether the *res gesta* is one that is specially authorized by the principal's instructions, or one which the agent performs in the exercise of the general discretion intrusted by his principal.¹

Special Instructions.—And even where an agent who has been limited by special instructions makes declarations within the apparent scope of his authority, such declarations will be admissible in evidence against the principal in favor of parties dealing with the agent without knowledge of such limitations.²

Admissions Not Made at Time of Transaction.—But the admissions of an agent, not made at the time of the transaction to which they relate, and not specially authorized by the principal, are not competent evidence against the latter, although the relation of principal and agent still exists.³ Nor will the near-

bright, 9 S. & R. (Pa.) 390; Hanover R. Co. v. Coyle, 55 Pa. St. 396; Pennsylvania R. Co. v. Titusville, etc., Plank Road Co., 71 Pa. St. 350; Mullan v. Philadelphia, etc., Steamship Co., 78 Pa. St. 25, 21 Am. Rep. 2; Grim v. Bonnell, 78 Pa. St. 152; Huntingdon R., etc., Co. v. Decker, 82 Pa. St. 119; Central Pennsylvania Tel., etc., Co. v. Thompson, 112 Pa. St. 118; Shafer v. Lacock (Pa., 1895) 32 Atl. Rep. 44; Dicken v. Winters (Pa., 1895), 32 Atl. Rep. 289.

South Carolina.—Meinhard v. Youngblood, (S. Car., 1894), 19 S. E. Rep. 675.

Tennessee.—Moore v. Bettis, 11 Humph. (Tenn.) 67, 53 Am. Dec. 771.

Texas.—Texas, etc., R. Co. v. Lester, 75 Tex. 56; Latham v. Pledger, 11 Tex. 439; Belo v. Fuller, 84 Tex. 450; Tuttle v. Turner, 28 Tex. 759.

Utah.—Idaho Forwarding Co. v. Firemen's Fund Ins. Co., 8 Utah 41.

West Virginia.—Baltimore, etc., R. Co. v. Christie, 5 W. Va. 325; Coyle v. Baltimore, etc., R. Co., 11 W. Va. 94.

Wisconsin.—Smith v. Wallace, 25 Wis. 55; Hooker v. Chicago, etc. R. Co., 76 Wis. 542.

In *Senn v. Southern R. Co.*, 108 Mo. 142, it was held that the declaration of an agent will bind his principal only when the declaration and the fact to be proved are so clearly connected, that the declaration can in the ordinary course of affairs be said to be the spontaneous exclamation of the real cause. See also *Leahey v. Cass Ave., etc.*, R. Co., 97 Mo. 167.

Res Gesta.—The declarations of an agent are not competent to charge his principal, unless a part of the *res gesta*, that is, unless they relate to the identical contract in controversy. *Dorne v. Southwork Mfg. Co.*, 11 Cush. (Mass.) 205; *Barber v. Bennett*, 62 Vt. 50.

In an action against a railroad for injuring the plaintiff by negligence, the court admitted declarations of the engineer, by whose negligence plaintiff was injured, made at the time of the injury, as part of the *res gesta*. *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.

Confidential Statement Made to Principal.—It was held in *In re Devala Provident Gold Min. Co.*, 22 Ch. Div. 593, that declarations of an agent not made to third parties, but to his principal confidentially, were not admissible in evidence against such principal.

1. *Pemigewassett Bank v. Rogers*, 18 N. H. 260. See cases cited in note 3 following.

2. *Howard v. Sheward*, L. R. 2 C. P. 148;

Howe Mach. Co. v. Snow, 32 Iowa 436; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298; *Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358.

The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even though (unknown to the buyer) he has express orders not to warrant. *Howard v. Sheward*, L. R. 2 C. P. 148. See, generally, the title **WARRANTY**.

3. Admissions of Agent Not Made at Time of Transaction or Authorized by Principal—United States.—Vicksburg, etc., R. Co. v. O'Brien, 119 U. S. 99; *Maury v. Talmadge*, 2 McLean (U. S.) 157; *St. Louis, etc., R. Co. v. McLelland*, 62 Fed. Rep. 116; *Northwestern Union Packet Co. v. Clough*, 20 Wall. (U. S.) 528; *The R. R. Kirkland*, 48 Fed. Rep. 760; *Goetz v. Kansas City Bank*, 119 U. S. 551; *The Fanwood*, 61 Fed. Rep. 523.

Alabama.—Governor v. Baker, 14 Ala. 652; *Winter v. Burt*, 31 Ala. 38.

Arkansas.—St. Louis, etc., R. Co. v. Sweet, 57 Ark. 287; *St. Louis, etc., R. Co. v. Barger*, 52 Ark. 78; *St. Louis, etc., R. Co. v. Kelley* (Ark., 1895), 31 S. W. Rep. 884.

California.—Garfield v. Knight's Ferry, etc., Mountain Water Co., 14 Cal. 35; *Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388; *Durkee v. Central Pac. R. Co.*, 69 Cal. 533, 58 Am. Rep. 562; *Hewes v. Germain Fruit Co.* (Cal., 1895), 39 Pac. Rep. 853.

Colorado.—Pueblo Bldg. Co. v. Klein (Colo. App., 1894), 38 Pac. Rep. 608.

Connecticut.—Enos v. Tuttle, 3 Conn. 250; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173; *Sears v. Hayt*, 37 Conn. 406.

Georgia.—Mason v. Croom, 24 Ga. 211; *Hematite Min. Co. v. East Tennessee, etc., R. Co.*, 92 Ga. 268; *Griffin v. Montgomery, etc., R. Co.*, 26 Ga. 111; *Carroll v. East Tennessee, etc., R. Co.*, 82 Ga. 452; *East Tennessee, etc., R. Co. v. Duggan*, 51 Ga. 212.

Idaho.—Holt v. Spokane, etc., R. Co. (Idaho, 1893), 35 Pac. Rep. 39.

Illinois.—Waterman v. Peet, 11 Ill. 648; *Bensley v. Brockway*, 27 Ill. App. 410; *Whiteside v. Margarel*, 51 Ill. 507; *Mobile, etc., R. Co. v. Klein*, 43 Ill. App. 63; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503; *Chicago, etc., R. Co. v. Lee*, 60 Ill. 501; *Chicago, etc., R. Co. v. Riddle*, 60 Ill. 534; *Thomas v. Rutledge*, 67 Ill. 214; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348.

Indiana.—Lafayette, etc., R. Co. v. Ehman, 30 Ind. 83; *Bennett v. Holmes*, 32 Ind. 108; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 336,

ness of such subsequent admissions to the transaction qualify them as evidence,

5 Am. Rep. 201; Ohio, etc., R. Co. v. Stein, 133 Ind. 243; Pittsburgh, etc., R. Co. v. Theobald, 51 Ind. 247; LaRose v. Logansport Nat. Bank, 102 Ind. 332.

Iowa.—Osgood v. Bringolf, 32 Iowa 265; Osgood v. Bauder, 82 Iowa 171; Treadway v. Sioux City, etc., R. Co., 40 Iowa 526; Verry v. Burlington, etc., R. Co., 47 Iowa 549; Yordy v. Marshall County, 86 Iowa 340; Hirsch v. J. I. Case Threshing Mach. Co., 85 Iowa 451; Worden v. Humeston, etc., R. Co., 72 Iowa 201; Phelps v. James, 86 Iowa 398.

Kansas.—Donnel v. Clark, 12 Kan. 154; Dodge v. Childs, 38 Kan. 526; Union Pac. R. Co. v. Fray, 35 Kan. 700; Atchison, etc., R. Co. v. Wilkinson (Kan., 1895), 39 Pac. Rep. 1043.

Kentucky.—Chesapeake, etc., R. Co. v. Reeves (Ky., 1889), 11 S. W. Rep. 464; Davis v. Whitesides, 1 Dana (Ky.) 177, 25 Am. Dec. 138; Murphy v. May, 9 Bush (Ky.) 33; Covington, etc., R. Co. v. Ingles, 15 B. Mon. (Ky.) 637; Louisville, etc., R. Co. v. Ellis (Ky., 1895), 30 S. W. Rep. 928.

Maine.—Gooch v. Bryant, 13 Me. 386; Franklin Bank v. Cooper, 36 Me. 191; Burnham v. Ellis, 39 Me. 320; Craig v. Gilbreth, 47 Me. 418; Lime Rock Bank v. Hewett, 52 Me. 533; Philbrook v. Clark, 77 Me. 176.

Maryland.—Bradford v. Williams, 2 Md. Ch. 1; Franklin Bank v. Pennsylvania, etc., Steam Nav. Co., 11 Gill & J. (Md.) 28, 33 Am. Dec. 687; Dietrich v. Baltimore, etc., R. Co., 58 Md. 356; Phelps v. George's Creek, etc., R. Co., 60 Md. 536; Baltimore, etc., R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233.

Massachusetts.—Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; Robinson v. Fitchburg, etc., R. Co., 7 Gray (Mass.) 92; Stiles v. Western R. Corp., 8 Met. (Mass.) 44, 12 Am. Dec. 486; Dorne v. Southwork Mfg. Co., 11 Cush. (Mass.) 205; Wakefield v. South Boston R. Co., 117 Mass. 544.

Michigan.—Benedict v. Denton, Walk. (Mich.) 336; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Wormsdorf v. Detroit City R. Co., 75 Mich. 472; Peek v. Detroit Novelty Works, 29 Mich. 313; Mabley v. Kitleberger, 37 Mich. 360.

Minnesota.—Lowry v. Harris, 12 Minn. 255.

Mississippi.—Moore v. Chicago, etc., R. Co., 59 Miss. 244; Vicksburg, etc., R. Co. v. McGowan, 62 Miss. 684, 52 Am. Rep. 205; Forsee v. Alabama G. S. R. Co., 63 Miss. 67, 56 Am. Rep. 801; Memphis, etc., R. Co. v. Cocke, 64 Miss. 713.

Missouri.—Price v. Thornton, 10 Mo. 135; Rogers v. McCune, 19 Mo. 558; Grace v. Nesbitt, 109 Mo. 9; Ready v. Steamboat Highland Mary, 20 Mo. 265; McDermott v. Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526; Scovill v. Glasner, 70 Mo. 449; Kelly v. Chicago, etc., R. Co., 88 Mo. 534; Barker v. St. Louis, etc., R. Co. (Mo., 1894), 28 S. W. Rep. 866.

Nebraska.—Gale Sulky Harrow Co. v. Laughlin, 31 Neb. 103; Commercial Nat. Bank v. Brill, 37 Neb. 626.

New Hampshire.—Pemigewasset Bank v. Rogers, 18 N. H. 261; Demeritt v. Meserve, 39 N. H. 521.

New Jersey.—Runk v. Ten Eyck, 24 N. J. L. 760; North Hudson County R. Co. v. May, 48 N. J. L. 401.

New York.—Jex v. Board of Education, 1 Hun (N. Y.) 157; Vassar v. Knickerbocker Ice Co. (Super. Ct.), 17 N. Y. Supp. 182; Thalhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; Merchants' Nat. Bank v. Clark, 139 N. Y. 314; People v. Green, 5 Thomp. & C. (N. Y.) 376; Hubbard v. Elmer, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590; Clarke v. Anderson, 14 Daly (N. Y.) 464; Highway Com'rs v. Oswego, etc., Plank Road Co., 7 How. Pr. (N. Y. Supreme Ct.) 94; Fogg v. Child, 13 Barb. (N. Y.) 246; Luby v. Hudson River R. Co., 17 N. Y. 131; Johnston v. Thompson, 23 Hun (N. Y.) 90; Anderson v. Rome, etc., R. Co., 54 N. Y. 340; Lyons First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; White v. Miller, 71 N. Y. 120, 27 Am. Rep. 13; Church v. Howard, 79 N. Y. 415; Thompson v. Sheehan (Supreme Ct.), 31 N. Y. Supp. 225; Strong v. Union Transfer, etc., Co. (C. Pl.), 32 N. Y. Supp. 124.

North Carolina.—Southerland v. Wilmington, etc., R. Co., 106 N. Car. 100.

North Dakota.—Short v. Northern Pac. Elevator Co., 1 N. Dak. 159.

Pennsylvania.—Clark v. Baker, 2 Whart. (Pa.) 340; Robeson v. Schuylkill Nav. Co., 3 Grant's Cas. (Pa.) 187; Hough v. Doyle, 4 Rawle (Pa.) 291; Magill v. Kauffman, 4 S. & R. (Pa.) 317, 8 Am. Dec. 713; Glaser v. Reno, 6 S. & R. (Pa.) 206; Northwestern Mut. L. Ins. Co. v. Roth, 118 Pa. St. 329; Bank of Northern Liberties v. Davis, 6 W. & S. (Pa.) 285; Fawcett v. Bigley, 59 Pa. St. 411; Stewart v. Huntingdon Bank, 11 S. & R. (Pa.) 269, 14 Am. Dec. 628; Pennsylvania R. Co. v. Books, 57 Pa. St. 339; Patton v. Minesinger, 25 Pa. St. 393; Pennsylvania R. Co. v. Titusville, etc., Plank Road Co., 71 Pa. St. 350; Grim v. Bonnell, 78 Pa. St. 152; Erie, etc., R. Co. v. Smith, 125 Pa. St. 259, 11 Am. St. Rep. 895; Bigley v. Williams, 80 Pa. St. 116; Huntingdon R., etc., Co. v. Decker, 82 Pa. St. 119; American Steamship Co. v. Landreth, 102 Pa. St. 136, 48 Am. Rep. 196.

South Carolina.—Patterson v. South Carolina R. Co., 4 S. Car. 153; Aiken v. Western Union Tel. Co., 5 S. Car. 358; Petrie v. Columbia, etc., R. Co., 27 S. Car. 63; Click v. Hamilton, 7 Rich. (S. Car.) 65; Raiford v. French, 11 Rich. (S. Car.) 369.

South Dakota.—Wendt v. Chicago, etc., R. Co. (S. Dak., 1893), 57 N. W. Rep. 226.

Tennessee.—Cobb v. Johnson, 2 Sneed (Tenn.) 73.

Texas.—Gulf, etc., R. Co. v. York, 74 Tex. 364; Dillingham v. Anthony, 73 Tex. 47; Laughlin v. Fidelity Mut. L. Assoc. (Tex. Civ. App., 1894), 28 S. W. Rep. 411; Gulf, etc., R. Co. v. Southwick (Tex. Civ. App., 1895), 30 S. W. Rep. 592.

Virginia.—Lake v. Tyree, 90 Va. 719; Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328.

Washington.—Weideman v. Tacoma, etc., R. Co., 7 Wash. 517.

Wisconsin.—Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Hazleton v. Union Bank,

unless they are so immediately connected with it as necessarily to form part

32 Wis. 36; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17.

Compare *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Dodge v. Bache*, 57 Pa. St. 425; *Union R.*, etc., *Co. v. Riegel*, 73 Pa. St. 72.

Under this rule, statements by railroad conductors, brakemen, etc., as to the cause of an accident, made before or after the accident, are generally excluded. *Mobile*, etc., *R. Co. v. Ashcraft*, 48 Ala. 15; *East Tennessee*, etc., *R. Co. v. Maloy*, 77 Ga. 237; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348; *Robinson v. Fitchburg*, etc., *R. Co.*, 7 Gray (Mass.) 92; *Furst v. Second Ave. R. Co.*, 72 N. Y. 542; *Southerland v. Wilmington*, etc., *R. Co.*, 106 N. Car. 100.

In *Southerland v. Wilmington*, etc., *R. Co.*, 106 N. Car. 100, it was held that the error in the admission of such evidence is not cured by the fact that the engineer, having been introduced as witness by the defendant, admitted on cross-examination that he made such admissions.

Thus, in an action against defendant for the death of an engineer on account of a defective track, it was held that evidence of what the section foreman of the track at the place where the accident occurred said, at a time other than that of the accident, as to the dangerous condition of the track at that point, was not admissible as part of the *res gestæ*. *Worden v. Humeston*, etc., *R. Co.*, 72 Iowa 201.

In an action for the specific performance of a parol agreement entered into by an agent on behalf of his principal, declarations by such agent a year or two after the consummation of the agreement with respect to its terms are inadmissible against the principal. *Clunie v. Sacramento Lumber Co.*, 67 Cal. 313.

In an action by a telephone company against a railroad company for removing the plaintiff's telephone poles, the declarations of a servant of the defendant made before the removing of the poles that he "would obey orders, if it broke owners," was admitted as showing the animus of the defendant. *International*, etc., *R. Co. v. Telephone*, etc., *Co.*, 69 Tex. 277, 5 Am. St. Rep. 45.

It was held in *Adams v. Humphreys*, 54 Ga. 496, that the declarations of an agent are not competent evidence against his principal, where it does not appear when they were made.

In *Dillingham v. Anthony*, 73 Tex. 47, it was held that where error has been committed by admitting evidence of statements not belonging to the *res gestæ*, it may be cured by withdrawing it and instructing the jury not to consider it, where there is other evidence sufficient to prove the fact.

In *Donnel v. Clark*, 12 Kan. 154, it was held that where it clearly appears that statements not belonging to the *res gestæ* could not have wrought any prejudice to the rights of the plaintiff in error, the error will not compel a reversal of the judgment.

Where Special Authority to Admit is Given.—One may be specially delegated to make an admission about a past transaction. *Burt v.*

Palmer, 5 Esp. 145; *Coates v. Bainbridge*, 5 Bing. 58, 15 E. C. L. 368; *Pemigewasset Bank v. Rogers*, 18 N. H. 259; *Stewart v. Huntingdon Bank*, 11 S. & R. (Pa.) 269, 14 Am. Dec. 628. See also *Hewes v. Germain Fruit Co. (Cal., 1895)*, 39 Pac. Rep. 853.

In *Cole v. Bean*, 1 Arizona 377, it was held that the declarations of an agent, made after the transaction in question, are admissible if his agency continues. See *St. Louis Wire-mill Co. v. Consolidated Barb-wire Co.*, 46 Kan. 773.

Admissions by General Agents as to Past Transactions.—There is some diversity of opinion among the authorities as to whether a party acting in the course of a general agency can make admissions in reference to past transactions to the prejudice of his principal. The following authorities seem to support the affirmative side of this question: 2 Whart. Ev., § 1177; *Kirkstall Brewery Co. v. Furness R. Co.*, L. R. 9 Q. B. 471; *Dowdall v. The Pennsylvania R. Co.*, 13 Blatchf. (U. S.) 403; *Buchanan v. Collins*, 42 Ala. 419; *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Malecek v. Tower Grove*, etc., *R. Co.*, 57 Mo. 21; *State Bank v. Wilson*, 1 Dev. (N. Car.) 484; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Charleston*, etc., *R. Co. v. Blake*, 12 Rich. (S. Car.) 634; *Austin v. Chittenden*, 33 Vt. 553; *Curtis v. Ingham*, 2 Vt. 287. See *Garth v. Howard*, 8 Bing. 451, 21 E. C. L. 341; *Barry v. Foyles*, 1 Pet. (U. S.) 311; *St. Louis*, etc., *R. Co. v. Weaver*, 35 Kan. 413; *Hutchings v. St. Louis*, etc., *Canal*, etc., *Co. (Supreme Ct.)*, 22 N. Y. Supp. 719.

In 2 Whart. Ev., § 1177, the author says that "a party who commits the management of his whole business or of a particular line of his business to an agent, is bound by the admissions of the agent as to his entire business committed to him; nor, when the agent is a general agent, representing his principal continuously, is it necessary for the admission of such declarations that they should either have been part of the *res gestæ* or should have been specially authorized."

When it appeared that the superintendent and secretary of a corporation were its general agents in the transaction of its business, their declarations concerning a debt contracted previously and within the scope of their authority were held properly admissible, under an exception to the rule excluding the declarations of an agent made subsequently to the transaction to which they relate. *Webb v. Smith*, 6 Colo. 366.

It is proper to state, however, that in several of the cases above cited, though the statements had reference to past transactions, the ground mentioned for the decision was that the admissions were made in connection with the doing of some act within the scope of the agent's authority, and thus constituted a part of the *res gestæ*. See *Kirkstall Brewery Co. v. Furness R. Co.*, L. R. 9 Q. B. 471; *St. Louis*, etc., *R. Co. v. Weaver*, 35 Kan.

of its history, in which case they may be competent.¹

b. ATTORNEYS—Rule as to Agents Generally Applies.—An attorney is, for the purposes of the trial, the agent of his client.² Like other agents, his admissions must be made within the scope of his authority³ and during the continuance of his agency,⁴ and his agency must be established by proof *aliunde*.⁵

Admissions in Common Conversation.—His admissions in common conversation are not to be received in evidence against his client.⁶

Distinct and Formal Admissions.—But his distinct and formal admissions or declarations, made for the purpose of dispensing with the proof of some fact,⁷

413; *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Austin v. Chittenden*, 33 Vt. 553. See also *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 38 N. J. L. 13.

Thus, in the case of *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450, it was held, in an action against the corporation for the loss of a trunk, that the admissions of the conductor, baggage master, or station master, as to the manner of the loss, made in answer to inquiries of the passenger, the next morning after the loss, were admissible in evidence against the corporation, for the reason, in the words of the court, that "it was part of the duty of those agents to deliver the baggage of passengers, and to account for the same if missing, provided inquiries for it were made within a reasonable time."

For Authorities Supporting the Opposite View, see *Westcot v. Bradford*, 4 Wash. (U. S.) 492; *Haven v. Brown*, 7 Me. 421; *Franklin Bank v. Steward*, 37 Me. 519; *City Bank v. Bateman*, 7 Har. & J. (Md.) 104; *Smith v. North Carolina R. Co.*, 68 N. Car. 107; *McComb v. North Carolina R. Co.*, 70 N. Car. 180; *Williams v. Southern Bell Telephone, etc., Co.*, 116 N. Car. 558; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17. See also *Stewartson v. Watts*, 8 Watts (Pa.) 392.

In *Stenhouse v. Charlotte, etc., R. Co.*, 70 N. Car. 542, it was held that evidence of what an agent said in regard to a transaction already past, but while his agency for similar objects still continued, was inadmissible to prove the contract itself.

1. *Bigley v. Williams*, 80 Pa. St. 116; *Fawcett v. Bigley*, 59 Pa. St. 411. See *Aldridge v. Midland Blast Furnace Co.*, 78 Mo. 559; *Thalhimer v. Brinckerhoff*, 4 Wend. (N. Y.) 398, 21 Am. Dec. 155. Compare *American Steamship Co. v. Landreth*, 102 Pa. St. 136, 48 Am. Rep. 196.

2. *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163; *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72. See, generally, the title ATTORNEY AND CLIENT.

3. **Must be Made within Scope of Authority.**—*Floyd v. Hamilton*, 33 Ala. 235; *Solomon R. Co. v. Jones*, 34 Kan. 443; *Saunders v. McCarthy*, 8 Allen (Mass.) 45; *Lord v. Bigelow*, 124 Mass. 185; *Murray v. Chase*, 134 Mass. 92; *Proctor v. Old Colony R. Co.*, 154 Mass. 251; *Walden v. Bolton*, 55 Mo. 405; *Adee v. Howe*, 15 Hun (N. Y.) 20; *Doe v. Witherspoon*, 10 Ired. (N. Car.) 191; *Reineman v. Blair*, 96 Pa. St. 155; *Morris v. Balkham*, 75 Tex. 111, 16 Am. St. Rep. 874; *Underwood v.*

Hart, 23 Vt. 120; *Herbert v. Alexander*, 2 Call (Va.) 499.

The Malice of a Plaintiff in an attachment suit cannot be shown by the admissions of his attorney. *Floyd v. Hamilton*, 33 Ala. 235.

An Unauthorized Letter by an Attorney to a person against whom the client intends to bring suit is not binding on him. *Wagstaff v. Wilson*, 4 B. & Ad. 339, 24 E. C. L. 70; *Solomon R. Co. v. Jones*, 34 Kan. 443; *Cassels v. Usry*, 51 Ga. 622.

An Affidavit by an Attorney of Record as to what an absent witness would testify, made to obtain a continuance, was held inadmissible against his client where the witness afterwards attended the trial and testified differently, the client not having authorized the affidavit.

4. **Must be Made during the Agency.**—*Walden v. Bolton*, 55 Mo. 405; *Janeway v. Skeritt*, 30 N. J. L. 97; *First Nat. Bank v. Anderson*, 28 S. Car. 144.

When Made before Suit.—Where it appears that the attorney was already retained to appear in the cause, his admissions may bind the client though made before suit. *Marshall v. Cliff*, 4 Campb. 134. See *Wagstaff v. Wilson*, 4 B. & Ad. 339, 24 E. C. L. 70; *Solomon R. Co. v. Jones*, 34 Kan. 443.

5. **How Fact of Agency must be Established.**—2 Whart. Ev. (3d ed.), § 1187; *Wagstaff v. Wilson*, 4 B. & Ad. 339, 24 E. C. L. 70; *Burghart v. Angerstein*, 6 C. & P. 690, 25 E. C. L. 600; *Pope v. Andrews*, 9 C. & P. 564, 38 E. C. L. 230; *Worley v. Hineman*, 6 Ind. App. 240.

6. **Admissions in Common Conversation Not Receivable.**—*Young v. Wright*, 1 Campb. 139; *Doe v. Richards*, 2 C. & K. 216, 61 E. C. L. 216; *Watson v. King*, 3 C. B. 608, 54 E. C. L. 608; *Rockwell v. Taylor*, 41 Conn. 55; *Thomas v. Kinsey*, 8 Ga. 421; *Holten v. Lake County*, 55 Ind. 194; *Treadway v. Sioux City, etc., R. Co.*, 40 Iowa 526; *McKeen v. Gammon*, 33 Me. 187; *Saunders v. McCarthy*, 8 Allen (Mass.) 45; *Ferson v. Wilcox*, 19 Minn. 449; *Angle v. Bilby*, 25 Neb. 595. See also *Truby v. Seybert*, 12 Pa. St. 105; *Murray v. Chase*, 134 Mass. 92.

To Entitle a Remark of Counsel to the character of an admission, it must have some degree of deliberation, purpose, and recognition for that end. *Adee v. Howe*, 15 Hun (N. Y.) 20.

7. **Admissions Made for Purpose of Dispensing with Proof.**—*Young v. Wright*, 1 Campb. 139; *Langley v. Oxford*, 1 M. & W. 508; *McRea v. Insurance Bank*, 16 Ala. 755; *Mather v. Phelps*, 2 Root (Conn.) 150, 1 Am. Dec. 65; *Perry v. Simpson Waterproof Mfg. Co.*, 40

or to modify the severity of some rule of practice,¹ are receivable.

When Receivable on Subsequent Trial.—And such admissions may be proved even on a subsequent trial of the cause, if, from the language used at the time and the surrounding circumstances, they appear not to have been limited to the former trial.² But, as a general rule, the admissions of fact by an attorney in one action are not receivable against the client in a subsequent action between him and a stranger.³

Conn. 313; *Treadway v. Sioux City, etc., R. Co.*, 40 Iowa 526; *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377; *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40; *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun (N. Y.) 365. *Compare* *Milbank v. Jones* (Super. Ct.), 17 N. Y. Supp. 464.

Mr. Justice Field, in giving the opinion in *Oscanyan v. Arms Co.*, 103 U. S. 261, said: "In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof."

Criminal Cause.—In *Clayton v. State*, 4 Tex. App. 515, it was held that in criminal cases counsel cannot make admissions of material facts in the government's case, to dispense with proof thereof. *Compare* *People v. Garcia*, 25 Cal. 531.

For Admission by Attorney in Pleading, see *infra*, this title, *Judicial Admissions*.

1. 1 Greenl. on Ev., § 186; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *Hanson v. Hoitt*, 14 N. H. 56.

2. **When Admissions may be Proved on Subsequent Trial of the Cause.**—2 Whart. on Ev., § 1184; *Doe v. Bird*, 7 C. & P. 6, 32 E. C. L. 415; *Langley v. Oxford*, 1 M. & W. 508; *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313; *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163; *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40; *Woodcock v. Calais*, 68 Me. 246; *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 96, 43 Am. Dec. 300; *Clark v. Fox, etc., Imp. Co.*, 20 Wis. 421. *Compare* *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *Baylor v. Smithers*, 1 T. B. Mon. (Ky.) 6.

Dixon, C. J., in delivering the opinion of the court in *Weisbrod v. Chicago, etc., R. Co.*, 20 Wis. 421, said: "Such admissions are frequently made for the purpose of saving time where counsel are confident of success upon some other point; and when so made they are always understood to have reference to the trial then pending, and not as stipulations which shall bind at any future trial." See also Whart. on Ev., § 1184. *Compare* *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313.

In *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 97, 43 Am. Dec. 300, it was held that an agreement of facts made and filed in a cause prior to its first trial, which after judgment was reversed upon appeal, is com-

petent evidence upon a second trial under a *procedendo*.

Informal Admissions at a Former Trial are not evidence on a subsequent trial. *Adee v. Howe*, 15 Hun (N. Y.) 20.

Whether the Admissions are General or Intended for Former Trial Only, a Question for the Court.—In *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40, it was stated as a rule that an admission made at the first trial, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding judge, in the exercise of his discretion, thinks proper to relieve the party from it.

But in *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 397, 42 Am. Rep. 163, the following language was used: "But whether the consent or admission or waiver is to be considered as made for the purposes of that trial only, or as a general admission, is ordinarily a question of fact to be determined by the jury, and so in this case the court placed it. It is true that sometimes the waiver or admission may be so obviously intended for that trial alone that the court may properly so instruct the jury, and it may also be so obviously intended as a general admission that the court may instruct the jury to treat it as such—as, for instance, where the parties sign an agreed statement of facts. But perhaps more often, especially in reference to oral admissions, it is uncertain whether they were intended as general admissions, like admissions in a pleading, by which the party intends to stand at all times, or as a mere waiver of proof for the purposes of facilitating the pending trial. Then the tribunal to determine what was the import and intent of the admission is the jury before which the case is then pending for hearing."

3. *Phillips* on Ev. 508, note 141 (*Cowen & Hill's Notes*); *Tompkins v. Ashby, M. & M.* 32, 22 E. C. L. 239; *Wilkins v. Stidger*, 22 Cal. 232, 83 Am. Dec. 64; *Harrison v. Baker*, 5 Litt. (Ky.) 250; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120; *Nichols v. Jones*, 32 Mo. App. 657; *Elting v. Scott*, 2 Johns. (N. Y.) 157; *Morris v. Balkham*, 75 Tex. 111, 16 Am. St. Rep. 874.

Where an attorney in stating the case said in the presence of his client that his client would testify to certain facts, it was held that this amounted to an admission of those facts by his client which could be used against him in a suit by a third party; as the statement was an assertion of a matter of fact made by the immediate representative of the client in the course and scope of such agency, for the benefit of such client, in his presence and with his concurrence. *Lord v. Bigelow*, 124

The Admissions of an Attorney's Clerk in the performance of his duties will be regarded as the admissions of the attorney.¹

c. HUSBAND AND WIFE—Husband's Admissions as to Wife's Separate Estate.—The admissions of the husband respecting the wife's separate estate are not competent evidence against the wife except where he acts as her agent and within the scope of his authority.²

Wife's Admissions as Affecting Husband.—And it may be laid down as a general principle that the admissions of the wife are not binding upon the husband,³

Mass. 185. *Compare Wilkins v. Stidger*, 22 Cal. 232, 83 Am. Dec. 64; *Adee v. Howe*, 15 Hun (N. Y.) 20.

Acquiescence.—In *Nichols v. Jones*, 32 Mo. App. 657, it was held that the admissions of fact by an attorney in one action are not admissible in evidence against the client in another action unless the client acquiesced in the admissions.

1. *Taylor v. Willans*, 2 B. & Ad. 845, 22 E. C. L. 195; *Standage v. Creighton*, 5 C. & P. 406, 24 E. C. L. 383; *Taylor v. Forster*, 2 C. & P. 195, 12 E. C. L. 85; *Griffiths v. Williams*, 1 T. R. 710; *Power v. Kent*, 1 Cow. (N. Y.) 211.

2. **Wife's Separate Estate—Husband's Admissions—Alabama.**—*Murphree v. Singleton*, 37 Ala. 412; *Brunson v. Brooks*, 68 Ala. 248.

Illinois.—*Pierce v. Hasbrouck*, 49 Ill. 24.

Maryland.—*Bradford v. Williams*, 2 Md. Ch. 1.

Massachusetts.—*Aldrich v. Earle*, 13 Gray (Mass.) 578; *Hunt v. Poole*, 139 Mass. 224.

Michigan.—*Campbell v. Quackenbush*, 33 Mich. 287.

Minnesota.—*Keller v. Sioux City, etc.*, R. Co., 27 Minn. 178.

Missouri.—*State v. Chatham Nat. Bank*, 19 Mo. App. 482; *Fox v. Windes* (Mo., 1895), 30 S. W. Rep. 323.

Nebraska.—*Woodruff v. White*, 25 Neb. 745.

New York.—*Deck v. Johnson*, 1 Abb. App. Dec. (N. Y.) 497; *Watkins Second Nat. Bank v. Miller*, 2 Thomp. & C. (N. Y.) 104.

North Carolina.—*Kirkman v. Greensboro Bank*, 77 N. Car. 394.

Pennsylvania.—*Smith v. Scudder*, 11 S. & R. (Pa.) 325; *Martin v. Rutt*, 127 Pa. St. 380; *Evans v. Evans*, 155 Pa. St. 572; *Leedom v. Leedom*, 160 Pa. St. 273.

Texas.—*McKay v. Treadwell*, 8 Tex. 176; *Clapp v. Engledow*, 82 Tex. 290.

Vermont.—*Pierce v. Pierce*, 66 Vt. 369.

Wisconsin.—*Livesley v. Lasalette*, 28 Wis. 38.

See also *Holly v. Flournoy*, 54 Ala. 99; *Holton v. Carter*, 90 Ga. 299; *Kingen v. State*, 50 Ind. 557; *Dawson v. Hall*, 2 Mich. 390; *McIntyre v. Costello* (Supreme Ct.), 6 N. Y. Supp. 397.

The admission of the husband of the receipt of the wife's property which he had a right to receive is admissible in evidence against her after his death. *Dodge v. Manning*, 11 Paige (N. Y.) 334.

Where it appears that the management of real property, standing in the name of a married woman, is left by her entirely with her husband, who is in fact her general agent, his declarations as to the consideration for

her conveyance of the property are admissible in evidence against her. *Barton v. Lynch*, 69 Hun (N. Y.) 1.

After the Husband's Agency has Ceased, his admissions are not receivable against the wife, but they are admissible against himself. *Taylor v. Deverell*, 43 Kan. 469.

3. **Wife's Admissions as Affecting the Husband—England.**—*Clifford v. Burton*, 1 Bing. 199, 8 E. C. L. 471; *Emerson v. Blonden*, 1 Esp. 142; *Carey v. Adkins*, 4 Campb. 92; *Meredith v. Footner*, 11 M. & W. 202.

Alabama.—*Hussey v. Elrod*, 2 Ala. 339, 36 Am. Dec. 420; *Rochelle v. Harrison*, 8 Port. (Ala.) 351; *Perry v. Graham*, 18 Ala. 822.

Arkansas.—*Burnett v. Burkhead*, 21 Ark. 77.

Connecticut.—*Turner v. Coe*, 5 Conn. 94.

Illinois.—*Downing v. Mayes*, 153 Ill. 330.

Indiana.—*Coryell v. Stone*, 62 Ind. 307.

Maine.—*Parsons v. Bangor*, 61 Me. 437.

Massachusetts.—*Johnson v. Sherwin*, 3 Gray (Mass.) 375.

Michigan.—*Hunt v. Strew*, 33 Mich. 85; *Rose v. Chapman*, 44 Mich. 312; *Burns v. Kirkpatrick*, 91 Mich. 364.

Missouri.—*State v. Jaeger*, 66 Mo. 180.

Nebraska.—*Norfolk Nat. Bank v. Wood*, 33 Neb. 113.

New Hampshire.—*Pickering v. Pickering*, 6 N. H. 120.

New York.—*Lay Grae v. Peterson*, 2 Sandf. (N. Y.) 338; *Riley v. Suydam*, 4 Barb. (N. Y.) 222; *M'Lean v. Jagger*, 13 How. Pr. (Orange County Ct., N. Y.) 494; *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54.

North Carolina.—*May v. Little*, 3 Ired. (N. Car.) 27, 38 Am. Dec. 707.

Pennsylvania.—*Mackinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; *Murphy v. Hubert*, 16 Pa. St. 50; *Reamer's Appeal*, 18 Pa. St. 510; *Bedford's Appeal*, 40 Pa. St. 18; *Bergman v. Roberts*, 61 Pa. St. 497; *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 233.

South Carolina.—*Colgan v. Phillips*, 7 Rich. (S. Car.) 359.

Vermont.—*Churchill v. Smith*, 16 Vt. 560; *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532; *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281.

See also *St. Louis Fourth Nat. Bank v. Nichols*, 43 Mo. App. 385; *Hill v. Smith*, 6 Tex. Civ. App. 312.

During Agency.—The admissions must be made during the continuance of the agency. *Chamberlain v. Davis*, 33 N. H. 122; *Thomas v. Hargrave*, *Wright* (Ohio) 595.

Within Scope of Agency.—The admissions must be made within the scope of the agency. *Rose v. Chapman*, 44 Mich. 312.

In *Goodrich v. Tracy*, 43 Vt. 314, 5 Am.

even where he sues in her right,¹ unless she has authority to make them as his agent.

Authority must be Established.—In the case of both husband and wife authority must be shown to have been actually given,² or necessarily implied from the circumstances under which they act,³ before such admissions can be received.

d. PARTIES REFERRED TO FOR INFORMATION—Rule Stated.—Where a party has referred another to a third person as authorized to give information con-

Rep. 281, it was held that where the agency of a wife for her husband extended only to the performance of certain specific acts of a general transaction, her admissions in respect to other matters connected with the general transaction were not admissible in evidence against the husband.

The declarations of the wife in reference to the title of a slave over whom she merely exercised control as a domestic in the family were not admissible against the husband. *Perry v. Graham*, 18 Ala. 822.

In an action for damages from the bite of a dog, declarations of the defendant's wife are inadmissible, as evidence, against the husband, although the injury occurs in a part of the house under the particular charge of the wife. Her performance of domestic duties therein does not constitute her the agent of the husband in such a sense as to render her admissions evidence against him. *Logue v. Link*, 4 E. D. Smith (N. Y.) 63.

1. When Husband Sues in Right of Wife—England.—*Kelly v. Small*, 2 Esp. 716; *Hill v. Hill*, 2 Stra. 1094; *Hodgkinson v. Fletcher*, 4 Campb. 70; *Alban v. Pritchett*, 6 T. R. 680.

Alabama.—*Hussey v. Elrod*, 2 Ala. 339, 36 Am. Dec. 420; *Jordan v. Hubbard*, 26 Ala. 433.

Arkansas.—See *Funkhouser v. Pogue*, 13 Ark. 295; *Burnett v. Burkhead*, 21 Ark. 77.

Connecticut.—*Coe v. Turner*, 5 Conn. 93; *White v. Portland*, 63 Conn. 18.

Indiana.—*Lasselle v. Brown*, 8 Blackf. (Ind.) 221.

Kentucky.—*Burgen v. Tribble*, 2 Dana (Ky.) 383.

Maine.—*White v. Holman*, 12 Me. 157.

Massachusetts.—*McGregor v. Wait*, 10 Gray (Mass.) 72, 69 Am. Dec. 305.

New Jersey.—*Ross v. Winners*, 6 N. J. L. 366.

New York.—*Lay Grae v. Peterson*, 2 Sandf. (N. Y.) 338.

Pennsylvania.—*Peck v. Ward*, 18 Pa. St. 506.

South Carolina.—*Hawkins v. Hatton*, 2 Nott & M. (S. Car.) 374.

Vermont.—*Churchill v. Smith*, 16 Vt. 560.

Virginia.—*Sheppard v. Starke*, 3 Munf. (Va.) 29.

Compare *Hackman v. Flory*, 16 Pa. St. 196; *Hollinshead v. Allen*, 17 Pa. St. 275.

But if, pending a Suit against Husband and Wife, the husband die and the suit proceed against the wife alone, her admissions of the debt made during coverture are competent evidence against her. *Lasselle v. Brown*, 8 Blackf. (Ind.) 221.

The Declarations of the Wife after Marriage

are not competent testimony to sustain a suit against husband and wife for the debt of the wife while sole. *Lay Grae v. Peterson*, 2 Sandf. (N. Y.) 338; *Ross v. Winners*, 6 N. J. L. 366. See *Churchill v. Smith*, 16 Vt. 560.

In an Action in which the Husband is Answerable for damages done by the wife, admissions of the wife are not receivable in evidence. *Hawkins v. Hatton*, 2 Nott & M. (S. Car.) 374; *Burgen v. Tribble*, 2 Dana (Ky.) 383.

An Acknowledgment by a Feme Covert is not sufficient to establish an account against her husband, though it be for articles furnished her before the marriage. *Sheppard v. Starke*, 3 Munf. (Va.) 29.

In an Action Brought to Recover Damages for an assault and battery by the wife of the defendant on the wife of the plaintiff, the admissions of the wife of the former cannot be given in evidence to charge her husband. *Hussey v. Elrod*, 2 Ala. 339, 36 Am. Dec. 420.

But the Declarations of a Wife, Made before Her Marriage, respecting her right to property, have been admitted in evidence against her husband. *Brush v. Blanchard*, 19 Ill. 31; *Claussen v. La Franz*, 1 Iowa 226; *Willis v. Snelling*, 6 Rich. (S. Car.) 280.

And in *Hollinshead v. Allen*, 17 Pa. St. 275, it was held that the voluntary declaration of a married woman, made since her marriage, that real estate claimed by her as her own separate estate was conveyed to her by her father in fraud of creditors, are admissible in evidence on the part of the plaintiff in an ejectment against her and her husband and her grantee. *Compare* *White v. Holman*, 12 Me. 157.

2. Authority must be Proved.—*Whitescarver v. Bonney*, 9 Iowa 480; *Donaldson v. Everhart*, 50 Kan. 718; *Butler v. Price*, 115 Mass. 578; *Hunt v. Poole*, 139 Mass. 224; *Deck v. Johnson*, 1 Abb. App. Dec. (N. Y.) 497; *Watkins Second Nat. Bank v. Miller*, 2 Thomp. & C. (N. Y.) 104; *May v. Little*, 3 Ired. (N. Car.) 27, 38 Am. Dec. 707; *Thomas v. Hargrave*, *Wright* (Ohio) 595; *Gilson v. Gilson*, 16 Vt. 464. See *Hunt v. Strew*, 33 Mich. 85; *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 233; *Colgan v. Philips*, 7 Rich. (S. Car.) 359.

In *Platner v. Platner*, 78 N. Y. 99, it was held that while the husband's agency must be established by proof *aliunde*, whether the declaration should be testified to before his agency was proved was a matter for the discretion of the trial court.

3. Rochelle v. Harrison, 8 Port. (Ala.) 351; *Hackman v. Flory*, 16 Pa. St. 196.

cerning a negotiation or disputed matter, he will be bound by the admissions of such referee to the same effect as if they were made by himself.¹

Admissions as to Other Matters.—But if a third person is referred to for information in regard to certain facts his admissions as to other facts are not to be received in evidence.²

6. Principal against Surety—General Rule.—The declarations of the principal bind the surety when they form part of the *res gestæ* of the transaction in reference to which the surety has covenanted.³

1. Party Referring Bound by Admissions of Referee—England.—*Williams v. Innes*, 1 Campb. 364; *Hood v. Reeve*, 3 C. & P. 532, 14 E. C. L. 432; *Burt v. Palmer*, 5 Esp. 145; *Daniel v. Pitt*, 6 Esp. 74.

United States.—*Allen v. Killinger*, 8 Wall. (U. S.) 480.

Connecticut.—*Chadsey v. Greene*, 24 Conn. 562.

Indiana.—*Wabash, etc., Canal v. Cokely*, 5 Ind. 164; *Over v. Schiffing*, 102 Ind. 191.

Maine.—*Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Bailey v. Blanchard*, 62 Me. 168.

Michigan.—*Rosenbury v. Angell*, 6 Mich. 508.

Missouri.—*Price v. Lederer*, 33 Mo. App. 426.

New Hampshire.—*Folsom v. Batchelder*, 22 N. H. 47.

New York.—*Wehle v. Spelman*, 1 Hun (N. Y.) 634; *Bedell v. Commercial Mut. Ins. Co.*, 3 Bosw. (N. Y.) 147; *Sands v. Shoemaker*, 4 Abb. App. Dec. (N. Y.) 149; *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561.

South Carolina.—*Delesline v. Greenland*, 1 Bay (S. Car.) 458.

Utah.—*People v. Clauson*, 2 Utah 502.

In *Barnard v. Macy*, 11 Ind. 536, it was held that in a suit against heirs for specific performance of a contract of their deceased ancestor for the conveyance of land, the defendants may not give in evidence a conversation held in the presence of the plaintiff between the witness and the ancestor in regard to the ownership of the land, unless the witness was referred by the plaintiff to the deceased for information concerning some disputed point, or uncertain question in regard thereto.

In an action to recover damages sustained by the plaintiff in consequence of the unlawful taking of her property by the defendants, proof that a witness was referred by the plaintiff to her brother as to the fact of the quantity of goods in the store was held to be admissible. *Wehle v. Spelman*, 1 Hun (N. Y.) 634.

Where there is No Intention to be Bound—No Agency.—But where a party claiming property alleged to have been transferred to him for the purpose of defrauding creditors was inquired of by a creditor as to his responsibility, and referred the creditor to the business men of a place where he had formerly resided to ascertain in regard to such responsibility, it was held that this reference did not authorize the statements of the business men at such place made in answer to the inquiries of the creditor to be given in evidence on behalf of the officer who subse-

quently attached such property at the suit of the creditors, it appearing from the whole transaction that no authority in the nature of an agency was bestowed. *Rosenbury v. Angell*, 6 Mich. 508.

Where it does not appear that the attorney to whom the president of a railroad company referred plaintiff, who had a claim against the company, had any authority to bind the company by his admissions, evidence of an admission of liability by him is incompetent. *Proctor v. Old Colony R. Co.*, 154 Mass. 251.

Interpreter of the Party's Selection.—Under this rule the statements of an interpreter as to what a party says are treated as the statements of the party himself. *Fabrigas v. Mostyn*, 11 St. Tr. 171; *Nadau v. White River Lumber Co.*, 76 Wis. 120, 20 Am. St. Rep. 29; *Blazinski v. Perkins*, 77 Wis. 9. *Compare Territory v. Big Knot on Head*, 6 Mont. 242.

Court Interpreter.—But this rule does not apply to the case of an interpreter of a witness in court, he not being the agent of the party calling him, but an officer of court. *Scheerer v. Harber*, 36 Ind. 536.

Admissions through Telephone Operator.—It has been held that admissions made through a telephone operator, like those made through an interpreter, bind the party making them, on the ground that they are made through an agent. *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Oskamp v. Gadsden*, 35 Neb. 7.

2. Duval v. Covenhoven, 4 Wend. (N. Y.) 564; *Lambert v. People*, 6 Abb. N. Cas. (N. Y. Ct. App.) 181; *Allen v. Killinger*, 8 Wall. (U. S.) 480.

One who refers another, for information on a matter in dispute, to a certain agent of a corporation, does not include in the scope of his reference correspondence thereon had between said agent and other agents more directly concerned in the matter. *Adler-Goldman Commission Co. v. Adams Express Co.*, 53 Mo. App. 284.

3. General Rule as to Declarations of Principal.—*Ingle v. Collard*, 1 Cranch (C. C.) 134; *State v. Newton*, 33 Ark. 276; *Bondurant v. State Bank*, 7 Ala. 835; *Placer County v. Dickerson*, 45 Cal. 12; *Hotchkiss v. Lyon*, 2 Blackf. (Ind.) 222; *Shelby v. Governor*, 2 Blackf. (Ind.) 289; *Lane v. State*, 27 Ind. 108; *Mahaska County v. Ingalls*, 16 Iowa 81; *Lee v. Brown*, 21 Kan. 458; *McShane v. Howard Bank*, 73 Md. 135; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *McKim v. Blake*, 139 Mass. 593; *Cheltenham Fire-brick Co. v. Cook*, 44 Mo. 29; *Union Sav. Assoc. v. Edwards*, 47 Mo. 445; *Father Mathew Soc. v. Fitzwilliams*, 84 Mo. 406; *Hinkley v. Davis*, 6 N. H. 210; *Hatch v.*

Declarations before and after the Transaction.—But his declarations made after the transaction,¹ or before it began,² will not be admitted in evidence, unless it is shown that the principal made them under the authority of the surety.³

7. Persons Jointly Interested—*a. GENERALLY*—**Rule Stated.**—Where no fraud or collusion appears,⁴ the admissions of persons jointly interested are receiv-

Elkins, 65 N. Y. 494; *Singer Mfg. Co. v. Coon* (C. Pl.), 30 N. Y. Supp. 232; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475. See also *Foxcroft v. Nevens*, 4 Me. 72; *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80; *Com. v. Kendig*, 2 Pa. St. 448; *Richardson v. Hitchcock*, 28 Vt. 758; *Atlas Bank v. Brownell*, 9 R. I. 168; *Walker v. Pierce*, 21 Gratt. (Va.) 722. *Compare* *Simonton v. Boucher*, 2 Wash. (U. S.) 473; *Respublica v. Davis*, 3 Yeates (Pa.) 128, 2 Am. Dec. 366; *Lowndes v. Pinckney*, 1 Rich. Eq. (S. Car.) 155; *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498.

Bank Clerk—Entries.—In an action upon a bond given to bankers conditioned for the fidelity of a clerk, entries of the receipt of sums of money, made by the clerk in books kept by him in the discharge of his duties as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money. *Whitnash v. George*, 8 B. & C. 556, 15 E. C. L. 295; *Middleton v. Melton*, 10 B. & C. 317, 21 E. C. L. 84. See *Williamsburg City F. Ins. Co. v. Frothingham*, 122 Mass. 391.

Where the Surety is Sued for the Default of His Principal, and gives the latter notice of the pendency of the suit, the admissions of the principal are evidence against the surety. 1 *Greenl. Ev.* (24th ed.), § 188.

Admissions of Surety.—In *Chapel v. Washburn*, 11 Ind. 395, it was held that the admissions of the surety are admissible against both principal and surety on the ground that they were made by a party who had a joint interest in the matter of the suit, and was jointly liable upon the note sued on. See also *Brown v. Munger*, 16 Vt. 12.

1. Admissions after the Transaction—Alabama.—*Bondurant v. State Bank*, 7 Ala. 830.

Indiana.—*Hotchkiss v. Lyon*, 2 Blackf. (Ind.) 222; *Shelby v. Governor*, 2 Blackf. (Ind.) 289; *Keegan v. Carpenter*, 47 Ind. 597.

Kansas.—*Lee v. Brown*, 21 Kan. 458.

Kentucky.—*Pollard v. Louisville, etc., R. Co.*, 7 Bush (Ky.) 597; *Cassity v. Robinson*, 8 B. Mon. (Ky.) 279.

Massachusetts.—*Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1.

Missouri.—*Union Sav. Assoc. v. Edwards*, 47 Mo. 445.

New York.—*Hill v. McKenzie*, 1 Hun (N. Y.) 110; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 404; *Hatch v. Elkins*, 65 N. Y. 494.

Tennessee.—*Wheeler v. State*, 9 Heisk. (Tenn.) 393; *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475; *Snell v. Allen*, 1 Swan (Tenn.) 208.

A Sheriff's Acknowledgment that He had Collected Money on an order of sale cannot be proved to sustain an action for the money on

the plaintiff's surety unless the acknowledgment was made whilst the sheriff was acting officially in relation to the receipt of the money. *Shelby v. Governor*, 2 Blackf. (Ind.) 289.

Where the Letter of a Person Admitting that he had received certain merchandise from the plaintiff to sell upon commission was written some time after the delivery, it is not evidence of the receipt of the merchandise against a third person to recover damages for having falsely represented the writer of the letter to be a man of property and integrity, etc. *Longenecker v. Hyde*, 6 Binn. (Pa.) 1; *Evans v. Beattie*, 5 Esp. 26.

The Admissions of a Defaulting Agent of a railroad company, after his discharge from the service of the company, are not admissible as evidence against a surety of such agent in an action on his bond for the faithful performance of his duties as agent. *Polard v. Louisville, etc., R. Co.*, 7 Bush (Ky.) 397. See also *Smith v. Whittingham*, 6 C. & P. 78, 25 E. C. L. 291; *Com. v. Brassfield*, 7 B. Mon. (Ky.) 447; *Union Sav. Assoc. v. Edwards*, 47 Mo. 445; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1; *Tenth Nat. Bank v. Darragh*, 3 Thomp. & C. (N. Y.) 138.

In an action on a bond averring that the covenants were broken, the admissions of the principal made after the act complained of are not admissible evidence against the surety. *White v. German Nat. Bank*, 9 Heisk. (Tenn.) 475.

The Record of a Judgment Confessed by the Principal has been held admissible as evidence of that fact in an action against the sureties. *Drummond v. Prestman*, 12 Wheat. (U. S.) 515. *Compare* *Beall v. Beck*, 3 Har. & M. (Md.) 242.

Where Suit is against the Principal and Sureties Combined, the admissions of the principal subsequent to the transaction will be evidence against himself, and the court should be asked to instruct the jury that such evidence should be disregarded so far as the sureties are concerned. *Union Sav. Assoc. v. Edwards*, 47 Mo. 444.

2. Cheltenham Fire-brick Co. v. Cook, 44 Mo. 29; *Dexter v. Clemans*, 17 Pick. (Mass.) 175.

3. Fenner v. Lewis, 10 Johns. (N. Y.) 38; *Meade v. M'Dowell* 5 Binn. (Pa.) 195. See *Bondurant v. State Bank*, 7 Ala. 831; *Hinkley v. Davis*, 6 N. H. 210.

In *Meade v. M'Dowell*, 5 Binn. (Pa.) 195, it was held that if the surety confides to the principal the power of making a contract, he confides to him the power of furnishing evidence of the contract, and if the contract is by parol, subsequent declarations of the party are evidence, though not conclusive.

4. Fraud or Collusion.—*Skaife v. Jackson*, 3 B. & C. 421, 10 E. C. L. 137; *Henderson v.*

able against each other,¹ except for the purpose of proving the joint interest.²

Wild, 2 Campb. 561; Loring v. Brackett, 3 Pick. (Mass.) 403; Walling v. Rosevelt, 16 N. J. L. 41.

1. **General Rule as to Admissions in Case of Persons Jointly Interested—England.**—Holme v. Green, 1 Stark. 488, 2 E. C. L. 187; Whitcomb v. Whiting, 2 Doug. 652; Kemble v. Farren, 3 C. & P. 623, 14 E. C. L. 490; Perham v. Raynal, 2 Bing. 306, 9 E. C. L. 413; Wyatt v. Hodson, 8 Bing. 309, 21 E. C. L. 301.

United States.—Van Reimsdyk v. Kane, 1 Gall. (U. S.) 635; Forsyth v. Doolittle, 120 U. S. 73.

Alabama.—Camp v. Dill, 27 Ala. 553.

Arkansas.—Kotian v. Nichols, 22 Ark. 244.

Connecticut.—Bound v. Lathrop, 4 Conn. 336, 10 Am. Dec. 147; Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110.

Georgia.—Kiser v. Dannenberg Co., 88 Ga. 541.

Illinois.—McMillan v. McDill, 110 Ill. 47.

Indiana.—Wonderly v. Booth, 19 Ind. 169.

Maine.—Getchell v. Heald, 7 Me. 26.

Massachusetts.—White v. Hale, 3 Pick. (Mass.) 291, 15 Am. Dec. 209; Martin v. Root, 17 Mass. 222.

Missouri.—Grace v. Nesbitt, 109 Mo. 10; St. Louis Paint Mfg. Co. v. Mephram, 30 Mo. App. 15.

New Jersey.—Walling v. Rosevelt, 16 N. J. L. 42; McElroy v. Ludlum, 32 N. J. Eq. 828.

New York.—Johnson v. Beardslee, 15 Johns. (N. Y.) 3; Barrick v. Austin, 21 Barb. (N. Y.) 241.

North Carolina.—Griffin v. Pleasant, 1 Ired. Eq. (N. Car.) 152.

South Carolina.—Beitz v. Fuller, 1 McCord (S. Car.) 541; Dillard v. Dillard, 2 Strobb. (S. Car.) 89.

Tennessee.—Irby v. Brigham, 9 Humph. (Tenn.) 750.

Texas.—Tuttle v. Turner, 28 Tex. 759; Thurman v. Blankenship, etc., Co., 79 Tex. 171.

Vermont.—U. S. Bank v. Lyman, 20 Vt. 666.

West Virginia.—Dickinson v. Clarke, 5 W. Va. 280.

See also Petrie v. Williams, 68 Hun (N. Y.) 589. Compare Bell v. Morrison, 1 Pet. (U. S.) 352; Derby v. Rounds, 53 Cal. 659; Thompson v. Richards, 14 Mich. 173; Wallis v. Randall, 81 N. Y. 164.

In Irby v. Brigham, 9 Humph. (Tenn.) 750, it was held that where several parties to a suit have a joint interest in the subject matter either as plaintiffs or as defendants, an admission made by one is evidence against all.

The Admission of One or Two Joint Beneficiaries under an insurance policy was admitted in evidence for the defendant in an action on the policy. Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535.

The admission of certain facts by the principal obligor, in which facts he and his sureties were jointly interested, is admissible evidence against them all. Parker v. State, 8 Blackf. (Ind.) 292.

In Ellis v. Dempsey, 4 W. Va. 126, it was

held that the declarations of one of several defendants sued as joint trespassers, made at the time and in the execution of the alleged trespass, relative to his purpose and intent, and the character in which he acted, whether upon his own responsibility or in conjunction with others and under their authority, are admissible as part of the *res gestæ*. See Gray v. Nations, 1 Ark. 557; Matthew v. Herdtfelder (Supreme Ct.), 15 N. Y. Supp. 165.

Must be Subsisting Interest at the Time.—Where the admissions of one person are offered in evidence against another on account of their joint interest in the subject, the joint interest must have subsisted at the time the admission was made. Blakeney v. Ferguson, 14 Ark. 641.

A statement made by a person in the presence of his associates and acquiesced in by them is admissible against them. Lathrop v. Bramhall, 3 Hun (N. Y.) 304.

Answers in Chancery.—The answer of one defendant cannot in general be read against another codefendant; otherwise such codefendant would be deprived of an opportunity of cross-examination. Van Reimsdyk v. Kane, 1 Gall. (U. S.) 630; Morris v. Nixon, 1 How. (U. S.) 118; Clark v. Van Reimsdyk, 9 Cranch (U. S.) 153; Blakeney v. Ferguson, 14 Ark. 641; McElroy v. Ludlum, 32 N. J. Eq. 828.

But where Parties are Partners, or Otherwise Jointly Interested, their answers in chancery may be read against each other. Van Reimsdyk v. Kane, 1 Gall. (U. S.) 630; Blakeney v. Ferguson, 14 Ark. 641; McElroy v. Ludlum, 32 N. J. Eq. 828.

Declaration in Declarant's Interest.—Parties are not entitled to prove what in their own favor they or their coparties may have stated in relation to the matter at issue. Carlyle v. Plumer, 11 Wis. 99; Danforth v. Carter, 4 Iowa 234; Crounse v. Fitch, 1 Abb. App. Dec. (N. Y.) 475.

Nor are the declarations of a party in his own interest admissible in evidence for the purpose of fixing a liability on his associate. Very v. Watkins, 23 How. (U. S.) 469. See Coppage v. Barnett, 34 Miss. 622. Compare Lucas v. De La Cour, 1 M. & S. 249.

Proof of Hostile Relations between partners may affect their credibility, but will not exclude their admissions. Western Assur. Co. v. Towle, 65 Wis. 247.

2. **Admissions Not Competent Proof of the Fact of Interest—England.**—Gray v. Palmers, 1 Esp. 135; Nicholls v. Dowding, 1 Stark. 81, 2 E. C. L. 40.

Arkansas.—Campbell v. Hastings, 29 Ark. 512.

Connecticut.—Bucknam v. Barnum, 15 Conn. 68.

Georgia.—Aiken v. Cato, 23 Ga. 154.

Massachusetts.—Allcott v. Strong, 9 Cush. (Mass.) 323.

New Hampshire.—Grafton Bank v. Moore, 13 N. H. 99, 38 Am. Dec. 478; Latham v. Kenniston, 13 N. H. 203; Rich v. Flanders, 39 N. H. 304.

Thus the admissions of a joint contractor are admissible in evidence against his fellow contractor.¹

New York.—*Harris v. Wilson*, 7 Wend. (N. Y.) 57; *Whitney v. Ferris*, 10 Johns. (N. Y.) 66.

North Carolina.—*Hilton v. McDowell*, 87 N. Car. 364.

North Dakota.—*Carson v. Gillitt* (N. Dak., 1891), 50 N. W. Rep. 710.

Ohio.—*Cowan v. Kinney*, 33 Ohio St. 422.

West Virginia.—*Dickinson v. Clarke*, 5 W. Va. 280.

1. **Joint Contractors**.—*England*.—*Perham v. Raynal*, 2 Bing. 306, 9 E. C. L. 413; *Whitcomb v. Whiting*, 2 Doug. 652.

Alabama.—*Camp v. Dill*, 27 Ala. 553.

Arkansas.—*Rotan v. Nichols*, 22 Ark. 244.

Connecticut.—*Bound v. Lathrop*, 4 Conn. 336, 10 Am. Dec. 147; *Coit v. Tracy*, 8 Conn. 268, 20 Am. Dec. 110.

Maryland.—*Owings v. Low*, 5 Gill & J. (Md.) 134.

Massachusetts.—*White v. Hale*, 3 Pick. (Mass.) 291, 15 Am. Dec. 209; *Martin v. Root*, 17 Mass. 222.

New Jersey.—*Walling v. Rosevelt*, 16 N. J. L. 41.

New York.—*Barrick v. Austin*, 21 Barb. (N. Y.) 241.

South Carolina.—*Beitz v. Fuller*, 1 McCord (S. Car.) 540.

Vermont.—*U. S. Bank v. Lyman*, 20 Vt. 666.

Compare Bell v. Morrison, 1 Pet. (U. S.) 352; *Thompson v. Richards*, 14 Mich. 188; *Burnham v. Sweatt*, 16 N. H. 418; *Wallis v. Randall*, 81 N. Y. 164; *Wilson v. McCormick*, 86 Va. 995; *Rogers v. Clements*, 92 N. Car. 81; *Smith v. Wagaman*, 58 Iowa 11.

In *U. S. Bank v. Lyman*, 20 Vt. 666, it was held that the admissions of one of several joint contractors or promissors are admissible, for some purposes, as evidence against all, when they do not extend to creating a new contract, or enlarging a pre-existing obligation or liability, but merely show that the obligation or liability has not been discharged or has been discharged in part only.

But in *Wallis v. Randall*, 81 N. Y. 164, it was held that one joint debtor cannot bind another by his statements or admissions unless he is the agent or in some way the representative of the other and authorized to speak for him; the mere fact of joint liability does not give the authority.

Joint Makers of Promissory Note.—The admissions of one or two or more joint makers of a promissory note are competent evidence against all. *Whitcomb v. Whiting*, 2 Doug. 652; *Jackson v. Fairbank*, 2 H. Bl. 340; *Camp v. Dill*, 27 Ala. 553; *Bound v. Lathrop*, 4 Conn. 336, 10 Am. Dec. 147; *Lincoln Academy v. Newhall*, 38 Me. 179; *Beitz v. Fuller*, 1 McCord (S. Car.) 541. *Compare Bush v. Stowell*, 71 Pa. St. 213, 10 Am. Rep. 694.

But in an action against one of two joint makers of a note, the execution of which is denied by the defendant, what the comaker said at the time of delivering the note to the plaintiff is not admissible. *Smith v. Wagaman*, 58 Iowa 11.

¹ C. of L.—45.

The Former English Rule that an admission by one obligor binds others whom he is bound to indemnify or contribute to, does not prevail in *Alabama*. *Rapier v. Louisiana Equitable L. Ins. Co.*, 57 Ala. 100. See also *Abel v. Forgue*, 1 Root (Conn.) 502.

There is **Some Diversity of Opinion** as to whether the acknowledgment of a debt by one joint debtor is admissible evidence against all to take the case out of the statute of limitations. The following are the cases supporting the affirmative side of the question: *Whitcomb v. Whiting*, 2 Doug. 652; *Jackson v. Fairbank*, 2 H. Bl. 340, 20 Am. Dec. 110; *Coit v. Tracy*, 8 Conn. 268; *Caldwell v. Sigourney*, 19 Conn. 37; *Bound v. Lathrop*, 4 Conn. 336, 10 Am. Dec. 147; *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358; *Getchell v. Heald*, 7 Me. 26; *Shepley v. Waterhouse*, 22 Me. 497; *Lincoln Academy v. Newhall*, 38 Me. 179; *White v. Hale*, 3 Pick. (Mass.) 291, 15 Am. Dec. 209; *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Beitz v. Fuller*, 1 McCord (S. Car.) 541.

But *compare Rogers v. Clements*, 92 N. Car. 81; *Bush v. Stowell*, 71 Pa. St. 213, 10 Am. Rep. 694.

By **Statute** in several of the states, it is declared that no acknowledgment or admission made by one joint contractor shall affect the liability of the others. *Rev. Stat. of Maine* (1890), p. 690, § 98; *Public Stat. of Massachusetts* (1882), c. 197, § 17; *Harding v. Butler*, 156 Mass. 34; *Faulkner v. Bailey*, 123 Mass. 588; *Rev. Laws of Vermont* (1880), § 976; *Bailey v. Corliss*, 51 Vt. 366; *Carlton v. Coffin*, 27 Vt. 496; *Rogers v. Anderson*, 40 Mich. 290.

In *Holme v. Green*, 1 Stark. 488, 2 E. C. L. 187, it was held that in order for such an admission to be binding on the other contractors it must be clear and explicit.

In *Wyatt v. Hodson*, 8 Bing. 309, 21 E. C. L. 301, it was held that the payment of interest within six years by one of several joint contractors takes a debt out of the statute of limitations as against all. See *Block v. Dorman*, 51 Mo. 31. *Compare Faulkner v. Bailey*, 123 Mass. 588.

Also, it was held in *Burleigh v. Stott*, 8 B. & C. 36, 15 E. C. L. 151, that a part payment operates as a promise to pay a joint note so as to take the debt out of the statute of limitations. See also *Jackson v. Fairbank*, 2 H. Bl. 340; *Whitcomb v. Whiting*, 2 Doug. 652; *Knight v. Clements*, 45 Ala. 89, 6 Am. Rep. 693; *Craig v. Callaway County Ct.*, 12 Mo. 94; *Disborough v. Bidleman*, 20 N. J. L. 275; *Whitaker v. Rice*, 9 Minn. 13. But *compare Brandram v. Wharton*, 1 B. & Ald. 467; *Davies v. Edwards*, 6 Eng. L. & Eq. 520; *Jackson v. Woolley*, 8 El. & Bl. 784, 92 E. C. L. 784; *Steele v. Sonder*, 20 Kan. 39; *Faulkner v. Bailey*, 123 Mass. 588; *Roscoe v. Hale*, 7 Gray (Mass.) 274; *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Davidson v. Harrison*, 33 Miss. 41; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Dunham v. Dodge*, 10 Barb. (N. Y.) 566; *Hance v. Hair*, 25 Ohio

Quantum of Interest.—It matters not how small the interest in the subject matter may be.¹

Joint Interest—Community of Interest.—It is a joint interest, however, and not a mere community of interest, that renders the admissions of one person receivable in evidence against another.² There is no such joint interest between

St. 349; *Coleman v. Fobes*, 22 Pa. St. 156; *Bush v. Stowell*, 71 Pa. St. 208, 10 Am. Rep. 694.

In *Littlefield v. Littlefield*, 91 N. Y. 203, it was held that a joint maker of a note may confer authority upon another maker to make a payment which will be effectual as against a plea of the statute of limitations.

Ratification of Void Contract.—In *Chamberlain v. Dow*, 10 Mich. 319, it was held that where two persons together make a bargain to buy goods of the value of more than fifty dollars, which is void because not in writing, the subsequent acceptance of the goods by one, without the knowledge or assent of the other, will not amount to a ratification of the void bargain as to both.

1. *Walling v. Roosevelt*, 16 N. J. L. 41.

2. *Fox v. Waters*, 12 Ad. & El. 43, 40 E. C. L. 18; *Scholey v. Walton*, 12 M. & W. 510; *Tullock v. Dunn*, R. & M. 416, 21 E. C. L. 478; *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535; *Kiser v. Dannenberg Co.*, 88 Ga. 541; *Wonderly v. Booth*, 19 Ind. 169; *Roberts v. Kendall*, 3 Ind. App. 339; *Eakle v. Clarke*, 30 Md. 322; *Redding v. Wright*, 49 Minn. 322; *McCune v. McCune*, 29 Mo. 117; *Petrie v. Williams* (Supreme Ct.), 23 N. Y. Supp. 237; *Slaymaker v. Gundacker*, 10 S. & R. (Pa.) 75; *Thurman v. Blankenship, etc., Co.*, 79 Tex. 171; *Prewett v. Land*, 36 Miss. 495. Compare *Williams v. Taunton*, 125 Mass. 34.

Surviving Promisor and Executor of Copromisor.—There is no such joint interest as to make the interest of one competent evidence against the other between a surviving promisor and the executor of his copromisor. *Atkins v. Tredgold*, 2 B. & C. 23, 9 E. C. L. 12; *Slater v. Lawson*, 1 B. & Ad. 396, 20 E. C. L. 409; *Marshall v. Adams*, 11 Ill. 37; *Hathaway v. Haskell*, 9 Pick. (Mass.) 42; *Disborough v. Bidleman*, 20 N. J. L. 275; See *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Stockton v. Johnson*, 6 B. Mon. (Ky.) 408; *Bloodgood v. Bruen*, 8 N. Y. 362; *Lane v. Doty*, 4 Barb. (N. Y.) 530.

Joint Promisor of Feme Sole and Her Husband, after Marriage.—Nor between a joint promisor with a *feme sole* and her husband, after marriage. *Pittam v. Foster*, 1 B. & C. 248, 8 E. C. L. 106.

Nor between an Obligor and Obligee, in the absence of fraud. *Bredin v. Bredin*, 3 Pa. St. 81; *Thomas v. Thomas*, 2 J. J. Marsh. (Ky.) 60.

Nor between Indorsers unless the indorsement is in concert. *Whart. Ev.* (3d ed.), § 1199; *Slaymaker v. Gundacker*, 10 S. & R. (Pa.) 75.

Nor between Underwriters on the same policy. *Lambert v. Smith*, 1 Cranch (C. C.) 361.

Nor between the Trustee and the Administrator of the Grantor of land conveyed in trust. *Harrison v. Mock*, 16 Ala. 616.

Nor between Executors and Heirs.—*Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612, 15 Am. Dec. 304. See also *Lawrence v. Wilson*, 160 Mass. 304; *Dillard v. Dillard*, 2 Strobb. (S. Car.) 89.

Agreement to Keep Codefendant in Stock.—Proof that A agreed to keep B in stock as a blacksmith, and that A admitted that he was liable for goods got by B after a certain date, is not sufficient to establish such a joint interest between A and B as to make the admissions of the former receivable against the latter. *Wonderly v. Booth*, 19 Ind. 169.

Insured and Beneficiary.—In *Supreme Lodge v. Schmidt*, 98 Ind. 374, it was held that where one takes an insurance policy on his own life in a mutual society, payable upon his death to another or "to such other person or persons as he may subsequently direct," no subsequent admissions of his are admissible in evidence against the beneficiaries in a suit by them upon the policy. See also *Rawls v. American L. Ins. Co.*, 36 Barb. (N. Y.) 357.

Widow Denying Legality of Her Marriage.—In an action by a widow for herself and minor children for the wrongful death of her husband, an *ex parte* affidavit of the widow denying the legality of her marriage with the decedent is not admissible as against all the plaintiffs. *Jackson v. Illinois Cent. R. Co.*, 46 La. Ann. 226.

The Admissions of the Father of a Girl who had brought suit against a railroad company for an injury to her were held inadmissible in evidence against her administrator afterwards prosecuting the suit, in the absence of any showing that the father was interested in the result. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229.

Father Suing for Injury to Minor Child—Latter's Admissions.—In an action for the loss of services of plaintiff's minor son, whose death was alleged to have been caused by defendant's negligence, statements of the son as to the cause of the accident, and that he alone was in fault, were held not to be admissible against the plaintiff as admissions, as the right of action is personal to plaintiff, and deceased could not bind him by admissions against his interest; but they were held to be competent as part of the *res gesta*. *Louisville, etc., R. Co. v. Berry*, 2 Ind. App. 427.

Declarations of Inhabitants.—There is some diversity of opinion among the authorities as to the admissibility of the admissions of inhabitants of a territorial political division. The *English* decisions hold to the affirmative side of the question. *Rex v. Hardwick*, 11 East 579; *Reg. v. Adderbury East*, 5 Q. B. 187, 48 E. C. L. 187; *Rex v. Whitley Lower*, 1 M. & S. 636.

tenants in common,¹ or between the tenant for life and the remainderman,² heirs,³ distributees,⁴ devisees or legatees,⁵ executors or administrators,⁶ trustees,⁷ the members of a board of officers of a municipal or other corporation,⁸ or stockholders.⁹

But the *American* authorities seem to support the opposite view. 2 Whart. Ev., § 1199; Landaff's Petition, 34 N. H. 164; Watertown v. Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80. Compare 1 Greenl. Ev. § 175.

1. **Tenants in Common.**—*Jaggers v. Bin-nings*, 1 Stark. 64, 2 E. C. L. 34; *The New Orleans*, 106 U. S. 13; *Bryant v. Booz*, 55 Ga. 438; *McLellan v. Cox*, 36 Me. 95, 58 Am. Dec. 736; *Page v. Swanton*, 39 Me. 400; *Eakle v. Clarke*, 30 Md. 322; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Cuyler v. McCartney*, 40 N. Y. 228; *Pier v. Duff*, 63 Pa. St. 59.

The Evidence which in Another Suit a Part Owner Gave as to the extent and cost of repairs put upon a vessel is not admissible against the other part owners, who were merely tenants in common with him. *The New Orleans*, 106 U. S. 13.

The Admissions of a Tenant in Common in the presence and hearing of a cotenant may be competent evidence against the latter. *Crippen v. Morss*, 49 N. Y. 63.

And where one tenant has succeeded to the ownership of an undivided share of his cotenant, the admissions of the latter made while he was interested in the premises will be received against the former. *Ozment v. Anglin*, 60 Ga. 242.

2. **Tenant for Life and Remainderman.**—*Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68; *McCune v. McCune*, 29 Mo. 117; *Hill v. Rod-erick*, 4 W. & S. (Pa.) 221.

3. **Heirs.**—*Hueston v. Hueston*, 2 Ohio St. 492.

4. **Distributees.**—*Prewett v. Coopwood*, 30 Miss. 369. See *Walkup v. Pratt*, 5 Har. & J. (Md.) 51.

5. **Devisees and Legatees.**—*Alabama.*—*Roberts v. Trawick*, 13 Ala. 68; *Blakey v. Blakey*, 33 Ala. 611.

Connecticut.—*Livingston's Appeal*, 63 Conn. 68.

Illinois.—*McMillan v. McDill*, 110 Ill. 47.

Indiana.—*Hayes v. Burkam*, 67 Ind. 359.

Iowa.—*Dye v. Young*, 55 Iowa 433.

Kentucky.—*Milton v. Hunter*, 13 Bush (Ky.) 163.

Maryland.—*Walkup v. Pratt*, 5 Har. & J. (Md.) 51.

Michigan.—*O'Connor v. Madison*, 98 Mich. 183; *Renaud v. Pageot* (Mich., 1894), 61 N. W. Rep. 3.

Mississippi.—*Prewett v. Coopwood*, 30 Miss. 369.

New York.—*La Bau v. Vanderbilt*, 3 Redf. (N. Y.) 384; *Matter of Baird*, 47 Hun (N. Y.) 77.

Ohio.—*Hueston v. Hueston*, 2 Ohio St. 492; *Thompson v. Thompson*, 13 Ohio St. 356.

Pennsylvania.—*Hauberger v. Root*, 6 W. & S. (Pa.) 431; *Boyd v. Eby*, 8 Watts (Pa.) 66; *Dotts v. Fetzer*, 9 Pa. St. 88; *Irwin v. West*, 81 Pa. St. 157.

West Virginia.—*Forney v. Ferrell*, 4 W. Va. 729.

Declarations or Admissions of One of Several Devisees or legatees named in a supposed will, tending to prove that the alleged testator was not of sufficiently sound mind at the time to make it, or, being very weak in mind, was improperly influenced to make it contrary to what he would otherwise have done, are not admissible in evidence. *Hau-berger v. Root*, 6 W. & S. (Pa.) 431; *Irwin v. West*, 81 Pa. St. 157.

6. **Executors and Administrators.**—*Scholey v. Walton*, 12 M. & W. 510; *Fox v. Waters*, 12 Ad. & El. 43, 40 E. C. L. 18; *Tullock v. Dunn*, R. & M. 416, 21 E. C. L. 478; *Chapin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56; *Berdan v. Allan*, 10 Ill. App. 91; *Shailer v. Bumstead*, 99 Mass. 127; *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Finnern v. Hinz*, 38 Hun (N. Y.) 465; *Church v. Howard*, 79 N. Y. 415; *Potter v. Greene*, 51 Hun (N. Y.) 6; *Bruyn v. Russell*, 52 Hun (N. Y.) 17.

The Admission by an Executor of a debt due from his testator is not admissible as evidence in a suit for the debt against his co-executor to establish the original demand. *Hammon v. Huntley*, 4 Cow. (N. Y.) 493.

Payment by One Executor will not take the case out of the statute of limitations as against a coexecutor. *Scholey v. Walton*, 12 M. & W. 510.

The admissions of an executor do not bind a subsequent administrator *de bonis non*. *Pease v. Phelps*, 10 Conn. 62. Compare *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735; *Lashlee v. Jacobs*, 9 Humph. (Tenn.) 718.

7. **Trustees.**—*Davies v. Ridge*, 3 Esp. 101; *Jex v. Board of Education*, 1 Hun (N. Y.) 157; *Walker v. Dunspaugh*, 20 N. Y. 170; *Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 217.

In *McArthur v. Carrie*, 32 Ala. 76, 70 Am. Dec. 529, it was held that the declarations of an administrator in chief, who has made a sale of property belonging to the estate, to the effect that the sale was private, are not competent evidence for a succeeding administrator, who seeks to recover the property from one claiming under the purchaser.

8. **Corporation Officers.**—*Lockwood v. Smith*, 5 Day (Conn.) 315. See *Davis v. Rochester* (Supreme Ct.), 21 N. Y. Supp. 215.

In *New Ebenezer Assoc. v. Gress Lumber Co.*, 89 Ga. 125, it was held that an offer by members of the committee of an association, to pay fifty cents on the dollar on a claim arising from a contract made by only one member of the committee, which contract the committee claimed to have been unauthorized, was inadmissible in evidence in an action against the association on the contract, unless made by a majority of the committee.

9. **Stockholders.**—*Hartford Bank v. Hart*, 3

Where Admission is Competent against Only One of Several Codefendants.—Where, however, an admission is competent evidence against one only of several joint defendants, it will not be excluded merely because it may affect the case of his codefendants; but the latter are entitled to an instruction to the jury limiting the application of the evidence.¹

Person Need Not be Party to the Record.—The person making the admission need not be a party to the record.²

b. PARTNERS—Rule Stated.—By the very act of association each member of a partnership is constituted the agent of all.³ Hence the admissions of a partner made during the continuance of the partnership,⁴ and within the scope

Day (Conn.) 495, 3 Am. Dec. 274; *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173; *Dean v. Ross*, 105 Cal. 227.

1. *Lewis v. Lee County*, 66 Ala. 480; *Palmer v. Severance*, 9 Ala. 751; *Rogers v. Suttle*, 19 Ill. App. 163; *Smith v. Meiser* (Ind. App., 1894), 38 N. E. Rep. 1092; *Union Sav. Assoc. v. Edwards*, 47 Mo. 445; *State v. Brite*, 73 N. Car. 26.

2. *Whart. Ev.*, § 1198; *Whitcomb v. Whiting*, 2 Doug. 652; *Weed v. Kellogg*, 6 McLean (U. S.) 44; *Forsyth v. Doolittle*, 120 U. S. 73; *Munson v. Wickwire*, 21 Conn. 513; *Mamlock v. White*, 20 Cal. 598; *McCutchin v. Bankston*, 2 Ga. 244; *Porter v. Wilson*, 13 Pa. St. 641; *Clayton v. Anthony*, 6 Rand. (Va.) 285. *Compare The Ship Betsey*, 23 Ct. Cl. 277; *Derby v. Rounds*, 53 Cal. 659; *Abel v. Forgue*, 1 Root (Conn.) 502; *Dickinson v. Clarke*, 5 W. Va. 280.

Silent Partner.—Thus in *Weed v. Kellogg*, 6 McLean (U. S.) 44, it was held that the admissions of a silent partner in the proceedings may be given in evidence. See *Fickett v. Swift*, 41 Me. 67, 66 Am. Dec. 214; *Webster v. Stearns*, 44 N. H. 502.

The Admission by One of Two Partners, of the correctness of an account stated against the partnership, is sufficient in a suit against the firm on such account, even though for want of service the suit has been dismissed as to the partner making the admission. *Cady v. Kyle*, 47 Mo. 347.

3. *Hahn v. St. Clair Sav., etc., Co.*, 50 Ill. 456; *Webster v. Stearns*, 44 N. H. 502. See, generally, the title PARTNERSHIP.

4. **Must be Made during Continuance of Partnership.**—*Catt v. Howard*, 3 Stark. 3, 14 E. C. L. 143; *Fail v. McArthur*, 31 Ala. 26; *Munson v. Wickwire*, 21 Conn. 513; *Hitt v. Allen*, 13 Ill. 596; *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519; *Dowzelot v. Rawlings*, 58 Mo. 75; *Webster v. Stearns*, 44 N. H. 502; *McKee v. Hamilton*, 33 Ohio St. 7; *Barrett v. Russell*, 45 Vt. 43; *Western Assur. Co. v. Towle*, 65 Wis. 248.

An Entry Made by One Partner on the Books of the Firm during the copartnership, will, after its termination, be evidence against the other partner, if he at the time knew of the entry or had an opportunity to examine the books, and did not dissent from it. *Dunnell v. Henderson*, 23 N. J. Eq. 174; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409.

Admissions Prior to Partnership.—In *Catt v. Howard*, 3 Stark. 3, 14 E. C. L. 143, it was held that a declaration of one of two partners is not evidence to charge the other with

respect to a transaction with that other partner which occurred previous to the partnership, unless a joint responsibility in the subject matter be shown.

After Dissolution.—It is a general rule, that after dissolution of a partnership one of the former partners cannot by his acknowledgments or assertions impose an obligation on his late copartner.

England.—*Kilgour v. Finlyson*, 1 H. Bl. 155; *Burton v. Issitt*, 5 B. & Ald. 267, 7 E. C. L. 91.

United States.—*Bell v. Morrison*, 1 Pet. (U. S.) 352.

Alabama.—*Fontaine v. Lee*, 6 Ala. 889; *Rowland v. Boozer*, 10 Ala. 690; *Cunningham v. Bragg*, 37 Ala. 436.

California.—*Curry v. White*, 51 Cal. 530.

Illinois.—*Hitt v. Allen*, 13 Ill. 596; *Miller v. Neimerick*, 19 Ill. 172; *Winslow v. Newlan*, 45 Ill. 146.

Indiana.—*Yandes v. Lefavour*, 2 Blackf. (Ind.) 371.

Kentucky.—*Walker v. Duberry*, 1 A. K. Marsh. (Ky.) 189; *Bentley v. White*, 3 B. Mon. (Ky.) 266, 38 Am. Dec. 186; *Stockton v. Johnson*, 6 B. Mon. (Ky.) 409; *Craig v. Alverson*, 6 J. J. Marsh. (Ky.) 609; *Daniel v. Nelson*, 10 B. Mon. (Ky.) 318.

Louisiana.—*Johnson v. Marsh*, 2 La. Ann. 772; *Conery v. Hayes*, 19 La. Ann. 325.

Maryland.—*Owings v. Low*, 5 Gill & J. (Md.) 135.

Missouri.—*Brady v. Hill*, 1 Mo. 315, 13 Am. Dec. 503; *American Iron Mountain Co. v. Evans*, 27 Mo. 552; *Flowers v. Helm*, 29 Mo. 324; *Dowzelot v. Rawlings*, 58 Mo. 75.

New Jersey.—*Flanagin v. Champion*, 2 N. J. Eq. 51.

New York.—*Hackley v. Patrick*, 3 Johns. (N. Y.) 536; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Hopkins v. Banks*, 7 Cow. (N. Y.) 650; *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Williams v. Manning*, 41 How. Pr. (N. Y. Ct. App.) 454; *Nichols v. White*, 85 N. Y. 531.

Pennsylvania.—*Tassey v. Church*, 4 W. & S. (Pa.) 141, 39 Am. Dec. 65.

Virginia.—*Shelton v. Cocke*, 3 Munf. (Va.) 191; *Rootes v. Wellford*, 4 Munf. (Va.) 215, 6 Am. Dec. 510.

After the Termination of the Partnership, no admission or acknowledgment by one of the partners, of the correctness of an account made before the dissolution of the partnership, is legal evidence against the other

members of the firm. *Conery v. Hayes*, 19 La. Ann. 325.

A Partner cannot Confess Judgment against the firm after dissolution. *Mair v. Beck* (Pa., 1886), 2 Atl. Rep. 218.

But this Rule does Not Apply where the partner is authorized to settle the business of the firm. *Burton v. Issitt*, 5 B. & Ald. 267, 7 E. C. L. 91; *Ide v. Ingraham*, 5 Gray (Mass.) 106; *Reppert v. Colvin*, 48 Pa. St. 248; *Hogg v. Orgill*, 34 Pa. St. 344; *Nichols v. White*, 85 N. Y. 531.

The admissions of one partner with reference to the business of the firm, made subsequently to the date of an assignment of their assets, are admissible in evidence in a suit against all the members of the firm where they have pleaded that they are still partners as to all matters of a firm nature. *Hunter v. Hubbard*, 26 Tex. 537.

In *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738, A subscribed the name of a firm, of which he claimed to be a member, to a contract of sale; B, his copartner, afterward ratified the act by receiving the purchase money. It was held that the subsequent adoption of B being established, it was admissible to give in evidence the declarations of A as to the partnership, made when the contract was executed.

There is Authority, however, for the Rule that the admissions of one copartner, made after the dissolution of a firm, in relation to facts which took place during the existence of the copartnership, in the regular course of business of the firm, and not creating a new liability, are admissible against his associates. *Wood v. Braddick*, 1 Taunt. 104; *Cochran v. Cunningham*, 16 Ala. 448, 50 Am. Dec. 186; *Parker v. Merrill*, 6 Me. 41; *Darling v. March*, 22 Me. 184; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Bridge v. Gray*, 14 Pick. (Mass.) 55, 25 Am. Dec. 358; *Pennoyer v. David*, 8 Mich. 407; *Curry v. Kurtz*, 33 Miss. 25; *Mann v. Locke*, 11 N. H. 246; *Pierce v. Wood*, 23 N. H. 519; *Rich v. Flanders*, 39 N. H. 304; *Myers v. Standart*, 11 Ohio St. 29; *Simpson v. Geddes*, 2 Bay (S. Car.) 533; *Nalle v. Gates*, 20 Tex. 315; *Loomis v. Loomis*, 26 Vt. 198. See *Hitt v. Allen*, 13 Ill. 596.

If a Note has been Indorsed by Partners in the name of their firm, a waiver of demand and notice, being but the modification of an existing liability, by dispensing with certain testimony which would otherwise be required, may be made by one partner, after the dissolution of the firm and before the note becomes payable. *Darling v. March*, 22 Me. 184.

In *Cochran v. Cunningham*, 16 Ala. 448, 50 Am. Dec. 186, it was held that in a suit at law by partners the admission of one of them, after the dissolution of the firm, that he has no right of action, is competent testimony in bar of the suit.

But in *Gillighan v. Tebbetts*, 33 Me. 360, it was held that such admissions will not be received where the partner has parted with all interest. See *Hitt v. Allen*, 13 Ill. 596.

Taking Debt out of Statute of Limitations.—It seems to be the better doctrine in this country, that an acknowledgment of a partnership

debt and a promise to pay it, made after dissolution, will not enable the creditors to enforce it against the copartners, if it is already barred by the statute of limitations.

Alabama.—*Wilson v. Torbert*, 3 Stew. (Ala.) 296, 21 Am. Dec. 632; *Lang v. Waring*, 17 Ala. 145.

Indiana.—*Yandes v. Lefavour*, 2 Blackf. (Ind.) 371.

Kentucky.—*Merritt v. Pollys*, 16 B. Mon. (Ky.) 355.

Maryland.—*Ellicott v. Nichols*, 7 Gill (Md.) 85 (*overruling Ward v. Howell*, 5 Har. & J. (Md.) 60); *Newman v. McComas*, 43 Md. 70.

New York.—*Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322 (*overruling Patterson v. Choate*, 7 Wend. (N. Y.) 441; *Smith v. Ludlow*, 6 Johns. (N. Y.) 267; *Hopkins v. Banks*, 7 Cow. (N. Y.) 653); *Graham v. Selover*, 59 Barb. (N. Y.) 315.

North Carolina.—*Wood v. Barber*, 90 N. Car. 76 (*overruling M'Intire v. Oliver*, 2 Hawks (N. Car.) 209, 18 Am. Dec. 760).

Ohio.—*Kerper v. Wood*, 48 Ohio St. 613.

Pennsylvania.—*Searight v. Craighead*, 1 P. & W. (Pa.) 135; *Levy v. Cadet*, 17 S. & R. (Pa.) 126, 17 Am. Dec. 650; *Reppert v. Colvin*, 48 Pa. St. 248.

Compare Greenleaf v. Quincy, 12 Me. 11, 28 Am. Dec. 145; *Mix v. Shattuck*, 50 Vt. 421, 28 Am. Rep. 511; *Wheelock v. Doolittle*, 18 Vt. 440, 46 Am. Dec. 163; *Tappan v. Kimball*, 30 N. H. 136.

Acknowledgment after Dissolution, but before Statute of Limitations Takes Effect.—But there is great diversity of opinion as to whether an acknowledgment made by a partner before the action was barred by the statute of limitations, though after dissolution of partnership, is admissible against the other members of the firm.

For the Affirmative View of This Question see *Espy v. Comer*, 76 Ala. 501; *Newman v. McComas*, 43 Md. 70; *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Graham v. Selover*, 59 Barb. (N. Y.) 315; *Reppert v. Colvin*, 48 Pa. St. 248.

For the Opposite View see *Bissell v. Adams*, 35 Conn. 299; *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74; *Sage v. Ensign*, 2 Allen (Mass.) 245; *Buxton v. Edwards*, 134 Mass. 567; *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378; *Tappan v. Kimball*, 30 N. H. 136; *Merritt v. Day*, 38 N. J. L. 32; *Casebolt v. Ackerman*, 46 N. J. L. 169; *Wheelock v. Doolittle*, 18 Vt. 440, 46 Am. Dec. 163.

In *Kerper v. Wood*, 48 Ohio St. 622, Marshall, J., in delivering the opinion of the court, said: "The fact that payments were made and that the note was given * * * within six years of the commencement of the suit and before the action was barred, can make no difference in the application of the statute, as whether payments were made or a promise given before or after the demand was barred, in either case it is a question of the authority of the one making the payment or promise to bind the other, and if the authority is not express, the other is not bound or affected thereby."

A partnership note is taken out of the

of the partnership business,¹ are, in general, admissible in an action against all the partners.²

Not Admissible to Prove the Partnership.—They are not evidence to prove the partnership itself;³ but that being once admitted or proved *aliunde*, the admissions

operation of the statute of limitations by a part payment thereof made by one partner within six years, although the firm had then been dissolved by the voluntary act of partners, if the holder of the note had previous dealings with the firm, and was not notified and had no knowledge of the dissolution. *Sage v. Ensign*, 2 Allen (Mass.) 245.

It has been held in *Massachusetts* and *Vermont* that the statutes in these states declaring that the promise or payment of a joint contractor cannot take a debt out of the statute of limitations against another joint contractor, do not have reference to partners, and that hence admissions made by one partner before dissolution of partnership will be as effectual against the other partners as if made by all. *Harding v. Butler*, 156 Mass. 34; *Carlton v. Coffin*, 28 Vt. 504; *Mix v. Shattuck*, 50 Vt. 421.

1. Must be within Scope of Partnership.—*Illinois*.—*Bruner v. Nisbett*, 31 Ill. App. 524; *Hahn v. St. Clair Sav., etc., Co.*, 50 Ill. 456.

Indiana.—*Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519.

Maryland.—*Wells v. Turner*, 16 Md. 134.

Massachusetts.—*Odiorne v. Maxcy*, 15 Mass. 39; *Collett v. Smith*, 143 Mass. 475.

Minnesota.—*Slipp v. Hartley*, 50 Minn. 118.

Missouri.—*Cady v. Kyle*, 47 Mo. 346; *Rimel v. Hayes*, 83 Mo. 200.

New Hampshire.—*Pierce v. Wood*, 23 N. H. 519; *Webster v. Stearns*, 44 N. H. 502.

New York.—*Elliott v. Dudley*, 19 Barb. (N. Y.) 326.

See also *Nixon v. Jenkins*, 1 Hilt. (N. Y.) 318; *Union Nat. Bank v. Underhill*, 102 N. Y. 336.

North Carolina.—*White v. Gibson*, 11 Ired. (N. Car.) 283.

Texas.—*Hunter v. Hubbard*, 26 Tex. 537.

Vermont.—*Barrett v. Russell*, 45 Vt. 43.

Wyoming.—See *Hester v. Smith* (Wyoming, 1895), 40 Pac. Rep. 310.

The admissions of a partner are not competent evidence against his copartners upon the issue as to whether it was a partnership transaction. *Scott v. Dansby*, 12 Ala. 714; *Tuttle v. Cooper*, 5 Pick. (Mass.) 414; *Uhler v. Browning*, 28 N. J. L. 79; *Elliott v. Dudley*, 19 Barb. (N. Y.) 326; *White v. Gibson*, 11 Ired. (N. Car.) 283. *Compare Hurd v. Haggerty*, 24 Ill. 171.

Where the plaintiffs as partners were doing business as machinists in the city of Baltimore, the declarations of one of them, in reference to subscriptions to and formation of an association to purchase an ice and tow boat for the purpose of keeping open the harbor of that city, were held not to be binding upon his copartner, such an association not being within the scope of their partnership business. *Wells v. Turner*, 16 Md. 134.

Where the business of a copartnership, as

far as appeared, was intrusted to one of the members to manage, transact, and superintend, and no written articles between them appeared to have been entered into, it was held that it might be presumed that the authority of such member, with respect to the affairs of the company, was unlimited, and his admissions would bind the company as well as himself. *Odiorne v. Maxcy*, 15 Mass. 39.

2. Latch v. Wedlake, 11 Ad. & El. 499, 39 E. C. L. 282; *Smitha v. Cureton*, 31 Ala. 652; *Pierce v. Roberts*, 57 Conn. 31; *McCutchin v. Bankston*, 2 Ga. 244; *Peck v. Lusk*, 38 Iowa 93; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Folk v. Wilson*, 21 Md. 538, 83 Am. Dec. 599; *Little v. Ferguson*, 11 Mo. 598; *American Iron Mountain Co. v. Evans*, 27 Mo. 552; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Boyd v. Thompson*, 153 Pa. St. 78; *Western Assur. Co. v. Towle*, 65 Wis. 248.

But in assumpsit against several defendants as partners, where there was a discontinuance as to part of the defendants, it was held to be error to deny a motion to strike out admissions by one of them tending to charge defendants as partners. *Bensley v. Brockway*, 27 Ill. App. 410.

3. Not Competent to Prove Fact of Partnership.—*Alabama*.—*Scott v. Dansby*, 12 Ala. 714; *Cross v. Langley*, 50 Ala. 8.

Arkansas.—*Berry v. Lathrop*, 24 Ark. 12; *Campbell v. Hastings*, 29 Ark. 512.

Connecticut.—*Bucknam v. Barnum*, 15 Conn. 68.

Georgia.—*McCutchin v. Bankston*, 2 Ga. 244; *Boswell v. Blackman*, 12 Ga. 591.

Illinois.—*Conley v. Jennings*, 22 Ill. App. 547.

Indiana.—*Pierce v. McConnell*, 7 Blackf. (Ind.) 170; *Vannoy v. Klein*, 122 Ind. 416. *Compare Bennett v. Holmes*, 32 Ind. 108.

Iowa.—*Holmes v. Budd*, 11 Iowa 186.

Maine.—*Burgess v. Lane*, 3 Me. 165.

Maryland.—*Folk v. Wilson*, 21 Md. 538, 83 Am. Dec. 599.

Massachusetts.—*Tuttle v. Cooper*, 5 Pick. (Mass.) 414; *Dutton v. Woodman*, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; *Allcott v. Strong*, 9 Cush. (Mass.) 323; *Smith v. Collins*, 115 Mass. 388; *Winchester v. Whitney*, 138 Mass. 549.

Missouri.—*Clark v. Huffaker*, 26 Mo. 264; *Rimel v. Hayes*, 83 Mo. 200.

Nebraska.—*McCann v. McDonald*, 7 Neb. 305.

Nevada.—*Jones v. O'Farrel*, 1 Nev. 354.

New Hampshire.—*Grafton Bank v. Moore*, 13 N. H. 99, 38 Am. Dec. 478; *Rich v. Flanders*, 39 N. H. 304.

New York.—*Davidson v. Hutchins*, 1 Hilt. (N. Y.) 123; *Whitney v. Ferris*, 10 Johns. (N. Y.) 66; *Kirby v. Hewitt*, 26 Barb. (N. Y.) 607.

North Carolina.—*White v. Gibson*, 11 Ired.

are then let in for all collateral purposes.¹

Partnership Provable by Successive Declarations of Members.—The partnership may, however, be proved by the successive declarations of each of several partners.²

c. CO-CONSPIRATORS.—It may be laid down as a general principle that where two or more persons are associated together for the accomplishment of the same illegal purpose, the acts and admissions of one of them, made during the pendency³ of the unlawful enterprise and in furtherance of its objects,⁴

(N. Car.) 283; *McFadyen v. Harrington*, 67 N. Car. 29; *Henry v. Willard*, 73 N. Car. 35; *Sawyer v. Grandy*, 113 N. Car. 42.

North Dakota.—*Carson v. Gillitt* (N. Dak., 1891), 50 N. W. Rep. 710.

Ohio.—*Cowan v. Kinney*, 33 Ohio St. 422.

Pennsylvania.—*Johnston v. Warden*, 3 Watts (Pa.) 101; *Richardson v. Aldrich*, 6 Phila. (Pa.) 534; *Lenhart v. Allen*, 32 Pa. St. 312; *Trego v. Lewis*, 58 Pa. St. 463; *Edwards v. Tracy*, 62 Pa. St. 378.

South Carolina.—*M'Corkle v. Doby*, 1 Strobb. (S. Car.) 396, 47 Am. Dec. 560.

West Virginia.—*Dickinson v. Clarke*, 5 W. Va. 280.

It is held that the declarations of a party to the suit as to the existence of a partnership are unquestionably competent to prove him to have been a member of the alleged firm, and who were admitted by him to have been the persons composing it, *Edwards v. Tracy*, 62 Pa. St. 378; *Taylor v. Henderson*, 17 S. & R. (Pa.) 453; *Johnston v. Warden*, 3 Watts (Pa.) 101; *Lenhart v. Allen*, 32 Pa. St. 312; *Bowers v. Still*, 49 Pa. St. 65; *Carr v. Wright*, 1 Wyoming 157; but that such declarations are not competent evidence against the others, *Ellis v. Watson*, 2 Stark. 453, 3 E. C. L. 485; *Conley v. Jennings*, 22 Ill. App. 547; *Pierce v. McConnell*, 7 Blackf. (Ind.) 170; *Vannoy v. Klein*, 122 Ind. 416; *Dutton v. Woodman*, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; *Grafton Bank v. Moore*, 13 N. H. 99, 38 Am. Dec. 478; *Cowan v. Kinney*, 33 Ohio St. 422; *Johnston v. Warden*, 3 Watts (Pa.) 101; *Lenhart v. Allen*, 32 Pa. St. 312; *Bowers v. Still*, 49 Pa. St. 65; *Crossgrove v. Himmelrich*, 54 Pa. St. 203; *M'Corkle v. Doby*, 1 Strobb. (S. Car.) 396, 47 Am. Dec. 560.

Nor can he disprove such declarations by declarations of a contrary nature. *Clark v. Huffaker*, 26 Mo. 264.

In *Allcott v. Strong*, 9 Cush. (Mass.) 323, it was held that evidence to show a continuance of a partnership, after it has been dissolved with notice to the parties, must be as satisfactory as that required to show its establishment.

The court must determine when a *prima facie* case of partnership is shown. *Hilton v. McDowell*, 87 N. Car. 364; *Harris v. Wilson*, 7 Wend. (N. Y.) 57.

Inadmissible to Disprove Partnership.—It is not competent for one copartner to prove the declarations of his copartner to show that a copartnership does not exist, when the question of partnership is at issue between them and third parties. *Carlyle v. Plumer*, 11 Wis. 99; *Clark v. Huffaker*, 26 Mo. 264;

Danforth v. Carter, 4 Iowa 230. Compare *Nichols v. White*, 41 Hun (N. Y.) 152. Except possibly under some peculiar circumstances. *Danforth v. Carter*, 4 Iowa 230.

1. *Van Reimsdyk v. Kane*, 1 Gall. (U. S.) 635.

2. *Haughey v. Strickler*, 2 W. & S. (Pa.) 411; *Reed v. Kremer*, 111 Pa. St. 482; *Painter v. Austin*, 37 Pa. St. 458.

If A admits that he is a partner with C, and B admits that he is a partner with A, it is evidence of a partnership as to both. *Edwards v. Tracy*, 62 Pa. St. 379.

3. **Admissions Made during the Pendency of the Unlawful Enterprise.**—*United States v. Sundry Goods, etc.*, v. U. S., 2 Pet. (U. S.) 358.

Alabama.—*Phoenix Ins. Co. v. Moog*, 78 Ala. 285, 56 Am. Rep. 31.

Arkansas.—*Clinton v. Estes*, 20 Ark. 216.

California.—*People v. Moore*, 45 Cal. 19.

Connecticut.—*Colt v. Eves*, 12 Conn. 243.

Georgia.—*Foster v. Thrasher*, 45 Ga. 517.

Indiana.—*Moore v. Shields*, 121 Ind. 267.

Louisiana.—*State v. Jackson*, 29 La. Ann. 354.

Maine.—*State v. Soper*, 16 Me. 293, 33 Am. Dec. 665.

Mississippi.—*Browning v. State*, 30 Miss. 656; *Lynes v. State*, 36 Miss. 617.

Missouri.—*State v. Ross*, 29 Mo. 32; *State v. Duncan*, 64 Mo. 262; *State v. Daubert*, 42 Mo. 239.

New Hampshire.—*Lee v. Lamprey*, 43 N. H. 13; *Jacobs v. Shorey*, 48 N. H. 100, 97 Am. Dec. 586; *State v. Larkin*, 49 N. H. 39, 6 Am. Rep. 456.

New York.—*Dart v. Walker*, 3 Daly (N. Y.) 136.

Ohio.—*Fouts v. State*, 7 Ohio St. 472.

Tennessee.—*Strady v. State*, 5 Coldw. (Tenn.) 300.

Texas.—*Phillips v. State*, 6 Tex. App. 364.

West Virginia.—*Ellis v. Dempsey*, 4 W. Va. 126.

4. *Alabama.*—*Stewart v. State*, 26 Ala. 44; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31.

Arkansas.—*Clinton v. Estes*, 20 Ark. 216.

California.—*People v. English*, 52 Cal. 212.

Indiana.—*Williams v. State*, 47 Ind. 569; *Moore v. Shields*, 121 Ind. 267.

Iowa.—*State v. Nash*, 7 Iowa 349.

Louisiana.—*State v. Hogan*, 3 La. Ann. 714.

Maine.—*State v. Soper*, 16 Me. 293, 33 Am. Dec. 665.

Massachusetts.—*Com. v. Brown*, 14 Gray (Mass.) 419.

are receivable in evidence against one or all of them.¹ But a foundation for

Mississippi.—*Browning v. State*, 30 Miss. 656.

Missouri.—*State v. Ross*, 29 Mo. 32.

New Hampshire.—*Lee v. Lamprey*, 43 N. H. 13; *Jacobs v. Shorey*, 48 N. H. 100, 97 Am. Dec. 586; *State v. Larkin*, 49 N. H. 39, 6 Am. Rep. 456.

New York.—*Dart v. Walker*, 3 Daly (N. Y.) 136.

North Carolina.—*State v. George*, 7 Ired. (N. Car.) 321.

Ohio.—*Fouts v. State*, 7 Ohio St. 472.

Tennessee.—*Strady v. State*, 5 Coldw. (Tenn.) 300.

Texas.—*Taylor v. State*, 3 Tex. App. 170; *Phillips v. State*, 6 Tex. App. 364.

Vermont.—*State v. Thibau*, 30 Vt. 100.

1. General Rule as to Admissions of Co-conspirators.—*England*.—*Rex v. Stone*, 6 T. R. 528.

United States.—*Sundry Goods, etc., v. U. S.*, 2 Pet. (U. S.) 358; *U. S. v. McKee*, 3 Dill. (U. S.) 546; *Lincoln v. Claffin*, 7 Wall. (U. S.) 132; *Nudd v. Burrows*, 91 U. S. 426.

Alabama.—*Stewart v. State*, 26 Ala. 44; *Smith v. State*, 52 Ala. 407; *Phoenix Ins. Co. v. Moog*, 78 Ala. 285, 56 Am. Rep. 31.

California.—*People v. Collins*, 64 Cal. 295.

Connecticut.—*Colt v. Eves*, 12 Conn. 243.

Georgia.—*McRae v. State*, 71 Ga. 96.

Illinois.—*Chicago, etc., R. Co. v. Collins*, 56 Ill. 212; *Snyder v. Laframboise*, 1 Ill. 343; *Philpot v. Taylor*, 75 Ill. 309.

Indiana.—*Williams v. State*, 47 Ind. 569; *Wolfe v. Pugh*, 101 Ind. 294; *Card v. State*, 109 Ind. 415; *Moore v. Shields*, 121 Ind. 267.

Iowa.—*State v. Nash*, 7 Iowa 349; *State v. McCahill*, 72 Iowa 111.

Kentucky.—*Oldham v. Bentley*, 6 B. Mon. (Ky.) 428.

Louisiana.—*State v. Hogan*, 3 La. Ann. 714; *Bushnell v. City Nat. Bank*, 20 La. Ann. 464; *Gaidry v. Lyons*, 29 La. Ann. 4.

Maine.—*State v. Soper*, 16 Me. 293, 33 Am. Dec. 665.

Massachusetts.—*Cpm. v. Brown*, 14 Gray (Mass.) 419; *Dole v. Wooldredge*, 142 Mass. 161.

Michigan.—*People v. Pitcher*, 15 Mich. 396.

Mississippi.—*Mask v. State*, 32 Miss. 406.

Missouri.—*State v. Minton*, 116 Mo. 605; *State v. Melrose*, 98 Mo. 594.

New Hampshire.—*Lee v. Lamprey*, 43 N. H. 13; *Jacobs v. Shorey*, 48 N. H. 100, 97 Am. Dec. 586; *State v. Larkin*, 49 N. H. 39, 6 Am. Rep. 456; *State v. Pike*, 51 N. H. 105.

New Jersey.—*Patton v. Freeman*, 1 N. J. L. 113.

New York.—*Legg v. Olney*, 1 Den. (N. Y.) 202; *Apthorp v. Comstock*, 2 Paige (N. Y.) 482; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *Dart v. Walker*, 3 Daly (N. Y.) 136; *People v. Kerr* (Oyer and T. Ct.), 6 N. Y. Supp. 674; *Osborn v. Robbins*, 7 Lans. (N. Y.) 44; *People v. McQuade*, 110 N. Y. 286.

North Carolina.—*Bryce v. Butler*, 70 N. Car. 585; *Barnhardt v. Smith*, 86 N. Car. 473.

Ohio.—*Fouts v. State*, 7 Ohio St. 472.

Pennsylvania.—*Jackson v. Summerville*, 13

Pa. St. 359; *Sommer v. Gilmore*, 160 Pa. St. 129; *Deakers v. Temple*, 41 Pa. St. 234; *Burns v. McCabe*, 72 Pa. St. 309; *Kelsey v. Murphy*, 26 Pa. St. 78; *Confer v. McNeal*, 74 Pa. St. 112; *Kehoe v. Com.*, 85 Pa. St. 127.

Texas.—*Taylor v. State*, 3 Tex. App. 170; *Tuttle v. Turner*, 28 Tex. 759.

Virginia.—*Claytor v. Anthony*, 6 Rand. (Va.) 285.

West Virginia.—*Ellis v. Dempsey*, 4 W. Va. 126; *Carskadon v. Williams*, 7 W. Va. 2.

Wisconsin.—*Tucker v. Finch*, 66 Wis. 17.

Made in Absence of the Other Conspirators.—Such declarations are admissible though made in the absence of the other conspirators. *Lincoln v. Claffin*, 7 Wall. (U. S.) 132; *Philpot v. Taylor*, 75 Ill. 309; *Oldham v. Bentley*, 6 B. Mon. (Ky.) 428; *Caidry v. Lyons*, 29 La. Ann. 4; *Com. v. Brown*, 14 Gray (Mass.) 419; *Patton v. Freeman*, 1 N. J. L. 113; *Phillips v. State*, 6 Tex. App. 364.

Made after Completion or Abandonment of Enterprise.—An admission made by one of two or more persons after the completion or abandonment of the common enterprise is competent evidence against the person making it, but not against the others.

England.—*Daniells v. Potter*, 1 M. & M. 501.

United States.—*U. S. v. Hartwell*, 3 Cliff. (U. S.) 221.

Arkansas.—*Clinton v. Estes*, 20 Ark. 216.

California.—*People v. Moore*, 45 Cal. 19; *People v. English*, 52 Cal. 212; *People v. Irwin*, 77 Cal. 495.

Illinois.—*Beeler v. Webb*, 113 Ill. 436; *Spies v. People*, 122 Ill. 7, 3 Am. St. Rep. 320.

Indiana.—*Roberts v. Kendall*, 3 Ind. App. 339.

Iowa.—*State v. Brant*, 86 Iowa 216.

Kentucky.—*Hudson v. Com.*, 2 Duv. (Ky.) 531.

Louisiana.—*State v. Jackson*, 29 La. Ann. 354; *Reid v. Louisiana State Lottery Co.*, 29 La. Ann. 388.

Mississippi.—*Lynes v. State*, 36 Miss. 617.

Missouri.—*State v. Minton*, 116 Mo. 605; *State v. Ross*, 29 Mo. 32; *State v. Duncan*, 64 Mo. 262; *State v. Fredericks*, 85 Mo. 145.

Nevada.—*State v. Ah Tom*, 8 Nev. 213.

New Hampshire.—*State v. Larkin*, 49 N. H. 39, 6 Am. Rep. 456; *State v. Pike*, 51 N. H. 105.

New York.—*Apthorp v. Comstock*, 2 Paige (N. Y.) 482; *Dart v. Walker*, 3 Daly (N. Y.) 136; *People v. McQuade*, 110 N. Y. 286.

Ohio.—*Searles v. State*, 6 Ohio Cir. Ct. Rep. 331.

Pennsylvania.—*Benford v. Sanner*, 40 Pa. St. 10, 80 Am. Dec. 545; *Helser v. McGrath*, 58 Pa. St. 458.

Tennessee.—*Strady v. State*, 5 Coldw. (Tenn.) 300; *Owens v. State*, 16 Lea (Tenn.) 2.

Texas.—*Phillips v. State*, 6 Tex. App. 364.

Vermont.—*State v. Thibau*, 30 Vt. 100.

Virginia.—*Hunter v. Com.*, 7 Gratt. (Va.) 641, 56 Am. Dec. 161.

Not Competent against One when Made before His Connection with Enterprise.—Similarly,

the introduction of such evidence must first be laid by showing *prima facie* the existence of the common design.¹

8. **Strangers.**—The admissions of strangers to the suit are competent evidence where the issue is substantially upon the rights and obligations of such persons at a particular time, and the admissions would be receivable in evidence in an action against them.²

IV. WHAT ADMISSIONS ARE RECEIVABLE.—1. **Generally—Admissions Stated as Facts.**—The admissions of matters stated as facts are receivable in evidence against the party making them, whether true or false, and whether based upon per-

evidence of the declarations of one conspirator before the other was leagued with him is not admissible as against the latter. *People v. Irwin*, 77 Cal. 495; *State v. Grant*, 86 Iowa 216.

1. **Foundation must be Laid before Admissions Receivable.**—*United States*.—U. S. v. McKee, 3 Dill. (U. S.) 546.

Alabama.—*Stewart v. State*, 26 Ala. 44.

Connecticut.—*Colt v. Eves*, 12 Conn. 243.

Georgia.—*Foster v. Thrasher*, 45 Ga. 517.

Indiana.—*Wolfe v. Pugh*, 101 Ind. 294; *Moore v. Shields*, 121 Ind. 267.

Iowa.—*State v. Nash*, 7 Iowa 349; *Wiggins v. Leonard*, 9 Iowa 194.

Kentucky.—*McGraw v. Com.* (Ky., 1892), 20 S. W. Rep. 279; *Metcalf v. Conner*, Litt. Sel. Cas. (Ky.) 497, 12 Am. Dec. 340.

Louisiana.—*State v. Hogan*, 3 La. Ann. 714; *Reid v. Louisiana State Lottery Co.*, 29 La. Ann. 388.

Maine.—*Smith v. Tarbox*, 70 Me. 127.

Massachusetts.—*Com. v. Crowninshield*, 10 Pick. (Mass.) 497; *Com. v. Ratcliffe*, 130 Mass. 36; *Dole v. Wooldredge*, 142 Mass. 161; *Burke v. Miller*, 7 Cush. (Mass.) 547.

Michigan.—*Hamilton v. People*, 29 Mich. 195; *Mawich v. Elsey*, 47 Mich. 11.

Mississippi.—*Browning v. State*, 30 Miss. 656; *Street v. State*, 43 Miss. 2; *Cameron v. Lewis*, 59 Miss. 139; *Garrard v. State*, 50 Miss. 147.

Missouri.—*State v. Daubert*, 42 Mo. 239; *State v. Ross*, 29 Mo. 32.

New Hampshire.—*State v. Pike*, 51 N. H. 105.

New York.—*Ormsby v. People*, 53 N. Y. 472; *Brackett v. Griswold*, 128 N. Y. 644; *Rutherford v. Schattman*, 119 N. Y. 604; *Jones v. Hurlburt*, 39 Barb. (N. Y.) 403.

North Carolina.—*Bryce v. Butler*, 70 N. Car. 585.

Ohio.—*Patton v. State*, 6 Ohio St. 468.

Pennsylvania.—*Kelsey v. Murphy*, 26 Pa. St. 78; *Benford v. Sanner*, 40 Pa. St. 10, 80 Am. Dec. 545; *Helser v. McGrath*, 58 Pa. St. 458.

Texas.—*Hightower v. State*, 22 Tex. 605.

Virginia.—*Claytor v. Anthony*, 6 Rand. (Va.) 285; *Triplett v. Goff*, 83 Va. 784.

West Virginia.—*Carksadon v. Williams*, 7 W. Va. 2.

What a Sufficient Foundation.—In an action on the case for conspiracy, proof of a division of the profits of the fraudulent transaction is sufficient evidence of combination in the first instance to render admissible the declarations of one conspirator against the rest. *Kimmell v. Geeting*, 2 Grant's Cas. (Pa.) 125.

In *Riehl v. Evansville Foundry Assoc.*, 104 Ind. 74, Elliot, J., said: "It is not necessary that there should be positive evidence of a conspiracy; it is sufficient if the circumstances show that the parties had embarked in a joint undertaking to commit a wrong."

In *Hart v. Hopson*, 52 Mo. App. 177, it was held that proof of the existence of a conspiracy, necessary to render competent the declarations of a stranger on the ground that he was a co-conspirator of the party against whom they are offered, may be circumstantial, but it must more than raise a bare suspicion of a possible conspiracy.

In *Com. v. Brown*, 14 Gray (Mass.) 419, it was held that the question of the existence of such common purpose is primarily to be passed upon by the court, for the purpose of deciding on the admissibility of the evidence of the admissions, but ultimately to be decided by the jury.

When Receivable before Prima Facie Case Established.—It has been held that it is proper sometimes for the sake of convenience to admit evidence of the declarations of a conspirator before a *prima facie* conspiracy has been established where the prosecution promises to introduce such proof at a subsequent stage of the cause. *Hall v. State*, 31 Fla. 176; *Spies v. People*, 122 Ill. 7, 3 Am. St. Rep. 320; *State v. Daubert*, 42 Mo. 239; *State v. Grant*, 86 Iowa 216. Compare *Browning v. State*, 30 Miss. 656; *Mawich v. Elsey*, 47 Mich. 10.

In *Hamilton v. People*, 29 Mich. 195, it was held that without such assurance on the part of the prosecution the evidence will be inadmissible.

In *State v. Daubert*, 42 Mo. 239, it was held that while admissions of a conspirator might sometimes be introduced before a *prima facie* conspiracy was shown, yet this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.

2. *Sloman v. Herne*, 2 Esp. 695; *Clay v. Langslow, M. & M.* 45, 22 E. C. L. 244; *Williams v. Bridges*, 2 Stark. 42, 3 E. C. L. 309; 1 Greenl. Ev. (14th ed.), § 181.

In an Action against an Officer for an Escape on mesne process the admissions of the defendant in the original suit may be proved to show a cause of action in such suit. *Hart v. Stevenson*, 25 Conn. 499.

The Statement, Verbal or Written, of a person entitled to receive money, is evidence of its payment in a controversy between other persons. *Lee v. Virginia, etc., Bridge Co.*, 18 W. Va. 299.

sonal knowledge or not;¹ but matters stated as mere hearsay are not so receivable.²

Admissions of Law.—The admissions of a party in relation to a question of law are inadmissible in evidence.³

Admissions for Sake of Compromise.—Admissions made expressly for the purpose of effecting a compromise of a matter under controversy,⁴ and offers of money

1. *Kitchen v. Robbins*, 29 Ga. 713; *Sparr v. Wellman*, 11 Mo. 230; *Chapman v. Chicago*, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81. See *Smith v. Headrick*, 93 N. Car. 210.

Hypothetical Admissions.—The admissions of a party, made upon the hypothesis that information given him by another is true, are admissible in evidence against him in connection with proof of such information. *Chapman v. Chicago*, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81.

Uncertainty of Statement.—The admission by a defendant that a part of an account presented to him is correct, without stating which part, is inadmissible in evidence for its uncertainty. *Watson v. Byers*, 6 Ala. 393. See also *Polk v. Robertson*, 1 Overt. (Tenn.) 463; *Glazier v. Streamer*, 57 Ill. 91.

2. **Merchants' Despatch Transp. Co. v. Joesting, 89 Ill. 152. See also *Berryhill v. M'Kee*, 1 Humph. (Tenn.) 31.**

3. *Craig v. Baker*, Hard. (Ky.) 288; *Boston Hat Manufactory v. Messinger*, 2 Pick. (Mass.) 223; *Rice v. Ruddiman*, 10 Mich. 125; *Crockett v. Morrison*, 11 Mo. 3; *Polk v. Robertson*, 1 Overt. (Tenn.) 463; *Berryhill v. M'Kee*, 1 Humph. (Tenn.) 31. See also *Crump v. Gerock*, 40 Miss. 765; *Brooks v. Isbell*, 22 Ark. 488; *Morgan v. Patrick*, 7 Ala. 185; *Keane v. Fisher*, 7 La. Ann. 335; *Steffy v. Carpenter*, 37 Pa. St. 41.

Where Matter Admitted Involves Questions of Both Law and Fact.—In *Crockett v. Morrison*, 11 Mo. 3, *Napton, J.*, in delivering the opinion of the court, said: "It is well settled that the admissions of a party in relation to a question of law are no evidence. Such admissions do not make the law either one way or the other, and where the matter admitted involves a question of law as well as fact it falls within this rule, and is therefore incompetent proof."

Misapprehension of Legal Rights.—The admissions of a party, under a misapprehension as to his legal rights, do not affect his interest. *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Solomon v. Solomon*, 2 Ga. 18; *Rowen v. King*, 25 Pa. St. 409.

4. **Admissions with a View to a Compromise.**—*England.*—*Jones v. Foxall*, 15 Beav. 388; *Hoghton v. Hoghton*, 15 Beav. 278; *Paddock v. Forrester*, 3 M. & G. 903, 42 E. C. L. 470; *Jardine v. Sheridan*, 2 C. & K. 24, 61 E. C. L. 24; *Healey v. Thatcher*, 8 C. & P. 388, 34 E. C. L. 442; *Cory v. Bretton*, 4 C. & P. 462, 19 E. C. L. 473; *Jones v. Foxall*, 13 Eng. L. & Eq. 140.

United States.—*Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *West v. Smith*, 101 U. S. 263.

Alabama.—*Wilson v. Hines*, Minor (Ala.) 255; *Wood v. Wood*, 3 Ala. 765; *Wilson v. State*, 52 Ala. 299; *Jackson v. Clopton*, 66 Ala.

29; *East Tennessee*, etc., R. Co. v. *Davis*, 91 Ala. 615; *Collier v. Coggins* (Ala., 1894), 15 So. Rep. 578.

California.—*Duff v. Duff*, 71 Cal. 513.

Colorado.—*Patrick v. Crowe*, 15 Colo. 543.

Georgia.—*Keaton v. Mayo*, 71 Ga. 649; *Emery v. Atlanta Real Estate Exch.*, 88 Ga. 321.

Illinois.—*Barker v. Bushnell*, 75 Ill. 220.

Indiana.—*Dailey v. Coons*, 64 Ind. 545; *Hood v. Tyner*, 3 Ind. App. 51.

Iowa.—*Mundheuk v. Central Iowa R. Co.*, 57 Iowa 718; *State v. Lavin*, 80 Iowa 555.

Louisiana.—*Chaffe v. Mackenzie*, 43 La. Ann. 1062.

Maine.—*Rowell v. Montville*, 4 Me. 270; *Webber v. Dunn*, 71 Me. 331.

Massachusetts.—*Harrington v. Lincoln*, 4 Gray (Mass.) 563, 64 Am. Dec. 95; *Gay v. Bates*, 99 Mass. 263.

Michigan.—*Campau v. Dubois*, 39 Mich. 274; *Montgomery v. Allen*, 84 Mich. 656.

Missouri.—*Ferry v. Taylor*, 33 Mo. 323; *Huetteman v. Viesselman*, 48 Mo. App. 582.

Nebraska.—*Olson v. Peterson*, 33 Neb. 358.

New Hampshire.—*Perkins v. Concord R. Co.*, 44 N. H. 223; *Rideout v. Newton*, 17 N. H. 71.

New Jersey.—*Wrege v. Westcott*, 30 N. J. L. 212.

New York.—*Edwards v. Watertown*, 59 Hun (N. Y.) 620; *York v. Conde*, 66 Hun (N. Y.) 316; *Smith v. Satterlee*, 130 N. Y. 677; *Williams v. Thorp*, 8 Cow. (N. Y.) 201; *Payne v. Forty-second St.*, etc., R. Co., 40 N. Y. Super. Ct. 8; *Gommersall v. Crew* (C. Pl.), 10 N. Y. Supp. 231; *Slingerland v. Norton* (Supreme Ct.), 12 N. Y. Supp. 647; *Davey v. Lohrman* (City Ct.), 14 N. Y. Supp. 922.

North Carolina.—*Carey v. Carey*, 108 N. Car. 267.

Pennsylvania.—*Slocum v. Perkins*, 3 S. & R. (Pa.) 295.

Rhode Island.—*Daniels v. Woonsocket*, 11 R. I. 4.

South Carolina.—*Frick v. Wilson*, 36 S. Car. 65.

Tennessee.—*Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

Texas.—*Hand v. Swann*, 1 Tex. Civ. App. 241; *International*, etc., R. Co. v. *Ragsdale*, 67 Tex. 24; *Darby v. Roberts*, 3 Tex. Civ. App. 427; *Western Union Tel. Co. v. Thomas* (Tex. Civ. App., 1894), 26 S. W. Rep. 117.

Wisconsin.—*State Bank v. Dutton*, 11 Wis. 371.

See *Swenson v. Kleinschmidt*, 10 Mont. 473; *Howland v. Bartlett*, 86 Ga. 669; *Kinsey v. Grimes*, 7 Blackf. (Ind.) 290; *Bayliss v. Murray*, 69 Iowa 290; *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454.

To Permit the Introduction of Such Offers tends

to buy peace,¹ if not accepted, cannot be proved against the party making

to discourage the adjustment of suits, and, for that reason, is against the public policy of the law. *Jones v. Foxall*, 15 Beav. 388; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

Failure to Object to Statements Contained in Offer.—In *Patrick v. Crowe*, 15 Colo. 543, it was held that a written offer of compromise made by one of the defendants and rejected by the plaintiff is not rendered admissible against the latter by the fact that he read it without specifically objecting to matters therein prejudicial to his case.

Confidence.—It must appear that the admission was made in confidence of a compromise, or it will be admissible in evidence. *Campau v. Dubois*, 39 Mich. 274; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59; *Kahn v. Traders' Ins. Co.* (Wyo., 1893), 34 Pac. Rep. 1059.

Admissions to a third person not an attorney, and not under any pledge of confidence, are competent evidence against the person making them, notwithstanding they were made with intent to promote a compromise of the demand to which they relate. *Ashlock v. Linder*, 50 Ill. 169. See *Smith v. Whittier*, 95 Cal. 279; *Moore v. Gaus*, 113 Mo. 98.

Facts Stated for Opinion of Court.—In *Hart's Appeal*, 8 Pa. St. 32, it was held that the facts set out in a case stated for the opinion of a court are not evidence in a subsequent proceeding, nor for any other purpose than that for which they are submitted.

Offers "without Prejudice."—"Decided cases may be found where it is said that the evidence is admissible unless the offer made was stated to be without prejudice; but the rule in general, both in *England* and the *United States*, is that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise." *Clifford, J.*, in *West v. Smith*, 101 U. S. 263, citing *Lofts v. Hudson*, 2 M. & R. 481, 17 E. C. L. 318; *Phil. Ev.* (5th Am. ed.) 427, note 124; 1 *Greenl. Ev.*, § 192.

In *Jones v. Foxall*, 15 Beav. 388, Sir John Romilly, M.R., said: "In my opinion such letters and offers are admissible for one purpose only, namely, to show that an attempt has been made to compromise the suit, which may sometimes be necessary; as, for instance, in order to account for the lapse of time; but never for the purpose of fixing the person making them with any admissions contained in such letters." See also *Hoghton v. Hoghton*, 15 Beav. 278; *In re River Steamer Co.*, L. R. 6 Ch. 822; *Molyneux v. Collier*, 13 Ga. 406.

Admission of Distinct Fact Made during Efforts to Compromise.—In *White v. Old Dominion Steamship Co.*, 102 N. Y. 660, it was held that proof of the admission, by one of the parties to an action, of a distinct fact which in itself tends to make out a cause of action or defense, is not rendered inadmissible because made during negotiations relating to a compromise, unless it is expressly stated to be made without prejudice; but if the admission is of such a character as to convince the court

that it would not have been made except for the purpose of the negotiations, and under an agreement, fairly to be implied from the circumstances, that it was not to be used to the prejudice of the party making it, there is no error in excluding the evidence.

Negotiations to Effect Compromise must Appear.—In order that admissions shall be excluded on the ground that they were made for the sake of a compromise, it must be clearly shown that such subsequent negotiations were had. *Steege v. Walls*, 4 Ind. App. 18.

A conversation between the parties to a suit, shortly before the trial, in which defendant made certain admissions, was not inadmissible as evidence because brought out by plaintiff through a proposition of settlement, when it did not appear that defendant's admissions were made with a view to a compromise, or that any terms of settlement were discussed. *Akers v. Kirke* 91 Ga. 590. See *Robb v. Hewitt*, 39 Neb. 217; *Smith v. Whittier*, 95 Cal. 281.

Admissions Subsequent to Negotiation.—After a negotiation for a settlement had failed, and the parties were about separating, and continued in conversation, it was held that declarations of one party to the other were clearly admissible against the party making them. *Broschart v. Tuttle*, 59 Conn. 2.

To Prove that Compromise was Effected.—Evidence of an offer of compromise may be admissible to prove that a compromise was actually effected. *Collier v. Nokes*, 2 C. & K. 1012, 61 E. C. L. 1012; *In re River Steamer Co.*, L. R. 6 Ch. 822; *Paulin v. Howser*, 63 Ill. 312.

Mississippi—Inclining against Exclusion.—In *Grubbs v. Nye*, 13 Smed. & M. (Miss.) 443, it was said that the courts of late, and especially in this country, have leaned against the exclusion of offers of compromise as evidence.

1. **Offers to Buy Peace.**—*Alabama.*—*Williams v. State*, 52 Ala. 411.

Arizona.—*Davis v. Simmons*, 1 Arizona 25.

Illinois.—*Barker v. Bushnell*, 75 Ill. 220.

Indiana.—*Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432.

Maryland.—*Reynolds v. Manning*, 15 Md. 510.

Massachusetts.—*Draper v. Hetfield*, 124 Mass. 53; *Durgin v. Somers*, 117 Mass. 56; *Gay v. Bates*, 99 Mass. 263; *Gerrish v. Sweetser*, 4 Pick. (Mass.) 374; *Batchelder v. Batchelder*, 2 Allen (Mass.) 105.

Nebraska.—*Eldridge v. Hargreaves*, 30 Neb. 638.

New York.—*Davey v. Lohrmann* (City Ct.), 14 N. Y. Supp. 922; *Payne v. Forty-second St., etc., R. Co.*, 40 N. Y. Super. Ct. 8.

Rhode Island.—*Daniels v. Woonsocket*, 11 R. I. 4.

Tennessee.—*Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

In *Colburn v. Groton* (N. H., 1890), 28 Atl. Rep. 95, it was held that whether defendant's payment of a claim was an admission of liability, or a mere purchase of peace, was a question of fact for the court.

them. But admissions of independent facts are receivable in evidence, though made during negotiations for a compromise.¹

Admissions under Duress.—Evidence of an admission is not excluded in a civil case because it was made under legal compulsion;² but the rule is otherwise if the person making it was imposed upon or under duress.³

Matters Material to the Issue.—Admissions, to be receivable in evidence, must relate to matters material to the issue.⁴

2. Parol Admissions in Pals.—Parol admissions made *in pals* are competent evidence of such facts as are provable by parol evidence;⁵ but they cannot be

1. Admissions of Independent Facts—England.
—Wallace v. Small, M. & M. 446, 22 E. C. L. 355.

Colorado.—Kutcher v. Love, 19 Colo. 542.
Connecticut.—Fuller v. Hampton, 5 Conn. 416; Hartford Bridge Co. v. Granger, 4 Conn. 142; Broschart v. Tuttle, 59 Conn. 1.

Georgia.—Columbus v. Howard, 6 Ga. 213.
Indiana.—Cates v. Kellogg, 9 Ind. 506.
Iowa.—Mundhenk v. Central Iowa R. Co., 57 Iowa 718.

Kansas.—Central Branch Union Pac. R. Co. v. Butman, 22 Kan. 639.

Kentucky.—Church v. Steele, 1 A.K. Marsh. (Ky.) 328.

Louisiana.—Delogny v. Rentoul, 2 Martin (La.) 175.

Maine.—Cole v. Cole, 3 Me. 542.
Massachusetts.—Snow v. Batchelder, 8 Cush. (Mass.) 513; Marsh v. Gold, 2 Pick. (Mass.) 285; Durgin v. Somers, 117 Mass. 55.

Michigan.—Manistee Nat. Bank v. Seymour, 64 Mich. 59; Taylor v. Bay City St. R. Co., 101 Mich. 140.

Mississippi.—Garner v. Myrick, 30 Miss. 448.

New Hampshire.—Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Rep. 201; Sanborn v. Neilson, 4 N. H. 501; Perkins v. Concord R. Co., 44 N. H. 223; Hamblett v. Hamblett, 6 N. H. 333; Plummer v. Currier, 52 N. H. 287.

New York.—Bartlett v. Tarbox, 1 Abb. App. Dec. (N. Y.) 120; McElwee v. Trowbridge, 68 Hun (N. Y.) 28; Murray v. Coster, 4 Cow. (N. Y.) 635; White v. Old Dominion Steamship Co., 102 N. Y. 660; Marvin v. Richmond, 3 Den. (N. Y.) 58.

Pennsylvania.—Sailor v. Hertzogg, 2 Pa. St. 182; Arthur v. James, 28 Pa. St. 236.

Vermont.—Doon v. Ravey, 49 Vt. 293.
See also Short Mountain Coal Co. v. Hardy, 114 Mass. 198; Emmons v. Gordon (Mo., 1894), 25 S. W. Rep. 938; Whitney Wagon Works v. Moore, 61 Vt. 230.

Where the execution of the contract sued on is denied by the defendant, a letter offering to compromise the claim and making an express recognition of the contract is admissible in evidence as an admission of the execution of the contract. Scofield v. Parlin, 61 Fed. Rep. 804.

In Clapp v. Foster, 34 Vt. 580, it was held that evidence that the defendant offered to settle the plaintiff's claim if the latter would consent to a continuance of the cause for a certain period, was admissible as tending to establish his liability.

Where there is no controversy over the

amount due, a proposition relating solely to the method of paying the claim due is not privileged. Hood v. Tyner, 3 Ind. App. 51; Kahn v. Traders' Ins. Co. (Wyo., 1893), 34 Pac. Rep. 1059.

2. Collett v. Keith, 4 Esp. 212; Stockfleth v. De Tastet, 4 Campb. 10; Robson v. Alexander, 1 M. & P. 448, 17 E. C. L. 190; Newhall v. Jenkins, 2 Gray (Mass.) 562.

But confessions made under duress are not admissible in evidence, in criminal law. See the title CONFESSIONS.

3. Whart. Ev. (3d ed.), § 1099; Tilley v. Damon, 11 Cush. (Mass.) 247; Carr v. Griffin, 44 N. H. 510.

4. Must Relate to Matters Material to the Issue.—Van Fossen v. Mosher, 38 Kan. 417; Broschart v. Tuttle, 59 Conn. 1; Albertson v. Williams, 97 N. Car. 268; Wrege v. Westcott, 30 N. J. L. 212; Chapman v. Chicago, etc., R. Co., 26 Wis. 296, 7 Am. Rep. 81; Cook v. Barr, 44 N. Y. 156; Stephens v. Vroman, 18 Barb. (N. Y.) 250. See Linsley v. Bushnell, 15 Conn. 225, 38 Am. Dec. 79; Simmons v. Haas, 56 Md. 153; Knapp v. Hanford, 6 Conn. 170.

In Nichols v. Allen, 112 Mass. 23, it was held that the admission by a defendant who denies his signature to a note in suit, that he made a note somewhat of the purport declared on, is of itself, when made in answer to an interrogatory filed by the plaintiff, sufficient evidence for the consideration of the jury.

Evidence of the declarations of a testator that he did not intend to claim anything upon a certain bond, is receivable to show that he ordered its destruction, where direct evidence of such an order has been offered. Albert v. Ziegler, 29 Pa. St. 50.

Where a witness testified that after the purchase of certain property by B and A, he heard them talking about some outstanding liabilities, and heard B speak to A about two five hundred dollar notes on which he said he had paid some, and that A must pay some, and the witness did not know what notes were referred to, or hear A say anything, it was held that there being no evidence of any other transaction to which the conversation could have related, *prima facie* it must be taken as evidence of notice to A of the plaintiff's lien on B's note of five hundred dollars. Moore v. Raymond, 15 Tex. 554.

5. When Parol Admissions in Pals Receivable.—Scott v. Clare, 3 Campb. 236; Bivins v. McElroy, 11 Ark. 23, 52 Am. Dec. 258; Mason v. Park, 4 Ill. 532; Jameson v. Conway, 10 Ill. 227; Welland Canal Co. v. Hathaway, 8

admitted to contradict documentary proof,¹ or as a substitute for existing evidence by matter of record.²

3. Documentary Admissions.—The admissions of a party may be contained in a written instrument,³ in which case they are receivable against him, though

Wend. (N. Y.) 480, 24 Am. Dec. 51; *Jenner v. Joliffe*, 6 Johns. (N. Y.) 9.

The existence of an outstanding equitable title to land, in a third person, may be proved by a party's parol admission. *Lewis v. Harris*, 31 Ala. 689.

The creditor authorized his debtor to make payment to B, and afterwards said, "If B will acknowledge payment to him, I will admit it." It was held that proof of the oral acknowledgment of B was admissible, after his death, to show payment. *Click v. Hamilton*, 7 Rich. (S. Car.) 65.

Such evidence is generally inadmissible where evidence of a higher nature is obtainable. *Mason v. Park*, 4 Ill. 532.

Admissions by Telephone.—Conversations through a telephone, when pertinent, are competent evidence. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195; *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331; *Stapp v. State*, 31 Tex. Crim. Rep. 349; *People v. Ward*, 3 N. Y. Crim. Rep. 483.

In *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, it was held that the fact that the voice at the telephone was not identified did not render the conversation inadmissible.

But the better doctrine seems to be that the person with whom the conversation is held should be identified. *J. Obermann Brewing Co. v. Adams*, 35 Ill. App. 540; *People v. Ward*, 3 N. Y. Crim. Rep. 483; *Stapp v. State*, 31 Tex. Crim. Rep. 349.

1. 1 Greenl. Ev. (14th ed.), § 203; *Barrett v. Wright*, 13 Pick. (Mass.) 45.

But the contents of a writing may be proved by parol evidence. *Slatterie v. Pooley*, 6 M. & W. 664; *Newhall v. Holt*, 6 M. & W. 662; *Earle v. Picken*, 5 C. & P. 542, 24 E. C. L. 448; *Loomis v. Wadhams*, 8 Gray (Mass.) 557; *Crichton v. Smith*, 34 Md. 42; *Taylor v. Peck*, 21 Gratt. (Va.) 11. See *Cramer v. Shriner*, 18 Md. 140. Compare *Threadgill v. White*, 11 Ired. (N. Car.) 591.

The court, in delivering the opinion in *Slatterie v. Pooley*, 6 M. & W. 664, said: "The reason why such parol statements are admissible, without notice to produce or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so."

It was held, in *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103, that a failure of title to lands can be shown only by documentary evidence; still, a witness, in testifying to conversations with the party responsible in

damages, may speak of such failure, if the plaintiff disavows all benefit of proof of failure of title arising from such conversations.

In *Lands v. Crocker*, 3 Brev. (S. Car.) 40, it was held that mere verbal declarations that a release had been executed will not be sufficient to establish the existence of a deed, more particularly where there is no other evidence to support the presumption of its having been executed.

In *Clute v. Small*, 17 Wend. (N. Y.) 238, it is held that the contents of a letter which is lost, containing a memorandum of an admission, are not admissible in evidence, where the writer of it can only say that what he wrote was undoubtedly true, but that he has no recollection of the contents of the letter, except that it contained a proposition of settlement.

2. 1 Greenl. Ev. (14th ed.), § 203; *Summersett v. Adamson*, 1 Bing. 74, 8 E. C. L. 409; *Ware v. Roberson*, 18 Ala. 105; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51. Compare *Edgar v. Richardson*, 33 Ohio St. 581, 31 Am. Rep. 571.

The admissions of a party are not evidence, either of the conveyance of land in another state, or that, by the law of that state, judgments are an lien on land. *Morgan v. Patrick*, 7 Ala. 185.

3. *Steed v. Knowles*, 97 Ala. 573; *Blackington v. Rockland*, 66 Me. 332; *Rich v. Flanders*, 39 N. H. 304; *Holderness v. Baker*, 44 N. H. 414; *Cook v. Barr*, 44 N. Y. 156. See *Leggat v. Leggat*, 13 Mont. 190; *Western Wool Commission Co. v. Hart* (Tex., 1892), 20 S. W. Rep. 131.

In *Blackington v. Rockland*, 66 Me. 332, it was held, that the written admissions of a party to a suit are receivable in evidence against him, to prove facts directly in issue, although such facts are established by a writing not produced, and, in its absence, not accounted for.

In *Rich v. Flanders*, 39 N. H. 304, it was held, that if a party to a suit, whether upon the stand as a witness, or otherwise, is shown a paper containing written statements material to the issue and adverse to his interests, and he, after examination, admits that the statements therein contained are true, the paper containing the statements may go to the jury, in connection with his statements, as the admission of the party, and it makes no difference when, where, or by whom the statement was thus written.

Will.—Where B said that he had given a certain negro to A, the will of B, of that date, is admissible to explain his declarations. *Morisey v. Bunting*, 1 Dev. (N. Car.) 3. See *Clark v. Wood*, 34 N. H. 447.

Letters.—Letters are receivable as admissions. *Holley v. Knapp*, 45 Ill. App. 372; *Butler v. Iron Cliffs Co.*, 96 Mich. 70; *Wiggin v. Boston*, etc., R. Co., 120 Mass. 201; *Prussel v. Knowles*, 4 How. (Miss.) 90;

such instrument is undelivered,¹ or is inoperative for the purpose intended.²

Holderness v. Baker, 44 N. H. 414; *Holler v. Weiner*, 15 Pa. St. 242; *Wills Point Bank v. Bates*, 72 Tex. 137.

A letter will be admitted in evidence, even though it is addressed to a third person. *Wilkins v. Burton*, 5 Vt. 76.

Notes, Bonds, etc.—Notes, bonds, etc., are *prima facie* admissions of indebtedness, to the full amount secured thereby. *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Bowers v. Hurd*, 10 Mass. 427. See also *Alabama, etc., R. Co. v. Sanford*, 36 Ala. 703; *Child v. Moore*, 6 N. H. 33; *Rawson v. Adams*, 17 Johns. (N. Y.) 130.

In *Carlisle v. Davis*, 9 Ala. 858, it was held that a writing in the possession of the plaintiff, purporting to be indorsed to the defendant, but not proved to have been ever held by him, is not admissible to raise a presumption against him, although the maker's and indorser's signatures are proved.

An indorsement against one's interest on a note is admissible in evidence against him. *Harper v. West*, 1 Cranch (C. C.) 192; *Clarke v. Ray*, 1 Har. & J. (Md.) 318.

Accounts Rendered by a Party whose duty it is to state and account for the information of another are admissible in evidence against him. *Gradwohl v. Harris*, 29 Cal. 150; *Carroll v. Ridgaway*, 8 Md. 328; *King v. Maddux*, 7 Har. & J. (Md.) 467; *McKim v. Blake*, 139 Mass. 593; *Halleck v. State*, 11 Ohio 400; *Goodwin v. Armstrong*, 19 Ohio 44; *Lockwood v. Thorne*, 18 N. Y. 285. See *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; *Burrows v. Stevens*, 39 Vt. 378. See the title ACCOUNTS.

Entries in the Books of a Party, Made by Himself or his clerk or bookkeeper, are evidence against him. *State v. Wooderd*, 20 Iowa 542; *Currier v. Boston, etc., R. Co.*, 31 N. H. 209. See *Chase v. Smith*, 5 Vt. 556.

A Tax Collector's "Stub Book" has been admitted against him. *Britton v. State*, 77 Ala. 202.

Tax List.—In a suit for the recovery of personal property, the tax list sworn to by a party showing no claim to the property, is receivable in evidence against him. *Lefever v. Johnson*, 79 Ind. 554.

Partnership Books.—Entries in partnership books, made in the regular course of business, during the continuance of the firm, are evidence in suits between the partners. *Perry v. Butt*, 14 Ga. 699; *Topliff v. Jackson*, 12 Gray (Mass.) 565; *Caldwell v. Leiber*, 7 Paige (N. Y.) 483; *Tucker v. Peaslee*, 36 N. H. 167. See *Symonds v. Gas Light, etc., Co.*, 11 Beav. 283.

Such entries are also evidence against the partnership, when sued by a stranger. *Perry v. Butt*, 14 Ga. 699.

But, in *Brannin v. Foree*, 12 B. Mon. (Ky.) 506, entries made in the books of a firm were not admitted as evidence against a stranger in a suit by the partnership. Compare *White v. Tucker*, 9 Iowa 100.

But to Make Such Books Admissible, it must appear that they were fairly kept, and that

the party against whom they are to be used had access to them. *Turnipseed v. Goodwin*, 9 Ala. 372; *Adams v. Funk*, 53 Ill. 219.

Such entries are not evidence, when made after the partnership has been dissolved. *Boyd v. Foot*, 5 Bosw. (N. Y.) 110.

Nor are they evidence against any one, to show that he is a member of the partnership. *Robins v. Warde*, 111 Mass. 244.

Bank Books, etc.—Bank books may be used against the bank, as admissions of the facts contained therein. *Forniquet v. West Feliciana R. Co.*, 6 How. (Miss.) 116; *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377, 4 Am. Dec. 280. See *Olney v. Chadsey*, 7 R. I. 224.

They may also be used against a person dealing with the bank, so far as he has made the person making such entries his agent. 2 Whart. Ev., § 1131; *Lehman v. Rothbarth*, 111 Ill. 186; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

In *Merchants' Bank v. Taylor*, 21 Ga. 334, it was held that in a case between an incorporated bank and a stockholder of the bank, the books of the bank are admissible against the stockholder.

Memoranda, Receipts, etc.—A memorandum in writing, though not signed by the party, is admissible in evidence against him. *Gaines v. Gaines*, 39 Ga. 68; *Snyder v. Reno*, 38 Iowa 329; *Cook v. Anderson*, 20 Ind. 15; *Wadsworth v. Ruggles*, 6 Pick. (Mass.) 63; *Errico v. Brand*, 9 Hun (N. Y.) 654; *Hosford v. Foote*, 3 Vt. 391.

In the same way, a receipt will be evidence against the person by whom it was given. *Rea v. Trotter*, 26 Gratt. (Va.) 585.

Telegrams.—A telegram may be used as admission against the party sending it, but the original draft in the handwriting of the party or his agent should be produced. *Matteson v. Noyes*, 25 Ill. 591; *Williams v. Brickell*, 37 Miss. 683, 75 Am. Dec. 88; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127. See *Benford v. Sanner*, 40 Pa. St. 10, 80 Am. Dec. 545.

1. *Bulley v. Bulley*, L. R. 9 Ch. 739; *Reg. v. Cooper*, 1 Q. B. Div. 19; *Medway v. U. S.*, 6 Ct. of Cl. 421. Compare *Robinson v. Cushman*, 2 Den. (N. Y.) 149.

2. **When Instrument Inoperative for Purpose Intended.**—*Crawford v. Jones*, 54 Ala. 459; *Stovall v. Fowler*, 72 Ala. 77; *Mims v. Sturtevant*, 18 Ala. 359; *Riley v. Butler*, 36 Ind. 51; *Towne v. Milner*, 31 Kan. 207; *Ross v. Gould*, 5 Me. 204; *Hickey v. Hinsdale*, 12 Mich. 99; *Fort v. Gooding*, 9 Barb. (N. Y.) 371; *Morrell v. Cawley*, 17 Abb. Pr. (N. Y. Supreme Ct.) 76; *Reis v. Hellman*, 25 Ohio St. 180; *Lea v. Hopkins*, 7 Pa. St. 492; *Huffman v. Cartwright*, 44 Tex. 296; *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Atkins v. Plympton*, 44 Vt. 21; *Beach v. Sutton*, 5 Vt. 209. See *Knowlton v. Moseley*, 105 Mass. 136.

An Instrument Rejected as a Contract may, nevertheless, by admissions contained therein, bind a party to it. *Bishop v. Fletcher*, 48 Mich. 555.

Receipts in a Deed by a grantor deceased,

4. **Judicial Admissions—What are.**—Admissions made by an attorney in reference to the progress and trial of a cause, and those contained in the pleadings of a party, are commonly classed as judicial admissions.¹ The former have been discussed in another portion of this article.²

Admissions Made in Pleadings will bind the party in the suit in which they are filed, though such pleadings have been stricken out or withdrawn.³

though said deed does not convey the land in question, are competent as the grantor's admission that he had sold the land in question, in favor of persons claiming under his alleged vendee. *Dunn v. Eaton*, 92 Tenn. 743.

1. 1 Greenl. Ev., § 205.

2. See *supra*, this title, *Attorneys*.

3. **General Rule as to Admissions in Pleadings**—*United States*.—*Lyster v. Stickney*, 4 McCrary (U. S.) 109; *Central R. Co. v. Stoermer*, 51 Fed. Rep. 518.

Georgia.—*Parker v. Lanier*, 82 Ga. 216.

Idaho.—*Pence v. Sweeney*, 2 Idaho 914.

Illinois.—*Daub v. Englebach*, 109 Ill. 267; *Soaps v. Eichberg*, 42 Ill. App. 375.

Iowa.—*Miller v. James*, 86 Iowa 242.

Maine.—*Washington Ice Co. v. Webster*, 68 Me. 449.

Missouri.—*Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541; *Bailey v. O'Bannon*, 28 Mo. App. 39.

North Carolina.—*Guy v. Manuel*, 89 N. Car. 83; *Adams v. Utley*, 87 N. Car. 356; *Spencer v. Fortescue*, 112 N. Car. 268.

Ohio.—*Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

Wisconsin.—*Folger v. Boyinton*, 67 Wis. 447.

See also *McCormick Harvesting Mach. Co. v. Snell*, 23 Ill. App. 80; *Halpin v. Manny*, 33 Mo. App. 388; *Ferris v. Hard*, 135 N. Y. 354; *Greenville v. Old Dominion Steamship Co.*, 104 N. Car. 91; *Oregon R., etc., Co. v. Dacres*, 1 Wash. 195; *Vanneman v. Swedesboro Loan, etc., Assoc.*, 42 N. J. Eq. 263.

In *Lawrence v. Lawrence*, 21 N. J. Eq. 317, it was held that an answer, though responsive, has not the effect of evidence where the facts are not within the personal knowledge of the defendant.

In *Watters v. Parker* (Tex., 1892), 19 S. W. Rep. 1022, it was held that defendant's admissions in a plea of abatement cannot be relied upon where it was overruled, and he went to trial on a general answer.

Admissions Made by Party as Witness.—Matters to which a party has testified are admitted by him, though no such admission is contained in the pleadings. *Judge v. Jordan*, 81 Iowa 519.

Deposition.—A deposition may be used against the person making it, although he is present to testify, or has testified. *State v. Chatham Nat. Bank*, 80 Mo. 626; *Meyer v. Campbell* (C. Pl.), 20 N. Y. Supp. 705; *Phenix Mut. L. Ins. Co. v. Clark*, 58 N. H. 164.

And this although the deposition was improperly taken. *Carr v. Griffin*, 44 N. H. 510; *Edwards v. Norton*, 55 Tex. 405.

But in *Dwinel v. Godfrey*, 44 Me. 65, it was held that no statement contained in any dep-

osition taken *in perpetuum* can be given as evidence against the deponent.

Suppressed Deposition.—In *Parker v. Chancellor*, 78 Tex. 524, it was held that though the plaintiff's deposition, taken by the defendant, has been suppressed, the answers are receivable as admissions where it appears they were given and subscribed by the plaintiff.

Payment of Money into Court.—In *Bacon v. Charlton*, 7 Cush. (Mass.) 582, it was held that where money is tendered and paid into court, upon a declaration which contains but one cause of action specifically set forth, it operates as a conclusive admission of every fact which the plaintiff would be bound to prove in order to maintain his action. See 1 Greenl. Ev., § 205; *Dyer v. Ashton*, 1 B. & C. 3, 8 E. C. L. 2.

But in *Hubbard v. Knous*, 7 Cush. (Mass.) 556, it was held that where the declaration contains more than one count, and a portion only of the sum demanded is paid into court, without specifications as to which of the counts it is to be applied upon, such payment is an admission only that the defendant owes the plaintiff the sum so paid, on some one or several of the counts, but it does not admit an indebtedness under any one count, or a liability on all of them. See also *Stapleton v. Nowell*, 6 M. & W. 9; *Archer v. English*, 1 M. & G. 873, 39 E. C. L. 691; *Kingham v. Robins*, 5 M. & W. 94.

Pleading Stricken out.—A pleading which is stricken out on motion of the adverse party, may nevertheless be admissible in evidence. *Fite v. Black*, 92 Ga. 363; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

Pleading Withdrawn.—So of admissions contained in a pleading which is afterwards amended or withdrawn. *Daub v. Englebach*, 109 Ill. 267; *Soaps v. Eichberg*, 42 Ill. App. 375; *Juneau v. Stunkle*, 40 Kan. 756; *Guy v. Manuel*, 89 N. Car. 84; *Adams v. Utley*, 87 N. Car. 356; *Smith v. Pelott* (Supreme Ct.), 18 N. Y. Supp. 301; *New York, etc., Transp. Co. v. Hurd*, 44 Hun (N. Y.) 17; *Bailey v. O'Bannon*, 28 Mo. App. 39; *Hall v. Woodward*, 30 S. Car. 564. See *Boots v. Canine*, 94 Ind. 408; *Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541. Compare *Kimball v. Bellows*, 13 N. H. 58; *Smith v. Davidson*, 41 Fed. Rep. 172.

It was held, however, in *Folger v. Boyinton*, 67 Wis. 447, that, after a pleading has been amended, the original pleading cannot be used or referred to on the trial, as proof of any fact, unless it has been introduced in evidence.

But in *California* such original pleading is held to be inadmissible. *Wheeler v. West*, 71 Cal. 128; *Mecham v. McKay*, 37 Cal. 154; *Ponce v. McElvy*, 51 Cal. 222; *Johnson v.*

They are Admissible also against Him in Another Suit in behalf of either the adverse party or a stranger, provided they were sworn to by the client personally, or were drawn under his special instructions.¹

Powers, 65 Cal. 179. Compare *Coward v. Clanton*, 79 Cal. 23.

In *Massachusetts* it is declared by statute that neither the declaration, answer, nor any subsequent allegation shall be deemed evidence on the trial, but allegations only whereby the party making them shall be bound. Public Stat. of Mass. 973; *Phillips v. Smith*, 110 Mass. 61; *Taft v. Fiske*, 140 Mass. 250, 54 Am. Rep. 459.

1. When Admissible in Another Suit.—*United States*.—*Pope v. Allis*, 115 U. S. 363; *Beale v. Brown*, 6 Mackey (D. C.) 577; *Hyman v. Wheeler*, 29 Fed. Rep. 347.

Alabama.—*Callan v. McDaniel*, 72 Ala. 96.

Delaware.—*McCafferty v. Heritage*, 5 Houst. (Del.) 220.

Indiana.—*Kentucky, etc., Cement Co. v. Cleveland*, 4 Ind. App. 171; *Boots v. Canine*, 94 Ind. 408.

Iowa.—*Coffin v. Knott*, 2 Greene (Iowa) 582, 52 Am. Dec. 537.

Louisiana.—*Wells v. Compton*, 3 Rob. (La.) 171.

Maine.—*Robison v. Swett*, 3 Me. 316; *Cragin v. Carleton*, 21 Me. 492; *Parsons v. Copeland*, 33 Me. 370, 54 Am. Dec. 628.

Massachusetts.—*Elliott v. Hayden*, 104 Mass. 180; *Bliss v. Nichols*, 12 Allen (Mass.) 443; *Brown v. Jewett*, 120 Mass. 215; *Williams v. Cheney*, 3 Gray (Mass.) 215.

Minnesota.—*Warder v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250; *Siebert v. Leonard*, 21 Minn. 442; *Rich v. Minneapolis*, 40 Minn. 82.

Mississippi.—*Crump v. Gerock*, 40 Miss. 765.

Missouri.—*St. Louis Mut. L. Ins. Co. v. Cravens*, 69 Mo. 72; *Murphy v. St. Louis Type Foundry*, 29 Mo. App. 541; *Nichols v. Jones*, 32 Mo. App. 657.

New York.—*Hamilton v. Patrick*, 62 Hun (N. Y.) 75; *Cook v. Barr*, 44 N. Y. 156.

Virginia.—*Tabb v. Cabell*, 17 Gratt. (Va.) 160.

Wisconsin.—*Meade v. Black*, 22 Wis. 241. See also *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156; *McDermott v. Hoffman*, 70 Pa. St. 32.

A bill in equity signed by the complainant may be admitted in evidence in another suit as an admission of the facts therein stated. *Buzard v. McNulty*, 77 Tex. 438.

A Bill Brought to Enjoin the Prosecution of an action at law may be read in evidence against the complainant upon the trial of such action as an acknowledgment of the facts therein. *Kankakee, etc., R. Co. v. Horan*, 131 Ill. 288.

In *Lynde v. McGregor*, 13 Allen (Mass.) 182, 90 Am. Dec. 188, it was held that answers made in writing under oath, but with the understanding that they may be revised by counsel before being signed, are clearly admissible in evidence against the party answering, though neither signed nor revised.

But statements made in pleadings signed

only by the attorney, and not sworn to by the client, are not competent evidence against the latter, in another suit where the statements were made without his knowledge or sanction. *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473; *Combs v. Hodge*, 21 How. (U. S.) 404; *Dennie v. Williams*, 135 Mass. 28; *Vogel v. Osborne*, 32 Minn. 167; *Siebert v. Leonard*, 21 Minn. 442; *Crump v. Gerock*, 40 Miss. 769. Compare *Coward v. Clanton*, 79 Cal. 23; *Lamar v. Pearre*, 90 Ga. 377; *Daub v. Englebach*, 109 Ill. 267; *Soaps v. Eichberg*, 42 Ill. App. 375.

In *Boileau v. Rutlin*, 2 Exch. 665, it was held that pleadings in equity, as well as at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and, if denied, to be proved and ultimately submitted for judicial decision.

Affidavits.—In the same way an affidavit filed in a cause is competent evidence against the party making such affidavit on the trial. *National Steamship Co. v. Tugman*, 143 U. S. 28; *Chicago, etc., R. Co. v. Ohle*, 117 U. S. 123; *Hyman v. Wheeler*, 29 Fed. Rep. 347; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 143; *Wabash, etc., Canal v. Bledsoe*, 5 Ind. 133; *Davenport v. Cummings*, 15 Iowa 219; *Albertson v. Williams*, 97 N. Car. 264; *Fulton v. Gracey*, 15 Gratt. (Va.) 314; *Rowe v. Hulett*, 50 Vt. 637.

See also *Forrest v. Forrest*, 6 Duer (N. Y.) 103.

An affidavit filed in the Court of Claims, by a government contractor, as to the amount of grain left on his hands by a quartermaster, was held admissible against him in his action against a carrier for unreasonable delay in forwarding. *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 143.

In *Bowen v. DeLattre*, 6 Whart. (Pa.), 430 it was held, in an action by the payee against the maker of a promissory note, that an affidavit of defense in the same case, made by the defendant under the *Pennsylvania Act* of 1835, in which he admitted the making of the note, might be read in evidence by the plaintiff, as an admission of the fact of making the note.

Depositions.—Statements made by a party in a deposition given by him in another cause may be used in evidence against him as an admission. *Brewer v. Hyndman*, 18 N. H. 9. See *Knowlton v. Moseley*, 105 Mass. 136; *Indo v. Gibbs*, 3 Gray (Mass.) 539; *Williams v. Cheney*, 3 Gray (Mass.) 215. Compare *Elsass v. Harrington*, 28 Mo. App. 300.

Admissions of a Witness.—The admissions of a party made as a witness at one trial may be used against him in a subsequent suit. *Lorenzana v. Camarillo*, 45 Cal. 125; *Wheat v. Summers*, 13 Ill. App. 444; *McKinzie v. Reneau*, 8 Blackf. (Ind.) 411; *Kurtzmeyer v.*

V. MODE AND REQUISITES OF PROOF—General Rule.—Admissions may be proved by any competent witness who heard them.¹

Precise Language should be Given, if Possible.—He should give the precise language used by the declarant, if possible; but if this cannot be done, it will suffice if he states the substance thereof.²

The Whole Admission, however, must be submitted, both the favorable and unfavorable parts;³ but the rule does not extend to matters distinct from the

Ennis, 27 N. J. L. 271; Tooker v. Gormer, 2 Hilt. (N. Y.) 71; McAndrews v. Santee, 57 Barb. (N. Y.) 193. See Lilley v. Mutual Ben. L. Ins. Co., 92 Mich. 153; Warren v. Fredericks, 83 Tex. 380. Compare Martien v. Barr, 5 Mo. 103.

In Castleman v. Sherry, 46 Tex. 228, it was held that a statement of facts purporting to contain the testimony of a party to a suit in a former trial, but which was not signed by him, does not stand on the footing of an admission in writing, and is not admissible against him.

Plea of Guilty in Criminal Cause Used as Admission in Civil Action.—In a civil suit for assault and battery the record of a criminal prosecution for the same act, in which the defendant pleaded guilty and was convicted, is proper evidence for the plaintiff, but only as an admission of the defendant. Eno v. Brown, 1 Root (Conn.) 528; Rudolph v. Landwerlen, 92 Ind. 34; Green v. Bedell, 48 N. H. 546. See also Birchard v. Booth, 4 Wis. 67.

1. Provable by any Competent Witness Who Heard Them.—Wilcox v. Green, 28 Conn. 572; Marshall v. Adams, 11 Ill. 37; Com. v. Griffin, 110 Mass. 181; Green v. Cawthorn, 4 Dev. (N. Car.) 409; Miller v. Wood, 44 Vt. 378; Reed v. Rice, 25 Vt. 171; Bailey v. Wright, 24 Ark. 73. See also Smith v. Williams, 89 Ga. 9; Hinters v. Hinters, 114 Mo. 26; Deitz v. Regnier, 27 Kan. 94.

In Reed v. Rice, 25 Vt. 171, it was held that if the admissions of a person are competent evidence in a case, they may be shown by writing, under the hand of the party, or by a witness who heard them made, or the party himself may be called, if a competent witness.

As to admissions in writing, see *supra*, this title, *Documentary Admissions*.

As to judicial admissions, see *supra*, this title, *Judicial Admissions*.

When a witness testifies that plaintiff showed him an account purporting to be a statement of money he had paid out for defendant, and that the witness took a copy of the footings of such account, the copy is admissible against plaintiff, as being a sworn copy of an admission by him. Butler v. Cornell, 148 Ill. 276.

Admissions are not receivable in evidence in chancery in England, unless put in issue by the pleadings. 1 Greenl. Ev. (14th ed.), § 171, n.; Austin v. Chambers, 6 Cl. & F. 1; Attwood v. Small, 6 Cl. & F. 234; Copland v. Toulmin, 7 Cl. & F. 350. But it is sufficient in the United States that the proposition to be established by the admission is stated in the bill. Brandon v. Cabiness, 10 Ala. 156; Smith v. Burnham, 2 Sumn. (U. S.) 612.

See Lyford v. Gove, 44 N. H. 253; Bailey v. Wright, 24 Ark. 73; Jenkins v. Eldredge, 3 Story (U. S.) 181.

Admissions Made on Witness Stand.—In Grafenreid v. Kundert, 31 Ill. App. 394, it was held that an admission made by a deceased party in interest, when on the witness stand, is to be proven in the same manner as if it had been made elsewhere.

2. Dennis v. Chapman, 19 Ala. 29, 54 Am. Dec. 186; Woods v. Geveche, 28 Iowa 561; Marshall v. Adams, 11 Ill. 37; Kittredge v. Russell, 114 Mass. 67; Hale v. Silloway, 1 Allen (Mass.) 21; State v. Carson, 95 N. Car. 593.

3. Whole Admission must be Proved.—England.—Beckham v. Osborne, 6 M. & G. 771, 46 E. C. L. 771; Robinson v. Scotney, 19 Ves. Jr. 584; Fletcher v. Froggatt, 2 C. & P. 569, 12 E. C. L. 267.

Alabama.—Bradford v. Bush, 10 Ala. 386; Martin v. State, 77 Ala. 2; Wilson v. Calvert, 8 Ala. 757; Yarborough v. Moss, 9 Ala. 382; Ward v. Winston, 20 Ala. 167. See also Mines v. Sturtevant, 18 Ala. 359.

Arkansas.—Trammell v. Bassett, 24 Ark. 499.

California.—People v. Murphy, 39 Cal. 52.

Connecticut.—Barnum v. Barnum, 9 Conn. 242; Bristol v. Warner, 19 Conn. 7.

Georgia.—Morris v. Stokes, 21 Ga. 552.

Illinois.—Phares v. Barber, 61 Ill. 272; Arnold v. Johnson, 2 Ill. 196; Moore v. Wright, 90 Ill. 470.

Indiana.—Miller v. Wildcat, etc., Co., 52 Ind. 51.

Kentucky.—Taylor v. Whiting, 2 B. Mon. (Ky.) 268; Withers v. Richardson, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44.

Maine.—Storer v. Gowen, 18 Me. 174.

Maryland.—Simmons v. Haas, 56 Md. 153; Turner v. Jenkins, 1 Har. & G. (Md.) 161.

Massachusetts.—Whitwell v. Wyer, 11 Mass. 6; O'Brien v. Cheney, 5 Cush. (Mass.) 148; Adams v. Eames, 107 Mass. 275; Dole v. Wooldredge, 142 Mass. 161.

Michigan.—Barry v. Davis, 33 Mich. 515.

Minnesota.—Searles v. Thompson, 18 Minn. 316.

Missouri.—Reeves v. Hardy, 7 Mo. 348; Howard v. Newsom, 5 Mo. 523.

New York.—Platner v. Platner, 78 N. Y. 90; Stuart v. Kissam, 2 Barb. (N. Y.) 494; Garey v. Nicholson, 24 Wend. (N. Y.) 350; Enders v. Sternbergh, 2 Abb. App. Dec. (N. Y.) 31; Barnes v. Allen, 1 Abb. App. Dec. (N. Y.) 111; Gildersleeve v. Mahony, 5 Duer (N. Y.) 383; Kelsey v. Bush, 2 Hill (N. Y.) 440; Perego v. Purdy, 1 Hilt. (N. Y.) 269. See also Forrest v. Forrest, 6 Duer (N. Y.) 102.

North Carolina.—Spencer v. Fortescue, 112

admissions,¹ and contradictory statements made at other times.²

If an Admission was Heard in a Conversation, the witness should testify to such portions of the conversation as he heard.³

Province of Jury.—While the whole admission must be submitted, the jury may believe the unfavorable parts, and reject the parts that are favorable.⁴

N. Car. 268; *Overman v. Coble*, 13 Ired. (N. Car.) 1.

Pennsylvania.—*Postens v. Postens*, 3 W. & S. (Pa.) 127, 38 Am. Dec. 752.

South Carolina.—*Devlin v. Kilcrease*, 2 McMull. (S. Car.) 425.

Virginia.—*Perkins v. Lane*, 82 Va. 59.

Collateral Facts.—In *Lamar v. Pearre*, 90 Ga. 377, it was held that collateral facts relevant to the principal fact and embraced with it in a declaration made against interest may, as well as the principal fact itself, be proved by the declaration.

Where the Admissions are Contained in a Conversation, the questions and responses of both parties thereto should be given. *Grand Rapids, etc., R. Co. v. Diller*, 110 Ind. 223; *Phares v. Barber*, 61 Ill. 272; *Howard v. Newsom*, 5 Mo. 523; *Platner v. Platner*, 78 N. Y. 90.

Where an Admission of the Correctness of an Account rendered is implied, the credits as well as the debits should be considered. *Fitzpatrick v. Harris*, 8 Ala. 32.

Letters.—Where it was proposed on the part of the plaintiff to give in evidence a letter written by the defendant's attorney, which purported to be an answer to a letter written to him by the plaintiff's attorney, it was held that, if the plaintiff put in this letter of the defendant's attorney, he should also call for and put in the letter to which it was an answer. *Watson v. Moore*, 1 C. & K. 626, 47 E. C. L. 626. See also *Holler v. Weiner*, 15 Pa. St. 242; *Lippus v. Columbus Watch Co. (Supreme Ct.)*, 13 N. Y. Supp. 319.

In *Bailey v. Pardridge*, 35 Ill. App. 121, it was held that declarations of a party in his own favor, contained in his letters offered in evidence by his adversary to prove certain admissions, are good evidence.

At Common Law, where any pleading of the adverse party is read in evidence, as an admission, it is necessary to read the whole pleading. *Whart. Ev.* (3d ed.), § 1105; *Bath v. Bathersea*, 5 Mod. 10; *Bermon v. Woodbridge*, 2 Doug. 781; *Baildon v. Walton*, 1 Exch. 617; *Stuart v. Kissam*, 2 Barb. (N. Y.) 494; *Gildersleeve v. Mahony*, 5 Duer (N. Y.) 383; *Spencer v. Fortescue*, 112 N. Car. 268. Compare *Parker v. Lanier*, 82 Ga. 216; *Kentucky, etc., Cement Co. v. Cleveland*, 4 Ind. App. 171.

But a different rule obtains in equity, according to the *English practice*. *Whart. Ev.*, § 1104; *Bartlett v. Gillard*, 3 Russ. 149.

If the Testimony in a Formal Trial is Read, all that is relevant, both in chief and on cross-examination, must be given. *Smith v. Biggs*, 5 Sim. 391; *Gildersleeve v. Caraway*, 10 Ala. 260, 44 Am. Dec. 485; *Woods v. Keyes*, 14 Allen (Mass.) 236, 92 Am. Dec. 766; *Com. v. Richards*, 18 Pick. (Mass.) 464, 29 Am. Dec.

608; *Wolf Creek Diamond Coal Co. v. Schultz*, 71 Pa. St. 180; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67.

In an Action for False Imprisonment against a justice, if a warrant is put in by the plaintiff as his evidence, the defendant may use a recital of it of an information on oath, in consequence of which the warrant was granted by him, as evidence of that fact. *Haylock v. Sparke*, 1 El. & Bl. 471, 72 E. C. L. 471. Compare *White v. Morris*, 11 C. B. 1015, 73 E. C. L. 1015.

1. **Matters Distinct from the Admission.**—*Prince v. Samo*, 7 Ad. & El. 627, 34 E. C. L. 183; *Sturge v. Buchanan*, 2 M. & Rob. 90; *Darby v. Ouseley*, 1 H. & N. 1; *Catt v. Howard*, 3 Stark. 3, 14 E. C. L. 143; *Miller v. Wildcat Gravel Road Co.*, 52 Ind. 52; *Platner v. Platner*, 78 N. Y. 90.

2. **Contradictory Statements.**—*Blight v. Ashley*, Pet. (C. C.) 15; *Bradford v. Bush*, 10 Ala. 386; *Hatch v. Potter*, 7 Ill. 725, 43 Am. Dec. 88; *Adam v. Eames*, 107 Mass. 275; *People v. Green*, 1 Park. Cr. Rep. (N. Y.) 11; *Edwards v. Ford*, 2 Bailey (S. Car.) 461.

3. *Denver, etc., R. Co. v. Neis*, 10 Colo. 56; *Williams v. Keyser*, 11 Fla. 234, 89 Am. Dec. 243; *Westmoreland v. State*, 45 Ga. 225; *Mays v. Deaver*, 1 Iowa 216; *Miles v. Andrews*, 153 Ill. 262; *Milton v. Hunter*, 13 Bush (Ky.) 163; *Com. v. Pitsinger*, 110 Mass. 101; *State v. Pratt*, 88 N. Car. 639; *State v. Covington*, 2 Bailey (S. Car.) 569.

But where an attempt to effect a settlement of accounts had been made by certain parties, seven years before the commencement of the suit, which attempt had failed, the admissions made by one party at that time were not allowed to be given in evidence by a person who did not recollect the whole conversation. *Scott v. Young*, 4 Paige (N. Y.) 542. Compare *Nash v. Gibson*, 16 Iowa 305.

In *Wolfe v. Perryman* (Ala., 1891), 9 So. Rep. 148, it was held that a witness who hears the terms of a contract discussed in the presence of the parties a few minutes after they have been agreed upon, and before the persons have dispersed, is competent to prove the contract, although he did not actually hear it made.

4. *Bermon v. Woodbridge*, 2 Doug. 781; *Baildon v. Walton*, 1 Exch. 617; *Wilson v. Calvert*, 8 Ala. 757; *Adkins v. Hershy*, 14 Ark. 442; *Ayers v. Metcalf*, 39 Ill. 307; *Licett v. State*, 23 Ga. 57; *Coon v. State*, 13 Smed. & M. (Miss.) 246; *Field v. Hitchcock*, 17 Pick. (Mass.) 182, 28 Am. Dec. 288; *Green v. State*, 13 Mo. 382; *Pearson v. Sabin*, 10 N. H. 205; *Brown v. State*, 2 Tex. App. 139; *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138; *Brown v. Com.*, 9 Leigh (Va.) 633, 33 Am. Dec. 263; *Roberts v. Gee*, 15 Barb. (N. Y.) 449; *Beckwith v. Mollohan*, 2 W. Va. 477. But see *Fox v. Lambson*, 8 N. J. L. 275.

VI. WEIGHT OF EVIDENCE.—Admissions, Deliberately Made, may afford proof of the most satisfactory character.¹

But Verbal Admissions, Un corroborated by other facts or evidence in the case, should always be weighed with great caution.²

In *Barnes v. Allen*, 1 Abb. App. Dec. (N. Y.) 111, it was held that although the jury are not necessarily bound to give equal credit to all parts of an admission, it is not proper to instruct them in effect that they may arbitrarily believe the fact admitted and disbelieve the reasons for it.

In *Fox v. Lambson*, 8 N. J. L. 275, it was held that though, where a declaration is offered in evidence, a court or jury may, on sufficient ground, believe a part and disbelieve another part, yet such parts must be distinct, and relate to different matters of fact.

1. *Wittick v. Keiffer*, 31 Ala. 199; *Ector v. Welsh*, 29 Ga. 443; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Ray v. Bell*, 24 Ill. 444; *Mauro v. Platt*, 62 Ill. 450; *James v. Mickey*, 26 S. Car. 270; *Saveland v. Green*, 40 Wis. 432.

Admission—Agreed Statement of Facts.—But it was held in *Adams v. Eichenberger* (Ark., 1892), 18 S. W. Rep. 853, that an admission cannot prevail over an agreed statement of facts.

Primary Evidence.—Admissions are receivable as primary evidence. *Kane v. Torbit*, 23 Ill. App. 311; *Larrison v. Payne* (Supreme Ct.), 5 N. Y. Supp. 221; *Keesey v. Old*, 82 Tex. 22; *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785.

2. **Verbal Admissions, Un corroborated, Received with Caution.**—*Wittick v. Keiffer*, 31 Ala. 199; *Prater v. Frazier*, 11 Ark. 249; *Ector v. Welsh*, 29 Ga. 443; *Richmond, etc., R. Co. v. Kerler*, 88 Ga. 39; *Chandler v. Schoonover*, 14 Ind. 324; *Myers v. Baker*, Hard. (Ky.) 553; *Becker v. Crow*, 7 Bush (Ky.) 198; *Croizet's Succession*, 12 La. Ann. 401; *Higgs v. Wilson*, 3 Metc. (Ky.) 337; *Saveland v. Green*, 40 Wis. 432; *Durkee v. Stringham*, 8 Wis. 2. See also *Ringo v. Richardson*, 53 Mo. 385; *Ward v. Valentine*, 7 La. Ann. 184; *Johnson v. Filson*, 118 Ill. 219.

This is especially true when the admission is implied from the silence of the party. 1 Greenl. Ev. (14th ed.), § 199.

Admissions Made Loosely in Conversations are of little weight. *Clark v. Larkin*, 9 Iowa 391; *James v. Mickey*, 26 S. Car. 270; *O'Brien v. Flynn*, 8 La. Ann. 307; *Homer v. Speed*, 2 Patt. & H. (Va.) 616; *Durkee v. Stringham*, 8 Wis. 2. See also *Church v. Howard*, 79 N. Y. 415.

In *Prater v. Frazier*, 11 Ark. 249, it was held that if made in casual conversation, after a great lapse of time, they are the weakest possible evidence admitted in the courts of justice. See also *Vaughn v. Hann*, 6 B. Mon. (Ky.) 338.

An instruction that "evidence of casual statements or admissions by a party, made in casual conversations and to disinterested persons, is regarded by law as very weak testimony, owing to the liability of the witness to misunderstand or forget what was really

said or intended by the party," was held to be strictly correct. *Haven v. Markstrum*, 67 Wis. 493.

In *Durkee v. Stringham*, 8 Wis. 2, it was held that testimony of such character ought not to be allowed to overcome the force of a settlement, deliberately made by the parties in interest, when they must have known the true state of the accounts they were adjusting.

Strongest or Weakest Evidence—Dependent upon Circumstances.—Doubtless admissions may be the best or weakest evidence according to the attendant circumstances. *Parker v. McNeill*, 12 Smed. & M. (Miss.) 355.

When of Little Weight.—Evidence derived from verbal admissions is of little weight where it appears that the person making them was misinformed, or did not clearly express his own meaning, or that the witness misunderstood him, or cannot give the words used, so that, by altering the expressions used, a different effect may be given to what the party did say. *Chicago, etc., R. Co. v. Button*, 68 Ill. 409.

Also, when the witness can give only part of the admissions. *Chandler v. Schoonover*, 14 Ind. 324; *Mays v. Deaver*, 1 Iowa 216.

So where the admissions relate to facts of which the party had no personal knowledge. *Sparr v. Wellman*, 11 Mo. 231; *Stephens v. Vroman*, 18 Barb. (N. Y.) 250.

Admissions made by persons since deceased, and proved by witnesses who cannot be contradicted, are said to be the weakest kind of evidence. *Dupre v. McCright*, 6 La. Ann. 146; *Wilder v. Franklin*, 10 La. Ann. 279.

Where the extra-judicial declarations of a party were offered in evidence against him, and it appeared that they were not necessarily called for when made, that they were in some instances made when in an inebriated condition, and always boastfully, it was held that, if admissible at all in a suit relative to his succession, they should be entitled to no weight whatever unless strongly supported by other and independent corroborating evidence. *Chapman v. Woodward*, 16 La. Ann. 167. See *State v. Bryan*, 24 N. Car. 351.

Admissions of one of the parties to a marriage contract obtained under threats by the father of the party injured, with a deadly weapon in his hand, or by the artifice of counsel, should be received and weighed with great caution. *Fidler v. McKinley*, 21 Ill. 308.

Admissions of Doubtful Competency.—In *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31, it was held that it was proper in *Georgia* to admit declarations of doubtful competency, with the instructions that such doubtful competency diminishes the credibility of the declarations.

It is the Province of the Jury to weigh such evidence, and give it the consideration to which it is entitled;¹ they should see to it that the true meaning and import of an admission shall not be unduly restricted or extended.²

ADMIT.—See note 3.

ADMIXTURE.—See the titles ACCESSION; CONFUSION OF GOODS.

ADMONISH.—See note 4.

ADMR.—"Admr." is an abbreviation of the word "administrator."⁵

ADOPT.—To take a stranger into one's family as son or heir; to take one who is not a child, and treat him as one.⁶ To take and receive as one's own that which is not naturally so.⁷

1. *Saveland v. Green*, 40 Wis. 432; *Mauro v. Platt*, 62 Ill. 450; *Dufield v. Cross*, 12 Ill. 397; *Stephens v. Vroman*, 18 Barb. (N. Y.) 250; *Whitacre v. Culver*, 8 Minn. 133. See *Enders v. Sternbergh*, 2 Abb. App. Dec. (N. Y.) 31.

2. *Smith v. Jones*, 15 Johns. (N. Y.) 229; *Lansing v. Stone*, 37 Barb. (N. Y.) 15; *Ripley v. Paige*, 12 Vt. 353; *Clarendon v. Weston*, 16 Vt. 332. See also *Halpin v. Manny*, 33 Mo. App. 388; *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Logan v. Berkshire Apartment Assoc. (C. Pl.)*, 22 N. Y. Supp. 776; *Driscoll v. Taunton*, 160 Mass. 486; *Fordice v. Beeman*, 10 Ind. App. 295; *Miller's Estate*, 151 Pa. St. 525; *Quarles v. Littlepage*, 2 Hen. & M. (Va.) 401, 3 Am. Dec. 637; *Douglass v. Davie*, 2 McCord (S. Car.) 219; *Harrison v. McKinney*, 2 Bay (S. Car.) 412; *Simon v. Reynaud*, 10 La. Ann. 506.

In an action on an account the admission that the account was correct was held to be an admission that it was correct as to all its items. *Keller v. Jackson*, 58 Iowa 629.

An admission of the genuineness of a deed is not an admission of the truth of its recitals. *Middleton v. Westenev*, 7 Ohio Cir. Ct. Rep. 393.

3. *In the Sense of Tolerate.*—In *Pollak v. Searcy*, 84 Ala. 259, an instruction was given that if the facts relating to the sale in question admitted of two constructions, the one rendering it fraudulent, the other valid, the latter must be accepted. In commenting upon these instructions the court said: "This instruction hypothesizes nothing as to the relative strength of testimony or belief, supporting the opposing alternate constructions. These may be very weak, and still not so weak or worthless as to fall within the asserted rule. *Admit*, in the sense here employed, is the synonym of 'tolerate.' A paraphrase of the sentence would be that, unless the testimony tending to prove the fraud is so clear as to *admit* of no other conclusion, then the jury must find the conveyance valid. The rule declared is too exacting." *Quoted in Skipper v. Reeves*, 93 Ala. 336.

Admitted to Bail.—"The allegation that the defendant was 'admitted to bail' must be understood to mean that he was discharged upon his recognizance." *Shelby County v. Simmonds*, 33 Iowa 347.

Admitted and Elected.—Being *admitted* a member of the court of a city company is equivalent to being "elected." *Reg. v. Saddlers' Co.*, 32 L. J. Q. B. 337, 10 H. L. Cas. 404.

4. *Precatory Trusts.*—A testator, after a devise to his grandchildren, *admonished* and charged them that the gift was made in the hope that they would provide for their parents. This was held to raise no trust in favor of the parents. The court said: "Indeed, the words *admonish* and 'hope,' while very appropriate to the expression of a wish that the children would perform their moral duty to their parents, would be singularly inappropriate to the expression of an intention to fix any legal 'charge' or 'trust' upon the property." *Arnold v. Arnold*, 41 S. Car. 291. See, generally, the title PRECATORY TRUSTS.

5. *Moseley v. Mastin*, 37 Ala. 216.

6. *Webst. Dict.*; *People v. Norton*, 59 Barb. (N. Y.) 195. See also the titles ADOPTION OF CHILDREN; PARENT AND CHILD; SUCCESSION.

Adopt in the Sense of Legitimate.—In *Blythe v. Ayres*, 96 Cal. 559, the court, although recognizing that *adoption* was properly applied to persons who are strangers in blood, and legitimation to persons where blood relation exists, says that "the verb *adopts*, as used in section 230 of the *California Code*, is used in the sense of 'legitimates,' and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child rather than in its adoption."

7. *Webst. Dict.*; *People v. Norton*, 59 Barb. (N. Y.) 195.

Adopt and Ratify. (See also RATIFY).—In *Ellison v. Jackson Water Co.*, 12 Cal. 551, *Field, J.*, says, speaking of the terms *adopt* and "ratify": "These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then *adopt* or *ratify* the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent." See also *Shepardson v. Gillette*, 133 Ind. 125.

Adopt Distinguished from Enact.—"Much is said in argument about the meaning of the terms *adopt* and 'enact,' and there is no doubt a difference. To *enact*, implies the creating anew a law which did not exist before; but *adopt* no doubt implies the making that their own which was created by another, as the adoption of the statute laws of Great Britain, as they stood, by the colonial government." *Williams v. Michigan Bank*, 7 Wend. (N. Y.) 557.

Adoption by Wife of Husband's Acts.—Where the husband contracts in writing, in his own name, for the construction of a house upon his wife's land, that the wife knew of the erection and gave directions as to the construction of some closets does not show that the husband acted as her agent, nor that she *adopted* the contract and made it her own. *Barker v. Berry*, 8 Mo. App. 446. In that case the court said: "In fact, there was no evidence tending to show that the wife was bound by what the husband had done. Of his own accord he made his express contract in writing for the building of the house, with which contract she had nothing to do; and, in the absence of any evidence other than that which this record discloses, there can be no presumption, so far as any lien is concerned, such as that which arises where the work is done or materials furnished for any building upon land 'under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor,' to use the essential words of the statute. Here the contract was not with the owner. It is true that the lien does not arise from the written contract as such, but from the furnishing of the materials or doing the work upon order or direction for them; but where there is a written contract, this governs in ascertaining the nature of the order, so far as the contract covers the work at least, in the absence of other directions, and here are none. The husband ordered and used his own money. The wife knew of the building, but this fact would not authorize the jury to infer that she ordered the work to be done, or was bound so far as her land was concerned. It was perfectly consistent with the express arrangement of the special contract that the wife should visit the building and know that it was in progress. There was no obligation upon her to dissent from the agreement that the contractor had been willing to make; and so far as she *adopted* or, to use the inapplicable word of the plaintiff, 'ratified' anything, it was the express written contract which she *adopted*, and by this she was not bound. In the face of one express and special contract the law does not, except, at least, upon very clear

and positive proof, raise an implied obligation inconsistent with the first; and especially should it not be so without such evidence, in the case of a wife. The husband is the head of the family, whose duty it is to provide the home. The wife, in her domestic capacity, has her own sphere, and may certainly 'give directions how she wants the closets and pantry finished,'—which is all she did here,—without authorizing an inference that she *adopts* as her own the contract of another person. Indeed, '*adoption*' is as inapt as 'ratification' to express the meaning; for adoption implies assent to the contract as it is, and certainly the case is conceivable that the material-man is willing to look exclusively to the written contract and the parties named in it. *Adoption* cannot imply the insertion of a new party to the contract, or of any additional obligation not arising from it as it stands. Here the testimony of the defendant negatives all concert of action on the part of the wife, and shows that not only the contract but the arrangement for building the house was the husband's."

City Council.—Upon a report to a municipal council by one of its committees, recommending certain action to be taken by the council, a record of the proceedings of the council in the word "*adopted*" expresses the will of the body that the course recommended be pursued. *State v. Minneapolis, etc., R. Co.*, 39 Minn. 220. Here the court said: "The evidence shows, as we consider, that the city council did *adopt* the plans and grade shown in the information. These plans having been reported to the city council by a committee of that body, with the recommendation that the same be *adopted* by the council, and that the city attorney be instructed to commence proceedings in court for their enforcement, the action of the council thereupon is expressed in its records by the word '*adopted*.' This expresses the *adoption* by the council as its will of what was thus recommended. Whether this was necessary we do not decide."

To Adopt a Route.—To *adopt* a route for the transportation of the mail, means to take the steps necessary to cause the mail to be transported over that route. *Rhodes v. U. S.*, Dev. Ct. of Cl. 47.

ADOPTION OF CHILDREN.

By JAMES M. NEWELL.

- I. DEFINITION AND ORIGIN, 726.
- II. CONSTITUTIONALITY OF ADAPTION STATUTES, 727.
- III. NATURE AND REQUISITES OF ADOPTION PROCEEDINGS, 727.
 - 1. *In General*, 727.
 - 2. *Consent and Notice*, 729.
- IV. WHO MAY ADOPT AND WHO MAY BE ADOPTED, 731.
- V. EXTRA-TERRITORIAL EFFECT OF ADOPTION, 733.
- VI. DECREE OF ADOPTION—HOW AND WHEN SET ASIDE, 734.
 - 1. *In General*, 734.
 - 2. *Fraud and Mistake*, 736.
 - 3. *May Not be Attacked Collaterally*, 736.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *PARENT AND CHILD*, *ENCYCLOPEDIA OF PLEADING AND PRACTICE*.

As to succession by and from adopted children, see the title *SUCCESSION*.

As to other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *BASTARDY*; *LEGITIMACY*; *PARENT AND CHILD*.

I. DEFINITION AND ORIGIN—Definition.—Adoption is the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature.¹

Origin.—Adoption is not recognized by the common law, being repugnant to its principles, and exists in the *United States* only by special statute.² It was, however, expressly sanctioned under the civil law, and exists in many countries on the Continent of Europe which derive their jurisprudence from that law.³ Traces of the practice are found in the jurisprudence of the Jews, Greeks, and Romans.⁴

1. *Morrison v. Sessions*, 70 Mich. 297, 14 Am. St. Rep. 500.

Adoption is the taking into one's family a child of another as son and heir, conferring on it a title to the privileges and rights of a child. An act, in other words, by which a person appoints as his heir the child of another. *Abney v. DeLoach*, 84 Ala. 393.

Adoption is the legal act whereby an adult person takes a minor into the relation of child and thereby acquires the rights and incurs the responsibility of a parent in respect to such minor. N. Y. Stat. 1873, c. 830.

2. **Common Law.**—*Abney v. DeLoach*, 84 Ala. 393; *Ballard v. Ward*, 89 Pa. St. 358; *In re Stevens Estate*, 83 Cal. 322, 17 Am. St. Rep. 252; *In re Johnson's Estate*, 98 Cal. 531; *Ex p. Clark*, 87 Cal. 638; *Morrison v. Sessions*, 70 Mich. 297, 14 Am. St. Rep. 500; *Fur-*

geson v. Jones, 17 Oregon 204, 11 Am. St. Rep. 808; *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23.

3. It was introduced from the laws of *France* and *Spain* respectively into *Louisiana* and *Texas*. *Vidal v. Commagere*, 13 La. Ann. 516; *Eckford v. Knox*, 67 Tex. 200.

4. **Civil Law.**—In *Morrison v. Sessions*, 70 Mich. 297, 14 Am. St. Rep. 500, Champlin, J., delivering the opinion of the court, said: "Among many of the continental nations it [adoption] has been practiced from the remotest antiquity. It appears to have been a necessary concomitant of the type of archaic society when the family constituted the unit of the community, and was an important factor in developing society into the broader community called the state."

Adoption, in the Roman law, was an act by

II. CONSTITUTIONALITY OF ADOPTION STATUTES.—Adoption statutes have been enacted in almost all the states of the Union,¹ and although their constitutionality has been assailed on various grounds, in no state, so far as can be ascertained, has such a statute been declared unconstitutional² when passed with the prescribed formalities.³

III. NATURE AND REQUISITES OF ADOPTION PROCEEDINGS—1. **In General.**—In most of the states the mode of adoption provided by statute is by petition to the probate or other like court, reciting the requisite facts. A decree is made by the court, based upon these facts, which judicially confers upon the child the capacity or qualification to inherit, and other incidents of the status authorized by the statute of the particular state where the adoption proceeding is had. This is a judicial procedure, involving the rendition of a judgment by the court by which the new status of the child is determined.⁴

which a person undertook to rear the child of another and appoint such child as his heir. *Ballard v. Ward*, 89 Pa. St. 358.

Adoption was a feature of the Roman law, and obtains in *Germany* and *France*, and some other continental nations of Europe, whose jurisprudence in this respect has followed the civil law. It prevailed also as a custom among the ancient Jews. In *Alabama*, prior to the Code of 1852, the right of adoption was limited to the legitimation of bastard children by their fathers. *Abney v. DeLoach*, 84 Ala. 393.

1. Stimp. Am. St. Law, §§ 6640-6651.

2. **Abandonment of Child by Father—Adoption may be Authorized on Application of Mother and without Father's Consent.**—In *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23, it was held that the statute authorizing the adoption of a child on the application of the mother, and without the consent of, or notice to, the father where the latter has relinquished his claim to the child by abandonment, is not in conflict with any provision of the constitution. In upholding the constitutionality of the statute the court said: "As to the constitutionality of the statute, when construed as we construe it, we have this to say: An examination of the statutes of adoption in force in the *United States* will show that in several states the consent of and notice to abandoning parents is not required. It is enough if the fact of abandonment is made to appear; then the remaining parent may consent to the adoption. This is the case in *Colorado*, *Illinois*, *Alabama*, and perhaps other states. After careful search we have been unable to find any case in which the constitutionality of such statutes has been denied or questioned, and certainly we have not been referred to any. Upon principle, I am unable to conceive of any valid constitutional objection to the statute as we construe it."

Conferring Power upon Judge.—The *California* statute was attacked because it conferred the power of adoption upon the judge as distinguished from the court. But the court upheld the statute, saying that the legislature has full power to regulate the adoption of children, and may invest any person or officer or court with the power of receiving, witnessing, and declaring the adoption, and prescribe the form of adoption; that the matter of adoption belongs to the

legislative, and not to the judicial, branch of the government; and though the act of passing upon the adoption may be judicial in the sense of being an act of judgment, still this does not make it any part of the judicial power spoken of in the constitution, and by that instrument vested in courts. *In re Stevens*, 83 Cal. 322.

School Fund.—The *Indiana* Act of Dec. 21, 1865 (1 Rev. Stat. 1876, p. 417), enabling children adopted under the laws of any other state of the Union to take and hold real estate in that state, is not in conflict with art. 8, § 2, of the state constitution, prescribing what shall constitute the common-school fund. *State v. Meyer*, 63 Ind. 33.

Affecting Devolution of Property.—It was held in *Sewall v. Roberts*, 115 Mass. 262, that the fact that the statute, as one of its incidental features, changes the descent and devolution of property, does not render it invalid unless it defeats vested rights. See also *In re Jessup's Estate*, 81 Cal. 408.

3. In *People v. Congdon*, 77 Mich. 351, Act 26, Laws of 1861, which provided for the adoption of minor children, was held to be unconstitutional, on the ground that it failed to express the object of the act in its title, in violation of the constitutional provision to that effect.

4. **Judicial Procedure.**—*Abney v. DeLoach*, 84 Ala. 393. And see the various local statutes.

Ministerial Act.—In other states a mode is adopted which is intended to be more simple and inexpensive. It consists of a written instrument, declaration, or statement, more in the nature of a deed than anything else, which is required to be executed, attested, acknowledged, and filed for record in the probate or other court of cognate jurisdiction. There is nothing judicial connected with this simple procedure; even the taking of the acknowledgment by the probate judge is purely a ministerial and not a judicial act. *Abney v. DeLoach*, 84 Ala. 393; Ala. Code 1886, §§ 2743-2745; Rev. Code Iowa, c. 7, § 2309; Civ. Stat. Tex., tit. 1, art. 1; Civ. Code Cal., c. 2, § 226.

Proceeding in Rem.—The adoption of a minor child has been declared to be in the nature of a proceeding *in rem*, the purpose being to change the status of the child, and, *ipso facto*, to render it what the court de-

The Compliance Required.—While the statutes authorizing adoption are in derogation of the common law, and for this reason are, in some respects, to be strictly construed, yet their construction should not be narrowed so closely as to defeat the legislative intent which may be made obvious by their terms, and by the mischief to be remedied by their enactment.¹

Presumption of Adoption.—There is no presumption that minor children living with a man who is not their father have been adopted by him.²

Noncompliance with Statute—Contract as to Property.—There are cases in which alleged adopted children have been allowed to inherit the property of alleged adopting parents when the statutory requirements regarding adoption have not been substantially complied with. But this has not been upon the ground that the defective proceedings constituted a valid adoption, but on the ground that there was a contract by such alleged parents to leave their property to such children, and that the latter having performed their part by rendering the services due from children to their parents, equity will enforce the contract against the representatives of the alleged adopting parents.³

clares it to be—the child and heir of the adopting parent. *Van Matre v. Sankey*, 148 Ill. 536.

Texas Statute.—The *Texas* Adoption Act modifies the law of *Spain* on that subject as far as the rights of the adopted child are concerned. Under the civil law the adopted child could not inherit if the adopting father had a legitimate child living. The statute of *Texas* confers on the adopted child the rights of a natural child only with reference to the estate, and does not constitute him a member of the family of the adopter, nor invest him with the privileges and duties peculiar to the relation of parent and child, as does the civil law. *Eckford v. Knox*, 67 Tex. 200; *Taylor v. Deseve*, 81 Tex. 246.

1. Strict Compliance.—In the following cases a strict compliance with the provisions of the statute was held necessary in order to constitute a valid adoption. *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808; *Luppie v. Winans*, 37 N. J. Eq. 245; *Keegan v. Geraghty*, 101 Ill. 26; *Johnson v. Terry*, 34 Conn. 259; *Ex p. Clark*, 87 Cal. 641; *In re Jessup's Estate*, 81 Cal. 408; *Wallace v. Rappleye*, 103 Ill. 229.

Verbal Agreement.—It was held, in *Taylor v. Deseve*, 81 Tex. 246, that a verbal agreement between the father, the mother being dead, and another, to the effect that the latter should have the custody of the child, did not constitute an adoption of such child, and that no rights grew out of such agreement. See also *State v. Baldwin*, 5 N. J. Eq. 454.

Failure to Execute Instrument—Intention to Execute.—In *Iowa*, where an instrument, intended to effect the adoption of an infant, was signed and acknowledged by his surviving parent, but the parties who intended to adopt the child failed to execute it, because the justice who had possession of the instrument was ill, and the child resided with his intended parents for nearly two years, it was held that there was not such a compliance with the provisions of the statute as to constitute a legal adoption. *Long v. Hewitt*, 44 Iowa 363.

Filing Instrument for Record.—In *Iowa*, where the articles of adoption of a child were executed, signed, and acknowledged by the

parties, but were not filed for record until after the death of the person making the adoption, it was held that the act of adoption was incomplete, and the child could not inherit as the heir of the decedent. *Tyler v. Reynolds*, 53 Iowa 146. Followed in *Gill v. Sullivan*, 55 Iowa 341. And this is true notwithstanding the fact that the child has complied with the terms of such articles during the full period of his minority. *Shearer v. Weaver*, 56 Iowa 578. And in *McCollister v. Yard* (Iowa, 1894), 57 N. W. Rep. 447, it was held that the instrument must be filed during the minority of the child, or there is no valid adoption.

Substantial Compliance.—In the following cases it has been held that a substantial compliance with the provisions of the statute is sufficient. *In re Williams' Estate*, 102 Cal. 70; *Cofer v. Scroggins*, 98 Ala. 342; *People v. Bloedel* (Buffalo Super. Ct.), 4 N. Y. Supp. 110; *Abney v. DeLoach*, 84 Ala. 393.

In *In re Johnson's Estate*, 98 Cal. 531, the court said: "The essential foundation of the proceeding is the consent of the persons named in the statute, and when this has been given in the presence of the proper judge, and manifested in writing, and by the order of such judge, the contract cannot be declared invalid because of some merely technical objection to the manner in which the judge who signed the order of adoption may have discharged his duty in the premises."

It was held in *Fosburgh v. Rogers*, 114 Mo. 122, that the adoption of a child under the surname of its adoptive parents, without disclosing its former name, is not insufficient for that reason, provided his identity is otherwise indicated with certainty; the statute not requiring its former name to be mentioned.

It has been held in *Vermont* that adoption proceedings will not be vitiated by failure to insert in the body of the deed the name of the person adopted, when his consent is evidenced by the signature of his guardian. *Bancroft v. Bancroft*, 53 Vt. 9.

2. In re Romero's Estate, 75 Cal. 379.

3. Van Tine v. Van Tine (N. J., 1888), 15 Atl. Rep. 249; *Wright v. Wright*, 99 Mich. 170; *Healey v. Simpson*, 113 Mo. 340.

2. Consent and Notice—The Parents.—In order to constitute a valid adoption under the statutes, the written consent of a child's natural parents must be obtained, if living, or the consent of the survivor, if one is dead,¹ provided

Where the father of an infant child made an agreement with an uncle of the infant, at the uncle's request, that the infant should be taken by said uncle and adopted as his own child, and that he should leave such property as he might have at his death, and the death of his wife, to such child, and where the uncle in pursuance of this agreement took the child and had him baptized, the child assuming his surname and living with him for twenty-five years, it was held that the child might maintain his bill upon the agreement after such performance on his part. *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

Under a *Michigan* statute, providing for the organization of mutual benefit associations, "to secure to the family or heirs of any member, upon his death, a certain sum of money," it was held that the term "family" will cover a case where the insured and the beneficiary were an old man and a young woman, respectively, not related at all, but who had lived for a number of years in the same household, and had treated each other as father and daughter. *Carmichael v. Northwestern Mut. Bea. Assoc.*, 51 Mich. 494.

Before the enactment of the *New York* Adoption Law, a girl was surrendered by her parents, while quite young, to a man and his wife. They agreed, in consideration thereof, to take her as a daughter, giving her their name and promising to leave their property to her. The parents did not exert any control over the girl, and she supposed, until after the death of her adopted parents, that she was the daughter of the latter. The adopted mother died without making a will, supposing that by the will of her husband, who had died previously, the property would pass to the girl. It was held that the promise of the adopted parents to leave their property to the girl would be enforced. *Godine v. Kidd* (Supreme Ct.), 19 N. Y. Supp. 335.

A man and his wife made an agreement to adopt an infant as their child, and leave it their property upon their death, but failed to execute a legal adoption. The child wholly performed its part of the agreement by living with them and rendering the obedience due from a child to its parents; the husband died leaving his property to his wife; the child continued to live with the wife until she died, intestate. It was held that the contract was valid, and that the plaintiff was entitled to a specific performance in regard to the disposition of the property. *Sharkey v. McDermott*, 91 Mo. 647 (reversing *Sharkey v. McDermott*, 16 Mo. App. 80).

Suing in Adopted Name.—In *Watson v. Watson*, 49 Mich. 540, it was held, where a girl had been practically though not formally adopted into a family, in pursuance of an understanding that she should be treated

in all things as a daughter, that she might use the name of her adopted parents as her own in bringing a suit against the head of the family.

1. Consent of Parents.—*Luppie v. Winans*, 37 N. J. Eq. 245; *Humphrey*, Appellant, 137 Mass. 84; *Ex p. Chambers*, 88 Cal. 216; *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23; *In re Johnson's Estate*, 98 Cal. 531; *Booth v. Van Allen*, 7 Phila. (Pa.) 401; *In re Clements*, 78 Mo. 352.

Statutes of Adoption are Founded on Consent, and when consent is required to be given, the court has no jurisdiction without it. *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808.

Word "Parents" Construed.—The word "parents," as used in the various statutes, is construed to mean only the lawful father and mother; and if a child be illegitimate, the consent of the mother only is necessary, and it is not necessary to give notice to the putative father. *Gibson*, Appellant, 154 Mass. 378; *Booth v. Van Allen*, 7 Phila. (Pa.) 401.

Consent Presumed.—It was held in *Sword v. Keith*, 31 Mich. 247, that where a child, on the death of his father, was adopted by his uncle, who stood to him *in loco parentis*, and to whom he sustained the relation of an adopted child until he became of age, it will be presumed, nothing appearing to the contrary, after a lapse of twenty years from his majority, that his mother has assented to such adoption by his uncle, and to his emancipation from any parental control or rights she might have asserted at that time.

Consent Dispensed with.—In most of the states a parent's consent may be dispensed with when he or she has been divorced for adultery or cruelty, or when he or she has been judicially deprived of the custody of the child. Cal. Civ. Code, § 224; Dak. Civ. Code, § 110; Idaho Civ. Code, § 4; Ill. Rev. Stat., c. 4; N. Y. Rev. Stat., tit. "Children," § 32; Nev. Gen. Stat., c. 24, § 4; *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23; Rev. Code Iowa, c. vii., § 2308.

It has been held in *California* that § 224, Civ. Code, rendering the consent of a parent divorced on account of adultery unnecessary to a valid adoption of a child, is applicable, even though the divorce was granted before the enactment of that provision, and for an act of adultery committed in another state. *In re Williams' Estate*, 102 Cal. 70.

It was held in *Baker v. Strahorn*, 33 Ill. App. 59, that a wife who has been awarded a divorce and the custody of the child, where she has no means to support the child, may give her consent to its adoption, and that this will be sufficient against the opposition of the husband, in the absence of any pecuniary aid on his part to the child.

It seems that in *Georgia* the consent of the mother is not necessary, unless the father is dead, or has abandoned his family; and if both be dead, or have abandoned the child,

they be known, and not hopelessly intemperate or insane, and have not abandoned the child;¹ or notice must be served upon them of the adoption proceedings.²

The Guardian or Next Friend.—If the parents be dead, or incapacitated as mentioned above, then the consent of the child's guardian or next friend must be obtained, or notice served upon him.³

Consent of Child.—In many of the states the consent of the child must also be obtained if it is over fourteen years of age,⁴ while in other states the child's consent must be obtained if it is over twelve years of age.⁵

then the consent of no one is required, but the court may decree the adoption if it seems to be for the best interests of the child. Ga. Code 1882, § 1788.

The mother of an illegitimate child consented to its adoption before she became of age, and the adoption was thereupon decreed. It was held that her consent was sufficient to render the decree valid. *In re Bush*, 47 Kan. 264.

1. Abandonment of Child.—In *Winans v. Luppie*, 47 N. J. Eq. 302, the court said: "The statutory notion of abandonment does not necessarily, we think, imply that the parent has deserted the child, or even ceased to feel any concern for its interests. It fairly may, and in our judgment does, import any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child."

Where the mother of the child is a party to adoption proceedings and gives her consent to the same, the father who has abandoned the child is not entitled to notice of the proceedings, nor is his consent to the adoption necessary. *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23, in which case the court said: "The 'parent' referred to in § 2279 (Rev. Stat. Wyoming, relative to adoption of children) is a parent who still possesses some right in or to the custody over and control of the child, which he or she can relinquish." See also *Barnard v. Barnard*, 119 Ill. 92.

It was, however, held in *Schiltz v. Roenitz*, 86 Wis. 31, that a parent could not be deprived of the custody of his child by adoption proceedings based on his alleged abandonment of the child, where he had no notice of the proceeding and no opportunity to defend.

Where Parent is Deprived of Civil Rights.—In *New York* the necessity for consent or notice to a parent is dispensed with if such parent has been deprived of civil rights. N. Y. Rev. Stat., tit. "Children," § 32.

And the same rule applies in *Oregon* and *Rhode Island*, where such parent is put in prison for more than three years. Code of Oregon, § 2939; *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808; Pub. Stat. R. I., c. 164, § 3.

2. Service of Notice.—In some of the states, where a parent does not consent to the adoption of his child, and does not belong to one of the excepted classes, it is required that he shall be personally served with a copy of the petition or order, if found in the state,

and if not, by publication made for a certain length of time (generally three weeks) in a newspaper printed in the county where the proceedings for adoption are had. *Humphrey*, Appellant, 137 Mass. 84; Oregon Code, § 2940; *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808; *Schiltz v. Roenitz*, 86 Wis. 31; R. I. Pub. Stat., c. 164, § 4; Ga. Laws 1889, p. 69.

It was held in *Lee v. Back*, 30 Ind. 148, that a decree depriving the father of the custody of his infant child, without jurisdiction of the person of the father having been acquired by notice, is void.

3. Consent of Guardian or Next Friend.—Ill. Rev. Stat., c. 4, § 5; N. H. Pub. Stat., c. 188, § 3; N. Y. Laws 1873, c. 830, § 7; R. I. Pub. Stat., c. 164, § 3; Wis. Code, § 4022.

It was held in *Burger v. Frakes*, 67 Iowa 460, that when a minor has a legally appointed guardian, he cannot be adopted except with the consent of such guardian.

In *Massachusetts*, if the person to be adopted is a married woman, the written consent of her husband is necessary in order to render the proceedings valid. In case of a subsequent adoption, the consent of the previous adopting parent is required. Mass. Pub. Stat., c. 148, § 2.

Where an orphan child has been supported wholly at the expense of an orphan asylum for the period of a year, such child cannot legally be adopted without the consent of the orphan asylum managers, given in the same manner that the consent of parents for the adoption of their children is required to be given. *Ex p. Chambers*, 80 Cal. 216.

If a Child Has no Guardian or Next Friend, then the court is, in its discretion, empowered to appoint one for it, to give or withhold consent as he may deem best. Pub. Stat. R. I. c. 164, § 3; *Edds*, Appellant, 137 Mass. 346.

4. Consent of Child.—See statutes of *Colorado*, *Connecticut*, *Illinois*, *Maine*, *Massachusetts*, *Minnesota*, *Mississippi*, *Nebraska*, *New Hampshire*, *New Jersey*, *Ohio*, *Oregon*, *Rhode Island*, *Utah*, *Virginia*, *Washington*, and *Wisconsin*, all of which require the consent of the child if it is over fourteen years of age.

5. The statutes of *Arizona*, *California*, *Dakota*, *Idaho*, *Montana*, *Nevada*, and *New York* require the consent of the child if it is over twelve years of age.

In *Michigan* the statute requires that the consent of the child be obtained if it is over seven years of age.

In *Kansas* the statute requires in all cases the consent of the person to be adopted, regardless of its age.

IV. WHO MAY ADOPT AND WHO MAY BE ADOPTED—Who may Adopt.—Generally, any person, being a resident of the state, and twenty-one years of age, is capable of adopting a child as his own.¹ But a person having a wife or husband capable of giving consent, from whom he or she is not lawfully separated, cannot adopt a child unless such wife or husband consents thereto.²

In those states whose statutes allow adults to be adopted, the consent of the parents of such adult is not required; the consent of the person to be adopted being sufficient. Ga. Code, § 1790; Mass. Pub. Stat., c. 148, § 3.

Consent of Minor Presumed.—In *Morrison v. Sessions*, 70 Mich. 297, 14 Am. St. Rep. 500, it was held that where the statute requires the assent of the minor to be adopted, in order to make the proceedings valid, such assent will be presumed, unless his dissent expressly appears, if the court is satisfied that such adoption is for the benefit of said minor.

Notice to Child.—In *Van Matre v. Sankey*, 138 Ill. 536, it was held that, unless the statute so requires; no notice to the child is necessary in proceedings for its adoption; the assent of its guardian will suffice.

1. Who may Adopt.—See the statutes of *Arizona, Kentucky, Massachusetts, Montana, Nevada, New Jersey, and Vermont.*

In *Iowa*, any person competent to make a will can adopt a child. Rev. Code Iowa, c. 7, § 2307.

Specified Difference in Age Required.—In some states the person adopting must be at least fifteen years older than the person adopted. See statutes of *Idaho, Louisiana, and New Jersey.*

In other states the person adopting must be at least ten years older than the person adopted. See statutes of *California, Dakota, and Nevada.*

In *Nevada* a Mongolian can neither adopt nor be adopted. Gen. Stat. Nev., § 610.

"Resident" Defined.—In *Wolf's Appeal*, 22 W. N. C. (Pa.) 93, in construing the Adoption Act of May 4, 1855, the court said: "The purpose of our Adoption Act is to promote the welfare of the child to be adopted, and any one desirous of adopting a child may invoke the power of the court of the county in which he or she may reside. It does not require that the petitioner shall be a citizen, a freeholder, or an inhabitant; nor does it require that he shall reside any certain length of time. It does not say that he shall be a permanent resident, which has been held to be synonymous with inhabitant; nor that he may be a temporary resident, which has been held synonymous with a sojourner. After a careful examination of all the authorities cited (they are too numerous to be classified or referred to here), I am of opinion that the word 'resident,' as used in the Act of May 4, 1855, includes both a permanent and a temporary resident, and the jurisdiction of the court is, therefore, sufficiently set forth in the petition." See also *Van Matre v. Sankey*, 148 Ill. 536.

Adoption by Nonresidents.—In *Massachusetts*, a person not an inhabitant of the commonwealth, who desires to adopt a child resid-

ing there, may present a petition to the probate court in the county where the child resides. Mass. Pub. Stat., c. 148, § 1.

Where adoption proceedings were conducted in *New Hampshire*, the statute of which state authorizes the adoption of a child on petition to the probate court in the county where the petitioner or the child resides, and the adopting parent was not a resident of New Hampshire when the petition was filed or the order for adoption made, the Supreme Court of *Massachusetts*, in construing the New Hampshire statute, said: "The law of New Hampshire, as recited in the case stated (which is the only evidence thereof before us), declares that upon a decree of adoption according to that law the child shall become to all intents and purposes, including inheritance and all other legal consequences and incidents of the natural relation of parent and child (except taking property expressly limited to heirs of the body), the child of the persons adopting him, and contemplates that immediately upon such decree their domicile shall become his. Such a statute is not to be presumed to extend to a case in which the domicile of those petitioning for leave to adopt a child is in another state. The provision in the statute of New Hampshire that the decree may be made in the county where the petitioner or the child resides, implies that the statute is intended to be limited to cases in which all parties have their domicile in that state, and there is no presumption in favor of the jurisdiction of a probate court exercising a special authority conferred by statute, and not according to the usual course of proceedings at common law or in chancery." *Foster v. Waterman*, 124 Mass. 592.

Guardian may Adopt.—Under the *Vermont* statute, a person in signing the instrument of affiliation may act in the double capacity of guardian and adopter. *Bancroft v. Bancroft*, 53 Vt. 9. See also *Sewall v. Roberts*, 115 Mass. 262.

2. Consent of Other Spouse Necessary.—*Wallace v. Rappleye*, 103 Ill. 229. See statutes of *Arizona, California, Colorado, Connecticut, Dakota, Delaware, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin.*

In *Pennsylvania* it is not necessary for one spouse to join the other in adoption proceedings, and where a woman did not join her husband in proceedings for the adoption of a child, it was held that such child did not become her child by adoption; that no confidential relations existed between them, and that in business transactions they dealt at

Who may be Adopted.—The statutes of many of the states authorize the adoption of "any minor."¹ A number of the states, however, provide for the adoption of "any child."² Some of the courts hold that the word "child," as used in these statutes, means "minor child,"³ while others hold that it includes adults as well as minors.⁴

arm's length. *Nulton's Appeal*, 103 Pa. St. 286.

Joint Adoption by Husband and Wife.—Many of the statutes, while requiring the consent of one spouse to the adoption of a child by the other, fail to expressly authorize the joint adoption by husband and wife. But whenever adoption proceedings have been attacked on the ground of being an attempted joint adoption, a proceeding which the statute did not authorize, the proceedings have been held to be valid. In *Abney v. DeLoach*, 84 Ala. 393, where the question was raised, the court said: "It is suggested in the bill that the adoption paper was signed by both John N. Sanders and his wife, and that the signature of the wife rendered it invalid as the joint act of both, a form of adoption which, it is said, is unauthorized by the statute. We do not think that a valid juridical act by one person can be rendered invalid by the consent or signature of another. The most that can be urged is that the signature of the wife was mere surplusage. It could not vitiate the act of the husband, who was *sui juris*, and, as we have shown, who complied with every essential requisite of the statute in the proceeding by which he sought to adopt the child named in the instrument of adoption."

In *Krug v. Davis*, 87 Ind. 590, the court said: "The obvious purpose of the statute before us was to authorize the incorporation of the children of other persons into families desirous of assuming control over them, and in that way to sanction the formation of new and artificial family relations between persons not necessarily of the same blood." After stating the objections made to a joint adoption, the court answered them as follows. "On the contrary, the better and more reasonable construction appears to us to be that a wife may unite with her husband in such proceeding, as, from the very nature of things, the interests of the entire family are necessarily involved in the object sought to be accomplished by it. There is not only no inconsistency, but a manifest propriety, in the wife thus uniting with her husband, as by doing so the adopted child is made to assume, in a general sense, the same position in the family which it would occupy if it were the natural child of both, born in lawful wedlock." Followed in *Markover v. Krauss*, 132 Ind. 294.

The same question arose in *California*, under a statute similar to the *Indiana* statute, and the court held as follows: "Under these sections the wife has precisely the same right to adopt a child as the husband, and we know of no reason why both may not unite in an application for the adoption of a child as the child of both, or why, in such a case, the order of adoption should not de-

clare that the child shall henceforth be treated and regarded as the child of both spouses. On the contrary, such procedure would seem to be in entire harmony with the object of the law, and an appropriate way by which husband and wife may mutually consent to the adoption of a stranger in blood into the family, and to assume towards such a child the duties of the parental relation." *In re Williams' Estate*, 102 Cal. 70.

1. See statutes of *Arizona, California, Colorado, Connecticut, Dakota, Iowa, Kansas, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Utah, Virginia, Washington*, and *Wyoming*.

Where the adoption statute uses the words "any minor," no adult can be adopted under its provisions. *McCollister v. Yard* (Iowa, 1894), 57 N. W. Rep. 447.

Excepted Relations.—In *Massachusetts* no person can adopt his or her wife, husband, brother, sister, uncle, or aunt, either of the whole or of the half blood. Pub. Stat. Mass., c. 148, § 1.

2. See statutes of *Alabama, Delaware, Florida, Illinois, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island*, and *Wisconsin*.

3. "Child" Defined.—It was held in *Moore, Petitioner*, 14 R. I. 38, and in *Williams v. Knight* (R. I., 1893), 27 Atl. Rep. 210, that the word "child," as used in the Adoption Act of that state, meant "minor child," and that adults could not be adopted under the act.

Pennsylvania.—It has been held in *Pennsylvania* that there is no law authorizing the adoption of an adult. *Anonymous*, 1 W. N. C. (Pa.) 576.

4. *Indiana.*—In *Markover v. Krauss*, 132 Ind. 294, the court, in construing the meaning of the word "child," as used in the *Indiana* Adoption Act, said: "Counsel argue that, because in the statute providing for the adoption of heirs the word 'child' is used, the proceeding can only apply to infants; that an adult is no longer a child, and hence cannot be adopted. * * * It is true that the word 'child' is used throughout the entire statute, including section 829. It is also true that the word 'child,' as commonly used, carries with it the idea of tender years and of minority. It is, however, also true that one's child does not cease to be his child when it obtains its majority. The statute, unlike the statutes of many of the states, contains no provision fixing or limiting the age at which heirs may be adopted. We can see no reason why its provisions may not apply to adults equally with infants. We think they may and do."

Massachusetts.—The *Massachusetts* Adoption Act uses the words "any child," but it

V. EXTRA-TERRITORIAL EFFECT OF ADOPTION.—A child adopted in one state, in accordance with the laws thereof, while the parties are domiciled there, will, after removal into another state, be recognized as the legal child of the adopting parent in the latter state, for the purpose of inheriting property there.¹

plainly indicates that an adult is included in these terms, as it provides that the consent of the parents of an "adult child" shall not be necessary in order to constitute a valid adoption of such child. Pub. Stat. Mass., c. 148, §§ 1, 2.

1. In *Van Matre v. Sankey*, 148 Ill. 536, the court held that a decree of adoption was a declaration of competent authority, and operated to change the status of the child, and *ipso facto* to render it that which it was declared to be—the heir-at-law of the adopting parent—and capable of inheriting from him in all respects as if it had been his child, born in lawful wedlock; and that the status of the adopted child having been established under, and existing by virtue of, the *lex domicilii*, is to be recognized and upheld in every other state, unless such status, or the rights flowing therefrom, are inconsistent with or opposed to the laws and policy of the state where it is sought to be taken advantage of. See 2 Black on Judgments, § 792 *et seq.*

In *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, Gray, C.J., delivering the opinion of the court, said: "We are not aware of any case in *England* or *America* in which a change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country, the laws of which allow a like change of status in a like manner with a like effect under like circumstances. We are, therefore, of opinion that the legal status of child of intestate, once acquired by the demandant under a statute and by a judicial decree of the state of *Pennsylvania* while the parties were domiciled there, continued after their removal into this Commonwealth."

In *Keegan v. Geraghty*, 101 Ill. 26, the court held that the rights of inheritance acquired by an adopted child under the law of *Wisconsin* would be recognized and upheld in *Illinois* only so far as they were not inconsistent with the law of descent of that state; so that if an adopted child could not take under the *Illinois* statute of descent, then it could not take at all, no matter what the law of *Wisconsin* might be in respect to the rights of an adopted child. To the same effect is *Sunderland's Estate*, 60 Iowa 732.

In *Indiana*, upon filing in any circuit court of the state a transcript of the record of the legal adoption in another state, a person so adopted has the same rights as if originally adopted in *Indiana*, and the rights of such person may be enforced, though the transcript is filed after he obtained his majority, and after the death of the adopting party. *Markover v. Krauss*, 132 Ind. 294. See also *Woodward v. Woodward*, 87 Tenn. 644.

Extra-territorial Effect of Decree of Legitimation.—The question of the extra-territorial

effect of adoption statutes and decrees is analogous to the question of the extra-territorial effect of statutes or decrees of legitimation, in that the effect of the statute or proceeding affecting the status of the party is involved in both. The following are some of the decisions on the latter point, which, however, are not at all uniform. In *Scott v. Key*, 11 La. Ann. 232, it was held that an act of the *Arkansas* legislature, legitimizing a son, did not give him the right to inherit his father's property in *Louisiana*. In *Barnum v. Barnum*, 42 Md. 251, it was held that this act of the *Arkansas* legislature could have no extra-territorial operation whatever, except as to any rights that might have been acquired under it in the state of *Arkansas*.

In *Lingen v. Lingen*, 45 Ala. 410, it was held that a child legitimized in *France* according to the forms of law in that country could not inherit property in *Alabama*. In *Smith v. Derr*, 34 Pa. St. 126, 75 Am. Rep. 641, the court said: "The fact that inheritable capacity is granted by law elsewhere cannot change our law of descents. A capacity in *Tennessee* does not prove capacity here. So far as our law is concerned, legitimation by the subsequent marriage of the parents abroad, by act of a foreign legislature, or by judicial decree abroad, are all fruitless. If they were allowed to constitute inheritable capacity here, then adoption might have the same effect. Then we should be without any law of inheritances in favor of relations in other states, except such as our neighbors should be pleased to give us. It is the fact of birth in wedlock that gives inheritable capacity, and not any artificial legitimation."

In *Doe v. Vardill*, 5 B. & C. 438, 11 E. C. L. 266, it was held that a person born in *Scotland* of parents domiciled there, but not married until after his birth, though legitimated by the laws of *Scotland*, could not take real estate in *England* as heir, his father having died intestate.

Contra.—In *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669, it was held that when an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the state, or country, where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit.

The same decision was reached in *New Jersey* in the case of *Dayton v. Adkisson*, 45 N. J. Eq. 603, 14 Am. St. Rep. 763, where the court said: "Many persons come to reside among us from neighboring states, and from those countries of Europe governed by the civil-law system, and bring with them children whom they suppose to be their lawful heirs for all purposes, but who would be denied the right of heirs as to real estate by

VI. DECREE OF ADOPTION—HOW AND WHEN SET ASIDE—1. In General.—In many of the states, the adopting parent, or the person adopted, by his next friend may appeal to the superior court or supreme court to have the decree of adoption set aside.¹ The statutes of some of the states provide that a parent who has not given his consent to adoption proceedings, and was not served with notice thereof, may appeal from the decree of adoption within a specified time.²

the rule adopted in *England* in *Doe v. Vardill*, 5 B. & C. 438, 11 E. C. L. 266, while, as to personal property, they would be lawful next of kin. I do not think such a state of the law a desirable one, and am not willing to be the first judge to declare such to be the law in this state. Nor do I think a law enabling, or even encouraging, parents to do simple justice to their innocent offspring, begotten out of wedlock, by investing them with the complete attributes of heirs, is immoral or tends to promote immorality. I see no reason why a man should not be permitted to adopt and invest with rights of heirship his own illegitimate child by marrying its mother; and I see no difference in morals between such mode of adoption and that provided by our statutes, which enables a man to adopt, with that effect, even the illegitimate child of unknown parents."

For further authorities on this subject, see the title **LEGITIMACY**.

1. How and When Decree Set Aside.—See statutes of *Maine*, *Massachusetts*, *New Hampshire*, *Oregon*, and *Rhode Island*.

By Act of Infant.—In *Vermont* it is provided by statute that a person adopted while yet a minor may dissent within one year after obtaining his majority, and thereby avoid adoption proceedings. Rev. Laws Vt., § 2539.

By Act of Next Friend.—It was held in *Murray v. Barber*, 16 R. I. 512, that a child adopted by a decree of the probate court, on a petition alleging abandonment by the natural father, can appeal from said decree, the father acting as next friend for the appeal.

Next of Kin cannot Appeal.—Under a statute authorizing the adopting parent or the person adopted, by his next friend to appeal from a decree of adoption, it was held in *Gray v. Gardner*, 81 Me. 554, that upon the death of the adopting parent his heirs or next of kin were not authorized to appeal from the decree of adoption. The court said: "Neither of the parties saw fit to appeal at the time the decree was passed. At that time, the petitioner living, it is clear the heirs presumptive had no right of appeal. They were not petitioners, nor could they in any legal sense be the representatives of the petitioner. The adoption of the child would impose no duties or obligations upon them. Nor had they any vested rights as heirs which the adoption would interfere with, nothing in this respect, of the prospect of which it was not entirely competent for the petitioner to deprive them, either by the adoption of an heir or in the various other methods known to the law. Nor are their rights increased by her death. If they are

deprived of their inheritance, it is by an act of the ancestor legal and competent for her to perform, and by which they must abide. It is equally clear that they cannot appeal as representatives of the petitioner. Not as heirs, for as such they are acting and must act, if at all, in their own behalf, and for their own interests. Not as administrators, if such they were, for the decree is the result of a completed act of the intestate." See also *Wolff's Appeal* (Pa., 1888), 13 Atl. Rep. 760; *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23.

Averment of Petition—Estoppel.—Where a petition for adoption states that a man and his wife are residents of a certain county, and they have upon the strength of that representation obtained an order of the county judge of that county consenting to the adoption of a child, the adopting parents would in their lifetime have been estopped to deny its truth in any controversy as to their parental duty to support and care for the child thus adopted by them, and any heirs claiming under them will be equally estopped to deny the fact, after the death of such adopting parents. *In re Williams' Estate*, 102 Cal. 70.

Character of Proceeding for Revocation of Adoption.—In *Van Matre v. Sankey*, 148 Ill. 536, the court held that a proceeding for the revocation of an adoption is not of such a summary character that it will not be regarded as *res judicata*, or as conclusive upon the rights of the parties in the courts of any other state; the application having been made by all the parties interested in the revocation, and with all the material facts before it, the court having proceeded to an adjudication of the questions raised upon their merits.

2. When Natural Parent may Have Decree Revoked.—See statutes of *Rhode Island* and *Vermont*. *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808.

In *Schiltz v. Roenitz*, 86 Wis. 31, the court held that a decree of adoption, based upon a petition reciting the abandonment of a child by its father, the father being given no notice of the proceedings or opportunity to defend against the charge of abandonment, was not conclusive against such father, and was no evidence that he had abandoned the child as alleged, and that it was competent for him to attack the adoption proceedings.

In *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23, the court said: "Notwithstanding these proceedings in adoption, the father might at any time since they took place have brought an action for the recovery of the possession or custody of the child, and no

Abuse of Child by Adopting Parents.—Since the best interests of the child are always to be looked after, it would seem that the courts would revoke a decree of adoption on the ground of abuse of the child by its adopting parent, or on the ground that such parent was not a proper person to have the custody of the child.¹

one will contend, or perhaps can successfully contend, that in such case these adoption proceedings would constitute a bar to the father's action, or that they were conclusive upon him."

Interest of Child of Paramount Consideration.—In *People v. Erbert*, 17 Abb. Pr. (N. Y. Supreme Ct.) 396, the court held that where a father has voluntarily suffered the custody of his children to be committed by indentures to third persons, on whom the indentures are binding, the court will not restore them to such father, unless it is shown to be for the benefit of the children to do so.

It is held in *Janet v. Cleghorn*, 54 Ga. 9, that where parental authority over an infant child is released to another, such release is not revocable without some sufficient legal reason being shown therefor.

Cannot be Revoked during Child's Minority.—It has been held in *Pennsylvania*, that as the adoption statute of that state contains no provision for a rescission of the contract of adoption, it cannot be revoked. After the child becomes of age he and his adopted parent may agree to rescind, but until then the child cannot consent, nor can any one waive his rights for him. *In re Theil*, 14 W. N. C. (Pa.) 422.

Probate Court cannot Revoke.—It was held in *In re Bush*, Petitioner, 47 Kan. 264, that an order of the probate court permitting the adoption of a minor is conclusive, as far as that court is concerned, and that such court can have no further jurisdiction in the matter. See also *Rives v. Sneed*, 25 Ga. 612.

Decree Not Void because of Mental Weakness of Petitioner.—In *Brown v. Brown*, 101 Ind. 340, it was held that a judgment upon the petition of a person of unsound mind, praying adoption of a child, is not void, and can only be set aside for cause. It is also held that the proper remedy of a person who asserts that an order directing the adoption of a child is invalid, because of the mental incapacity of the adoptive parent, is in equity; that an unexplained delay of more than ten years will prevent the maintenance of such a suit, as, were it otherwise, it would encourage what equity abhors, sloth and negligence.

Rights of Adoptive Parent to Custody of Child will be Enforced.—In *Armitage v. Hoyle*, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 438, it was held that where a parent had by a duly executed deed disposed of the custody and tuition of his minor child, and the person adopting had accepted the child, an action would lie to enforce the rights of the adopting parent, and that an injunction would be granted restraining the interference of the natural parent, and all persons acting under him, with the custody and management of the child by its adopting parent.

Habeas Corpus.—It was held in *Meyers v. Meyers*, 32 Ill. App. 189, that an appeal by the natural parent from a decree for the adoption of his child cannot be maintained in the absence of express statutory provision concerning same, and that the only remedy for such parent is by habeas corpus.

Decree Not Rescinded by Subsequent Informal Proceedings.—A decree of adoption fixes the status of both the adopting parent and the child adopted, with all its reciprocal rights and obligations. A subsequent written statement by the adopting parent to the effect that the child's natural mother may have it whenever she desires, does not rescind the decree of adoption. *In re Clements*, 12 Mo. App. 592.

1. Revocation of Adoption Decree on Account of Abuse of Child.—The mother of an illegitimate child having consented to its adoption, marrying afterwards, attacked the proceedings on the ground that she was not of age when she consented to the adoption of her child, and that such proceedings were therefore void. On appeal the court held that the only question for consideration was, whether the adopting parents were proper persons to have the custody of the child. In rendering its decision the court said: "The only question for our consideration is, Does the evidence establish the fact that the respondents are not proper persons to have the custody, care, and education of said infant? If it does, it is our duty to take such infant from the possession of the respondents and place it in proper hands, looking principally to the future welfare of the infant in so doing. * * * Under such circumstances it would take a strong showing to induce this court to take the child from them for any purpose. While this court would not hesitate to remove the child from their custody if they were satisfied the respondents were not proper persons to bring it up, yet it would require a stronger showing than under many circumstances and conditions to induce us to take the child from persons who adopted it as their own, by permission of the court, at such a tender age when it required so much attention and care, and after they had cared for it for a period of three years and over. * * * We believe these people who have this child are giving it, and will continue to give it, reasonably good care and a reasonably good home. If, at any time in the future, during the infancy of Bessie May, the respondents should fail in their duty to her to such an extent as to render it necessary and proper for this court to interfere in her behalf, we would, upon our attention being called thereto, promptly relieve them of the custody of the child and place it in other hands." *In re Bush*, 47 Kan. 264.

2. Fraud and Mistake.—Where a decree or order of adoption is obtained by fraud practiced on the court, or by mistake of a material fact, it will be revoked.¹

3. May Not be Attacked Collaterally.—The judgment of a court of competent jurisdiction, decreeing the adoption of a child, fixes the status of both the adoptive parent and the child, and is conclusive as against all collateral attacks by parties or their privies.²

In *Janes v. Cleghorn*, 54 Ga. 9, the court said: "That a contract made by a parent, releasing his parental authority over his child to a third person, may be revoked for good and sufficient legal reasons, we do not doubt, such as bad treatment, want of social standing, and the like, but nothing of that sort is pretended in this case."

1. Fraud Ground for Revocation.—Where a decree of adoption was based upon a petition so framed as to induce the court to believe that the infant was an unfortunate child whose father was unknown and whose mother had abandoned it, and that there was no one interested in the application except the petitioner; whereas the facts were that the child had been placed with the petitioner by her own brother, its father, who was paying for its maintenance, she knowing the whereabouts of her brother at the time she filed the petition, which she did without his knowledge or consent,—it was held that the decree of adoption should be revoked on the ground that misrepresentation and fraud had been practiced upon the court. *Booth v. Van Allen*, 7 Phila. (Pa.) 401.

In *Tucker v. Fisk*, 154 Mass. 574, where a decree of adoption was attacked on the ground that the adopting parent was of unsound mind, and that the adopted child had used undue influence upon her, and had practiced fraud upon the court, Morton, J., in delivering the opinion of the court, said: "There would seem to be nothing in the nature of a decree of adoption to take away the power of the probate court to revoke and annul it on the ground that it had been procured by fraud practiced upon the court. It is said, generally, in *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122, that it is impossible to deny the power of the probate court 'to correct errors arising out of fraud or mistake in its own decrees;' and the same thing is held in substance in *Gale v. Nickerson*, 144 Mass. 415. There is nothing in the statutes which places a decree of adoption on any different footing in this respect from that of other judgments and decrees of that court. * * * The respondent further objects, that, even if the said Eliza was of unsound mind at the time of the adoption proceedings, the validity of the decree is not thereby affected, because a judgment against an insane person is neither void nor voidable. If we assume that to be so, the answer is that the case proceeds, not on the ground that the decree is to be avoided by reason of the unsoundness of mind of Eliza, but on the ground that by means of that unsoundness, and of the undue influence which he was thereby enabled to gain

over her, and his suppression of these and other facts, the respondent was enabled to perpetrate, and did perpetrate, a fraud upon the court, which resulted in a decree of adoption which would not otherwise have been made. It is not a case where, with the facts all before it, the court came to a wrong conclusion, but a case in which by means of the fraudulent conduct and undue influence which the respondent exercised over Eliza, and which he concealed from the court, he procured the entry of the decree in controversy. *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393."

In *Brown v. Brown*, 101 Ind. 340, where the next of kin of the adopting parent sought to have a decree of adoption set aside on the ground of fraud, alleging that the adopted child knew that the adopting parent was of unsound mind, but consented to such adoption in order to inherit his property, the court, while plainly holding that fraud practiced on the court would be valid ground for revoking a decree, yet held that there was no fraud in this case, and, therefore, refused to revoke the decree, saying: "The silence of the minor did not operate as a fraud upon the court. It is by no means every wrongful act of a litigant that will authorize the overthrow of a judgment. It is quite well settled that fraud will vitiate a judgment only when it is affirmatively shown that it was practiced upon the court."

Revocation of Decree on Account of Mistake.—In *Ex p. Clark*, 87 Cal. 638, where the parents consented to the adoption of their child by Jacob Reulein, and the agreement to adopt was signed by David Reulein, and the court rendered the decree of adoption giving the child to Jacob Reulein, in habeas corpus proceedings by the child's natural parents to recover the custody of the child from John D. Reulein and wife, the court held that there was nothing in the record of the adoption proceedings to indicate that the names Jacob Reulein, David Reulein and John D. Reulein referred to one and the same person; that this was such a mistake as would vitiate the adoption proceedings, and it was therefore ordered that the child be remanded to the custody of its natural father and mother.

2. Collateral Attack.—*Brown v. Brown*, 101 Ind. 340; *Gray v. Gardner*, 81 Me. 554.

In *Sewall v. Roberts*, 115 Mass. 262, where the parents of the child to be adopted were dead, upon petition of the guardian of the child the probate court decreed the adoption of the child, and the petitioner assented thereto as guardian. It was held that the fact that no guardian *ad litem* was appointed, even granting that such appointment should

ADRIFT.—See note 1.

ADS.—*Ads.* indicates and means *ad sectam*, as *v.* indicates *versus*.²

ADULT. (See also AGE.)—The word "adult" signifies a person who has attained the full age of twenty-one years.³

have been made, did not render the decree of adoption void, but voidable only, and that it could not be avoided by a stranger to the proceeding, to the injury of the child.

It was held in *Barnard v. Barnard*, 119 Ill. 92, that where an order or decree of the county court declared a child to be the adopted child and heir of another, if the court had jurisdiction to act at all, however erroneous its action might be, the decree or order must stand until reversed in some direct proceeding. See also *Van Matre v. Sankey*, 148 Ill. 536.

It was held in *In re Johnson's Estate*, 98 Cal. 531, that the failure of the judge to personally examine the child before rendering a decree of adoption, where such child is under the age of twelve years (the age at which its consent is made necessary by statute), does not render such decree void on collateral attack.

In *Nugent v. Powell* (Wyoming, 1893), 33 Pac. Rep. 23, the court said: "But it does not follow that because the adoption proceedings were not conclusive upon the father, they were not conclusive upon the parties to the proceedings and their privies; on the contrary, we think they are, and so hold." See also *People v. Bloedel* (Buffalo Super. Ct.), 16 N. Y. Supp. 837; *Vanfleet's Collateral Attack*, § 408. Compare *Ferguson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808; *Lee v. Back*, 30 Ind. 148.

1. Seaweed between high and low water mark, which has not been deposited upon the shore and which during flood tide is moved by each rising and receding wave, is *adrift* within the *Massachusetts* statutes, although the bottom of the mass may touch the beach. *Anthony v. Gifford*, 2 Allen (Mass.) 549. See the titles ACCRETION; SEAWEED.

2. *Bowen v. Willcox, etc., Sewing Mach. Co.*, 86 Ill. 12. And in this case it was held that an affidavit of merits appearing in the pleas of a defendant entitled "C D *ads.* A B" is the same as "A B *v.* C D," and is properly entitled.

3. **Aggravated Assault.** (See also the title ASSAULT AND BATTERY.)—*Schenault v. State*, 10 Tex. App. 411; *Henkel v. State*, 27 Tex. App. 512; *Hall v. State*, 16 Tex. App. 10, 49 Am. Rep. 824. These cases were upon the construction of the term *adult* as used in the definition of aggravated assault.

The burden of proof of the age is on the state. *George v. State*, 11 Tex. App. 95.

In *Schenault v. State*, 10 Tex. App. 411, the court said: "The authorities all agree, so far as we are advised, that at common law the word *adult* signifies a person who has attained the full age of twenty-one years. The

word *adult* seems to have a well-defined meaning, both in law and in common acceptance. Mr. Bouvier defines the meaning of the word as used in the civil law, with which we have no present concern, and says: 'In the common law an *adult* is considered one of full age.' Mr. Wharton defines the word as signifying 'a person of full age.' Mr. Webster gives as one of the meanings 'one who has reached the years of manhood.' In *Raven v. Waite*, 1 Swanst. 553, cited by Mr. Bouvier, the term *adult* and the phrase 'having arrived at the age of twenty-one years' appear to be used interchangeably."

So a boy of seventeen is not an *adult* within the definition. *Galbraith v. State* (Tex. App., 1890), 13 S. W. Rep. 607.

Lunatic.—A general order provided that Order 434 should apply to cases in which an *adult* was interested in the estate as well as an infant, and it was held that the term *adult*, as there used, did not include a lunatic. *Warrnack v. Prieur*, 12 Ont. Pr. Rep. 271. In this case the court said: "It was passed to overcome the difficulty pointed out in *Fullerton v. Keely*, 9 C. L. J. N. S. 54, which followed the unreported case decided by Strong, V.C., of *Lloyd v. Burke*. That difficulty arose where the combined action of the registrar granting a praecipe decree against *adults* and of the referee in chambers making a decree against infants had to be invoked in order to procure a complete judgment. The term *adult* used in the order thus gets its interpretation as meaning one grown up to the age of man, as opposed to 'infant,' meaning one who is under age. There was no intention to use the term so as to include lunatics or persons of unsound mind. These form a class who stand by themselves in the statute book, general orders, and in the rules of court, and they are to be regarded as distinct from infants and *adult* parties. Order 645 was passed on 10th January, 1879, when a number of other orders were promulgated in which the term *adult* was used with the meaning of a person competent to act for himself; see Orders 638 and 640. Such is the meaning to be attributed to the term when used in General Order 645. That such is the proper construction is also manifest when the case of a sole defendant, being of unsound mind, is considered. There is no jurisdiction in such a case to award a judgment or decree in chambers."

Females Included in Term.—A statute to prevent the sale of liquor required that the law should be enforced upon the petition of a majority of the *adult* residents. It was held that *adult* females, as well as males, might join in the petition. *Blackwell v. State*, 36 Ark. 178.

ADULTERATION.

By GEORGE H. MARSHALL.

- I. DEFINITION AND SCOPE, 738.
- II. AT COMMON LAW, 738.
- III. BY STATUTE, 739.

CROSS-REFERENCES.

For matters pertaining to the adulteration of alcoholic liquors, see the title INTOXICATING LIQUORS.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: BOARDS OF HEALTH; FOOD; MILK; OLEOMARGARINE; POLICE POWER.

I. DEFINITION AND SCOPE—*Definition.*—To adulterate is to debase by the admixture of foreign materials. Adulteration is the act of corrupting or debasing by the admixture of foreign substances. The term is commonly employed in reference to the act of mixing with articles of food or drink intended for sale other materials of an inferior quality and usually of a more or less hurtful character.¹

Treatment Confined to Adulteration as Criminal Offense.—The following article is confined to adulteration as an indictable offense against the rules or provisions of the common or statute laws, the question of civil liability for selling adulterated articles belonging properly to other titles.²

II. AT COMMON LAW.—At common law it is an indictable offense to mix unwholesome ingredients, such as alum, in bread, or to furnish for prisoners of war bread baked in an unwholesome and insufficient manner and filled with dirt or other unwholesome substances.³ Polluting the drinking water used by a

1. *State v. Newton*, 45 N. J. L. 469.

In *Com. v. Hough*, 1 Pa. Dist. Rep. 51, the court, by Arnold, J., said: "To adulterate is to corrupt, debase, or make impure by the admixture of baser materials."

To adulterate is to corrupt by some foreign mixture or by intermixing what is less valuable. *People v. West*, 44 Hun (N. Y.) 162, *quoting* Worcester's Dict.

Whether mixing water with milk is an adulteration within the meaning of the *New York* statute (Act of April 23, 1862), *quære*. *People v. Fauerback*, 5 Park. Cr. Rep (N. Y. Supreme Ct.) 311.

Adulteration is the act of corrupting or debasing. The act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind. *Bouv. Law Dict.* i. 126.

2. See the titles IMPLIED WARRANTY; WARRANTY; FRAUD AND MISREPRESENTATION.

3. The selling of unwholesome provisions is an offense against public health. 4 Bl. Com. 162.

In *Treuve's case*, 2 East P. C. 821, where the defendant furnished bread (for the French prisoners of war) filled with dirt, filth, and other

unwholesome ingredients, it was held that the giving of any person unwholesome provisions, not fit for man to eat, *lucris causa* or from malice or deceit, is undoubtedly in itself an indictable offense. See *Burnby v. Bollett*, 16 M. & W. 644.

In *Rex v. Dixon*, 3 M. & S. 11, the defendant Dixon was indicted for supplying to the royal military asylum, at Chelsea, a large quantity of bread not fit for the food of man, which he well knew, etc. It appeared that many of the loaves were strongly impregnated with alum, and that large pieces of crude alum were found in them. The defendant was found guilty, and a new trial was refused, the court saying that alum being perilous to health in the form used, it was immaterial that if used in certain quantities it was not noxious, but wholesome.

It is an indictable offense at common law for a contractor who has agreed to furnish bread made of good marketable English or foreign wheat, to furnish bread not made wholly of good marketable English or foreign wheat, but containing divers noxious and unwholesome ingredients. *Reg. v. Baldock*, 2 Chitty's Crim. Law. 556.

family is an indictable offense; and, in brief, to mix unwholesome substances in anything intended for the food of man is an offense at common law.¹

III. BY STATUTE.—Statutes prohibiting the sale of adulterated meat, butter, milk, and liquors, are intended for the protection of the public health, and are within the police power of the state; such statutes have been enacted in *England* and in several of the *United States*.²

1. Throwing Carcass into Well.—To throw into a well the carcass of an animal which tainted and corrupted the drinking water used by a family, was held to be an indictable offense at common law. *State v. Buckman*, 8 N. H. 205.

Selling Meat Not Sound and Wholesome.—It is an indictable offense at common law to cause to be publicly exposed for sale, as sound and wholesome meat, meat known not to be sound and wholesome, *Reg. v. Stevenson*, 3 F. & F. 106; or knowingly to send such meat to market, *Reg. v. Jarvis*, 3 F. & F. 108. But a person is not indictable for sending to a meat salesman meat he knows to be unfit for human food if he does not know that it is to be sold as human food. *Reg. v. Crawley*, 3 F. & F. 109.

An indictment charging a miller with receiving good barley to be ground at his mill and delivering a mixture of oat and barley meal different from the product of the barley, and musty and unwholesome, there being no allegation that the meal was to be used for human food, does not charge an indictable offense. *Rex v. Haynes*, 4 M. & S. 214.

Selling Unwholesome Provisions.—Knowingly selling unwholesome provisions is a misdemeanor at common law. *State v. Norton*, 2 Ired. (N. Car.) 40; *State v. Smith*, 3 Hawks (N. Car.) 378.

Ancient Statute.—Although selling unwholesome provisions was indictable at common law, it is to be noted that there is a very ancient statute, 51 Henry III., prohibiting the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew. 4 Bl. Com. 162; *Burnby v. Bollett*, 16 M. & W. 644. But this statute seems to have been enacted merely to aggravate the punishment, for prosecutions under it were rare. *State v. Smith*, 3 Hawks (N. Car.) 378.

Not Necessary that Sickness Result from Using Unwholesome Meat.—Under an indictment for selling diseased beef it is not necessary to show that actual sickness was caused by eating it. Dealers in tainted provisions have no right to palm off their noxious articles until those who eat them are prostrated by actual sickness. *Goodrich v. People*, 19 N. Y. 577.

Knowledge or Means of Knowledge Necessary.—In *Hunter v. State*, 1 Head (Tenn.) 160, the court held that if the pork in question was unsound, and the defendant might have known it by ordinary care and diligence on the part of himself or those employed by him in preparing it for market, he should be convicted, whether in point of fact he knew it or not. But if the pork was unsound and the defendant did not know it, nor could have known it by ordinary and proper prudence and care, he would not be guilty.

2. Fitzpatrick v. Kelly, L. R. 8 Q. B. 337; **Powell v. Pennsylvania**, 127 U. S. 678; **Pierce v. State**, 63 Md. 592; **State v. Marshall**, 64 N. H. 549; **Palmer v. State**, 39 Ohio St. 236.

Sale of Food and Drugs Act—Adulteration by Abstraction.—On a prosecution for a violation of the *English Sale of Food and Drugs Act* of 1875, providing for the punishment of any one who adulterates milk, drugs, or liquors, and also providing that "no person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it, so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds," it is sufficient to prove that an article of food has been adulterated by the abstraction of some part of it, and sold in its adulterated state. *Dyke v. Gower* (1892), 1 Q. B. 220.

Adulterated Tea.—The appellant, a tea dealer, was convicted under Stat. 35 and 36 Vict., c. 74, § 2, for selling as unadulterated "green tea" which was adulterated. An analysis showed that the tea was painted and faced with gypsum and Prussian blue, put in for the purpose of coloring it. The tea was sold in the same state in which it comes from abroad. Tea which is imported from China as green tea and generally known as such in the tea trade is painted and faced in this manner, but this practice is not known to the public. Pure green tea, though not known generally in the trade as green tea, is imported from Japan. It was held that the conviction was right. *Roberts v. Egerton*, L. R. 9 Q. B. 494.

A Person Who Sells Mustard Mixed with Flour and Turmeric Acid, declaring at the time that he does not sell it as unadulterated mustard, is guilty of no offense against the *English* statute for the prevention of adulteration of food and drugs. *Pope v. Tearle*, L. R. 9 C. P. 499.

Alcoholic Liquors—Selling Gin under Proof, with Notice.—A publican who sold gin which was 40½ degrees under proof, but who gave notice at the time that all spirits sold by him were sold as diluted spirits and that no alcoholic strength was guaranteed, was held not to be guilty of a violation of section 6 of the *English Sale of Food and Drugs Act* of 1875. *Gage v. Elsey*, 10 Q. B. Div. 518.

Selling Watered Gin.—Where a publican sold gin containing 43.15 per cent of water, but not injurious to health, it was held that whether the mixture was what a customer buying gin would reasonably expect or not was a question for the magistrate, and that there was sufficient evidence to justify conviction. *Webb v. Knight*, 2 Q. B. Div. 530; *Pashler v. Stevenitt*, 35 L. T. N. S. 862.

English Customs Act—Mixing Strong and Weak Beer.—The mixing of two kinds of beer amounts to a dilution of the stronger beer, under section 7, subsection 2, of the *English Customs and Inland Revenue Act* of 1885. *Crofts v. Taylor*, 19 Q. B. Div. 524.

Tennessee—Oath against Adulterating Al-

Oleomargarine.—The manufacture and sale of oleomargarine is regulated by statute in a great many of our states, and in some states its manufacture or sale as a substitute for dairy butter is prohibited altogether.¹

coholic Liquors.—The laws of *Tennessee* (§ 4, c. 1, Acts 1859-60) require any person or persons who sell or offer to sell spirituous or alcoholic liquors to take an oath and give a bond not to adulterate them. *Levi v. State*, 4 Baxt. (Tenn.) 289. This statute is not complied with by taking an oath not to mix with such liquors any poisonous substance whatever. *Hall v. State*, 9 Lea (Tenn.) 574.

Druggists, etc., Allowed to Adulterate Liquors.—Under section 6 of the same act, druggists, physicians, and persons engaged in the mechanical arts are allowed to mix and adulterate liquors for medical or mechanical purposes. Under this section, a druggist may furnish mixed or adulterated spirits upon the prescription of a physician. *Newman v. State*, 7 Lea (Tenn.) 617.

But under a statute similar in its provisions it has been held that druggists and physicians are not exempted from taking the oath against adulteration. *State v. Ferguson*, 72 Mo. 297.

Pennsylvania—Any Adulteration Impairing Value of Liquors Prohibited.—Under the laws of *Pennsylvania* no recovery can be had upon a sale of liquors where there is any impurity, vitiation, or adulteration which impairs the value of the liquors in suit to the least extent. *Clohesy v. Rosdelheim*, 99 Pa. St. 56.

Nebraska—Sale or Gift of Adulterated Liquors Forbidden.—The disposing of adulterated liquors by gift or sale is forbidden by section 13 of the *Nebraska Liquor Law*, and where an applicant for a license to sell liquor has within a year sold adulterated liquor he is not entitled to a license. *Livingston v. Corey*, 33 Neb. 366.

Butter—New York.—In the case of the *People v. Mahaney*, 41 Hun (N. Y.) 26, the court held that the fact that the defendant sold at his grocery an article, representing it to be butter, which contained about seventy-five per cent of butter and twenty-five per cent or thereabouts of foreign matter, showed him to have been guilty of a violation of the act which prohibited the sale, not only of various kinds of manufactured butter, but of any substance not butter and represented to be butter.

Ohio.—It is within the power of the legislature to prohibit the sale of substances having a semblance of butter or cheese, but not wholly made from pure milk or cream, unless each package of such substance shall have plainly stamped upon it the name of each article used in or entering into the composition of such article, and it is no defense to the indictment for selling impure provisions to show that they were patented. *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

Lard—Iowa—Compound Lard Act Constitutional.—An act requiring that all compound lard should have the words "compound" lard, together with the name and proportions of the ingredients composing the same, upon the top or outer side of the package containing the same, is valid. *State v. Snow*, 81 Iowa 642.

Minnesota.—The laws of *Minnesota* require that the seller of any article made as a substitute

for or designed to take the place of lard shall disclose to the purchaser, by label or card, the nature and ingredients of the article which he offers for sale. *State v. Aslesen*, 50 Minn. 5.

Selling Diseased Flesh—Knowledge Essential.—In *Teague v. State*, 25 Tex. App. 577, it was held that in order to convict one of selling the flesh of a diseased hog, it was necessary to show not only that the hog was diseased, but that the defendant knew the fact, and the conviction was reversed because the evidence failed to show that the defendant knew the hog to be diseased.

The gist of the offence of selling diseased meat under *Massachusetts Revised Statutes*, c. 131, § 1, consists in the guilty knowledge or evil intent of a party in selling meat which he knows to be unfit for food. *Com. v. Boynton*, 12 Cush. (Mass.) 499.

1. Oleomargarine—Validity of Act Prohibiting Sale.—An act prohibiting the manufacture or sale of oleomargarine or any article in imitation of butter and cheese, is within the police power of the state. *Powell v. Pennsylvania*, 127 U. S. 678; *Walker v. Pennsylvania*, 127 U. S. 699; *In re Brosnahan*, 18 Fed. Rep. 62; *Butler v. Chambers*, 36 Minn. 69; *State v. Addington*, 77 Mo. 110, 12 Mo. App. 214; *Powell v. Com.*, 114 Pa. St. 268; *Com. v. Shirley*, 152 Pa. St. 170.

Such acts are not unconstitutional as regulating interstate commerce. *State v. Addington*, 77 Mo. 110; *Com. v. Huntley*, 156 Mass. 236; *In re Brosnahan*, 18 Fed. Rep. 62.

Nor do these acts violate the rights of patentees. *In re Brosnahan*, 18 Fed. Rep. 62. See *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

But in *New York*, on the other hand, it has been held that an act prohibiting the manufacture or sale as an article of food of any substitute for butter or cheese produced from pure, unadulterated milk or cream, is unconstitutional, inasmuch as the prohibition is not limited to unwholesome or simulated substitutes, but absolutely prohibits the manufacture or sale of any compound designed to be used as a substitute for butter or cheese, however wholesome, valuable, or cheap the compound may be, and however openly and fairly its character may be avowed and published. *People v. Marx*, 99 N. Y. 377, reversing 35 Hun (N. Y.) 528; *Waterbury v. Eagan* (City Ct.), 23 N. Y. Supp. 115.

Validity of Acts Regulating the Sale of Oleomargarine.—The power of the legislature to pass a law regulating the sale of oleomargarine is too plain to be questioned. *Com. v. Huntley*, 156 Mass. 236; *Pierce v. State*, 63 Md. 592; *McAllister v. State*, 72 Md. 390; *Bainbridge v. State*, 30 Ohio St. 264; *People v. Arensberg*, 103 N. Y. 388. See *Carter v. District Ct.*, 49 N. J. L. 600; *State v. Newton*, 49 N. J. L. 617.

Construction of Statutes—Placard Required on Wagons Selling Oleomargarine.—The *Massachusetts* statute of 1891, c. 412, § 4, providing a penalty for the sale of oleomargarine from a wagon "not having then and there on both sides of said vehicle a placard in uncondensed Gothic letters, not less than three inches in length, 'Li-

Milk.—The statutes of a great many of our states make the sale of adulterated milk, or of milk containing less than a certain per cent of milk solids, a misdemeanor; under these statutes it is immaterial what reduced the milk below the required standard, or whether the foreign matter is or is not injurious to health.¹

censed to sell oleomargarine," is not complied with by having such a placard upon the inside of a covered wagon from which oleomargarine is being sold. *Com. v. Crane*, 158 Mass. 218.

Restaurants Selling Oleomargarine must Give Notice.—Section 5 of the same chapter, which requires every person who furnishes to a guest in a restaurant or hotel oleomargarine or butterine instead of butter, to notify him that the substance furnished is not butter, is not complied with by having in the restaurant a sign reading "Butterine Used Only Here," and by having the words "Only Fine Butterine Used Here," printed on the bill of fare, if the guest does not read the signs or examine the bill of fare. *Com. v. Stewart*, 159 Mass. 113.

Selling from Broken Packages.—Where oleomargarine is exposed for sale in original packages, under a law requiring the top and bottom of the package to be plainly marked, it is not a violation of the law to sell from a package from which the cover has been temporarily removed. *Com. v. Bean*, 148 Mass. 172.

A Regulation Prescribed by the Commissioner of Internal Revenue, under the oleomargarine act, for carrying it into effect, cannot be considered as a "thing required by law," in the carrying on or conducting the business of a wholesale dealer in oleomargarine, in such manner as that its violation should become a criminal offense punishable under section 18 of the act, inasmuch as it is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and the statutory authority in such a case is insufficient. *U. S. v. Eaton*, 144 U. S. 677.

But where the law requires dealers to pack oleomargarine in suitable packages, marked and branded as the Commissioner of Internal Revenue, with the consent of the Secretary of the Treasury, shall prescribe, a defendant may be convicted for failure to comply with the regulations of the commissioner. *U. S. v. Ford*, 50 Fed. Rep. 467.

New York—Must Prove Intention to Sell as Butter.—In order to convict one of the violation of sections 18 and 19 of c. 183, *New York Laws of 1885*, it is necessary to prove not only that the defendant manufactured the article in question, by mixing animal fats or animal or vegetable oils with natural milk, cream, or butter, but also that he intended to sell the product for butter and not for just what it was, oleomargarine or butterine. *People v. Dold*, 63 Hun (N. Y.) 583.

Sale from Broken Package Imported into State.—A sale of oleomargarine from a broken package, imported into the state, is a violation of the *Pennsylvania* statute prohibiting the manufacture or sale of oleomargarine. *Com. v. Paul*, 148 Pa. St. 559.

1. **Cream Included in the Term Milk.**—Cream to which boric acid has been added is within the statute which makes it an offense to have in one's possession, with intent to sell the same, "milk to which a foreign substance has been

added"; milk being used as a general term in a sense broad enough to include cream. *Com. v. Gordon*, 159 Mass. 8.

Milk below a Certain Standard Deemed Adulterated.—A statute providing that milk containing less than a certain per cent of milk solids or less than a certain per cent of milk fats shall be deemed adulterated is valid and constitutional. *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344.

Kind of Foreign Matter Used in Adulterating Immaterial.—It is immaterial whether the foreign matter is or is not injurious to health; the addition of pure water is punishable under the statutes. *Com. v. Schaffner*, 146 Mass. 512; *Com. v. Waite*, 11 Allen (Mass.) 264.

It is immaterial, in a prosecution for selling adulterated milk, in what manner the quantity of milk solids has been reduced below thirteen per cent, if the intent is to sell the milk as pure milk, not as skimmed milk. *Com. v. Bowers*, 140 Mass. 483. See *Com. v. Keenan*, 139 Mass. 193.

But under the *Massachusetts* statute an indictment charging the defendant with having in his possession milk to which water has been added, is not sustained by proving that the milk is below the legal standard, without proof of the admixture of foreign articles. *Com. v. Luscumb*, 130 Mass. 42.

If below Standard, Wholesomeness Immaterial.—Where the law requires that all milk sold shall come up to a certain standard of richness, the court cannot take judicial notice whether milk below the standard is or is not unwholesome or dangerous to public health. If the legislature has power to fix a standard, it must judge whether or not milk below that standard is wholesome. *State v. Campbell*, 64 N. H. 404.

City Ordinances.—An ordinance prohibiting the adulteration of milk is authorized by a city charter, making it the duty of the council to prevent the sale of adulterated food. *State v. Stone*, 46 La. Ann. 147; *State v. Labatut*, 39 La. Ann. 514, 18 Am. & Eng. Corp. Cas. 565; *State v. Fourcade*, 45 La. Ann. 718.

A city ordinance prohibiting the sale of milk containing less than twelve per cent of milk solids is a valid exercise of the police power, *Kansas City v. Cook*, 38 Mo. App. 660; and within the scope of sanitary regulations, *Polinsky v. People*, 73 N. Y. 65.

Selling Skimmed Milk to Butter and Cheese Factories.—An act providing that no person or persons shall sell, supply, or bring to be manufactured, to any butter or cheese factory, any milk diluted with water, or any unclean, impure, unhealthy, adulterated, or unwholesome milk, does not extend so far as to make it criminal for the owner of a cheese factory supplied with milk exclusively by himself, to furnish milk diluted with water. *People v. West*, 106 N. Y. 293.

An act to protect butter and cheese manufacturing is not intended to apply to a person making butter and cheese on his own account, but to such factories as are conducted on a joint or

Skimmed Milk.—Under some of these statutes it is an offense to sell skimmed milk unless it is sold as such, and from a can or vessel marked "skimmed milk."¹

Action for Penalty.—Some statutes, in addition to making the sale of adulterated milk a misdemeanor, also provide for the recovery by a specified officer of a penalty in a civil action against one violating the provisions of the act.²

Sampling Milk.—The statutes of several of the states provide that certain public officers may enter places where milk is sold, and take and cause to be analyzed samples of the milk sold, and that the result of such analysis shall be admissible in evidence. The decisions construing such enactments are collected in the notes.³

co-operative plan. *Phillips v. Meade*, 75 Ill. 334.

Posting Statute—Ohio.—The requirement of the second section of the *Ohio* Act of March 14, 1871 (68 Ohio L. 39), prohibiting the adulteration of milk, that each manufacturer of cheese or butter shall post a copy of the act in the receiving-room of his factory, is directory only, and a failure to do so will not exculpate one guilty of selling adulterated or skimmed milk to the factory contrary to the provisions of section 1 of said act. *Bainbridge v. State*, 30 Ohio St. 265.

Sanitary Code of New York City.—The keeping and offering for sale of adulterated milk is a violation of section 45 of the sanitary code of the city of New York. *People v. Justices*, 7 Hun (N. Y.) 214.

New York—Bringing Adulterated Milk into City.—The offense of bringing into the city impure or adulterated milk for sale may be complete without either selling or offering it for sale. *Polinsky v. People*, 73 N. Y. 65.

Massachusetts—Registered Milk Dealers Only.—In order to convict one of selling adulterated milk under *Massachusetts* General Statutes, c. 49, § 151, it is necessary to aver with certainty and precision that the name of the defendant was recorded as a dealer in milk in the books of the inspector. *Com. v. O'Donnell*, 1 Allen (Mass.) 593.

Experts.—Farmers' and dairymen are competent witnesses to testify whether milk has been mixed with water or not. *Lane v. Wilcox*, 55 Barb. (N. Y.) 615.

In an action for damages for the adulteration of milk furnished by the defendants under contract, where an expert testified as to the results of his analysis of certain samples of the milk, it was held that the defendant might, on cross-examination, ask for the results of the analysis of other samples of milk furnished by the plaintiffs. *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431.

1. Regulations as to Skimmed Milk.—In *Pennsylvania* the law permits the sale of skimmed milk if it is sold from cans or vessels on which the words "skimmed milk" are printed in letters not less than one inch long. *Com. v. Hough*, 1 Pa. Dist. Rep. 51.

In *New York*, by cc. 183 and 458 of the Statutes of 1885, the keeping of skimmed milk for sale in the county where it is produced is not an offense so long as the same is not sold as pure milk; and where the evidence does not show whether the milk taken for analysis was taken from a can containing skimmed milk or from a can containing pure milk, a conviction cannot be

sustained. *People v. Thompson* (Supreme Ct.), 14 N. Y. Supp. 819.

In *Massachusetts* it is not an offense to sell skimmed milk which is not of the standard quality of pure milk, from cans marked "skimmed milk," and it is not necessary for the buyer to have knowledge that the milk is skimmed, provided the vessel containing it is duly marked. *Com. v. Smith*, 149 Mass. 9.

But it is an offense against the laws of *Massachusetts* to sell skimmed milk to which water has been added. *Com. v. Wetherbee*, 153 Mass. 159.

In *Com. v. Tobias*, 141 Mass. 129, the court, by Field, J., said: "The construction we give to the Pub. Stat. c. 57, §§ 5, 6, 7, and 9, is that these sections prohibit the sale, etc., of milk containing 'more than eighty-seven per cent of watery fluid,' or 'less than thirteen per cent of milk solids,' unless it is sold, not as pure milk, but as skimmed milk, and out of a vessel, can, or package marked as required by section 7; that, on such a charge, it is immaterial what is the cause of the excess of watery fluid, or of the deficiency of milk solids; that the sale, etc., of milk 'to which water or any foreign substance has been added, or milk produced from cows fed on the refuse of distilleries, or from sick or diseased cows,' is prohibited, whether it is sold as skimmed milk or pure milk, and whether it contains more or less than thirteen per cent of milk solids; and that the sale of skimmed milk as pure milk is prohibited, even if it contains more than thirteen per cent of milk solids, and is prohibited in all cases, unless it is sold as skimmed milk and out of a vessel, can, or package marked as required by section 7."

2. *People v. Briggs*, 114 N. Y. 56.

Preponderance of Evidence Sufficient.—In an action to recover the penalty under the statutes prohibiting the manufacture, possession, and sale of products made from animal fat or animal and vegetable oils, designed to take the place of natural butter or cheese, proof by a preponderance of evidence is sufficient, and it is not necessary to prove the act charged beyond a reasonable doubt. *People v. Briggs*, 114 N. Y. 56.

3. Right to Take Samples Statutory.—The right to take samples of milk without the consent of the owner can only be justified by an act of the legislature regulating the business which otherwise might become injurious to the public health. But an intention on the part of the legislature that the inspectors should have the right to delegate their powers to other persons ought not to be inferred from equivocal phrases. An agent of a milk inspector, not acting under

Other Articles.—The adulteration of vinegar, olive oil, honey, maple sugar, cigarettes, confectionery, and other articles, is prohibited by statutes in several of the states of the Union.¹

the direction of the inspector, has no right to take samples of milk against the will of the owner. *Com. v. Smith*, 141 Mass. 135.

Mode of Proof Provided by Statute Not Exclusive.—The fact that the law provides a somewhat unusual mode of proof of adulteration by means of the record of analyses of tests made, does not exclude other appropriate modes of proof which existed before. *Com. v. Spear*, 143 Mass. 172.

In cases where the milk analyzed has not been taken under the provisions of the statute, the competency of evidence is to be determined by the common law, and the testimony of any person who has sufficient skill to analyze milk, and who has analyzed some of the milk shown to have been sold by the defendant, is admissible. *Com. v. Holt*, 146 Mass. 38.

Act Constitutional.—An act which virtually confines the testimony to an analysis of the samples which are destroyed in the process of analysis is constitutional. *State v. Groves*, 15 R. I. 208.

Obtaining Sample without Disclosing Official Character.—The *Massachusetts* statute of 1886, c. 318, § 1, gives collectors of samples of milk power to enter places where milk is kept and to take samples for analysis; and section 3 of the same act, requiring a sealed sample to be left with the owner if desired, does not apply to a case where the inspector buys a sample without disclosing that he is an inspector, and the defendant may be convicted on proof that his milk was below the legal standard. *Com. v. Coleman*, 157 Mass. 460.

It is not necessary, where a sample of milk in course of delivery is procured for analysis under section 3 of the *English Sale of Food and Drugs Act Amendment Act 1879*, for the officer procuring such sample to notify the seller or his agent of his intention to have the sample analyzed in order to deliver to the seller or his agent a portion of the sample. *Rouch v. Hall*, 6 Q. B. Div. 17.

Portion to be Kept and Delivered to Owner.—The *Massachusetts* statute of 1886 provides that a portion of a sample of milk taken for analysis shall, if the person taking the same be requested so to do, be sealed and delivered to the owner. This provision impliedly repealed the former enactment on the subject. *Com. v. Kennesson*, 143 Mass. 418.

The provision of the statute requiring all samples of milk to be sealed is not complied with by simply placing wax on top of the cork, not extending it over the nose of the bottle. *Com. v. Lockhardt*, 144 Mass. 132.

The clause of the *Massachusetts* statute requiring a portion of the sample of milk taken for inspection to be kept and delivered to the defendant on request is directory, and does not form a condition precedent to the use of the testimony of the inspector. *Com. v. Holt*, 146 Mass. 38.

Samples Taken from Lower Part of Can.—In a prosecution for selling adulterated milk to a cheese factory, evidence that the milk has not

been watered or skimmed, and that the sample analyzed was drawn from the lower part of the can and was not a fair sample of the milk, is admissible. *People v. Hodnett*, 68 Hun (N. Y.) 341, 22 N. Y. Supp. 809.

Analysis Made after Lapse of a Year—Evidence of a test made with defendant's milk, which he is charged to have adulterated, is inadmissible as against the defendant if such test is made nearly a year after the sale of the milk. *Stearns v. Ingraham*, 1 *Thomp. & C.* (N. Y.) 218.

Test by Lactometer.—In support of an indictment which alleges that the defendant "did unlawfully keep, offer for sale, and sell" adulterated milk, an inspector of milk who in a great many instances has used a lactometer for the purpose of testing the quality and purity of milk, may testify to the result of an experiment made by him with the same lactometer upon the milk in question, although no evidence is offered as to the character of the instrument. *Com. v. Nichols*, 10 Allen (Mass.) 199.

Certificate of Analysis, when Admissible in Evidence.—A certificate of the result of an analysis of milk, by a sworn inspector appointed under the *Massachusetts* statute of 1864, c. 122, is admissible in evidence in a criminal prosecution under that statute, provided he also testifies at the trial to the same facts which are stated therein; and in such case the admission of the certificate in evidence before he testifies furnishes no ground for a new trial, after a verdict of guilty. *Com. v. Waite*, 11 Allen (Mass.) 264.

1. See *California* Statutes (St. 1891, c. 47, p. 46); *Kansas* Statute (Laws 1891, c. 1, p. 1); *Minnesota* Statutes (Gen. Laws, 1893, c. 21, p. 123); *Minnesota* (Gen. Laws 1893, c. 22, p. 125); *Missouri* Statutes (Laws 1891, p. 218); *New Hampshire* Statutes (Laws 1891, c. 39, p. 333); *Pennsylvania* Statutes (Laws 1891, No. 225, p. 297); *Vermont* Statutes (Laws 1890, No. 52, p. 62); *Wisconsin* Statutes (Laws 1891, c. 394, p. 325); *Com. v. Chase*, 125 Mass. 202.

The Possession of Adulterated Teas for the purposes of sale to the general public is a nuisance. *Health Dept. v. Purdon*, 99 N. Y. 237.

Ohio—Power of Dairy and Food Commissioner.—Where the Dairy and Food Commissioner is authorized to enforce all laws against the adulteration of food, he has power to point out such matters as may be necessary to inform dealers that certain vinegar was manufactured and sold in violation of the law, and that persons dealing therein will be punished according to law. *Williams v. McNeal*, 7 Ohio Cir. Ct. Rep. 280.

New York—Adulteration of Food and Drugs—Proof of Poison Essential.—An indictment for a violation of the *New York* statute to prevent the adulteration of food and drugs, passed May 28, 1881, is not sustained by proof that the defendant sold canned peas containing copper, unless it is shown that the copper contained in the peas was poison, proof that the peas sold contained poison being essential to warrant a conviction. *People v. Bischoff* (Supreme Ct.), 14 N. Y. St. Rep. 581.

Intent.—Under the statutes prohibiting the sale of adulterated milk or butter or other adulterated articles, it has been held that criminal intent is not an essential element of the offense.¹ But it is necessary generally to prove an intent to sell,² and under some statutes an intent to sell as food.³

1. Guilty Intent—Milk.—Statutes providing that "whoever sells or keeps, or offers for sale, adulterated milk, or milk to which water or other foreign substance has been added," shall be punished, etc., have been held to throw the risk upon the seller of knowing that the article he offers for sale is not adulterated, and it is not necessary in an indictment under such a statute to allege or prove criminal intent or guilty knowledge. *Com. v. Faren*, 9 Allen (Mass.) 489; *Com. v. Nichols*, 10 Allen (Mass.) 199; *Com. v. Waite*, 11 Allen (Mass.) 264; *Com. v. Smith*, 103 Mass. 444; *Com. v. Warren*, 160 Mass. 533; *Com. v. Vieth*, 155 Mass. 442; *People v. Schaeffer*, 41 Hun (N. Y.) 23; *People v. Cipperly*, 101 N. Y. 634; *People v. Kibler*, 106 N. Y. 321; *People v. Eddy* (Supreme Ct.), 12 N. Y. Supp. 628; *State v. Smith*, 10 R. I. 258. See *Com. v. Evans*, 132 Mass. 11.

Oleomargarine.—The same rule that no criminal intent is necessary, has been held to apply under an act forbidding the sale of oleomargarine or other imitation of dairy products unless express notice be given to the purchaser. *State v. Newton*, 50 N. J. L. 549; *Com. v. Gray*, 150 Mass. 327.

Other Articles of Food.—In *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337, under a statute against selling as unadulterated any article of food or drink which is adulterated, and imposing a penalty for so doing, it was held that there need not be an express representation or statement that the article was unadulterated.

Tobacco.—In *Reg. v. Woodrow*, 15 M. & W. 404, a dealer in and retailer of tobacco was held liable to the penalty imposed by statute for having in his possession adulterated tobacco, although he had purchased it as genuine and had no knowledge or cause to suspect it was not so.

Tea.—One may be convicted of selling adulterated green tea, under Stat. 35 and 36 Vict., c. 74, although he did not know that the tea was adulterated. *Roberts v. Egerton*, L. R. 9 Q. B. 494.

Wine.—To convict one of violating the act making it a misdemeanor to sell adulterated wines, it is not necessary to prove that he knew the wine to be adulterated. *Altschul v. State*, 8 Ohio Cir. Ct. Rep. 214. See also the title INTOXICATING LIQUORS.

Statute Requiring Knowledge.—Where the statute requires knowledge on the part of the seller, the case is, of course, different. *Dilley v. People*, 4 Ill. App. 52; *Com. v. Flannelly*, 15 Gray (Mass.) 195; *Com. v. Smith*, 103 Mass. 444; *Sanchez v. State*, 27 Tex. App. 14; *Cantee v. State* (Tex. App., 1889), 10 S. W. Rep. 757.

Evidence of Similar Transaction.—Upon the trial of an indictment for knowingly delivering skimmed milk to a factory to be manufactured into cheese, with intent to defraud, evidence of transactions of the same kind, other than that relied upon for a conviction, near the same time, is admissible for the purpose of showing guilty knowledge, on the part of the accused, that the milk, for delivering which a conviction

is sought, was skimmed milk. *Bainbridge v. State*, 30 Ohio St. 265.

2. Intent to Sell.—In *New York*, to authorize a conviction under c. 467 of the Laws of 1862 it was necessary to aver and prove that the milk was adulterated with a view of offering it for sale or exchange, and a charge that the defendant had adulterated milk, without stating the object of such adulteration, was insufficient. *People v. Fauerback*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 311.

Evidence that the defendant was on a wagon with a license number on it and containing milk cans, from one of which was taken adulterated milk, is competent on the issue that he was in possession of the milk with intent to sell it. *Com. v. Rowell*, 146 Mass. 128.

The exposing of oleomargarine, unmarked, with other pure butter or groceries, upon the shelves or counter of a salesroom, is an act from which an intent to sell may be inferred in the absence of rebutting evidence. *State v. Dunbar*, 13 Oregon 591.

At the trial of a complaint under the *Massachusetts* Pub. Stat., c. 57, § 5, alleging that the defendant had in his possession adulterated milk, with intent unlawfully to sell the same, the evidence showed that a wagon with the defendant's name and a number on it was standing upon a public street in a city at an early hour of the morning; that the defendant's servant was on the wagon, and there were several eight-quart cans in the wagon; that a collector of samples in the employ of the inspector of milk for the city took a sample of milk from one of the cans, which was not marked "skimmed milk;" and that an analysis of the milk taken showed that it was below the legal standard. It was held that there was evidence of an intent on the part of the defendant to sell the milk, which was properly submitted to the jury. *Com. v. Smith*, 143 Mass. 169.

In *Rhode Island* the fact of having milk of the prohibited quality in possession without an intent to sell or exchange it is not punishable. *State v. Smyth*, 14 R. I. 100.

Sale in Restaurant.—Furnishing oleomargarine to a customer as a part of a meal ordered by the latter is sufficient to convict a restaurant keeper of a sale of oleomargarine under § 3, Act of May 21, 1885, P. L. 22. *Com. v. Miller*, 131 Pa. St. 118.

Evidence of a sale, in the defendant's café, of a glass of adulterated milk to be drunk on the premises, is sufficient to convict him under the *Massachusetts* Statute of 1886, c. 318, § 2. *Com. v. Vieth*, 155 Mass. 442; *Com. v. Warren*, 160 Mass. 533.

3. In order to convict a person of violating the *Pennsylvania* Oleomargarine Act of April 21, 1885, P. L. 22, it is necessary to show that he sold the oleomargarine as an article of food. If it was sold for some other purpose, as, for instance, for wagon grease, it would not be a violation of the law. *Com. v. Schollenberger*, 153 Pa. St. 625; *Com. v. Callahan*, 1 Pa. Dist. Rep. 437.

Master's Liability for Act of Servant.—The criminal responsibility of the master for the acts of his servant is here, as under other statutes of a like character, a question upon which the courts are not in accord.¹

1. Master's Responsibility for Act of Servant.—Where the master had sampled the can from which the adulterated milk was sold, and the servant had afterwards added water to the can, although there was no evidence of any connivance on the part of the master, it was held that the master was rightly convicted as the seller of the milk, though evidence that the adulteration was contrary to his instructions might have been admitted by the magistrate in mitigation of the penalty. *Brown v. Foot*, 61 L. J. Mag. Cas. 110. Compare *Kearley v. Tonge*, 60 L. J. Mag. Cas. 159.

A master may be held criminally liable for an inadvertent sale of adulterated or inferior milk, or of imitation butter, made by his servant or agent, in the course of his employment, in violation of

the statute. *Com. v. Gray*, 150 Mass. 327; *Com. v. Warren*, 160 Mass. 533; *Com. v. Vieth*, 155 Mass. 442.

But in *State v. Smith*, 10 R. I. 258, it was held that in order to charge the master, where the milk is found in possession of a servant, there should be evidence, in addition to the proof of possession for sale or exchange by the servant, that the servant in having it so for sale or exchange was acting for and in pursuance of the will of the master; and that where there was such proof the master might be convicted, for in such a case the possession of the servant is, in law, the possession of the master. See generally, upon this subject, the titles AGENCY; CRIMINAL LAW; INTOXICATING LIQUORS; MASTER AND SERVANT.

ADULTERY (AS A CRIME).

By THEODOR MEGAARDEN.

I. BY THE COMMON LAW, 747.

1. *Definition*, 747.
2. *Not Indictable*, 747.
3. *A Civil Injury*, 747.

II. BY THE CANON LAW, 747.

1. *Definition*, 747.
2. *An Ecclesiastical Offense*, 747.
3. *A Cause for Divorce*, 747.

III. UNDER STATUTES MAKING ADULTERY A CRIME, 747.

1. *In General*, 747.
2. *What Constitutes*, 748.
 - a. *Under Statutes Not Defining the Offense*, 748.
 - (1) *The Common-law Definition Adopted*, 748.
 - (2) *The Canon-law Definition Adopted*, 748.
 - (3) *Points of Agreement between the Two Definitions*, 750.
 - (a) *One of the Parties must be Married*, 750.
 - (b) *Both Parties need Not be Married*, 750.
 - (c) *Unmarried Woman cannot Commit the Offense*, 750.
 - b. *Under Statutes Defining the Offense*, 750.
3. *The Carnal Knowledge*, 750.
4. *The Criminal Intent*, 750.
 - a. *In General*, 750.
 - b. *Inferred from Criminal Act*, 751.
 - c. *Ignorance of Law*, 751.
 - d. *Mistake or Ignorance of Fact*, 751.
5. *Consent of the Woman Not Essential*, 752.

IV. LIVING IN ADULTERY, 752.

V. EVIDENCE, 752.

1. *In General*, 752.
2. *Of the Carnal Act*, 752.
 - a. *Circumstantial Evidence*, 752.
 - b. *Corroborative Evidence*, 753.
 - c. *The Time and Place*, 755.
 - d. *Name of Particeps Criminis*, 755.
 - e. *Defendant's Sex*, 755.
 - f. *The Man's Virility*, 756.
3. *Of the Marriage*, 756.
4. *Sufficiency of Proof*, 757.
5. *Evidence Admissible against One Only of Two Joint Defendants*, 757.

VI. PUNISHMENT, 757.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see 1 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, p. 305.

For *ADULTERY* as a *Civil Injury*, see the title *CRIMINAL CONVERSATION*.

For *ADULTERY* as a *Ground for Divorce*, see the title *DIVORCE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ATTEMPTS TO COMMIT CRIME*; *BASTARDY*; *BIGAMY*; *CHARACTER (IN EVIDENCE)*; *CIRCUMSTANTIAL EVIDENCE*; *CONFESSIONS*; *CRIMINAL LAW*; *EXPERT AND OPINION EVIDENCE*; *FORNICATION*; *HOMICIDE*; *LEWD AND LASCIVIOUS COHABITATION AND CONDUCT*; *MARRIAGE*; *WITNESSES*.

I. BY THE COMMON LAW—1. **Definition.**—Adultery, by the common law, is criminal conversation with a man's wife. The woman must be married; she must be another man's wife; and whoever, married or single, has illicit intercourse with her, becomes guilty of adultery.¹

Reason of Rule.—The common law concerned itself with the act of adultery only as it tended to expose an innocent husband to maintain another man's children, and having them succeed to his inheritance. Hence adultery was limited to criminal conversation with a married woman; the connection of a married man with a single woman does not, by the common law, make him guilty of the offense.²

2. Not Indictable.—Adultery was not an indictable offense at common law,³ except, indeed, when open and notorious, amounting to a public nuisance.⁴

3. A Civil Injury.—It was considered to be only a private wrong, for which the offender was answerable to the injured husband in a civil action for exemplary damages.⁵

II. BY THE CANON LAW—1. **Definition.**—By the canon or ecclesiastical law adultery was sexual connection between a man and a woman, of whom one at least was lawfully married to a third person. The ecclesiastical law regarded adultery as a sin arising out of the marriage relation. And, as a violation of the marriage vow, it was equally great whether the offender was male or female. Hence the offense was broader than at common law, and was committed by a married man having connection with a single woman.⁶ But the term "adulterer" was never applied by the spiritual courts to a person who was unmarried.⁷

2. An Ecclesiastical Offense.—Adultery was in *England* punishable in the ecclesiastical courts.⁸

3. A Cause for Divorce.—And the ecclesiastical courts recognized adultery as a ground for divorce.⁹

III. UNDER STATUTES MAKING ADULTERY A CRIME—1. **In General.**—In the *United States*, commencing at an early date, statutes have from time to time been enacted which, by prescribing a punishment for the offense, have made adultery a crime.¹⁰

1. 3 Bl. Com. 139.

"Noah Webster defines it to be the violation of the marriage bed; a crime or a civil injury which introduces or may introduce into a family a spurious offspring. Such would seem to have been the more ancient and common meaning attached to the term 'adultery.'" Rice, J., in *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59.

Civil Law.—This was also the definition of adultery by the civil law. Wood's Inst. 272; 2 Whart. Crim. L., § 2644.

2. Denny, J., in *Com. v. Call*, 21 Pick. (Mass.) 509, 32 Am. Dec. 284.

3. 1 Bish. Cr. L., §§ 35, 39, 501; Pollard v. Lyon, 1 McArthur (D. C.) 296.

And therefore, in the *United States*, except as it is made a crime by statutory enactment, adultery is not indictable. *Delany v. People*, 10 Mich. 241; *State v. Brunson*, 2 Bailey (S. Car.) 149; *State v. Moore*, 1 Swan (Tenn.) 136; *State v. Cooper*, 16 Vt. 551. And see *State v. Avery*, 7 Conn. 267, 18 Am. Dec. 105; *State v. Roth*, 17 Iowa 336; *State v. Smith*, 32 Tex. 167; *Anderson v. Com.*, 5 Rand. (Va.) 627, 16 Am. Dec. 776; *Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465. See also the title FURNICATION.

4. 1 Bish. N. Cr. L., § 38.

So it seems that in the *United States* acts of adultery may be punished, under certain

circumstances, as a public nuisance. See *State v. Moore*, 1 Swan (Tex.) 136; *State v. Smith*, 32 Tex. 167.

As an Offense against Public Decency.—Adultery is not made indictable as an offense against public decency by charging that the defendants lived "in open lewdness, whoredom, and adultery." As an act of adultery, the offense is but adultery, whether it is perpetrated openly or covertly. *State v. Brunson*, 2 Bailey (S. Car.) 149.

5. See the title CRIMINAL CONVERSATION.

6. 2 Bish. Cr.-L., § 15; 2 Whart. Cr. L., (8th ed.), § 1719.

Scotland.—According to the Scotch law, adultery might be committed either by the intercourse of an unmarried man with a married woman, or that of a married man with a single woman. 1 Hume Cr. L. (2d ed.) 451; Ersk. Prin. L. of Scotland (12th ed.) p. 531; Mack. Cr. L., 118, § 11.

7. Pearson, J., in *Com. v. Kilwell*, 1 Pittsb. (Pa.) 255.

8. 1 Bish. N. Crim. L. §§ 39, 38; 2 Burn Eccl. Law, Phillim. ed., tit. Lewdness, 401; Coote Eccl. Pract. 145; *Burgoyne v. Free*, 2 Hagg. Eccl. 456; *Watson v. Thorp*, 1 Phillim. 269; *Wheatley v. Fowler*, 2 Lee 376.

9. See the title DIVORCE.

10. In *Indiana* a statute declaring that "crimes and misdemeanors shall be defined

2. What Constitutes.—As to what constitutes the crime of adultery aimed at by these statutes, the cases arising under them, in some respects, show an irreconcilable conflict.¹

a. UNDER STATUTES NOT DEFINING THE OFFENSE.—These statutory enactments against adultery have quite generally omitted to state of what the crime shall consist.

(1) *The Common-law Definition Adopted.*—In defining the crime of adultery under statutes of this kind, the courts of some of the states have, it seems, adopted the definition of the common law. Thus it is held that the sexual intercourse of a single man with a married woman is adultery in the man.² But it is considered that adultery can be committed only with a married woman, so that a man, though married, does not commit the crime by having intercourse with a single woman.³

(2) *The Canon-law Definition Adopted.*—Other authorities are more in accordance with the ecclesiastical law. They sustain the general proposition that an illicit sexual connection between two persons, either of whom is married, is adultery in the married person.⁴ Consequently a married man commits the crime by having intercourse with a single woman.⁵ But, according to the

and the punishment therefor fixed by the statutes of this state, and not otherwise," was followed by an enactment prescribing a punishment for, but not defining, adultery. On the principle that a statute which is enacted subsequently to a prior inconsistent one repeals the earlier enactment, it was held that an indictment for adultery would lie under this statute although it did not define the crime. *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21, 5 Cent. L. J. 35.

1. And, as Veazey, J., in *State v. Searle*, 56 Vt. 516, says: "So far as this difference exists in reported cases, it may have grown out of a difference in statutory provisions: not in statutory definitions of adultery, as those are rarely if ever found; but in provisions that indicate the legislative view, and control the judicial and legal view."

As to whether the definition of the common or the ecclesiastical law should be adopted in construing these statutes, Chilton, C.J., in *Smitherman v. State*, 27 Ala. 23, says: "It is my individual opinion that the term 'adultery,' as used in our code, should be construed with reference to the subject matter with which it stands connected. When used with reference to divorce, it is to be taken in the canonical sense of that term, and embraces the infidelity of the husband to the wife in his illicit sexual commerce with another woman, whether married or single, and so of the wife; but when considered with reference to the criminal law, it imports such sexual intercourse as violates another man's bed—as may entail a spurious issue upon the defrauded husband—'carnal knowledge of another man's wife,' as defined by the civil law. Wood's Inst. 272."

2. *State v. Pearce*, 2 Blackf. (Ind.) 318; *State v. Wallace*, 9 N. H. 515; *State v. Taylor*, 58 N. H. 331. See *Galbraith's Charge*, 4 Am. L. Reg. 209.

Statutes Making the Intercourse of a Single Man with a Married Woman Adultery in the Man.—The statutes sometimes expressly provide that when the crime is committed between a married woman and a man who is

unmarried, the man shall be deemed guilty of adultery. *Massachusetts Rev. Stat.*, c. 130, § 1; *Gen. Stat.*, c. 165, § 3; see *Com. v. Ellwell*, 2 Met. (Mass.) 190, 35 Am. Dec. 398; *Com. v. Reardon*, 6 Cush. (Mass.) 78; *Wisconsin Rev. Stat.*, § 4721; see *State v. Fellows*, 50 Wis. 65, 1 Crim. L. Mag. 577; *Minnesota Comp. Stat.* 765, § 7; see *State v. Armstrong*, 4 Minn. 335. And see *State v. Way*, 6 Vt. 311.

Concerning a provision of this kind it has been said: "This special provision made to include an unmarried man would seem to indicate that the legislature were of the opinion that it required both parties to be married to constitute the crime of adultery, and that they only intended to change the rule in the particular case of connection between an unmarried man with a married woman." *State v. Armstrong*, 4 Minn. 335.

3. *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21, 5 Cent. L. J. 35; *State v. Armstrong*, 4 Minn. 335; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; *Galbraith's Charge*, 4 Am. L. Reg. 209.

Fornication.—In the jurisdictions where the rule stated in the text obtains, sexual intercourse between a man, whether married or not, and an unmarried woman, is fornication. *State v. Chandler*, 96 Ind. 591; *State v. Pope*, 109 N. Car. 849. See the title FORNICATION.

4. See *Territory v. Whitcomb*, 1 Mont. 359.

5. *Helfrich v. Com.*, 33 Pa. St. 68, 75 Am. Dec. 579; *Com. v. Kilwell*, 1 Pittsb. (Pa.) 255. See also *Morgan v. State*, 11 Ala. 289.

In *Massachusetts*, under a statute making adultery an offense punishable in the common-law courts, but not defining the crime, it was held to include the act of a married man having sexual intercourse with an unmarried woman. *Com. v. Call*, 21 Pick. (Mass.) 509, 32 Am. Dec. 284. But this view was arrived at by reference to the preamble to an earlier act (Mass. Stat. 1784, c. 40), which preamble, in setting forth the object of the statute, stated it to be the enforcing "the due observance of the marriage covenants;" "thus,"

view adopted by this line of cases, an unmarried defendant cannot be convicted of adultery, although the other party to the act should be married.¹ Neither is an unmarried woman guilty of the crime by having intercourse with a married man.² Thus the criminal connection of a single man with a married woman is not adultery in him.³

says Dewey, J., "indicating its general application to both parties, rather than the more limited object of punishing the infidelity of the wife merely." The statute of 1785, c. 69, which authorized a divorce from the bonds of matrimony for adultery in either of the parties was also referred to, and it was argued from these instances that "whatever may have been the original meaning of the term 'adultery,' it is very obvious that we have in this commonwealth adopted the definition given to it by the ecclesiastical courts, and this not merely in relation to divorces, but also as descriptive of a public crime." And in *Wisconsin*, in the case of *State v. Fellows*, 50 Wis. 65, 1 Crim. L. Mag. 577, 11 Cent. L. J. 55, the statutory provisions upon which the case was based did not define the crime of adultery, but only prescribed the punishment for the offense. It was said that the statute, however, did not differ materially from that which was before the court in *Hunter v. U. S.*, 1 Pin. (Wis.) 91, 39 Am. Dec. 277, and that the legislature may reasonably be supposed to have acted with reference to the definition of adultery given in that case, both when enacting laws for the punishment of the offense as well as in the statute in regard to divorce. Continuing, the court insisted upon the same definition of the crime as that given to adultery in the law of divorce.

In an early *Georgia* case arising under a statute punishing but not defining adultery it was held that a married man who had intercourse with a single woman was guilty of adultery. *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410. But it seems that under the *Georgia Revised Code*, section 4466, declaring that "any man and woman who shall commit adultery or fornication, or adultery and fornication, shall be severally indicted," etc., he would be guilty of the offense of adultery and fornication. *Bigby v. State*, 44 Ga. 344.

The early *Vermont* statute (Gen. Stat., c. 117), now changed in the Revised Laws of that state, contained a provision, peculiar to that enactment, which was construed to preclude the idea of adultery where the intercourse is with a single woman. But in *State v. Searle*, 56 Vt. 516, Veazey, J., said that if it were not for the controlling effect of this provision upon the question as to what constitutes adultery, "it would not be difficult to hold upon authority and reason that it is adultery for a married man to have sexual intercourse with an unmarried woman."

In some early *Alabama* cases, apparently arising under statutes punishing but not defining adultery, dicta are found which define adultery to be the illicit commerce of two persons of different sex, one of those being married to another person. *State v. Hinton*, 6 Ala. 864; *State v. Glaze*, 9 Ala. 283. But in a later *Alabama* case, that of *Smitherman v.*

State, 27 Ala. 24, Chilton, C. J., in a dictum on the subject, says that adultery within the code of that state, when considered with reference to the criminal law, means the "carnal knowledge of another man's wife." But in *White v. State*, 74 Ala. 31, though it is not a decision on this question, the definition of the first-mentioned cases is quoted seemingly with approval.

There are a number of other cases which define adultery to be criminal intercourse between a married person and one who is not such person's husband or wife (*Miner v. People*, 58 Ill. 591), or "the illicit intercourse of two persons of different sexes, where either is married" (see *Hull v. Hull*, 2 Strobb. Eq. (S. Car.) 174), and hold that intercourse of a married man with a single woman is adultery. *State v. Hutchinson*, 36 Me. 261. But the terms of the statutes upon which these cases arose do not appear from the reports.

1. Adultery, it has been said, could, under the *Pennsylvania* Act of 1705, "only be committed by one who was married. The married party is guilty of adultery, the unmarried of fornication." Pearson, J., in *Com. v. Kilwell*, 1 Pittsb. (Pa.) 255.

Unmarried Party Principal in Second Degree.—Mr. Bishop says that if there is a state in which adultery is made a statutory felony, and at the same time no punishment is provided for fornication, the unmarried party to the act, where only one is married, will, by the unwritten law, be punishable for participating with the other as principal in the second degree, unless the statute is in terms to exclude this consequence. Bish. Stat. Cr., § 659.

2. *Respublica v. Roberts*, 1 Yeates (Pa.) 6, 2 Dall. (Pa.) 124; *Com. v. Lafferty*, 6 Gratt. (Va.) 672; *Hunter v. U. S.*, 1 Pin. (Wis.) 91, 39 Am. Dec. 277. See *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410, for a statute under which the above-cited *Virginia* case was probably decided. See *Com. v. Jones*, 2 Gratt. (Va.) 557.

Referring to the case of *Respublica v. Roberts*, 1 Yeates (Pa.) 6, 2 Dall. (Pa.) 124, Judge Galbraith in a charge to the grand jury of Clarion county, Pennsylvania, said: "That the decision in this case stands, not upon legal principles, but upon mere usage, is most clearly and satisfactorily shown in the treatise of Chief Justice Lewis (*Criminal Law of the United States*) at p. 41, and must have been decided upon the principles of the strictest construction of the criminal law so as to extend it to no case not clearly brought within it." Continuing, the learned judge said that, if left on principle alone, he would say that the intercourse of an unmarried man with a married woman is adultery in the man. Galbraith's Charge, 4 Am. L. Reg. 209.

3. In an early *Georgia* case (*Cook v. State*,

(3) *Points of Agreement between the Two Definitions.*—Notwithstanding the radical disagreement between these two lines of authorities on the question of what constitutes the offense within the meaning of the statutes which punish, but do not define, adultery, it is apparent that they must agree in certain particulars.

(a) *One of the Parties must be Married.*—Thus it is evident that whether the common or the canon law definition is followed, adultery cannot be committed unless one of the parties to the carnal act is married to a person other than the participant therein.¹

Intercourse between Unmarried and Divorced Persons.—The bond of matrimony is abrogated by a valid decree of divorce. And therefore adultery is not committed by sexual commerce between a divorced person and an unmarried person.²

(b) *Both Parties need Not be Married.*—It is also clear that by neither of these definitions need both parties to the adulterous intercourse be married.³

(c) *Unmarried Woman cannot Commit the Offense.*—And it would seem that, unless there is some statutory definition establishing a different rule, a single woman cannot be guilty of adultery.⁴

b. *UNDER STATUTES DEFINING THE OFFENSE.*—In some of the states these questions are set at rest in a large measure, or wholly, by more or less complete statutory definitions of the crime of adultery.⁵ Thus statutes have been enacted rendering each party implicated in the act equally liable to punishment if either the man or woman be married.⁶

3. *The Carnal Knowledge.*—As to the carnal knowledge of the body of the woman which is necessary to constitute adultery, it has been held that the sexual intercourse need not be completed by emission; penetration is sufficient.⁷

4. *The Criminal Intent*—a. *IN GENERAL.*—As in the case of other crimes, the offense of adultery cannot be committed without a criminal intent.⁸

11 Ga. 53, 56 Am. Dec. 410), it was held that intercourse between a married man and a single woman was not adultery, but fornication, in the woman. But under the Revised Code, section 4460, providing that "any man and woman who shall commit adultery or fornication, or adultery and fornication, shall be severally indicted," etc., it was held that an unmarried woman who had intercourse with a married man was guilty of "adultery and fornication," and that an indictment charging her with fornication was not good. *Bigby v. State*, 44 Ga. 344.

1. *Smitherman v. State*, 27 Ala. 23; *Buchanan v. State*, 55 Ala. 154; *Banks v. State*, 96 Ala. 78; *Miner v. People*, 58 Ill. 59; *State v. Thurstin*, 35 Me. 205, 58 Am. Dec. 695.

Fornication.—Intercourse between two unmarried persons constitutes fornication. *Banks v. State*, 96 Ala. 78. See also, the title *FORNICATION*.

2. It is immaterial that the divorced person was the guilty cause of the divorce, and that such guilty cause of a divorce is, by statute, restrained from contracting another marriage. *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59; *Com. v. Putnam*, 1 Pick. (Mass.) 136.

Fraudulent Divorce.—A decree of divorce void by reason of the defendant's fraud and want of jurisdiction of the court, is no defense to an indictment for adultery by means of a second marriage contracted in reliance

upon the validity of the decree. *State v. Whitcomb*, 52 Iowa 85, 35 Am. Rep. 258.

3. The rule has been announced that the charge of adultery against a man can only be sustained by showing that both parties to the act were married. *Galbraith's Charge*, 4 Am. L. Reg. 209. This view is a result of a confusion of the principles of the common and ecclesiastical laws, and adopting from the former the requirement that the woman must be married and from the latter the rule that only the married person is guilty of the offense. It is clearly not the law. *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *White v. State*, 74 Ala. 31. See *Com. v. Kilwell*, 1 Pittsb. (Pa.) 255.

4. *Single Woman.*—A law writer of eminent authority says that probably no adjudication has affirmed that a single woman commits adultery by a connection with a married man. *Bish. Stat. Cr.*, § 656.

5. *Bish. Stat. Cr.*, § 658.

6. *Maine Rev. Stat.*, c. 160, § 1. See *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59. *Pennsylvania Act of March 31, 1860*, § 38; *Purd. Dig.* (9th ed.) 223. See *State v. Wilson*, 22 Iowa 364.

7. *Com. v. Hussey*, 157 Mass. 415.

8. See *State v. Goodenow*, 65 Me. 30; *Com. v. Elwell*, 2 Met. (Mass.) 190, 35 Am. Dec. 398.

Intercourse Effected by Force.—Where the intercourse is effected by force, the woman is

b. INFERRED FROM CRIMINAL ACT.—But while it is true that the crime of adultery cannot be committed without a criminal intent, the intent may be inferred from the criminality of the act itself.¹

c. IGNORANCE OF LAW.—Hence it has been held that a defendant cannot show that there was in fact no criminal intent because he relied in good faith upon an invalid marriage, and acted in ignorance of the law.²

d. MISTAKE OR IGNORANCE OF FACT—*Marriage Not Known to be Bigamous.*—Where a marriage is void by reason of the fact that one of the parties thereto has a consort living, and the other is ignorant of that fact, the party who is without knowledge of the bigamous nature of the marriage does not, by sexual intercourse with the supposed husband or wife after the marriage and before such knowledge is obtained, become guilty of adultery.³

not guilty of adultery. *State v. Henderson*, 84 Iowa 161.

1. In an indictment for adultery the state need not allege, and is not called upon to prove, a criminal intent. *State v. Cutshall*, 109 N. Car. 764; *State v. Cody*, 111 N. Car. 725; *Fox v. State*, 3 Tex. App. 329, 30 Am. Rep. 144.

2. In *State v. Goodenow*, 65 Me. 30, it was held that where a man and woman are jointly indicted for adultery, the female defendant, having a lawful husband alive, cannot set up in defense that such husband had been married again, and that, on that account, they supposed they could lawfully marry, and that they were so advised by the magistrate who married them, they relying upon the opinion of the magistrate in good faith.

Marriage of White Person and Negro in Contravention of Statutory Inhibition.—Where the marriage of a free person of color and a white person is prohibited by statute, and is null and void, such persons cohabiting together come within the statutes against adultery and fornication. *State v. Fore*, 1 Ired. (N. Car.) 378.

Prosecution for either Adultery or Bigamy.—The offense of adultery is not necessarily involved in bigamy. The latter offense is completed by the second marriage without proof of subsequent cohabitation. And there may be a prosecution for living together in a state of adultery, although the parties may also be guilty of bigamy. *Owens v. State*, 94 Ala. 97. See the title BIGAMY.

3. A woman marrying and cohabiting with a married man, not knowing of his prior marriage, is not guilty of adultery. *Vaughan v. State*, 83 Ala. 55; *Banks v. State*, 96 Ala. 78.

But in certain *Massachusetts* cases it was said that the mere fact that the defendant married a married woman in ignorance of the fact that she had a husband living constituted no legal defense to an indictment for adultery. *Com. v. Thompson*, 6 Allen (Mass.) 591, 83 Am. Dec. 653; *Com. v. Thompson*, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

Absence of Husband for Seven Years.—In *Com. v. Thompson*, 6 Allen (Mass.) 591, 83 Am. Dec. 653, it was held that if it appeared that the husband had absented himself from his wife, and remained absent for the space of seven years together, a man who should, under the existence of such circumstances,

and not knowing her husband to have been living within that time, in good faith and in the belief that she had no husband, intermarry with her and cohabit with her as his wife, would not by such acts be criminally punishable for adultery, although it should subsequently appear that the former husband was then living.

But under the *Massachusetts* statute (Rev. Stat., c. 130) it has been held that the fact that the husband is absent and unheard of for any time less than seven years will not render innocent the marriage of the wife to another person, though she honestly believes at the time of the second marriage that her husband is dead. *Com. v. Mash*, 7 Met. (Mass.) 472.

Marriage of, and Cohabitation with, a Woman Who has Left Her Husband.—In *Com. v. Thompson*, 11 Allen (Mass.) 23, 87 Am. Dec. 685, it was held that a man may be convicted of adultery who in good faith and in the belief that she is a widow marries and cohabits with a woman who has left her husband and remained absent from him for more than seven years together without hearing of him, if, in fact, her husband is still living. But this case, in Mr. Bishop's opinion, was decided contrary to just principle (Bish. on Stat. Cr., § 663). "A woman married and lived a while with her husband, but his habits were dissipated and he did not provide for her, so she was compelled to leave him. She read in the newspapers of the killing of a man of his exact name, in a drunken row, and had no suspicion that the person killed could be any other than her husband. Thereupon she represented herself to be a widow. Eleven years after she last saw or heard from him she and another man intermarried, both acting in absolutely good faith, with no doubt of the death of the former husband. But, in fact, he was alive, and the second husband was indicted for adultery committed by cohabiting under the second marriage. He was convicted, and the court held the conviction to be correct." 1 Bish. Cr. L., § 3030, note, par. 18.

Burden of Proof of Knowledge or Ignorance.—It has been held that where it is proved that the defendant married and was living, in sexual intercourse with a person who already had a husband or wife living, the state has proven all that is incumbent on it to show the defendant's guilt, and it is for

Associated with an Unlawful Act.—On the other hand, when a man does that which is unlawful, and, in pursuing his criminal purpose, does that which constitutes another and different offense, he shall be held responsible for all the legal consequences of such criminal act.¹

Illicit Intercourse in Ignorance of Marriage.—Hence a person who has sexual intercourse with one who is married, though ignorant of the marriage, and supposing the act to be fornication, may nevertheless be guilty of adultery.²

5. Consent of the Woman Not Essential.—The consent of the woman to the carnal intercourse is not necessary to constitute the crime of adultery in the man; he is guilty of the offense, although the connection with the woman is accomplished by force and against her will,³ or, at the time the act was committed, she was in such a state of stupefaction as to be incapable of consent.⁴

IV. LIVING IN ADULTERY.—Ordinarily a single act of sexual intercourse may fall within the definition of adultery,⁵ but statutes which, while of varying phraseology, in effect punish the offense only when the adulterous intercourse extends over a more or less extended period of time, have been enacted in a number of our states.⁶

V. EVIDENCE—1. In General.—Whether the question arises in a criminal prosecution, a proceeding for divorce, or an action for the civil injury, the rules governing the proof of the offense are, with a few exceptions, practically the same.⁷

2. Of the Carnal Act.—From the nature of the offense of adultery it is not, save in exceptional cases, susceptible of direct and positive proof; it can more often only be established by evidence more or less circumstantial in its nature.

a. CIRCUMSTANTIAL EVIDENCE.—Hence it is considered that direct proof of the carnal act is not necessary; it is sufficient to show circumstances from which the jury may reasonably infer the guilt of the parties.⁸ So it has been

the defendant to show ignorance of the prior marriage. *State v. Cody*, 111 N. Car. 725; *State v. Cutshall*, 109 N. Car. 764. See *Fox v. State*, 3 Tex. App. 329, 30 Am. Rep. 144.

On the other hand it has been held that in such case the burden is upon the state to prove the knowledge. *Banks v. State*, 96 Ala. 78. And the proof or presumption of such knowledge must be "strong enough to repel all reasonable doubt." *Vaughan v. State*, 83 Ala. 55. See the title REASONABLE DOUBT.

1. See the title CRIMINAL LAW.

2. *Com. v. Elwell*, 2 Met. (Mass.) 190, 35 Am. Dec. 398.

3. *State v. Sanders*, 30 Iowa 582; *State v. Donovan*, 61 Iowa 278; *State v. Henderson*, 84 Iowa 161. See also *Com. v. Parr*, 5 W. & S. (Pa.) 345.

4. As where the woman was drunk. *Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248.

5. *State v. Brown*, 47 Ohio St. 102, 21 Am. St. Rep. 790, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 209.

6. Thus there are statutes directed against "living together in adultery or fornication," *Hall v. State*, 53 Ala. 463; *Quartemas v. State*, 48 Ala. 269; "living together as husband and wife without being married," *Hopper v. State*, 19 Ark. 143; *Sullivan v. State*, 32 Ark. 187; "unlawful cohabitation," *Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465.

For an extended treatment of these different statutory offenses see the title LEWD AND LASCIVIOUS COHABITATION AND CONDUCT.

7. 2 Greenl. Ev., § 40. See the titles CRIMINAL CONVERSATION; DIVORCE; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT; FORNICATION.

8. *State v. Green*, Kirby (Conn.) 88; *State v. Poteet*, 8 Ired. (N. Car.) 23; *State v. Eliason*, 91 N. Car. 564; *Com. v. Bowers*, 121 Mass. 45; *Com. v. Gray*, 129 Mass. 474, 37 Am. Rep. 378; *Com. v. Manock*, 2 Crim. L. Mag. 239; *Richardson v. State*, 34 Tex. 142.

It has been said that the circumstances must be such as "to lead the guarded discretion of a reasonable and just man" to the conclusion of guilt. *Thayer v. Thayer*, 101 Mass. 113; *State v. Way*, 5 Neb. 283.

The fact that the defendant met the woman in a barn several times was held competent evidence of adultery. *State v. Marvin*, 35 N. H. 22.

Delivery of Child by Woman.—On the trial of an indictment for adultery with an unmarried woman evidence that she was delivered of a child which might have been begotten about the time of the offense charged was held inadmissible. *Com. v. O'Connor*, 107 Mass. 219.

Suspicion or Jealousy of Defendant's Wife.—The suspicion or jealousy of the defendant's wife cannot be adduced as evidence against him. *State v. Crowley*, 13 Ala. 172. See *Graham v. State*, 28 Tex. App. 9, 19 Am. St. Rep. 809.

Neighborhood Rumor.—Evidence of rumor and talk in the neighborhood is admissible to prove the adultery. *Belcher v. State*, 8 Humph. (Tenn.) 63. See also *Overstreet v.*

held that the act of adultery may be proved by evidence that a man and woman occupied the same bed and room, undressed, in the night time,¹ or even that they occupied a room with a bed in it most of the night.²

Conduct, Situation, and Opportunity of the Parties.—It is competent to prove the situation, circumstances, and opportunities of the parties to the offense.³

Visiting Bawdy-house.—It seems to be competent to show that the defendant visited a bawdy-house with the woman with whom he is charged with being guilty of adultery.⁴

Character or Reputation of the Woman for Chastity.—And evidence of the character or reputation for chastity of a woman with whom the adultery of the defendant is alleged to have been committed is admissible.⁵

b. CORROBORATIVE EVIDENCE.—There is a certain class of facts which, though occurring at a time different from that of the act charged, and not alone sufficient to justify a conviction,⁶ may nevertheless be adduced in corroboration of more immediate proof of the carnal act, and to establish the probability of the act having been committed.⁷

Other Like Acts.—The general rule of criminal evidence, that the commission of other, though similar, offenses by the defendant cannot be proven to show the likelihood of his having committed the offense charged, has, it is said, been somewhat relaxed in cases where the offense consists of illicit intercourse between the sexes.⁸

Before the Offense Charged.—And the rule is now quite generally accepted that when the fact of adultery is alleged to have been committed within a limited period of time it is not necessary that the evidence be confined to that period, and proof of acts anterior to the time alleged may be adduced in explanation of other acts of the like nature within that period.⁹

State, 3 How. (Miss.) 328. See the title HEARSAY EVIDENCE.

1. Com. v. Mosier, 135 Pa. St. 221, 26 W. N. C. (Pa.) 182. But see State v. Way, 6 Vt. 311.

2. State v. Ean (Iowa, 1894), 58 N. W. Rep. 898; Com. v. Clifford, 145 Mass. 97.

3. Gardner v. State, 81 Ga. 144; State v. Brecht, 41 Minn. 50.

The Acquaintance, Conduct, and Familiarity of the Parties involved in the charge are material subjects of inquiry, and pertinent to the issue. People v. Girdler, 65 Mich. 68.

Driving, Fishing, etc., Together.—The fact that the parties to the alleged crime had several times taken buggy rides, or had gone fishing together, etc., was held admissible in evidence on the ground that, when adultery is charged, the acquaintance, conduct, and familiarity of the parties involved in such charge are material subjects of inquiry, if not too remote. People v. Girdler, 65 Mich. 68. And see State v. Stubbs, 108 N. Car. 774.

Acts Innocent in Themselves must be Connected with Acts Tending to Show a Criminal Intimacy.—But in a prosecution for adultery it was held prejudicial error to permit a witness to testify that he had seen the accused persons together near some haystacks, where there was at the same time nothing in his testimony from which it could be inferred that they were engaged in illicit intercourse. State v. Clawson, 30 Mo. App. 139.

4. See Hall v. State, 88 Ala. 236, 16 Am. St. Rep. 51; Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378. And see the title DIVORCE.

5. Com. v. Gray, 129 Mass. 474, 37 Am.

Rep. 378. See also Cauley v. State, 92 Ala. 71. See the title CHARACTER (IN EVIDENCE).

In Blackman v. State, 36 Ala. 295, it was held that if familiarities indicating adultery are proven against a male defendant, evidence is then admissible that the alleged *particeps criminis* is generally reputed as unchaste. Blackman v. State, 36 Ala. 295.

But it was held that evidence that the accused was "foolishly fond of women" is inadmissible in rebuttal of evidence of good character. The phrase "fondness for women" does not, *ex vi termini*, convey the meaning of lustful desire and its unlawful gratification. Cauley v. State, 92 Ala. 71.

6. Showing acts of familiarity or sexual intercourse at a time different from that of the act charged, is not alone sufficient to justify a conviction. Brevaldo v. State, 21 Fla. 789.

7. But when evidence of other acts is admitted in corroboration of the more direct evidence of the offense charged, the court should, by instructions to the jury, limit such evidence to its proper purpose and thereby guard against the conviction of the defendant for such acts instead of the act charged. Funderburg v. State, 23 Tex. App. 392. See State v. Henderson, 84 Iowa 161.

8. See State v. Markins, 95 Ind. 464, 48 Am. Rep. 733; People v. Jenness, 5 Mich. 305; State v. Way, 5 Neb. 283. And see the titles DIVORCE; FORNICATION; INCEST; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT.

9. 2 Greenl. Ev., § 47; State v. Kemp, 87 N. Car. 538.

Improper Familiarities.—Thus, after evidence tending to prove the sexual intercourse for which the defendant is on trial has been offered, or in connection with such evidence, evidence of prior improper familiarities between the same persons may be introduced as corroborative proof, to render it not improbable that the offense might have been committed.¹

Sexual Intercourse.—And it has been contended by eminent authority that if recognition is to be given to the rule that previous familiarities, not amounting to actual sexual intercourse, but tending in that direction, may be shown because they tend to corroborate other evidence of actual intercourse, proof of previous acts of sexual intercourse is competent for a like purpose,² and it has been so held.³

After the Offense Charged.—It has even been held competent to show a continuation of the relation of intimacy between the parties to the crime after the commission of the particular act for which the defendant is prosecuted.⁴ Thus it has been held that evidence of improper familiarity between the parties subsequent to the time of the offense charged may be received as corroborating proof, after evidence has been introduced tending to prove the offense charged, or in connection with such evidence.⁵

Sexual Intercourse.—Indeed, it seems that where presumptive evidence of an act of adulterous intercourse within the period alleged has been given evidence of a subsequent act may be given.⁶

Must be Connected with the Offense Charged.—But while the general rule seems to be that evidence of improper familiarity, and even of other acts of sexual intercourse, between the same parties, whether prior or subsequent to the act charged, is admissible in connection with or subsequent to the introduction of evidence tending to establish the particular act of which the defendant is accused,⁷ yet it must appear that such acts of familiarity or adultery are con-

1. *McLeod v. State*, 35 Ala. 395; *Com. v. Merriam*, 14 Pick. (Mass.) 518, 25 Am. Dec. 420; *Com. v. Lahey*, 14 Gray (Mass.) 91; *Com. v. Morris*, 1 Cush. (Mass.) 391; *Cole v. State*, 6 Baxt. (Tenn.) 243; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124. See also *People v. Jenness*, 5 Mich. 305; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *Com. v. Pierce*, 11 Gray (Mass.) 447; *State v. Wallace*, 9 N. H. 515.

Prior Familiarity.—So testimony that the defendant and the person with whom it was alleged that the adultery had been committed had been "walking and sitting together many times at various places" on the witness's farm, "when no other person was with them," was said to be competent. *Com. v. Durfee*, 100 Mass. 146.

2. *Bish. Stat. Cr.*, § 680. And see *People v. Jenness*, 5 Mich. 305; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733.

3. In prosecutions for adultery evidence of prior acts of adultery is admissible after or in connection with evidence of the particular carnal act charged. *Brevaldo v. State*, 21 Fla. 789; *State v. Pippin*, 88 N. Car. 646; *Com. v. Bell* (Pa., 1895), 166 Pa. St. 405, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 214; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *State v. Potter*, 52 Vt. 33. See also *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *State v. Henderson*, 84 Iowa 161; *People v. Jenness*, 5 Mich. 305. But see *Com. v. Thrasher*, 11 Gray (Mass.) 450, and criticism of these cases in *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110.

In *State v. Bates*, 10 Conn. 372, where, under an information for adultery, charging but one offense and that in a single count, the public prosecutor, having given evidence of one act of adultery, was held to be confined to that act, it is clear that the evidence of other acts of adultery was not understood as being offered merely to corroborate the evidence adduced to prove the act charged. Thus the court said that the effect of admitting such evidence would be to permit the prosecuting attorney to prove "any number of offenses, and then elect upon which to claim a conviction."

4. *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *Baker v. U. S.*, 1 Pin. (Wis.) 641. But see *Com. v. Horton*, 2 Gray (Mass.) 354, criticised in *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110.

5. *State v. Way*, 5 Neb. 283; *Cole v. State*, 6 Baxt. (Tenn.) 243.

6. *Alsabrooks v. State*, 52 Ala. 24. But see *State v. Donovan*, 61 Iowa 278.

Evidence tending to show illicit intercourse by the defendant with the same person charged in the indictment, both before and after the day laid, is competent to prove the relation and mutual disposition of the parties. *State v. Williams*, 76 Me. 480.

Acts of adultery between the defendant and the same woman, near the time of the adultery for which he was indicted (it not appearing whether before or after), though committed in another place, were held competent to be proved. *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346.

7. *Jayne v. Jayne*, 5 Misc. Rep. (N. Y.

nected with the act charged; mere isolated acts of familiarity or adultery which occurred long before or after the act charged may not be given in evidence.¹

When One Witness Sufficient.—If there is no statutory provision to the contrary, the evidence of one credible witness may be sufficient to authorize a conviction for adultery.²

c. THE TIME AND PLACE.—It seems that, although a day is alleged in the indictment, it is not so far material that it will be variance if the proof does not show that the crime was committed on the very day alleged.³ It has been held that if the proof shows that the act was committed on any day within the period fixed by the statute of limitations, it is sufficient.⁴ The adulterous act charged must be shown to have been committed within the county of the indictment.⁵

d. NAME OF PARTICES CRIMINIS.—It seems that in a prosecution for adultery the name of the person with whom the act is alleged to have been committed need not always be proved.⁶ But if the indictment states the crime to have been committed with one person, evidence will not be admitted to show that it was committed with another.⁷

e. DEFENDANT'S SEX.—The sex of the defendant, he being personally present in court, may be inferred from his dress and general appearance, in connection with all the evidence in the case.⁸

Super. Ct.) 307, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 214. Such evidence is only admissible when proposed in connection with, or subsequent to, the introduction of evidence tending to establish the fact of the act charged. And it is not alone sufficient to justify conviction. *Breveldo v. State*, 21 Fla. 789.

1. *State v. Crowley*, 13 Ala. 172.

In *Michigan*, when adultery is charged, the previous acquaintance, conduct, and familiarity are, it seems, considered to be material subjects of inquiry, and pertinent to the issue, if not too remote. See *People v. Girdler*, 65 Mich. 68. But it is held that to allow guilt to be established by the aid of proof of acts committed earlier, it ought to be made to appear that they were not isolated acts separated by a considerable interval of apparently proper conduct from the act relied upon for conviction. *People v. Davis*, 52 Mich. 569. Acts of familiarity and intimacy, occurring two years before the criminal act charged, have been held too remote. *People v. Hendrickson*, 53 Mich. 525.

2. *State v. Henderson*, 84 Iowa 161; *Com. v. Gregor*, 7 Gratt. (Va.) 591.

3. *Com. v. Cobb*, 14 Gray (Mass.) 57; *State v. Brecht*, 41 Minn. 50.

Adulterous Cohabitation.—In *Bailey v. State*, 36 Neb. 808, it is held that where a defendant is charged with adulterous cohabitation while living with his wife, proof of such adulterous cohabitation, during any portion of the period laid in the information, is sufficient to sustain the charge.

4. *State v. Williams*, 76 Me. 480; *Com. v. Cobb*, 14 Gray (Mass.) 57. See *State v. Briggs*, 68 Iowa 416.

5. *Com. v. Horton*, 2 Gray (Mass.) 354; *Com. v. Call*, 21 Pick. (Mass.) 509, 32 Am. Dec. 284.

But this rule does not preclude proof of other acts in a different county or state, as corroborative evidence to show the nature of the relation between the parties. *State v.*

Briggs, 68 Iowa 416; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Funderburg v. State*, 23 Tex. App. 392. See *supra*, this title, CORROBORATIVE EVIDENCE.

6. *Com. v. Tompson*, 2 Cush. (Mass.) 551. See 1 ENCYC. PL. AND PR. 306. But in the case of a prosecution of a man for adultery, and where the crime, as is the case in some states, can only be committed with a married woman, it may become necessary to state the name of the woman with a view to showing that she was married.

7. In *State v. Vittum*, 9 N. H. 519, where the indictment alleged that the defendant committed adultery with one L. W., without any further designation, and it appeared that there were in the same town two individuals of that name, father and son, and that the latter used the addition "junior" to his name, and was thereby well known and distinguished from his father, it was held that evidence of adultery with L. W., junior, was not admissible under the indictment.

So where the indictment alleged that the adultery was committed with "Adaline Winders" and the proofs showed that it was committed with "Mary Adaline Winders" the variance was held fatal. *State v. Dudley*, 7 Wis. 664.

Same Person Known by Different Names.—An instruction that if the person with whom the adultery was alleged to have been committed was as well known by the name of Vesta Brown as by that of Vesta A. Brown, the jury would be warranted in finding that the offense, if committed, was committed with Vesta Brown, was held correct. *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115. Likewise, on an indictment for adultery committed with Margaretha Schlichthaber, proof of adultery with Anna Margaretha Schlichthaber was held not to be a material variance, the woman being equally well known by both names. *State v. Brecht*, 41 Minn. 50.

8. And it was held that the court may prop-

f. THE MAN'S VIRILITY.—It is a matter of legal presumption that a mature male of the human species has normal powers of virility unless the contrary appears.¹

3. Of the Marriage.—Since the marriage of at least one of the parties to a person other than the participant in the carnal act is an essential element of the crime of adultery,² it is necessary that such marriage be proved.³

What Proof Necessary.—It has been said that there must be strict proof of the fact of marriage.⁴

Actual Marriage.—And it has been held that to sustain a charge of adultery there must be proof of actual marriage; reputation and cohabitation are not sufficient.⁵

How Proved.—The marriage may be proved⁶ by the testimony of a person who was present at the marriage ceremony,⁷ as by the testimony of the defendant's husband or wife,⁸ or it may be proved by the confessions of the defendant.⁹ And the marriage record and certificate is held competent evidence of the marriage when accompanied by proof of the identity of the parties.¹⁰

erly instruct the jury to this effect when requested to charge that they "can only look to the sworn statements of the witnesses in determining whether the defendant is a man." *White v. State*, 74 Ala. 31.

1. **Presumption.**—*Gardner v. State*, 81 Ga. 144.

2. See *supra*, this title, *One of the Parties must be Married*.

3. **Necessity of Proving Marriage.**—*Bish. Stat. Cr.*, § 690; *State v. Sanders*, 30 Iowa 582; *State v. Winkley*, 14 N. H. 481; *Parks v. State*, 3 Tex. App. 337; *Tucker v. State*, 35 Tex. 113.

Marriage to Woman under Age of Legal Consent.—Proof of the defendant's marriage to a girl within the age of legal consent is not sufficient without showing that she continued to cohabit with him after arriving at that age. *People v. Bennett*, 39 Mich. 208.

Name of Person to Whom Married.—It has been held that the state need not allege or prove the name of the person to whom one of the adulterers is married, *Hildreth v. State*, 19 Tex. App. 196; and if the name is alleged, the allegation is not a descriptive one, but is surplusage, and need not be proved, *Collum v. State*, 10 Tex. App. 708.

4. See *Miner v. People*, 58 Ill. 59.

5. *Miner v. People*, 58 Ill. 59. See *Bailey v. State*, 36 Neb. 808.

6. For a general treatment of the evidence of marriage see the title MARRIAGE.

In a prosecution for adultery, where the defendant's alleged prior marriage to the complaining witness was denied, it was held that parol evidence of the contents of a letter read to such witness by another was not competent to prove the death of her former husband prior to the alleged marriage with the defendant. *State v. Henke*, 58 Iowa 457.

7. *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163; *State v. Winkley*, 14 N. H. 481; *State v. Marvin*, 35 N. H. 22; *State v. Clark*, 54 N. H. 456.

The testimony of witnesses present at the marriage supper is admissible to show a

marriage in fact. *Mill v. U. S.*, 1 Pin. (Wis.) 73.

8. *State v. Wilson*, 22 Iowa 364; *Bailey v. State*, 36 Neb. 808. For a detailed treatment of this branch of the subject see the title WITNESSES.

9. **Confessions.**—*Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Owens v. State*, 94 Ala. 97; *Cook v. State*, 11 Ga. 56, 56 Am. Dec. 410; *State v. Sanders*, 30 Iowa 582; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *State v. Medbury*, 8 R. I. 543; *Boger v. State*, 19 Tex. App. 91. But see *State v. Bowe*, 61 Me. 171; *Com. v. Thompson*, 99 Mass. 444; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *State v. Armstrong*, 4 Minn. 335; *State v. Rood*, 12 Vt. 396. See the title CONFESSIONS.

In *Massachusetts* the defendant's marriage may, by statute, be proved by his admission of the fact, or by general repute. *Com. v. Holt*, 121 Mass. 61.

10. **Certificate and Record of Marriage.**—*People v. Stokes*, 71 Cal. 263; *Com. v. Norcross*, 9 Mass. 492; *People v. Broughton*, 49 Mich. 339; *State v. Brecht*, 41 Minn. 50. And see *Com. v. Briggs*, 5 Pick. (Mass.) 429.

A marriage certificate made in another state has been held not competent evidence of the marriage in a criminal trial where the accused is entitled to confront witnesses. *Com. v. Morris*, 1 Cush. (Mass.) 391; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49.

In *Maine* a copy of the record is admissible, but it is not sufficient to prove the marriage. Proof of identity of person, not of name merely, must be produced, *Wedgwood's Case*, 8 Me. 75; but if the marriage was in another state or county, proof of the defendant's confession that he was married is sufficient proof of the fact, *Cayford's Case*, 7 Me. 57.

Where the defendant, twenty years before the alleged adultery, on hiring a house, said he had a wife and child, and moved into the house with a woman whom he called "Miss Ham," with whom he lived as his wife for several years and then deserted her, it was held that there was not sufficient proof of the

4. Sufficiency of Proof.—Where the evidence submitted by the state is consistent with the defendant's innocence, it will not sustain a verdict of guilty.¹

Question for the Jury.—The sufficiency of the evidence is exclusively a question for the jury.²

5. Evidence Admissible against One Only of Two Joint Defendants.—Evidence which is admissible against one of two defendants jointly indicted and tried cannot be excluded from the jury on motion. The remedy of the other is to request proper instructions limiting its effect, so as to confine its influence to his codefendant, against whom alone it is admissible.³

VI. PUNISHMENT—In General.—In some states the offense is punishable as a felony,⁴ in others as a misdemeanor.⁵

When Committed between Whites and Blacks.—A statute prescribing a heavier punishment for adultery or fornication between whites and blacks than between persons of one race is not unconstitutional.⁶

AD VALOREM.—See note 7.

ADVANCE—ADVANCES.—The verb "advance," as applied to commerce, means to supply beforehand, to furnish on credit, or before goods are delivered or work done; or to furnish as a part of stock or fund, as to advance money on loan or contract, or towards a purchase or establishment.⁸ "Advances" ordinarily indicate money paid before or in "advance" of the proper time of payment.⁹

marriage. *Ham's Case*, 11 Me. 391. Compare *State v. Wallace*, 9 N. H. 515.

1. *Weaver v. State*, 74 Ga. 376.

For cases where the evidence was held insufficient see *State v. Waller*, 80 N. Car. 401; *State v. Pope*, 109 N. Car. 849; *Breveldo v. State*, 21 Fla. 789.

In *State v. Chancy*, 110 N. Car. 507, on an indictment for adultery against a negress and a white man, the evidence showed that the former, since her separation from her husband, had given birth to two children, of whom the white man was very fond. On several occasions he was seen taking care of them and playing with them, and was heard teaching them to sing. He had his picture taken with them, and was seen riding several times with the negress. He ate with her at the same table, employed servants to cook for them both, and had their clothes washed together. These circumstances were held sufficient to sustain a verdict of guilty.

2. Hence, where the court overruled a motion to exclude all the testimony tending to establish the carnal act, on the ground that it was "weak and inconclusive," there was held to be no error. *Alsabrooks v. State*, 52 Ala. 24.

3. *Blackman v. State*, 36 Ala. 295; *Owens v. State*, 94 Ala. 97.

4. See *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105.

5. See *State v. Cooper*, 16 Vt. 551.

In a prosecution under a statute against the offense of fornication and adultery which declared that it should be a misdemeanor, but did not prescribe any particular punishment, the defendants were each sentenced to be imprisoned in the common jail of the county for the period of four months. There was a statute providing that in the case of misdemeanor, or where no special punishment was prescribed, the offense should be punishable as misdemeanor at common law. Hence it

was held that punishment by imprisonment in the common jail for a period in the discretion of the court was allowable. *State v. Manly*, 95 N. Car. 661.

Excessive Punishment.—Where the defendant was guilty of long-continued adulterous intercourse with the twin sister of his wife, sixteen years of age, and the statutes limited the punishment for the crime of adultery to imprisonment for three years, it was held that a sentence of the extreme penalty—three years' imprisonment—was not excessive. *State v. Hazen*, 39 Iowa 648. See the title CRIMINAL LAW.

6. *Ellis v. State*, 42 Ala. 525; *Ford v. State*, 53 Ala. 150; *Pace v. State*, 69 Ala. 231, 44 Am. Rep. 513.

7. **Ad Valorem Tax.**—The term *ad valorem* tax is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing subject to taxation. *Bailey v. Fuqua*, 24 Miss. 501. See also the title TAXATION.

8. Webster's Dict., quoted in *Hartje v. Collins*, 46 Pa. St. 273; *Bates v. State Bank*, 2 Ala. 479.

To *advance* is to "supply beforehand;" "to loan before the work is done or the goods made." *Lafin, etc.*; *Powder Co. v. Burkhardt*, 97 U. S. 117.

The word *advance* implies an act which by anticipation puts money or money's worth into the hands of a party who would otherwise not receive it. *Cooper v. Cooper*, L. R. 8 Ch. 824.

9. *Vail v. Vail*, 10 Barb. (N. Y.) 69.

An *advance* of money on contract, strictly speaking, is payment made before an equivalent is received. *Gibbons v. U. S.*, Dev. Ct. of Cl. 51.

Distinguished from Advancements.—See also the title ADVANCEMENTS.

The word *advances* when taken in its strict

legal sense does not mean gifts—advancements—and does mean a sort of loan; and when taken in its ordinary and usual sense includes both loans and gifts—loans more readily, perhaps, than gifts. *Nolan v. Bolton*, 25 Ga. 355.

"Advancement" and "advancements" are the terms used in the law dictionaries, and in the *New York* statutes, to designate money or property given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. *Advances* is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signification. It may characterize a loan or a gift, or money advanced, to be repaid conditionally. "Lent and advanced" was the language of the old common count, in assumpsit, for money loaned or advanced, to be repaid. *Chase v. Ewing*, 51 Barb. (N. Y.) 612.

It was rightly ruled that the word *advances*, as used in one clause of the will, was not restricted to advancements. *Barker v. Comins*, 110 Mass. 488.

But for the use of *advances* in the technical sense of "advancement" in a will, see *Wheeler's Appeals*, 70 Pa. St. 429. See also *Wright's Appeal*, 89 Pa. St. 67, and 93 Pa. St. 87.

Expenses for the Support of Minor Children.—In *Vail v. Vail*, 10 Barb. (N. Y.) 69, a testator directed that his executors should appropriate from the income of his estate sufficient sums to support and educate his minor children, and that they should pay certain specific legacies to his adult children and to his minor children upon their coming of age or marriage, and provided that the rest of his estate should be set aside for the use and benefit of his children, in such proportions as to equalize with interest the previous *advances*. It was held in the settlement of the estate that the children were not to be charged with the sums applied for their support and maintenance, those sums not being included in previous *advances*. The court said: "The term *advances* does not, even in ordinary cases, include money thus expended. Its etymological and its ordinary use indicate moneys paid before, or in *advance* of, the proper time of payment. Thus it is used as to moneys paid before the completion of work under a contract, and as to property given to a child at his full age or marriage, and which is received in anticipation of the share which he will have in his parent's estate at the parent's decease."

Whether the Word Imports a Loan.—In *Morrow v. Turney*, 35 Ala. 137, the question was whether a transaction was a mortgage or a conditional sale. The court said: "The parties certainly meant, by an *advance* of money, a loan. It was either a loan or a payment. The import of the word *advance* is such as rather to indicate that there was a loan than a payment of purchase money."

Loan and Advance.—In *Wright's Appeal*, 93 Pa. St. 87, "loan" and *advance* were held to have been used interchangeably. See also *Nolan v. Bolton*, 25 Ga. 352; *Wright's Appeal*,

89 Pa. St. 67; *Oxford Bank v. Bobbitt*, 108 N. Car. 538; *Rogers v. Oxford Bank*, 108 N. Car. 580; *Chase v. Ewing*, 51 Barb. (N. Y.) 612.

Same—Advance to an Agent.—In *North-Western Mut. L. Ins. Co. v. Mooney*, 108 N. Y. 125, the court construed an agreement that a principal was to *advance* money to an agent to be used in *advancing* the interest of the principal, saying: "Thus the principal is to *advance*, i. e., put forward to the agent, money, and in its turn the money is to be used in *advancing*, that is, 'putting forward,' the interests of the company. The first *advance* is not more a loan to the agent than the last *advance* is a loan by the agent to the company. He is responsible to them for its use, and may be called on to account for, or show that it has been used for the purpose for which he received it. And for his failure to account the sureties would be bound, by the express terms of the bond. They undertake that he shall 'discharge his duties as agent,' and they undertake that he 'shall pay over all moneys belonging to the company.' Money loaned ceases to be the money of the lender and becomes the property of the borrower. If the money in question was loaned, it was not in his hands as money belonging to the company."

Marine Insurance.—As to the admission of expert evidence upon the meaning of the term *advances*, and as to whether it includes "outfits" in a policy of marine insurance, see *Burnham v. Boston Marine Ins. Co.*, 139 Mass. 399. And see the title MARINE INSURANCE.

Rent.—Within the meaning of a *Nevada* statute providing for the payment of claims against the state for services and *advances*, it was held that the word *advances* included the rent of premises occupied by the state. *Ormsby County v. State*, 6 Nev. 287.

Whether They must be of a Pecuniary Nature.—An equity decree declared that H. had made *advances* for the improvement of the estate described in the bill, and that such estate was chargeable for the sums so *advanced*. It was held that this language imported only a pecuniary *advance*, and could not be construed, in the absence of anything in the context favoring such a construction, to import also an *advance* in the shape of personal services. *Hodges v. Hodges*, 9 R. I. 32. Compare *M'Keene v. Joynson*, 5 C. B. N. S. 230, 94 E. C. L. 230, where it is said by Byles, J.: "I think the word *advance* in this document does not necessarily or even *prima facie* mean an *advance* in money only. The expression used is not 'pay,' or 'lend,' or 'lend to me through Reuben Hill,' nor even '*advance* in cash,' but it is simply 'who shall *advance* to Reuben Hill on this agreement the sum of six pounds.' *Prima facie*, that seems to me to import such an *advance* as shall, as between the sailor and the man who deals with him, be an *advance* of six pounds; and therefore I think any *advance* to that amount, whether in money or in money's worth, is an *advance* within this contract."

Lien upon Crops for Advances. (See also the title CROPS.)—A landlord lent corn to his tenant to be used in making the crop, the

corn to be returned or paid for upon the close of the year. At the expiration of the year the tenant asked to be allowed to pay for the corn at the end of the ensuing year, and the landlord consented. This was held not to constitute *advance* for the second year within the lien law. The court said: "To constitute *advance* the landlord must furnish, or cause to be furnished, something not before the tenant's, and mere forbearance to demand something due him from the tenant in one year does not give him a lien on the agricultural products of the leased premises for the next year, as against one who has a deed of trust embracing them, whatever may be his right as against the tenant." *Lumblay v. Gilruth*, 65 Miss. 26.

Same.—A mule was held not to be an *advance*. *McCullough v. Kibler*, 5 S. Car. 468. Here the court said: "In no wise can a mule be considered an *advance* to be expended upon the soil which produces the crop. The labor of a mule might very properly be considered a necessary supply for the production of a crop, but a mule, instead of being worn out and rendered useless in producing a crop, may be in much better condition and more valuable after the crop is made than before."

Factors. (See also the title COMMISSION MERCHANTS OR FACTORS.)—In *Balderston v. National Rubber Co.* (R. I., 1893), 27 Atl. Rep. 510, it is said: "What are *advances*? They are moneys paid by the factor to his principal, on the credit of the goods consigned, and in anticipation of the debt which will become due to the principal upon the sale of such goods. The ordinary use of the term indicates moneys paid before or in *advance* of the proper time of payment. To *advance* is to supply beforehand, 'to loan before the work is done or the goods are made.' *Lafin, etc., Powder Co. v. Burkhardt*, 97 U. S. 110."

In *Hoy v. Reade*, 1 Sweeny (N. Y.) 626, the court, in speaking of an *advance*, said: "It is in fact a prepayment on account of a debt anticipated by both parties to arise to that or a greater amount from the consignor [consignee?] to the consignee [consignor?] out of the performance by the consignee of a con-

tract existing between them. It necessarily results that, before the consignee can call on the consignor to pay back any portion of this prepayment, he must show the performance of this contract, and that his indebtedness arising thereout did not, as was anticipated, amount to the prepayment."

In *Gihon v. Stanton*, 9 N. Y. 476, it is said: "An *advance* is something which precedes; and, of course, there is something to follow. As applied to the payment of money, the term implies that the parties look forward to a time when the money will be due to the recipient. A debtor who voluntarily pays his debt before it is due is said to *advance* it. Can he recover it back? An *advance* by a factor is a transaction somewhat similar. It is a prepayment—a mere anticipation of the avails of the goods consigned; and no more creates a debt in the first instance than an advancement of a father to his son, in anticipation of his expected inheritance, creates a debt. It is true that if the property proves insufficient to reimburse the factor for his *advances*, the law, in the absence of any agreement to the contrary, implies an undertaking to make up the deficiency."

Under the *Louisiana Code* the term *advances* has been construed to include acceptances not paid. *Turpin v. Reynolds*, 14 La. 477.

Disbursements from Party's Own Funds.—In *Lee v. Byrne*, 75 Ala. 132, plaintiff and defendants entered into a written contract, whereby the former agreed to deliver to the latter logs at a stated price per thousand feet, and the latter agreed to pay, at the end of each month, for the logs delivered during that month, "after deducting for all *advances*" and commissions thereon at a specified rate. It was held that defendants were not entitled to commissions on disbursements made by them from plaintiff's money, or when they were indebted to him for logs delivered under the contract; nor on an old indebtedness owing by the plaintiff, and incurred prior to the execution of the contract.

A to Advances upon Supplies to Lumbermen. see the titles LOGS and LUMBER.

As to Mortgages for Future Advances, see the titles MORTGAGES; CHATTEL MORTGAGES; FUTURE ACQUIRED PROPERTY.

ADVANCEMENTS.

By JAMES K. BLAKE.

- I. DEFINITION,** 760.
- II. ORIGIN,** 761.
- III. REQUISITES,** 762.
 - 1. *Must be a Completed Transfer,* 762.
 - 2. *The Donor must Die Intestate,* 763.
- IV. OF WHAT ADVANCEMENTS MAY CONSIST,** 764.
 - 1. *In General,* 764.
 - 2. *Real Property,* 765.
 - 3. *Personal Property,* 767.
- V. BETWEEN WHOM ADVANCEMENTS MAY BE MADE,** 769.
 - 1. *General Principles,* 769.
 - 2. *Parent and Child,* 771.
 - 3. *Husband and Wife,* 773.
 - 4. *Parent-in-law and Son-in-law,* 773.
 - 5. *Grandparent and Grandchild,* 774.
 - 6. *Other Relations,* 775.
- VI. HOW ADVANCEMENTS MAY BE DETERMINED,** 775.
 - 1. *A Question of Intention,* 775.
 - 2. *How Intention may be Shown,* 776.
 - 3. *Intention as Determined by Will,* 777.
 - 4. *Effect of Evidence of Indebtedness,* 778.
 - 5. *Entries in Books,* 780.
- VII. CHANGE OF GIFT TO ADVANCEMENT, AND VICE VERSA,** 780.
- VIII. RIGHTS AND REMEDIES OF PARTIES TO ADVANCEMENT,** 781.
- IX. VALUE OF ADVANCEMENTS,** 783.
 - 1. *How Computed,* 783.
 - 2. *Interest,* 785.
- X. APPLICATION OF THE DOCTRINE OF ADVANCEMENTS,** 785.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ABATEMENT OF LEGACIES; ADEMPMENT OF LEGACIES; ADOPTION OF CHILDREN; ALLOWANCES; ANNUITIES; EXECUTORS AND ADMINISTRATORS; GIFTS; HOTCHPOT; LEGACIES AND DEVISES; PARENT AND CHILD; SUCCESSION; UNDUE INFLUENCE; WILLS.

I DEFINITION.—An advancement is a transfer of property from a person standing *in loco parentis* toward another, to that other, in anticipation of the share of the donor's estate which the donee would receive in the event of the donor's dying intestate.¹

1. **Advancement Defined.**—The term is defined in *Cawthon v. Coppedge*, 1 Swan (Tenn.) 487, to be "a gift by a parent to his child, by anticipation, in whole or part, of what it is supposed

the child would be entitled to on the death of the parent."

On the question of the meaning of the term "advancement," the court, in *Rickenbacker v.*

Distinguished from Gift, Debt, and Ademption.—An advancement differs from a gift inasmuch as it is charged against the child; and from a debt, in that there is no enforceable liability on the part of the child to repay during the lifetime of the donor, or after his death, except in the way of suffering a deduction from his portion in the estate.¹ Unlike an ademption, it has to do with intestate estates only.²

II. ORIGIN.—The doctrine of advancements rests upon the English statute of distributions, which is generally recognized in this country as a part of the common law.³ Its provisions are similar to certain particular customs

Zimmerman, 10 S. Car. 110, 30 Am. Rep. 37, said: "In 1 Bouvier Law Dict. 76 the term 'advancement' is defined to be 'that which is given by a father to his child or presumptive heir by anticipation of what he might inherit.' In *M'Caw v. Blewit*, 2 McCord Eq. (S. Car.) 91, the leading case on the subject of advancements in this state, no definition of the term is given in the decision of the Court of Appeals, but in the circuit decree it is defined to be 'such a part of a man's estate as he gives to a child on marriage, or on setting out in life, which may be necessary for its settling in the world.' In the argument of this case the counsel for the appellant, who afterwards became one of the most eminent chancellors of this state, questions the correctness of this definition, and says: 'If a definition may be ventured, an advancement is the gift of a parent to a child beyond what by law he is bound to provide, from which a substantial benefit is to be derived by the child.' But, after long experience on the bench, this distinguished judge seems to have reached the conclusion that it was not an easy matter to frame an accurate definition of the term. *Murrell v. Murrell*, 2 Strobb. Eq. (S. Car.) 151, 49 Am. Dec. 664. While, however, it is a difficult matter to frame such a definition as will cover every possible case, there are certain essential elements which every advancement must possess; one of which is that it must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or taken out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child." See also *Nolan v. Bolton*, 25 Ga. 352.

In *Clark v. Willson*, 27 Md. 693, the court, by Weisel, J., said: "An advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the parent making it and dying intestate."

Advancement is "a pure and irrevocable gift by a parent, in his lifetime, to his child, on account of such child's share of the estate after the parent's decease." *Brightly's Eq.*, § 389, quoted approvingly in *Miller's Appeal*, 31 Pa. St. 337.

In *Yundt's Appeal*, 13 Pa. St. 575, 53 Am. Dec. 496, the term is defined as an irrevocable gift by a parent to a child in anticipation of such child's future share of the parent's estate. See also *Greene v. Brown* (Ind., 1894), 38 N. E. Rep. 519, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 216.

In *Dillman v. Cox*, 23 Ind. 440, it was said by the court, speaking by *Frazer, J.*: "The true notion of an advancement is a giving by antici-

pation of the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement."

Other Definitions are given in *Weatherhead v. Field*, 26 Vt. 665; *Cazassa v. Cazassa*, 92 Tenn. 573; *Yancy v. Yancy*, 5 Heisk. (Tenn.) 357, 13 Am. Rep. 5; *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Osgood v. Breed*, 17 Mass. 356; *Holliday v. White*, 33 Tex. 460; *Wallace v. Reddick*, 119 Ill. 156; *Darne v. Lloyd*, 82 Va. 859, 3 Am. St. Rep. 123.

How the Doctrine is Applied.—"The donee * * * in order to share in the remainder of the estate, is required to bring what he has received into hotchpot. He is not necessarily required to return the property or thing received, but must submit to having its value charged against him." *Olds, J.*, in *Herkimer v. McGregor*, 126 Ind. 254. See also *Stone v. Halley*, 1 Dana (Ky.) 197; *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726.

The one advanced cannot be required to bring his advancement into hotchpot. *Marston v. Lord*, 65 N. H. 4; *Phillips v. McLaughlin*, 26 Miss. 592; *Hawley v. James*, 5 Paige (N. Y.) 318; *Hamer v. Hamer*, 4 Strobb. Eq. (S. Car.) 124. But his refusal is a bar to all claims. *Taylor v. Reese*, 4 Ala. 121.

1. *Proctor v. Newhall*, 17 Mass. 81; *Weatherhead v. Field*, 26 Vt. 668; *Dawson v. Macknet*, 42 N. J. Eq. 633. See also the titles DEBT; GIFTS.

"An Advancement is neither a Loan or Debt to be repaid, nor an absolute gift. It is a bestowment of property by a parent on a child, on condition that if the donee claims to share in the intestate estate of the donor, he shall bring in this property for the purposes of equal distribution." *In re Hall*, 14 Ont. 557.

If the Donee So Wishes He may Elect to claim no interest under the distribution, in which case he cannot be compelled to bring the property into hotchpot. *Phillips v. McLaughlin*, 26 Miss. 592.

Distinguished from Advances.—The term "advancement" is to be distinguished from "advances." The latter strictly signifies a kind of loan. *Nolan v. Bolton*, 25 Ga. 352. See ADVANCE—ADVANCES.

It is Also Used Loosely to include debts, gifts, and advancements, when the meaning is to be determined largely from the context. *Chase v. Ewing*, 51 Barb. (N. Y.) 612; *Barker v. Comins*, 110 Mass. 477; *Whelen's Appeal*, 70 Pa. St. 410.

2. *Johnson v. Belden*, 20 Conn. 324. See also the titles ADEMPMENT OF LEGACIES; LEGACIES AND DEVICES.

3. **Doctrine Rests upon English Statute of Distributions.**—*Thornton on Gifts and Advance-*

of England¹ and the rules of the Roman law.²

The Basis of the Doctrine of advancements is the equality with which it is presumed a parent desires all his children to share in his estate.³

III. REQUISITES—1. Must be a Completed Transfer.—An advancement must be a completed transfer of property, and as such must be perfected during the donor's lifetime.⁴

If Such is Not the Case the transaction is ineffectual as an advancement, and a court of equity can grant no relief.⁵

ments, § 523. The provisions on the subject of advancement are contained in section 5, and are as follows: That "all the residue" shall be divided "by equal portions, to and amongst the children of such persons dying intestate as legally represent such children. In case any of the said children be then dead, other than such child or children (not being heirs at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir at law, shall have any estate by a settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated; but the heir at law is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate." 22 and 23 Car. II., c. 10.

1. Provisions of Statute Similar to Certain Particular Customs.—The custom of *London* and the province of *York*; also of *Scotland*, 2 Blackstone's Commentaries, p. 517; Twisden v. Twisden, 9 Ves. Jr. 413; Elliot v. Collier, 3 Atk. 526, 1 Ves. 15; Blundell v. Barker, cited in 1 Atk. 403; Pusey v. Desbouvrie, 3 P. Wms. 315; Cevill v. Rich, 1 Vern. 181; Tomkyns v. Ladbroke, 2 Ves. 591; Mitchell v. Mitchell, 8 Ala. 414; Terry v. Dayton, 31 Barb. (N. Y.) 522. As to the present effect of the custom of *London* see Kintz v. Friday, 4 Dem. (N. Y.) 540.

2. Roman Law.—The doctrine of advancements is by some believed to be derived from the *collatio honorum* of the imperial law (Dig. 376), hence the equalizing of advancements is sometimes called their collation, especially in *Louisiana*, where this branch of the law forms the subject of minute regulation. See *Louisiana Rev. Civil Code* of 1875, arts. 1227, 1228; Destrehan v. Destrehan, 4 Martin N. S. (La.) 557; Sohm's Institutes of the Roman Law (Leslie's Translation), p. 439.

3. Equality of Distribution the Basis.—Boyd v. Boyd, L. R. 4 Eq. 305; Edwards v. Freeman, 2 P. Wms. 413; Greene v. Speer, 37 Ala. 532; Condell v. Glover, 56 Ill. App. 107; Herkimer v. McGregor, 126 Ind. 254; Shawhan v. Shawhan, 10 Bush (Ky.) 600; Parks v. Parks, 19 Md. 323; Clark v. Willson, 27 Md. 700.

Where a testator directed that amounts advanced to his children should be equalized from his estate, it was held that this should be done from the principal and not from the profits accrued since his death. *White v. White*, 3 Dana (Ky.) 374.

"Equality is Equity amongst Heirs, and the doctrine of advancement has for its object the furtherance of this end." Thompson, J., in *Miller's Appeal*, 31 Pa. St. 337.

Hence the Presumption of the Law is in favor of advancements as against gifts or loans. *Patterson's Appeal*, 128 Pa. St. 280.

4. Transfer must be Completed in Donor's Lifetime.—*Herkimer v. McGregor*, 126 Ind. 247; *Crosby v. Covington*, 24 Miss. 619; *Yancy v. Yancy*, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5.

In *Ison v. Ison*, 5 Rich. Eq. (S. Car.) 15, the court, by Johnson, J., said: "An advancement always embraces the idea that the parent has parted from his title in the subject advanced."

Where, by the direction of the owner of land, the owner's daughter and her husband entered into possession, it being the intention of the father that they should reside thereon during his life, make repairs, pay the taxes, and receive the proceeds, and that at his death the daughter should take a life estate with remainder to her children, it was held that there had been no advancement, the court, by Niblack, J., saying: "To constitute an advancement the ancestor must, in his lifetime, divest himself of all interest in the property set apart to the heir." *Joyce v. Hamilton*, 111 Ind. 166.

Delivery of Personal Property Necessary.—In case of personal property there must be an actual delivery and change of possession. *Meadows v. Meadows*, 11 Ired. (N. Car.) 148.

Promise to Release Debt.—A promise to release a debt is not a good advancement. *Denman v. McMahon*, 37 Ind. 241.

Notes.—It has been held, however, that a note from father to son is. *Shotwell v. Struble*, 21 N. J. Eq. 31.

Parol Gift of Land.—An estate passed as an advancement and was held not to be revocable, where a father by parol gave his daughter, in contemplation of her marriage, and with the knowledge of her intended husband, a house and tract of land, and the daughter after marriage entered into possession, which possession she retained until her death. *Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306.

Equitable Title at Least must Pass.—Where a man purchased land with money of his mother-in-law, as a home for her and himself, taking title in his own name without her knowledge, it was held to be a case of agency, not of advancement. *Girault v. A. P. Hotaling Co.*, 7 Wash. 90.

5. Williams v. Mears, 2 Disney (Ohio) 604.

Donor Himself must Act.—The transfer must be perfected by the donor himself.¹

Property at the Risk of Donee.—After it has taken place, the property is at the risk of the donee.²

The Right of the Donor is Gone, and no act of his, without the concurrence of the donee, can affect it.³

Legal Title or Immediate Possession of Donee Unnecessary.—It is not necessary, however, that the donee have the legal title or the immediate possession, so long as his estate is fully created.⁴

Testamentary Provision.—A testamentary provision cannot constitute an advancement.⁵

2. The Donor must Die Intestate—In General—Wills.—If the donor disposes of his whole estate by will, the doctrine of advancements has no application,⁶ unless the will specifically refers to advancements and defines what previous gifts shall be so considered.⁷ Even if the will expressly states that the property is to be distributed according to law as in cases of intestacy, it is still a will, and the doctrine of advancements does not apply.⁸ The courts are very liberal in that connection in regarding informal instruments as wills.⁹

Partial Intestacy.—In order that the child may be compelled to account for advancements, the ancestor must, according to the common-law doctrine, have died wholly intestate.¹⁰ That rule is generally recognized in this country, both in states which have tacitly adopted the common law, and in those which use the word "intestate" in the statute, which term is construed to mean wholly intestate.¹¹ If the principle of advancements in case of partial

1. The Donor's Wife and Sons Have No Authority to make a transfer after he has become insane, although he had the intention of making it prior thereto. *Bailey v. Bailey*, 6 Conn. 308.

2. When Completed, the Property at Risk of Donee.—*In re Young's Estate*, 3 Md. Ch. 461; *West v. Jones*, 85 Va. 616.

He must account for it in the distribution, even though its value is gone through no fault of his, as in case of the emancipation of a slave. *Fennell v. Henry*, 70 Ala. 484, 45 Am. Rep. 88.

3. Thereafter Not Affected by Any Act of Donor.—*Phillips v. McLaughlin*, 26 Miss. 592; *Haverstock v. Sarbach*, 1 W. & S. (Pa.) 390; *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423. This last case holds that the property advanced is no part of the estate of the decedent.

4. Donee need Not Have Legal Title or Immediate Possession.—*Clark v. Willson*, 27 Md. 697. In this case it was held that a deed of trust duly executed for the benefit of the donee, after the donor's death, is a sufficient conveyance.

Title Bond.—In *Thompson v. Thompson*, 1 Yerg. (Tenn.) 97, it is held that if a father obtain a title bond in favor of himself and his son there is an advancement of the half interest, even if the deed is made to the father alone.

A Binding Covenant to Settle Lands upon the child attaining a certain age, or upon marriage, will be treated as an advancement. *Edwards v. Freeman*, 2 P. Wms. 435, 2 Eng. Rul. Cas. 252.

So would a Gift of a Slave, a life use in the grantor being reserved. *Wilks v. Greer*, 14 Ala. 437.

And so will an Oral Gift of Land accompanied by a transfer of possession. *Ford v. Ellingwood*, 3 Metc. (Ky.) 359.

5. Testamentary Provision Not Advancement. *Twisden v. Twisden*, 9 Ves. Jr. 425; *Nettleton v. Nettleton*, 17 Conn. 542; *Snelgrove v. Snel-*

grove, 4 Desaus. (S. Car.) 274; *Edwards v. Freeman*, 2 P. Wms. 439; *Reed v. Crocker*, 12 La. Ann. 436.

6. Nettleton v. Nettleton, 17 Conn. 542.

7. Coleman v. Smith, 55 Ala. 368. See also *infra*, this title, *How Advancements may be Determined*.

8. De Caumont v. Bogert, 36 Hun (N. Y.) 382.

It has been held that where the will says that the property is to be "disposed of as the law directs," this is a sufficient disposition to prevent intestacy, and advancements need not be brought into hotchpot. *Brown v. Brown*, 2 Ired. Eq. (N. Car.) 309.

9. Hayden v. Burch, 9 Gill (Md.) 79.

10. Ancestor must Die Wholly Intestate.—*Twisden v. Twisden*, 9 Ves. Jr. 426; *Walton v. Walton*, 14 Ves. Jr. 324; *Cowper v. Scott*, 3 P. Wms. 124; *Vachell v. Jeffereys*, Pre. Ch. 170.

11. Alabama.—*Cawfield v. Brown*, 45 Ala. 552; *Coleman v. Smith*, 55 Ala. 368; *Greene v. Speer*, 37 Ala. 532. In this last case the reasons for the rule are clearly stated by the court, speaking through Stone, J.: "The doctrine of hotchpot rests for its justification, on the presumed desire of decedents to equalize the portions of all distributees standing in the same relation to them. In cases of intestacy it operates with justice and equality, for it bears alike on all who have been advanced. This would rarely be the case where there is a will. In a majority of cases, parents during their lifetime have made gifts by way of advancement to their older children, and when they come to make a will they usually attempt to make up to the children not advanced, what they, in their discretion, intend as the equivalent of the advancements previously given off. In other words, the advancements given off and the be-

intestacy is recognized, it applies only to property not covered by the will, and not to that falling to residuary legatees.¹

IV. OF WHAT ADVANCEMENTS MAY CONSIST—1. In General.—Under the English System of Primogeniture, all the real estate went to the eldest son, who was, as to his inheritance of land, expressly excepted from the operation of the statute.

Coparceners—Hotchpot.—Land descended to more than one in the case only of coparceners, who were subject to the operation of the rule of hotchpot which required that gifts of land only be accounted for.²

It was Only to the Distribution of the Personal Effects of the testator that the terms of the statute of distribution having to do with advancements applied.³

Realty or Personality.—Such advancements might be of either real or personal property, or both.⁴

Statutory Regulation.—In this country the matter is regulated by statute; and whether advancements shall be of either real or personal property exclusively, or may be of both, and whether one can be set off against the other, are matters in regard to which the terms of the statute must be followed.⁵

quests contained in the will are collectively the distribution which the testator desires to make."

Delaware.—*Marshall v. Rensch*, 3 Del. Ch. 239. Here the court, by Bates, J., said: "Both in England and in the United States the law of advancements has been applied only in cases of intestacy. Never where there is a will, not even, as held in many cases, though there may be a surplus undisposed of by the will, is a gift in the testator's lifetime required to be brought into the distribution of such surplus."

Georgia.—*Walker v. Williamson*, 25 Ga. 549; *Brewton v. Brewton*, 30 Ga. 416; *McNeil v. Hammond*, 87 Ga. 618; *Huggins v. Huggins*, 71 Ga. 66, which construed the word "intestate" occurring in section 2582 of the code of 1882, in the manner stated in the text.

Maryland.—*Stewart v. Pattison*, 8 Gill (Md.) 46; *Hayden v. Burch*, 9 Gill (Md.) 79; *Pole v. Simmons*, 45 Md. 246; *Manning v. Thruston*, 59 Md. 218.

Missouri.—*Turpin v. Turpin*, 88 Mo. 337, which holds that the term "intestate" in the statute means wholly intestate.

New York.—*De Caumont v. Bogert*, 36 Hun (N. Y.) 382; *Clark v. Kingsley*, 37 Hun (N. Y.) 246; *Arnold v. Haronn*, 43 Hun (N. Y.) 278; *Camp v. Camp*, 18 Hun (N. Y.) 219; *Thompson v. Carmichael*, 3 Sandf. Ch. (N. Y.) 120 (which construed the word "intestate" in the statute as meaning wholly intestate); *Hawley v. James*, 5 Paige (N. Y.) 450; *Arthur v. Arthur*, 10 Barb. (N. Y.) 24. But see *Hays v. Hibbard*, 3 Redf. (N. Y.) 28.

North Carolina.—*Richmond v. Vanhook*, 3 Ired. Eq. (N. Car.) 581 (holding in accordance with the text where the statute used the term "intestate"); *Hurdle v. Elliott*, 1 Ired. (N. Car.) 176; *Jenkins v. Mitchell*, 4 Jones Eq. (N. Car.) 207; *Donnell v. Mateer*, 5 Ired. Eq. (N. Car.) 7; *Johnston v. Johnston*, 4 Ired. Eq. (N. Car.) 9; *Brown v. Brown*, 2 Ired. Eq. (N. Car.) 309; *Croom v. Herring*, 4 Hawks (N. Car.) 393.

Ohio.—In *Needles v. Needles*, 7 Ohio St. 435, 70 Am. Dec. 85, it was decided that when the decedent manifestly intended to dispose of all his property by will, the fact that he had unknowingly died intestate as to part, was not enough to warrant the application of the doctrine of advancements.

Pennsylvania.—*Newell's Will*, 1 Browne

(Pa.) 311; *Kreider v. Boyer*, 10 Watts (Pa.) 54; *Christman v. Siegfried*, 5 W. & S. (Pa.) 400.

South Carolina.—*Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 291; *Richardson v. Sinkler*, 2 Desaus. (S. Car.) 139; *Newman v. Wilbourne*, 1 Hill Eq. (S. Car.) 10; *McFall v. Sullivan*, 17 S. Car. 512; *Allen v. Allen*, 13 S. Car. 512, 36 Am. Rep. 716; *Rainsford v. Rainsford*, Spear Eq. (S. Car.) 385.

Virginia.—*Wilson v. Miller*, 1 Patt. & H. (Va.) 353.

Contrary Rule by Express Statute—Tennessee.—In Tennessee, however, the doctrine applies in a case of partial intestacy, by virtue of an express statute. *Vance v. Huling*, 2 Yerg. (Tenn.) 135; *Sturdevant v. Goodrich*, 3 Yerg. (Tenn.) 95; *Pearce v. Gleaves*, 10 Yerg. (Tenn.) 359; *Gold v. Vaughan*, 4 Sneed (Tenn.) 245; *Perry v. High*, 3 Head (Tenn.) 349; *Farnsworth v. Dinsmore*, 2 Swan (Tenn.) 38.

1. *Hays v. Hibbard*, 3 Redf. (N. Y.) 28.

2. See the title HOTCHPOT.

3. *Thornton on Gifts and Advancements*, § 550; *Cevill v. Rich*, 1 Vern. 181; *Terry v. Dayton*, 31 Barb. (N. Y.) 522.

4. *Havens v. Thompson*, 23 N. J. Eq. 321; *Terry v. Dayton*, 31 Barb. (N. Y.) 522; *Hamer v. Hamer*, 4 Strobb. Eq. (S. Car.) 124.

5. **Effect of Statute Specifying Personality Only.**—If the statute specifies only advancements of personal property, those of real estate are to be disregarded. *Putnam v. Putnam*, 18 Ohio 347; *Myers v. Warner*, 18 Ohio 519.

Statute Embracing both Real and Personal Property.—So, if the statute provides that advancements of both real and personal property shall be brought into hotchpot in the distribution of the personal effects, but that in the division of the land, advancements of land only shall be regarded, it must be followed. *Havens v. Thompson*, 23 N. J. Eq. 321.

Real Property.—So also if it provides for the application of only real estate advancements in the division of the land. *Marshall v. Rensch*, 3 Del. Ch. 239 (under § 279 of *Delaware Revised Code*).

Virginia Statute.—In *Williams v. Stonestreet*, 3 Rand. (Va.) 559, it is held that where the statute provides that real estate received by way of advancement shall be brought into hotchpot with "estate descended," and personal estate

Where the Common Law has been Adopted, and a statute subsequently enacted provides for advancements in the case of the descent of real estate, it has been held that in equity advancements of real estate are to be charged upon the shares of the heirs, and of personal property on those of the next of kin.¹ It has been held in this country that under the common law the heir stood in the same position as under the *English* system and did not have to account for gifts of land,² but the rule is now generally otherwise by virtue of statute.³

2. Real Property—Voluntary Conveyance from Father to Child—Presumption.—A voluntary conveyance of land from father to child, expressed in the deed to be in consideration of love and affection, is presumed to be an advancement.⁴

Conveyance by Third Party—Consideration Moving from Father—Presumption.—The same is

with "distributable surplus," the two kinds of property must be kept separate, the real being applied in the distribution of the realty and the personal in the distribution of the personalty. See also *Fleming's Appeal*, 5 Phila. (Pa.) 351.

New York.—As to the effect of substituting the word "deceased" for "intestate" in the statute of *New York* providing for the distribution of the personal estate, and retaining the latter word in that regulating the descent of lands (N. Y. Rev. Stat. 1882, pp. 2213, 2304), see *Hawley v. James*, 5 Paige (N. Y.) 450.

1. Statute Providing for Advancements in Case of Descent of Realty.—*Terry v. Dayton*, 31 Barb. (N. Y.) 522, where the court, by Emott, J., gives the following historical account of the origin of the rule: "1. At common law there was no notice taken of advancements except in the case of estates in coparcenary, as to lands, and by the custom of *London*, of *York*, and of *Scotland*, as to goods. The case of lands held in coparcenary was the only instance of a title acquired by a number of persons jointly by inheritance, except under the custom of gavelkind in Kent. I do not find that the law of hotchpot or of advancements was ever applied to this species of estate. As to coparceners, the only application of the law of hotchpot was in the case of lands given in frank marriage, which was the only gift which was looked upon as an advancement in respect to lands. So that the only case in which, by the general law of *England*, lands descended to more than one person in equal shares—i. e., in the case of a man dying intestate and leaving daughters only—in which event they took as coparceners; in that case the law compelled any one of the daughters who had been advanced by a gift of land to bring her advancement into hotchpot if she would take any share of the lands descended. The law of hotchpot was not precisely like the present law of advancements, but what is material to the present question is, that in the case of lands descended the law did not regard any gifts as advancements, except gifts of lands; for estates in frank marriage were such exclusively. These advancements of land were accounted for in the division of an estate descended. 2. When the rights of children and relatives were firmly established against the claims of the administrator, and the statute of distribution was passed (Statutes of 22, 23, and 29 Charles II.), the same provision was introduced in substance which we now have, and which prevailed in certain parts of the realm by custom before. This extended to all advancements whether of lands or goods; and it included, of course, as well the heir as the other children. The law of primogeniture forbade any interference with the inheritance

where there was an heir entitled to the whole. But where the estate went into coparcenary, then these advancements of lands had to be accounted for, and when there was personal estate all advancements, whether they had been made by lands, or goods, or money, were taken into the account in the distribution of the personal estate. 3. When primogeniture was abolished in this country after the revolution, although all the heirs at law took in the same manner as coparceners did at common law, there was no rule or provision for deducting advancements from the share of an heir in real estate. As to personal estate the statute of distributions contained a provision similar to the English. But there was no such provision in the statute of descents. If, therefore, a child had been advanced to any amount, and the father died leaving only real estate, the advancement was not taken into account. 4. When the revised statutes were passed, the legislature introduced sections 23, 24, 25, 26, to remedy what they considered an injustice in this particular, and to provide for an accounting and adjustment of all advancements against the shares of the heirs at law in the real estate which descended to them."

2. Terry v. Dayton, 31 Barb. (N. Y.) 522; *Davis v. Duke*, 2 Hayw. (N. Car.) 224.

3. Dwight on Persons and Personal Property, p. 641; *Tiedeman on Real Property* (2d ed.), § 672; and the cases cited under this section, *supra*.

4. Conveyance from Father to Child—Natural Love and Affection—Connecticut.—*Hatch v. Straight*, 3 Conn. 31, 8 Am. Dec. 152.

Indiana.—*McCaw v. Burk*, 31 Ind. 56; *Ruch v. Biery*, 110 Ind. 444; *Scott v. Harris*, 127 Ind. 520.

Kentucky.—*Cleaver v. Kirk*, 3 Metc. (Ky.) 270.

Maryland.—*Parks v. Parks*, 19 Md. 323.

Missouri.—*Ray v. Loper*, 65 Mo. 470.

New Jersey.—*Gordon v. Barkeley*, 6 N. J. Eq. 94; *Jakolet v. Danielson* (N. J. Eq., 1888), 13 Atl. Rep. 850.

Rhode Island.—*Sayles v. Baker*, 5 R. I. 457.

Tennessee.—*Keys v. Keys*, 11 Heisk. (Tenn.) 425.

Texas.—*Lott v. Kaiser*, 61 Tex. 665.

Advancement in Part, Gift in Part.—A conveyance may be construed, according to the donor's intention, as an advancement in part and a gift in part. *Meeker v. Meeker*, 16 Conn. 383.

The Surplus Profits from a Farm, given by a father to his sons, from which they agreed to support their sister, must be charged to them as an advancement. *Ford v. Thompson*, 1 Metc. (Ky.) 580.

true of a conveyance to the child by an outside party, the consideration being paid by the father.¹

Presumption Rebuttable.—But this presumption is rebuttable.²

Lands in Another State.—Under some of the statutes the rules as to advancements apply only to the division of lands situate within the state.³

Recital of Nominal Consideration.—The presumption of an advancement is not affected by the recital of a nominal consideration, as one dollar or five dollars, in case of the conveyance of a valuable interest.⁴

Substantial Consideration—Presumption.—Where a substantial consideration is recited the transaction is presumed to be a purchase,⁵ but this presumption may be rebutted.⁶

Gifts of Mortgage Interests are not within the statutes of advancements, unless expressly included.⁷

Invalid Gifts of Lands—Receipt of Rents by Donee.—Where the donor made an invalid gift of lands, from which the donee received the rents, it was held that the land was not an advancement, nor were the rents that were received.⁸

Remainder—Reversion—Contingent Interest—Life Estate—Lease—Rents.—A remainder or a reversion may be the subject of an advancement;⁹ and so may a contingent interest,¹⁰ a life estate,¹¹ a lease,¹² or a settlement of rents.¹³

1. *Stanley v. Brannon*, 6 Blackf. (Ind.) 193.

An Advancement, and Not a Resulting Trust, is implied where a father purchases land with his own money and takes a deed in the name of his son. *Parish v. Rhodes*, Wright (Ohio) 339; *Tremper v. Barton*, 18 Ohio 418.

2. **Presumption as to Advancement Rebuttable.**—*Murrell v. Murrell*, 2 Strobb. Eq. (S. Car.) 148, 49 Am. Dec. 664; *Hattersley v. Bassett*, 50 N. J. Eq. 577. But see *contra*, *Lott v. Kaiser*, 61 Tex. 665.

But the presumption is not overcome by evidence that the grantor afterwards spoke of it as merely a gift. *Phillips v. Phillips* (Iowa, 1894), 58 N. W. Rep. 879.

3. *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Parks v. Gilbert*, 1 Baxt. (Tenn.) 97.

4. **How Conveyance of Valuable Interest Affected by Recital of Nominal Consideration.**—*Hatch v. Straight*, 3 Conn. 31, 8 Am. Dec. 152; *Harper v. Harper*, 92 N. Car. 300; *McClanahan v. McClanahan*, 36 W. Va. 42.

But see *Scott v. Scott*, 1 Mass. 527, where a recital of a consideration of love and affection and five shillings was held to mark the transaction as a sale and not an advancement.

5. **Substantial Consideration—Presumption of a Purchase.**—*Miller's Appeal*, 107 Pa. St. 221; *Newell v. Newell*, 13 Vt. 24.

6. **This Presumption of a Purchase may be Rebutted.**—*Meeker v. Meeker*, 16 Conn. 383; *Sadler v. Huffhines* (Ky., 1889), 12 S. W. Rep. 715; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Sanford v. Sanford*, 61 Barb. (N. Y.) 293; *Witbeck v. Waine*, 16 N. Y. 538.

Parol Evidence is Admissible for This Purpose.—*Bruce v. Slemp*, 82 Va. 352. Compare *Newell v. Newell*, 13 Vt. 24.

A statement in a deed of land from father to son, of a consideration of one thousand dollars, was held not sufficient to warrant the setting aside of a decree of the probate court treating the deed as an advancement, where there was evidence of an admission of the son to the effect that there was a gift of the tract of land from his father, and evidence that through a long series of years the land was understood to be a gift, and statements of members of the family that

such a gift had been made. *Pate v. Johnson*, 15 Ark. 275.

Services of the Child as a Consideration.—The services of a child, for which the parent was under a moral obligation to pay, constitute a consideration sufficient to rebut the presumption of advancement. *Murrell v. Murrell*, 2 Strobb. Eq. (S. Car.) 148, 49 Am. Dec. 664.

And parol evidence is admissible to show that a consideration in a deed to a daughter, stated nominally to be one dollar, was really a service sufficient to constitute a substantial consideration, and thus to rebut the presumption of an advancement. *Hattersley v. Bissett*, 50 N. J. Eq. 577.

But where the child was compensated for the services at the time they were rendered, they do not rebut the presumption of an advancement. *Parks v. Parks*, 19 Md. 323.

7. *Mowry v. Smith*, 5 R. I. 255.

8. *Montjoy v. Maginnis*, 2 Duv. (Ky.) 186.

9. **Remainder or Reversion may be Subject of Advancement.**—*Murless v. Franklin*, 1 Swanst. 13; *Finch v. Finch*, 15 Ves. Jr. 43; *Williamson v. Jeffreys*, 18 Jur. 1071; *Eales v. Drake*, 1 Ch. Div. 217.

This is true of an estate subject to a life use in the donor. *Comings v. Wellman*, 14 N. H. 287; *Ruch v. Biery*, 110 Ind. 444.

Even though the donor retains the right to defeat the estate on a certain contingency. *Hughey v. Eichelberger*, 11 S. Car. 36.

10. **Contingent Interest may be Subject of Advancement.**—*Edwards v. Freeman*, 2 P. Wms. 449; *Knight v. Oliver*, 12 Gratt. (Va.) 33.

11. **Life Estate may be Subject of Advancement.**—*Clark v. Willson*, 27 Md. 693; *Wagner's Appeal*, 38 Pa. St. 122; *Wainwright's Estate*, 37 Leg. Int. (Pa.) 104.

An estate *per auter vie* given by a father to a child is subject to be brought into hotchpot as an advancement, where the father has died intestate. *Dixon v. Coward*, 4 Jones Eq. (N. Car.) 354.

12. **Lease may be Subject of Advancement.**—*Jennings v. Selleck*, 1 Vern. 467.

13. **Settlement of Rents may be Subject of Advancement.**—*Edwards v. Freeman*, 2 P. Wms. 439.

3. Personal Property — Not Every Casual Gift an Advancement.—An advancement being a gift by anticipation of a part of that which would ultimately come to the child, it follows that not every casual gift is to be classed under that head.¹

Presents of Inconsiderable Value.—Trifling or small presents are not *prima facie* advancements.²

Presents of Considerable Value.—In some instances it is held that presents of considerable value are presumed to be advancements and not absolute gifts;³ in others it is held that there is no such presumption, but that there must be corroborative evidence in order to treat them as advancements.⁴

Question Dependent Largely upon Parent's Means and the Surrounding Circumstances.—Whether any particular gift is an advancement or not, will depend largely on the parent's means⁵ and the circumstances accompanying it.⁶

Will Specifying What to be Considered as Advancements.—Where a will defines what gifts of personal property are to be considered advancements in the distribution of the estate, only payments coming under such definition can be so treated.⁷

Money Expended for Child's Education, Maintenance, and Travels.—It may be laid down as a general principle that money expended by a father on his son's education will not, in the absence of clear evidence of such intention, be construed to be an advancement,⁸ and likewise of a sum required for his maintenance,⁹

1. *Taylor v. Taylor*, L. R. 20 Eq. 155, 44 L. J. Ch. 718.

2. **Small Presents Not Prima Facie Advancements.**—2 Williams Executors (9th ed.) 1355; *Mitchell v. Mitchell*, 8 Ala. 414; *Cooner v. May*, 3 Strobb. Eq. (S. Car.) 185; Note to *Pusey v. Desbouvrie*, 3 P. Wms. 317; *Taylor v. Taylor*, L. R. 20 Eq. 155, 44 L. J. Ch. 718.

In *Sanford v. Sanford*, 61 Barb. (N. Y.) 293, 5 Lans. (N. Y.) 486, it was held that money to pay for small presents should be regarded as having been given "without a view to a portion or settlement in life."

In *Meadows v. Meadows*, 11 Ired. (N. Car.) 148, it was decided that money to supply a child with clothing and ordinary amusements and pleasures suitable to his rank in life is not an advancement.

3. **Presents of Large Value.**—*Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91; 6 Am. Dec. 355. See also *Watkins v. Young*, 31 Gratt. (Va.) 84.

4. In *Johnson v. Belden*, 20 Conn. 322, it was held that neither the mere relationship between parent and child, nor the fact that the parent had delivered property to his child, nor equality in the estate ("as in many families a judicious discrimination is equitable") was enough, without evidence of the intention, to establish an advancement. See also *Partridge v. Havens*, 10 Paige (N. Y.) 618.

5. *Elliot v. Collier*, 1 Ves. 16, 3 Atk. 528. In this case the gift of a gold watch and forty or fifty pounds, the donor being "a man of means," was held not to be an advancement. Other cases supporting the text are *Fennell v. Henry*, 70 Ala. 484, 45 Am. Rep. 88; *King's Estate*, 6 Whart. (Pa.) 373.

Insolvency of Donor.—The insolvency of the donor, however, has been held not enough to prevent the gift from being considered as an advancement, and it may be brought into hotchpot. In *re Young's Estate*, 3 Md. Ch. 461.

Transfer in Fraud of Creditors.—Unless it can be shown that the transfer was made to defraud creditors. *Creed v. Lancaster Bank*, 1 Ohio St. 1.

6. **How Controlled by Circumstances.**—*Dilley v. Love*, 61 Md. 603; *M'Caw v. Blewit*, 2 McCord Eq. (S. Car.) 103.

Mere Inadequacy in the Purchase Price, where the person advanced is a nominal vendee, is not enough to raise a presumption of an advancement. *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 209.

7. *McNeill v. Hammond*, 87 Ga. 618; *Loring v. Blake*, 106 Mass. 592; *Sayre v. Sayre*, 32 N. J. Eq. 61; *Noel v. Noel*, 86 Va. 109.

8. **Education of Child.**—*Edwards v. Freeman*, 2 P. Wms. 435, 2 Eng. Rul. Cas. 261; *Taylor v. Taylor*, L. R. 20 Eq. 155, 44 L. J. Ch. 718, which held that payment to a special pleader for services in the case of a child intended for the bar, being in the nature of payment for a preliminary education, need not be accounted for, and was to be distinguished from entry money at an Inn of Court.

This is not affected by the fact that the parent made entries in his account books at the time for the amount so paid, *Miller's Appeal*, 40 Pa. St. 57, 80 Am. Dec. 555; or took security, *Richardson v. Sinkler*, 2 Desaus. (S. Car.) 127; *Riddle's Estate*, 19 Pa. St. 431; *Bradsher v. Cannady*, 76 N. Car. 445.

General and Professional Education.—In *Cooner v. May*, 3 Strobb. Eq. (S. Car.) 185, it was held that there should be no distinction between moneys paid for a child's general and professional education, and that neither is properly an advancement. See also *White v. Moore*, 23 S. Car. 456.

Elder and Younger Children.—But it has been held that when elder children have been educated out of the parent's estate, and distribution is made before the younger ones have had this advantage, these payments should be charged against the elder children as advancements. *State v. Stephenson*, 12 Mo. 178.

9. **Money Expended for Child's Maintenance.**—*Taylor v. Taylor*, L. R. 20 Eq. 155, 44 L. J. Ch. 718, which held that sums of money given to a child to aid in his maintenance did not tend to establish him in life and were not to be treated as advancements; neither were gifts to a son for

his apprenticeships, or his travels.¹ Such expenses are incurred in the discharge of ordinary parental duty.

Establishing Child in Business.—If, however, the parent goes further, and, instead of merely supplying the needs of the hour, makes a substantial provision for his son's establishment in life, as by setting him up in business or in his profession, the presumption of an advancement arises.²

Payments for Child's Pleasure.—Thus payments made for the pleasure of a child are not advancements.³

Provisions for Child's Permanent Good—Intention.—If the provision, however, is for his permanent good, or if the intention to advance affirmatively appears, it is immaterial what form it takes.

Accordingly an Annuity given for the purpose of settling a son in life will be construed as an advancement.⁴

Life Insurance Policy.—The provision may consist of a life-insurance policy.⁵

Stock Purchased in Child's Name—Father Receiving Dividends—Payment of Debt.—It may also consist of stock purchased in the son's name, even though the father received the dividends;⁶ or of the payment of a debt.⁷

an outfit and passage money to India for himself and his wife, nor sums paid for debts subsequently contracted in India, these being by way of temporary assistance only.

By a deed of separation, a husband covenanted to pay an annuity of two hundred pounds to each of his daughters during her life. It was held that so much of the annuity as was paid during his life was not an advancement, but that the balance at the time of his death was. *Hatfield v. Minet*, 8 Ch. Div. 136, 47 L. J. Ch. 612.

1. Apprenticeships and Travels.—*Cooner v. May*, 3 Strobb. Eq. (S. Car.) 185; *Bowles v. Winchester*, 13 Bush (Ky.) 1; *Bruce v. Griscom*, 9 Hun (N. Y.) 280, 70 N. Y. 612; *Sanford v. Sanford*, 61 Barb. (N. Y.) 293. But the rule is otherwise when the amount paid is considerable. 2 Wms. Exrs. (9th ed.) 1355.

2. Setting Child up in Business or Profession.—*Dwight on Persons and Personal Property*, p. 640; *Norton v. Norton*, in note to *Pusey v. Desbouverie*, 3 P. Wms. 317; *Edwards v. Freeman*, 2 P. Wms. 435; *Boyd v. Boyd*, L. R. 4 Eq. 305, 36 L. J. Ch. 877; *Shiver v. Brock*, 2 Jones Eq. (N. Car.) 137; *Fellows v. Little*, 46 N. H. 27; *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Chase v. Ewing*, 51 Barb. (N. Y.) 597; *Meadows v. Meadows*, 11 Ired. (N. Car.) 148.

In *Taylor v. Taylor*, L. R. 20 Eq. 155, 44 L. J. Ch. 718, it was held that the following payments were advancements: First, the payment of the admission fee to one of the Inns of Court in the case of a child intended for the bar; second, the price of a commission and outfit of a child entering the army; third, the price of plant and machinery, and other payments for the purpose of starting a child in business. The court, by Jessel, M. R., said: "I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him, not a mere casual payment. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways; you may pay for a commission; you may buy for him the good-will of a business and give him stock in trade; all these things I understand to be portions or provisions."

In *Boyd v. Boyd*, L. R. 4 Eq. 305, 36 L. J. Ch. 877, it was held that a premium paid upon the occasion of a son being articulated to an attorney was an advancement, although the profession was afterwards relinquished; and so was the purchase price of a commission in the army, and sums paid for debts of honor thereafter contracted, non-payment of which would have compelled the son to leave the army.

To the same effect as to the last point is *Blockley v. Blockley*, 29 Ch. Div. 250.

The Purchase of a Benefice may be an advancement. *Hender v. Rose*, 3 P. Wms. 317, note.

Army Commission.—As may an army commission. *Kircudbright v. Kircudbright*, 8 Ves. Jr. 51.

3. Ison v. Ison, 5 Rich. Eq. (S. Car.) 15; *M'Caw v. Blewit*, 2 McCord Eq. (S. Car.) 90; *Malone v. Malone* (Ala., 1895), 17 So. Rep. 676.

4. Annuity to Settle Son in Life.—*Edwards v. Freeman*, 2 P. Wms. 435.

5. Life Insurance Policy may Constitute Advancement.—*In re Richardson*, 47 L. T. N. S. 514; *Rickenbacker v. Zimmerman*, 10 S. Car. 110, 30 Am. Rep. 37; *Cazassa v. Cazassa*, 92 Tenn. 573.

6. Stock Bought in Son's Name—Receipt of Dividends by Father—Advancement.—*Sidmouth v. Sidmouth*, 2 Beav. 447.

Charging Child with Stock from Which She Derived No Benefit.—But merely charging a daughter with stock over which she had no control and from which she derived no benefit, the stock being afterwards sold and the proceeds used by the father, was held not to be an advancement. *Herkimer v. McGregor*, 126 Ind. 247.

Purchase in Joint Names of Parent and Child.—A purchase by a mother in the joint names of herself and child was held to be an advancement. *Sayre v. Hughes*, 37 L. J. Ch. 401, L. R. 5 Eq. 376, 16 W. R. 662.

Subscription to Stock in Child's Name.—It has been held that a mere subscription to stock in the daughter's name was not enough to constitute an advancement. *Butler v. Merchants' Ins. Co.*, 14 Ala. 777. Compare *Batstone v. Salter*, L. R. 19 Eq. 250.

7. Payment of Debts.—*Taylor v. Taylor*, L. R. 20 Eq. 155, 44 L. J. Ch. 718; *Johnson v. Hoyle*, 3 Head (Tenn.) 56; *Steele v. Frierson*, 85 Tenn. 430.

Father Taking Security in Child's Name for Money Loaned.—Where a father lends money, taking security in the name of the child, there is *prima facie* an advancement.¹

Omission of Father to Collect Interest on Son's Note in His Favor.—The omission to collect interest on the child's note in favor of the father may constitute an advancement.²

Failure of Father to Collect of Son Rent of Land Leased.—And so may the failure of the father to collect the rent of property leased to the child.³

V. BETWEEN WHOM ADVANCEMENTS MAY BE MADE—1. General Principles—Property Purchased in Name of One for Whom Vendee is under Obligation to Provide—Presumption.—Where one purchases property, taking title in the name of another for whom he is under a legal, natural, or moral obligation to provide, the usual presumption of a resulting trust does not arise, but, on the contrary, a presumption of an advancement or gift arises.⁴

The Payment of Gaming Debts may constitute an advancement. *Carter v. Cutting*, 5 Munf. (Va.) 223.

Promise of Reimbursement.—But where a mother paid a son's debt, and he acknowledged his indebtedness to her and promised to reimburse her, there was held not to be an advancement. *Wolsner v. Wells* (Tex. Civ. App., 1894), 28 S. W. Rep. 247, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 219.

1. *Denman v. McMahan*, 37 Ind 241; *Cerney v. Pawlot*, 66 Wis. 262; *Shotwell v. Struble*, 21 N. J. Eq. 31.

2. *Le Blanc v. Bertant*, 16 La. Ann. 294.

3. Thus, in *Ridley v. McNairy*, 2 Humph. (Tenn.) 174, where the donee put in a claim for improvements made, it was held that the value of what he enjoyed was a necessary element of the adjustment.

In *Shawhan v. Shawhan*, 10 Bush (Ky.) 600, where the decedent kept an account, charging all his children except one with rents of the lands occupied by them as advancements, it was held that this one should also be charged with rents.

In *Wakefield v. Gilleland*, 13 Ky. L. Rep. 845, where the donor made an invalid gift of land, from which the donee received the rents, it was held that though the land was not an advancement, the rents received were. See also *Robinson v. Robinson*, 4 Humph. (Tenn.) 392.

4. General Rule when Title to Property Purchased is Taken in Name of Another.—Fetter on Equity, p. 197.

England.—*Crabb v. Crabb*, 1 Myl. & K. 511; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Shales v. Shales*, 2 Freem. 252; *Dyer v. Dyer*, 2 Cox 92; *Beckford v. Beckford*, Lofft. 490; *Taylor v. Taylor*, 1 Atk. 386; *Mumma v. Mumma*, 2 Vern. 19; *Grey v. Grey*, 2 Swanst. 594; *Jennings v. Selleck*, 1 Vern. 467; *Finch v. Finch*, 15 Ves. Jr. 43; *Christy v. Courtenay*, 13 Beav. 96; *Skeats v. Skeats*, 2 Y. & Coll. C. C. 9, 12 L. J. Ch., N. S. 22, 6 Jur. 942; *Scroope v. Scroope*, 1 Ch. Cas. 27; *Collinson v. Collinson*, 3 De G., M. & G. 409; *Jeans v. Cooke*, 24 Beav. 513.

Alabama.—*Mitchell v. Mitchell*, 8 Ala. 414; *Coleman v. Smith*, 55 Ala. 369.

The resulting trust arising in equity in favor of one who furnishes money for the purchase of land while the conveyance is taken in the name of another is overthrown where the purchase is made by a parent in the name of his child. This doctrine is designed to carry into effect the pre-

sumptive intention of the parent, but will not be applied in opposition to the obvious purpose and design of the transaction. *Halton v. Landman*, 28 Ala. 127, *cited with approval* in *Kelly v. Karsner*, 72 Ala. 106.

In *Clements v. Hood*, 57 Ala. 463, the court by Stone, J., said: "It is settled by an unbroken current of authorities that money or property given by a parent to a child will be presumed to be intended as an advancement, unless such presumption is repelled by the nature of the gift, or by other evidence showing that it was an absolute gift. But such presumption is not conclusive. It may be overturned by proof."

The same judge in *Kelly v. Karsner*, 72 Ala. 111, said: "The doctrine of resulting trust is one of sheer implication, and that implication may be easily overturned. If a husband or father purchase lands with his own means, and have title made to his wife or child, the presumption of a resulting trust is overturned, and the contrary presumption arises. (*Perry on Trusts*, §§ 143-4.)"

In *Butler v. Merchants' Ins. Co.*, 14 Ala. 777, the court by Chilton, J., said: "This presumption of a trust, however, may be and is rebutted in cases where it may be fairly inferred the purchase was made in the name of another from considerations of natural love and affection. Thus it is laid down generally in the books that if a parent purchase in the name of his son it will be deemed *prima facie* an advancement, so as to rebut the presumption of a trust resulting in favor of the parent. * * * This evidence may consist in the contemporaneous acts and declarations of the parent. * * * 'The moral obligation,' says Judge Story, 'of a parent to provide for his children, is the foundation of this exception, or rather this rebutter of the presumption' that the purchase in the name of the child was intended for the father's benefit. The presumption of an advancement should not therefore be frittered away by nice refinements.' 2 Story Eq. Juris., § 1203; *Finch v. Finch*, 15 Ves. Jr. 50."

Arkansas.—So in *James v. James*, 41 Ark. 301, the transaction was regarded as an advancement, and not a resulting trust, where the purchase was made by a father in the name of his child.

In *White v. White*, 52 Ark. 188, it was held that the presumption was not overcome by the fact that the father held possession of the land

When Presumption of Advancement Strongest.—The presumption of advancement is

for seven years, made improvements, paid the taxes, and claimed that it was his, with the knowledge and acquiescence of his son, the son being a minor, and the father at the time of the purchase saying that it was made for the son.

Connecticut.—This presumption is rebuttable. *Clark v. Warner*, 6 Conn. 355.

Georgia.—*Brown v. Burke*, 22 Ga. 574.

Illinois.—*Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Wormley v. Wormley*, 98 Ill. 544.

Where land is purchased by a parent in the name of his children, if not explained by circumstances it will be presumed to be intended as an advancement or gift. *Taylor v. Taylor*, 9 Ill. 303.

Purchase by a parent in the name of a child is generally considered an advancement, but it is competent to rebut the presumption by proof from circumstances of a different intentment. *Bay v. Cook*, 31 Ill. 336.

In the last-named case it was also held that an advancement differs only in form from a voluntary settlement; also that fraud would repel the presumption.

Indiana.—*Stanley v. Brannon*, 6 Blackf. (Ind.) 193; *Baker v. Leathers*, 3 Ind. 558; *Hodgson v. Macy*, 8 Ind. 121; *Dillman v. Cox*, 23 Ind. 440; *Woolery v. Woolery*, 29 Ind. 249, 95 Am. Dec. 630.

Iowa.—A resulting trust is created in favor of one who buys real estate, taking the legal title in the name of another, unless such other be one for whom the former is under some natural or moral obligation to provide, when the transaction will be treated *prima facie* as an advancement. *Cotton v. Wood*, 25 Iowa 43.

Maryland.—In *Hayden v. Burch*, 9 Gill (Md.) 79, where a father purchased land with his own money for the son, and the son entered into possession and disposed of it as his own property, it was held that the money advanced for the purchase of land must be treated as land, and the transaction regarded as an advancement of real estate.

Lands given by a parent to his son by bonds for conveyance and lease were presumed to be an advancement, and the services of the son, who worked the land upon shares, were not considered sufficient evidence of a contrary intention to rebut the presumption. *Graves v. Spedden*, 46 Md. 527.

In *Parks v. Parks*, 19 Md. 323, it was held that where the property advanced consists of real estate the presumption in favor of an advancement is strengthened, as it is then more in accordance with a permanent settlement.

Mississippi.—*Gee v. Gee*, 32 Miss. 190; *Wilson v. Beauchamp*, 50 Miss. 24; *Lisloff v. Hart*, 25 Miss. 245, 57 Am. Dec. 203, which held that a conveyance of land to a son by voluntary settlement of the father vests a title in the son not to be divested by a subsequent destruction of the deed. It must be considered as an advance, and is not revocable.

Missouri.—*Darrier v. Darrier*, 58 Mo. 226.

In *Allen v. DeGroodt*, 98 Mo. 159, it was held that where a father, being the holder of a life estate in a piece of real property with remainder to his son, bought the land at a fore-

closure sale, the purchase was presumed to be an advancement to the son.

New Hampshire.—*Page v. Page*, 8 N. H. 187; *Hill v. Pine River Bank*, 45 N. H. 300.

New Jersey.—*Gordon v. Barkeley*, 6 N. J. Eq. 94.

New York.—*Partridge v. Havens*, 10 Paige (N. Y.) 618; *Astreen v. Flanagan*, 3 Edw. Ch. (N. Y.) 279, which held that the same presumption was applicable in the case of an adopted child.

And the question is one of intention entirely. *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424.

North Carolina.—*Melvin v. Bullard*, 82 N. Car. 33.

In *Hollister v. Attmore*, 5 Jones Eq. (N. Car.) 373, it was held that where a brother and sister joined in a deed to the brother's children, of property intended for them by another sister, who had failed from accident to leave a will, the brother and sister being sole distributees of the deceased sister, upon a distribution of the brother's estate the children were not required to bring in the property as an advancement.

Ohio.—*Tremper v. Barton*, 18 Ohio 418.

It is an abstract presumption merely, and will be overcome by proof of a manifest intention to the contrary. *Creed v. Lancaster Bank*, 1 Ohio St. 1.

Oregon.—Before a court of equity will be warranted in making a decree contrary to this presumption the evidence must be clear, definite, and free from doubt. *Parker v. Newitt*, 18 Oregon 274.

But when made for the purpose of hindering or delaying creditors, it will be regarded as a resulting trust. *Taylor v. Miles*, 19 Oregon 550.

Pennsylvania.—*Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158; *Dutch's Appeal*, 57 Pa. St. 461.

Acts of ownership on the part of the father may be shown in evidence to rebut this presumption; also his declarations to explain those acts. *Sampson v. Sampson*, 4 S. & R. (Pa.) 329.

In *Weaver's Appeal*, 63 Pa. St. 309, it was held that in determining whether a gift presumably is an advancement or not, the size of the estate and the number of children are to be considered.

South Carolina.—*Douglass v. Brice*, 4 Rich. Eq. (S. Car.) 322.

Tennessee.—*Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Gaugh v. Henderson*, 2 Head (Tenn.) 628; *Johnson v. Patterson*, 13 Lea (Tenn.) 626.

Texas.—*Lott v. Kaiser*, 61 Tex. 665.

In *Shepherd v. White*, 10 Tex. 72, 11 Tex. 346, it was held that where the donee died leaving a will in which he spoke of the gift as a trust the presumption of an advancement was rebutted.

Virginia.—*Watkins v. Young*, 31 Gratt. (Va.) 84.

West Virginia.—In order to rebut the presumption the heirs will not be permitted to show that such a conveyance was made for a fraudulent purpose. *McClintock v. Loisseau*, 31 W. Va. 865.

strongest when the donee is just starting out in life,¹ and living apart from the parent after marriage.²

Indebtedness of Parent to Child.—An existing indebtedness of the parent to the child raises a presumption of an intention to pay the debt rather than to make an advancement.³

2. Parent and Child—General Rule—Presumption in Favor of Advancement.—The doctrine of advancements is most frequently applied in the case of transactions between parent and child. A presumption of advancement arises whenever a father makes to a child a transfer of property,⁴ either real or personal,⁵ or wherever he furnishes the purchase price of property, title to which is taken in the name of the child.⁶

This Presumption may be Rebutted by evidence of a different intention.⁷

Such a deed may be impeached, as being within the statute against fraudulent conveyances, if made to defraud, hinder, or delay creditors; and such fraud may legally be inferred from the facts and circumstances of the case. *Lockhard v. Beckley*, 10 W. Va. 87.

If No Presumption, a Question of Fact.—When there is no such presumption, whether or not a payment is an advancement is a question of evidence. *Bennet v. Bennet*, 10 Ch. Div. 474, 27 W. R. 573, 40 L. T. 378; *Holt v. Frederick*, 2 P. Wms. 357.

May be Shown to be a Gift.—It may be shown in evidence that a transfer of property *prima facie* an advancement is really a gift. *Duling v. Johnson*, 32 Ind. 155; *Stokesberry v. Reynolds*, 57 Ind. 425; *Dille v. Webb*, 61 Ind. 85.

Or it may be Shown to be a Sale.—*Stewart v. State*, 2 Har. & G. (Md.) 114.

But Slight Evidence is Not Enough to rebut this presumption. *Parker v. Parker* (Ky., 1889), 11 S. W. Rep. 97.

Burden of Proof.—The burden of proof lies on the party alleging a gift or trust, to rebut this presumption of advancement. *Christy v. Courtenay*, 13 Beav. 96; *Ruch v. Biery*, 110 Ind. 444; *Higham v. Vanosdol*, 125 Ind. 74; *Scott v. Harris*, 127 Ind. 520; *Burton v. Baldwin*, 61 Iowa 283; *Dutch's Appeal*, 57 Pa. St. 461.

Statutes.—It is declared in *New York* that every estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, shall be deemed an advancement. *Beebe v. Estabrook*, 79 N. Y. 246; N. Y. Rev. Stat. 1882, §§ 2213, 2305. In *Ohio* the provision applies when children of their descendants have thus been advanced. *Ohio Stat.* 1884, §§ 4169 *et seq.* The *New Jersey* statute uses the word "issue." N. J. Stat. (Revision of 1877) 297. The Code of *North Carolina* says "children." N. Car. Code 1883, vol. 1, § 1483. In *Vermont* the provision applies to children or other lineal descendants. *Vt. Rev. Laws* 1880, §§ 2246 *et seq.*

1. When Donee is Starting Out in Life.—*Hollister v. Attmore*, 5 Jones Eq. (N. Car.) 373.

2. Donee Living Apart from Parent after Marriage.—*Holliday v. Wingfield*, 59 Ga. 206.

3. Haglar v. McCombs, 66 N. Car. 345. And it was here held that the same rule applies where money is given to a son-in-law.

The rule holds even though the amount of property conveyed exceeds the amount of the debt, if there is no evidence of a different intention. *Kelly v. Kelly*, 6 Rand. (Va.) 176, 18 Am. Dec. 710.

4. Transfer of Property from Father to Child—Presumption in Favor of Advancement—England.—*Scroope v. Scroope*, 1 Ch. Cas. 27; *Christy v. Courtenay*, 13 Beav. 96; *Elliot v. Elliot*, 2 Ch. 231; *Jennings v. Selleck*, 1 Vern. 467.

Indiana.—*Wolfe v. Kable*, 107 Ind. 565; *Higham v. Vanosdol*, 125 Ind. 74.

Iowa.—*Cecil v. Beaver*, 28 Iowa 241, 4 Am. Rep. 174; *Burton v. Baldwin*, 61 Iowa 283; *McMahill v. McMahon*, 69 Iowa 115.

Louisiana.—*Laycock v. Bird*, 13 La. Ann. 173.

Maryland.—*Mutual F. Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673.

Pennsylvania.—*Dennison v. Goehring*, 7 Pa. St. 179, 47 Am. Dec. 505.

Texas.—*Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Ellis v. Stewart* (Tex. Civ. App., 1893), 24 S. W. Rep. 585.

See also the cases cited in the subdivision immediately preceding.

Unless the Child is Already Fully Advanced.—*Shales v. Shales*, 2 Freem. 252.

And even though the Child is an Adopted One.—*Astreen v. Flanagan*, 3 Edw. Ch. (N. Y.) 279.

Or Illegitimate.—*Beckford v. Beckford*, Lofft. 490; *Kilpin v. Kilpin*, 1 Myl. & K. 520; *Soar v. Foster*, 4 Kay & J. 152. See also *Ramsey v. Abrams*, 58 Iowa 512.

Or an Idiot.—*Eastham v. Powell*, 51 Ark. 530; *Cartwright v. Wise*, 14 Ill. 417.

Transfer in Consideration of Release of All Interest in Parent's Estate.—A transfer of property in consideration of a release of all interest in the parent's estate will be considered an advancement. *Kinyon v. Kinyon*, 6 Misc. Rep. (N. Y. Supreme Ct.) 584.

5. Dillman v. Cox, 23 Ind. 440; *Graves v. Spedden*, 46 Md. 527; *Blackerby v. Holton*, 5 Dana (Ky.) 520.

6. Hodgson v. Macy, 8 Ind. 121; *Higham v. Vanosdol*, 125 Ind. 74.

7. Evidence of Contrary Intention.—*Christy v. Courtenay*, 13 Beav. 96.

As by evidence showing that the transfer was probably made in satisfaction of a moral obligation. *Beakhusht v. Crumby* (R. I., 1894), 30 Atl. Rep. 453, 31 Atl. Rep. 753.

Slight circumstances are not enough to rebut the presumption of an advancement. *Finch v. Finch*, 15 Ves. Jr. 43.

The question is one of intention, however, and proof that it was not so intended is always admissible. *Bay v. Cook*, 31 Ill. 336; *Watkins v. Young*, 31 Gratt. (Va.) 84.

What Not Sufficient to Overcome the Presumption.—The mere fact, however, that the parent remains in possession of property after he has conveyed it to the son is not sufficient for that purpose, nor that he receives the rent or leases or devises it.¹

Purchase by Parent in Joint Names of Son and Stranger.—An advancement is presumed in the case of a purchase by a parent in the joint names of a son and a stranger.²

Title in Joint Names of Parent and Child.—The same result follows where title is taken in the joint names of the son and father.³

And parol evidence is admissible to show this, though declarations, to be admitted, must be contemporaneous. *Williams v. Williams*, 32 Beav. 370; *Woolery v. Woolery*, 29 Ind. 249, 95 Am. Dec. 630.

Illustrations.—Such as the exacting by the father of an agreement on the part of the son to pay the principal and interest of a sum of money transferred from the former to the latter. *Kintz v. Friday*, 4 Dem. (N. Y.) 540.

Where a son admitted that there was no advancement of property standing in his name, it has been decided that it was held in trust by him for the father. *Scawin v. Scawin*, 1 Y. & Coll. C. C. 65.

Where the father pays a large part of the purchase price, there is an advancement *pro tanto*. *Sweet v. Northrup*, 12 N. Y. Wkly. Dig. 377.

Or where the father sells land which the son has occupied for some time, and the son receives the money therefor, there is an advancement. *Gordon v. Barkelew*, 6 N. J. Eq. 94.

Where land was purchased by the father in the name of his son, it was held that improvements made thereon by the father while in his (the father's) possession are to be included as advancements. *Kemp v. Cossart*, 47 Ark. 62.

Under the *English* law a purchase of real property in the name of a younger son is an advancement to him where the eldest son waives a trust and no creditors interpose. *Grey v. Grey*, 2 Swanst. 600.

And it has been held that it is not always necessary for the heir to so waive. *Stileman v. Ashdown*, 2 Atk. 480.

Where a child purchased property with his parent's money, which he held with his parent's consent, there was held to be an advancement. *Peer v. Peer*, 11 N. J. Eq. 432; *Gregory v. Winston*, 23 Gratt. (Va.) 102; *Mullen v. Mullen*, 2 Am. L. Rec. 611.

Where A made a title bond of eighty acres of land to B, which bond B assigned to C, and subsequently, at C's request, A made the deed to C and his son, whereupon the father and son entered into possession and the next year made a settlement by which the former was to have ten acres and the latter seventy acres, it was held that these circumstances characterized the transaction as one of debt, not advancement. *Hodgson v. Macy*, 8 Ind. 121.

Restrictions and Reservations.—Neither a restriction upon alienation, nor the reservation of a life estate, nor a reservation of the right to revoke the gift conclusively indicates an intention that the gift shall be otherwise than an advancement. *Graves v. Spedden*, 46 Md. 527; *Hughey v. Eichelberger*, 11 S. Car. 36; *Hook v. Hook*, 13 B. Mon. (Ky.) 526; *Barber v. Taylor*, 9 Dana (Ky.) 85.

Payment of Taxes.—That the father pays all the taxes, is competent evidence on the question of advancement. *Tuggle v. Tuggle*, 57 Ga. 520.

Child Living Apart.—As is the fact that the son lived apart from the father. *Holliday v. Wingfield*, 59 Ga. 206; *Smith v. Smith*, 21 Ala. 761.

1. Parent Remaining in Possession—Receiving the Rents.—*Grey v. Grey*, 2 Swanst. 600; *Dyer v. Dyer*, 2 Cox 92; *Murless v. Franklin*, 1 Swanst. 13; *Williams v. Williams*, 32 Beav. 370; *Allen v. DeGroodt*, 98 Mo. 159, 14 Am. St. Rep. 626; *McClintock v. Loiseau*, 31 W. Va. 865.

So held in cases of conveyance to a son eighteen years of age. *Taylor v. Taylor*, 1 Atk. 386.

Where a deed was executed to a father and son as joint grantees and found among the father's papers after his death, he having during his lifetime made leases, collected the rents, and given powers of attorney for that purpose, it was nevertheless held an advancement. *Aleyne v. Aleyne*, 8 Ir. Eq. Rep. 493, 2 J. & L. 544. But it has been held that the general proposition is not true in the case of a formal and unmistakable taking of possession, *Stock v. McAvoy*, L. R. 15 Eq. 55, 42 L. J. Ch. 230; and the fact that the father retains possession is always evidence against the advancement, *Woodman v. Morrell*, 2 Freem. 33.

2. Purchase by Father in Joint Names of Son and Stranger—Presumption.—*Crabb v. Crabb*, 1 Myl. & K. 511.

Where one holding a copyhold for the joint lives of himself and brother released this and took a new title for the joint lives of himself, his son, and his brother, it was held that the son, where he survived both father and uncle, took the land as an advancement. *Skeats v. Skeats*, 2 Y. & Coll. C. C. 9, 12 L. J. Ch., N. S. 22, 6 Jur. 942.

A Purchase in the Name of a Son and a Trustee. by a father, is an advancement to the son. *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

3. Presumption of Advancement when Title is Taken in Joint Names of Father and Son.—*Windham v. Windham*, 1 Ch. Cas. 27; *Grey v. Grey*, 2 Swanst. 594; *Strode v. Strode*, 1 Ch. Cas. 27; *Back v. Andrew*, 2 Vern. 120.

Mother Purchasing in Her Own Name and That of Child.—The same rule applies where the mother purchases in her own name and that of her child. *Sayre v. Hughes*, L. R. 5 Eq. 376.

So a Deposit in the joint names of the donor and the donee may be an advancement. *Talbot v. Cody*, 10 Ir. Eq. Rep. 138.

It was held that under the *Rhode Island* Pub. Stat., c. 187, § 20, where the deceased father had deposited money in the savings bank in the children's names and his own name as trustee, tell-

Transfer to Daughter and Child or to Daughter and Husband.—A transfer to a daughter and her child, or to a daughter and her husband, jointly, is an advancement to the daughter.¹

Dealings between Mother and Child.—The same presumption is, in this country, generally considered to arise in the case of dealings between mother and child as in the case of those between father and child,² but the *English* rule was otherwise.³

3. Husband and Wife.—Where a wife receives property from her husband, or from another, the husband paying the consideration, it is often said that a presumption of advancement arises,⁴ although this is doubted by excellent authority.⁵

It is immaterial whether title be taken in the name of the wife alone, the wife and her husband jointly,⁶ the two and a child jointly,⁷ or all three jointly with a stranger.⁸

4. Parent-in-law and Son-in-law—Personalty.—A gift of personal property to a son-in-law is *prima facie* an advancement to the daughter.⁹

ing the children of his action, but never delivering any of the principal or interest, this was no advancement. *Atkinson's Petition*, 16 R. I. 414.

1. *Edwards v. Freeman*, 2 P. Wms. 435; *Weyland v. Weyland*, 2 Atk. 632; *Kyle v. Conrad*, 25 W. Va. 774, which holds that in case of a transfer to a daughter for life, remainder to her child, the value of the fee simple should be charged as an advancement to the mother.

It has been held that where a mother-in-law had stock put in the joint names of herself, her daughter, and her son-in-law, and the dividends were received by the son-in-law and paid to the mother during her life, there was an advancement. *Batstone v. Salter*, L. R. 19 Eq. 250, 44 L. J. Ch. 209, 23 W. R. 289, 31 L. T. N. S. 600, affirmed in L. R. 10 Ch. 431, 44 L. J. Ch. 760.

2. **Mother and Child.**—*Lentz v. Hertzog*, 4 Whart. (Pa.) 520; *Murphy v. Nathans*, 46 Pa. St. 508; *Beakhust v. Crumby* (R. I., 1894), 30 Atl. Rep. 453, 31 Atl. Rep. 753.

3. *Holt v. Frederick*, 2 P. Wms. 356; *Bennet v. Bennet*, 10 Ch. Div. 474.

Where the son acted as his mother's solicitor, and money was put in his name to be used in that capacity, it was held to be no advancement. *Garrett v. Wilkinson*, 2 DeG. & Sm. 244.

4. **Wife Receiving Property from Husband.**—2 *Story's Equity Jurisprudence* (12th ed.), p. 1204; *Dwight on Persons and Personal Property*, p. 642; 2 *Warvelle on Vendors*, p. 583.

England.—*In re Cadbury*, 11 W. R. 895, 32 L. J. Ch. 780; *Dummer v. Pitcher*, 2 Myl. & K. 262.

The presumption is rebutted, however, when its purpose is to defraud creditors, in which case a trust will result. *Christ's Hospital v. Budgin*, 2 Vern. 683.

Where there was an agreement to purchase land entered into in the joint names of the husband and wife, and the husband died before the purchase was completed, it was held that the property was for the benefit of the widow, and that the unpaid purchase price was payable from the personal estate of the deceased husband. *Drew v. Martin*, 2 Hem. & M. 130.

Where the husband directed his bankers to purchase stock in the joint names of himself and wife, and died after the purchase but before the transfer of the stock was made, it was held that

the stock belonged to the wife. *Vance v. Vance*, 1 Beav. 605.

Illinois.—*Wormley v. Wormley*, 98 Ill. 544; *Maxwell v. Maxwell*, 109 Ill. 588.

Maine.—*Spring v. Hight*, 22 Me. 408, 39 Am. Dec. 587; *Stevens v. Stevens*, 70 Me. 92.

Massachusetts.—*Whitten v. Whitten*, 3 Cush. (Mass.) 191.

Mississippi.—*Warren v. Brown*, 25 Miss. 66, 57 Am. Dec. 191; *Fatheree v. Fletcher*, 31 Miss. 265.

New Hampshire.—*Hill v. Pine River Bank*, 45 N. H. 300.

New York.—*Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Welton v. Divine*, 20 Barb. (N. Y.) 9; *Garfield v. Hatmaker*, 15 N. Y. 475.

Oregon.—*Parker v. Newitt*, 18 Oregon 274.

Texas.—*Tarpley v. Poage*, 2 Tex. 150; *Parker v. Chance*, 11 Tex. 513; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

Vermont.—*In Wallace v. Bowen*, 28 Vt. 638, it was held that though there is a presumption of an advancement, it is rebuttable.

Marriage must be Legal.—The marriage must be a legal one, however. *Soar v. Foster*, 4 Kay & J. 152; *Taylor v. Miles*, 19 Oregon 550.

Strength of the Presumption.—*In Wilson v. Beauchamp*, 50 Miss. 24, it was held that where a conveyance was made to a wife, the presumption of an advancement is stronger than if made to a child, as a wife cannot be a trustee for her husband.

5. *Thornton on Gifts and Advancements*, §§ 579, 605; *Barnes v. Allen*, 25 Ind. 222.

6. *Dyer v. Dyer*, 2 Cox 92.

7. *Back v. Andrew*, 2 Vern. 120; *Glaister v. Hewer*, 8 Ves. Jr. 195; *Stevens v. Stevens*, 70 Me. 92.

8. *Kingdon v. Bridges*, 2 Vern. 67; *In re Eykyn's Trusts*, 6 Ch. Div. 115, 37 L. T. N. S. 261.

9. **Gift of Personalty to Son-in-law, Prima Facie Advancement to Daughter.**—*Bridgers v. Hutchins*, 11 Ired. (N. Car.) 68; *Rains v. Hays*, 6 Lea (Tenn.) 303, 40 Am. Rep. 39 (affirming 2 Tenn. Ch. 668).

The Payment of a Husband's Debts by his father-in-law may constitute an advancement to the wife. *Haglar v. McCombs*, 66 N. Car. 345; *Peale v. Thurmond*, 77 Va. 753; *McDearman v. Hodnett*, 83 Va. 284.

Realty.—In case of real estate, the authorities are at variance, some applying the same rule as in case of personalty,¹ others holding such transfers absolute gifts or loans according to the circumstances, but not advancements in the absence of evidence of intention.²

Time of Transaction—Consent of Wife.—The fact that the transaction took place soon after marriage is always material as tending to show an advancement,³ as is also the presence or absence of the consent of the wife.⁴

5. Grandparent and Grandchild.—Under the *English* statute of distributions a grandchild must account for advancements to his parent, but nothing is said as to advancements to the grandchild himself.⁵ It was early decided, however, that in gifts to grandchildren no trust resulted.⁶

The Term "Child" in the Statutes Generally Held to Include "Grandchild."—Under the *English* statutes and similar enactments the word "child" is generally construed to cover "grandchild," and gifts between persons in this relationship are liable to be considered advancements.⁷ The opposite conclusion has been reached, however, in some states.⁸

Transfer must be Made after Death of Parent.—In any case transfers to a grandchild,

Knowledge of Daughter.—A payment to a daughter's husband will be regarded as an advancement to her when she knew the fact of the gift, and that the intention of the donor was that it should be an advancement. *Dittoe v. Cluney*, 22 Ohio St. 436; *Ex p. Oakey*, 1 Bradf. (N. Y.) 281.

Partnership between Father-in-law and Son-in-law.—But where a father was in partnership with his son-in-law, though he provided all the capital and the son-in-law shared the profits, it was held that there was no advancement to the daughter. *Wilks v. Greer*, 14 Ala. 437.

Where a Father Gave Money to His Son-in-law, taking his note, which was to be void if his wife survived him, and not to be collected for the benefit of his children, there was held to be an advancement. *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685.

1. Gifts of Realty—Authorities Not Agreed.—*Barber v. Taylor*, 9 Dana (Ky.) 84; *Stevenson v. Martin*, 11 Bush (Ky.) 485; *Groom v. Thompson* (Ky., 1891), 16 S. W. Rep. 369; *Rains v. Hays*, 6 Lea (Tenn.) 303, 40 Am. Rep. 39 (*affirming* 2 Tenn. Ch. 668); *Bruce v. Slemph*, 82 Va. 352.

Where a father by way of advancement to his daughter placed a deed of land in her husband's name, this was decided to be an advancement to her. *Baker v. Leathers*, 3 Ind. 558.

2. Banks v. Shannonhouse, Phil. (N. Car.) 284, where the court, by Pearson, J., said with reference to gifts of personalty and realty: "In our opinion there is a very essential difference. If *personal property* be given to a wife it instantly *jure mariti* belongs to the husband, so it is immaterial whether the gift be made to the wife or to the husband; but if *land* be given to the wife it remains hers, and the husband can only become entitled to a life estate as tenant by the courtesy, whereas if it be conveyed to the husband the wife takes nothing, save a collateral right to have dower in case she survives. So it cannot be said in any sense that she has received of her father any land by way of advancement."

A moiety only of lands conveyed by a father to his daughter and her husband jointly can be considered an advancement. *Jones v. Spaight*, 2 Murph. (N. Car.) 89.

3. Rogers v. Mayer, 59 Miss. 524; *Farrel v. Perry*, 1 Hayw. (N. Car.) 2; *Carter v. Rutland*, 1 Hayw. (N. Car.) 97; *Parker v. Phillips*, 1 Hayw. (N. Car.) 451.

4. Wilson v. Wilson, 18 Ala. 176; *James v. James*, 41 Ark. 301; *Dilley v. Love*, 61 Md. 603; *Bridgers v. Hutchins*, 11 Ired. (N. Car.) 68; *Lindsay v. Platt*, 9 Fla. 150; *Towles v. Roundtree*, 10 Fla. 299.

5. 22 and 23 Car. II., c. 10, § 5; Parsons v. Parsons (Ohio, 1895), 40 N. E. Rep. 165.

6. Ebrand v. Dancer, 2 Ch. Cas. 26. *Compare Smith v. Smith*, 5 Ves. Jr. 721.

7. Wyth v. Blackman, 1 Ves. 196; *Royle v. Hamilton*, 4 Ves. Jr. 437; *Beebe v. Estabrook*, 79 N. Y. 246 (*affirming* 11 Hun (N. Y.) 523); *Dickinson v. Lee*, 4 Watts (Pa.) 82, 28 Am. Dec. 684; *Eshleman's Appeal*, 74 Pa. St. 42; *Storey's Appeal*, 83 Pa. St. 89; *Dilley v. Love*, 61 Md. 603. *Compare Earnest v. Earnest*, 5 Rawle (Pa.) 220.

Illegitimate Grandchild.—It has been held that there can be no advancement to an illegitimate grandchild. *Tucker v. Burrow*, 2 H. & M. 515.

8. Knight v. Oliver, 12 Gratt. (Va.) 44; *Law v. Smith*, 2 R. I. 244.

Where a statute provided that "in case any one of the children shall have been advanced in personal estate of greater value than an equal share thereof which shall have come to the other children, he or his legal representative shall be charged in the division of the real estate, if there be any, with the excess in value which he may have received as aforesaid, over and above an equal distributive share of the personal estate" (Rev. Code of *North Carolina*, 1854, p. 249, § 1, rule 2), it was held that grandchildren must account for property advanced by their grandparents to their parents, but need not account for property given to themselves after the death of such parents. *Headen v. Headen*, 7 Ired. Eq. (N. Car.) 159; *Daves v. Haywood*, 1 Jones Eq. (N. Car.) 253; *Arrington v. Dortch*, 77 N. Car. 367. See also *Tournillon's Succession*, 15 La. Ann. 263; *Destrehan v. Destrehan*, 4 Martin N. S. (La.) 557.

to have the effect of advancements, must be made after the death of the parent.¹

Advancements Made to the Parent.—It has been held that where a statute exists under which, if grandchildren alone are left and they take *per capita*, they do not have to account for advancements made to their parents;² it is otherwise if they take *per stirpes*.³

Presumption.—Some cases hold that the presumption in any case of a gift to a grandchild is against an advancement, and that it will be construed to be such only if from the surrounding circumstances the intention to advance appears.⁴

6. Other Relations.—The doctrine of advancements has been extended to cover transactions between uncle and nephew,⁵ aunt and niece,⁶ and older and younger brothers,⁷ but not those between father-in-law and daughter-in-law.⁸

VI. HOW ADVANCEMENTS MAY BE DETERMINED—1. A Question of Intention.—Whether a gift is absolute or by way of advancement, depends upon the intention of the donor,⁹ which is to be determined as a question of fact.¹⁰

Time of the Intention.—This intention must exist at the time of the transfer; if it does not, there is no advancement,¹¹ and no subsequent consent of the donee will be of any avail.¹²

Transfer must be Voluntary.—As the character of the transaction is determined by the intention of the donor, it follows that a transfer, to be an advancement, must be voluntary.¹³

1. Must be Made after Death of Parent.—*Mason v. Mason*, 12 La. 589; *Stevenson v. Martin*, 11 Bush (Ky.) 485, which so held under a statute (*Kentucky Rev. Stat.*, c. 30, § 17) which provided that "any real or personal property or money given or devised by a parent or grandparent to a descendant shall be charged to the descendant or those claiming through him in the division and distribution of the undivided estate of the parent or grandparent, and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him according to his descendible and distributable share of the whole estate, real and personal, devised and undevise."

2. Grandchildren Taking per Capita—Advancements to Their Parents.—*Brown v. Taylor*, 62 Ind. 295; *Person's Appeal*, 74 Pa. St. 121; *Storey's Appeal*, 83 Pa. St. 89.

3. Grandchildren Taking per Stirpes—Advancements to Their Parents.—*Proud v. Turner*, 2 P. Wms. 560; *McRea v. McRea*, 3 Bradf. (N. Y.) 199; *McLure v. Steele*, 14 Rich. Eq. (S. Car.) 105; *Nelson v. Bush*, 9 Dana (Ky.) 104; *Hughes' Appeal*, 57 Pa. St. 179; *Eshleman's Appeal*, 74 Pa. St. 42; *Storey's Appeal*, 83 Pa. St. 89; *Daves v. Haywood*, 1 Jones Eq. (N. Car.) 253. This is provided expressly by statute in some states; e.g., see *Mass. Gen. Stat.*, c. 91, § 10.

4. Soar v. Foster. 4 Kay & J. 152; *Ebrand v. Dancer*, 2 Ch. Cas. 26. *Contra*, *Dart on Vendor and Purchaser*, p. 437.

5. Uncle and Nephew.—*Currant v. Jago*, 1 Colly 261, 8 Jur. 610.

6. Aunt and Niece.—*Beecher v. Major*, 13 W. R. 1054.

7. Older and Younger Brothers.—*Forrest v. Forrest*, 34 L. J. Ch. 428.

8. Father-in-law and Daughter-in-law.—*Ex p. Middleton*, 42 S. Car. 178.

9. Intention.—*Boone on Real Property*, § 274.

England.—*Loyd v. Read*, 1 P. Wms. 607.

Canada.—*Owen v. Kennedy*, 20 Grant's Ch. (Ont.) 163.

Connecticut.—*Johnson v. Belden*, 20 Conn. 322; *Hart v. Chase*, 46 Conn. 207.

Georgia.—*Weems v. Andrews*, 22 Ga. 43; *Holliday v. Wingfield*, 59 Ga. 206.

Mississippi.—*Wilson v. Beauchamp* 50 Miss. 24.

New York.—*Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; *Matter of Morgan*, 104 N. Y. 74.

Ohio.—*Fels v. Fels*, 1 Ohio Cir. Ct. Rep. 420.

Pennsylvania.—*Riddle's Estate*, 19 Pa. St. 431; *Lawson's Appeal*, 23 Pa. St. 85.

Tennessee.—*Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Johnson v. Patterson*, 13 Lea (Tenn.) 627.

10. *Shaw v. Kent*, 11 Ind. 80.

11. *Lawson's Appeal*, 23 Pa. St. 85.

12. Subsequent Consent of Donee.—*Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *Graves v. Spedden*, 46 Md. 527; *Bradsher v. Cannady*, 76 N. Car. 445; *Rains v. Hays*, 2 Tenn. Ch. 674, *affirmed* in 6 Lea (Tenn.) 303, 40 Am. Rep. 39, which cites and comments on most of the then leading cases.

13. To Constitute an Advancement the Transfer must be Voluntary.—In *Hart v. Chase*, 46 Conn. 207, it was held, where a mortgagor was required to pay and did pay the mortgage debt on land formerly his, but at the time belonging to his wife's heirs at law, although he was in possession as tenant by the curtesy, that the payment did not constitute an advancement, the court by Carpenter, J., saying: "The circumstances pretty effectually repel the presumption of an advancement. At the very threshold of the inquiry we find that the payment was an involuntary one. Advancements are ordinarily, if not always, voluntary, and when a man makes a payment in response to a legal demand, and in discharge of a legal obligation, it is a little difficult to extract from such payment any evi-

2. How Intention may be Shown—Preponderance of Evidence.—This intention may be established by a preponderance of evidence in its favor.¹

Parol Evidence.—It may be shown by parol evidence² unless the statute requires a writing.³

Circumstances—Declarations.—It may be shown by circumstances⁴ or by the declarations of the donor prior to the transfer or contemporaneous with it.⁵

deed of an intention to make an advancement."

A Forced Payment by a surety for the husband of a daughter is not an advancement. *Rains v. Hays*, 6 Lea (Tenn.) 303, 40 Am. Rep. 39, affirming 2 Tenn. Ch. 668.

1. *Middleton v. Middleton*, 31 Iowa 151.

The Recollection of a Witness of a Verbal Agreement after the lapse of twenty-five years was held not sufficient to rebut the *prima facie* presumption of an advancement. *Parker v. Parker* (Ky., 1889), 11 S. W. Rep. 91.

2. **Parol.**—*Smith v. Smith*, 21 Ala. 761; *Phillips v. Chappell*, 16 Ga. 16; *Clendening v. Clymer*, 17 Ind. 155; *Dillman v. Cox*, 23 Ind. 440; *Thomas v. Capps*, 5 Bush (Ky.) 273; *Langdon v. Astor*, 16 N. Y. 9.

A Conveyance of Land may be shown by parol evidence to be an advancement. *Kingsbury's Appeal*, 44 Pa. St. 460; *Bruce v. Slemp*, 82 Va. 352.

Although the Effect of the Deed is Thereby Changed.—*Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607.

Or it may be Shown that it is a Gift.—*Dumper v. Dumper*, 3 Giff. 583.

Parol Evidence Disproving Statement in Deed.—But a statement in a deed that it is intended as an advancement cannot be disproved by parol evidence. *Kershaw v. Kershaw*, 102 Ill. 307.

A Statement that it is a Gift is Final.—*James v. James*, 76 N. Car. 331.

Even though a Subsequent Will says that such deeded property is to be taken into final account in order that all the children may share equally. *Aden v. Aden*, 16 Lea (Tenn.) 453.

Burden of Proof.—Where there is an ordinary deed reciting a consideration of full value, the burden of proof is on the one claiming it to have been an advancement. *Miller's Appeal*, 107 Pa. St. 221.

3. **Statute Requiring Writing.**—*Filman v. Filman*, 15 Grant's Ch. (Ont.) 643; *Shepherd v. White*, 10 Tex. 72, affirmed in 11 Tex. 346.

The statutes in *Massachusetts*, *Maine*, and *Vermont* require as evidence of an advancement that there shall be a declaration to that effect in the gift or grant of the parent, or a charge to that effect by the intestate, or an acknowledgment in writing by the child. See *Mass. Gen. Stat. c. 91, § 8*; *Hartwell v. Rice*, 1 Gray (Mass.) 587; *Bigelow v. Poole*, 10 Gray (Mass.) 104; *Barton v. Rice*, 22 Pick. (Mass.) 508; *Ashley, Appellant*, 4 Pick. (Mass.) 24; *Osgood v. Breed*, 17 Mass. 358; *Bullard v. Bullard*, 5 Pick. (Mass.) 527; *Bulkeley v. Noble*, 2 Pick. (Mass.) 340; *Porter v. Porter*, 51 Me. 376; *Brown v. Brown*, 16 Vt. 197; *Adams v. Adams*, 22 Vt. 50; *Weatherhead v. Field*, 26 Vt. 665.

4. The effect of a gift is to be decided by the intention of the donor, determined from all the circumstances of the case. *Youngblood v. Norton*, 1 Strobh. Eq. (S. Car.) 122.

5. **Declarations of Donor Prior to, or Contemporaneous with, Transfer—England.**—*Williams* v.

Williams, 32 Beav. 370; *Dumper v. Dumper*, 3 Giff. 583; *Fowkes v. Pascoe*, L. R. 10 Ch. 343.

Alabama.—*Mitchell v. Mitchell*, 8 Ala. 414; *O'Neil v. Teague*, 8 Ala. 345; *Butler v. Merchants' Ins. Co.*, 14 Ala. 777; *Smith v. Smith*, 21 Ala. 761; *Autrey v. Autrey*, 37 Ala. 614; *Fennell v. Henry*, 70 Ala. 484, 45 Am. Rep. 88.

In *Merrill v. Rhodes*, 37 Ala. 449, it was held that a parent's declarations in reference to other gifts not in issue are admissible as tending to show his general policy in reference thereto.

Georgia.—*Phillips v. Chappell*, 16 Ga. 16. In *Nolan v. Bolton*, 25 Ga. 352, it was held that declarations at the time of making a will, in which certain payments were declared advancements, were admissible as being part of the *res gestæ* at the time the advancement was made.

Iowa.—In *Middleton v. Middleton*, 31 Iowa 151, it was held that declarations of an ancestor made about the time of the conveyance of a piece of land, to the effect that the heir had paid him for it, are admissible to rebut the presumption of an advancement.

Indiana.—In *Duling v. Johnson*, 32 Ind. 155, the court by Ray, J., said: "It is certainly proper that all declarations of intent made by a parent during the execution of a settlement of property among a set of his children should be admitted in evidence to aid in determining whether such purpose was to make an advancement or gift to each of such children." See also *Woolery v. Woolery*, 29 Ind. 249, 95 Am. Dec. 630.

In *Baker v. Leathers*, 3 Ind. 558, the court said: "Such evidence [parol declarations at the time of the conveyance] is most unsatisfactory, on account of the facility with which it may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce. Yet if plain, consistent, and especially if corroborated by circumstances, it is competent ground for a decree."

In *Joyce v. Hamilton*, 111 Ind. 163, it was held that declarations of a parent previous to the time his daughter took possession of the land advanced are admissible.

Illinois.—*Cline v. Jones*, 111 Ill. 563.

Kentucky.—But mere declarations of intention cannot make that an advancement which is not such under the law. *Cleaver v. Kirk*, 3 Metc. (Ky.) 273.

Mississippi.—*Wilson v. Beauchamp*, 50 Miss. 24.

Missouri.—Declarations are of no avail unless the transfer of property be shown. *Nelson v. Nelson*, 90 Mo. 464.

Pennsylvania.—*Christy's Appeal*, 1 Grant's Cas. (Pa.) 369; *Oller v. Bonebrake*, 65 Pa. St. 338, which held that declarations of a parent contemporaneous with entries of advancements in a book are admissible.

Contemporaneous declarations that the property was intended to compensate the child, who

Subsequent Declarations are inadmissible¹ unless part of the *res gesta*,² or against interest; that is, to the effect that a certain transaction was a gift or advancement rather than a resulting trust. They are not admissible in determining which of the two former it was, or to disprove either in favor of the trust.³

Contemporaneous Memoranda and Charges are likewise competent evidence.⁴

Dying Declarations.—Declarations of the intestate, otherwise incompetent, are not made admissible by the fact that they were made upon his deathbed.⁵

3. Intention as Determined by Will.—While the doctrine of advancements proper is applied in the case of intestacy only,⁶ it is frequently necessary in settling a testate estate to construe the term "advancements" as used in the will. The term is not, when thus employed, taken in its technical sense.⁷

When Will Directs Gifts to be Considered Advancements.—It is a general rule that where

was in the parent's employ, for loss of wages while in Europe, are admissible to show that it was not intended as an advancement. *Stern's Estate*, 3 Pa. Dist. Ct. Rep. 369, 15 Pa. Co. Ct. Rep. 4.

Virginia.—*Arnold v. Barrow*, 2 Patt. & H. (Va.) 1; *Watkins v. Young*, 31 Gratt. (Va.) 84; *McDearman v. Hodnett*, 83 Va. 281; *Bruce v. Slemp*, 82 Va. 352, which held that the acts and declarations of both parties are admissible to show the nature and character of the consideration and the real design of the donor in making an advancement.

1. General Rule as to Subsequent Declarations.—*Williams v. Williams*, 32 Beav. 370; *Dumper v. Dumper*, 3 Giff. 583; *Hatch v. Straight*, 3 Conn. 31, 8 Am. Dec. 152; *Ray v. Loper*, 65 Mo. 470; *Merkel's Appeal*, 89 Pa. St. 340; *House v. Woodard*, 5 Coldw. (Tenn.) 201; *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 215; *Rains v. Hays*, 2 Tenn. Ch. 672. Compare *Mason v. Holman*, 10 Lea (Tenn.) 318.

In *Batton v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630, it was held that proof of the declarations of a parent that he had fully advanced a child is not sufficient to make an advancement of a debt due from the child which was released only after the death of the child.

In *Autrey v. Autrey*, 37 Ala. 614, the court by Walker, J., said: "Where the question arises between distributees, whether property received by one of them was intended as an advancement or as a pure gift, there is much reason as well as authority in support of the proposition that the declarations of the intestate, made subsequent to the delivery, expressive of his intention in parting with the property, are admissible." Compare *Parks v. Parks*, 19 Md. 323, cited with approval in *Cecil v. Cecil*, 20 Md. 153.

2. When Subsequent Declarations Part of the Res Gestæ.—*Johnson v. Belden*, 20 Conn. 322; *Phillips v. Chappell*, 16 Ga. 16; *Wallace v. Owen*, 71 Ga. 544; *Harness v. Harness*, 49 Ind. 384; *Nelson v. Nelson*, 90 Mo. 460; *Lawson's Appeal*, 23 Pa. St. 85; *Wheeler v. Wheeler*, 47 Vt. 637; *Wilson v. Beauchamp*, 50 Miss. 24, which held that "any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction" are admissible.

But this rule is liberally applied. It is sufficient if the declarations are sufficiently close to the transaction to indicate its character. *Graves v. Spedden*, 46 Md. 527; *McDearman v. Hod-*

nett, 83 Va. 284; *Watkins v. Young*, 31 Gratt. (Va.) 84.

In *Thistlewaite v. Thistlewaite*, 132 Ind. 355, it was held that such acts and declarations made several years after the transaction were not admissible as a part of the *res gesta*, because too remote, and not as declarations against interest, because immaterial in that regard. Citing *Harness v. Harness*, 49 Ind. 384, and *Joyce v. Hamilton*, 111 Ind. 163. See the titles *ADMISSIONS*; *RES GESTÆ*.

3. Thornton on Gifts and Advancements, § 587; *Thistlewaite v. Thistlewaite*, 132 Ind. 355; *Abbott's Trial Evidence*, p. 155.

4. Contemporaneous Memoranda and Charges.—Contemporaneous memoranda and charges in the form of accounts are admissible. *Nelson v. Nelson*, 90 Mo. 460.

In *Pole v. Simmons*, 45 Md. 246, a memorandum of calculations made with reference to the property by the donor before executing the paper were held admissible to show intention.

In *Law v. Smith*, 2 R. I. 244, it was held that proof of declarations alone without charge or memorandum or other proof showing a delivery at the time was not proof of an advancement.

Subsequent Memoranda.—Memoranda and accounts made subsequent to the transfer are not admissible. *Nelson v. Nelson*, 90 Mo. 464.

5. Duling v. Johnson, 32 Ind. 155; *Middleton v. Middleton*, 31 Iowa 151.

But in *Gilbert v. Wetherell*, 2 Sim. & S. 259, where a father furnished a son with ten thousand pounds to engage in trade and took his demand note in return, and on his deathbed the father called for and destroyed the note, the court held that the presumption of a debt was repelled, and that the money was an advancement.

6. Lyon's Estate, 70 Iowa 375. Here it was held that where a testator leaves his property in equal shares to his children, and makes no mention of advancements received, they cannot be charged with advancements, and a contrary intention cannot be proved by parol.

Advancements should not be charged against the distributee where there is a will disposing of the entire estate, unless the will so directs. *Coleman v. Smith*, 55 Ala. 369; *Arnold v. Haronn*, 43 Hun (N. Y.) 278.

7. Barker v. Comins, 110 Mass. 477; *Eisner v. Koehler*, 1 Dem. (N. Y.) 277; *Hammett v. Hammett*, 38 S. Car. 50.

the will specifies that certain gifts are advancements, they are to be treated as such regardless of their true nature, evidence to prove them otherwise being inadmissible.¹ But the will must be valid² and unrevoked.³

No Reference in Will to Advancements Received.—If property is expressly given as an advancement, but no reference is made to it in the will of the parent, the child will take under the will, and need not account for the property received during the parent's lifetime.⁴

4. Effect of Evidence of Indebtedness—Prima Facie Loan.—The giving of any of the ordinary evidences of indebtedness is *prima facie* proof that the transaction was a loan, and not an advancement.⁵ Such is the effect of notes,⁶

1. **Direction in Will Controlling.**—*Fox v. Fox*, L. R. 11 Eq. 142; *Chapman v. Allen*, 56 Conn. 152; *Blackstone's Appeal*, 64 Conn. 415; *Hall v. Davis*, 3 Pick. (Mass.) 450; *Bacon v. Gassett*, 13 Allen (Mass.) 334; *Lewis v. Lundy* (N. J., 1887), 9 Atl. Rep. 883; *Watson v. Watson*, 6 Watts (Pa.) 254; *Green v. Howell*, 6 W. & S. (Pa.) 203; *Hufsmith's Estate*, 65 Pa. St. 141; *Porter's Appeal*, 94 Pa. St. 332; *Darne v. Lloyd*, 82 Va. 559, 3 Am. St. Rep. 123.

When a specific amount is stated as the amount of the advancement, this is the amount to be deducted. *In re Goble's Will* (Surrogate Ct.), 10 N. Y. Supp. 19.

Where a will provided that "all notes or other evidences of indebtedness which may be held by me at the time of my death against any of my children or sons-in-law shall be treated by my executors as advancements and deducted from the shares of the respective beneficiaries under this my will," it was decided that where a son received no share of the estate a note of his held by the estate was canceled. *Snider v. Snider*, 149 Pa. St. 362.

Where the testator provides that his property shall be distributed as though he died intestate, prior advancements are to be reckoned in making the distribution. *Raiford v. Raiford*, 6 Ired. Eq. (N. Car.) 490; *Stewart v. Stewart*, 15 Ch. Div. 544.

In *Ex p. Middleton*, 42 S. Car. 178, where the will provided: "I do further will that what money I may have advanced from time to time to either of my children shall be deducted from their share of the estate, that all may share equal," money loaned by the testator to a son, secured by a mortgage from the son's wife, which mortgage the testator held until it was barred by the statute of limitations and then satisfied without consideration, was held not to be an advancement. The court cites 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 219. See *infra*, this title, *Effect of Evidence of Indebtedness*.

But in *Aden v. Aden*, 16 Lea (Tenn.) 453, it was held that when a deed expressly stated that under no consideration was the conveyance to be deemed an advancement, a subsequent will could not make it so.

2. **Will must be Valid.**—*Douglass v. Brice*, 4 Rich. Eq. (S. Car.) 322.

3. **Will must be Unrevoked.**—*Hartwell v. Rice*, 1 Gray (Mass.) 587.

4. **Property Given as Advancement—No Reference Thereto in Will.**—*Turner's Appeal*, 52 Mich. 398; *Chapman v. Allen*, 56 Conn. 152.

In this latter case it was held that where a father gave his daughter one thousand dollars and took a receipt which read as follows: "Received of my father \$1000 as a part of my portion of his estate at his decease; refer to will," and three years afterwards made a will giving her "\$1400 in addition to what I have given her before," the daughter took the fourteen hundred dollars without accounting for the one thousand already received.

Where a will is silent on the subject of advancements, parol evidence is not admissible to show that an advancement made prior to the execution of the will was a satisfaction in whole or in part of a legacy. The rule is otherwise when the advancement was subsequent to the will. *In re Peacock's Estate*, L. R. 14 Eq. 236; *Jones v. Richardson*, 5 Met. (Mass.) 247; *Turpin v. Turpin*, 88 Mo. 337; *Van Houten v. Post*, 32 N. J. Eq. 709; *Camp v. Camp*, 18 Hun (N. Y.) 217; *Zeiter v. Zeiter*, 4 Watts (Pa.) 212, 28 Am. Dec. 698; *Kreider v. Boyer*, 10 Watts (Pa.) 54.

5. *Harley v. Harley*, 57 Md. 340; *Speer v. Speer*, 14 N. J. Eq. 240; *Harris's Appeal*, 2 Grant's Cas. (Pa.) 304; *Jones' Estate*, 29 Pittsb. L. J. (Pa.) 89; *Morris' Appeal*, 80 Pa. St. 427; *Ex p. Middleton*, 42 S. Car. 178, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 219.

Receipt.—In *Overholser v. Wright*, 17 Ohio St. 157, the father conveyed real estate to his son at the price of twelve hundred dollars, and took from the son his note for two hundred dollars, payable to the father with interest, and for the residue a receipt in this form: "Received of B. O. [the father] one thousand dollars for the use without interest received by me, D. O. [the son]." It was held that the sum named in the receipt would not be regarded an advancement, but merely a part of the consideration of the conveyance, payable to the father, but in the hands of the son to use without interest until the father saw fit to demand its payment.

6. **Notes—Prima Facie Debt.**—*Grey v. Grey*, 22 Ala. 233; *Robinson v. Meseley*, 93 Ala. 70; *Denman v. McMahan*, 37 Ind. 241. See also *Stock's Estate*, 158 Pa. St. 355.

In *Seagrist's Appeal*, 10 Pa. St. 424, where a mother said in her will that all moneys advanced to a child were to be deducted from the child's share, and the only thing sought to be charged as an advancement was a note from the child's husband to the mother for which security had been taken, it was held that this was a mere debt of the husband.

In *Vaden v. Hance*, 1 Head (Tenn.) 300, it was held that notes are *prima facie* evidence

or bonds and mortgages in the ordinary form.¹

Declarations of the Donor made to a third party are not sufficient to overcome this presumption.²

A Statement Signed by the Donee at the time of the receipt of property, that it is taken as an advancement, is binding on him.³

Gifts Intended and Accepted as Advancements will be so considered.⁴

of a debt unless it can be proved that they were given simply as memoranda of advancements or gifts, or that the father did not intend to collect them. See also *Johnson v. Ghost*, 11 Neb. 414, where it was held that the fact that the son gave his father a statement of the several sums advanced to him did not weaken the presumption of an advancement; and *Brook v. Latimer*, 44 Kan. 431, 21 Am. St. Rep. 292, which holds that parole evidence is admissible to show that a promissory note was intended merely as a receipt or memorandum.

In *House v. Woodard*, 5 Coldw. (Tenn.) 196, a note of a child given for a purchase from a parent was held a debt, not an advancement.

A loan by a mother for which a note is taken, signed by a daughter and her husband, on which interest is payable, has been held not to be an advancement, *Ruiz v. Campbell*, 6 Tex. Civ. App. 714; but money lent to a daughter to purchase land, for which her husband's note was taken, but of which neither interest nor principal was collected, was held an advancement, *Spires v. Langford* (Ky., 1894), 25 S. W. Rep. 597.

Where payments made by a father, as surety on a son's notes, are not treated as advancements by the father, they will not be considered such, *Reynolds v. Reynolds*, 92 Ky. 565; but when a son signs as surety a note given to the father for the purchase of land, which he afterwards conveys to the son, it has been held that the land was not an advancement, *White v. Moore*, 23 S. Car. 456. Where a father furnished money to a son to start in business, taking the son's demand note in return, and the father afterwards on his deathbed called for and destroyed the note, it was held to be an advancement, and not a debt. *Gilbert v. Wetherell*, 2 Sim. & S. 259.

Outlawed Note.—In *Batton v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630, it was held that the mere fact that the notes of a son are outlawed is not enough in itself to show an advancement. But statements of a parent before his decease that outlawed notes are advancements, being admissions against his interest, are admissible as evidence. *West v. Bolton*, 23 Ga. 531.

Presumption Rebuttable.—The presumption that it is a debt may be rebutted, however. *Cutliff v. Boyd*, 72 Ga. 302; *Peabody v. Peabody*, 59 Ind. 556; *Harris v. Harris*, 69 Ind. 181; *Bragg v. Stanford*, 82 Ind. 234; *Scobee v. Bridges*, 87 Ky. 427; *Dille v. Love*, 61 Md. 603. But it has been held that loose verbal declarations of the parent, unsustained by writing, that money for which he held a bond or note against a child was intended as an advancement or gift, are insufficient to

establish it as such. *Roland v. Schrack*, 29 Pa. St. 125; *Yundt's Appeal*, 13 Pa. St. 575, 53 Am. Dec. 496; *Merkel's Appeal*, 39 Pa. St. 340; *Harley v. Harley*, 57 Md. 340; *Levering v. Rittenhouse*, 4 Whart. (Pa.) 130.

Where a son's note twenty-four years old was found among the parent's effects, it was held that the presumption of payment rebutted any presumption of an advancement. *White v. Moore*, 23 S. Car. 456.

1. Bond and Mortgage Prima Facie Debt.—*Dawson v. Macknet*, 42 N. J. Eq. 633.

In *High's Appeal*, 21 Pa. St. 283, where a father took a bond from his son, a memorandum found among the father's papers after his death, indicating an intention at the time it was made to release the bond after his decease, was held not enough to change the presumption of a debt.

Where a father paid off a mortgage of his daughter's and took an assignment in blank of the mortgage and note, and held the same until his decease, it was held that this was an advancement. *Johnson v. Eaton*, 51 Kan. 708.

Declarations of the parent introduced as evidence to rebut the presumption of a debt must be part of the *res gestæ*, or in corroboration thereof, to be admissible. *Frey v. Heydt*, 116 Pa. St. 601.

Where the Mortgage of the Child is Invalid, a court of equity will regard the money loaned him as an advancement. *Re Willocks' Estate* (Pa. O. Ct.), 24 Pittsb. L. J. N. S. 446.

Chattel Mortgage.—In *Bruce v. Griscom*, 9 Hun (N. Y.) 280, 70 N. Y. 612, where a parent advanced money to his child to purchase an interest in a patent right, taking a chattel mortgage on the entire patent as security, it was held a debt, and not an advancement.

2. Declarations of Donor to Third Party.—*Harley v. Harley*, 57 Md. 340; *Porter v. Allen*, 3 Pa. St. 390; *Miller's Appeal*, 107 Pa. St. 221; *Homiller's Estate*, 17 W. N. C. (Pa.) 238.

3. Statement Signed by Donor that Property is Advancement.—*Lockyer v. Savage*, 2 Stra. 947; *Barham v. McKneely*, 89 Ga. 812; *Galbraith v. McLain*, 84 Ill. 379; *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651; *Havens v. Thompson*, 26 N. J. Eq. 383; *Brands v. DeWitt*, 44 N. J. Eq. 545, 6 Am. St. Rep. 909; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84; *McDonald v. McDonald*, 5 Jones Eq. (N. Car.) 211, 75 Am. Dec. 434; *Powers' Appeal*, 63 Pa. St. 443; *Kirby's Appeal*, 109 Pa. St. 41; *Summerville's Estate*, 129 Pa. St. 631.

Thus a statement signed by a son-in-law reading as follows: "Received of J. S. \$500, it being part of my wife's portion," found among the notes held by the intestate after his decease, was held binding. *Hartwell v. Rice*, 1 Gray (Mass.) 587.

4. Alleman v. Manning, 44 Mo. App. 4; *Foltz v. Wert*, 103 Ind. 404.

Release of All Claims against Ancestor's Estate.—A release in full of all claims against the ancestor's estate, given on the receipt of advancements by the heir *sui juris*, is binding and bars any future claim.¹

5. Entries in Books—Insufficient to Show an Advancement.—Mere entries of the transfer of property or payment of money, in the account books of the parent, are not sufficient in themselves to show an advancement, but evidence *aliunde* is required for that purpose.²

It is otherwise if they expressly state that the transfer or payments were by way of advancement,³ or if made in a family book kept for entries of advancements.⁴

Evidence of Intention.—Evidence of the parent's intention in making unambiguous entries is inadmissible.⁵

Entries may be Shown to be False or Excessive.—The entries may be shown to be false or excessive, however.⁶

Amounts may be Shown to have been Repaid.—Or the amounts so entered may be shown to have been repaid during the lifetime of the intestate, and so discharged.⁷

VII CHANGE OF GIFT TO ADVANCEMENT, AND VICE VERSA—Donor may Change Advancement to Gift without Donee's Consent.—A donor may change an advancement to an absolute gift without the knowledge or consent of the donee.⁸

May Not Change Gift to Advancement.—He cannot, however, reverse the process and deprive the donee of property already his, by changing a gift to an advancement.⁹

Changing Debts to Advancements.—As the proceeding is necessarily advantageous to the donee, it has been held that the donor may of his own motion change debts into advancements,¹⁰ while other authorities take the contrary view, on the theory that both parties to a contract must assent to any change in its

1. *Bishop v. Davenport*, 58 Ill. 105; *Smith v. Smith*, 59 Me. 214; *De Witt v. Brands* (N. J. Eq., 1887), 10 Atl. Rep. 181. Even though the value of the property received is much less than would be that of the share on distribution. *Quarles v. Quarles*, 4 Mass. 680; *Kenney v. Tucker*, 8 Mass. 143.

2. **Entries in Parent's Account Books.**—*Benjamin v. Dimmick*, 4 Redf. (N. Y.) 7; *Lawrence v. Lawrence*, 4 Redf. (N. Y.) 278; *Marsh v. Brown*, 18 Hun (N. Y.) 319; *Miller's Appeal*, 40 Pa. St. 57, 80 Am. Dec. 555.

Where the charges are made in the usual way as between debtor and creditor, they tend to show that relation and disprove the fact of advancement. *Ashley, Appellant*, 4 Pick. (Mass.) 21.

3. **Payments Expressly Stated to be Advancements.**—*Clark v. Warner*, 6 Conn. 355. In this case the account began: "A, my son, Dr. The following articles that may be charged are to go towards his portion." The court held that the articles charged were to be treated as advancements, and that the condition of affairs was not changed by a subsequent entry: "To the contrary, by a gift, I balance my son A's account."

4. **Entries in Family Books Wherein Record of Advancements is Kept.**—*Bulkeley v. Noble*, 2 Pick. (Mass.) 337.

The book must be one other than one used for the ordinary accounts of debit and credit. *Brown v. Brown*, 16 Vt. 197.

It is immaterial that the child had no knowledge of the entry. *Hengst's Estate*, 6 Watts (Pa.) 86.

Where a testator provides in his will that all entries in his books are to be considered advancements, and two years afterwards makes in his books an entry that all accounts of advancements have been settled in full, no such advancements are chargeable. *Webster v. Gray* (Supreme Ct.), 7 N. Y. Supp. 266.

5. *Bulkeley v. Noble*, 2 Pick. (Mass.) 337; *Barton v. Rice*, 22 Pick. (Mass.) 508; *Fellows v. Little*, 46 N. H. 27; *Hengst's Estate*, 6 Watts (Pa.) 86; *Weatherhead v. Field*, 26 Vt. 665. But see *Mitchell v. Mitchell*, 8 Ala. 414.

6. *Hoak v. Hoak*, 5 Watts (Pa.) 80.

7. *Musselman's Estate*, 5 Watts (Pa.) 9.

8. **Changing Advancement to Gift.**—*Sherwood v. Smith*, 23 Conn. 516; *Wallace v. Owen*, 71 Ga. 544; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85.

9. **Changing Gift to Advancement.**—*Harper v. Parks*, 63 Ga. 705; *Wallace v. Owen*, 71 Ga. 544; *Bradsher v. Cannady*, 76 N. Car. 445; *Lawson's Appeal*, 23 Pa. St. 85; *Arnold v. Barrow*, 2 Patt. & H. (Va.) 1.

And subsequent declarations of the donor that he meant a gift to be an advancement are not admissible to show that it was such. *Frey v. Heydt*, 116 Pa. St. 601.

Even if the donor had changed an advancement into a gift he cannot change it back again without the consent of the donee and a new consideration. *Sherwood v. Smith*, 23 Conn. 516.

10. *Kirby's Appeal*, 109 Pa. St. 41; *Darne v. Lloyd*, 82 Va. 859, 3 Am. St. Rep. 123.

terms, and that it is the right of every debtor to pay his obligation according to the original agreement.¹

Advancement Irrevocable without Donee's Consent.—An advancement once made cannot be recalled without the donee's consent.²

Will Referring to Gift or Debt as Advancement.—Where a will refers to a previous gift or debt as an advancement, its terms will, as a general rule, prevail.³

VIII. RIGHTS AND REMEDIES OF PARTIES TO ADVANCEMENTS—Resettling Terms of Advancements.—By mutual agreement the parties in interest may resettle the terms of an advancement after the death of the donor.⁴

Release by Donee of Interest in Ancestor's Estate.—It is generally held that the one advanced can by a release executed during the lifetime of the donor bar all his rights in the estate,⁵ although this has been doubted.⁶

Donee need Not Accept Advancement—Effect of Acceptance.—A donee is not obliged to accept an advancement, but having enjoyed the benefits he cannot deny that he took it as such.⁷

Grandchildren Account for Advancements to Their Parent.—Any one inheriting from the donor through the donee takes subject to advancements made to the donee.⁸

1. Dewee's Estate, 3 Brewst. (Pa.) 314.

2. **Advancement Not Revocable without Donee's Consent.**—O'Brien v. Sheil, 7 Ir. Eq. Rep. 255; *In re Miller's Will*, 73 Iowa 118; *Lisloff v. Hart*, 25 Miss. 245, 57 Am. Dec. 203; *Mars-ton v. Lord*, 65 N. H. 4; *Haverstock v. Sar-bach*, 1 W. & S. (Pa.) 390; *Yancy v. Yancy*, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5.

Where a transfer of consols was made by a godmother into the joint names of herself and godson, with the intention of making the transfer for his benefit, it was held that she could not afterwards revoke the same with-out his consent. *Standing v. Bowring*, 31 Ch. Div. 282.

Nor can it be afterwards changed to a debt without the intervention of some new consid-eration therefor. *Higham v. Vanosdol*, 125 Ind. 74; *Harris v. Harris*, 69 Ind. 181.

3. **Previous Transfers and Gifts Referred to in Will as Advancements.**—*Mitchell v. Mitchell*, 8 Ala. 414; *Hall v. Davis*, 3 Pick. (Mass.) 450; *Bacon v. Gassett*, 13 Allen (Mass.) 334; *In re McClintock's Estate*, 58 Mich. 152; *Eis-ner v. Koehler*, 1 Dem. (N. Y.) 277; *Law-rence v. Lindsay*, 7 Hun (N. Y.) 641; *Brad-sher v. Cannady*, 76 N. Car. 445; *Green v. Howell*, 6 W. & S. (Pa.) 203; *Whitman's Ap-peal*, 2 Grant's Cas. (Pa.) 323; *Manning v. Manning*, 12 Rich. Eq. (S. Car.) 410.

Where a will provided that advancements were to be deducted, and a subsequent codicil revoked the devise to one son and gave his share to the daughter-in-law, the wife of said son, it was held that she took it charged with the advancements to the son. *Buehler's Appeal*, 100 Pa. St. 385.

Where a will said that a daughter might take a legacy if her husband would pay to the estate certain sums, it was held that the daughter might consider these sums advance-ments, and that the executor could not re-cover them by suit. *Darne v. Lloyd*, 82 Va. 859, 3 Am. St. Rep. 123.

In Nolan v. Bolton, 25 Ga. 352, where the testator said: "It is my will * * * that each one shall be charged with * * * all money or property they have received from me," it

was held that the legatees must account for everything received, whether it was a loan or an advancement. And in *McAlister v. Butterfield*, 31 Ind. 25, where the testator stated in his will that one was to be charged with a certain amount as an advancement, and he denied that he had ever received any sum at all, it was held that the will was to be followed, and evidence was not admissible to contradict it.

4. **Terms of Advancement Resettled by Mutual Consent**—*Harper v. Parks*, 63 Ga. 705; *Wal-lace v. Owen*, 71 Ga. 544.

Where a settlement has been agreed on by all the children, and when no sufficient error can be shown, the settlement cannot be re-opened after the father's death. *Reeser's Appeal*, 100 Pa. St. 79. See also *Fitts v. Morse*, 103 Mass. 164.

5. **Release.**—*Galbraith v. McLain*, 84 Ill. 379; *Kershaw v. Kershaw*, 102 Ill. 307; *Nicholson v. Caress*, 59 Ind. 39.

Disability.—It is otherwise if the donee is under disability. *Bishop v. Davenport*, 58 Ill. 105.

Fraud—Undue Influence.—Or is induced to act through fraud or undue influence. *Brown v. Brown* (Ind., 1894), 39 N. E. Rep. 152.

6. *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85; *Towles v. Roundtree*, 10 Fla. 299.

7. **Donee's Option to Accept Advancement.**—1 *Swift's Digest*, p. 458; *Burbeck v. Spollen*, 10 Am. L. Rec. 491; *Treadwell v. Cordis*, 5 Gray (Mass.) 341; *Nesmith v. Dinsmore*, 17 N. H. 515.

Georgia.—In *Holliday v. Wingfield*, 59 Ga. 206, it was held that under the Code of *Geor-gia* it was not necessary that the child should accept the provision as an advancement, if intended by the parent as such.

8. *Bransford v. Crawford*, 51 Ga. 20; *West v. Bolton*, 23 Ga. 531; *Dupuy v. Dupont*, 11 La. Ann. 226; *Parsons v. Parsons* (Ohio, 1895), 40 N. E. Rep. 165; *McLure v. Steele*, 14 Rich. Eq. (S. Car.) 105.

Thus a grandchild is bound by an agree-ment of his father (the son of the intestate)

A Purchaser of an Heir's Interest after his ancestor's decease takes the property subject to all advancements to the heir.¹

Purchaser of Expectancy.—And the same is true in the case of the purchaser of an expectancy.²

They may Likewise Compel the Other Heirs to account for advancements received, in the same way as the heir could have done.³

Transfer in Fraud of Creditors.—If a transfer was made to defraud creditors, it will not stand as an advancement, even though, had such not been the case, there would have been a presumption in its favor;⁴ property received by way of advancement being acquired subject to the donor's debts.⁵

No Right of Dower.—The widow has no dower in the property advanced,⁶ the donor having, by the act of advancing, divested himself of all interest in the property.

Right of Administrator.—It being, therefore, no part of the estate of the intestate, the administrator is not entitled to it as such;⁷ neither is he a party in

who has accepted a provision in full of his share of the estate. *Simpson v. Simpson*, 114 Ill. 603.

1. **Purchaser of Heir's Interest Takes Subject to Advancements.**—*Steele v. Frierson*, 85 Tenn. 43.

The Creditors of an Heir attaching the heir's interest in his ancestor's estate are liable to have the amount of the said interest lessened by the deduction of advancements made to the heir during the ancestor's life. *Liginger v. Field*, 78 Wis. 367.

2. **Purchaser of Expectancy Takes Subject to Advancements.**—*Johnson v. Hoyle*, 3 Head (Tenn.) 56; *Nashville v. Potomac Ins. Co.*, 2 Baxt. (Tenn.) 303; *Towles v. Towles*, 1 Head (Tenn.) 601; *Mann v. Mann*, 12 Heisk. (Tenn.) 246.

And a Bona Fide Purchaser from the Parent with Notice that the land stands in the children's names takes it subject to their right to it as an advancement. *Stanley v. Brannon*, 6 Blackf. (Ind.) 193; *Lady George's Case*, 3 Cro. Car. 550.

Purchase of Land Subject to Lease by Way of Advancement.—So a purchaser of land with knowledge that it is subject to a lease for ninety-nine years to the vendor's child takes it subject to such lease as an advancement. *Jennings v. Selleck*, 1 Vern. 467.

3. *Duncan v. Henry*, 125 Ind. 10.

4. **When Transfer of Property in Fraud of Creditors.**—*Bay v. Cook*, 31 Ill. 336; *Lisloff v. Hart*, 25 Miss. 245, 57 Am. Dec. 203; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Hamilton v. Bradley*, 5 Hayw. (Tenn.) 127; *Gaugh v. Henderson*, 2 Head (Tenn.) 628; *Lockhard v. Beckley*, 10 W. Va. 87.

Advancement Pending Divorce Proceedings.—During a suit for divorce with alimony a wife is a creditor so that an advancement to a child by the father *pendente lite* will be deemed fraudulent. *Lott v. Kaiser*, 61 Tex. 672, with cases there cited.

Donee Insolvent.—It has been held that the father of an insolvent daughter has a moral and legal right to make an advancement to her separate use, so invested that her husband's creditors cannot reach it. *May v. Jenkins*, 15 Ill. 101.

Fraud a Question of Fact.—A parent cannot give away so much of his estate as not to re-

tain enough to meet existing demands against himself, or in view of insolvency, but whether the advancement is in fraud of the creditors or not is wholly a question of fact. *Bay v. Cook*, 31 Ill. 336.

Valid until Avoided.—But a conveyance unobjectionable except in that it defrauds creditors is valid until avoided by them. *Hill v. Pine River Bank*, 45 N. H. 300.

5. *Light v. Kennard*, 11 Neb. 129.

6. **No Right of Dower in Property Advanced.**—*Kircudbright v. Kircudbright*, 8 Ves. Jr. 51; *Logan v. Logan*, 13 Ala. 653; *Beavors v. Winn*, 9 Ga. 189; *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Ex p. Lawton*, 3 Desaus. (S. Car.) 199; *Brunson v. Brunson*, Meigs (Tenn.) 630; *Richards v. Richards*, 11 Humph. (Tenn.) 429; *Knight v. Oliver*, 12 Gratt. (Va.) 33.

The Widow Has an Interest, however, where real estate has been advanced in which she has a previous dower right. *Andrews v. Hall*, 15 Ala. 85.

A North Carolina statute provides that she shall share equally with the children. *Hunter v. Husted*, 1 Busb. Eq. (N. Car.) 97; *Credle v. Credle*, 1 Busb. (N. Car.) 225; *Arrington v. Dortch*, 77 N. Car. 367.

Advancements may not be compelled to be brought in for the benefit of the widow. *Ward v. Lant*, Pre. Ch. 182; *Gibbons v. Caunt*, 4 Ves. Jr. 850; *Kircudbright v. Kircudbright*, 8 Ves. Jr. 64; *Logan v. Logan*, 13 Ala. 653; *Porter v. Collins*, 7 Conn. 1; *Beavors v. Winn*, 9 Ga. 189; *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114; *Matter of Morgan*, 104 N. Y. 74; *Miller's Estate*, 2 Brews. (Pa.) 355; *Ex p. Lawton*, 3 Desaus. (S. Car.) 199; *Brunson v. Brunson*, Meigs (Tenn.) 630; *Richards v. Richards*, 11 Humph. (Tenn.) 429.

7. **Administrator.**—*Birch v. Blagrove*, Ambl. 266; *Cleaver v. Kirk*, 3 Metc. (Ky.) 270; *Clark v. Willson*, 27 Md. 693; *Crosby v. Covington*, 24 Miss. 619; *Luqueer's Estate*, 1 Tuck. (N. Y.) 236; *Yancy v. Yancy*, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5.

An instrument making an advancement cannot be of a testamentary nature, as the title to an advancement passes at once. *Holliday v. White*, 33 Tex. 460.

If, subsequently to the advancement, the

interest in establishing the fact of advancements.¹

Lapse of Time cannot be set up against liability for an advancement.²

A Power to a Wife to Divide Property given to her for life, among children, has been held not to authorize her to make advancements to some of them and not to others.³

Defective Advancements.—A court of equity will not aid a defective advancement.⁴

Specific Performance.—Nor will it enforce specific performance of an advancement to the detriment of other heirs.⁵

IX. VALUE OF ADVANCEMENTS—1. How Computed—General Rule.—When the advancement was one taking effect *in presenti*, it is to be reckoned at its value at the time it was made.⁶ When it was one to take effect *in futuro*, it is to

father takes possession of the property and uses it, he becomes his son's debtor, and the statute of limitations runs against the claim for the use of the property. *Persoll v. Scott*, 64 Ga. 767.

But Advancements may be Deducted from the personal property in the administrator's hands for distribution, if adequate. *Bemis v. Stearns*, 16 Mass. 200. See also *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626; *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423; *French v. Davis*, 38 Miss. 167.

But when the testator left the residue of his estate to his children in equal shares, stipulating that each share was to be charged with advancements, it was held that the administrator could reserve enough of a child's share to pay a judgment recovered against the administrator on the child's bond. *Stieff v. Collins*, 65 Md. 69.

Where a will provided that if it was necessary to pay debts, advancements made to the children should first be resorted to before taking the property devised to the wife, and all said advancements were enumerated and shown by notes and receipts, it was held that the advancements were still assets of the estate and could be subjected to the payment of debts. *Hammett v. Hammett*, 38 S. Car. 50; *Ex p. Chaffin*, 38 S. Car. 65; *Ex p. Lipscomb*, 38 S. Car. 65.

1. *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626.

2. **Lapse of Time.**—*Hughes' Appeal*, 57 Pa. St. 179.

3. *Farmer v. Farmer*, 93 Ind. 435. But see *Wimberly v. Bailey*, 58 Tex. 222, and *Weir v. Smith*, 62 Tex. 1.

But when property was devised to a widow for life, and at her death what remained was to be divided equally among the children, and the widow and children agreed that what she gave to each should be charged in the final division, it was held that the advancements should be accounted for according to the agreement. *Foltz v. Wert*, 103 Ind. 404.

4. **Equity will Not Aid Defective Advancement.**—*Williams v. Mears*, 2 Disney (Ohio) 604.

Younger Children Otherwise Unprovided for.—But it has been held that where there is a defective advancement to younger children, otherwise unprovided for, a court of equity will supply the defects. *Ward v. Webber*, 1 Wash. (Va.) 274.

5. **Decreeing Specific Performance.**—*McMahill v. McMahl*, 69 Iowa 115. See also *McFerran v. McFerran*, 69 Ind. 29.

But where different children have been advanced, and those first advanced hold by defective deeds, equity will lend its aid and perfect their titles. *Ward v. Webber*, 1 Wash. (Va.) 274.

6. **Present Advancement—Value at Time Made.**—*Illinois.*—*Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726.

Kentucky.—*Young v. Sadler* (Ky., 1893), 24 S. W. Rep. 877.

Maryland.—*Warfield v. Warfield*, 5 Har. & J. (Md.) 459.

Mississippi.—*Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114.

Missouri.—*Ray v. Loper*, 65 Mo. 470.

North Carolina.—*Stallings v. Stallings*, 1 Dev. Eq. (N. Car.) 298; *Lamb v. Carroll*, 6 Ired. (N. Car.) 4.

Pennsylvania.—*Oyster v. Oyster*, 1 S. & R. (Pa.) 422; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

Rhode Island.—*Law v. Smith*, 2 R. I. 244.

Tennessee.—*Burton v. Dickinson*, 3 Verg. (Tenn.) 112; *Moore v. Burrow*, 89 Tenn. 101.

Texas.—*Scooby v. Sweatt*, 28 Tex. 713.

Virginia.—*Knight v. Yarborough*, 4 Rand. (Va.) 566.

West Virginia.—*Kyle v. Conrad*, 25 W. Va. 760.

The Value of a Life Estate reserved by a father should not be deducted in determining its value under *New York Stat.*, pt. 2, c. 2, § 25, which provides that the value of property shall be reckoned at its worth when the gift is made. *Palmer v. Culbertson* (Ct. App.), 62 N. Y. St. Rep. 164.

In *South Carolina*, under the statutes, it is held that the value at the time of the death of the donor is the value to be taken. See *Wilson v. Kelly*, 21 S. Car. 537, with cases cited therein.

As to the value of advancements under the *Alabama Code*, § 2265, see *Turner v. Kelly*, 67 Ala. 173.

Worthless Property.—Where stocks advanced to a child were worthless at the time of the advancement, they are not to be charged as of any value, even though the donor makes an entry in his account book giving them a value. *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465.

Price Paid by Parent.—Where a parent purchases land in the name of a child, the purchase price paid is the value of the ad-

be reckoned at its value at the time the donee came into actual possession and enjoyment.¹

Value Fixed by Will.—When the value is fixed by the will, this controls in the absence of fraud.²

Rents and Profits.—Rents and profits cannot be charged as part of the advancement;³ nor improvements, whether made by the donor himself⁴ or by the donee.⁵

But Property Destroyed or Made Valueless previous to the donor's death, while in the donee's possession, is so chargeable.⁶

Life Insurance Policy.—Where a father has his life insured for his child's benefit, or for the benefit of his estate, and subsequently assigns it to the child, it has been held in one instance that the value of the policy at the time it was taken out, with the amount of premiums paid added, should be taken as the

vancement. *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

Annuities.—Annuities brought into hotchpot as advancements are valued at the date when granted. *Hatfield v. Minet*, 46 L. J. Ch. 812. See generally the title ANNUITIES.

Life Estates.—As to the rule for computing the value of life estates, see *Brown v. Dortch*, 12 Heisk. (Tenn.) 740; *Bowles v. Winchester*, 13 Bush (Ky.) 1.

Consideration in Deed.—The consideration mentioned in a deed by a father to a daughter-in-law, intended as an advancement to a son, was held final as to the worth of the property in estimating the value of the advancement. *Palmer v. Culbertson* (Ct. App.), 62 N. Y. St. Rep. 164.

1. **Advancement in Future—Valued at Time of Possession.**—*Hook v. Hook*, 13 B. Mon. (Ky.) 526; *Stevenson v. Martin*, 11 Bush (Ky.) 485; *Clark v. Willson*, 27 Md. 693; *Andrews v. Andrews*, 7 Heisk. (Tenn.) 234; *Chinn v. Murray*, 4 Gratt. (Va.) 379.

Thus in *Wilks v. Greer*, 14 Ala. 437, where a father conveyed some slaves by deed to his daughter, reserving a life estate therein to himself and wife, it was held that the daughter was not chargeable with the value of the slaves until the time they were delivered to her, and their value was their value at that time.

In *Barber v. Taylor*, 9 Dana (Ky.) 84, it was held that the value was to be taken at the time when the gift became complete and irrevocable in law and equity. See also *Shiver v. Brock*, 2 Jones Eq. (N. Car.) 137; *Haynes v. Jones*, 2 Head (Tenn.) 372; *Pigg v. Carroll*, 89 Ill. 206; *Meadows v. Meadows*, 11 Ired. (N. Car.) 148; *Puryear v. Cabell*, 24 Gratt. (Va.) 260.

Donee Enjoying the Benefit before Advancement Perfected.—But when the donee enjoyed the benefits of the gift before it was perfected, he was chargeable with the value at the time he began to enjoy the same. *Pigg v. Carroll*, 89 Ill. 206; *Hook v. Hook*, 13 B. Mon. (Ky.) 528; *O'Neal v. Breecheen*, 5 Baxt. (Tenn.) 605.

2. **Will Fixing Value Controls.**—*Nelson v. Nelson*, 7 B. Mon. (Ky.) 672; *Hook v. Hook*, 13 B. Mon. (Ky.) 526; *Grigsby v. Wilkinson*, 9 Bush (Ky.) 91.

When a child's debt to her father was evi-

denced by her note, and the father's will directed that previous advancements, as evidenced by notes, should be deducted from the child's share, and she, subsequently to the making of the will, reduced the amount of such advancement by payments on the note, it was held that she was not chargeable with the full amount of the note. *Spires v. Langford*, 15 Ky. L. Rep. 792.

3. **Rents and Profits Not Chargeable.**—*Ison v. Ison*, 5 Rich. Eq. (S. Car.) 15; *Hughey v. Eichelberger*, 11 S. Car. 36; *Ridley v. McNairy*, 2 Humph. (Tenn.) 174; *Williams v. Stonestreet*, 3 Rand. (Va.) 559; *Kyle v. Conrad*, 25 W. Va. 760.

But the Use of Land may be considered as an advancement. *Robinson v. Robinson*, 4 Humph. (Tenn.) 392; *Biehn v. Biehn*, 18 Grant's Ch. (Ont.) 497; *Hovey v. Ferguson*, 18 Grant's Ch. (Ont.) 499.

Equalizing Shares According to Direction of Will.—Rents and profits may be charged when it is necessary to make shares equal by direction of the will. *Jordan v. Miller*, 47 Ga. 346; *Wakefield v. Gilleland*, 13 Ky. L. Rep. 845.

The Accrued Value of an Estate could not be charged against the donee. *Beckwith v. Butler*, 1 Wash. (Va.) 224.

Use of Slaves.—It has been held in *South Carolina* that the use of slaves could not be charged as an advancement, since, after they had been given, their use belonged exclusively to the donee. *Wilson v. Kelly*, 21 S. Car. 535.

Where a Life Estate in Slaves was Given, only the reasonable value of the life estate could be treated as an advancement, not the use and profits of their labor. *Cawthon v. Copledge*, 1 Swan. (Tenn.) 487.

4. **Improvements Made by the Donor.**—*Powell v. Powell*, 9 Dana (Ky.) 12; *Knight v. Yarrowborough*, 4 Rand. (Va.) 569.

5. **Improvements Made by the Donee.**—*Gordon v. Barkelaw*, 6 N. J. Eq. 94.

6. *Fennell v. Henry*, 70 Ala. 484, 45 Am. Rep. 88; *Ventress v. Brown*, 34 La. Ann. 448; *Cawthon v. Kimbell*, 46 La. Ann. 750. See also *Hughey v. Eichelberger*, 11 S. Car. 36; *Ex. p. Glenn*, 20 S. Car. 64; *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Brown v. Dortch*, 12 Heisk. (Tenn.) 754; *Fleming's Appeal*, 5 Phila. (Pa.) 351.

value of the advancement,¹ and in another that the true value is the net amount received after the death.²

2. Interest.—Interest is not chargeable on advancements up to the date of the donor's death,³ even though the advancement consisted of a debt due from the donee.⁴ It is to be charged, however, for the period between the death of the testator and the distribution.⁵

A testator in a will which provides for the charging of advancements may prescribe that interest be charged.⁶

X. APPLICATION OF THE DOCTRINE OF ADVANCEMENTS—Hotchpot.—While one advanced cannot be compelled to bring the property into hotchpot, he must do so if he would share in the distribution.⁷

Intention—Agreement.—A mere intention to elect to retain advancements and not to claim under the distribution, especially when not acted on to the prejudice of another, will not prevent one advanced from claiming his distributive share;⁸ but an agreement to do so is binding.⁹

When Donee must Act.—And the one advanced must exercise his rights within a reasonable time.¹⁰

If He is under Disability, a court of equity will appoint a guardian,¹¹ and the course most beneficial to his interests will be taken.¹²

1. *Rickenbacker v. Zimmerman*, 10 S. Car. 110, 30 Am. Rep. 37.

2. *Cazassa v. Cazassa*, 92 Tenn. 573.

3. **Not Chargeable up to Donor's Death.**—*Manning v. Thruston*, 59 Md. 218; *Moale v. Cutting*, 59 Md. 510; *Ray v. Loper*, 65 Mo. 470; *Osgood v. Breed*, 17 Mass. 356; *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423; *Hosmer v. Sturges*, 31 Ohio St. 657; *Fickes v. Wireman*, 2 Watts (Pa.) 314.

And even where a receipt given by the donee stated that the payments were to bear interest from a period earlier than the donor's death, it was held that interest could be reckoned only from the date of the death of the donor. *Roberson v. Nail*, 85 Tenn. 124.

4. *Krebs v. Krebs*, 35 Ala. 293; *Hall v. Davis*, 3 Pick. (Mass.) 450; *Wilkins v. Wilkins*, 43 N. J. Eq. 595; *Grim's Appeal*, 105 Pa. St. 375; *Patterson's Appeal*, 128 Pa. St. 269.

5. **Chargeable for Time between Death of Donor and the Distribution.**—*Andrewes v. George*, 3 Sim. 393; *Hilton v. Hilton*, L. R. 14 Eq. 468; *Field v. Seward*, 5 Ch. Div. 538; *Steele v. Frierson*, 85 Tenn. 430; *Moore v. Burrow*, 89 Tenn. 101; *Johnson v. Patterson*, 13 Lea (Tenn.) 626; *Williams v. Williams*, 15 Lea (Tenn.) 438; *Kyle v. Conrad*, 25 W. Va. 760.

In *Pennsylvania* interest is chargeable on advancements from the time of filing the executor's account to the time of distribution. *Ford's Estate*, 11 Phila. (Pa.) 97. Children last settled with in final distribution are entitled to interest from the time when other heirs receive their share. *Yundt's Appeal*, 13 Pa. St. 575, 53 Am. Dec. 496.

6. *Treadwell v. Cordis*, 5 Gray (Mass.) 341; *Nichols v. Coffin*, 4 Allen (Mass.) 27.

7. **Donee Not Compellable to Come into Hotchpot—Alabama.**—*Taylor v. Reese*, 4 Ala. 121; *Mitchell v. Mitchell*, 8 Ala. 414; *Wilks v. Greer*, 14 Ala. 437; *Wilson v. Wilson*, 18 Ala. 176.

Georgia.—*Sims v. Sims*, 39 Ga. 108, 99 Am. Dec. 450.

Illinois.—*Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Condell v. Glover*, 56 Ill. App. 107.

Kentucky.—*Haden v. Haden*, 7 J. J. Marsh. (Ky.) 168; *Nelson v. Bush*, 9 Dana (Ky.) 104.

Mississippi.—*Phillips v. McLaughlin*, 26 Miss. 592.

Missouri.—*In re St. Vrain's Estate*, 1 Mo. App. 294; *Ray v. Loper*, 65 Mo. 470.

New York.—*Hawley v. James*, 5 Paige (N. Y.) 318; *Sherwood v. Wooster*, 11 Paige (N. Y.) 441.

North Carolina.—*Norwood v. Branch*, 2 Law Repos. (N. Car.) 598; *Daves v. Haywood*, 1 Jones Eq. (N. Car.) 253; *Shiver v. Brock*, 2 Jones Eq. (N. Car.) 137; *Headen v. Headen*, 7 Ired. Eq. (N. Car.) 159; *Walker v. Brooks*, 99 N. Car. 207.

Tennessee.—*Gold v. Vaughan*, 4 Sneed (Tenn.) 245; *Perry v. High*, 3 Head (Tenn.) 349; *Vance v. Huling*, 2 Yerg. (Tenn.) 135; *Farnsworth v. Dinsmore*, 2 Swan (Tenn.) 38.

Land Sold by Parent to Child for Less than its Value.—Proof that the land sold by a parent to a child was worth more than the price paid therefor is not alone reason enough to order the child to bring it as advancement into hotchpot. *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 209.

Part Gift and Part Advancement.—Where part of the property was a gift and part an advancement, only that which was an advancement must be accounted for. *Walker v. Brooks*, 99 N. Car. 207.

8. *Key v. Jones*, 52 Ala. 238.

9. *Smith v. Axtell*, 1 N. J. Eq. 494; *Bason v. Harden*, 72 N. Car. 281.

10. *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726.

11. *Andrews v. Hall*, 15 Ala. 85.

12. *Powell v. Powell*, 5 Dana (Ky.) 168; *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726. See also *Andrews v. Hall*, 15 Ala. 85.

Refusing to Come in at Original Division.—Even though the one advanced refuses to come in at the original division, he may do so at a subsequent division, as of dower lands.¹

Effect of Bringing Property into Hotchpot.—A donee does not give up his title to property by bringing it into hotchpot. It is brought in only for the purpose of ascertaining whether or not it amounts to his full share in the estate.² Whether or not it is equal is a question of fact for the jury.³ An adjudication by a proper probate court is binding upon the parties in subsequent proceedings.⁴

ADVANTAGE.—See note 5.

ADVANTAGEOUSLY.—The term “advantageously” means beneficially, conveniently, profitably and gainfully.⁶

ADVENTURE. (See also the title MARINE INSURANCE.)—In marine insurance an adventure means “either one of the perils insured against, as in the clause in a policy commencing ‘Touching the adventures and perils’; or the liability or risk undertaken by the insurers, as in the clause in a policy commencing, ‘Beginning the adventure upon the said goods and merchandise’; or the speculation or undertaking to protect which the assured effected the insurance;”⁷ or a subject of insurance which has been exposed to the risks insured against.”⁸

ADVERSE CLAIM.—See CLAIMS, and the title SHERIFFS; and see ENCYC. PL. AND PR., title INTERPLEADER.

ADVERSE ENJOYMENT.—See ENJOYMENT.

ADVERSE INTEREST.—See INTEREST.

ADVERSE PARTIES.—See PARTIES; and see 2 ENCYC. PL. AND PR., title APPEALS, p 192, and the title PARTIES, in the same work.

1. Knight v. Oliver, 12 Gratt. (Va.) 33; Persinger v. Simmons, 25 Gratt. (Va.) 238.

2. Jackson v. Jackson, 28 Miss. 674, 64 Am. Dec. 114; In re Elliott's Estate, 98 Mo. 384; Phillips v. McLaughlin, 26 Miss. 592.

A widow who under her husband's will held land and slaves, which were to be divided equally between herself and her children, but with a power to advance to the children the property at such times and in such kinds of property as her judgment might dictate, advanced to two of the children some slaves and more than their aliquot share of land, intending to give them a balance still due from the slave property. It was held that the unexpected circumstance of the destruction of the slave property by the war did not entitle the children not advanced to a redistribution of the land, or an account of the slave property which went into the hands of the children advanced. Kelly v. McCullum, 83 N. Car. 563.

3. State v. Jameson, 3 Gill & J. (Md.) 442.

4. In re Carpenter's Estate, 4 Pa. St. 222.

5. **Advantage in the Sense of Priority.**—A United States statute gives to the surety who has discharged a bond for duty to the United States the *advantage* secured to the United States. It was held that the word *advantage* was used as synonymous with “preference and priority,” and that the surety was not

entitled to other *advantages* to which the United States would have been entitled in a suit against the principal. U. S. v. Preston, 4 Wash. (U. S.) 451. See, generally, the titles REVENUE LAWS; SUBROGATION; SURETSHIP.

6. Garman v. Potts, 135 Pa. St. 521. In this case a lessee agreed to mine so much ore at a certain rate, provided the ore could be *advantageously* mined. The plaintiff contended that the only effect of this clause was to release the lessee from hidden defects. The trial court instructed that the lessee was not liable under the lease unless the ore could be *advantageously*—that is, beneficially, conveniently, profitably and gainfully—mined. The appellate court said: “The court below gave to the word *advantageously* its common and popular meaning. It is not a technical word or term of art, and the parties must be presumed to have used it in its known sense.”

7. Fenwick v. Robinson, 3 C. & P. 324, 14 E. C. L. 328; Jenkins v. Power, 6 M. & S. 289.

The words “begin the *adventure*” are equivalent to the expression “risk commenced.” Cottam v. Mechanics', etc., Ins. Co., 40 La. Ann. 260.

8. Inglis v. Stock, L. R. 10 App. Cas. 269, 54 L. J. Q. B. 852; Wood 348.

ADVERSE POSSESSION.

By THE EDITORIAL STAFF.

I. DEFINITION, 789.

II. WHAT CONSTITUTES ADVERSE POSSESSION, 789.

1. *General Principles*, 789.
 - a. *Ouster—Claim of Title*, 789.
 - b. *Intent*, 789.
 - c. *Permissive Possession*, 794.
2. *Essential Elements*, 795.
 - a. *In General*, 795.
 - b. *Possession must be Hostile and under Claim of Right*, 796.
 - (1) *General Principles*, 796.
 - (2) *Executory Contracts of Purchase*, 799.
 - (3) *Tenants in Common*, 801.
 - (4) *Life Tenant and Remainderman*, 807.
 - (5) *Landlord and Tenant*, 810.
 - (6) *Trust Estates*, 812.
 - (7) *Principal and Agent*, 815.
 - (8) *Mortgagor and Mortgagee*, 815.
 - (9) *Purchaser Pendente Lite*, 818.
 - (10) *Vendor and Vendee*, 818.
 - (11) *Husband and Wife*, 820.
 - (12) *Parent and Child*, 821.
 - c. *Possession must be Actual*, 822.
 - (1) *General Rule*, 822.
 - (2) *Evidence of*, 825.
 - (a) *By Occupation*, 825.
 - (b) *By Cultivation*, 827.
 - (c) *By Enclosure*, 828.
 - (d) *By Payment of Taxes*, 831.
 - d. *Possession must be Open and Notorious*, 832.
 - e. *Possession must be Exclusive*, 834.
 - f. *Possession must be Continuous*, 834.
 - (1) *General Rule*, 834.
 - (2) *Interruption of Possession*, 835.
 - (a) *Re-entry and Intrusion*, 835.
 - (b) *Acknowledgment of Superior Title*, 838.
 - (c) *Suit by True Owner—Recovery*, 840.
 - (d) *Abandonment*, 841.
 - (3) *Tacking*, 842.

III. COLOR OF TITLE, 846.

1. *Definition*, 846.
2. *Distinguished from Claim of Title*, 846.
3. *Not Essential to Adverse Possession*, 847.
4. *What Constitutes*, 848.
 - a. *Whether a Writing is Necessary*, 848.
 - (1) *In General*, 848.
 - (2) *Parol Gift or Purchase*, 850.
 - (3) *Descent Cast*, 850.
 - b. *Inoperative Conveyances*, 850.

ADVERSE POSSESSION.

- (1) *General Rule*, 850.
- (2) *What Sufficient*, 851.
 - (a) *Defects in Title Appearing dehors the Immediate Conveyance*, 852.
 - (b) *Defects on Face of Writing*, 855.
 - aa. *In General*, 855.
 - bb. *Omission of Seal*, 856.
 - cc. *Defective Acknowledgment*, 857.
 - dd. *Insufficiently Witnessed*, 857.
 - (c) *Instrument must Apparently Convey Title*, 857.
 - aa. *In General*, 857.
 - bb. *Must Have Grantor and Grantee*, 858.
 - cc. *Must Describe the Land*, 858.
 - dd. *Must Contain Words of Conveyance*, 859.
 - (d) *Unrecorded Instruments*, 860.
 - (e) *Quitclaim Deeds*, 860.
 - (f) *Lost Deed*, 860.
 - (g) *A Question of Law*, 861.

5. *Good Faith*, 861.

IV. EXTENT OF ADVERSE POSSESSION, 861.

1. *Without Color of Title*, 861.
2. *Under Color of Title*, 862.
 - a. *General Rule—Constructive Possession*, 862.
 - b. *Prerequisites to Constructive Possession*, 864.
 - (1) *Color of Title*, 864.
 - (2) *Actual Possession of Part of Land*, 865.
 - (3) *Claim of Right to Whole Tract*, 867.
 - (4) *Good Faith*, 868.
 - c. *Mixed Possession*, 869.
 - (1) *Definitions*, 869.
 - (2) *When True Owner is in Possession of Part*, 869.
 - (3) *When Neither Claimant Has True Title*, 870.
 - d. *Overlapping Boundaries*, 871.

V. SUBJECTS OF ADVERSE POSSESSION, 874.

1. *General Rule*, 874.
2. *The Several Classes of Property Considered*, 874.
 - a. *Personalty*, 874.
 - b. *Mines*, 874.
 - c. *Water*, 875.
 - d. *Easements*, 875.
 - e. *Public Lands*, 875.
 - f. *State Lands*, 876.
 - g. *Property of Municipal and Quasi-municipal Corporations*, 878.
 - (1) *Property Dedicated to Public Uses—Highways, Streets, Parks, etc.*, 878.
 - (2) *Property Held in Private Right*, 879.
 - (3) *Equitable Estoppel*, 882.

VI. EFFECT OF ADVERSE POSSESSION, 883.

VII. EVIDENCE, 886.

1. *A Question of Law and Fact*, 886.
2. *Burden of Proof*, 887.
3. *Clear Proof Required*, 887.
4. *Presumptions of Law*, 888.
5. *What Evidence Admissible*, 890.

CROSS-REFERENCES.

For matters of PROCEDURE, see the several forms of action in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, under their appropriate titles, such as, EJECTMENT; LIMITATIONS (STATUTES OF); QUIETING TITLE—REMOVAL OF CLOUD, and the like.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: CHAMPERTY AND MAINTENANCE; CLOUD UPON TITLE; LIMITATION OF ACTIONS; OCCUPYING CLAIMANT'S ACTS; PRESCRIPTION; TAX TITLES; TITLE (REAL PROPERTY).

I. DEFINITION.—An adverse and hostile possession is one held for the possessor as distinguished from one held in subordination to the right of another; in other words, it is a possession inconsistent with the possession, or right of possession, by another.¹ As applied to real estate, it is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action.²

Adverse User.—An adverse user means such a use of property as the owner himself would make, asking permission of no one, and disregarding all other claims to it so far as they conflict with this use.³

II. WHAT CONSTITUTES ADVERSE POSSESSION—1. **General Principles**—*a. OUSTER*—CLAIM OF TITLE.—In order to constitute an effective adverse possession there must be an ouster of the real owner, followed by an actual, notorious, and continuous possession by the adverse claimant, with an intention on his part to claim in hostility to the title of the real owner.⁴

b. INTENT.—The intention with which possession is taken or held is re-

1. *Sheaffer v. Eakman*, 56 Pa. St. 144.

Other Definitions.—In *Magee v. Magee*, 37 Miss. 152, Smith, C.J., quoting Angell on Limitations 410, said: "A disseisin and adverse holding is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right; either under an openly avowed claim or under a constructive claim, arising from the acts and circumstances attending the appropriation, to hold the land against him who was seised." And see *Gildehaus v. Whiting*, 39 Kan. 711.

"It is a possession not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession by which he is disseised and ousted of the lands so possessed." *Ingersoll, J.*, in *Bryan v. Atwater*, 5 Day (Conn.) 181, 5 Am. Dec. 136, quoted in *French v. Pearce*, 8 Conn. 443, 21 Am. Dec. 680.

The term designates a possession in opposition to the true title and real owner, and implies that it commenced in wrong—by ouster or disseisin—and is maintained against right. It must be openly and notoriously in defiance of the actual title, and such as converts the estate into a mere right of entry or action. *Alexander v. Polk*, 39 Miss. 755.

It is the enjoyment of land or such estate as lies in grant, under circumstances which indicate that such enjoyment has been commenced and continued under assertion or color of right on the part of the possessor. *Wallace v. Duffield*, 2 S. & R. (Pa.) 527, 7 Am. Dec. 660; *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 53; *Smith v. Burtis*, 9 Johns. (N. Y.) 174.

Adverse possession is a possession inconsistent with the right of the true owner. In other words, where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than as owner, that is, with the intention of excluding all persons from it, including the rightful owner, he is in adverse possession of it. For example, if a person is in possession of a tract of land of another, his possession thereof is

adverse unless there is something to show that it is consistent with a recognition of such other person's title. *Sweet Law Dict.*, tit. Possession; *Morse v. Seibold*, 147 Ill. 318, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), 225.

2. *Parker v. Banks*, 79 N. Car. 480; *Buswell on Lim. and Adv. Poss.*, § 237. And see *Stanley v. Schwalby*, 147 U. S. 524.

Adverse possession of land may be said to be founded in trespass, but it must be a trespass constantly continued by acts on the premises. It must challenge the right to all the world. *Olewine v. Messmore*, 128 Pa. St. 484.

3. *Blanchard v. Moulton*, 63 Me. 434; *Cox v. Forrest*, 60 Md. 74. See also *French v. Marstin*, 24 N. H. 440, 57 Am. Dec. 294.

4. **Must be Ouster of True Owner and Claim of Right.**—*Jackson v. Huntington*, 5 Pet. (U. S.) 439; *Pickett v. Doe*, 74 Ala. 131; *Davis v. Bowmar*, 55 Miss. 765.

When the possession is without color of title there must be an actual occupancy. *Dothard v. Denson*, 75 Ala. 482.

In *Dixon v. Cook*, 47 Miss. 220, it is said: "To constitute adverse possession, two facts must concur: First, there must be an entry under color of right, claiming title, hostile to the true owner and the world; second, that entry must be followed by possession and appropriation of the premises, to use publicly and notoriously, so that the other claimants may take notice and others may be cognizant of the fact." See also *Huntington v. Allen*, 44 Miss. 668; *Dean v. Tucker*, 58 Miss. 487.

It is the occupation with intent to claim against the true owner which renders the entry and occupation adverse. *Magee v. Magee*, 37 Miss. 138.

Must be Some One to Dispute Right.—Adverse possession cannot arise until there is some one to dispute the right claimed, and the mere occupancy by an abutting owner of the space designed for an alley, without claim or color of title, does not establish an adverse possession until the interests of some one else are affected by it. *Marble v. Price*, 54 Mich. 466.

garded as a controlling factor in determining whether or not it is adverse.¹ There must be an intention to claim the title as owner, and in derogation of the rights of the true owner.²

1. Intention Controlling—Alabama.—Brown v. Cockerell, 33 Ala. 45; Alexander v. Wheeler, 69 Ala. 332.

Illinois.—McNamara v. Seaton, 82 Ill. 498. **Indiana.**—Doe v. Hearick, 14 Ind. 242; Price v. Hall (Ind., 1895), 39 N. E. Rep. 941, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 227.

Iowa.—Jones v. Hockman, 12 Iowa 108; McCarty v. Rochel, 85 Iowa 427; Grube v. Wells, 34 Iowa 148; Skinner v. Crawford, 54 Iowa 119; McNamee v. Moreland, 26 Iowa 97.

Kansas.—Winn v. Abeles, 35 Kan. 85, 57 Am. Rep. 138.

Kentucky.—Haffendorfer v. Gault, 84 Ky. 124; Smith v. Morrow, 5 Litt. (Ky.) 211.

Maine.—Brown v. Gay, 3 Me. 126; Worcester v. Lord, 56 Me. 269, 96 Am. Dec. 456; Dow v. McKenney, 64 Me. 138.

Maryland.—Waltmeyer v. Baughman, 63 Md. 200.

Massachusetts.—Allen v. Holton, 20 Pick. (Mass.) 458; Cook v. Babcock, 11 Cush. (Mass.) 210.

Mississippi.—Magee v. Magee, 37 Miss. 152; Davis v. Bowman, 55 Miss. 671.

Missouri.—Musick v. Barney, 49 Mo. 458; Betts v. Brown, 3 Mo. App. 20; Knowlton v. Smith, 36 Mo. 507, 88 Am. Dec. 152.

Nebraska.—Colvin v. Republican Valley Land Assoc., 23 Neb. 75, 8 Am. St. Rep. 114.

New Hampshire.—Grant v. Fowler, 39 N. H. 101.

New York.—Jackson v. Thomas, 16 Johns. (N. Y.) 293; Jackson v. Wheat, 18 Johns. (N. Y.) 44.

North Carolina.—Green v. Harman, 4 Dev. (N. Car.) 158.

Texas.—Schleicher v. Gatlin, 85 Tex. 270; Norton v. Collins, 1 Tex. Civ. App. 272.

Vermont.—Morse v. Churchill, 41 Vt. 649; Spaulding v. Warren, 25 Vt. 316.

West Virginia.—Flynn v. Lee, 31 W. Va. 487.

An adverse possession depends upon the intention with which the possession was taken and held. Hudson v. Putney, 14 W. Va. 561.

The *quo animo* must be established as well as the fact. Jackson v. Huntington, 5 Pet. (U. S.) 439.

An entry by one man on the land of another is an ouster of the legal possession arising from the title, or is not, according to the intention with which it is done: if made under claim and color of right, it is an ouster; otherwise it is a mere trespass. The intention guides the entry and fixes its character. Ewing v. Burnet, 11 Pet. (U. S.) 41.

Time of Intention to Claim Title.—The intention to acquire title by adverse possession must be entertained at the time the statute commences to run. Larwell v. Stevens, 2 McCrary (U. S.) 311.

The Acts and Declarations of the Parties Owning the Estate, made after thirty years, which have a tendency to show their motives and

views during the time of their occupancy, are proper to show the nature of the occupancy, and rebut the inference which would otherwise follow from the fact of possession. Church v. Burghardt, 8 Pick. (Mass.) 327.

2. Intention to Claim as Owner.—Clemens v. Meyer, 44 La. Ann. 390; Stille v. Shull, 41 La. Ann. 816; Ringo v. Woodruff, 43 Ark. 486; East Hampton v. Kirk, 84 N. Y. 220, 38 Am. Rep. 505; Casey v. Dunn, 57 N. Y. Super. Ct. 381; Doherty v. Matsell, 119 N. Y. 646; Grube v. Wells, 34 Iowa 148; Abbott v. Abbott, 51 Me. 584; Pharis v. Jones, 122 Mo. 125; Bradley v. West, 60 Mo. 33; Knowlton v. Smith, 36 Mo. 507, 88 Am. Dec. 152; McDonald v. Fox, 20 Nev. 364; Shaw v. Schoonover, 130 Ill. 448; Forsod v. Golson, 77 Tex. 666.

Occupation in Belief that Land is Vacant.—Occupation with the belief that the land is vacant, and with intent to acquire title from the state, is not adverse possession. Schleicher v. Gatlin, 85 Tex. 270; Mhoon v. Cain, 77 Tex. 316. But see Converse v. Ringer, 6 Tex. Civ. App. 51.

Intention to Hold until the True Owner Makes Claim.—Nor is it adverse where the possession is taken with intent to hold until the true owner claims it. Smeberg v. Cunningham, 96 Mich. 378, 35 Am. St. Rep. 613.

Ignorance of Adverse Rights.—In Silver v. Hansen, 77 Cal. 579, it is held that the fact that one in exclusive possession under a claim of title does not suppose that he is interfering with anybody's rights does not defeat his right to claim by adverse possession.

Animus Furandi Not Essential.—It is not necessary, to constitute a disseisin, that the intention of the disseisor must in all cases be to wrongfully possess himself of property known to him to belong to another. The *animus furandi* is not essential. Cases not infrequently arise where a disseisin is innocently committed under a mistake as to the validity of the title, but the title must be asserted. Cases may arise where a man may be under a mistake as to the true extent of his domain, yet if he intentionally claims title to all of which he has possession, his neighbors may be barred by lapse of time from asserting their rights. Worcester v. Lord, 56 Me. 273, 96 Am. Dec. 456.

Presumption of Intent.—A survey unaccompanied by any other act of user and occupation will not justify a presumption that the party went upon the land with the palpable intent to claim the possession as his own. Beatty v. Mason, 30 Md. 409.

Motive.—But the motive of the one in possession claiming title is immaterial. Omaha, etc., Land, etc., Co. v. Hansen, 32 Neb. 449.

The Intention must be Manifest.—Culver v. Rhodes, 87 N. Y. 348; Marcy v. Marcy, 6 Met. (Mass.) 360; Hart v. Gregg, 10 Watts (Pa.) 185, 36 Am. Dec. 166; Prescott v. Nevers, 4 Mason (U. S.) 330.

But it need Not be Expressed; it may be in-

Occupation by Mistake—Boundaries.—If one, though by mistake, encloses the land of another and claims it as his own, his actual possession will work a disseisin;¹ but if through inadvertence or ignorance of the division line, he includes part of an adjoining tract within his enclosure, making no claim, however, of the land to the fence, but with the intent only to claim to the true line, his possession is not adverse.² If, however, there is an intent to claim

ferred from the manner of occupancy. *Conyers v. Kenan*, 4 Ga. 308, 48 Am. Dec. 226; *Dean v. Goddard*, 55 Minn. 290.

Evidence—Improvements.—Permanent and valuable improvements made upon the land and used by the claimant would tend to show an intention to hold adversely. *Hamilton v. West*, 63 Mo. 93.

1. Mistake in Location—Alabama.—*Alexander v. Wheeler*, 69 Ala. 332.

Arkansas.—*Wilson v. Hunter*, 59 Ark. 626.

California.—*Farish v. Coon*, 40 Cal. 33; *White v. Spreckels*, 75 Cal. 610.

Connecticut.—*French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680.

Illinois.—*McNamara v. Seaton*, 82 Ill. 498; *Schneider v. Botsch*, 90 Ill. 577; *Grim v. Murphy*, 110 Ill. 271.

Indiana.—*Brown v. Anderson*, 90 Ind. 94.

Iowa.—*Burdick v. Heivly*, 23 Iowa 511; *Meyer v. Weigman*, 45 Iowa 579; *Tracy v. Newton*, 57 Iowa 210; *Wilson v. Gunning*, 80 Iowa 331; *Wacha v. Brown*, 78 Iowa 432.

Kentucky.—*Hunter v. Chrisman*, 6 B. Mon. (Ky.) 463.

Maine.—*Abbott v. Abbott*, 51 Me. 584; *Hitchings v. Morrison*, 72 Me. 331; *Ricker v. Hibbard*, 73 Me. 105.

Michigan.—*Bunce v. Bidwell*, 43 Mich. 542; *Michigan Land, etc., Co. v. Thoney*, 89 Mich. 226.

Minnesota.—*Seymour v. Carli*, 31 Minn. 81; *Ramsey v. Glenn*, 45 Minn. 401, 22 Am. St. Rep. 736.

Mississippi.—*Metcalfe v. McCutchen*, 60 Miss. 145.

Missouri.—*Keen v. Schnedler*, 15 Mo. App. 590; *Tamm v. Kellogg*, 49 Mo. 118; *Hamilton v. West*, 63 Mo. 93; *Houx v. Batteen*, 68 Mo. 84; *Walbrunn v. Ballen*, 68 Mo. 166; *Cole v. Parker*, 70 Mo. 379; *Mather v. Walsh*, 107 Mo. 121.

Nebraska.—*Levy v. Yerga*, 25 Neb. 764; *Tex. v. Pflug*, 24 Neb. 666; *Obernalte v. Edgar*, 28 Neb. 70; *Omaha, etc., Land, etc., Co. v. Hansen*, 32 Neb. 449.

New Hampshire.—*Enfield v. Day*, 7 N. H. 457, 28 Am. Dec. 360.

New Jersey.—*Southmayd v. McLaughlin*, 24 N. J. Eq. 181.

New York.—*Swettenham v. Leary*, 18 Hun (N. Y.) 284; *Crar v. Goodman*, 22 N. Y. 170; *Sherman v. Kane*, 86 N. Y. 57.

North Carolina.—*Green v. Harman*, 4 Dev. (N. Car.) 158; *Mode v. Long*, 64 N. Car. 433.

Oregon.—*Caulfield v. Clark*, 17 Oregon 473, 11 Am. St. Rep. 845; *Rowland v. Williams*, 23 Oregon 515.

Tennessee.—*Erck v. Church*, 87 Tenn. 575.

Texas.—*Puckett v. McDaniel* (Tex. Civ. App., 1894), 28 S. W. Rep. 360; *Cartwright v. Pipes* (Tex. Civ. App., 1895), 29 S. W. Rep.

690; *Hand v. Swann*, 1 Tex. Civ. App. 241; *Converse v. Ringer*, 6 Tex. Civ. App. 51, citing this title, 1 AM. AND ENG. ENCYC. OF LAW (1st ed.); *Chance v. Branch*, 58 Tex. 490. *Vermont.*—*Burnell v. Maloney*, 39 Vt. 579; *Soule v. Barlow*, 49 Vt. 329.

Taking Possession by Mistake of Lot Adjoining That Named in Deed.—Where a party received a deed to a lot of land, but took possession of an adjoining lot by mistake and claimed it as his own, a possession continued by him and his successors for more than twenty years was held to have ripened into a title. *Ricker v. Hibbard*, 73 Me. 105.

Taking Possession by Fraud or Mistake of Another Lot of Same Vendor.—But where a purchaser, through fraud or mistake, enters upon another tract of the same vendor, the entry is under a claim of title assumed to have been derived from the vendor, and is in subordination to the latter's title. *Farish v. Coon*, 40 Cal. 33.

Tenant of Two Lessors Erecting Division Fence for Convenience—Subsequent Purchase and Adverse Claim.—Where a tenant of two adjoining lots, owned by different lessors, divides them, for convenience in cultivation, by a fence not on the true division line, and afterwards purchases the lot thus enlarged, his occupancy of the ground taken from the other lot cannot be set up as an adverse possession. *Betts v. Brown*, 3 Mo. App. 21. See *McNamara v. Seaton*, 82 Ill. 498.

2. Alabama.—*Brown v. Cockerell*, 33 Ala. 38; *Alexander v. Wheeler*, 69 Ala. 332.

California.—*Irvine v. Adler*, 44 Cal. 559.

Florida.—*Watrous v. Morrison*, 33 Fla. 261, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 262.

Georgia.—*Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Howard v. Reedy*, 29 Ga. 152, 74 Am. Dec. 58; *Shiels v. Roberts*, 64 Ga. 370.

Illinois.—*McNamara v. Seaton*, 82 Ill. 498; *Grim v. Murphy*, 110 Ill. 271.

Indiana.—*Silver Creek Cement Corp. v. Union Lime, etc., Co.*, 138 Ind. 297, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 249.

Iowa.—*Goldsbrough v. Pidduck*, 87 Iowa 599; *Heinz v. Cramer*, 84 Iowa 497; *Sweny v. Bruns*, 74 Iowa 701; *Van Sickle v. Keith*, 88 Iowa 942; *Fisher v. Muecke* (Iowa, 1891), 48 N. W. Rep. 936; *Mills v. Penny*, 74 Iowa 172, 7 Am. St. Rep. 474; *Bolton v. McShane*, 79 Iowa 26; *Grube v. Wells*, 34 Iowa 148; *Skinner v. Crawford*, 54 Iowa 119; *Wacha v. Brown*, 78 Iowa 432.

Kentucky.—*Scheible v. Hart* (Ky., 1889), 12 S. W. Rep. 628; *Rugles v. Fannian* (Ky., 1888), 9 S. W. Rep. 373.

Maine.—*Brown v. Gay*, 3 Me. 126; *Lincoln v. Edgecomb*, 31 Me. 345; *Abbott v. Abbott*, 51 Me. 584; *Worcester v. Lord*, 56 Me. 265,

to the fence, the possession is adverse.¹

96 Am. Dec. 456; *Dow v. McKenney*, 64 Me. 138; *Hitchings v. Morrison*, 72 Me. 331; *Ricker v. Hibbard*, 73 Me. 105; *Preble v. Maine Cent. R. Co.*, 85 Me. 260, 35 Am. St. Rep. 366.

Massachusetts.—*Burrell v. Burrell*, 11 Mass. 294; *Cleaveland v. Flagg*, 4 Cush. (Mass.) 76.

Missouri.—*St. Louis University v. McCune*, 28 Mo. 481; *Knowlton v. Smith*, 36 Mo. 507, 88 Am. Dec. 152; *Thomas v. Babb*, 45 Mo. 384; *Kincaid v. Dormey*, 47 Mo. 337; *Tamm v. Kellogg*, 49 Mo. 118; *Hamilton v. West*, 63 Mo. 93; *Walbrunn v. Ballen*, 68 Mo. 166; *Houx v. Batteen*, 68 Mo. 84; *Cole v. Parker*, 70 Mo. 379; *Acton v. Dooley*, 74 Mo. 63; *Huckshorn v. Hartwig*, 81 Mo. 648; *Schad v. Sharp*, 95 Mo. 573; *Crawford v. Ahrnes*, 103 Mo. 88; *Pharis v. Jones*, 122 Mo. 125; *Shotwell v. Gordon*, 121 Mo. 482; *Adkins v. Tomlinson*, 121 Mo. 487; *McWilliams v. Samuel*, 123 Mo. 659; *Skinker v. Haagsma*, 99 Mo. 208; *Krider v. Milner*, 99 Mo. 145, 17 Am. St. Rep. 549; *Kunze v. Evans*, 107 Mo. 487.

Nevada.—*McDonald v. Fox*, 20 Nev. 364.

New Hampshire.—*Enfield v. Day*, 7 N. H. 457, 28 Am. Dec. 360.

New York.—*Robinson v. Kime*, 70 N. Y. 147.

North Carolina.—*Green v. Harman*, 4 Dev. (N. Car.) 163.

Oregon.—*King v. Brigham*, 19 Oregon 560.

Pennsylvania.—*Comegys v. Carley*, 3 Watts (Pa.) 280, 27 Am. Dec. 356; *Bradford v. Guthrie*, 4 Brews. (Pa.) 351.

Tennessee.—*Kirkman v. Brown*, 93 Tenn. 476; *Gates v. Butler*, 3 Humph. (Tenn.) 447; *Erck v. Church*, 87 Tenn. 575.

One Claiming Title Only to a Specified Line, Capable of being Ascertained, cannot, by ignorantly having possession up to another line, acquire a title by disseisin to land lying between the two, which he does not intentionally claim. *Worcester v. Lord*, 56 Me. 274, 96 Am. Dec. 456; *Politt v. Bland* (Ky., 1893), 22 S. W. Rep. 842.

Where the Proprietors of a Township Surveyed through Mistake a portion of land without the limits of their grant, and conveyed the same, describing it as within their limits, a grantee entering and occupying such premises with a claim of ownership, and adversely to all others, will acquire a title by disseisin by lapse of time. The rule that occupation by mistake does not give right, is not applicable as against the grantee, who is not supposed to be familiar with the rights of his grantor, and who must be considered as intending to claim what he has purchased. *Otis v. Moulton*, 20 Me. 205.

Adjoining Owners, for Convenience in Making Fence, Depart from True Line.—Where adjoining owners, having a well defined and recognized straight line between their lands, built together a zigzag fence wherever they could build the cheapest and easiest, following rocks and ledges where they could do so, and not pretending to build on the true line, the possession to the fence was held not to

be available to either owner to gain title beyond the true line. *Morse v. Churchill*, 41 Vt. 649.

Intention to Remove Fence Back to Another Line.—Where an adjoining proprietor more than once said that he intended to move his fence back to another line, his possession was not adverse. *Crutchlow v. Beatty* (Ky., 1893), 23 S. W. Rep. 960.

A Temporary Fence, built merely as an enclosure until the true line can be ascertained, will not make the possession adverse. *Hockmoth v. Des Grand Champs*, 71 Mich. 520; *Bird v. Stark*, 66 Mich. 654.

Estoppel.—Where the fence on the old line has been always disputed and the possessor has twice insisted on a resurvey of the line, he is estopped from claiming beyond the true boundary. *Fairfield v. Barrette*, 73 Wis. 463.

Unintentional Encroachment of House.—Where the owner of a city lot undertook to erect a building upon his own ground, but by inadvertence and ignorance of the true line of his lot placed a portion of the wall four inches over the dividing line and upon the adjoining lot, but with no intention then or afterward to claim any portion of such adjoining lot as his own, and the adjoining lot-owner had no knowledge of such encroachment, the possession thus taken was held not to be adverse. *Winn v. Abeles*, 35 Kan. 85, 57 Am. Rep. 138.

Centre of Wall—Entry.—Where a stone wall separating the lands of adjoining-owners, A and B, was wholly upon the land of A, while B held possession of his land up to the wall, believing the centre of the wall to be the dividing line, but with no knowledge of a similar claim on the part of A, and no other possession of the ground covered by the wall, it was held that there was not sufficient adverse possession to vest in B a title to the centre of the wall. *Huntington v. Whaley*, 29 Conn. 391.

¹ *Alabama*.—*Hoffman v. White*, 90 Ala. 354; *Alexander v. Wheeler*, 69 Ala. 332.

Arkansas.—*Wilson v. Hunter*, 59 Ark. 626.

Connecticut.—*French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680.

Florida.—*Watrous v. Morrison*, 33 Fla. 261; *Seymour v. Creswell*, 18 Fla. 29.

Iowa.—*Doolittle v. Bailey*, 85 Iowa 398.

Kentucky.—*Hawkins v. Walker* (Ky., 1891), 15 S. W. Rep. 519; *Scheible v. Hart* (Ky., 1889), 12 S. W. Rep. 628.

Maine.—*Preble v. Maine Cent. R. Co.*, 85 Me. 260; *Hitchings v. Morrison*, 72 Me. 331; *Abbott v. Abbott*, 51 Me. 584.

Massachusetts.—*Beckman v. Davidson*, 162 Mass. 347; *Burrell v. Burrell*, 11 Mass. 294.

Michigan.—*Greene v. Anglemire*, 77 Mich. 168.

Minnesota.—*Seymour v. Carli*, 31 Minn. 81.

Missouri.—*Shotwell v. Gordon*, 121 Mo. 482; *Kincaid v. Dormey*, 51 Mo. 552; *Major v. Rice*, 57 Mo. 384; *West v. St. Louis, etc., R. Co.*, 59 Mo. 510; *Handlan v. McManus*, 100 Mo. 124; *Battner v. Baker*, 108 Mo. 311; *Finch v. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383; *Thomas v. Babb*, 45 Mo. 387.

Agreement upon Line.—If two coterminous proprietors agree upon a dividing line and follow up such agreement by the joint construction of a dividing fence, and afterwards occupy up to that fence, the possession is adverse.¹

Oregon.—*Ramsey v. Ogden*, 23 Oregon 347.

Pennsylvania.—*Davis v. Russell*, 142 Pa. St. 426; *McVey v. Durkin*, 26 W. N. C. (Pa.) 522.

Texas.—*Harn v. Smith*, 79 Tex. 310, 23 Am. St. Rep. 340.

Improving up to the Fence.—The location of a division fence, acquiesced in for twenty years and acted upon by improving up to the fence, has been held to become binding as a true line. *Dyer v. Eldridge*, 136 Ind. 654; *O'Donnell v. Penney*, 17 R. I. 164; *Dale v. Jackson* (Supreme Ct.), 8 N. Y. Supp. 715; *Smith v. Faulkner*, 48 Hun (N. Y.) 186.

Setting Back Fence for Convenience.—One having the legal title to a strip of land by adverse possession does not lose it by setting back his fence for his own convenience. *Jones v. Hughes* (Pa., 1889), 16 Atl. Rep. 849.

Presumption.—In the absence of evidence of intention to hold adversely, it will be presumed that the intention was to hold only to the true line. *Hamilton v. West*, 63 Mo. 93.

1. *United States.*—*Boyd v. Graves*, 4 Wheat. (U. S.) 513; *Brown v. Leete*, 6 Sawy. (U. S.) 332.

Alabama.—*Brown v. Cockerell*, 33 Ala. 38; *Alexander v. Wheeler*, 69 Ala. 332.

California.—*Grimm v. Curley*, 43 Cal. 251; *Irvine v. Adler*, 44 Cal. 559; *Helm v. Wilson*, 76 Cal. 476.

Georgia.—*Watt v. Ganahl*, 34 Ga. 290; *Howard v. Reedy*, 29 Ga. 152, 74 Am. Dec. 58; *Shiels v. Roberts*, 64 Ga. 370.

Illinois.—*Darst v. Enlow*, 116 Ill. 475; *Bitter v. Saathoff*, 98 Ill. 266; *Cutler v. Callison*, 72 Ill. 113; *Hubbard v. Stearns*, 86 Ill. 35; *Fisher v. Bennehoff*, 121 Ill. 426; *McNamara v. Seaton*, 82 Ill. 498; *Sheets v. Sweeney*, 136 Ill. 336.

Iowa.—*Tracy v. Newton*, 57 Iowa 210; *Heinrichs v. Terrell*, 65 Iowa 25; *Skinner v. Crawford*, 54 Iowa 119; *Hjatt v. Kirkpatrick*, 48 Iowa 73.

Kansas.—*Sheldon v. Atkinson*, 38 Kan. 14. **Kentucky.**—*Hammond v. Williams* (Ky., 1888), 9 S. W. Rep. 711.

Maine.—*Abbott v. Abbott*, 51 Me. 584; *Walker v. Simpson*, 80 Me. 143; *Faught v. Holway*, 50 Me. 24.

Massachusetts.—*Halloran v. Halloran*, 149 Mass. 298; *Burrell v. Burrell*, 11 Mass. 296; *Boston, etc., R. Co. v. Sparhawk*, 5 Met. (Mass.) 469.

Michigan.—*Bunce v. Bidwell*, 43 Mich. 542; *Bird v. Stark*, 66 Mich. 654; *White v. Hapeman*, 43 Mich. 267; *Jones v. Pashby*, 67 Mich. 459, 11 Am. St. Rep. 589.

Missouri.—*Knowlton v. Smith*, 36 Mo. 507, 88 Am. Dec. 152; *Walbrunn v. Ballen*, 68 Mo. 164; *Cole v. Parker*, 70 Mo. 372; *Hamilton v. West*, 63 Mo. 93; *Houx v. Batteen*, 68 Mo. 84; *Betts v. Brown*, 3 Mo. App. 20; *Tanner v. Kellogg*, 49 Mo. 118; *Irwin v. Woodmansee*, 104 Mo. 403; *Atchison v. Pease*, 96 Mo. 566.

Nebraska.—*Trussel v. Lewis*, 13 Neb. 415, 42 Am. Rep. 767.

New York.—*Adams v. Rockwell*, 16 Wend. (N. Y.) 285; *McCormick v. Barnum*, 10 Wend. (N. Y.) 105; *Dibble v. Rogers*, 13 Wend. (N. Y.) 536; *Becken v. Weeks* (Supreme Ct.), 15 N. Y. Supp. 585; *Eldridge v. Kenning* (Supreme Ct.), 12 N. Y. Supp. 693; *Rock v. Doerr* (Supreme Ct.), 15 N. Y. Supp. 14; *Sherman v. Kane*, 86 N. Y. 57; *Robinson v. Phillips*, 1 Thomp. & C. (N. Y.) 151, 56 N. Y. 634; *Ford v. Schlosser*, 13 Misc. Rep. (N. Y. C. Pl.) 205, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 249.

Ohio.—*Smith v. McKay*, 30 Ohio St. 409; *Bobo v. Richmond*, 25 Ohio St. 115; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122.

Pennsylvania.—*Grove v. McAlevy* (Pa., 1887), 8 Atl. Rep. 210; *Kuhns v. Fennell* (Pa., 1888), 15 Atl. Rep. 920; *Rider v. Maul*, 46 Pa. St. 376.

Tennessee.—*Mayse v. Lafferty*, 1 Head (Tenn.) 60.

Vermont.—*Hodges v. Eddy*, 38 Vt. 345; *Davis v. Judge*, 46 Vt. 655; *Spaulding v. Warren*, 25 Vt. 316.

Wisconsin.—*Donahue v. Thompson*, 60 Wis. 500; *Tobey v. Secor*, 60 Wis. 310; *Bader v. Zeise*, 44 Wis. 96; *Bartlett v. Secor*, 56 Wis. 520.

Where the Division Line between Two Adjoining Estates is Indefinite or Unascertained, the owners may effectually agree upon the true boundary, and the line thus ascertained will control their deeds. A jury may infer a practical location of a disputed boundary line by agreement, from long acquiescence less than the period necessary to constitute adverse possession, and from acts and declarations of the parties. *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226, and note. See *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533; *Baldwin v. Brown*, 16 N. Y. 363.

Where Owners of Adjoining Lots Open an Alley, lying one half on each lot, and build barns and fences thereon, and acquiesce in deeds describing the alley, etc., it constitutes an adverse possession under a claim of right, and by user for twenty years each acquires an easement in the premises of the other which neither can lawfully disturb, and an injunction forbidding the obstruction of such alley by one of the adjoining owners against the other will be granted. *Nicholls v. Wentworth*, 100 N. Y. 455.

Fence within the Line.—Adjoining owners orally agreed that one of them should keep up a division fence, but should keep it entirely within his own bounds. After twenty years the fence was moved to the boundary, and ejectment was brought for the strip of land cut off by its removal. It was held that the action would not lie. As the oral agreement was void and the owner might have withdrawn from it, the strip was never held adversely to the owner, whose title was recognized in the agreement and always

c. PERMISSIVE POSSESSION.—A mere permissive possession, or one consistent with the title of another, however long continued, can never ripen into a title by adverse possession.¹

afterward. *White v. Hapeman*, 43 Mich. 267, 38 Am. Rep. 178; *Hagey v. Detweiler*, 35 Pa. St. 409.

Evidence of Agreement.—In *Jones v. Smith*, 64 N. Y. 180, where it appeared that the adjoining owners for more than fifty years had occupied each on his own side up to an old fence, which fence had been put up and maintained as a division fence for more than twenty years by an agreement, each owner keeping up one half, it was held that this was sufficient evidence of a practical location and an acquiescence in the fence as a boundary line, and of a possession of more than twenty years in pursuance of such location, to require the submission of that question to the jury.

A License to Occupy the land in dispute is not equivalent to an agreement upon the boundary line. *Wright v. Lassiter*, 71 Tex. 640.

Estoppel.—An adjoining owner acquiescing for sixteen years in a boundary line is estopped from disputing it. *Burris v. Fitch*, 76 Cal. 395.

Mistake—No Intent to Claim.—But if by mistake adjoining owners agree upon a line with no intent to claim beyond the true line, they will not hold adversely to each other. *Houx v. Batteen*, 68 Mo. 84; *Majors v. Rice*, 57 Mo. 384; *Devyr v. Schaefer*, 55 N. Y. 446; *Irvine v. Adler*, 44 Cal. 559; *White v. Hapeman*, 43 Mich. 267, 38 Am. Rep. 178; *Gaude v. Williams*, 47 La. Ann. 1325; *Heinz v. Cramer*, 84 Iowa 497. And see *Bunce v. Bidwell*, 43 Mich. 542.

Where a line or corner is in fact certain, and an erroneous line or corner is by mistake made, the acts of the parties in making such mistake, and the fencing by both parties, in accordance with such mistake, do not operate in the nature of an estoppel *in pais* to forfeit the estate. What subsequent acquiescence after the mistake is discovered, or what gross neglect afterward to assert a right to correct it, amounting to fraud, will conclude the owner, is another question. *McAfferty v. Conover*, 7 Ohio St. 99, 70 Am. Dec. 57; *Bobo v. Richmond*, 25 Ohio St. 115.

Question for Jury.—The question of the nature of the possession, and of the claims of the respective parties, is one of fact for the jury exclusively. *Bunce v. Bidwell*, 43 Mich. 542.

1. **Rule as to Permissive Possession—England.**—*Cholmondeley v. Clinton*, 2 Jac. & W. 1. *United States.*—*Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Lowndes v. Huntington*, 153 U. S. 1; *Larwell v. Stevens*, 2 McCrary (U. S.) 311.

Alabama.—*Alexander v. Wheeler*, 69 Ala. 332; *Collins v. Johnson*, 57 Ala. 304; *Trufant v. White*, 99 Ala. 526; *East Tennessee, etc., R. Co. v. Davis*, 91 Ala. 615, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 251.

Arkansas.—*Pulaski County v. State*, 42 Ark. 118; *Ellsworth v. Hale*, 33 Ark. 633; *Ringo v. Woodruff*, 43 Ark. 485.

California.—*Smith v. Smith*, 80 Cal. 323.

Delaware.—*Cooper v. McBride*, 4 Houst. (Del.) 461.

Georgia.—*Roe v. Doc*, 30 Ga. 971. Compare *Ford v. Holmes*, 61 Ga. 419.

Illinois.—*Smith v. Stevens*, 82 Ill. 554; *Shaw v. Schoonover*, 130 Ill. 448.

Indiana.—*Law v. Smith*, 4 Ind. 56.

Iowa.—*Davenport v. Sebring*, 52 Iowa 365; *Grube v. Wells*, 34 Iowa 148; *Colvin v. McCune*, 39 Iowa 502.

Maryland.—*Dean v. Brown*, 23 Md. 11, 87 Am. Dec. 555.

Massachusetts.—*Morrill v. Titcomb*, 8 Allen (Mass.) 100; *Sargent v. Ballard*, 9 Pick. (Mass.) 251.

Michigan.—*Perkins v. Nugent*, 45 Mich. 156.

Mississippi.—*Davis v. Bowmar*, 55 Miss. 671; *Rothschild v. Hatch*, 54 Miss. 554; *Adams v. Guice*, 30 Miss. 307; *Dean v. Tucker*, 58 Miss. 487; *Green v. Mizelle*, 54 Miss. 225.

Missouri.—*Pease v. Lawson*, 33 Mo. 35; *Meier v. Meier*, 105 Mo. 411.

Montana.—*Alderson v. Marshall*, 7 Mont. 288.

Nebraska.—*Smith v. Hitchcock*, 38 Neb. 104; *Roggenkamp v. Converse*, 15 Neb. 105; *Smith v. Mount*, 38 Neb. 111.

New York.—*Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Babcock v. Utter*, 1 Abb. App. Dec. (N. Y.) 27, 1 Keyes (N. Y.) 397; *Borden v. South Side R. Co.*, 67 N. Y. 588, 5 Hun (N. Y.) 184; *Colvin v. Burnet*, 17 Wend. (N. Y.) 564; *Coleman v. Pickett*, 82 Hun (N. Y.) 287; *Sherman v. Kane*, 86 N. Y. 57; *Kathan v. Rockwell*, 16 Hun (N. Y.) 90; *Burbank v. Fay*, 65 N. Y. 57.

North Carolina.—*Felton v. Simpson*, 11 Ired. (N. Car.) 84.

Oregon.—*Curtis v. La Grande Hydraulic Water Co.*, 20 Oregon 34; *Abraham v. Owens*, 20 Oregon 511; *Anderson v. McCormick*, 18 Oregon 301.

Pennsylvania.—*Main Tp. School Dist. v. Reichard*, 142 Pa. St. 226; *Pennsylvania R. Co. v. Freeport*, 138 Pa. St. 91.

South Carolina.—*Wingo v. Caldwell*, 35 S. Car. 609.

See also *Heiskell v. Cobb*, 11 Heisk. (Tenn.) 638; *Townsend v. Boyd*, 13 Ky. L. Rep. 755 (Ky., 1892), 18 S. W. Rep. 365; *Chance v. Branch*, 58 Tex. 490; *Evans v. Berlocher*, 83 Tex. 612; *Murphy v. Reynaud*, 2 Tex. Civ. App. 470; *Mitchell v. Walker*, 2 Aik. (Vt.) 266, 16 Am. Dec. 710; *Plimpton v. Converse*, 44 Vt. 158; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 587; *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137; *Thomas v. Jones*, 28 Gratt. (Va.) 383; *Hudson v. Putney*, 14 W. Va. 561; *Core v. Faupel*, 24 W. Va. 238; *Allen v. Allen*, 58 Wis. 202; *Roebke v. Andrews*, 26 Wis. 311; *Woodward v. McReynolds*, 2 Pin. (Wis.) 268; *Bartlett v. Secor*, 56 Wis. 520; *Nau v. Brunette*, 79 Wis. 661.

"It would shock that sense of right which must be felt equally by legislators and by

2. Essential Elements—*a. IN GENERAL.*—There are five essential elements necessary to constitute an effective adverse possession: first, the possession must be hostile and under a claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and fifth, it must be continuous. If any of these constituents is wanting, the possession will not effect a bar of the legal title.¹

judges, if a possession which was permissive and entirely consistent with the title of another, should silently bar that title." Marshall, C.J., in *Kirk v. Smith*, 9 Wheat. (U. S.) 241.

If the original entry be not with the intention of claiming the premises, and the possession is continued by the permission of the owner and with the understanding that he is at all times to be regarded as the proprietor, notwithstanding such possession, it is not adverse, and can never ripen into title. *Chance v. Branch*, 58 Tex. 493.

And the same is true of the possession of one claiming under such a party. *Butler v. Bertrand*, 97 Mich. 59.

In *Murphy v. Reynaud*, 2 Tex. Civ. App. 470, it is said: "Consent of the owner of land to its occupancy by another does not of itself prevent such occupancy from being adverse, if the other essentials of an adverse holding appear. It is the absence of claim or recognition of the true owner on the part of the possessor which prevents an occupancy which would otherwise be adverse from assuming that character. Such recognition does not necessarily result from an acquiescence in the use by the owner, but it is to be inferred from the conduct of the possessor." See also *Cooper v. McBride*, 4 Houst. (Del.) 461.

Instances of Permissive Possession.—When there is a gradual subsidence of the water in a mill-pond because of the want of repair of the dam, and the owner of a pasture contiguous to the pond turns his cattle in, and they wander from the pasture over the bottom of the old pond, such possession of the land made dry by the water receding as the dam lowered would indicate that it was not adverse, but permissive. *Eddy v. St. Mars*, 53 Vt. 462, 38 Am. Rep. 695.

Where one who is in possession of land is present at its sale by another, and makes no claim to it, such possession continued after the sale will be deemed to be subordinate and friendly to the purchaser. *Wikieron v. Thompson*, 82 Mo. 317.

Where adjoining land-owners cultivate and occupy a part of the right of way granted by Congress as an easement to a railroad company, such possession must be regarded as permissive only, and not hostile or adverse so as to confer title. *Union Pac. R. Co. v. Kindred*, 43 Kan. 134.

A licensee's possession is permissive. *Dean v. Tucker*, 58 Miss. 487; *Devyr v. Schaefer*, 55 N. Y. 446. And the possession of a transferee of a licensee is not adverse unless so declared and brought to the knowledge of the licensor. *Cameron v. Chicago, etc., R. Co.* (Minn., 1895), 61 N. W. Rep. 814.

The possession of a care-taker of the land

is permissive. *Heward v. O'Donohoe*, 19 Can. Supreme Ct. 341.

Possession as to Strangers.—But permissive possession, with parol executory conditions attached, may be adverse as against third persons or strangers. *Dean v. Goddard*, 55 Minn. 290.

Permission is Presumed to Continue after having once been given. *Hall v. Stevens*, 9 Met. (Mass.) 418.

1. *United States.*—*Sharon v. Tucker*, 144 U. S. 533; *Ward v. Cochran*, 150 U. S. 606.

Alabama.—*Collins v. Johnson*, 57 Ala. 304; *Potts v. Coleman*, 67 Ala. 221; *Alexander v. Wheeler*, 69 Ala. 340; *Murray v. Hoyle*, 97 Ala. 588.

Arkansas.—*Mooney v. Cooledge*, 30 Ark. 640; *Ringo v. Woodruff*, 43 Ark. 469.

California.—*Thompson v. Felton*, 54 Cal. 547; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Oneto v. Restano*, 78 Cal. 374.

Delaware.—*Inskeep v. Shields*, 4 Harr. (Del.) 345; *Bright v. Stephens*, 1 Houst. (Del.) 31; *Bartholomew v. Edwards*, 1 Houst. (Del.) 17.

Illinois.—*Noyes v. Heffernan*, 153 Ill. 339; *Flaherty v. McCormick*, 113 Ill. 538; *Timmons v. Kidwell*, 138 Ill. 13, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 228.

Indiana.—*Silver Creek Cement Corp. v. Union Lime, etc., Co.*, 138 Ind. 297.

Iowa.—*Elliot v. Lane*, 82 Iowa 484; *Hempsted v. Huffman*, 84 Iowa 398.

Kansas.—*Gildehaus v. Whiting*, 39 Kan. 706.

Kentucky.—*Haffendorfer v. Gault*, 84 Ky. 124.

Maine.—*School Dist. No. 4 v. Benson*, 31 Me. 381, 52 Am. Dec. 618.

Maryland.—*Beatty v. Mason*, 30 Md. 409.

Massachusetts.—*Cook v. Babcock*, 11 Cush. (Mass.) 209; *Middlesex Co. v. Lane*, 149 Mass. 101.

Michigan.—*Yelverton v. Steele*, 40 Mich. 538; *Sparrow v. Hovey*, 44 Mich. 63; *Paldi v. Paldi*, 95 Mich. 410.

Minnesota.—*Washburn v. Cutter*, 17 Minn. 361; *Sherin v. Brackett*, 36 Minn. 152.

Mississippi.—*Dixon v. Cook*, 47 Miss. 227; *Davis v. Bowmar*, 55 Miss. 671.

Missouri.—*Bowman v. Lee*, 48 Mo. 335.

Nebraska.—*Horbach v. Miller*, 4 Neb. 31; *Gatling v. Lane*, 17 Neb. 82; *Parker v. Starr*, 21 Neb. 680; *Colvin v. Republican Valley Land Assoc.*, 23 Neb. 75, 8 Am. St. Rep. 114; *Ballard v. Hansen*, 33 Neb. 861; *Lantry v. Parker*, 37 Neb. 353; *Omaha, etc., Land, etc., Co. v. Parker*, 33 Neb. 775, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 254.

New Jersey.—*Foulke v. Bond*, 41 N. J. L. 545.

New York.—*Burhans v. Van Zandt*, 7 N. Y. 527; *Robinson v. Kime*, 70 N. Y. 152; *Jackson*

b. POSSESSION MUST BE HOSTILE AND UNDER CLAIM OF RIGHT—(1) General Principles.—To be effective, adverse possession must be hostile to the title of the true owner, and under a claim of right.¹ There must be no recog-

v. Sharpe, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; *Sturges v. Parkhurst*, 50 N. Y. Super. Ct. 306.

Ohio.—*Dietrick v. Noel*, 42 Ohio St. 18, 51 Am. Rep. 788.

Pennsylvania.—*Johnston v. Irwin*, 3 S. & R. (Pa.) 291; *Hawk v. Senseman*, 6 S. & R. (Pa.) 21; *Overfield v. Christie*, 7 S. & R. (Pa.) 173; *Messer v. Rhodes*, 3 Brews. (Pa.) 180; *Bradford v. Guthrie*, 4 Brews. (Pa.) 351; *Hood v. Hood*, 2 Grant's Cas. (Pa.) 229; *Mercer v. Watson*, 1 Watts (Pa.) 330; *Sheaffer v. Eakman*, 56 Pa. St. 144; *Moreland v. Moreland*, 121 Pa. St. 573.

Tennessee.—*Porter v. Cocke*, Peck (Tenn.) 42.

Texas.—*Bracken v. Jones*, 63 Tex. 184; *Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71; *Mhoon v. Cain*, 77 Tex. 316; *Parker v. Covey* (Tex. Civ. App., 1894), 28 S. W. Rep. 64.

Vermont.—*Partch v. Spooner*, 57 Vt. 583.

Virginia.—*Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Creekmur v. Creekmur*, 75 Va. 430.

West Virginia.—*Core v. Faupel*, 24 W. Va. 243; *Oney v. Clendenin*, 28 W. Va. 34.

And see the succeeding divisions of this title.

1. *United States*.—*Ward v. Cochran*, 150 U. S. 597.

Alabama.—*Herbert v. Hanrick*, 16 Ala. 581; *Potts v. Coleman*, 67 Ala. 221; *Murray v. Hoyle*, 97 Ala. 588.

Arkansas.—*Ringo v. Woodruff*, 43 Ark. 469.

California.—*Dietz v. Mission Transfer Co.* (Cal., 1890), 25 Pac. Rep. 423; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Rix v. Horstmann*, 93 Cal. 502.

Connecticut.—*Russell v. Davis*, 38 Conn. 562.

Delaware.—*O'Daniel v. Baker's Union*, 4 Houst. (Del.) 488.

Georgia.—*Carrol v. Gillion*, 33 Ga. 539.

Illinois.—*Jackson v. Berner*, 48 Ill. 203.

Indiana.—*Buckley v. Taggart*, 62 Ind. 236; *Wiggins v. Holley*, 11 Ind. 2; *Peck v. Louisville, etc., R. Co.*, 101 Ind. 366; *McCray v. Humes*, 116 Ind. 103.

Iowa.—*Delong v. Mulcher*, 47 Iowa 445; *Grube v. Wells*, 34 Iowa 150; *Smith v. Rochel*, 85 Iowa 427.

Kentucky.—*M'Gee v. Morgan*, 1 A. K. Marsh. (Ky.) 62.

Louisiana.—*Clemens v. Meyer*, 44 La. Ann. 390; *Simon v. Richard*, 42 La. Ann. 842.

Maine.—*Putnam Free School v. Fisher*, 38 Me. 324.

Maryland.—*Beatty v. Mason*, 30 Md. 409.

Massachusetts.—*Newhall v. Wheeler*, 7 Mass. 189; *Coburn v. Hollis*, 3 Met. (Mass.) 125; *Slater v. Rawson*, 6 Met. (Mass.) 439; *Cook v. Babcock*, 11 Cush. (Mass.) 209.

Michigan.—*Yelverton v. Steele*, 40 Mich. 538; *Sparrow v. Hovey*, 44 Mich. 63; *Paldi v. Paldi*, 95 Mich. 410; *Sanscrainte v. Torongo*, 87 Mich. 69.

Minnesota.—*Washburn v. Cutter*, 17 Minn. 361.

Mississippi.—*Magee v. Magee*, 37 Miss. 152; *Gordon v. Sizer*, 39 Miss. 805.

Missouri.—*Wall v. Shindler*, 47 Mo. 282; *Burke v. Adams*, 80 Mo. 504; *Musick v. Barney*, 49 Mo. 458; *Martin v. Bousack*, 61 Mo. 556; *Wilkerson v. Eilers*, 114 Mo. 245; *Crockett v. Morrison*, 11 Mo. 3.

Nebraska.—*Ballard v. Hansen*, 33 Neb. 861.

New Hampshire.—*Lund v. Parker*, 3 N. H. 49.

New York.—*Smith v. Burtis*, 6 Johns. (N. Y.) 218, 5 Am. Dec. 218; *New York v. Mott* (Supreme Ct.), 15 N. Y. Supp. 22; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; *DeForest v. Walters* (Supreme Ct.), 28 N. Y. Supp. 831; *In re New York*, 18 N. Y. Supp. 82; *Jackson v. Ellis*, 13 Johns. (N. Y.) 118; *Smith v. Burtis*, 9 Johns. (N. Y.) 174; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525; *Jackson v. Camp*, 1 Cow. (N. Y.) 605; *Jackson v. Brink*, 5 Cow. (N. Y.) 483; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Miner v. New York*, 37 N. Y. Super. Ct. 171; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; *Jackson v. Thomas*, 16 Johns. (N. Y.) 293; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Sturges v. Parkhurst*, 50 N. Y. Super. Ct. 306; *Casey v. Dunn*, 57 N. Y. Super. Ct. 381; *Doherty v. Matsell*, 119 N. Y. 646, 56 N. Y. Super. Ct. 76.

Pennsylvania.—*Jones v. Porter*, 3 P. & W. (Pa.) 132; *Hawk v. Senseman*, 6 S. & R. (Pa.) 21; *Rung v. Shoneberger*, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

Tennessee.—*Snoddy v. Kreutch*, 3 Head (Tenn.) 304; *Kirkman v. Brown*, 93 Tenn. 476.

Texas.—*Satterwhite v. Rosser*, 61 Tex. 166; *Bracken v. Jones*, 63 Tex. 184; *Oury v. Saunders*, 77 Tex. 278; *Converse v. Ringer*, 6 Tex. Civ. App. 51.

Vermont.—*Hodges v. Eddy*, 38 Vt. 344; *Morse v. Churchill*, 41 Vt. 649; *Soule v. Barlow*, 49 Vt. 329.

Virginia.—*Clarke v. McClure*, 10 Gratt. (Va.) 305; *Whitlock v. Johnson*, 87 Va. 323.

West Virginia.—*Hudson v. Putney*, 14 W. Va. 561.

Wisconsin.—*Dhein v. Benschner*, 83 Wis. 316; *Pepper v. O'Dowd*, 39 Wis. 548; *Furlong v. Garrett*, 44 Wis. 111; *Childs v. Nelson*, 69 Wis. 125.

Constructive Possession.—One holding the legal title to lands, although not actually occupying, will be considered as constructively in possession thereof, unless they are in the actual hostile occupancy of another under a claim of title. *Bliss v. Johnson*, 94 N. Y. 235.

The Very Essence of an Adverse Possession is, that the holder of it claims the right to his possession, not under, but in opposition to, the title to which his possession is alleged to be adverse. *Dietrick v. Noel*, 42 Ohio St. 21,

nition of title in another,¹ and any evidence of such recognition is always

51 Am. Rep. 788; *Farish v. Coon*, 40 Cal. 33; *Smith v. Hitchcock*, 38 Neb. 104; *Smith v. Mount*, 38 Neb. 111.

Must be Hostile to All the World.—The holding must be against the claim of all other persons. *Schleicher v. Gatlin*, 85 Tex. 270. But see *Mather v. Walsh*, 107 Mo. 121; *Skipwith v. Martin*, 50 Ark. 141.

Where the possession is not under a claim of title, no right can be maintained under it. *McCarty v. Rochel*, 85 Iowa 427; *Jones v. Hockman*, 12 Iowa 101; *Bell v. Fry*, 5 Dana (Ky.) 344; *Church v. Burghardt*, 8 Pick. (Mass.) 327; *Straw v. Jones*, 9 N. H. 400; *Rix v. Horstmann*, 93 Cal. 502.

It is not the possession alone, but the fact that it is accompanied by the claim to the fee, which gives it effect. *Jackson v. Porter*, 1 Paine (U. S.) 457; *Jones v. Hockman*, 12 Iowa 101; *McDonald v. Fox*, 20 Nev. 364.

The claim must be asserted as a matter of right, so as to be notice to the true owner. *Glencoe v. Wadsworth* (Minn., 1892), 51 N. W. Rep. 377; *Sharon v. Tucker*, 144 U. S. 533.

Hence an occupant of land, who enters upon it under no claim of right, and ignorant of the true owner, cannot avail himself of the statute of limitations during any portion of the period in which he is seeking the owner with a view of purchasing title. *Mhoon v. Cain*, 77 Tex. 316.

The possession of a mere trespasser, entering and holding without claim of right, is not adverse to the rightful owner, and does not ripen into a title by lapse of time, nor invalidate a conveyance by the owner to another person. *Bernstein v. Humes*, 78 Ala. 134; *Clarke v. Courtney*, 5 Pet. (U. S.) 320.

A possession is not shown to be adverse if it does not clearly appear under what claim, whether of title or otherwise, the party was in possession. *McCabe v. Kenny*, 52 Hun (N. Y.) 514.

To constitute the foundation of an adverse possession, the entry must be accompanied by a claim of title. It does not matter how defective the claim or color may be, if that is the right under which the disseisin is made, and if the possession is hostile to the real owner. *Gladney v. Barton*, 51 Miss. 220; *Ewing v. Burnet*, 11 Pet. (U. S.) 51; *Green v. Neal*, 6 Pet. (U. S.) 291.

Mere naked possession, no matter how long, without a claim of right, never ripens into a good title, but is regarded as being held for the true owners. *Creekmur v. Creekmur*, 75 Va. 130; *Maple v. Stevenson*, 122 Ind. 368.

Taking possession to hold until the land is put upon the market is not adverse. *Warren v. Frederichs*, 83 Tex. 380. Or so long as the party can do so without the payment of rent. *Smeberg v. Cunningham*, 96 Mich. 378.

Enlargement of Claim.—The claim of title with which entry is made cannot be afterwards enlarged, except by acts equivalent to a new entry and new claim of adverse possession. *Furlong v. Garrett*, 44 Wis. 111; *Pepper v. O'Dowd*, 39 Wis. 538. But if the

acts of the party are sufficient, he may, although entering in privity with the true owner, dis sever such relation, and claim by adverse title without first surrendering the possession. *Creekmur v. Creekmur*, 75 Va. 430.

Possession under Parol Gift.—Possession taken under a parol gift is adverse in the donee against the donor, and if continued for the necessary period, perfects the title of the former as against the latter. The donor in such case not only knows that the possession is adverse, but intends it to be so; and there is no occasion for any notoriety. *Clark v. Gilbert*, 39 Conn. 94; *Lee v. Thompson*, 99 Ala. 95, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 280.

Purchase at Sheriff's Sale.—The possession of a purchaser at a sheriff's sale claiming under his deed, which purports to convey the interest of the judgment debtor, is only adverse as to the interest conveyed, and will not bar the wife's dower. *Cowan v. Lindsay*, 30 Wis. 586.

Verbal Assertion of Claim.—Verbal statements as to how one claims are not essential when all his acts are such as to indicate ownership. *Kockemann v. Bickel*, 92 Cal. 665; *Barnes v. Light*, 116 N. Y. 34; *Sherry v. Frecking*, 4 Duer (N. Y.) 452; *Faloon v. Simshauser*, 130 Ill. 649; *James v. Indianapolis, etc., R. Co.*, 91 Ill. 554; *Illinois Cent. R. Co. v. Houghton*, 126 Ill. 233, 9 Am. St. Rep. 581; *Magee v. Magee*, 37 Miss. 138; *Kohlheim v. Harrison*, 34 Miss. 457.

As against a Stranger, mere possession is sufficient. *Fugate v. Pierce*, 49 Mo. 441.

1. Must be No Recognition of Title in Another.—*Tomlinson v. Lynch*, 32 Mo. 160; *Roggenkamp v. Converse*, 15 Neb. 105; *Mhoon v. Cain*, 77 Tex. 316; *Smith v. Lee*, 82 Tex. 124.

So long as the possession is consistent with or in submission to the title of the real owner, it is not adverse. *Morse v. Seibold*, 147 Ill. 318, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 225.

Attempt to Condemn the Land.—A railroad company's possession is not adverse where, both prior and subsequent to its entry, it attempted to condemn the land, such efforts being a recognition of the owner's title. *Hull v. Chicago, etc., R. Co.*, 21 Neb. 371, 24 Neb. 740; *Nebraska R. Co. v. Culver*, 35 Neb. 143.

Accepting a Lease from Another is evidence tending to show that the claim is not adverse, *Baldwin v. Temple*, 101 Cal. 396; or writing to his agent offering to accept a lease, *Horton v. Davidson*, 135 Pa. St. 186.

Recognition by Fraud or under Mistake of One's Rights.—But a party in possession of lands, recognizing the title of the claimant and agreeing to purchase, may subsequently deny such title, set up title in himself, and show that his acknowledgment was produced by imposition or made under a misapprehension of his rights. *Jackson v. Spear*, 7 Wend. (N. Y.) 401.

Admission that Possession is Not Adverse to Certain Person.—And an acknowledgment that possession is not held adversely to one per-

admissible to show the real character of the possession.¹

Hostility.—The possession must be hostile in its inception and continue hostile.²

Where Originally Subordinate.—If originally held and acquired in subordination to the title of the true owner, there must be, in order to constitute the possession adverse, a disclaimer of the title of him from whom the possession was acquired, and actual hostile possession of which he has notice, or which is so open and notorious as to raise the presumption of notice.³

son does not preclude the claim of adverse possession as to all others. *Portis v. Hill*, 14 Tex. 69, 65 Am. Dec. 99. And see *Northwestern Pac. R. Co. v. Kranich*, 52 Fed. Rep. 911.

Acceptance of a Deed is not such a recognition of the title as to estop the vendee from setting up a previous adverse possession to that title. *Blair v. Smith*, 16 Mo. 273.

Entertaining Doubts as to Title.—In *Hoffman v. White*, 90 Ala. 354, it is held that the possession of one who erects a fence intending to place it on the true line, and, honestly believing that he has done so, holds up to it under a claim of right, is adverse; and if the other essentials exist, will vest in him a perfect title, notwithstanding that before the expiration of the statutory period he entertains doubts as to his title, or a belief that the strip next the fence is not his.

Recognition of Superior Title after Statute has Run.—In *Trufant v. White*, 99 Ala. 526, it was held that if, after adverse possession has matured into a title, the holder thereof admits that his possession is in recognition of a paramount title, and after the admission he continues in possession permissively under this confessed superior title for ten years, the title to the land thereby divests out of him and reverts in the admitted owner.

Unseated Lands.—Where, in *Pennsylvania*, one entered on unseated land with the intention "to leave when the real owner came, but not until then," the owner being unknown, and continued in possession for twenty-one years, it was held that he acquired a perfect title against the former owner, which was not affected by his endeavoring to find the real owner and purchase the title, or by his declaration to strangers of his want of title, and his desire and intention to buy the land or be paid for his improvements when the real owner appeared. *Patterson v. Reigle*, 4 Pa. St. 201, 45 Am. Dec. 684.

1. **Declarations.**—*Warren v. Frederichs*, 83 Tex. 383. And see *Colvin v. Burnet*, 17 Wend. (N. Y.) 564; and *infra*, this title, *Evidence*.

Declarations of the party in possession are always admissible to show the extent and nature of the interest claimed. *Jackson v. Porter*, 1 Paine (U. S.) 457; *Dothard v. Denison*, 72 Ala. 541; *Calhoun v. Cook*, 9 Pa. St. 226; *Whiting v. Taylor*, 8 Dana (Ky.) 403; *Human v. Pettett*, 5 B. & Ald. 223, 7 E. C. L. 75. See *Carrol v. Gillion*, 33 Ga. 539; *Hall v. Mathias*, 4 W. & S. (Pa.) 331.

Such declarations are admissible against him, and all persons claiming under him. *Jackson v. Bard*, 4 Johns. (N. Y.) 230. But see *Jackson v. Miller*, 6 Cow. (N. Y.) 756.

The character of the possession may be

shown by parol. *Blaisdell v. Martin*, 9 N. H. 253.

Evidence that the defendant, during the period of the running of the statute of limitations, offered to pay the adverse claimant for the land, tends to disprove the defense, and an instruction which in effect withdraws such evidence from the consideration of the jury is erroneous. *Liggett v. Morgan*, 98 Mo. 39.

See *infra*, this title, *Evidence*; and the title **ADMISSIONS**.

2. *Alabama.*—*Lucy v. Tennessee, etc.*, R. Co., 92 Ala. 246.

California.—*Thompson v. Felton*, 54 Cal. 547.

Illinois.—*Jackson v. Berner*, 48 Ill. 203; *Morse v. Seibold*, 147 Ill. 318, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 225; *Noyes v. Heffernan*, 153 Ill. 339; *Turney v. Chamberlain*, 15 Ill. 273.

Kansas.—*Gildehaus v. Whiting*, 39 Kan. 711; *Dewey v. McLain*, 7 Kan. 126, 12 Am. Rep. 418.

Kentucky.—*M'Gee v. Morgan*, 1 A. K. Marsh. (Ky.) 62.

Michigan.—*Sparrow v. Hovey*, 44 Mich. 63. Compare *Michigan Land, etc., Co. v. Thoney*, 89 Mich. 226.

Minnesota.—*St. Paul, etc., R. Co. v. Hinckley*, 53 Minn. 398.

Missouri.—*Moore v. Harris*, 91 Mo. 616; *Nave v. Smith*, 95 Mo. 596, 6 Am. St. Rep. 79; *Mabary v. Dollarhide*, 98 Mo. 198, 14 Am. St. Rep. 639; *Smoot v. Wathen*, 8 Mo. 522; *Hamilton v. Boggess*, 63 Mo. 233.

New York.—*Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Miller v. Platt*, 5 Duer (N. Y.) 272; *Jackson v. Brink*, 5 Cow. (N. Y.) 483. And see *Sharpe v. Kelley*, 5 Den. (N. Y.) 431.

Pennsylvania.—*Jones v. Porter*, 3 P. & W. (Pa.) 132.

The word "hostile" does not imply ill-will, but merely a holding as owner and against all other claimants. *Ballard v. Hansen*, 33 Neb. 861.

Acts of Exclusive Ownership and Control are proof of the hostility of the claim. *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455.

Government Title.—Possession held in subordination to the title of the United States may be adverse as to another claimant. *Francœur v. Newhouse*, 14 Sawy. (U. S.) 601; *Hayes v. Martin*, 45 Cal. 559; *McManus v. O'Sullivan*, 48 Cal. 7.

Possession Necessary to Easement.—A possession necessary to the enjoyment of an easement is not hostile. *Pinkum v. Eau Claire* (Wis., 1892), 51 N. W. Rep. 550.

3. **When Possession Originally in Recognition of True Title.**—*United States.*—*Heermans v.*

(2) *Executory Contracts of Purchase*—Before Payment of Purchase Money.—The possession of lands under an executory contract of purchase is not adverse to the vendor so long as the purchase money is not paid, or until by the terms of the agreement the vendee is entitled to demand a conveyance of the legal estate.¹

Schmaltz, 10 Biss. (U. S.) 335; Zeller v. Eckert, 4 How. (U. S.) 289; McClaskey v. Barr, 42 Fed. Rep. 609.

Alabama.—Shelton v. Doe, 6 Ala. 230; Lucas v. Daniels, 34 Ala. 188; Collins v. Johnson, 57 Ala. 304; Alexander v. Wheeler, 69 Ala. 332; Dothard v. Denson, 72 Ala. 545; Trufant v. White, 99 Ala. 526; Ponder v. Cheaves (Ala., 1894), 16 So. Rep. 145.

Arkansas.—Coldcleugh v. Johnson, 34 Ark. 312.

California.—Millett v. Lagomarsino (Cal., 1894), 38 Pac. Rep. 308.

Georgia.—Williams v. Cash, 27 Ga. 507, 73 Am. Dec. 739.

Illinois.—Rigg v. Cook, 9 Ill. 336, 46 Am. Dec. 462.

Kentucky.—Ray v. Barker, 1 B. Mon. (Ky.) 364.

Maine.—Millay v. Millay, 18 Me. 387; Lamb v. Foss, 21 Me. 240; Moore v. Moore, 21 Me. 350.

Massachusetts.—Hall v. Stevens, 9 Met. (Mass.) 418.

Missouri.—Hamilton v. Boggess, 63 Mo. 233; Budd v. Collins, 69 Mo. 129; Fulkerson v. Brownlee, 69 Mo. 371; Estes v. Long, 71 Mo. 609; Gordon v. Eans, 97 Mo. 587; Spencer v. O'Neill, 100 Mo. 49; Comstock v. Eastwood, 108 Mo. 48; Meier v. Meier, 105 Mo. 411.

New Jersey.—Townsend v. Reeves, 44 N. J. L. 525.

New York.—Jackson v. Denison, 4 Wend. (N. Y.) 558.

Pennsylvania.—Read v. Thompson, 5 Pa. St. 327; Dikeman v. Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Martin v. Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Cadwalader v. App, 81 Pa. St. 194; McMasters v. Bell, 2 P. & W. (Pa.) 181; Hood v. Hood, 2 Grant's Cas. (Pa.) 229.

South Carolina.—Markley v. Amos, 2 Bailey (S. Car.) 603; Moore v. Johnston, 2 Spears (S. Car.) 288.

West Virginia.—Hudson v. Putney, 14 W. Va. 561.

Wisconsin.—Quinn v. Quinn, 27 Wis. 168.

1. *United States*.—Heermans v. Schmaltz, 7 Fed. Rep. 566, 10 Biss. (U. S.) 323; Graydon v. Hurd, 55 Fed. Rep. 724.

Alabama.—Walker v. Crawford, 70 Ala. 567; East Tennessee, etc., R. Co. v. Davis, 91 Ala. 615, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 251; Potts v. Coleman, 67 Ala. 221; Beard v. Ryan, 78 Ala. 37; Tayloe v. Dugger, 66 Ala. 445; Miller v. State, 38 Ala. 600; Ormond v. Martin, 37 Ala. 598; McQueen v. Ivey, 36 Ala. 308; Sellers v. Hayes, 17 Ala. 749.

California.—Farish v. Coon, 40 Cal. 33; Kerns v. Dean, 77 Cal. 555.

Connecticut.—Catlin v. Decker, 38 Conn. 262.

Delaware.—Lynch v. Cannon, 7 Houst. (Del.) 386. Compare Doe v. Jefferson, 5 Houst. (Del.) 477.

Florida.—Spratt v. Livingston, 32 Fla. 507; Gamble v. Hamilton, 31 Fla. 401.

Georgia.—Stamper v. Griffin, 12 Ga. 457; Williams v. Cash, 27 Ga. 507, 73 Am. Dec. 739; Hawkins v. Dearing, 93 Ga. 108.

Illinois.—Dunlap v. Daugherty, 20 Ill. 397; Timmons v. Kidwell, 138 Ill. 13, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 228; Rigor v. Frye, 62 Ill. 507.

Indiana.—Neal v. Pressell, 4 Ind. 594; Rucker v. Steelman, 97 Ind. 222; Clouse v. Elliott, 71 Ind. 302; Cole v. Wright, 70 Ind. 179.

Kentucky.—Turner v. Thomas, 13 Bush (Ky.) 518; Higginbotham v. Fishback, 1 A. K. Marsh. (Ky.) 506; Gossom v. Donaldson, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723.

Louisiana.—Clark v. Comford, 45 La. Ann. 502.

Massachusetts.—Knox v. Hook, 12 Mass. 329; Brown v. King, 5 Met. (Mass.) 173.

Mississippi.—Adams v. Guice, 30 Miss. 397; Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169; Moring v. Ables, 62 Miss. 263, 52 Am. Rep. 186; Benson v. Stewart, 30 Miss. 49; McClanahan v. Barrow, 27 Miss. 664.

Missouri.—Adair v. Adair, 78 Mo. 630; Adams v. Cowherd, 30 Mo. 458; Strickland v. Summerville, 55 Mo. 165; Estes v. Long, 71 Mo. 605; Pratt v. Canfield, 67 Mo. 50; Cole v. Roe, 39 Mo. 411; Hannibal, etc., R. Co. v. Miller, 115 Mo. 158.

New Jersey.—Van Blarcom v. Kip, 26 N. J. L. 351.

New York.—Griswold v. Little, 13 Misc. Rep. (N. Y. Supreme Ct.) 281; Jackson v. Foster, 12 Johns. (N. Y.) 490; Matter of Department of Public Parks, 73 N. Y. 560; Jackson v. Camp, 1 Cow. (N. Y.) 605.

Ohio.—Woods v. Dille, 11 Ohio 455.

Oregon.—Anderson v. McCormick, 18 Oregon 301.

Pennsylvania.—Harris v. Richey, 56 Pa. St. 395; McCracken v. Roberts, 19 Pa. St. 390; Bennett v. Morrison, 120 Pa. St. 390, 6 Am. St. Rep. 711; Eichelberger v. Gitt, 104 Pa. St. 64.

South Carolina.—Blackwell v. Ryan, 21 S. Car. 112; Gillison v. Savannah, etc., R. Co., 7 S. Car. 173; McKibben v. Salinas, 41 S. Car. 105; Richards v. McKie, Harp. Eq. (S. Car.) 184; Frazier v. Center, 1 McCord Eq. (S. Car.) 270; White v. Kavanagh, 8 Rich. (S. Car.) 377; Secrest v. McKenna, 6 Rich. Eq. (S. Car.) 72; Milhouse v. Patrick, 6 Rich. (S. Car.) 352.

Texas.—Browning v. Estes, 3 Tex. 462, 49 Am. Dec. 760; Keys v. Mason, 44 Tex. 140; Lander v. Rounsaville, 12 Tex. 195; Warren v. Frederichs, 83 Tex. 380.

Vermont.—Adams v. Fullam, 43 Vt. 592, 47 Vt. 558.

Estoppel.—The vendee, though not strictly a tenant of the vendor, is estopped from denying his title,¹ and this estoppel applies to whomever acquires possession under him.²

As to Third Parties.—But such vendee holds adversely as to the claims of third parties other than his vendor.³

Sub-purchasers.—And where one in possession under an executory contract of sale sells and conveys the land to a third party, who pays the stipulated price and is placed in possession, the possession of such sub-purchaser has been held to be adverse to the original vendor.⁴

Virginia.—Clarke v. McClure, 10 Gratt. (Va.) 305; Nowlin v. Reynolds, 25 Gratt. (Va.) 137; Whitlock v. Johnson, 87 Va. 323.

West Virginia.—Hudson v. Putney, 14 W. Va. 561; Core v. Faupel, 24 W. Va. 238.

Wisconsin.—Furlong v. Garrett, 44 Wis. 111; Pepper v. O'Dowd, 39 Wis. 538.

A Party Entering into Possession under an Agreement to Purchase cannot dispute the title of him under whom he enters, until after a surrender of the possession. Jackson v. Spear, 7 Wend. (N. Y.) 401; Heermans v. Schmaltz, 10 Biss. (U. S.) 335.

There must be Some Unequivocal and Positive Action to indicate the purpose to hold adversely, and the usual acts of ownership consistent with the position of a vendee in possession under a contract of purchase are not evidence of such adverse claim. Hannibal, etc., R. Co. v. Miller, 115 Mo. 158.

But Acquiescence by a Vendor, for the statutory period, in the possession of land by the vendee in a contract of purchase, under a claim that the contract has been surrendered and that the land belongs to the vendee, will bar a recovery by the vendor. Trenton v. Miller, 94 Mich. 204.

Vendee by Title Bond.—The possession of the vendee by title bond is not adverse, and the statute will not commence running to protect him until there is an open and notorious denial on his part of the vendor's title. Coldcleugh v. Johnson, 34 Ark. 312.

The possession of a purchaser of land by title bond, who goes into possession and holds for himself, is not the possession of his vendor who has color of title, so as to perfect the latter's title, under *Tennessee Act of 1819*, § 1, in seven years, against an otherwise superior title in another. If the purchaser in such case be for some purposes regarded as the tenant at will of his vendor, yet he is not the tenant in fact, and his possession is not that of his vendor, in the sense of the statute. Ellege v. Cooke, 5 Lea (Tenn.) 622.

Taking Lease from Another.—One holding under a contract of purchase cannot, by accepting a lease from a stranger, convert his holding into an adverse possession as against his vendor; and if one so holding abandons the land, and afterwards re-enters under a lease from a stranger without having rescinded his contract, and without any one having in the meantime taken possession, his re-entry will be held to relate back and continue the original possession, and not to create a new and adverse possession. Pratt v. Canfield, 67 Mo. 50.

Purchase with Borrowed Money.—If one buys land with borrowed money, taking the title in the name of the lender, and goes into possession under an agreement with the lender that the title is to be conveyed to him whenever he repays the loan, his possession will not become adverse as against such lender until he has made an open and explicit disavowal of the latter's title, and assertion of the title in himself, and such disavowal and assertion have been brought home to the lender. Estes v. Long, 71 Mo. 605.

Purchase of Incumbrance.—A vendee in possession under his purchase who buys an incumbrance cannot set up an adverse title under it against his vendor, but the purchase enures to the benefit of the vendor's title, and the vendee can only abate the unpaid purchase money or recover the amount he has paid for the incumbrance by action on the covenant in his deed. Bush v. Adams, 22 Fla. 177.

1. Potts v. Coleman, 67 Ala. 221; Hawkins v. Dearing, 93 Ga. 108; Heermans v. Schmaltz, 10 Biss. (U. S.) 335; Miller v. Larson, 17 Wis. 624; Quinn v. Quinn, 27 Wis. 168; Jackson v. Spear, 7 Wend. (N. Y.) 401; Wolf v. Holton, 92 Mich. 136.

A Purchaser by Executory Contract is a Quasi Tenant, and holds the possession, so far as strangers are concerned, for the benefit of his vendor's title, which he is estopped from denying, and cannot prejudice by any contract he may make with any other person. Turner v. Thomas, 13 Bush (Ky.) 518; Kirk v. Taylor, 8 B. Mon. (Ky.) 262.

3. Parties Holding under Vendee.—Potts v. Coleman, 67 Ala. 221; Russell v. Erwin, 38 Ala. 44; Jackson v. Harder, 4 Johns. (N. Y.) 202, 4 Am. Dec. 262; Jackson v. Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; Jackson v. Walker, 7 Cow. (N. Y.) 643; Jackson v. Spear, 7 Wend. (N. Y.) 403; Pratt v. Canfield, 67 Mo. 50; Anderson v. McCormick, 18 Oregon 301.

The Widow of the Vendee is estopped. Blackwell v. Ryan, 21 S. Car. 112.

3. As to Third Parties.—State Bank v. Smyers, 2 Strobb. (S. Car.) 24; Coogler v. Rogers, 25 Fla. 853; Pearson v. Boyd, 62 Tex. 541; Roosevelt v. Davis, 49 Tex. 463; Keys v. Mason, 44 Tex. 144; Elliott v. Mitchell, 47 Tex. 445; Ketchum v. Spurlock, 34 W. Va. 597; Vrooman v. Shepherd, 14 Barb. (N. Y.) 441; Howland v. Newark Cemetery Assoc., 66 Barb. (N. Y.) 366.

4. Purchasers from Vendee.—Tayloe v. Dugger, 66 Ala. 444; Beard v. Ryan, 78 Ala. 37; Walker v. Crawford, 70 Ala. 567; Miller v. State, 38 Ala. 600; State v. Conner, 69 Ala. 212. And see Northrop v. Wright, 7 Hill (N.

After Payment of Purchase Money.—After payment of the purchase money, however, the possession is presumed to be antagonistic to the vendor, because all duty to him has been performed, and if it continues for the necessary period without some act of recognition of or subordination to the legal estate of the vendor, his right of entry or of action is barred.¹

(3) *Tenants in Common*—**Must be an Ouster.**—The entry and possession of one tenant in common is deemed the entry and possession of all the cotenants, and does not amount to a disseisin. Such possession, therefore, can never be

Y.) 476; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Janes v. Patterson*, 62 Ga. 527; *Foulke v. Bond*, 41 N. J. L. 527.

Illustrations.—A, having contracted to purchase lands of B, paid part of the purchase money, but titles were never made. A gave the land to his son, C, who went into possession, and it was held that his possession was adverse as to both A and B. *Hunter v. Parsons*, 2 Bailey (S. Car.) 59.

But possession by virtue of an executory contract with one who himself claims under a like contract from the patentee is not adverse to that of the patentee until the latter repudiates his contract by selling to other parties, in which case possession under the executory contract will be adverse to that of the second vendee. *Pearson v. Boyd*, 62 Tex. 541; *Roosevelt v. Davis*, 49 Tex. 463; *Keys v. Mason*, 44 Tex. 144.

There was a sale of land by bond for title in 1853. In 1855 the vendee sold and conveyed to a stranger, who entered and held possession until his death, in 1866, and after his death his widow and children continued to occupy the premises. In 1871 a bill was filed to enforce the vendor's lien for the purchase money due upon the sale in 1853. The defense was seven years' possession under the statute. The court held that the vendee, or a purchaser from him, stood in the relation of a trustee to the vendor for the unpaid purchase money, against whom the statute does not run. *Lewis v. Hawkins*, 23 Wall. (U. S.) 119. See also *Swartwout v. Burr*, 1 Barb. (N. Y.) 499; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 402, 10 Am. Dec. 343.

1. **Possession of Vendee after Purchase Price is Paid.**—*Alabama.*—*Beard v. Ryan*, 78 Ala. 37; *Jernigan v. Flowers*, 94 Ala. 508; *Newsome v. Snow*, 91 Ala. 641; *Tillman v. Spann*, 68 Ala. 102; *Potts v. Coleman*, 67 Ala. 221; *Taylor v. Dugger*, 66 Ala. 445; *McQueen v. Ivey*, 36 Ala. 308.

Connecticut.—*Catlin v. Decker*, 38 Conn. 262; *Bryan v. Atwater*, 5 Day (Conn.) 181, 5 Am. Dec. 136.

Georgia.—*Stamper v. Griffin*, 12 Ga. 450; *Newton v. Mayo*, 62 Ga. 11.

Illinois.—*Schneider v. Botsch*, 90 Ill. 577.

Massachusetts.—*Brown v. King*, 5 Met. (Mass.) 173.

Mississippi.—*Magee v. Magee*, 37 Miss. 138; *Benson v. Stewart*, 30 Miss. 49; *Moring v. Ables*, 62 Miss. 263, 52 Am. Rep. 186; *Niles v. Davis*, 60 Miss. 750. Compare *Gladney v. Barton*, 51 Miss. 216.

Missouri.—*Ridgeway v. Holliday*, 59 Mo. 444.

New Jersey.—*Van Blarcom v. Kip*, 26 N. J. L. 351.

Oregon.—*Anderson v. McCormick*, 18 Oregon 301.

South Carolina.—*Watts v. Witt*, 39 S. Car. 356, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 230.

Texas.—*Robertson v. Wood*, 15 Tex. 1, 65 Am. Dec. 140; *Newsom v. Davis*, 20 Tex. 419.

Vermont.—*Adams v. Fullam*, 43 Vt. 592.

Virginia.—*Nowlin v. Reynolds*, 25 Gratt. (Va.) 137.

Wisconsin.—*Simpson v. Snecloche*, 83 Wis. 201, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 230-232.

Contra—West Virginia.—But in *Core v. Faupel*, 24 W. Va. 244, it was said to be the established law of that state, that the possession of a purchaser of land under an executory contract is not adverse to his vendor, although he has paid all the purchase money and used and occupied the land for his own exclusive benefit; that the contract, being executory and made in contemplation of the conveyance by deed, recognizes the legal title as outstanding, and his possession will be treated as in subordination thereto, and not adverse.

After Such Possession has Ripened into a Perfect Title the vendee may assert and maintain his title by a bill to enjoin a sale under execution issued upon a judgment against the vendor, even though the judgment may have been rendered and become a lien before such title became perfect. *Niles v. Davis*, 60 Miss. 750.

Curtsey Barred.—A sold land belonging to his wife to B, giving only a title bond. B entered into possession. The wife died thirty years after such entry, and it was held that A's estate by curtesy was barred by the possession of B and his successors. *Stokely v. Slayden*, 8 Baxt. (Tenn.) 307.

Presumption of Payment from Lapse of Time.—A presumption of the payment of the purchase money, from mere lapse of time, in favor of a purchaser in possession under an executory contract, does not arise until after the expiration of twenty years from the commencement of his possession. *Taylor v. Dugger*, 66 Ala. 444.

Agreement for Partition.—Where one enters into possession of land under a bond for title which recites that the land belongs to the estate of S., and that a deed will be given as soon as a conveyance can be made, and where later he himself is party to an agreement with the heirs to said estate for partition proceedings before commissioners, his possession will not commence to be adverse to the heirs of S., at least until after the agreement for partition. *Smith v. Lee*, 82 Tex. 124.

adverse until there is an actual ouster of the cotenants, or some act deemed by law equivalent thereto.¹

1. **Rule as to Tenants in Common**—*United States*.—*Roberts v. Moore*, 3 Wall. Jr. (C. C.) 292; *Clymer v. Dawkins*, 3 How. (U. S.) 674; *M'Clung v. Ross*, 5 Wheat. (U. S.) 116; *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37.

Alabama.—*Abercrombie v. Baldwin*, 15 Ala. 363; *Burrus v. Meadors*, 90 Ala. 140.

Arkansas.—*Brewer v. Keeler*, 42 Ark. 289.

California.—*Colman v. Clements*, 23 Cal. 245; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Bath v. Valdez*, 70 Cal. 350; *Watson v. Sutro*, 86 Cal. 500; *Tully v. Tully* (Cal., 1886), 9 Pac. Rep. 841.

Connecticut.—*Catlin v. Decker*, 38 Conn. 362.

Delaware.—*Bartholomew v. Edwards*, 1 Houst. (Del.) 17; *Milbourn v. David*, 7 Houst. (Del.) 209.

Florida.—*Winn v. Strickland*, 34 Fla. 610; *Coogler v. Rogers*, 25 Fla. 853.

Illinois.—*Busch v. Huston*, 75 Ill. 344; *Ball v. Palmer*, 81 Ill. 370; *Winters v. Haines*, 94 Ill. 585; *Stevens v. Wait*, 112 Ill. 544; *Baldwin v. Ratcliff*, 125 Ill. 376; *Gosselin v. Smith*, 154 Ill. 74.

Indiana.—*Manchester v. Doddridge*, 3 Ind. 360; *McCray v. Humes*, 116 Ind. 103.

Iowa.—*Burns v. Byrne*, 45 Iowa 285; *Killmer v. Wuchner*, 74 Iowa 359; *Loreson v. Davis*, 83 Iowa 405; *Smith v. Young* (Iowa, 1893), 56 N. W. Rep. 506.

Kansas.—*Squires v. Clark*, 17 Kan. 84; *Hamilton v. Redden*, 44 Kan. 193.

Kentucky.—*Ward v. Ward* (Ky., 1894), 25 S. W. Rep. 112.

Louisiana.—*Simon v. Richard*, 42 La. Ann. 842.

Maryland.—*Van Bibber v. Frazier*, 17 Md. 436.

Massachusetts.—*Bellis v. Bellis*, 122 Mass. 414.

Michigan.—*Campau v. Campau*, 44 Mich. 31.

Mississippi.—*Wood v. Ford*, 29 Miss. 57; *Day v. Davis*, 64 Miss. 253.

Missouri.—*Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443; *Lapeyre v. Paul*, 47 Mo. 590; *Fugate v. Pierce*, 49 Mo. 441; *McQuiddy v. Ware*, 67 Mo. 74; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352, reversing 9 Mo. App. 571; *Wheelock v. Overshiner*, 110 Mo. 100.

Nevada.—*Abernathie v. Consolidated Virginia Min. Co.*, 16 Nev. 260.

New Hampshire.—*Campbell v. Campbell*, 13 N. H. 483.

New Jersey.—*Foulke v. Bond*, 41 N. J. L. 527.

New York.—*Northrop v. Wright*, 24 Wend. (N. Y.) 221; *Kathan v. Rockwell*, 16 Hun (N. Y.) 90; *Woolsey v. Morss*, 19 Hun (N. Y.) 273; *Walther v. Regnault*, 56 Hun (N. Y.) 560; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Stoddard v. Weston* (Supreme Ct.), 6 N. Y. Supp. 34; *La Tourette v. Decker* (Supreme Ct.), 18 N. Y. Supp. 840; *Millard v. McMul-*

lin, 68 N. Y. 352; *Culver v. Rhodes*, 87 N. Y. 348.

North Carolina.—*Linker v. Benson*, 67 N. Car. 150; *Neely v. Neely*, 79 N. Car. 478; *Jeter v. Davis*, 109 N. Car. 458.

Ohio.—*Youngs v. Heffner*, 36 Ohio St. 232; *Farmers', etc., Nat. Bank v. Wallace*, 45 Ohio St. 152.

Oregon.—*Northrop v. Marquam*, 16 Oregon 173; *Morrill v. Morrill*, 20 Oregon 96, 23 Am. St. Rep. 95.

Pennsylvania.—*Lodge v. Patterson*, 3 Watts (Pa.) 74, 27 Am. Dec. 335; *Miller's Appeal*, 3 Grant's Cas. (Pa.) 247; *Miller v. Daud*, 1 Lack. Jur. (Pa.) 25; *Dikeman v. Parrish*, 6 Pa. St. 225, 47 Am. Dec. 455; *Long v. Mast*, 11 Pa. St. 189; *Peck v. Ward*, 18 Pa. St. 506; *Forward v. Deetz*, 32 Pa. St. 69; *Bennet v. Bullock*, 35 Pa. St. 364; *Logan v. Friedlines* (Pa., 1888), 14 Atl. Rep. 343.

South Carolina.—*Odum v. Weathersbee*, 26 S. Car. 244.

Texas.—*Portis v. Hill*, 3 Tex. 273; *Alexander v. Kennedy*, 19 Tex. 488, 70 Am. Dec. 358; *Gilkey v. Peeler*, 22 Tex. 663; *Roberts v. Thorn*, 25 Tex. 728, 78 Am. Dec. 552; *Baily v. Trammell*, 27 Tex. 317; *Peeler v. Guilkey*, 27 Tex. 355; *Teal v. Terrell*, 58 Tex. 257; *Peterson v. Ward*, 5 Tex. Civ. App. 208; *Robinson v. Jones*, 2 Tex. Civ. App. 316.

Virginia.—*Purcell v. Wilson*, 4 Gratt. (Va.) 16; *Caperton v. Gregory*, 11 Gratt. (Va.) 505.

West Virginia.—*Bogges v. Meredith*, 16 W. Va. 1; *Rust v. Rust*, 17 W. Va. 901; *Cooley v. Porter*, 22 W. Va. 121.

Wisconsin.—*Challefoux v. Ducharme*, 8 Wis. 287; *Fowler v. Schafer*, 69 Wis. 23.

Canada.—*Hill v. Ashbridge*, 20 Ont. App. 44.

A Silent Possession, Unaccompanied by Any Act Amounting to an Ouster, or giving notice to the cotenant that his possession is adverse, will never amount to an adverse possession. *M'Clung v. Ross*, 5 Wheat. (U. S.) 116.

There must be Some Notorious Act of Ouster or adverse possession by the party entering, brought home to the knowledge or notice of the others, and when this occurs the possession is from that period treated as adverse. *Clymer v. Dawkins*, 3 How. (U. S.) 674; *King v. Carmichael*, 136 Ind. 20, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 233; *Coogler v. Rogers*, 25 Fla. 853.

It Requires Clear and Satisfactory Proof of the Dissession of a cotenant to characterize the possession as adverse, so as by lapse of time to bar a right of entry. It is not sufficient that he continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight improvements on the land, and pays taxes. *Busch v. Huston*, 75 Ill. 343.

Intent.—It must be shown that the possession was with the intent to hold adversely, and such intent must be indicated by acts calculated to exclude the cotenant. *Colman v. Clements* 23 Cal. 245.

What Amounts to Ouster.—There must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, or a clear, positive, and continuous disclaimer and disavowal of the cotenant's title, and assertion of an adverse right.¹

Members of One Family.—A tenant in common is not prevented from obtaining title adversely, by the fact that the cotenant is a member of his family. *Feliz v. Feliz*, 105 Cal. 1.

Actual Ouster.—By the term "actual ouster" is not meant some act accompanied by real force. A man may come in by rightful possession and yet hold over adversely without title. If he does, such holding over under the circumstances will be equivalent to an actual ouster. *Doe v. Prosser*, Cowp. 217; *Van Bibber v. Frazier*, 17 Md. 436; *Burns v. Byrne*, 45 Iowa 287; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614.

In order that a cotenant may dispossess his companions there must be an actual ouster, or such acts as are constructively equivalent to an ouster, as a denial of right to the rent of any part or the possession of any part of the land, or an exclusive possession for a long time, so as to afford the presumption of a disseisin. *Manchester v. Doddridge*, 3 Ind. 361; 2 Preston on Abstracts, 291.

Ouster may be Inferred from circumstances. *Harmon v. James*, 7 Smed. & M. (Miss.) 111.

Adverse Claimant Requesting Cotenant to Sign Quitclaim Deed.—If the possession of a tenant in common is adverse to his cotenant, it will not lose its hostile character by the former tendering a quitclaim deed to the latter, and requesting him to sign it, there being no offer to purchase, nor any acknowledgment of the tenancy. *Unger v. Mooney*, 63 Cal. 585, 49 Am. Rep. 100.

Children of Bigamous Marriage.—The possession of the children of an alleged bigamous marriage, claiming as heirs of the father, is adverse to the heirs by the former marriage, and not that of tenants in common. *Westenfelder v. Green*, 24 Oregon 448.

Judgment for Land—Enures to Benefit of All the Tenants.—Judgment in favor of one tenant against an adverse claimant whom he sues to recover possession of the entire tract relates back to the beginning and enures to the benefit of his cotenants. *Newman v. California Bank*, 80 Cal. 368.

Partners.—Where one of several partners buys lands with partnership funds, but takes title in his own name and takes possession, his possession is the possession of all, and a trust results in favor of his partners. *Riddle v. Whitehill*, 135 U. S. 621.

1. *United States*.—*Zeller v. Eckert*, 4 How. (U. S.) 296; *Barr v. Gratz*, 4 Wheat. (U. S.) 213.

Alabama.—*Stevenson v. Anderson*, 87 Ala. 228; *Abercrombie v. Baldwin*, 15 Ala. 363.

California.—*Pico v. Phelan*, 77 Cal. 86; *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177; *Winterburn v. Chambers*, 91 Cal. 170; *Gregory v. Gregory*, 102 Cal. 50; *Bath v. Valdez*, 70 Cal. 350; *Feliz v. Feliz*, 105 Cal. 1.

Georgia.—*McDowell v. Sutlive*, 78 Ga. 142.

Illinois.—*Hinkley v. Greene*, 52 Ill. 223; *Todd v. Todd*, 117 Ill. 92; *Baldwin v. Ratcliff*, 125 Ill. 376; *Busch v. Huston*, 75 Ill. 344; *Ball v. Palmer*, 81 Ill. 370.

Indiana.—*English v. Powell*, 119 Ind. 93.

Iowa.—*Burns v. Byrne*, 45 Iowa 285; *Killmer v. Wuchmer*, 74 Iowa 359.

Kentucky.—*Gossom v. Donaldson*, 18 B. Mon. (Ky.) 241, 68 Am. Dec. 723; *Russell v. Marks*, 3 Metc. (Ky.) 45; *Barret v. Coburn*, 3 Metc. (Ky.) 513; *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579.

Michigan.—*Fenton v. Miller*, 94 Mich. 204.

Minnesota.—*Lindley v. Groff*, 37 Minn. 338.

Missouri.—*Wommack v. Whitmore*, 58 Mo. 448; *Rozier v. Johnson*, 35 Mo. 326; *Lapeyre v. Paul*, 47 Mo. 586; *Rodney v. McLaughlin*, 97 Mo. 426; *Hoffstetter v. Blattner*, 8 Mo. 276.

New York.—*Baker v. Oakwood*, 123 N. Y. 16; *Smith v. Burtis*, 9 Johns. (N. Y.) 174; *Jackson v. Brink*, 5 Cow. (N. Y.) 483; *Jackson v. Tibbits*, 9 Cow. (N. Y.) 241; *Miller v. Platt*, 5 Duer (N. Y.) 272; *Northrop v. Wright*, 24 Wend. (N. Y.) 221; *Florence v. Hopkins*, 46 N. Y. 182; *Culver v. Rhodes*, 87 N. Y. 348.

North Carolina.—*Breden v. McLauren*, 98 N. Car. 307.

Oregon.—*Northrop v. Marquam*, 16 Oregon 173.

Pennsylvania.—*Long v. Mast*, 11 Pa. St. 189.

Texas.—*Mayes v. Manning*, 73 Tex. 43.

Virginia.—*Fry v. Payne*, 82 Va. 759.

Ordering Cotenant to Leave—Acquiescence.—If one tenant in common notifies the other that he claims the whole property as his own, and orders the latter to leave, and the latter acquiesces in the pretension and leaves the premises to the possession of the first, there is an ouster, notwithstanding the fact that neither party was aware of the true state of the title, and each was under a mistake with reference to his rights. *McCormack v. Silsby*, 82 Cal. 72.

Acts of Ownership during a Series of Years.—Where one cotenant takes possession of the land and openly and notoriously exercises acts of exclusive ownership for a series of years, as by removing the soil, quarrying and selling rock, and by such acts as amount to the destruction of the thing itself, taking all the rents and profits without account, and by other acts which exclude the idea of his claiming a cotenancy, a jury will be warranted in presuming an ouster. *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443; *Campau v. Dubois*, 39 Mich. 274.

Occasional Acts of Ownership on Unenclosed Lands.—But occasionally cutting wood and hop-poles in small quantities, on unenclosed lands, does not amount to an ouster. *Mansfield v. McGinniss*, 86 Me. 118.

Tenant Claiming the Lands in His Own Right.—The fact that a tenant in common claims to occupy the land "in his own right" does not necessarily imply that he asserts right to the portion of the land occupied by him adversely

Evidence Required.—The ouster by a tenant in common, of his cotenant, does not differ in its nature from any other ouster, nor in any respect except in the

to the rights of his cotenant. *Teal v. Terrell*, 58 Tex. 257.

Proof of a Verbal Sale of the interest of one of the heirs to an estate, to another of the heirs, followed by twenty years' adverse possession in such other heir, has been held to create title in the latter. *Hyne v. Osborn*, 62 Mich. 235.

The Mere Reception of the Rents and Profits, and claim of the land, will not prove an ouster. There must be positive acts or a line of conduct indicating an intention to exclude the cotenants. *Susquehanna, etc., R., etc., Co. v. Quick*, 61 Pa. St. 328; *Velott v. Lewis*, 102 Pa. St. 327; *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509; *Brown v. M'Coy*, 2 W. & S. (Pa.) 307, note; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158; *Hart v. Gregg*, 10 Watts (Pa.) 185, 36 Am. Dec. 166; *Watson v. Gregg*, 10 Watts (Pa.) 289, 36 Am. Dec. 176; *Morris v. Vanderen*, 1 Dall. (U. S.) 64; *Forward v. Deitz*, 32 Pa. St. 69; *Bennet v. Bullock*, 35 Pa. St. 364; *Tulloch v. Worrall*, 49 Pa. St. 133; *Lagoria v. Dozier* (Va., 1895), 22 S. E. Rep. 239; *Todd v. Todd*, 117 Ill. 92; *Busch v. Huston*, 75 Ill. 343; *Rodney v. McLaughlin*, 97 Mo. 426; *Lapeyre v. Paul*, 47 Mo. 586; *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Parker v. Proprietors*, 3 Met. (Mass.) 91, 37 Am. Dec. 121; *Higbee v. Rice*, 5 Mass. 351, 4 Am. Dec. 63. And see *Linker v. Benson*, 67 N. Car. 150.

Exclusive Possession and Reception of Rents and Profits for a great length of time has been held insufficient to create a legal presumption of ouster. *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *McGee v. Hall*, 26 S. Car. 179; *Frederick v. Gray*, 10 S. & R. (Pa.) 182; *Lodge v. Patterson*, 3 Watts (Pa.) 74, 27 Am. Dec. 335; *Watson v. Gregg*, 10 Watts (Pa.) 289, 36 Am. Dec. 176; *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654. But it may warrant the jury in presuming an ouster in the particular instance. *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509. *limiting Hart v. Gregg*, 10 Watts (Pa.) 185, 36 Am. Dec. 166; *Corbin v. Cannon*, 31 Miss. 570; *Mehaffy v. Dobbs*, 9 Watts (Pa.) 377; *Calhoun v. Cook*, 9 Pa. St. 226; *Keyser v. Evans*, 30 Pa. St. 507; *Rider v. Maul*, 46 Pa. St. 376; *Burns v. Byrne*, 45 Iowa 287; *Henning v. Warner*, 109 N. Car. 406; *Robidoux v. Casseligi*, 10 Mo. App. 516.

Taking Rents and Profits and Claiming the Land as His Own.—Where one tenant in common enters on the whole and takes the rents and profits and claims the whole exclusively for a long series of years, the jury ought to presume an actual ouster. *Frederick v. Gray*, 10 S. & R. (Pa.) 182; *Wilson v. Collishaw*, 13 Pa. St. 276; *Grim v. Dyar*, 3 Duer (N. Y.) 354; *Law v. Patterson*, 1 W. & S. (Pa.) 184; *Lapeyre v. Paul*, 47 Mo. 586; *Cummings v. Wyman*, 10 Mass. 464; *Abrams v. Rhoner*, 44 Hun (N. Y.) 507; *Hubbard v. Wood*, 1 Sneed (Tenn.) 279.

Refusal to Pay over Rents to the cotenant

upon demand of his share is a circumstance showing an adverse intent. *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158. And no evidence can be more satisfactory than such refusal accompanied by a refusal to admit the cotenant to possession. *Newell v. Woodruff*, 30 Conn. 492; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 186; *Jackson v. Tibbits*, 9 Cow. (N. Y.) 253. But the cotenants must have notice of the claim. *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673.

Excluding or Hindering Entry by the cotenant amounts to an ouster sufficient to support an action of ejectment, *Gordon v. Pearson*, 1 Mass. 323; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 133; *Siglar v. Van Riper*, 10 Wend. (N. Y.) 419; *Hubbard v. Wood*, 1 Sneed (Tenn.) 279; although the portion from which he is excluded be less than the whole, *Carpentier v. Webster*, 27 Cal. 524.

Claiming under Deed to Whole.—And the same is true where a cotenant claims under a deed to the whole. *Clark v. Vaughan*, 3 Conn. 191; *Barnes v. Born*, 133 Ind. 169; *Prescott v. Nevers*, 4 Mason (U. S.) 326; *Millard v. McMullin*, 68 N. Y. 345; *Ashley v. Rector*, 20 Ark. 359; *Trotter v. Neal*, 50 Ark. 340; *McCulloh v. Daniel*, 102 N. Car. 529; *Ellington v. Ellington*, 103 N. Car. 54; *Puckett v. McDaniel* (Tex. Civ. App., 1894), 28 S. W. Rep. 360. And the grantee of one tenant in common, for the whole, entering under such conveyance, may set up the statute of limitations against his cotenants. *Jackson v. Huntington*, 5 Pet. (U. S.) 402. Such entry and claim constitute an ouster. *Marcy v. Marcy*, 6 Met. (Mass.) 360. And see *Highstone v. Burdette*, 54 Mich. 329; *Watson v. Jeffrey*, 39 N. J. Eq. 62. But not where the grantor quitclaims only his interest. *Moore v. Antill*, 53 Iowa 612. See *Laraway v. Larue*, 63 Iowa 407; *McQuiddy v. Ware*, 67 Mo. 74; *Kathan v. Rockwell*, 16 Hun (N. Y.) 90.

Taking a deed by one tenant in common from a third person, and spreading it on the record, will have no effect as the equivalent of an ouster, unless accompanied and followed by a hostile claim of which the cotenant had knowledge, and by acts of possession not only inconsistent with, but exclusive of, the right of such cotenant. *Holley v. Hawley*, 39 Vt. 532, 94 Am. Dec. 350. See *Culver v. Rhodes*, 87 N. Y. 348.

Purchase at Tax Sale.—A purchase at a sale for taxes enures to all the cotenants. *Jonas v. Flanniken*, 69 Miss. 577; *Richards v. Richards*, 75 Mich. 408. See the article TAX TITLES.

Entry and Exclusive Claim to the Whole, indicated by some unequivocal act, amounts to an ouster. *Frederick v. Gray*, 10 S. & R. (Pa.) 182; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

Such acts ought so necessarily and notoriously to import a claim of exclusive right, as to apprise the cotenant of the nature and

degree of evidence required. The distinction relates to the character of the evidence necessary to prove that the possession was adverse.¹

Notice.—In order to operate as an ouster, the tenant out of possession must have actual notice of the adverse holding, or the hostile character of the possession must be so openly manifest that notice on his part will be presumed.²

existence of it. *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509; *Knowles v. Brown*, 69 Iowa 11. As, for instance, denying possession to the cotenant. *Doe v. Bird*, 11 East 49; *Bellis v. Bellis*, 122 Mass. 415; *Bigelow v. Jones*, 10 Pick. (Mass.) 161; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Lefavour v. Homan*, 3 Allen (Mass.) 354; *Florence v. Hopkins*, 46 N. Y. 182.

Exclusive Possession for a long period of time may afford a presumption of ouster, *Manchester v. Doddridge*, 3 Ind. 365; *King v. Carmichael*, 136 Ind. 25, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 233; *Van Dyck v. Van Beuren*, 1 Cai. (N. Y.) 84; *Jackson v. Brink*, 5 Cow. (N. Y.) 483; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Littlejohn v. Barnes*, 138 Ill. 478; especially where there is no accounting for the rents and profits, or demand made or claim set up. *Doe v. Prosser*, Cowp. 217; *Jackson v. Whitbeck*, 6 Cow. (N. Y.) 532, 16 Am. Dec. 454; *Neely v. Neely*, 79 N. Car. 478; and improvements are made, *Campau v. Dubois*, 39 Mich. 274; *Lapeyre v. Paul*, 47 Mo. 586.

But this presumption is a matter of evidence for the consideration of the jury. *Purcell v. Wilson*, 4 Gratt. (Va.) 16. But see *Van Dyck v. Van Beuren*, 1 Cai. (N. Y.) 84, where it was held that the law would raise the presumption in such cases, and that the jury were not at liberty to disregard it.

Taking Title from a Hostile Source and refusing to let in the cotenant is an ouster. *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Clark v. Crego*, 47 Barb. (N. Y.) 617; *Phelan v. Kelly*, 25 Wend. (N. Y.) 395.

Witnessing Will of Whole.—Witnessing a will of one cotenant devising all the land, by another cotenant, and hearing it read, has been held an ouster. *Miller v. Miller*, 60 Pa. St. 16. See *Coker v. Ferguson*, 70 Ala. 284.

Payment of Taxes, Accompanied by Possession, does not amount to an ouster, *Robinson v. Jones*, 2 Tex. Civ. App. 316; *Alsobrook v. Eggleston*, 69 Miss. 833; not even when accompanied by improvements made upon the property, *Pierson v. Conley*, 95 Mich. 619; nor by the receipt of the rents and profits, *Sontag v. Bigelow*, 142 Ill. 143.

The Mortgage of the Whole premises by a cotenant is not *per se* an ouster. *Wilson v. Colishaw*, 13 Pa. St. 276.

But a Sale of the Whole does amount to an ouster. *Culler v. Motzer*, 13 S. & R. (Pa.) 356, 15 Am. Dec. 604.

Partition.—A partition of the premises, though illegal and void, and the possession of a part, amounts to an ouster from the part occupied. *Jackson v. Tibbits*, 9 Cow. (N. Y.) 241; *Gautier v. Howard*, 38 Mo. 68.

Partition is a mutual ouster. *Cryer v. Andrews*, 11 Tex. 170; *Scoby v. Sweatt*, 28 Tex. 713.

1. *Newell v. Woodruff*, 30 Conn. 492.

The Distinction between Strangers and Tenants in Common relates to the character of the evidence necessary to prove that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are in themselves, in the absence of explanatory evidence, proof of the ouster of the true owner; whereas in cases of privity of title, such as subsists between tenants in common, the acts of possession of one tenant will, in the absence of satisfactory evidence to the contrary, be referred to the community of title, and there must be clearer and more decisive evidence of an ouster by one tenant in common of his associate than is necessary to prove that a person having no right of possession had ousted an owner in severalty. *Foulke v. Bond*, 41 N. J. L. 527.

2. **Notice to Cotenant.**—*Zeller v. Eckert*, 4 How. (U. S.) 296; *McClaskey v. Barr*, 47 Fed. Rep. 154; *Barr v. Gratz*, 4 Wheat. (U. S.) 213; *M'Clung v. Ross*, 5 Wheat. (U. S.) 124; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Gage v. Downey*, 94 Cal. 241; *In re Grider's Estate*, 81 Cal. 571; *Busch v. Huston*, 75 Ill. 344; *Ball v. Palmer*, 81 Ill. 372; *Warfield v. Lindell*, 38 Mo. 581, 90 Am. Dec. 443, 30 Mo. 272, 77 Am. Dec. 614; *Lapeyre v. Paul*, 47 Mo. 586; *Culver v. Rhodes*, 87 N. Y. 348; *Long v. Mast*, 11 Pa. St. 189; *Hall v. Stevens*, 9 Met. (Mass.) 418; *Beall v. Evans*, 1 Tex. Civ. App. 443; *Golson v. Fielder*, 2 Tex. Civ. App. 400; *Sydnor v. Palmer*, 29 Wis. 226; *Challefoux v. Ducharme*, 8 Wis. 287.

Notice of Ouster to a Cotenant may be Constructive, by such open and notorious acts of ouster, or such an assertion of the claim to the exclusive possession of the whole land, as in law will impart notice to the cotenants of an adverse and exclusive claim of title. *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443; *Van Gunden v. Virginia Coal, etc., Co.*, 52 Fed. Rep. 838.

Reasonable Presumption of Notice.—It is not necessary to show such knowledge by direct and positive evidence, but it is sufficient, if the contrary is not shown, if the circumstances are such that knowledge may be reasonably presumed. *Knowles v. Brown*, 69 Iowa 11; *Laraway v. Larue*, 63 Iowa 407; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

If No Notice is Given of the adverse intent it must be manifested by outward acts of an unequivocal kind. *Jackson v. Huntington*, 5 Pet. (U. S.) 402; *Abernathie v. Consolidated Virginia Min. Co.*, 16 Nev. 260; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Lodge v. Patterson*, 3 Watts (Pa.) 74, 27 Am. Dec. 335; *Owen v. Morton*, 24 Cal. 373; *Weisinger v. Murphy*, 2 Head (Tenn.) 674; *Culler v. Motzer*, 13 S. & R. (Pa.) 356, 15 Am. Dec. 604.

It must make the intention to hold adversely manifest. *Marcy v. Marcy*, 6 Met. (Mass.)

Questions for Jury under Instructions from Court.—Whether or not there has been an ouster is a question of fact, to be determined by the jury under proper instructions from the court as to the facts and circumstances which tend to establish an ouster. It is for the court to say what circumstances will authorize the jury to presume an ouster, and for the jury to say whether, in the given case, these circumstances exist.¹

Conveyance by Cotenant.—A conveyance by one cotenant of the entire estate gives color of title, and if possession is taken under it, the grantee claiming title to the whole, it amounts to an ouster of the cotenants, and the possession of the grantee is adverse as to them.²

360; *Prescott v. Nevers*, 4 Mason (U. S.) 330; *Hart v. Gregg*, 10 Watts (Pa.) 185, 36 Am. Dec. 166.

Recording Tax Deed.—Adverse possession is not created by a cotenant recording a tax deed to himself alone, without knowledge thereof by his cotenants or that he claims under it. *Cocks v. Simmons*, 55 Ark. 104.

1. *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Cummings v. Wyman*, 10 Mass. 465; *Parker v. Proprietors*, 3 Met. (Mass.) 91, 37 Am. Dec. 121; *Harmon v. James*, 7 Smed. & M. (Miss.) 111, 45 Am. Dec. 296; *Clark v. Crego*, 47 Barb. (N. Y.) 599; *Doe v. Hill*, 10 Leigh (Va.) 477; *Purcell v. Wilson*, 4 Gratt. (Va.) 16; *Blackmore v. Gregg*, 2 W. & S. (Pa.) 182; *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509.

Ouster is a question of fact which it is the province of the jury to determine, and the facts and circumstances which go to establish the ouster should, under proper instructions from the court, be submitted to the jury. *Highstone v. Burdette*, 54 Mich. 329.

The question whether the entry of a tenant in common is such as to accrue to the benefit of the others, and whether one has actually ousted another, are questions of fact involving sometimes the intentions and motives of the party in possession, which it is the province of the jury to determine. *Cummings v. Wyman*, 10 Mass. 464.

What state of facts will constitute an ouster and adverse possession is a question of law, but the existence of such facts is a question for the jury. *Washburn v. Cutter*, 17 Minn. 361.

Burden of Proof.—The burden of proof rests upon the party alleging the ouster. *Van Bibber v. Frazier*, 17 Md. 436; *Highstone v. Burdette*, 54 Mich. 329; *Newell v. Woodruff*, 30 Conn. 492.

2. **England.**—*Hoven v. Annesley*, 2 Sch. & L. 628; *Doe v. Prosser*, Cowp. 217; *Townsend & Pastor's Case*, 4 Leon. 52; *Doe v. Taylor*, 5 B. & Ad. 575, 27 E. C. L. 126.

Alabama.—*Abercrombie v. Baldwin*, 15 Ala. 363.

Arkansas.—*Brown v. Bocquin*, 57 Ark. 97.

California.—*Bath v. Valdez*, 70 Cal. 350; *Frick v. Simon*, 75 Cal. 337, 7 Am. St. Rep. 177.

Georgia.—*Horne v. Howell*, 46 Ga. 9; *McDowell v. Sutlive*, 78 Ga. 142.

Illinois.—*Goewey v. Urig*, 18 Ill. 242.

Indiana.—*King v. Carmichael*, 136 Ind. 20, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 233; *Nelson v. Davis*, 35 Ind. 474.

Kentucky.—*Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Miller v. McDowell* (Ky., 1891), 17 S. W. Rep. 482.

Maryland.—*Rutter v. Small*, 68 Md. 133, 22 Am. St. Rep. 655.

Maine.—*Thomas v. Pickering*, 13 Me. 337.

Massachusetts.—*Higbee v. Rice*, 5 Mass. 352, 4 Am. Dec. 63; *Marcy v. Marcy*, 6 Met. (Mass.) 360; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Bigelow v. Jones*, 10 Pick. (Mass.) 161; *Parker v. Proprietors*, 3 Met. (Mass.) 91, 37 Am. Dec. 121; *Kittredge v. Proprietors*, 17 Pick. (Mass.) 246, 28 Am. Dec. 296.

Michigan.—*Sands v. Davis*, 40 Mich. 14; *Campau v. Dubois*, 39 Mich. 274; *Highstone v. Burdette*, 61 Mich. 54.

Minnesota.—*Ricker v. Butler*, 45 Minn. 545, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 234, 236.

Missouri.—*Long v. Stapp*, 49 Mo. 508; *Warfield v. Lindell*, 30 Mo. 282, 77 Am. Dec. 614, 38 Mo. 578, 90 Am. Dec. 443; *Lapeyre v. Paul*, 47 Mo. 590.

Nevada.—*Abernathie v. Consolidated Virginia Min. Co.*, 16 Nev. 260.

New Hampshire.—*Jeffers v. Radcliff*, 10 N. H. 242.

New Jersey.—*Foulke v. Bond*, 41 N. J. L. 527; *Watson v. Jeffrey*, 39 N. J. Eq. 62.

New York.—*Town v. Needham*, 3 Paige (N. Y.) 545, 24 Am. Dec. 246; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Baker v. Oakwood*, 123 N. Y. 16.

North Carolina.—*Black v. Lindsay*, Busb. (N. Car.) 467; *Covington v. Stewart*, 77 N. Car. 148; *Thomas v. Garvan*, 4 Dev. (N. Car.) 223, 25 Am. Dec. 708; *Cloud v. Webb*, 4 Dev. (N. Car.) 290.

Pennsylvania.—*Culler v. Motzer*, 13 S. & R. (Pa.) 356, 15 Am. Dec. 604; *Lodge v. Patterson*, 3 Watts (Pa.) 74, 27 Am. Dec. 335; *Mehaffy v. Dobbs*, 9 Watts (Pa.) 363; *Law v. Patterson*, 1 W. & S. (Pa.) 191; *Frederick v. Gray*, 10 S. & R. (Pa.) 182; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455.

South Carolina.—*Gray v. Bates*, 3 Strobb. (S. Car.) 498.

Tennessee.—*Jewett v. Stockton*, 3 Yerg. (Tenn.) 492, 24 Am. Dec. 594; *Weisinger v. Murphy*, 2 Head (Tenn.) 674; *Burns v. Headrick*, 85 Tenn. 102.

Texas.—*Jack v. Dillon*, 6 Tex. Civ. App. 192; *De Leon v. McMurray*, 5 Tex. Civ. App. 280; *Lewis v. Terrell* (Tex. Civ. App., 1894), 26 S. W. Rep. 754.

Wisconsin.—*Sydnor v. Palmer*, 29 Wis. 226.

Reservation of Rights of Cotenants.—But

(4) *Life Tenant and Remainderman*.—As against the Remainderman—Before Life Estate has Fallen In.—One entering as tenant for life cannot hold adversely to those in remainder, nor can those who enter under him prior to the falling in of the life estate.¹

where one of several tenants in common conveys land, excepting and reserving the interest of his cotenants, and the grantee takes possession of the whole under an agreement with the grantor to pay the taxes for and on behalf of the cotenants, such possession, without a subsequent ouster or disseisin, cannot be regarded as adverse to them. *Grand Tower Min., etc., Co. v. Gill*, 111 Ill. 541; *Price v. Hall* (Ind., 1895), 39 N. E. Rep. 941, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 234.

Permanent improvements upon the land will not, in such case, amount to an ouster. *McClaskey v. Barr*, 42 Fed. Rep. 609.

When Presumption Arises.—The presumption of ouster does not arise until the grantee has been in possession the necessary period. *Ferguson v. Wright*, 113 N. Car. 537.

Agreement to Convey.—Possession under an agreement to convey does not become adverse to the cotenants until the date of the deed executed. *Phelan v. Smith*, 100 Cal. 158.

Pending Administration the assignee of a tenant in common cannot acquire title by limitation. *In re Grider's Estate*, 81 Cal. 571.

Reconveyance to Grantor.—An owner of land conveyed the same to his five children. One of the grantees afterwards reconveyed to the original grantor, but by deed purporting to convey, not the undivided one-fifth interest which he held, but the entire tract. It was considered, however, that the legal effect of the reconveyance was, under the circumstances, the same as if it had purported to convey only the interest which the grantor therein held—an undivided one-fifth part. So the original grantor, having thus acquired an undivided one-fifth interest in the land, became a tenant in common with the other four owners to whom he had previously conveyed, and his possession in that relation was not adverse to them. *Stevens v. Wait*, 112 Ill. 544.

If there be **Parcel Exchange of Lands** for purposes of mutual tenancy, the presumption is that the possession is not adverse, but permissive; but in such case, if the proofs show a hostile claim of title by either of the occupants, possession for ten years under such claim may mature into a good title. *Alexander v. Wheeler*, 69 Ala. 332.

Several Conveyances of Part.—Entry under a deed conveying half, and two deeds each conveying a fourth undivided interest, executed by different parties, is not an ouster of the cotenants, as the deeds do not necessarily include the entire tract. *Noble v. Hill* (Tex. Civ. App., 1894), 27 S. W. Rep. 756.

1. **Rule as to Life Tenant and Remainderman.**—*Arkansas*.—*Ogden v. Ogden*, 60 Ark. 70.

Connecticut.—*Chandler v. Phillips*, 1 Root (Conn.) 547.

Georgia.—*Wallace v. Jones*, 93 Ga. 419; *Bagley v. Kennedy*, 81 Ga. 721.

Illinois.—*Higgins v. Crosby*, 40 Ill. 260;

Orthwein v. Thomas, 127 Ill. 554, 11 Am. St. Rep. 159; *Rohn v. Harris*, 130 Ill. 525; *Meacham v. Bunting*, 156 Ill. 586; *Borders v. Hodges*, 154 Ill. 498; *Mettler v. Mettler*, 129 Ill. 642, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 237, 238.

Indiana.—*Haskett v. Maxey*, 134 Ind. 182; *Nicholson v. Carress*, 59 Ind. 39.

Kentucky.—*Phillips v. Johnson*, 14 B. Mon. (Ky.) 140; *Kellar v. Stanley*, 86 Ky. 240; *Scott v. Proctor* (Ky., 1890), 13 S. W. Rep. 790; *Woolfolk v. Richardson* (Ky., 1889), 10 S. W. Rep. 320; *Turman v. White*, 14 B. Mon. (Ky.) 450; *Burns v. Ray*, 18 B. Mon. (Ky.) 403; *Simmons v. McKay*, 5 Bush (Ky.) 31.

Maryland.—*Hanson v. Johnson*, 62 Md. 25, 50 Am. Rep. 199.

Massachusetts.—*Stevens v. Winship*, 1 Pick. (Mass.) 318, 11 Am. Dec. 178.

Michigan.—*Richards v. Richards*, 75 Mich. 408.

Minnesota.—*Lindley v. Groff*, 37 Minn. 338.

Missouri.—*Thomas v. Black*, 113 Mo. 66; *Salmon v. Davis*, 29 Mo. 176; *McCracken v. McCracken*, 67 Mo. 590; *Keith v. Keith*, 80 Mo. 125; *Sutton v. Casseleggi*, 77 Mo. 397.

New York.—*Jackson v. Mancius*, 2 Wend. (N. Y.) 357; *Bedell v. Shaw*, 59 N. Y. 46; *Moore v. Townshend*, 54 N. Y. Super. Ct. 245; *Clute v. New York Cent., etc., R. Co.*, 120 N. Y. 267; *Fleming v. Burnham*, 100 N. Y. 1; *Devyr v. Schaefer*, 55 N. Y. 446; *Christie v. Gage*, 71 N. Y. 189.

North Carolina.—*Orrender v. Call*, 101 N. Car. 399; *Turner v. Williams*, 108 N. Car. 210; *Ladd v. Byrd*, 113 N. Car. 466.

Pennsylvania.—*Tulloch v. Worrall*, 49 Pa. St. 133; *Bannon v. Brandon*, 34 Pa. St. 263, 75 Am. Dec. 655.

Tennessee.—*Bleidorn v. Pilot Mountain Coal, etc., Co.*, 89 Tenn. 166; *Burns v. Headrick*, 85 Tenn. 102; *McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165.

West Virginia.—*Austin v. Brown*, 37 W. Va. 634.

But possession by a life tenant after purchase at an administrator's sale has been held to be of an adversary character. *Balkham v. Woodstock Iron Co.*, 43 Fed. Rep. 648. And the renunciation of the life estate and open adverse assertion of title will set the statute of limitations in motion. *Miller v. Foster*, 76 Tex. 479.

Acquiring Tax Title.—The life tenant may not, by failure to pay taxes, assert an adverse claim founded upon a tax title issued by reason of such default. *Watkins v. Green*, 101 Mich. 493.

Adverse through Trustee.—Where property is left in trust for life, with remainder over, the purchaser of the fee cannot mature title by adverse possession against the remainderman, through the trustee, as he does not hold for the remainderman, and as he cannot maintain an action for the recovery of the

Grantee of Life Tenant.—If the life tenant conveys to a third person by a deed purporting to convey the absolute property, the possession of the grantee is not, and during the existence of the life estate cannot be, adverse to the remainderman or reversioner.¹

land during the lifetime of the life tenant. *Moseley v. Hankinson*, 25 S. Car. 519.

Contingent Remainders.—Land was conveyed to a trustee for the use of S. for life, and after her death to be held for the use of her three children, A., M., and W., during their lives, and at their death to vest absolutely in their children. A. survived S. and the trustee. After A.'s death his children brought a statutory action, in the nature of ejectment, for their portion of the land, and the defendant claimed it by adverse possession during the lives of the first and second life tenants. It was held that if, at the date of the execution of the deed in trust, the second life tenants had no children in being, the remainders over in fee were contingent remainders, and while they remained contingent the trustee represented the contingent remaindermen for the preservation of the remainders, and adverse possession against him for ten years before the happening of the contingency upon which the remainders were to vest barred the right of entry of the contingent remaindermen. But the remainder in fee vested upon the birth of a child to the second life tenant, and as against such vested remainderman there could be no adverse possession during the continuance of the preceding life estate. *Gindrat v. Alabama Western R. Co.*, 96 Ala. 162, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 237. And see *King v. Rhew*, 108 N. Car. 606, 23 Am. St. Rep. 76. And see *infra*, this section, *Trust Estates*.

Possession of Widow.—A widow to whom dower is assigned comes in under the heir, to whom her possession can never become adverse. *Malloy v. Bruden*, 86 N. Car. 251; *Musham v. Musham*, 87 Ill. 80; *Riggs v. Girard*, 133 Ill. 619; *Lawrence v. Lawrence*, 14 Oregon 77; *Cook v. Nicholas*, 2 W. & S. (Pa.) 27; *Hall v. Mathias*, 4 W. & S. (Pa.) 331; *Iddings v. Cairns*, 2 Grant's Cas. (Pa.) 88; *McQueen v. Fletcher*, 77 Ga. 444. Nor can her possession of the mansion-house pending an assignment of dower be adverse. *Null v. Howell*, 111 Mo. 273; *Hannon v. Hounihan*, 85 Va. 429; *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399; *Page v. Branch*, 97 N. Car. 97, 2 Am. St. Rep. 281; *Robinson v. Allison*, 97 Ala. 596. Nor can the possession of her tenant under a lease she had no authority to make. *Melvin v. Waddell*, 75 N. Car. 361. Nor the grantee under her deed. *Culver v. Rhodes*, 87 N. Y. 348; *Melton v. Fitch*, 125 Mo. 281. But where a widow remained in occupation of her deceased husband's residence for many years, claiming ownership, it was held that her possession was adverse to the heirs. *Hogan v. Kurtz*, 94 U. S. 773. But a widow's declaration that the husband had devised the land to her prevented her possession becoming adverse. *Breidegam v. Hoffmaster*, 61 Pa. St. 223.

But possession for twenty years, of lands allotted a widow by the purchaser under a

conveyance made in invalid proceedings instituted by the guardian of infant heirs, has been held to bar the right of the heirs. *Lowery v. Davis* (Ala., 1890), 8 So. Rep. 79.

And twenty years' adverse possession by a widow having a life interest by dower right and an equitable title by reason of a purchase of the reversion at an administrator's sale with money which has been used to pay debts, gives her a legal title. *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584. But the possession of the widow is adverse to all the world save the heirs. *Hickman v. Link* (Mo., 1888), 7 S. W. Rep. 12.

Curtsey.—The possession of the husband after the death of his wife is not adverse to her heirs. *Jackson v. Cairns*, 20 Johns. (N. Y.) 301; *Corwin v. Corwin*, 6 N. Y. 342; *Craig v. Harbison*, 4 Penny. (Pa.) 489.

1. *United States.*—*McClaskey v. Barr*, 42 Fed. Rep. 609, 47 Fed. Rep. 154.

Alabama.—*Pickett v. Doe*, 74 Ala. 122; *Gindrat v. Alabama Western R. Co.*, 96 Ala. 162, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 237; *Pendley v. Madison*, 83 Ala. 484.

Arkansas.—*Jones v. Freed*, 42 Ark. 357; *Moore v. Childress*, 58 Ark. 510.

Georgia.—*Taylor v. Kemp*, 86 Ga. 181; *Bagley v. Kennedy*, 81 Ga. 721; *Dupon v. Walden*, 84 Ga. 690; *Lamar v. Pearre*, 82 Ga. 354, 14 Am. St. Rep. 168.

Illinois.—*Mettler v. Miller*, 129 Ill. 630, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 237, 238; *Rohn v. Harris*, 130 Ill. 525.

Iowa.—*Smith v. Young* (Iowa, 1893), 56 N. W. Rep. 506.

Kansas.—*Dewey v. McLain*, 7 Kan. 126, 12 Am. St. Rep. 418.

Kentucky.—*Berry v. Hall* (Ky., 1889), 11 S. W. Rep. 474; *Simmons v. McKay*, 5 Bush (Ky.) 31; *May v. Scott* (Ky., 1890), 14 S. W. Rep. 191; *Mullins v. Conger* (Ky., 1893), 22 S. W. Rep. 546, 880.

Maine.—*Poor v. Larrabee*, 58 Me. 543.

Maryland.—*Hanson v. Johnson*, 62 Md. 25, 50 Am. Rep. 199.

Massachusetts.—*Mixter v. Woodcock*, 154 Mass. 535.

Mississippi.—*Wilson v. Parker* (Miss., 1894), 14 So. Rep. 264.

Missouri.—*Jones v. Manly*, 58 Mo. 559; *Brown v. Moore*, 74 Mo. 633; *State v. Moore*, 61 Mo. 280; *Keith v. Keith*, 80 Mo. 125; *Colvin v. Hauenstein*, 110 Mo. 575; *Holmes v. Kring*, 93 Mo. 452.

New Jersey.—*Pinckney v. Burrage*, 31 N. J. L. 21.

New York.—*Burhans v. Van Zandt*, 7 N. Y. 523; *Manolt v. Petrie*, 65 How. Pr. (N. Y. Super. Ct.) 206; *Bedell v. Shaw*, 59 N. Y. 49; *Sands v. Hughes*, 53 N. Y. 294; *Christie v. Gage*, 71 N. Y. 189; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Clute v. New York Cent., etc., R. Co.*, 120 N. Y. 267.

North Carolina.—*Henley v. Wilson*, 77 N. Car. 216.

After the Life Estate has Fallen in—As against the Remainderman or Reversioner.—After the death of the original life tenant the continued possession of his vendee becomes adverse as to the remainderman or reversioner.¹

Life Estate Acquired by Adverse Possession.—The life estate may be acquired by adverse possession.²

Ohio.—*Carpenter v. Denoon*, 29 Ohio St. 379.

Oregon.—*Savage v. Savage*, 19 Oregon 112, 20 Am. St. Rep. 795.

Pennsylvania.—*Gernet v. Lynn*, 31 Pa. St. 94; *Winters v. DeTurk*, 133 Pa. St. 359.

South Carolina.—*Moseley v. Hankinson*, 25 S. Car. 519.

Tennessee.—*McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *Templeton v. Twitty*, 88 Tenn. 595.

Texas.—*Haby v. Fuos* (Tex. Civ. App., 1894), 25 S. W. Rep. 1121.

West Virginia.—*Austin v. Brown*, 37 W. Va. 634.

Wisconsin.—*Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795, citing 1 AM. & ENG. ENCYC. OF LAW (1st ed.) 237, 238.

No Sale of the Estate by the Life Tenant can in any manner affect or change the nature or status of the estate in remainder. *Pickett v. Doe*, 74 Ala. 122.

The Remainderman's Cause of Action does not accrue till the death of the life tenant. *Elyton Land Co. v. McElrath*, 53 Fed. Rep. 763. And the statute of limitations only begins to run from his death. *Thompson v. Simpson*, 128 N. Y. 270.

Life Tenancy under Irregular Will.—But where a husband entered into possession of lands as tenant for life under a will so irregularly executed as not to pass real estate, and remained in possession a number of years, and united with the remainderman in a conveyance of the fee, it was held, in an action of ejectment by the heirs-at-law against the grantee, that the claim of title and possession of the husband as tenant for life under the will, being hostile to the title of the heirs at law, was, as against them, adverse and exclusive. *Hanson v. Johnson*, 62 Md. 25, 50 Am. Rep. 199.

Other Illustrations.—The appellee had possession and paid taxes for above twenty years, under a quitclaim deed. His grantor had an estate *pour autre vie*, and the appellant and another were the reversioners. The will under which the appellee's grantor acquired his title was never recorded, nor, so far as the proof showed, brought to the notice of the appellee. It was held that, under these circumstances, his possession had been adverse to the reversioners, and the bar of the statute was complete. *Safford v. Stubbs*, 117 Ill. 389.

Where a husband conveys in fee land of the wife in which he has curtesy, the statute will not run against the vendee of the wife until the husband's death. *Jones v. Freed*, 42 Ark. 357.

Where one of several remaindermen who was living with the tenant for life upon the land, accepted a deed of a portion thereof without warranty and for a nominal consideration, and thereafter occupied claiming to

hold the premises conveyed adversely under the deed, but there was no apparent change of possession or occupation, and no notice of a hostile claim given to the cotenants, it was held that the giving and receiving of the deed was not in itself an act hostile to the rights of the cotenants, but that both the deed and the possession under it were consistent therewith, as the grantor could convey the life estate, so that it gave no notice or intimation of a hostile claim; and that, therefore, there was no adverse possession, such as would defeat an action for partition. *Culver v. Rhodes*, 87 N. Y. 348.

But it has been held that under *Illinois* Rev. Stat., c. 83, § 6, the statute of limitations will run against a remainderman, even during the continuance of the prior estate, where the person invoking the statute had no notice of the existence of the estate in remainder. *Lewis v. Pleasants*, 143 Ill. 271. In this case the tenant for life acquired a tax deed to the land and conveyed under the tax deed. And see *Lewis v. Barnhart*, 145 U. S. 56, 43 Fed. Rep. 854.

1. After Expiration of Life Tenancy.—*Mettler v. Miller*, 129 Ill. 642, citing 1 AM. & ENG. ENCYC. OF LAW (1st ed.) 237, 238; *Talcott v. Draper*, 61 Ill. 56; *Henley v. Wilson*, 77 N. Car. 216; *Jones v. Johnson*, 81 Ga. 293; *Christie v. Gage*, 71 N. Y. 189; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Jackson v. Harsen*, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517; *Hall v. Vandegrift*, 3 Binn. (Pa.) 374. And see *Barnes v. Born*, 133 Ind. 169.

Where a deed conveyed a life estate, and the grantee remained in possession thirty years or more, the heirs of the grantor setting up no claim to the reversion, it was held that the occupancy for so long a period becomes in itself an independent source of title. *Osborne v. Anderson*, 89 N. Car. 261.

The Grantee in Fee of the Tenant for Life is not precluded from claiming in hostility to those in reversion or remainder after the expiration of the life tenancy. *Christie v. Gage*, 71 N. Y. 189. But see *Learned v. Tallmadge*, 26 Barb. (N. Y.) 443.

But the reversioner must have notice of the claim. *Cleveland v. Crawford*, 7 Hun (N. Y.) 616.

Where Land Reverts to the Grantor upon a Contingency, twenty years' adverse possession will establish title against him. *Newark v. Watson*, 56 N. J. L. 667.

The Husband of a Life Tenant may, after her death, make a deed which will give color of title. *Forest v. Jackson*, 56 N. H. 357.

2. Moore v. Luce, 29 Pa. St. 260, 72 Am. Dec. 629; *Hodges v. Ross*, 6 Tex. Civ. App. 437; *Higgins v. Crosby*, 40 Ill. 260.

And where the life estate has been acquired by the adverse possession of a third person, a deed by the life tenant to the remainderman

(5) *Landlord and Tenant—Rule Stated.*—The possession of the tenant is consistent with the title of the landlord, and cannot therefore be adverse to him.¹

will be ineffective to pass any title to the latter which can merge in the remainder. *Baker v. Oakwood*, 123 N. Y. 16.

But the possession of one claiming under the heirs of an intestate is not adverse to one claiming dower as the widow of the intestate's grantor until a sale of the land to satisfy such claim. *Rogers v. Johnson*, 125 Mo. 202.

1. *Possession of Tenant the Possession of Landlord—United States.*—*Coyle v. Franklin*, 4 C. A. 538.

Alabama.—*Dothard v. Denson*, 72 Ala. 541; *Wells v. Sheerer*, 78 Ala. 142; *Alabama State Land Co. v. Kyle*, 99 Ala. 474.

California.—*Abbey Homestead Assoc. v. Willard*, 48 Cal. 614; *Von Glahn v. Brennan*, 81 Cal. 261.

Connecticut.—*Catlin v. Decker*, 33 Conn. 262.

Delaware.—*Doe v. Jefferson*, 5 Houst. (Del.) 477.

Indiana.—*Vanduyne v. Hepner*, 45 Ind. 589.

Kentucky.—*Whipple v. Earick*, 93 Ky. 121; *South v. Marcum* (Ky., 1893), 22 S. W. Rep. 844.

Maryland.—*Campbell v. Shipley*, 41 Md. 81.

Massachusetts.—*Old South Soc. v. Wainwright*, 156 Mass. 115.

Michigan.—*Butler v. Bertrand*, 97 Mich. 59; *Smeberg v. Cunningham*, 96 Mich. 378.

Mississippi.—*Holman v. Bonner*, 63 Miss. 131.

Missouri.—*Comstock v. Eastwood*, 108 Mo. 41; *Sharis v. Jones*, 122 Mo. 125.

New York.—*Whiting v. Edmunds*, 94 N. Y. 309; *Landon v. Townshend*, 129 N. Y. 166.

Pennsylvania.—*McGinnis v. Porter*, 20 Pa. St. 80; *Koons v. Steele*, 19 Pa. St. 203.

Must be Repudiation of Relationship and Assertion of Ownership.—The possession of the tenant is the possession of his landlord, and the statute of limitations does not begin to run against the latter until such tenancy is terminated. *Vanduyne v. Hepner*, 45 Ind. 589; or until there is a repudiation of the relation and an assertion of ownership in his own right by the tenant. *Tilghman v. Little*, 13 Ill. 241; *Alderson v. Marshall*, 7 Mont. 288; *Jones v. Pelham*, 84 Ala. 208; *Brunson v. Morgan*, 84 Ala. 598; *Estes v. Long*, 71 Mo. 605; *School Directors v. Edrington*, 40 La. Ann. 633; *Avery v. Baum*, *Wright* (Ohio) 576; *Thayer v. United Brethren Soc.*, 20 Pa. St. 62; *Boyer v. Smith*, 3 Watts (Pa.) 449; *Bidwell v. Evans*, 156 Pa. St. 30; *Davis v. Hurst* (Tex., 1890), 14 S. W. Rep. 610; *Udell v. Peak*, 70 Tex. 547; *Wild v. Serpell*, 10 Gratt. (Va.) 405; *Reed v. Shepley*, 6 Vt. 602; *Holley v. Hawley*, 39 Vt. 534, 94 Am. Dec. 350; *Swann v. Thayer*, 36 W. Va. 46; *Swann v. Young*, 36 W. Va. 57. And tenant cannot by disclaimer, or by mere words denying his landlord's title and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. *Whiting v. Edmunds*, 94 N. Y. 309.

A Lessee of Wharf Rights upon the navigable waters of New York harbor cannot, as against the lessor and without his consent, during the continuance of the lease, acquire an absolute right to occupy by a permanent structure the waters in front of such wharf, to the destruction of its value and usefulness. *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263.

Execution of Lease to Avoid Creditors.—Where it was shown that the defendant in possession executed a lease to the plaintiff, not for the purpose of creating the relation of landlord and tenant, but to prevent his creditors from taking the land in execution, a verdict by the jury in favor of the defendant was affirmed. *Bidwell v. Evans*, 156 Pa. St. 30.

One in Possession Subsequently Taking a Lease cannot, during the term of his lease, hold adverse possession against his landlord by the mere intention so to hold, and without the doing of some act which would amount to adverse possession by a tenant who entered under a lease. *Abbey Homestead Assoc. v. Willard*, 48 Cal. 614. But he may by disclaimer and notice terminate the tenancy. *Voss v. King*, 33 W. Va. 236.

But where a Tenant Extends the Boundaries and takes in adjoining land, claiming it as his own, his possession is adverse as to the additional inclosure. *Pharis v. Jones*, 122 Mo. 125.

Possession Presumed Continuous.—When after a contract of tenancy the landlord sees the tenant in possession cultivating the land, and after an absence of nine years returns and finds him still in possession, it will be presumed that the possession of the tenant under said landlord was continuous during all of that time. *Alabama State Land Co. v. Kyle*, 99 Ala. 474.

Death of Landlord.—Upon the death of the landlord the possession of the tenant is subordinate to the title of the devisees. *Carothers v. Covington* (Tex. Civ. App., 1894), 27 S. W. Rep. 1040; *Scofield v. Douglass* (Tex. Civ. App., 1895), 30 S. W. Rep. 817.

Tenant at Will.—One in possession of land under a bond for a deed which provided that in case of default in payment he should have the rights of a tenant at will, and be allowed thirty days after notice in which to quit, does not hold adversely to the owner until after such notice shall have been given. *Austin v. Wilson*, 46 Iowa 362.

Although a tenant at will cannot transfer any of his rights to another, and his tenancy ends if he makes such transfer and surrenders the occupancy, the person taking it coming in as a trespasser only, yet where such person claims the right of occupancy by virtue of the assignment only, the recognition and allowance of such claim by the owner of the premises makes the occupant a tenant at will, the same as his predecessor, and his occupation continues the possession of the owner. *Landon v. Townshend*, 129 N. Y. 166.

Tenant by Sufferance.—Where one is in pos-

Failure to Pay Rent.—The mere failure to pay rent, even though none be demanded, does not make the possession adverse.¹

Limitation of Rule.—But while the tenant is estopped from denying the title of his landlord so long as the relation exists and is recognized between them,² he may repudiate the relation and set up an adverse claim and possession in himself, which, when properly brought home to the landlord, will put in operation the statute of limitations in the tenant's favor.³

Tenant Holding Over.—The continuance of possession by holding over after the lease is not adverse.⁴

Claimants under Tenant.—All persons claiming under a tenant, or deriving their possession from him, however remotely, are precluded from relying upon their possession for the purpose of barring the title of the landlord.⁵

session of land as a tenant by sufferance, his possession will not be adverse to the landlord. *Creigh v. Henson*, 10 Gratt. (Va.) 231.

1. *Campbell v. Shipley*, 41 Md. 81; *Ehrman v. Mayer*, 57 Md. 612; *Bradt v. Church*, 110 N. Y. 537; *Butler v. Bertrand*, 97 Mich. 63.

The possession is not adverse because the circumstances raise a presumption of the extinguishment of the rent. *Failing v. Schenck*, 3 Hill (N. Y.) 344.

2. *Wells v. Sheerer*, 78 Ala. 142; *Moshier v. Reding*, 12 Me. 478; *Towne v. Butterfield*, 97 Mass. 105; *Tilghman v. Little*, 13 Ill. 241; *Willison v. Watkins*, 3 Pet. (U. S.) 43.

3. *Wells v. Sheerer*, 78 Ala. 142; *Ponder v. Cheaves* (Ala., 1894), 16 So. Rep. 145; *Catlin v. Decker*, 38 Conn. 262; *Swann v. Thayer*, 36 W. Va. 46; *McKie v. Anderson*, 78 Tex. 207; *Morton v. Lawson*, 1 B. Mon. (Ky.) 46; *Turner v. Davis*, 1 B. Mon. (Ky.) 153; *Sanscrainte v. Torongo*, 87 Mich. 69.

A Tenant may, by Open and Notorious Renunciation of his allegiance to his landlord, hold adversely to him. *Whipple v. Earick*, 93 Ky. 121; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462.

But to Initiate an Adverse Holding he must surrender possession to the landlord, or do something that is equivalent, and bring home to the landlord knowledge of the adverse claim. *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263; *Whiting v. Edmunds*, 94 N. Y. 314; *Jackson v. Stiles*, 1 Cow. (N. Y.) 575; *Whaley v. Whaley*, 1 Spears (S. Car.) 225, 40 Am. Dec. 594; *Thayer v. United Brethren Soc.*, 20 Pa. St. 62; *Towne v. Butterfield*, 97 Mass. 105.

It must be Made Plain that the Real Owner Has been Given a Cause of Action, and if the possession commenced in subordination to his right, there should be evidence of distinct renunciation of it before he is put in position to lose anything by not bringing suit. If one goes into possession under him, he is entitled to assume that his rights are continuously admitted, until the contrary is brought to his knowledge. *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 606, 41 Am. Dec. 250; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Campau v. Lafferty*, 50 Mich. 114.

It must be shown that the possessor intended to dispossess all others not in privity

with him, and to hold and claim the property exclusively as his own. *Comstock v. Eastwood*, 108 Mo. 41.

But Surrender of Possession is Not Necessary where the adverse claim is against one with whom there is no relation of landlord and tenant. *Millett v. Lagomarsino*, 107 Cal. 102.

A Deed to the Tenant from One Having no Title is insufficient as a basis for adverse possession. *McRoberts v. Bergman* (Supreme Ct.), 11 N. Y. Supp. 108.

The Purchase of a Tax Title to the land by the tenant renders his possession adverse to the landlord. *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204. But not until the sale has been confirmed. *Austin v. Willis*, 90 Ala. 421. And see *Gregory v. Ford*, 5 B. Mon. (Ky.) 475.

Fraudulent Possession.—And the purchaser of a tax title obtaining possession by a fraudulent arrangement with the owner's tenant becomes the tenant of the owner, and his possession is not adverse. *Pulford v. Whicher*, 76 Wis. 555.

Proof.—If he claims title by virtue of a subsequent parol agreement with the landlord he must establish the same by clear proof. *Cole v. Potts*, 10 N. J. Eq. 67.

Presumption.—The presumption is that possession continues as tenant. *Leport v. Todd*, 32 N. J. L. 124.

4. Holding Over after Expiration of Term.—*Tompkins v. Snow*, 63 Barb. (N. Y.) 525; *Brandter v. Marshall*, 1 Cal. (N. Y.) 394; *Learned v. Tallmadge*, 26 Barb. (N. Y.) 444; *Day v. Cochran*, 24 Miss. 261; *Schuylkill, etc., Imp., etc., Co. v. McCreary*, 58 Pa. St. 304.

The possession of the tenant, thus in subordination to the title of the landlord, continues, not only during the term, but is presumed to remain unchanged until twenty years after the termination thereof and notwithstanding any claim of the tenant or his successors to a hostile title. *Whiting v. Edmunds*, 94 N. Y. 309; *Church v. Schoonmaker*, 115 N. Y. 570, 42 Hun (N. Y.) 225.

But after a Cancellation of the Lease the tenant's possession may become adverse. *Meridian Land, etc., Co. v. Ball*, 68 Miss. 135.

5. Rule as to Persons Claiming under Tenant—England.—*Davies v. Pierce*, 2 T. R. 53; *Doe v. Wilkinson*, 3 B. & C. 413, 10 E. C. L. 135; *Fenner v. Duplock*, 2 Bing. 10, 9 E. C. L. 295.

(6) *Trust Estates*—As between Trustee and Cestui Que Trust—Express Trusts.—Where the trust is express, the possession of the trustee is considered to be also the possession of the beneficiary, and consequently is not hostile or adverse until there is an open disavowal of the trust, which must be brought home to the *cestui que trust*.¹

Alabama.—Henley v. Mobile Branch Bank, 16 Ala. 552.

Connecticut.—Camp v. Camp, 5 Conn. 291, 13 Am. Dec. 60.

Illinois.—Ragor v. McKay, 44 Ill. App. 79; Tilghman v. Little, 13 Ill. 241.

Kentucky.—Doe v. Million, 4 J. J. Marsh. (Ky.) 395; Miller v. South (Ky., 1890), 14 S. W. Rep. 361.

Maryland.—Campbell v. Shipley, 41 Md. 91.

Massachusetts.—Binney v. Chapman, 5 Pick. (Mass.) 124.

Michigan.—Butler v. Bertrand, 97 Mich. 59.

New York.—Brandter v. Marshall, 1 Cai. (N. Y.) 394; Jackson v. Scissam, 3 Johns. (N. Y.) 504; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Jackson v. Spear, 7 Wend. (N. Y.) 401; Tompkins v. Snow, 63 Barb. (N. Y.) 525.

Pennsylvania.—Cooper v. Smith, 8 Watts (Pa.) 536.

South Carolina.—Anderson v. Darby, 1 Nott & M. (S. Car.) 369.

Tennessee.—Wood v. Turner, 7 Humph. (Tenn.) 517.

Where the Relation of Landlord and Tenant has been Once Established the possession of the tenant and of his grantee is that of the landlord, and not hostile or adverse, and this is so where such grantee has taken a deed to the fee in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation. The relation once established, it attaches to all who may succeed to the possession under the tenant. *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 265; *Whiting v. Edmunds*, 94 N. Y. 309.

But Knowledge Brought Home to the Landlord that the vendee of the tenant claims under a warranty deed to the fee, will render the possession adverse. *Swann v. Young*, 36 W. Va. 57.

Assessment Lease.—But this rule is not applicable to one holding under an assessment lease. An adverse possession may be originated during the running of such lease, which will ripen into a title in twenty years after the end of the term. And where one enters under an assessment lease and subsequently grants the land in fee to another who enters and holds under that grant, claiming title, the possession is adverse to that of the owner of the reversion. *Sands v. Hughes*, 53 N. Y. 287; *Hilton v. Bender*, 4 Thomp. & C. (N. Y.) 270.

1. *United States*.—Willison v. Watkins, 3 Pet. (U. S.) 43.

Alabama.—McCarthy v. McCarthy, 74 Ala. 546.

California.—Schlessinger v. Mallard, 70 Cal. 326.

Illinois.—Meacham v. Bunting, 156 Ill. 586;

Reynolds v. Sumner, 126 Ill. 58, 9 Am. St. Rep. 523.

Indiana.—Milner v. Hyland, 77 Ind. 458.

Kentucky.—Hamilton v. Taylor, 1 Litt. Sel. Cas. (Ky.) 444.

Maine.—Dunn v. Wheeler, 86 Me. 238.

Missouri.—Bobb v. Woodward, 50 Mo. 95; *Goodwin v. Goodwin*, 69 Mo. 617.

New York.—Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 125, 11 Am. Dec. 417.

North Carolina.—Miller v. Bingham, 1 Ired. Eq. (N. Car.) 423, 36 Am. Dec. 58; *Falls v. Torrence*, 4 Hawks (N. Car.) 412; *Edwards v. University*, 1 Dev. & B. Eq. (N. Car.) 325, 30 Am. Dec. 170.

Ohio.—Williams v. First Presbyterian Soc., 1 Ohio St. 478.

South Carolina.—Gardner v. Holland, 42 S. Car. 50; *Jones v. Swearingen*, 42 S. Car. 58.

Tennessee.—Shelby v. Shelby, Cooke (Tenn.) 179, 5 Am. Dec. 686; *Marr v. Gilliam*, 1 Coldw. (Tenn.) 489.

Texas.—Golson v. Fielder, 2 Tex. Civ. App. 400.

West Virginia.—Heiskell v. Trout, 31 W. Va. 810.

Where the Trustee Purchases Property with Trust Funds, though in his own name, his possession will be deemed the possession of the beneficiaries until he does some unequivocal act denying their right; until then the statute of limitations does not begin to run against them. *Butler v. Lawson*, 72 Mo. 227.

No Length of Possession by the Trustee as Such will give him a title as against the beneficiary, but the trustee may repudiate existing relations and thenceforth hold adversely to the *cestui que trust*. What acts will amount to such a repudiation and adverse holding, is sometimes a subject of controversy. There can be little doubt, however, when the beneficiary himself recognizes and acquiesces in the hostile possession. *Hill v. Bailey*, 8 Mo. App. 89. And see *Catlin v. Decker*, 38 Conn. 262.

Assumption of Ownership in Himself.—The possession of the trustee does not become adverse until by some act he assumes to himself the ownership of the property. *Carter v. Feland*, 17 Mo. 383.

Cannot Hold in Dual Capacity.—A person holding in one capacity cannot hold adversely to himself, claiming in another capacity. *Roman Catholic Archbishop v. Shipman*, 79 Cal. 288.

Disclaimer.—The statute of limitations is not applicable to an express trust where there is no disclaimer. *Seymour v. Freer*, 8 Wall. (U. S.) 202; *Cunningham v. McKindley*, 22 Ind. 149. The trust must be disavowed. *Boone v. Chiles*, 10 Pet. (U. S.) 177.

Time begins to run against the trust only from the time it is disavowed by the trustee, who insists upon an adverse right and inter-

Constructive Trusts.—This principle is not applicable to constructive trusts where, by the wrongful act of one party, the other may charge him in equity as trustee. The rule in regard to this class of trusts is that if one, knowing he can avail himself of the benefit of such trust, lies by for the statutory period, his claim is thereby barred.¹ The statute, however, does not run against one

est, which is fully and unequivocally made known to the beneficiary. *Oliver v. Piatt*, 3 How. (U. S.) 333; *Janes v. Throckmorton*, 57 Cal. 368; *Hearst v. Pujol*, 44 Cal. 235; *Clayton v. Clayton* (Ky., 1889), 12 S. W. Rep. 312; *Roberts v. Littlefield*, 48 Me. 61.

Where the trustee, with the knowledge of the beneficiary, disclaims a trust, either expressly or by acts that necessarily imply a disclaimer, and an unbroken possession follows in the trustee, or those claiming under him, for a period equal to that prescribed by the act of limitations to constitute a bar, such lapse of time may be relied upon as a defense. *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478.

Where Real Estate is Conveyed in Trust for a Married Woman to the sole use of herself and her heirs by her present husband, and they have a daughter born to them, after which the wife dies and the husband remains on the premises with the daughter, who marries, each paying part of the expenses of house-keeping for three years, when the daughter dies, and her husband continues to live on the premises five years without paying board, the possession of the father, after the daughter's husband leaves, will not bar a recovery of the premises in an action by the husband and heirs of the daughter, there being nothing to show that such possession was adverse. *Spencer v. O'Neill*, 100 Mo. 49.

Where there is no Adverse Possession against a tenant in common by any of his cotenants, and no open repudiation of the trust has been made to his knowledge by the trustee in possession, the possession of the trustee is as much his possession as that of the other cotenants, and the statute of limitations cannot run against him, though the trustee has not declared a trust in his favor and has declared a trust in favor of the other cotenants, and has purchased his interest from another cotenant, if such declaration of trust and conveyance were unknown to such tenant in common. *Watson v. Sutro*, 86 Cal. 500.

What Amounts to Repudiation.—If the trustee does an act which he intends, and which is understood by his *cestui que trust*, to be a discharge of his trust, from that time the statute begins to run. *Starke v. Starke*, 3 Rich. (S. Car.) 438.

A deed to a tract of land granted in 1765 to the town of N. declared that the premises were conveyed to the inhabitants of said town "for a parsonage and the use and support of ministers of the gospel." Since 1800 the town had used the premises otherwise, and applied the income and profits therefrom to municipal purposes. It was held that there had been such a distinct repudiation and disavowal of the trust, and such an adverse holding of the premises, without application to have trust executed, as to make a

complete legal and equitable title in the town. *Congregational Soc. v. Newington*, 53 N. H. 595.

Secret Trusts.—The same rules apply to secret trusts, where property is conveyed for the purpose of defeating the grantor's creditors, with a secret trust for the use of the grantor. The grantee in such deed, and his heirs, is not clothed with any ownership of the land which will uphold a claim of adverse possession against a creditor of the grantor seeking to subject the land to the payment of his debts. *McSween v. McCown*, 23 S. Car. 342; *Jones v. Wilson*, 69 Ala. 400. See *Ellwell v. Hinckley*, 138 Mass. 225. Compare *Estes v. Long*, 71 Mo. 605.

1. *Boone v. Chiles*, 10 Pet. (U. S.) 223; *Peters v. Jones*, 35 Iowa 512; *Kennedy v. Kennedy*, 25 Kan. 151; *Main v. Payne*, 17 Kan. 608; *Hall v. Ditto* (Ky., 1890), 12 S. W. Rep. 941; *Weaver v. Leiman*, 52 Md. 708; *Murdock v. Hughes*, 7 Smed. & M. (Miss.) 219; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 120, 11 Am. Dec. 417; *Starke v. Starke*, 3 Rich. (S. Car.) 438; *Strimpfler v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606; *Cummings v. Stovall*, 6 Lea (Tenn.) 679; *Shelby v. Shelby*, *Cooke* (Tenn.) 179, 5 Am. Dec. 686.

Where a person takes possession of property in his own right, and is afterwards, by matter of evidence or construction, changed into a trustee, lapse of time may be pleaded in bar. *Decouche v. Sanetier*, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478.

Where a Constructive Trust is Made out in Equity, time protects the trustee, though his conduct was originally fraudulent. So where a party takes possession in his own right, and was *prima facie* owner, and is turned into a trustee by matter of evidence only. *Boone v. Chiles*, 10 Pet. (U. S.) 177.

If a party is constituted a trustee by a decree of a court of equity, founded on fraud or the like, his possession is then considered adverse and the statute of limitations will run. *Edwards v. University*, 1 Dev. & B. Eq. (N. Car.) 325, 30 Am. Dec. 170.

Continuing Express Trusts form the only class protected from the operation of the statute. *Murdock v. Hughes*, 7 Smed. & M. (Miss.) 219.

Where a Deed in Trust was Made to Secure Bona Fide Debts, one who purchased and took the trustee's title was held to be protected by the statute of limitations, however fraudulently he may have acted in suppressing competition, and although he bought in the property for the trustee. *Taylor v. Dawson*, 3 Jones Eq. (N. Car.) 86.

But the statute of limitations will not run against a claim to land, based upon a resulting trust implied when such claimant and the person having the legal title are both in continued and fraudulent possession of the land in question. There must be, for the legal

ignorant of his rights or incompetent to enforce them,¹ and the trustee must bring himself clearly within the position of a continued and consistent adverse claimant, and the *cestui que trust* must have no reasonable excuse for failing to prosecute his claim within the proper time.²

As to Third Parties.—But the rule that lapse of time does not bar a trust estate holds only as between the *cestui que trust* and the trustee, not between the *cestui* and the trustee on the one side and a stranger on the other. Therefore where the *cestui* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both.³ If the legal title was vested in the trustee, it is immaterial that the beneficiary was laboring under a disability, as of infancy or coverture.⁴

period, a possession adverse and hostile in its character. The fact that one held by deed and the other did not, does not make the possession adverse or vary the principle. *McCammon v. Pettitt*, 3 Sneed (Tenn.) 242.

1. Where children had a resulting trust in land bought by their father with their mother's money, it was held that the statute did not begin to run until their father's death. *Groves v. Groves*, 57 Miss. 658.

2. *McKin v. Williams*, 48 Tex. 89; *Grumbles v. Grumbles*, 17 Tex. 472; *Hunter v. Hubbard*, 26 Tex. 537; *Anderson v. Stewart*, 15 Tex. 285; *Carlisle v. Hart*, 27 Tex. 350; *Cole v. Noble*, 63 Tex. 432; *Hunter v. Dennis*, 112 Ill. 568; *McNamara v. Garrity*, 106 Ill. 384. And see *Lewis v. Hawkins*, 23 Wall. (U.S.) 119; *Swartwout v. Burr*, 1 Barb. (N.Y.) 499; *Champion v. Brown*, 6 Johns. Ch. (N.Y.) 402, 10 Am. Dec. 343; *Clayton v. Clayton* (Ky., 1889), 12 S. W. Rep. 312.

3. *United States*.—*Meeks v. Vassault*, 3 Sawy. (U.S.) 206; *Elmendorf v. Taylor*, 10 Wheat. (U.S.) 152.

Alabama.—*Fleming v. Gilmer*, 35 Ala. 62.

California.—*Patchett v. Pacific Coast R. Co.*, 100 Cal. 505.

Georgia.—*Mason v. Mason*, 33 Ga. 435, 83 Am. Dec. 172.

Missouri.—*Ewing v. Shannahan*, 113 Mo. 188.

Nebraska.—*McKesson v. Hawley*, 22 Neb. 692.

New Jersey.—*Snyder v. Snover*, 56 N. J. L. 20; *Prudden v. Lindsley*, 29 N. J. Eq. 615.

North Carolina.—*King v. Rhew*, 108 N. Car. 696, 23 Am. St. Rep. 76; *Herndon v. Pratt*, 6 Jones Eq. (N. Car.) 327.

Pennsylvania.—*Thompson v. Carmichael*, 122 Pa. St. 478.

Tennessee.—*Woolbridge v. Planters' Bank*, 1 Sneed (Tenn.) 297; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; *Shelby v. Shelby*, *Cooke* (Tenn.) 179, 5 Am. Dec. 686; *Watkins v. Specht*, 7 Coldw. (Tenn.) 585.

West Virginia.—*Swann v. Thayer*, 36 W. Va. 46; *Swann v. Young*, 36 W. Va. 57.

It is well settled that if the trustee delays the assertion of his rights until the statute perfects a bar against him, the *cestui que trust* will also be barred. The trustee may be compelled by the *cestui que trust* to enter so as to avoid an adverse possession. *Bryan v. Weems*, 29 Ala. 423, 65 Am. Dec. 407; *Colburn v. Broughton*, 9 Ala. 363; *Couch v. Couch*, 9 B. Mon. (Ky.) 160; *Worthy v. Johnson*, 10 Ga. 358, 54 Am. Dec. 393; *Crook v. Glenn*, 30 Md. 55.

As respects strangers, the legal and equitable estates are one, so as to be barred by adverse possession as to the legal estate. *Smilie v. Biffle*, 2 Pa. St. 52, 44 Am. Dec. 156.

An Adverse Public User of Land Held in Trust for the Purpose of a Highway, continuing for twenty years, will establish the highway against both trustee and *cestui que trust*, whether consistent with the trust or not. *Prudden v. Lindsley*, 29 N. J. Eq. 615.

Contingent Interests.—Where land was conveyed to a trustee and his heirs for the sole and separate use of a married woman, and her husband conveyed the same by deed in which her name did not appear except in the attestation clause, and no reference was made to the trustee or the equitable estate, it was held to be the deed of the husband alone; and the limitation being to the trustee and his heirs, to hold for the sole and separate enjoyment of the wife for life, and at her death to be equally divided between any children surviving, born of the marriage, it was necessary that the trustee should hold the fee until the vesting of the contingent interest, and the fee being in him and his estate being barred, that of the beneficiaries was also barred. *King v. Rhew*, 108 N. Car. 696, 23 Am. St. Rep. 76.

Where a trustee holding title to land for the benefit of one for life, with remainder to others, to be ascertained at the termination of the life estate, allows a prescriptive title to ripen against him during the life estate, the remaindermen are also barred. *Cushman v. Coleman*, 92 Ga. 772.

Purchaser from Trustee.—One purchasing at a trustee's sale and taking possession, is to be regarded as holding in his own right, and independent of the beneficiary. This constitutes his possession adverse. *Clark v. Snodgrass*, 66 Ala. 243.

Where, in case of an implied or resulting trust, the trustee or one holding the legal title assumes ownership, and sells and conveys the property to a third party, this amounts to a repudiation of the trust, and the possession of the grantees claiming under such conveyance will be regarded as adverse. *Peters v. Jones*, 35 Iowa 512; *Cummings v. Stovall*, 6 Lea (Tenn.) 679.

Notice.—A purchaser with notice of the trust must give clear notice to the beneficiary of his repudiation of the trust. *Sullivan v. Latimer*, 35 S. Car. 422.

4. *Alabama*.—*Molton v. Henderson*, 62 Ala. 426.

Georgia.—*Wingfield v. Virgin*, 51 Ga. 139;

(7) *Principal and Agent*.—The possession of one entering upon land as agent for another is that of his principal, and cannot become adverse to him until a disclaimer of his title and the assertion of a hostile title brought home to his knowledge.¹

(8) *Mortgagor and Mortgagee*.—*Possession of Mortgagor*.—The possession of the mortgagor is consistent with the rights and estate of the mortgagee, and in no sense adverse² until a repudiation of the mortgage, and denial of the right and title of the mortgagee, so open and notorious that knowledge on his part will be presumed.³

Brady v. Walters, 55 Ga. 251; *Worthy v. Johnson*, 10 Ga. 358, 54 Am. Dec. 393; *Knorr v. Raymond*, 73 Ga. 749; *Pendergrast v. Foley*, 8 Ga. 1.

Kentucky.—*Barclay v. Goodloe*, 83 Ky. 493; *Edwards v. Woolfolk*, 17 B. Mon. (Ky.) 376.

Maryland.—*Weaver v. Leiman*, 52 Md. 708.

Missouri.—*Ewing v. Shannahan*, 113 Mo. 188.

Pennsylvania.—And see *Smilie v. Biffle*, 2 Pa. St. 52, 44 Am. Dec. 156.

South Carolina.—*Long v. Cason*, 4 Rich. Eq. (S. Car.) 60.

Tennessee.—*Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; *Wooldridge v. Planters' Bank*, 1 Sneed (Tenn.) 297; *Parker v. Hall*, 2 Head (Tenn.) 641; *Goss v. Singleton*, 2 Head (Tenn.) 67.

Where such is the case the statute bars as effectually as if there existed no disability in the *cetui que trust*. *Crook v. Glenn*, 30 Md. 71; *Wych v. East India Co.*, 3 P. Wms. 309.

If the Trustee has been Guilty of a Breach of the Trust, and wronged the beneficiary, the remedy is against the trustee. *Ewing v. Shannahan*, 113 Mo. 201; *Molton v. Henderson*, 62 Ala. 426.

1. *Baucum v. George*, 65 Ala. 259; *Lucy v. Tennessee, etc.*, R. Co., 92 Ala. 246; *Whiting v. Taylor*, 8 Dana (Ky.) 403; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 605, 41 Am. Dec. 250; *Heward v. O'Donohoe*, 19 Can. Supreme Ct. 341; *Hunt v. Swiney* (Cal., 1893), 33 Pac. Rep. 854; *Williams v. Patt*, L. R. 12 Eq. 149; *Com. v. Dudley*, 10 Mass. 408.

Though a party who has agreed to act as friend and *quasi* agent of a nonresident landowner may renounce the agency at any time without a breach of trust or contract, he cannot at the same time retain the possession of the land; nor can he make the possession, when it becomes hostile, operate retrospectively so as to make the statute of limitations commence running before the possession became openly hostile. *Whiting v. Taylor*, 8 Dana (Ky.) 403.

Adverse to All Others.—But the possession of the agent may be adverse to all others but his principal. Thus the possession for the statutory period, by army officers, of land acquired by the United States for a reservation, although it should be in fact for the United States, is adverse as to other claimants, and a complete defense to an action of trespass to try title brought against such officers. *Stanley v. Schwalby*, 147 U. S. 508.

Deed by Agent.—It has been held that a deed signed by an agent will not constitute color of title. *Simmons v. Lane*, 25 Ga. 178; *Payne v. Blackshear*, 52 Ga. 637.

Attorney and Client.—Where an attorney, without undue influence, *bona fide* and for a full and fair price, acquires land, the subject matter of his attorneyship, from his client, and receives a deed from the client and is put into possession, where he remains for over fifteen years, making valuable improvements, paying taxes, and claiming the land as his own, and in the meantime compromises an outstanding title, and during the fifteen years the client makes no claim to the premises or to any proceeds arising therefrom, the statute of limitations is a bar to any action. *Yeamans v. James*, 27 Kan. 195.

2. *Ringo v. Woodruff*, 43 Ark. 469; *Jordan v. Sayre*, 24 Fla. 1; *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233; *Green v. Turner*, 38 Iowa 113; *Crawford v. Taylor*, 42 Iowa 260; *Gower v. Winchester*, 33 Iowa 303; *Watts v. Creighton*, 85 Iowa 154; *Hodgdon v. Heidman*, 66 Iowa 645, *explaining* *Jamison v. Perry*, 38 Iowa 14; *Doyle v. Mellen*, 15 R. I. 523.

Presumption as to Possession.—The mortgagor is presumed to hold in subordination to the title of the mortgagee. *Boyd v. Beck*, 29 Ala. 703; *Williams v. Kerr*, 113 N. Car. 306.

Presumption of Payment.—A presumption of payment of the mortgage debt may be raised where the mortgagor remains in uninterrupted possession of the property, after condition broken, without entry or claim on the part of the mortgagee. *Howland v. Shurtleff*, 2 Met. (Mass.) 26, 35 Am. Dec. 384; *Chick v. Rollins*, 44 Me. 104.

The presumption, however, is disputable. *Cheever v. Perley*, 11 Allen (Mass.) 584; *Ayres v. Waite*, 10 Cush. (Mass.) 76.

In Louisiana the exceptional legislation relative to property bank mortgages protects such mortgages against any adverse right of ownership or possession subsequent to their date and up to their enforcement. *Kernan v. Baham*, 45 La. Ann. 799.

3. *England*.—*Doe v. Williams*, 5 Ad. & El. 291, 31 E. C. L. 340; *Palmer v. Eyre*, 17 Q. B. 366, 79 E. C. L. 366; *Pugh v. Heath*, L. R. 7 App. Cas. 235, 35 Moak Rep. 172.

Alabama.—*Foster v. Goree*, 5 Ala. 424; *Elsberry v. Boykin*, 65 Ala. 336; *State v. Conner*, 69 Ala. 212.

Arkansas.—*Duke v. State*, 56 Ark. 485; *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572 (*approving* *Harris v. King*, 16 Ark. 122; *Birnie v. Main*, 29 Ark. 591; *Coldcleugh v. Johnson*, 34 Ark. 312, and *overruling* *Sullivan v. Hadley*, 16 Ark. 129; *Guthrie v. Field*, 21 Ark. 379; *McGehee v. Blackwell*, 28 Ark. 27; *Hall v. Denckla*, 28 Ark. 506; *Mayo v. Cartwright*, 30 Ark. 407, in so far as they

Possession of His Grantee.—Grantees of the mortgagor with notice, or where the mortgage has been recorded, can only avail themselves of the statute of limitations under the same circumstances which would be available to the mortgagor.¹

After Foreclosure Sale.—The possession of the mortgagor after a valid foreclosure sale is in subordination to the title of the purchaser unless the contrary appears, or until an intention to claim the premises is made manifest.²

held that adverse possession may be set up by the mortgagor or his vendee with notice, without a distinct denial of, or acts inconsistent with, the mortgagee's title).

Connecticut.—Haskell v. Bailey, 22 Conn. 573.

Iowa.—Grether v. Clark, 75 Iowa 383, 9 Am. St. Rep. 491; Jamison v. Perry, 38 Iowa 14.

Massachusetts.—Holmes v. Turner's Falls Co., 150 Mass. 535.

Missouri.—Chouteau v. Riddle, 110 Mo. 366, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 245; Lewis v. Schwenn, 93 Mo. 26, 3 Am. St. Rep. 511; Combs v. Goldsworthy, 109 Mo. 151; Benton County v. Czarlinsky, 101 Mo. 275; Cape Girardeau County v. Harbison, 58 Mo. 90; Snyder v. Chicago, etc., R. Co., 112 Mo. 527, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 246; Gardner v. Terry, 99 Mo. 523; Booker v. Armstrong, 93 Mo. 49; St. Louis v. Priest, 103 Mo. 652.

North Carolina.—Parker v. Banks, 79 N. Car. 480.

West Virginia.—Flynn v. Lee, 31 W. Va. 487.

Must be Repudiation of Mortgage.—The friendly relation between the mortgagor and mortgagee will be regarded as continuing until disclaimed by declarations or acts unmistakably hostile. Chouteau v. Riddle, 110 Mo. 366, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 245.

Until foreclosure the mortgagor owns the equity of redemption. This he may alien or transfer to another. It cannot be known, without some overtact throwing off allegiance, that the mortgagor or his vendee is not quietly enjoying the possession of the equity of redemption, at all times acknowledging the rights of the mortgagee. Boyd v. Beck, 29 Ala. 714.

It must appear that the mortgagor has by his acts or declarations repudiated the mortgage and denied the right and title claimed under it. Mere possession under claim of title is not necessarily adverse to the mortgagee. He must be advised by some act or declaration that possession is being held against his superior right, or at least something must be done that would put a reasonably prudent man on inquiry as to whether such holding was hostile to his right. Combs v. Goldsworthy, 109 Mo. 160.

But actual knowledge is not necessary. Bush v. White, 85 Mo. 339.

It is not sufficient that the mortgagor or those holding under him occupy, use, improve, and pay taxes on the premises as their own absolute property. Ringo v. Woodruff, 43 Ark. 469.

Where a Husband Mortgages His Land after a Parol Gift to His Wife, as payment of loans to

him from her separate estate, the possession of the wife, while she resides on the land with her husband, is not an adverse possession under the statute of limitations as against the mortgagee. Gafford v. Strauss, 89 Ala. 283, 18 Am. St. Rep. 111, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 250.

Mortgage by Agent.—Where an agent buys land with his principal's money, taking the conveyance in his own name and executing a mortgage of the premises to a third party, his principal cannot avail himself of the statute of limitations as against the mortgagee where such principal takes a deed from the agent and enters into possession. Watts v. Creighton, 85 Iowa 154.

Condition Broken.—A condition broken will render the possession adverse. Green v. Mizelle, 54 Miss. 220.

1. Doyle v. Mellen, 15 R. I. 523; Boyd v. Beck, 29 Ala. 714; Herbert v. Hanrick, 16 Ala. 581; Harding v. Durand, 36 Ill. App. 238; Duke v. State, 56 Ark. 485; Grether v. Clark, 75 Iowa 383, 9 Am. St. Rep. 491; Lewis v. Schwenn, 15 Mo. App. 342.

A Deed by the Mortgagor in Possession of a Third Party with Notice of the mortgage conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. Parker v. Banks, 79 N. Car. 480.

Such Purchaser Stands in the Shoes of the Mortgagor, and can avail himself of the presumption of payment only where the mortgagor could have done so under like circumstances. Chouteau v. Riddle, 110 Mo. 366; Martin v. Neblett, 86 Tenn. 383.

The Mere Taking Possession by the Vendee of the Mortgagor and continued occupancy by him and his vendees for the period of the statutory bar, accompanied by their open control and improvement of the land and payment of taxes thereon as their own absolute property, with the intention of holding it against all comers, will not bar the action. Whittington v. Flint, 43 Ark. 504, 51 Am. Rep. 572. See Jamison v. Perry, 38 Iowa 14.

And the rule is the same as to a junior mortgagee. Elsberry v. Boykin, 65 Ala. 336.

Possession of mortgaged premises under claim of ownership will not be adverse to the mortgagee where the claim was made with the knowledge of the mortgage and the claimant never in terms repudiated it. Duke v. State, 56 Ark. 485.

2. Avery v. Judd, 21 Wis. 262; Seeley v. Manning, 37 Wis. 574; Maxwell v. Hartmann, 50 Wis. 660; Neilson v. Geignon, 85 Wis. 550, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 227, 228; Cook v. Travis, 20 N. Y. 400; Lowry v. Tilly, 31 Minn. 500; Tucker v. Keeler, 4 Vt. 161.

And the rule is the same as to a purchaser—

Possession by Mortgagee.—The mortgagee in possession after payment of the debt must, in order to be protected by the statute of limitations, show that he holds adversely, and some act other than the mere possession under the mortgage must be shown in order to establish the adverse character of such possession.¹ If in possession after condition broken, he may acquire title by lapse of time,² unless he has, in the meantime, recognized the mortgage as still subsisting and the mortgagor's right to redeem.³

from the mortgagor. *Williams v. Kerr*, 113 N. Car. 306.

Where a mortgagor or his grantee remains in possession after the title to an undivided interest therein has passed by a foreclosure sale to a purchaser thereof, his possession is presumed amicable and in subordination to the title of the purchaser until the contrary appears. The parties so jointly owning the land become tenants in common, the possession of one being deemed the possession of both; and the statute of limitations does not begin to run against such purchaser until an ouster or the assertion of some hostile claim by the tenant in possession, denoting an intention to hold adversely to his cotenant. *Lowry v. Tihen*, 31 Minn. 500.

1. *Green v. Turner*, 38 Iowa 118; *Crawford v. Taylor*, 42 Iowa 262; *Warder v. Enslin*, 73 Cal. 291; *Bollinger v. Chouteau*, 20 Mo. 89; *Wilkerson v. Allen*, 67 Mo. 502; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658.

When Statute Begins to Run.—The statute of limitations will commence running against the right of the mortgagor to redeem whenever the mortgagee, with notice to the mortgagor, asserts an absolute title in himself to the property in his possession. A devise of the property as his estate is an assertion of title adverse to the claim of the mortgagor to redeem. *Kohlheim v. Harrison*, 34 Miss. 457.

Mortgagee in Possession to Satisfy His Claim out of Proceeds.—Where a mortgagee takes possession under an arrangement with the mortgagor for him to hold possession of the property, and manage it until he shall satisfy his claim from the proceeds, such possession is not adverse until the mortgagee's claim is satisfied or until he asserts an absolute title in himself and gives distinct notice of it to the mortgagor. *McPherson v. Hayward*, 81 Me. 329.

Possession by the Mortgagee after Foreclosure, but no order of sale issued pursuant to an arrangement with the mortgagor by which the mortgagee was to apply the rents to a satisfaction of the mortgage, is not adverse. *Frink v. Le Roy*, 49 Cal. 317. See *Knowlton v. Walker*, 13 Wis. 264.

California.—Under *California Code Civ. Pro.*, § 346, an action to redeem a mortgage can be brought by the mortgagor against the mortgagee in possession at any time, unless the mortgagee has maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. *Raynor v. Drew*, 72 Cal. 307.

Void Foreclosure—Color of Title.—Where there has been a foreclosure, and a deed acquired by the mortgagee, though the pro-

ceedings were void, yet the deed will give color of title. *Mason v. Ayers*, 73 Ill. 121.

Deed Absolute on Its Face.—One in possession under a deed absolute on its face, but which is in fact a mortgage, does not hold adversely. *Husheon v. Husheon*, 71 Cal. 407.

2. *Slicer v. Pittsburg Bank*, 16 How. (U. S.) 571; *Gunn v. Brantley*, 21 Ala. 633; *Morgan v. Morgan*, 10 Ga. 297; *Montgomery v. Chadwick*, 7 Iowa 114; *Reynolds v. White*, 94 Ky. 156; *Phillips v. Sinclair*, 20 Me. 269; *Little v. Teague*, 60 Miss. 115; *Hoffman v. Harrington*, 33 Mich. 392; *Chapin v. Wright*, 41 N. J. Eq. 438; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Knowlton v. Walker*, 13 Wis. 264; *Waldo v. Rice*, 14 Wis. 286.

The statute does not begin to run against the owner of the equity of redemption until the mortgagee takes actual, open, and notorious possession of the mortgaged premises. *Knowlton v. Walker*, 13 Wis. 264.

Claiming to Hold as Owner.—Where the mortgagee has, during a period of twenty-one years, held possession adversely to the mortgagor, claiming to hold not as mortgagee, but as owner, a court of equity, acting on the analogy of the statute of limitations, will hold the right to redeem barred, and the mortgagee must hold the possession in such manner that if the legal title and right of possession were in the mortgagor he would be barred of an action of ejectment. *Robinson v. Fife*, 3 Ohio St. 551; *Crook v. Glenn*, 30 Md. 55. The period is adopted by analogy to the statute of limitations. *Hughes v. Edwards*, 9 Wheat. (U. S.) 489.

Where there has been No Accounting.—A mortgagor, by allowing the mortgagee to hold possession of the premises for twenty years without accounting and without admitting that he possessed the mortgage title only, loses the right of redemption. *Clark v. Clough*, 65 N. H. 43; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; 8 Am. Dec. 467; *Phillips v. Sinclair*, 20 Me. 269; *Jenner v. Tracy*, 3 P. Wms. 287, note.

Before Bar is Complete.—A mortgagee's possessor at any period within twenty years from his entry, so far from being hostile to that of the mortgagor, is in equity deemed a possession in trust for him. *Borst v. Boyd*, 3 Sandf. Ch. (N. Y.) 507.

Presumption of Foreclosure.—Twenty years' possession under a mortgage is presumptive evidence of foreclosure. *Randall v. Bradley*, 65 Me. 43.

3. **Recognition of Mortgage.**—*Robinson v. Fife*, 3 Ohio St. 551; *Waldo v. Rice*, 14 Wis. 286; *Edsell v. Buchanan*, 2 Ves. Jr. 83.

Any acts or circumstances which show a recognition of the mortgage will prevent the

(9) *Purchaser Pendente Lite*.—The statute of limitations has no operation upon the subject of litigation, and hence does not run in favor of the purchaser of land *pendente lite*, who cannot be regarded as holding adversely to the parties to the suit during the continuance of the litigation.¹

(10) *Vendor and Vendee*—*Possession of Vendor*.—Though the mere continued possession of the vendor of land, after conveyance executed, is not adverse to his vendee, or one claiming under him,² yet there is nothing in

running of time against the mortgagor, and time will begin to run only from the latest recognition within that period, *Morgan v. Morgan*, 10 Ga. 297; as, for example, where the mortgagee within twenty-one years before the filing of the bill to redeem takes a judgment for the mortgage debt, and files a bill of foreclosure, *Robinson v. Fife*, 3 Ohio St. 551. And see *Pendleton v. Rooth*, 1 Giff. 35.

Burden of Proof.—It lies upon the mortgagor to show such recognition. *Morgan v. Morgan*, 10 Ga. 297.

1. **Rule as to Purchasers Pendente Lite.**—In a suit to enforce a judgment lien against the real estate of a judgment debtor, a *pendente lite* purchaser from such debtor does not hold adversely to the party seeking to enforce such lien. *Parker v. Clarkson*, 39 W. Va. 184.

Where land was sold at a judicial sale, the sale confirmed, and a conveyance made to the purchaser, who took possession, and the litigation continued, and after ten years the decrees ordering and confirming the sale were reversed and declared void, and the sale set aside for want of jurisdiction in the court to order it, during which time the purchaser had been in the actual possession of the land, paying taxes, it was held that such possession was not adverse; that he stood in only the same relation to the land in controversy as did his vendor, and was as much bound by the proceedings in the suit, and could therefore claim no protection from the statute of limitations or adverse possession which his vendor could not claim, and he, being a party to the suit, had no such claim whatever. *Lynch v. Andrews*, 25 W. Va. 751.

Laches—Bona Fide Purchaser.—But though it is well settled that a purchaser *pendente lite* is bound by the judgment rendered against the one from whom he purchased, a party may by laches, lose his *lis pendens*, and the purchaser from the party whose title is defeated, and against whom a recovery is had, will be treated as a stranger to the proceedings. Unreasonable delay in the prosecution of an action is such negligence as will deprive a party of his remedy against a *bona fide* purchaser. *Wallace v. Marquett*, 88 Ky. 130.

Administration.—So long as the administration of an estate remains unclosed, the successor in interest of one of the distributees, entering into the possession under a decree of partial distribution, cannot acquire title by limitation or adverse possession as against those legally entitled to claim an interest in the land as tenants in common, though he claims title to the whole and pays

all taxes thereon. *In re Grider's Estate*, 81 Cal. 571. And see *Christy v. Spring Valley Water Works*, 97 Cal. 21.

2. *United States*.—*Higginson v. Mein*, 4 Cranch (U. S.) 415; *Woolworth v. Root*, 40 Fed. Rep. 723.

Alabama.—*Yancey v. Savannah*, etc., R. Co., 101 Ala. 234.

Arkansas.—*Harris v. King*, 16 Ark. 122.

Georgia.—*Jay v. Whelchel*, 78 Ga. 786.

Indiana.—*Ronan v. Meyer*, 84 Ind. 390; *Jeffersonville*, etc., R. Co. v. *Oyler*, 82 Ind. 394; *Henry v. Stevens*, 108 Ind. 281; *Record v. Ketcham*, 76 Ind. 482; *Rowe v. Lewis*, 30 Ind. 163; *Rowe v. Beckett*, 30 Ind. 154, 95 Am. Dec. 676.

Iowa.—*Clarity v. Sheridan* (Iowa, 1894), 59 N. W. Rep. 52; *Garstang v. Davenport* (Iowa, 1894), 57 N. W. Rep. 876.

Kansas.—*McNeil v. Jordan*, 28 Kan. 7; *Sellers v. Crossan*, 52 Kan. 570.

Kentucky.—*Carpenter v. Carpenter*, 8 Bush (Ky.) 285.

Louisiana.—*Roe v. Bundy*, 45 La. Ann. 398, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), title ADVERSE POSSESSION.

Missouri.—*Brown v. Brown*, 106 Mo. 611; *De Bernardi v. McElroy*, 110 Mo. 650; *Ivy v. Yancey* (Mo., 1895), 31 S. W. Rep. 937.

New York.—*Jackson v. Burton*, 1 Wend. (N. Y.) 341; *Butler v. Phelps*, 17 Wend. (N. Y.) 642; *Doe v. Butler*, 3 Wend. (N. Y.) 149. And see *Bissing v. Smith*, 85 Hun (N. Y.) 564.

Ohio.—*Pittsburg*, etc., R. Co. v. *Canton* (C. C.), 3 Ohio Dec. 241.

Pennsylvania.—*Connor v. Bell*, 152 Pa. St. 444, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 247; *Olwine v. Holman*, 23 Pa. St. 279; *Ingles v. Ingles*, 150 Pa. St. 397; *Buckholder v. Sigler*, 7 W. & S. (Pa.) 154.

Texas.—*Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71; *Voight v. Mackle*, 71 Tex. 78.

Wisconsin.—*Schwalbach v. Chicago*, etc., R. Co., 73 Wis. 137, 2 Am. St. Rep. 740, 69 Wis. 292; *Allen v. Allen*, 58 Wis. 210; *McCormick v. Herndon*, 86 Wis. 449, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 247; *Riha v. Pelnar*, 86 Wis. 408.

Void Deed.—Where, after the execution by husband and wife of a void deed of their homestead, they remained in possession thereof, their possession was held not to be the possession of the grantee, so as to enable him to claim by adverse possession, as against a party claiming by deed from the wife made after the husband's death, and while she was in possession. *Parks v. Barnett* (Ala., 1894), 16 So. Rep. 136.

Reservation of Homestead.—The owner of land, while in its occupancy as a homestead,

their relations which will prevent the vendor from acquiring a title by adverse possession;¹ and if the intention to hold adversely is manifested by some unequivocal act of hostility, brought to the knowledge of the vendee, the statute of limitations will begin to run.²

conveyed the same in fee, reserving in the deed, however, his homestead right. It was held that the continued possession of the premises by the grantor, after his conveyance, was not adverse to his grantee, because such possession was consistent with the deed. *Stevens v. Wait*, 112 Ill. 544.

Acquisition of Tax Title.—The defendant's father, with whom the defendant lived, and whose affairs he managed, sold the land in question, which by intermediate conveyances came to plaintiffs' ownership. The defendant's father continued to farm the land, and it was never separated from the rest of his farm. The plaintiffs used it a few weeks of each year in their business of driving logs. It was held that defendant's father was tenant or licensee of the owners, that he held the land in trust, and that under the existing relationship he could not equitably extinguish their title and acquire the land himself by buying it at a tax sale and concealing his purchase until the time of redemption expired. *Saunders v. Farmer*, 62 N. H. 572.

Execution Sale—Judgment Debtor.—The possession of a judgment debtor after a sale of the property under execution is by sufferance of the purchaser, and not adverse to him. *Hamilton v. Buchanan*, 112 N. Car. 463; *Jackson v. Sternbergh*, 1 Johns. Cas. (N. Y.) 153; *Bradford v. Russell*, 79 Ind. 64; *Rucker v. Steelman*, 97 Ind. 222.

It is not adverse until after the delivery of the sheriff's deed. *Leonard v. Flynn* (Cal., 1891), 26 Pac. Rep. 1097.

And there must be an explicit disclaimer of the purchaser's right, and assertion of right in himself. *Whitlock v. Johnson*, 87 Va. 323.

Tax Sale.—The rule is the same as to one purchasing at a tax sale. *Hubbell v. Weldon*, Hill & D. Supp. (N. Y.) 139.

Administrator's Sale—Possession of Heirs.—Since the heirs take subject to the payment of debts, their possession is not adverse to a purchaser at the administrator's sale. *Rogers v. Johnson*, 125 Mo. 202.

1. *Smith v. Montes*, 11 Tex. 24; *Cramer v. Benton*, 4 Lans. (N. Y.) 291.

He may disseise his grantee, and by adverse possession for the necessary time bar the latter's entry. *Tilton v. Emery*, 17 N. H. 536.

Warranty Deed.—It is immaterial that the land was conveyed by warranty deed. The grantor is not estopped from asserting the adverse possession by a covenant of warranty. *Sherman v. Kane*, 86 N. Y. 57; *Abbott v. Page*, 92 Ala. 571, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 247; *Traip v. Traip*, 57 Me. 268; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 Am. Dec. 65.

A Grantor Conveying by Quitclaim Deed may remain in possession of the property and assert and maintain an adverse possession. *Dorland v. Magilton*, 47 Cal. 485.

The Grantor of Lands in Trust may, by subse-

quent adverse use, acquire rights inconsistent with the trust. *Snyder v. Snover* (N. J., 1893), 27 Atl. Rep. 1013.

2. *Sherman v. Kane*, 46 N. Y. Super. Ct. 310; *Burhans v. Van Zandt*, 7 Barb. (N. Y.) 91; *Ingles v. Ingles*, 150 Pa. St. 397; *Olwine v. Holman*, 23 Pa. St. 279; *Garabaldi v. Shut-tuck*, 79 Cal. 511; *Hoyt v. Jones*, 31 Wis. 389; *Chalfin v. Malone*, 9 B. Mon. (Ky.) 496, 50 Am. Dec. 525; *Creekmur v. Creekmur*, 75 Va. 430; *Roe v. Bundy*, 45 La. Ann. 398, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), title ADVERSE POSSESSION.

Intention must be Manifest.—There must be a change in the character of the possession if the vendor wishes to acquire title by adverse possession. Such change must be manifested by some act of hostility to the title of the vendee, plainly indicating to the latter the intention to deny his right and hold adversely to it. *Connor v. Bell*, 152 Pa. St. 444; *Paldi v. Paldi*, 84 Mich. 346.

Where a sale of land under a decree was made and confirmed, and the purchase money paid, but no deed given, and the former owner's heirs remained in possession, it was held that the statute of limitations did not begin to run against the purchaser until the heirs made a distinct disavowal of his title, and the assertion of the adverse claim was brought home to him. *Whitlock v. Johnson*, 87 Va. 323.

Presumption when Grantor's Possession Long Continued.—In *Brinkman v. Jones*, 44 Wis. 498, it was held that the possession of the grantor is presumably adverse to the grantee where it is continued for a long time after the grant, and is inconsistent in its nature with the grantee's rights under the terms of the deed.

Conveyance of Right of Way—Re-entry of Grantor.—The plaintiff had conveyed land to the defendant for a right of way, by a conveyance in which the defendant agreed to construct its railroad on the plaintiff's lands, and upon condition that if the railroad should not be so located the conveyance should be void. After the conveyance the defendant located the road-bed on the land. After five years, the plaintiff, without the knowledge of the defendant, cultivated a part of said land for thirteen years from the execution of the deed, at the end of which time the defendant entered without further permission from the plaintiff and completed the road. It was held that the re-entry by the plaintiff was insufficient to originate a right to the land by adverse possession. *Yancey v. Savannah*, etc., R. Co., 101 Ala. 234.

Second Grantee.—Where the vendor continued in possession of the land for a number of years and then conveyed it to another party, who took and held possession thereunder, such possession by the second grantee was held adverse to those claiming under the first deed. *Smith v. Osage*, 80 Iowa 84.

When a person who has conveyed property

Possession of Vendee.—The possession of the vendee is adverse to all the world, including his vendor, whether his deed is defective or not.¹

(11) **Husband and Wife**—As between Husband and Wife.—Owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues,² but where the marital relations have been terminated

by a warranty deed subsequently acquires an interest in the same property by a tax title, and conveys his subsequently-acquired title in a portion of the property to third parties, who reside thereon for more than ten years, their title cannot be attacked. *Reilly v. Blaser*, 61 Mich. 399.

Re-entry by Vendor.—If the vendor, on the abandonment of the land by his vendee, takes possession and puts in a tenant, it amounts to an ouster. *Pipher v. Lodge*, 16 S. & R. (Pa.) 214. And see *Watson v. Gregg*, 10 Watts (Pa.) 289, 36 Am. Dec. 176; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

1. **Rule as to Possession of Vendee**—*Kentucky*.—*Voorhies v. White*, 2 A. K. Marsh. (Ky.) 28; *Moore v. Farrow*, 3 A. K. Marsh. (Ky.) 48; *Lyne v. Kentucky Bank*, 5 J. J. Marsh. (Ky.) 571; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 239, 68 Am. Dec. 723; *Ring v. Gray*, 6 B. Mon. (Ky.) 374; *Sutton v. Pollard* (Ky., 1895), 29 S. W. Rep. 637; *Ray v. Thurman* (Ky.), 15 S. W. Rep. 1116.

Michigan.—*Case v. Green*, 53 Mich. 615.

Missouri.—*Mattison v. Ausmuss*, 50 Mo. 551; *Norcum v. Gaty*, 19 Mo. 65.

New York.—*Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 637; *People v. Trinity Church*, 22 N. Y. 44.

Texas.—*Thompson v. Thompson*, 12 Tex. 327; *Nexia v. Lewis*, 3 Tex. Civ. App. 113. See also *Eskridge v. Patterson*, 78 Tex. 417.

West Virginia.—*Ketchum v. Spurlock*, 34 W. Va. 597.

Purchaser at Execution Sale.—So a purchaser at an execution sale holds adversely to the defendant in execution. *Normant v. Eureka Co.* (Ala., 1893), 12 So. Rep. 454.

Grantee in Deed from Guardian.—The possession of the grantee in a deed by a guardian is adverse, in its incipency, as against the widow and adult son of the intestate, who were parties to the proceedings in court ordering the sale. *Myers v. McGavock*, 39 Neb. 843.

Deed in Escrow.—The possession of a grantee under a deed placed in escrow, but never delivered, is the possession of the grantor. *McAuliff v. Parker*, 10 Wash. 141.

Subsequently Acquired Interest of Vendor.—A vendee in possession under a deed to the entire undivided interest of a tenant in common does not hold adversely to his grantor as to an interest subsequently acquired by the latter from another cotenant. *Gardner v. Pace* (Ky., 1889), 11 S. W. Rep. 779.

Parol Gift.—Possession under a parol gift is adverse to the donor. *International Bank v. Fife*, 95 Mo. 118; *Comins v. Comins*, 21 Conn. 416; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Quinn v. Quinn*, 76 Iowa 565.

Exception in Deed.—But a vendee entering under his deed does not hold adversely as to certain lots excepted in his deed as previously

sold to another. *Rossee v. Wickham*, 36 Barb. (N. Y.) 386. And a grantee with notice that an alleyway is excepted from his deed does not acquire title thereto by adverse possession on account of the mere failure of the grantor to have it opened. *Garstang v. Davenport* (Iowa, 1894), 57 N. W. Rep. 876.

2. *Cloughton v. Cloughton*, 70 Miss. 384; *Bell v. Bell*, 37 Ala. 536, 79 Am. Dec. 73; *Gafford v. Strauss*, 89 Ala. 283, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 250; *Kille v. Ege*, 79 Pa. St. 45; *Veal v. Robinson*, 70 Ga. 809; *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249; *Berry v. Hall* (Ky., 1889), 11 S. W. Rep. 474; *Jackson v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; *Berkowitz v. Brown*, 3 Misc. Rep. (N. Y. C. Pl.) 1. And see *Clark v. Gilbert*, 39 Conn. 94; *Collins v. Lynch*, 157 Pa. St. 246, 33 W. N. C. (Pa.) 230.

The possession of premises by a husband claiming the same in his marital right can in no sense be deemed adverse to the claim of one deriving title from the wife. *Vandervoort v. Gould*, 36 N. Y. 639.

A Wife cannot Claim Adversely to Her Husband, or those claiming under him, so long as he remains the head of the family. *Santa Barbara First Nat. Bank v. Guerra*, 61 Cal. 109.

Nor can a Husband Hold Adversely to His Wife premises of which they are in the joint occupancy as a family. *Hendricks v. Rasson*, 53 Mich. 575.

Where Husband and Wife are Tenants by Entirety, neither is capable of claiming or holding adversely to the other. *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159.

Divorce.—In *Hopson v. Fowlkes*, 92 Tenn. 697, it was held that the wife's title is barred if, after the severance of an estate by the entirety by a divorce of the husband and wife, the entire interest in the lands is sold under decree for the husband's debts, and thereafter held adversely by the purchaser for the statutory period.

Joint Possession by Husband and Wife, held under the wife's color and claim of title, inures to her benefit. *Templeton v. Twitty*, 88 Tenn. 595.

Land Bought by Husband with Wife's Funds.—Where land is bought in the husband's name with the money of the wife, his possession of it as their common home without claim of ownership expressed to her or to any one likely to inform her is not adverse to her right to a resulting trust. *Berry v. Wiedman* (W. Va., 1894), 20 S. E. Rep. 817.

Destruction by Husband of Unrecorded Deed—**Fraudulent Conveyance in Trust for Wife.**—In *Potter v. Adams*, 125 Mo. 118, the husband destroyed his unrecorded deed in order to reinvest title in his grantor, and then procured a deed to the same lands to be made in fraud of his creditors, to a third person in trust for his wife, which was recorded, and both hus-

by divorce or abandonment, it seems that one may acquire title from the other by adverse possession.¹

As to Third Parties.—For the same reason a husband or wife entering upon land in subordination to the title of the owner cannot acquire title by adverse possession through the possession of his or her consort.²

(12) *Parent and Child.*—As between those occupying parental and filial, or *quasi* parental and filial, relations, the possession of one is presumed to be permissive, and not adverse to the other.³

band and wife remained in possession of the land for more than ten years, the wife having title under the trust deed, and the husband having no title. It was held that the wife must be considered to have had sole possession during the joint occupancy, and that title would vest in her by virtue of the statute of limitations, running from the recording of the trust deed. See also *McQueen v. Fletcher*, 77 Ga. 444.

Homestead.—The husband's acts of possession and control over the homestead will be taken as evidence of joint ownership with the wife, and no presumption of an adverse holding can be indulged or allowed. *Mauldin v. Cox*, 67 Cal. 391.

Separate Property.—In *Bell v. Bell*, 37 Ala. 541, 79 Am. Dec. 73, it was said that it might be that if the wife was in possession of property claiming openly that it was conveyed to her as a separate estate, so as to exclude the husband's marital rights, and if she had continued to possess and enjoy the property under such claim for more than twenty years, the law would presume against the husband that the claim was founded on a valid conveyance creating a separate estate.

Grantee of Husband.—Where a husband sells the land of his wife, the possession of his grantee is not adverse to the wife during the existence of the coverture. *Stephens v. McCormick*, 5 Bush (Ky.) 181; *Salter v. Salter*, 80 Ga. 178, 12 Am. St. Rep. 249.

Dower of Wife.—And an adverse possession for the statutory period under a contract of sale made by the husband does not bar the wife's inchoate right of dower. *Boling v. Clark*, 83 Iowa 481; *Williams v. Williams*, 89 Ky. 381; *Miller v. Pence*, 132 Ill. 149.

Grantee of Wife.—But where a married woman conveys land held in her own right without joining her husband in the deed, fifteen years' adverse possession by the grantee will bar the inchoate right of the husband. *Jenkins v. Dewey*, 49 Kan. 49.

1. *Jones v. Thomas*, 124 Mo. 586.

Where a void decree of divorce was made between husband and wife, partitioning certain land of the husband's, and the decree was acquiesced in by the husband, and the wife thereafter lived upon the portion of the land partitioned to her, in undisturbed possession, as a *feme sole*, for the time required for an adverse possession by the statute of limitations, she was held to have acquired a title by adverse possession. *Warr v. Honeck*, 8 Utah 61. In this case it was said that under the statute giving a married woman all her property owned prior to the marriage or acquired during the coverture, with power to sue and be sued plead and be impleaded, defend and

be defended at law, an abandoned wife, living as a *feme sole*, could hold land adversely to her husband.

2. Where a husband rents land and moves upon it with his family in subordination to the owner's title, the wife cannot, during coverture, claim the premises adversely to the owner so as to set in motion the statute of limitations. *Frink v. Alsip*, 49 Cal. 103. And the husband's declarations as to the nature of his holding are binding upon the widow after his death. *Daveis v. Collins*, 43 Fed. Rep. 31. And see *Meier v. Meier*, 105 Mo. 411.

The possession of the widow is of the same character as was that of her husband. *Mitchell v. Murphy*, 43 Fed. Rep. 425. There must be a renunciation of the privity. *Mitchell v. Murphy*, 9 Pa. Co. Ct. Rep. 583. And see *Oury v. Saunders*, 77 Tex. 278.

3. *Burrus v. Meadors*, 90 Ala. 140; *Wells v. Head*, 12 B. Mon. (Ky.) 170.

A possession with reference to parental or filial duty cannot be adverse. *White v. White*, 52 Ark. 188. But see *Douglas v. Irvine*, 126 Pa. St. 643.

Where the Title is in the Child the possession of the parent is not adverse until he does some act disavowing the right of the child and asserts title in himself in hostility thereto. *Allen v. Allen*, 58 Wis. 202; *McDougal v. Bradford*, 80 Tex. 558; *Collins v. Lynch*, 167 Pa. St. 635. And see *Evans v. Berlocher*, 83 Tex. 612.

Nor is the Possession of the Children occupying and renting the property and paying taxes adverse to the absent parent. *Silva v. Wimpenny*, 136 Mass. 253. And see *Gifford v. Gifford*, 100 Mich. 258.

Acts of Possession and Control among those occupying parental and filial relations are not to be deemed so convincing, because they may be consistent with a mere permissive enjoyment of a usufructuary possession. *Davis v. Bowmar*, 55 Miss. 766.

The Residence of a Son upon land in the occupation of his parent at the time of and subsequent to the taking by the son of a deed to the land cannot be regarded as possession adverse to the parent. *Cahoon v. Parks*, 25 Nova Scotia 1.

Widow.—A daughter will not lose title to land through a possession first asserted to be adverse during her coverture by the widow of her father, the original occupant, who during his lifetime, and at the time of his daughter's marriage, held in subordination to her title. *Oury v. Saunders*, 5 Tex. Civ. App. 310.

The mere entry and possession of a widow of the land of her deceased husband, claim-

c. **POSSESSION MUST BE ACTUAL**—(1) *General Rule*.—It is well established that possession, which is necessary to ripen into title, must be actual, and to begin such possession there must be an entry which will amount to an ouster of the true owner.¹ It must be actual, either of all or part of the land claimed, as the same may be held with color of title or without; because constructive possession follows the title, and there cannot be two possessions of the same land at the same time, and the owner, being in possession by virtue of his title, remains until he is disseised or ousted by another entering and holding for himself.²

The Usual Tests of Entry and Possession are actual occupation and residence, cultivation and improvement of the land.³

ing it and taking the rents and profits, is not adverse to her children, the heirs. *Cook v. Nicholas*, 2 W. & S. (Pa.) 27; *Hall v. Matthias*, 4 W & S. (Pa.) 331. And see *Thomas v. Black*, 113 Mo. 66.

Estoppel.—In *Fox v. Windes*, 127 Mo. 502, a father who had conveyed a portion of his lands to his sons subsequently made a deed to them of another portion, which recited that it was made in lieu of the first deed on account of a misdescription of the lands therein. The sons accepted the second deed and afterwards sold the lands conveyed thereby. It was held that such acceptance and sale by the sons estopped them to claim the land conveyed by the first deed, and that the possession of the father, after the making of the second deed, of the lands conveyed by the first deed, was adverse to the sons.

Son Improving Wild Lands of Father.—And where a son, by his father's permission, took possession of certain wild land belonging to the latter, and, having cleared and built upon it, took the whole use and profits for fifteen years, it was held that the father's title was thereby extinguished. *Lane v. Copley*, 1 Root (Conn.) 68.

After Child Attains Majority.—But possession by a father after the majority of his son may be adverse. *Den v. Lane*, 2 N. J. L. 397.

1. *Alabama*.—*Beasley v. Clarke*, 102 Ala. 254.

Arkansas.—*Ringo v. Woodruff*, 43 Ark. 469.
California.—*Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Thompson v. Pioche*, 44 Cal. 517.

Connecticut.—*Huntington v. Whaley*, 29 Conn. 391; *State v. Wells*, 31 Conn. 210.

Florida.—*Seymour v. Creswell*, 18 Fla. 29.

Georgia.—*Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198; *Eagle, etc., Mfg. Co. v. Brunswick Bank*, 55 Ga. 44.

Illinois.—*Ambrose v. Raley*, 58 Ill. 506.

Indiana.—*Peterson v. McCullough*, 50 Ind. 35.

Iowa.—*Booth v. Small*, 25 Iowa 177.

Maine.—*Jewett v. Hussey*, 70 Me. 433.

Maryland.—*Morrison v. Hammond*, 27 Md. 604; *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115; *Beatty v. Mason*, 30 Md. 409.

Massachusetts.—*Cook v. Babcock*, 11 Cush. (Mass.) 209.

Michigan.—*Yelverton v. Stead*, 10 Mich. 538; *Sparrow v. Hovey*, 44 Mich. 3.

Minnesota.—*Washburn v. Cutter*, 17 Minn. 361.

Mississippi.—*Huntington v. Allen*, 44 Miss. 654.

Missouri.—*Bowman v. Lee*, 48 Mo. 335; *Fugate v. Pierce*, 49 Mo. 441; *Bradley v. West*, 60 Mo. 33; *Mather v. Walsh*, 107 Mo. 121.

Nebraska.—*Horbach v. Miller*, 4 Neb. 31.

New York.—*Ogden v. Jennings*, 66 Barb. (N. Y.) 301, 62 N. Y. 526; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 604.

North Carolina.—*Parker v. Banks*, 79 N. Car. 480; *Malloy v. Bruden*, 86 N. Car. 251.

Pennsylvania.—*Miller v. Shaw*, 7 S. & R. (Pa.) 129; *Altemus v. Campbell*, 9 Watts (Pa.) 28, 34 Am. Dec. 494; *Bradford v. Guthrie*, 4 Brews. (Pa.) 351; *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72.

South Carolina.—*Pegues v. Warley*, 14 S. Car. 180.

Texas.—*Satterwhite v. Rosser*, 61 Tex. 166; *Bracken v. Jones*, 63 Tex. 184; *Fuentes v. McDonald*, 85 Tex. 132; *Whitehead v. Foley*, 28 Tex. 291.

Vermont.—*Soule v. Barlow*, 49 Vt. 329.

Virginia.—*Creekmur v. Creekmur*, 75 Va. 430.

West Virginia.—*Core v. Faupel*, 24 W. Va. 238.

Wisconsin.—*Pepper v. O'Dowd*, 39 Wis. 538.

In order to constitute an actual possession there should be made an entry so that there may be an ouster effected and an adverse possession begun, and he who sets up the title must go upon the lands with a palpable intent to claim the possession as his own. *Knowlton v. Smith*, 36 Mo. 507, 88 Am. Dec. 152; *Bradley v. West*, 60 Mo. 33.

2. *Ringo v. Woodruff*, 43 Ark. 469. And see the cases cited throughout this section.

3. **Tests of Entry and Possession**.—*Alabama*.—*Bell v. Denson*, 56 Ala. 444; *Lee v. Thompson*, 99 Ala. 95.

California.—*Hesperia Land, etc., Co. v. Rogers*, 83 Cal. 10.

Georgia.—*McMullin v. Erwin*, 58 Ga. 427.

Illinois.—*Martin v. Judd*, 81 Ill. 488; *Smith v. Jackson*, 76 Ill. 254.

Kentucky.—*Singleton v. School Dist. No. 34*, 10 Ky. L. Rep. 851 (Ky., 1889), 10 S. W. Rep. 793.

Maine.—*Goodwin v. Sawyer*, 33 Me. 541.

Massachusetts.—*Poignard v. Smith*, 6 Pick. (Mass.) 172; *Cutter v. Cambridge*, 6 Allen (Mass.) 20; *Bennett v. Clemence*, 6 Allen (Mass.) 10; *Bates v. Norcross*, 14 Pick. (Mass.) 224; *Morse v. Sherman*, 155 Mas. 222.

Question of Actual Adverse Possession Largely Dependent upon Circumstances.—The evidence necessary to establish actual adverse possession varies in each particular case, much depending upon the situation of the property and the use to which it may be applied.¹ The same rule will not apply equally to cultivated lands, town property, and wild lands.²

When Actual Occupation, Cultivation, or Residence Unnecessary.—Although there must be actual entry, neither actual occupation, cultivation, nor residence is necessary where the property is so situated as not to admit of any permanent improvement or cultivation; but where acts of ownership have been done upon land, which from their nature indicate a continuous claim of property, and are continued long enough, such acts are evidence of an adverse possession for the consideration of the jury.³

Minnesota.—Costello v. Edson, 44 Minn. 135.

Mississippi.—Kirkman v. Mays (Miss., 1893), 12 So. Rep. 443.

New York.—Jackson v. Warford, 7 Wend. (N. Y.) 62; Erwin v. Olmsted, 7 Cow. (N. Y.) 229; Finlay v. Cook, 54 Barb. (N. Y.) 9.

Ohio.—Humphries v. Huffman, 33 Ohio St. 403.

Pennsylvania.—Schuylkill, etc., Imp., etc., Co. v. McCreary, 58 Pa. St. 304.

Texas.—Hunton v. Nichols, 55 Tex. 217; Read v. Allen, 63 Tex. 154; Jacks v. Dillon, 6 Tex. Civ. App. 192.

Virginia.—Taylor v. Burnside, 1 Gratt. (Va.) 165.

1. Situation of the Lands—Uses to Which They may be Applied.—Ewing v. Burnet, 11 Pet. (U. S.) 41; Normant v. Eureka Co., 98 Ala. 181; Mooney v. Cooledge, 30 Ark. 655; Dorr v. School Dist. No. 26, 40 Ark. 237; Houghton v. Wilhelmy, 157 Mass. 521.

In Bowen v. Guild, 130 Mass. 123, Lord, J., said: "What is an adverse and exclusive possession, and what is an interruption of such possession, depend very much upon the character of the land, and the purpose to which it is adapted and for which it is used. The adverse possession of an outlying lot of small value, remote from the dwellings of people, suitable for pasturing or for the growth of wood, or for some other purpose of husbandry, is to be proved by evidence very different from that which establishes the exclusive occupation of a residence or a shop or storehouse within the limits of a thickly settled business population. The rule of law is the same in both cases; but the evidence necessary to prove the fact is very different."

In Mooney v. Cooledge, 30 Ark. 655, the court said: "It is not the particular use made of the land, or whether built upon and used as a residence, or cleared and cultivated as a farm; but the exclusive use and adverse possession may be proven as well by other acts and declarations, which show a visible, open, and exclusive possession and use of the land."

In Brown v. Rose, 55 Iowa 734, it was held that an instruction charging the jury that adverse possession might be predicated on the exercise of such acts of ownership, control, and dominion as are usually exercised by owners over their lands of like character,

condition, and situation, was erroneous when applied to unimproved prairie lands.

2. Brumagim v. Bradshaw, 39 Cal. 24; *Draper v. Shoot*, 25 Mo. 197, 69 Am. Dec. 462; *Leeper v. Baker*, 68 Mo. 407.

3. When Actual Occupation, Cultivation, or Residence Dispensed with—United States.—*Ellicott v. Pearl*, 10 Pet. (U. S.) 442.

Arkansas.—Dorr v. School Dist. No. 26, 40 Ark. 237.

California.—*Brumagim v. Bradshaw*, 39 Cal. 24.

Georgia.—*Royall v. Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *Scott v. Cain*, 90 Ga. 34.

Illinois.—*Dills v. Hubbard*, 21 Ill. 328; *Morrison v. Kelly*, 22 Ill. 624, 74 Am. Dec. 169; *Kerr v. Hitt*, 75 Ill. 51; *Coleman v. Billings*, 89 Ill. 183.

Iowa.—*Langworthy v. Myers*, 4 Iowa 18; *Booth v. Small*, 25 Iowa 177; *Clement v. Perry*, 34 Iowa 564.

Massachusetts.—*Bates v. Norcross*, 14 Pick. (Mass.) 224.

Minnesota.—*Washburn v. Cutter*, 17 Minn. 361.

Mississippi.—*Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137; *Massey v. Rimm*, 69 Miss. 667.

Missouri.—*Fugate v. Pierce*, 49 Mo. 441.

New Hampshire.—*Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190.

New York.—*Cunger v. Kinney* (Supreme Ct.), 16 N. Y. Supp. 752.

North Carolina.—*Williams v. Buchanan*, 1 Ired. (N. Car.) 540, 35 Am. Dec. 760.

Acts of Ownership.—In *Draper v. Shoot*, 25 Mo. 203, 69 Am. Dec. 462, recognizing the fact that it is difficult to lay down any precise rule for all cases, the court maintained that it might be safely said that where acts of ownership have been done on land, which from their nature indicate a notorious claim of property in it, such acts are evidence of an ouster of a former owner, provided the property was not susceptible of a more strict or definite possession.

But in *Cook v. Farrah*, 105 Mo. 492, where the separate tract, half prairie and half timber, could have been easily enclosed, and was fit for cultivation, it was held that the erection of timber structures, cutting of timber, pasturing of hogs, and payment of taxes under claim of ownership by one residing a mile and a half distant from the tract did not constitute actual adverse possession.

Wild Lands.—So in the case of wild lands incapable of improvement the possession and use must be such as from its nature the land is susceptible of.¹

Neither a Deed nor Any Equivalent Muniment is necessary where there is actual possession and occupation.²

More Naked Possession without Color of Title is adverse only to the extent of the actual possession or enclosure.³

Entry under Conveyance from One Having Color of Title.—But an entry into possession under a conveyance from a person having color of title is presumed to be made according to the description in the deed, and his occupancy is construed as possession of the entire lot where there is no actual adverse possession of the parts not actually occupied by him.⁴

In *Huntington v. Allen*, 44 Miss. 654, where the lands remained in a wild state, unused for any practical purpose, until the occupancy under the several vendees of the claimant began, and prior to that time there had been no act of ownership by the latter except the payment of taxes and an occasional visit to them, it was held that this was not an appropriation of them to some use for which they were fit so as to create an eviction, and that the statute of limitations commenced to run from the date of the actual entry and occupancy by the purchasers.

1. *Bell v. Denson*, 56 Ala. 444; *Clancey v. Houdlette*, 39 Me. 451; *West v. Lanier*, 9 Humph. (Tenn.) 762.

Swamp Land—Paying Taxes—Cutting Timber—Using Pond.—In *Leeper v. Baker*, 68 Mo. 407, the court said: "A fence, building, or other improvement is not essential to constitute an adverse possession. Acts of ownership, under a claim of right, visible, are sufficient to authorize the court to find such possession, and the nature of these acts of ownership must depend on the uses of which the land was capable." In this case the claim was for forty acres of land, a part of an entire tract of six hundred acres. The land was swamp land, unfit for cultivation, and could not be fenced in. It being shown that the defendant had paid the taxes for more than ten years before suit, used the pond for watering his stock, and cut timber from the swamp, it was held that a verdict for the defendant was not without evidence.

Cutting Timber and Grass.—In *Forey v. Bigelow*, 56 Iowa 381, where lands were open and unenclosed, but it appeared that the defendant and those under whom he claimed had exercised the exclusive right to cut timber and grass therefrom, and had at various times sold to others the right to cut grass, it was held that such possession was as effectual as actual enclosure of the land.

Survey of Land—Payment of Taxes.—A mere survey of land and payment of taxes are not sufficient evidence to establish adverse possession. *Thompson v. Burhans*, 61 N. Y. 52.

Cutting Timber—Erecting Fences and Buildings—Payment of Taxes.—In *Davis v. Bowmar*, 55 Miss. 742, the court said: "It is certain that appellant took possession, under some sort of right in himself, of a wilderness, felled the forest, cleared the jungle, erected fences and buildings, made the place his home, cultivated it, protected it by levees, had it assessed as his own, paid taxes on it,

and enjoyed exclusive possession and control of it as his own from 1836 to 1863; and in the uncertainty, if any, from the imperfect knowledge we have, as to exactly how the possession began, appellant is entitled to the benefit of the just presumption that he was holding as owner from having acted so long, and from the beginning, as owners do, and so inconsistently with the idea of title in any other than himself."

Making Roads—Cutting Timber.—In *Finn v. Wisconsin River Land Co.*, 72 Wis. 546, where it appeared that the plaintiffs had entered and been upon the land a number of times to see if any trespasses were being committed thereon, looking over the timber and running out lines upon which to build roads for the purpose of getting out some of the timber and firewood, that in winter they cut roads through the same for the purpose of getting out fence rails and firewood, cleared out the old roads and built new ones, it was held that this occupation was open, notorious, and continuous in the usual manner that lands are occupied for such purposes, and was sufficient to constitute adverse possession. *Lyon, J.*, in delivering the opinion of the court stated the rule to be that if the plaintiffs actually and exclusively occupied the land in question in hostility to the defendant's title, and subjected the same to their will and dominion by actual and appropriate use thereof, according to its locality, quality, and character, the evidence of such occupation being tangible and visible to a person going upon and examining the land, such occupancy and use constituted adverse possession by the plaintiffs.

Accretions.—In *Chicago, etc., R. Co. v. Groh*, 85 Wis. 641, it was held that a disseisor who entered upon land bordering a navigable water and enclosed the same with a fence was entitled to the accretions, and that it was not necessary for him to continually extend his boundaries to the water's edge. See the title ACCRETION.

2. *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 604.

3. **Naked Possession without Color of Title—How Far Adverse.**—*Bristol v. Carroll County*, 95 Ill. 89; *Coleman v. Billings*, 89 Ill. 189; *Bell v. Denson*, 56 Ala. 444; *Munshower v. Patton*, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678; *Cantagrel v. Von Lupin*, 58 Tex. 570; *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586.

4. *Watson v. Mancill*, 76 Ala. 600; *Bell v.*

But Entry upon Part of a Tract, even under claim of the whole, while the other part is held adversely, cannot found adverse possession of the whole, although adverse possession of the other part be abandoned.¹

Legal Owner in Possession of Part of the Tract.—So where the legal owner is in possession of a part of the land of which he has the fee, the law invests him with the possession of the whole, and a person entering thereon, not having the legal title, will be restricted in his possession to the part actually occupied or cultivated;² and it has been held that a statutory provision that possession under color of title of a part of a tract in the name of the whole tract shall be deemed a possession of the whole, applies only where there is no occupancy by the legal owner of any part.³

(2) *Evidence of—(a) By Occupation.*—Actual, continued occupation and possession is strong evidence of adverse possession, but mere occasional entries upon, and use of, the land will not generally be sufficient to show adverse possession.⁴

Denson, 56 Ala. 448; Turney v. Chamberlain, 15 Ill. 271; Coleman v. Billings, 89 Ill. 183; Schneider v. Botsch, 90 Ill. 577; Kincaid v. Logue, 7 Mo. 166; Clark v. Potter, 32 Ohio St. 49; Hicklin v. McClear, 18 Oregon 126; Sweetenham v. Leary, 18 Hun (N. Y.) 285; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230; Jackson v. Warford, 7 Wend. (N. Y.) 62. See *infra*, this title, *Extent of Possession*.

As was said by Snyder, J., in *Core v. Faupel*, 24 W. Va. 245: "A man cannot, by mere physical means, retain land in his exclusive grasp. Possession may be more manifest as to a part than as to the rest; therefore it is an established rule of law that the actual possession of a part is the possession of the entire tract or boundary covered by the occupant's title or claim of title. * * * What is the extent of his possession, is to be determined by the limits of his title or color of title. An intruder without color of title is, of necessity, confined to his mere enclosure."

1. *Pepper v. O'Dowd*, 39 Wis. 538; *Wilson v. McEwan*, 7 Oregon 87.

In *Pepper v. O'Dowd*, 39 Wis. 538, it was held that to make the actual adverse possession of part of a tract of farming land, once possessed and used as several farms by several owners, constructive adverse possession of the whole tract as one farm, it was necessary to show not merely that the whole tract was included in some of the claimants' title papers, but that the several farms had been joined together in one known farm before the entry under which the claim was made, and constituted one known farm at the time of such entry.

2. *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586; *Schultz v. Lindell*, 30 Mo. 310; *DeGraw v. Taylor*, 37 Mo. 310; *Seymour v. Creswell*, 18 Fla. 29; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 587.

3. *Bradley v. West*, 60 Mo. 33.

4. *Illinois.*—*McClellan v. Kellogg*, 17 Ill. 498; *Ambrose v. Raley*, 58 Ill. 506; *Chicago, etc., R. Co. v. Galt*, 133 Ill. 657.

Minnesota.—*Bazille v. Murray*, 40 Minn. 48.
New Hampshire.—*Aiken v. Ela*, 62 N. H. 400.

New Jersey.—*Cornelius v. Giberson*, 25 N. J. L. 33.

New York.—*Wheeler v. Spinola*, 54 N. Y. 377; *Roberts v. Baumgarten*, 51 N. Y. Super. Ct. 482; *Miller v. Long Island R. Co.*, 71 N. Y. 380; *East Hampton v. Kirk*, 68 N. Y. 459; *Colvin v. Burnet*, 17 Wend. (N. Y.) 564.

North Carolina.—*Williams v. Wallace*, 78 N. Car. 354; *Ruffin v. Overby*, 88 N. Car. 369; *McLean v. Smith*, 106 N. Car. 179.

Pennsylvania.—*Ewing v. Alcorn*, 40 Pa. St. 492; *Washabaugh v. Entriaken*, 34 Pa. St. 74. 36 Pa. St. 513; *Wheeler v. Winn*, 53 Pa. St. 122, 91 Am. Dec. 186; *Rifener v. Bowman*, 53 Pa. St. 313; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115.

Tennessee.—*Hicks v. Fredericks*, 9 Lea (Tenn.) 491; *Pullen v. Hopkins*, 1 Lea (Tenn.) 741; *Cass v. Richardson*, 2 Coldw. (Tenn.) 28.

Occasional Acts of Ownership.—"Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state—such acts to be so repeated as to show that they are done in the character of owner, and not of an occasional trespasser." *Gaston, J.*, in *Williams v. Buchanan*, 1 Ired. (N. Car.) 540, 35 Am. Dec. 760.

As was said in *Bazille v. Murray*, 40 Minn. 48: "While it is true that what will constitute adverse possession depends to a certain extent upon the character of the property, yet all the authorities agree that the possession of one claiming by disseisin must be actual, open, or visible, notorious, exclusive, distinct, and continuous. * * * An occasional or sporadic use of land, an occasional entry upon timber land, and cutting timber thereon, an annual entry to cut timber or feed cattle, an annual entry to cut grass, have been held insufficient to disseise the true owner, and create adverse possession against him."

Digging Sand and Gravel from Time to Time.—The taking of gravel for three days in one month was held to be not an interference with the possessor. *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42.

Where all that the defendant had done was to dig sand on and from the land from time to time, and sell the same, his entries thereon for that purpose were but successive acts of trespass against the true owner if he was

An Entry to Survey the tract is not such occupation and entry as are required.¹

The Erection of Temporary Structures is not such occupation as will establish title by adverse possession.²

Acts Indicating and Serving as Notice of Intention to appropriate.—But where upon occasional entries the acts done upon the land are such as to indicate and serve as a notice of an intention to appropriate the land itself, and not the mere products of it, as making permanent improvements, adverse possession may be established.³

not owner himself. *Parker v. Wallis*, 60 Md. 15, 45 Am. Rep. 703.

Merely Tearing down Part of a Fence and Walking across the Land does not establish sufficient possession, *Green v. Dwyer*, 33 Minn. 403; nor does slightly extending a line fence, *Carrol v. Gillion*, 33 Ga. 539.

Marking Boundaries—Cutting Trees.—In *The Mission of the Immaculate Virgin, etc., v. Cronin*, 143 N. Y. 524, it was held that where land was unenclosed, unimproved, and unoccupied, the facts that a person has for twenty years claimed title thereto, surveyed it, marked its boundaries by monuments, cut trees thereon from time to time, and for a few years had paid taxes thereon, do not establish an adverse possession, nor do these facts, in the absence of a constructive or actual possession, authorize the presumption of a grant from the true owner.

Gathering Seaweed.—In *East Hampton v. Kirk*, 68 N. Y. 459, it was held that the mere use by the defendant of the *locus in quo* for the gathering and storing of sea manure was not evidence of an occupation under a claim of title.

The Use of the Water of a Stream during a Period of Abundance is not an adverse use on which a prescription can be founded. *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185.

Occupying Sugar Place for Purpose of Making Sugar.—In *Wilson v. Blake*, 53 Vt. 305, it was held that occupying a sugar place from year to year, only for the purpose of making sugar, such place being separated from the home farm by intervening lands owned by others, is not actual or continuous possession.

Cutting Ice.—In *Gouverneur v. National Ice Co.*, 57 Hun (N. Y.) 474, it was held that cutting ice on a pond during a few weeks of every winter was not sufficient possession or occupation to constitute an adverse possession.

Mining Lands.—A mere digging of coals in the winter with an abandonment of the property for the rest of the year is not sufficient to establish adverse possession. *Jackson v. Stoetzel*, 87 Pa. St. 302. Possession of the surface does not carry with it the possession of the coal below where the title to the mineral right has been severed from that of the surface. *Caldwell v. Copeland*, 37 Pa. St. 427, 78 Am. Dec. 436; *Westmoreland, etc., Natural Gas Co. v. DeWitt*, 130 Pa. St. 235. The operations of building a shed, quarrying rocks, and erecting a limekiln on the land in dispute, continued for the statutory period, have been held sufficient. *Moore v. Thomp-*

son, 69 N. Car. 120. See also *Colvin v. McCune*, 39 Iowa 502. See also the title MINES AND MINING CLAIMS.

Burying Ground.—If a person enters upon, sets apart, and asserts an exclusive right to a piece of land as a family burying ground for a series of years as deaths may occur in his own family and those of his friends, it will constitute an adverse possession. Actual residence or continuous occupation in such a case is not necessary. But where the possession is not under color of title, it will be restricted to such parts of the land as are covered with graves. *Mooney v. Cooledge*, 30 Ark. 655. See *Bonham v. Loeb* (Ala., 1895), 18 So. Rep. 300; also the title CEMETERIES.

Presumptions as to Quantity of Land Occupied.

—In *Alexander v. Polk*, 39 Miss. 737, it was held that where knowledge on the part of the owner of the adverse holding is sought to be established by the presumption arising from the nature and character of the possession, the quantity or proportion of the land actually occupied becomes material; and that if the whole tract is occupied and enclosed by a party asserting an adverse claim, the presumption is violent that the owner has knowledge of the adverse character of the claim; but where, on a boundary line between the owner and the adverse claimant, the possession of the latter has been but of a small quantity, which might be attributed to accident, a knowledge on the part of the owner of the adverse claim will not be presumed. See *infra*, this title, *Extent of Adverse Possession*.

1. *Thompson v. Burhans*, 61 N. Y. 70; *King v. Hunt* (Ky., 1890), 13 S. W. Rep. 214.

2. *Royall v. Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *De Lancey v. Piepgras*, 138 N. Y. 26.

One who was accustomed to have a wood pile upon a vacant lot for thirty years, and had buried potatoes upon it for six years, acquired no title to the lot by such a possession. *Miller v. Downing*, 54 N. Y. 631.

In *Cass v. Richardson*, 2 Coldw. (Tenn.) 28, it was held that the erection and use of a wash place to wash ore was not sufficient evidence of possession.

In *McKinnon v. Meston* (Mich., 1895), 62 N. W. Rep. 1014, it was held that the fact that one occupied a shanty on certain wild lands while removing timber therefrom did not show a *bona fide* and actual possession against the real owner.

3. *Costello v. Edson*, 44 Minn. 135.

Illustrations.—"Where a claimant subjects the land to some use of which it is susceptible in its present state and at such intervals as

When Question for Jury.—And although it may not be decisive, when there is evidence of the actual possession, use, cultivation, and improvement of the land, the question of adverse possession should be submitted to the jury.¹

Residence may be by Tenant or Vendee under Contract of Purchase.—Actual residence and occupation by the owner of the title in person is not necessary, but it is sufficient if the owner has possession by tenant, and by one under a contract to purchase.²

(b) By Cultivation—Ordinary Use and the Taking of Ordinary Profits Sufficient Cultivation.—Cultivation, in order to establish adverse possession, need not be the highest state of cultivation of which the land is susceptible, but ordinary use and the taking of the ordinary profits of the land will suffice.³

Occasional Acts of Working and Improving Insufficient.—But mere dilatory and negligent cultivation and occasional acts of working and improving are insufficient.⁴

Reaping Not Cultivation.—There must be actual continued cultivation; reaping alone cannot be considered cultivation or improvement.⁵

Going upon Land.—So going upon the land from time to time to cut hay or grass does not constitute such possession as will ripen into title.⁶

Cutting Timber—Firewood.—Nor will cutting and carrying off firewood and rails⁷

to indicate unmistakably that he means to be considered as claiming the ownership, and not to commit an occasional trespass simply, such occupancy is sufficient, *Williams v. Buchanan*, 1 Ired. (N. Car.) 535, 35 Am. Dec. 760; *Bynum v. Carter*, 4 Ired. (N. Car.) 310; and especially if he submits it to the only use of which it is susceptible, *Tredwell v. Reddick*, 1 Ired. (N. Car.) 56. Where land is used for agricultural purposes, it is not essential that the claimant should cultivate it constantly, but only in accordance with usages prevailing among husbandmen." *Avery, J., in Hamilton v. Icard*, 114 N. Car. 532.

Where a party erected upon a city lot, to which he claimed title, a substantial and permanent brick building, which he claimed to own throughout its entire extent, the circumstances attending his act amounted to such a claim of title to the land upon which the building was erected, at least to the centre of the walls, as might, by lapse of time, ripen into a title. *Crapo v. Cameron*, 61 Iowa 447.

In *Congdon v. Morgan*, 14 S. Car. 587, where it was shown that the claimants had made entry upon the land under their deed, marked out their claim by survey and stakes, and built thereon a wharf, erected a boat shed, and used both wharf and shed, it was held that these were such acts of possession as would ripen into title.

In *Judson v. Duffy*, 96 Mich. 255, it was held that evidence that a defendant in ejectment entered into actual possession under a void title, and that his grantor twenty years prior had arranged with a neighboring farmer to look after the land, and thereafter paid the taxes assessed thereon, and that the farmer had sometimes pastured his cattle thereon, and authorized others to cut grass thereon, was not that clear and cogent proof necessary to divest the title to the land by adverse possession.

1. *Allen v. Allen*, 58 Wis. 205; *Johnson v. Gorham*, 38 Conn. 522; *Davis v. Bowmar*, 55 Miss. 742; *Hollister v. Young*, 42 Vt. 407;

Nashville, etc., R. Co. v. Hammond (Ala., 1894), 15 So. Rep. 935.

2. *Martin v. Judd*, 81 Ill. 488; *Elliott v. Dycke*, 78 Ala. 150.

Statutory Requirement.—In *Sloan v. Martin*, 33 Tex. 417, where the statute provided that "whoever has possession, cultivation, use, or enjoyment of a tract, etc.," it was held that mere cultivation was not sufficient.

3. *Copeland v. Murphey*, 2 Coldw. (Tenn.) 64; *Booth v. Small*, 25 Iowa 177; *Dorr v. School Dist. No. 26*, 40 Ark. 237; *Tourtellotte v. Pearce*, 27 Neb. 57; *Tex v. Pflug*, 24 Neb. 666, 8 Am. St. Rep. 231; *Malcom v. Hanson*, 32 Neb. 60; *Seymour v. Creswell*, 18 Fla. 29.

4. *Brown v. Rose*, 55 Iowa 734; *Morris v. Callanan*, 105 Mass. 129; *Nye v. Alfter* (Mo., 1895), 30 S. W. Rep. 186.

In *Robbins v. Moore*, 129 Ill. 30, where it appeared that in 1857 a party, under claim of title, took possession of a tract of land by breaking about thirty acres thereof and sowing it in wheat, but the land was not fenced, though there was a shanty on it, and that after the crop was harvested no other acts of possession were shown until after the lapse of fifteen years, it was held that this failed to establish adverse possession as required.

Cultivation of Different Spots.—In *Hamilton v. Icard*, 114 N. Car. 532, it was held that the planting of tobacco beds in different places, not upon the same spot for more than two successive years, though continued for the statutory period, would not constitute an actual possession such as would mature title, since occupancy does not divest title beyond its actual bounds.

5. *Doolittle v. Tice*, 41 Barb. (N. Y.) 181.

6. See *supra*, this title, *By Occupation*, and cases cited there.

7. *Pike v. Robertson*, 79 Mo. 615; *Musick v. Barney*, 49 Mo. 458; *Long v. Young*, 28 Ga. 130; *Johnson v. Gorham*, 38 Conn. 513; *Hamilton v. Icard*, 114 N. Car. 537.

In *Forey v. Bigelow*, 56 Iowa 381, it was held that where lands were open and unen-

and timber suffice where the land is suitable for other purposes.¹

Merely Grazing Cattle and horses upon land will not show an adverse possession.²

When Cultivation of Part Constructive Possession of the Whole.—The cultivation of part of a tract does not create constructive possession of the whole, unless the original entry is by color of title by specific boundaries to the whole tract.³

(c) **By Enclosure.**—The actual fencing and enclosing of the tract are not,

closed, but it appeared that the defendant and those under whom he claimed had for more than ten years claimed and exercised the exclusive right to cut timber and grass therefrom, and had at various times sold the right to cut grass to others, such possession was as effectual as an actual enclosure of the land.

In *Watkins v. Lynch*, 71 Cal. 21, it was held that the acts of sowing grain and pasturing cattle on the sides of a public road were not sufficient to show either an abandonment of the use of the road by the public, or its adverse possession by the person doing such acts.

But in *Lantry v. Parker*, 37 Neb. 353, it was said that the protection of grass during the growing season, and the cutting, curing, and disposal of the hay at the proper periods, was actual possession in the defendant, especially when taken in connection with his using the land in like manner as the surrounding tracts owned or claimed by him, and his acts to prevent its use by others.

1. *Alabama*.—*Rivers v. Thompson*, 46 Ala. 336; *Childress v. Calloway*, 76 Ala. 128; *Alexander v. Savage*, 90 Ala. 383; *Normant v. Eureka Co.*, 98 Ala. 181.

Georgia.—*Strong v. Powell*, 92 Ga. 591.

Illinois.—*Horner v. Reuter*, 152 Ill. 106.

Kentucky.—*Wait v. Gover*, 11 Ky. L. Rep. 750 (Ky., 1890) 12 S. W. Rep. 1068.

Minnesota.—*Bazille v. Murray*, 40 Minn. 48; *Washburn v. Cutter*, 17 Minn. 361.

Missouri.—*Goltermann v. Schiermeyer*, 125 Mo. 291.

New Hampshire.—*Hale v. Glidden*, 10 N. H. 397.

North Carolina.—*Cox v. Ward*, 107 N. Car. 507.

Tennessee.—*Pullen v. Hopkins*, 1 Lea (Tenn.) 741.

Virginia.—*Anderson v. Harvey*, 10 Gratt. (Va.) 386; *Pasley v. English*, 5 Gratt. (Va.) 141.

Wisconsin.—*Kurz v. Miller*, 89 Wis. 426.

Illustrations.—Such acts are mere separate acts of trespass, and do not constitute continuous possession or use. As was said by Richardson, J., in *White v. Reid*, 2 Nott & M. (S. Car.) 534, of the several acts in that case: "Every trespass * * * was distinct, and had no necessary connection with the next trespass. For instance, on one day the defendant may have felled ten trees, the next twenty, the third twenty-five, and so on successively; they cannot be called even trespasses by continuation, as by feeding cattle on another's land. For in the case before us every trespass terminated in itself, and can no more be committed [continued?] than beating A to-day is beating him to-morrow; each

begins, continues, and is completed in itself."

So in *Childress v. Calloway*, 76 Ala. 130, it was held that cutting a small quantity of timber on two occasions, at an interval of one year between the two, when the land was shown to be good for grazing and farming purposes, and suitable for a homestead, was not sufficient to establish adverse possession.

Nor will repeated cutting establish possession necessarily. *Townsend v. Reeves*, 44 N. J. L. 525. And it has been held that entirely clearing the land will not accomplish this if the timber is allowed to grow again. *Parker v. Parker*, 1 Allen (Mass.) 245.

In *Heller v. Peters*, 140 Pa. St. 648, evidence that the claimant's ancestor had a mill near the land in dispute, and for twenty years or more when he wanted a stick of timber went upon the land and got it, was held insufficient to prove actual possession.

In *Copeland v. Murphey*, 2 Coldw. (Tenn.) 64, although the timber constituted the principal source of the value of the land, yet since it did not appear that the land was not susceptible of cultivation, the taking of timber was not sufficient to establish adverse possession.

But where the land is susceptible of no other use, as where it is merely woodland, and one under color of title uses the land for the purpose of obtaining wood for fuel or fencing for farming, this may constitute possession. *Scott v. Delany*, 87 Ill. 148; *Clement v. Perry*, 34 Iowa 564.

Timber Lands.—So in *Finn v. Wisconsin River Land Co.*, 72 Wis. 546, it was held that where the plaintiff went upon the land a number of times every year to see whether trespass was being committed thereon, to look over the timber, and to run out lines on which to build roads to get out some timber, and that the roads were built, and timber was cut during each winter to be used for fence rails and firewood on plaintiff's farm, which adjoined the land, and for other purposes, and where his occupation was in the usual manner that timber lands were occupied, the possession was adverse. See also *Clement v. Perry*, 34 Iowa 564.

And in *West v. Lanier*, 9 Humph. (Tenn.) 762, where it appeared that the land was valuable only for the timber and ore on it, and the defendant placed slaves thereon to cut timber and dig ore, his possession was held equivalent to actual possession.

2. *Fuentes v. McDonald*, 85 Tex. 132; *Sellman v. Hardin*, 58 Tex. 86; *Andrews v. Marshall*, 26 Tex. 212; *Murphy v. Welder*, 58 Tex. 241; *Lambert v. Stees*, 47 Minn. 141.

3. *Ege v. Medlar*, 82 Pa. St. 86; *Barnes v. Sabron*, 10 Nev. 217.

unless expressly required by statute, essential to constitute adverse possession, but such acts are very decisive in determining possession and claim of ownership.¹

Enclosure without Residence.—Where the property has been properly enclosed there may be sufficient evidence of claim to ownership without actual residence.²

By Statute in Some States it is provided that to constitute adverse possession the land must be protected by a substantial enclosure or be actually cultivated or improved where the claim is not founded on a written instrument.³

Sufficiency of Enclosure.—When required or depended upon, the fence must be substantial, and merely lapping fallen trees or making a bush fence will not generally be sufficient;⁴ but natural barriers may be used. The sufficiency of the enclosure is, however, a question for the jury.⁵

1. Actual Fencing and Enclosing Not Necessary unless Required by Statute.—*Ellicott v. Pearl*, 10 Pet. (U. S.) 441; *Zeilin v. Rogers*, 21 Fed. Rep. 103; *Bell v. Denson*, 56 Ala. 444; *Beecher v. Galvin*, 71 Mich. 391; *Irwin v. Woodmansee*, 104 Mo. 403; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; *Thompson v. Philadelphia, etc., Coal, etc., Co.*, 133 Pa. St. 46; *Clark v. Potter*, 32 Ohio St. 49; *Hornor v. Reuter*, 152 Ill. 106.

As was said by Somerville, J., in *Doe v. Anderson*, 79 Ala. 215: "A fence or enclosure is not an essential element of adverse possession, but is only one of many acts indicative of possession and claim of ownership. It is often very important, it is true, to mark with precision the limits or boundaries of a possession, especially when the occupant is without color of title, which would answer this purpose. In a section of the country, for example, where fence laws have been abolished, the absence of an enclosure would weigh but little; so where a river constitutes a boundary line. The reason is that it would then be no index of an intention to abandon. It has often been decided in this country that the possession of an occupant may be adverse without either enclosure or improvements."

So in *Beecher v. Galvin*, 71 Mich. 391, it was held that an instruction which assumed that there could be no adverse possession such as could develop into title unless the land was enclosed, was incorrect.

In *Maryland* it has been held that actual enclosure is necessary to defeat the title of the real owner. *Armstrong v. Risteau*, 5 Md. 274, 59 Am. Dec. 115; *Casey v. Inloes*, 1 Gill (Md.) 496, 39 Am. Dec. 658.

Town Lots.—In *Garrett v. Belmont Land Co.*, 94 Tenn. 459, it was held that there must be actual enclosure, whenever the property is susceptible of it, in order to make out a case of adverse possession of town lots.

2. Laird v. McConachy, 3 S. & R. (Pa.) 290; *Miller v. Shaw*, 7 S. & R. (Pa.) 129; *Smith v. Middleton*, 1 Har. & M. (Md.) 521; *Armstrong v. Risteau*, 5 Md. 257, 59 Am. Dec. 115.

3. California Code Civ. Pro., § 325; *New York Code Civ. Pro.*, § 372.

4. Fence must be Substantial—Lapping Fallen Trees.—*Coburn v. Hollis*, 3 Met. (Mass.) 125; *Slater v. Jepherson*, 6 Cush. (Mass.) 129; *Hale v. Glidden*, 10 N. H. 397.

In *Borel v. Rollins*, 30 Cal. 408, it was held

that putting up a fence, consisting of small posts with two rails nailed on, without actually occupying the land, and afterwards suffering the fence to decay within a year or two, was not sufficient to constitute *prima facie* evidence of title to land by actual possession.

As to Woodland, *Agnew, J.*, lays down the following rule in *O'Hara v. Richardson*, 46 Pa. St. 390: "If a party defines his boundaries, and takes actual possession of a part by clearing or cultivation, and uses the remainder as farmers usually do woodland, taking timber, tapping trees, and so forth, and does this adversely and exclusively for a period to satisfy the statute, the owner in the meantime not interfering, he gains title by limitation."

In *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230, it was held that a possession fence, which was made by trees felled and lapping one upon another, did not constitute a sufficient adverse possession to toll the right of entry of the true owner. The court said there must be a real and substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defense, and is to countervail a legal title. The object of the statute defining the acts essential to constitute an adverse possession is that the real owner may, by unequivocal acts of the disseisor, have notice of the hostile claim, and be thereby called upon to assert his legal title. In this case there was no actual enclosure by fences of the land in question.

Brush Fence.—In *Smith v. Hosmer*, 7 N. H. 436, 28 Am. Dec. 354, it was held that a brush fence maintained near the line between the possessions of two adjoining owners, but not continued at all times in the same place, is not evidence of an adverse possession, so as to hold either party to the line usually occupied by such fence.

So in *Hutton v. Schumaker*, 21 Cal. 453, it was held that the mere enclosure of a lot, with brush fence from two to three feet high, without any other steps being taken to subject the property to any use, was not sufficient evidence of ownership or right of possession.

5. Question for Jury.—*Goodwin v. McCabe*, 75 Cal. 584; *Becker v. Van Valkenburgh*, 29 Barb. (N. Y.) 319.

The Fence should be a Complete Enclosure, and not merely on two or three sides.¹
Temporary Breaches in the fence or enclosure will not affect the claim.²

Removing Fences to Prevent their being Carried off by Floods.—Where it appeared that fences on the sides of defendant's premises, extending across the strip in question to or near low-water mark, had been maintained by him and his grantors for more than twenty years, those portions across the beach being taken away in winter to prevent their being carried away by the ice and tides; and there was no fence along the cliff, the land on that side being open to the sea; it was held that the evidence was sufficient to authorize the submission to the jury of the question as to whether there was a substantial enclosure within the meaning of the statute. *East Hampton v. Kirk*, 84 N. Y. 221, 38 Am. Rep. 505. In this case the court said: "The requirement that the premises shall be protected by a substantial enclosure, if construed to require a continuous, uninterrupted enclosure for twenty years, would in many cases make it impossible to acquire title by adverse possession founded upon that provision. Upon such a construction, if fences were carried away by floods or destroyed by fire, or taken down in the winter for the accommodation of travel, the adverse possession would cease, although they were restored as soon as circumstances permitted. It is well understood that the bottom-lands on some parts of the Mohawk river are annually overflowed, and fences are removed to prevent them from being carried away by the flood. It cannot, we think, be claimed that the temporary removal of fences for this purpose defeats an adverse possession under the provision of the statute in respect to enclosure. In this case the land was left unenclosed on the side toward the sea. The sea was a natural barrier—as much so as a mountain or a river or a ledge of rocks; and the sea, with the lateral fences when maintained, constituted, we think, a substantial enclosure within the meaning of the statute. The removal of the fences during the winter was to protect them from being swept away by the ice and tides. If they had not been removed, but had been left to be carried away each winter by the sea, the defendant could, we think, have replaced them in the spring, and would not have lost his right under the statute. By the voluntary removal of the fences he simply anticipated the action of the elements; and having restored them when the danger was passed, and maintained them during the season when the use of the beach for taking seaweed was practicable, the purpose of notice, upon which the statute proceeds, was met."

Fencing on Margin of River.—In *Jackson v. Halstead*, 5 Cow. (N. Y.) 216, title to land fronting on the Delaware river was claimed by adverse possession. Fences had been erected, extending to a point about a rod from the river, leaving some of the disputed ground unenclosed. But it was proved that the fence at this place was as near the river as the wash of the floods and the make of the

ground would permit. This was held to be a sufficient enclosure. *Woodworth, J.*, said that it would be too strict to require the fence to be placed on the very margin of the river, where it would be liable to be swept away by the rise of water, and not within the reason of the rule defining what shall constitute an adverse possession. The learned judge further said that a river or mountain, or a ledge of rocks, on one side, forming a natural barrier, the other sides being enclosed, would, with claim of title, constitute an adverse possession. So in *Allen v. Holton*, 20 Pick. (Mass.) 458, it was held that where land is enclosed by a river, fence, or road, and a disseisor occupies it as near to the river, fence, or road as is convenient, reference being had to the nature and situation of the land, this may be, if such be the intention of the occupant, a possession of the whole lot, although there be a narrow strip by the river, fence, or road not actually cultivated.

Whether Fence Erected for Purpose of Protecting Certain Lands or of Claiming Others—Intention.—Where land was claimed by actual possession and enclosed in fences, and was bounded on one side by a pond and on the other side by other lands to which the claimant had good title, though his fences did in fact surround the land in question on all sides except that next the pond, yet it was properly left to the jury to decide whether they were built for the purpose of enclosing the land in controversy or merely for the protection of his own. *Dennett v. Crocker*, 8 Me. 239.

1. *Morrison v. Chapin*, 97 Mass. 72.

2. *Morrison v. Hammond*, 27 Md. 604; *Williams v. Rand* (Tex. Civ. App., 1895), 30 S. W. Rep. 509.

In *Moore v. McCown* (Tex. Civ. App., 1892), 20 S. W. Rep. 1112, where it appeared that the plaintiffs had more than ten years before constructed a wire fence around all the land in controversy, and maintained it intact for a number of years, after which time gaps were cut in it, but the posts remained standing, and it could be seen that there was a fence around the land, it was held that such a fence was sufficient to give notice of adverse possession, and that the plaintiffs were entitled to the land.

The Enclosure must be for the Purpose of Marking the Boundaries.—*Soule v. Barlow*, 48 Vt. 132.

When it is Enclosed Merely for Convenience, but with no intention to lay claim to the land, it is no evidence of a claim of ownership. *Soule v. Barlow*, 49 Vt. 329.

Specific Parcel within Large Enclosure.—A general enclosure of a large tract of land is not sufficient to constitute an actual, exclusive possession of a specific parcel within it, where it appears that much of the land within the enclosure is not claimed, and much of it is in the actual occupancy of persons claiming and holding adversely. *Walsh v. Hill*, 41 Cal. 571. See also *Doolittle v. Tice*, 41 Barb. (N. Y.) 181, where it was held that

(d) **By Payment of Taxes.**—Payment of taxes alone does not constitute adverse possession, and is not of itself evidence of ouster;¹ but together with other acts of ownership and circumstances indicating possession the payment of taxes may be considered as evidence of the claim of ownership,² and may be admitted as evidence of the extent of the title claimed.³

Tax Receipts as Evidence.—Tax receipts showing such payments are admissible in evidence where offered in support of actual possession.⁴

Necessity of Payment of Taxes.—In some states the payment of taxes is essential to the validity of the title of one who claims under the statute of limitations.⁵

although the claimant might avail himself of a fence upon the line, yet he could not avail himself of a fence located far away from the premises and including other lands.

1. **Effect of Payment of Taxes.**—*Naglee v. Albright*, 4 Whart. (Pa.) 291; *Chapman v. Templeton*, 53 Mo. 463; *Cashman v. Cashman*, 50 Mo. App. 663; *Miller v. Davis*, (Mich., 1895), 64 N. W. Rep. 338; *Cornelius v. Giberson*, 25 N. J. L. 1; *Sioux City, etc., Town Lot, etc., Co. v. Wilson*, 50 Iowa 422; *Brown v. Rose*, 48 Iowa 231; *Raymond v. Morrison*, 59 Iowa 371; *Malloy v. Bruden*, 86 N. Car. 251; *Miller v. Long Island R. Co.*, 71 N. Y. 380; *Thompson v. Burhans*, 61 N. Y. 52; *Reed v. Field*, 15 Vt. 672.

A mere occasional occupancy, though taxes are paid regularly, will not give title. *Sorber v. Willing*, 10 Watts (Pa.) 141.

2. **Payment of Taxes in Connection with Other Circumstances.**—*Green v. Jordan*, 83 Ala. 220; *Baucum v. George*, 65 Ala. 259; *Jay v. Stein*, 49 Ala. 514; *Draper v. Shoot*, 25 Mo. 197, 69 Am. Dec. 462; *Rayner v. Lee*, 20 Mich. 387; *Murray v. Hudson*, 65 Mich. 676; *Cook v. Rounds*, 60 Mich. 310; *McClure v. Jones*, 121 Pa. St. 551.

Illustrations.—In *Brown v. Bocquin*, 57 Ark. 97, it was held that permitting a person on two occasions to use part of the land as a lemonade stand for a day at a time, and causing some paving stone for a sidewalk to be deposited on the property, were not sufficient in connection with the payment of taxes to constitute adverse possession.

Paying taxes and surveying the premises was held not sufficient in *Paine v. Hutchins*, 49 Vt. 314.

In *Royer v. Benlow*, 10 S. & R. (Pa.) 303, it was held that where the owner confessed himself out of possession and permitted the improver to pay taxes, such facts might be considered in determining the possession.

In *Walcott v. Gibbs*, 97 Ill. 118, where a defendant in ejectment received a warranty deed for the land in 1859, and paid all taxes thereon for the years 1859 to 1879 inclusive, and the proof showed it was timber land and was never enclosed, but that he used it every year after the date of his deed as occasion required in procuring therefrom rails, firewood, posts, etc., it was held that whether the land was in possession or vacant and unoccupied, the bar of the statute was complete.

And in *Holbrook v. Gouverneur*, 114 Ill. 623, it was held that where a defendant in ejectment showed the payment of all taxes on the land, under color of title, for seven

consecutive years while the land was vacant and unoccupied, and he was found or shown to be in possession when the action was brought, it should be presumed that his possession was under his color of title, especially when that fact was not disputed on the trial.

The payment of taxes for many years following the purchase under a void tax sale, which is not followed by a collector's deed, would not be an act of possession, nor evidence tending to show a possessory title. *Langdon v. Templeton*, 66 Vt. 173.

In *Farrar v. Fessenden*, 39 N. H. 268, it was held that the assessment to and payment of taxes by one for a long series of years was competent evidence tending to show ownership, or at least a claim of ownership. See also *Little v. Downing*, 37 N. H. 355.

The Testimony of the Assessor who made the assessment upon an actual view of the land, was held admissible to show that those precise lands had been assessed to the claimant, and that the tax he paid was paid upon it. *Wren v. Parker*, 57 Conn. 529.

3. *Hockenburt v. Snyder*, 2 W. & S. (Pa.) 240.

4. *Green v. Jordan*, 83 Ala. 220.

5. **Illinois.**—*Hurlbut v. Bradford*, 109 Ill. 397; *Durfee v. Peoria, etc., R. Co.*, 140 Ill. 435; *Dawley v. Van Court*, 21 Ill. 460; *Jayne v. Gregg*, 42 Ill. 416; *Bride v. Watt*, 23 Ill. 507; *Timmons v. Kidwell*, 149 Ill. 507; *Bolden v. Sherman*, 101 Ill. 483.

California.—The *California Code Civ. Pro.*, § 325, requires that one who claims by adverse possession must have paid "all taxes, state, county, or municipal, which have been levied and assessed upon such land, during the five years of his adverse occupancy." See *Cavanaugh v. Jackson*, 99 Cal. 672; *Ross v. Evans*, 65 Cal. 439; *McNoble v. Justiniano*, 70 Cal. 395.

This provision, however, applies only to a case in which there is a contest between the holder of the legal title and a party claiming possession for five years adversely to such title, and not to a case where the plaintiff in an action of ejectment is simply protecting his possession against one who entered thereon without right or title. *Shanahan v. Tomlinson*, 103 Cal. 89.

In *O'Connor v. Fogle*, 63 Cal. 9, the plaintiff claimed under a patent from the state. More than five years elapsed between the issuing of the patent and the commencement of the action. The defendant pleaded the statute of limitations, and relied upon an adverse possession commencing before the patent issued. It appeared from the evidence

d. POSSESSION MUST BE OPEN AND NOTORIOUS—Rule Stated.—Open, visible and notorious possession is a necessary constituent of an adverse possession. In order that the statute of limitations may operate upon the right of the true owner, the occupation or possession of the one holding adversely must be of such a nature that the owner may have knowledge or the means of knowledge that there is a possession adverse to his title, under which it is intended to make title against him.¹

that the plaintiff had paid the taxes upon the land. The court instructed the jury as to the proof required to make out an adverse possession, and that in addition to the fact of possession and its adverse character it was necessary for the defendant to show that the taxes had been paid by him. The jury rendered a verdict in favor of defendant. It was held (1) that the statute could not commence to run until the issuing of the patent; (2) that the possession of the defendant, even if sufficient in other respects, was not adverse because of his failure to pay the taxes, the statute requiring it.

1. *United States.*—*Armstrong v. Morrill*, 14 Will. (U. S.) 131; *Willison v. Watkins*, 3 Pet. (U. S.) 51; *Jackson v. Huntington*, 5 Pet. (U. S.) 402; *Ewing v. Burnett*, 11 Pet. (U. S.) 53.

Alabama.—*Herbert v. Hanrick*, 16 Ala. 581; *Abercrombie v. Baldwin*, 15 Ala. 363; *Benje v. Creagh*, 21 Ala. 151; *Brown v. Cockerell*, 33 Ala. 47; *Potts v. Coleman*, 67 Ala. 221.

Arkansas.—*Ringo v. Woodruff*, 43 Ark. 469. *California.*—*Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Thompson v. Pioche*, 44 Cal. 517.

Connecticut.—*School Dist. No. 8 v. Lynch*, 33 Conn. 330.

Illinois.—*Chicago, etc., R. Co. v. Galt*, 133 Ill. 657; *Turney v. Chamberlain*, 15 Ill. 271.

Indiana.—*Peterson v. McCullough*, 50 Ind. 35; *Richwine v. Presbyterian Church*, 135 Ind. 80.

Kansas.—*Guinn v. Spillman*, 52 Kan. 496.

Maryland.—*Beatty v. Mason*, 30 Md. 409.

Massachusetts.—*Pray v. Pierce*, 7 Mass. 381, 5 Am. Dec. 59; *Samuels v. Borrowscale*, 104 Mass. 207; *Cook v. Babcock*, 11 Cush. (Mass.) 207.

Missouri.—*Turner v. Hall*, 60 Mo. 271; *Fugate v. Pierce*, 49 Mo. 441; *Pike v. Robertson*, 79 Mo. 615.

New Jersey.—*Foulke v. Bond*, 41 N. J. L. 527; *Cornelius v. Giberson*, 25 N. J. L. 1; *Cobb v. Davenport*, 32 N. J. L. 369.

New York.—*East Hampton v. Kirk*, 84 N. Y. 220, 38 Am. Rep. 505; *Culver v. Rhodes*, 87 N. Y. 354.

Pennsylvania.—*Mather v. Trinity Church*, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663; *Sailor v. Hertzog*, 2 Pa. St. 185.

Texas.—*Word v. Drouthett*, 44 Tex. 365; *Portis v. Hill*, 3 Tex. 278.

Vermont.—*Vermont University v. Reynolds*, 3 Vt. 544, 23 Am. Dec. 234; *Wells v. Austin*, 59 Vt. 157.

Virginia.—*Turpin v. Saunders*, 32 Gratt. (Va.) 34.

Wisconsin.—*Pepper v. O'Dowd*, 39 Wis. 538.

In *Pike v. Robertson*, 79 Mo. 618, the court

said: "If the owner visit his land, the indications of adverse possession and claim should be so patent that he could not be deceived. In this case, if the owner should have visited this land, he might have seen wood cut and rails split and hauled off, pretty good indications of trespass; but he would have seen no habitation, no enclosures, no fields—nothing indeed to advise him that an adverse claim was set up, that some one was disputing his title."

Secret Possession.—In *Armstrong v. Morrill*, 14 Wall. (U. S.) 145, Clifford, J., said: "Secret possession will not do, as publicity and notoriety are necessary as evidence of notice and to put those claiming an adverse interest upon inquiry."

To hold otherwise would be to establish a principle by which every proprietor of vacant lands might be dispossessed without his knowledge, or even the possibility of protecting himself. *Dawson v. Watkins*, 2 Rob. (Va.) 259.

Against a Mortgagee.—To constitute adverse possession against a mortgagee it is not sufficient that the mortgagor or those holding under him occupy, use, improve, and pay taxes on the premises as their own absolute property, but the possession must be in open denial of the mortgagee's title, and accompanied with such acts or declarations of the holders as are sufficient to put the mortgagee on notice that they claim and hold in hostility to his rights and adversely to him. *Ringo v. Woodruff*, 43 Ark. 469.

In *Lynde v. Williams*, 68 Mo. 370, an instruction to the effect that "any act done on the premises indicating an intention to hold the land is sufficient" was held incomplete as not requiring the necessary element of notoriety in adverse possession.

Posting Notice.—Merely posting a notice declaring an intention to take the property is not of itself sufficient in all cases. *Lynde v. Williams*, 68 Mo. 360. *Compare Phillipson v. Gibbons*, L. R. 6 Ch. 428.

General Reputation.—Where the defendant in an action of ejectment sets up title under adverse possession, it is competent for him to show that it was generally known in the neighborhood that he was in possession of the disputed premises, and was generally regarded as the owner. *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586.

Such testimony may be irrelevant in support of a paper title, but it has important bearing upon the notoriety of his possession. *Sparrow v. Hovey*, 44 Mich. 63.

In *Graydon v. Hurd*, 6 U. S. App. 610, it was held that where the possession of the defendant was originally in subordination to the title of the plaintiff an instruction that if

Actual Notice Unnecessary.—It is not necessary, however, to prove actual notice to the disseisee.¹

The Question of Notoriety does Not Arise where it is shown that the owner had actual knowledge that the possession sufficient to work a disseisin was under claim of title.²

Possession under Deed Duly Recorded—Constructive Notice.—It has been held that possession under a deed, duly recorded, is constructive notice that he who is in possession is claiming adversely, it being the presumption that he is claiming under and according to the title.³ It would seem however, that possession

the defendant's possession was so notorious as to be known to the people generally in the vicinity, and of such a character as to be hostile to the plaintiff's title, the jury might find that the plaintiff had notice of its adverse character, although there might be no proof of actual notice or knowledge, was erroneous.

In *Ross v. Goodwin*, 88 Ala. 390, it was held that where title to land is in issue a witness cannot be asked, "Whose land was it generally known as in the neighborhood?"

Notoriety Not Necessarily Continuous.—In *Watrous v. Morrison*, 33 Fla. 279, commenting upon the word "notorious" as used in defining an adverse holding, *Raney, C.J.*, said: "It seems to us not unadvisable to accompany this expression, when used, with some such explanation, and thereby prevent any misapprehension by the jury as to the extent of the notoriety that is requisite. To declare that the adverse holding must be asserted at all times and in all places wherever necessary to make such claim generally known and understood, is, to say nothing more, calculated to mislead a jury, at least by leaving it to them to decide at what times and places it is necessary to make such claim generally known and understood. They might infer that an indiscriminate assertion and a publicity of explanation of an adverse holding not contemplated by the law was necessary."

1. *Samuels v. Borrowscale*, 104 Mass. 207; *Cook v. Babcock*, 11 Cush. (Mass.) 207.

In *Wilson v. Williams*, 52 Miss. 487, it was held that it was erroneous to tell the jury that there must be presumptive notice without instructing them as to what constitutes such notice. Presumptive notice is an inference of law arising from certain facts. These facts should have been stated hypothetically, and the jury instructed that if they existed plaintiff had notice in law, and if not then he did not have.

2. **When Notoriety Unimportant.**—*Clark v. Gilbert*, 39 Conn. 94; *Brown v. Cockerell*, 33 Ala. 47; *Allen v. Mansfield*, 108 Mo. 343.

In *Clark v. Gilbert*, 39 Conn. 94, it was held that as the donor when the adverse possession was taken under a parol gift knew that the possession was adverse, there was no occasion for any notoriety. As was said in this case: "Notoriety is only important where the adverse character of the possession is to be brought home to the owner by presumption. Of course where it is shown that he had actual knowledge that the possession was under claim of a title, and therefore adverse, openness and notoriety are unim-

portant; for no other person has any legal interest in the question or right to be informed by notoriety or otherwise."

In *Dausch v. Crane*, 109 Mo. 323, an instruction to the effect that the adverse possession must have been known and acquiesced in by the true owner, or it must have been open and notorious, continuous and exclusive, was held correct. *Black, J.*, said: "The law requires the adverse possession to be open and notorious in order to notify the real owner of the possession and claim of the disseisor. From adverse possession which is open and notorious the law presumes notice to the true owner."

In *Key v. Jennings*, 66 Mo. 367, the court said: "In the case before us nothing is left for presumption, as the evidence shows actual knowledge" on the part of the real owner.

Where the Acts do Not Amount to a Disseisin.—If the acts of ownership and possession relied upon as proof of title by disseisin are not of a nature to work a disseisin, they cannot be made more effectual for this purpose by proof that they were known and not objected to by the legal owner. *Cook v. Babcock*, 11 Cush. (Mass.) 206.

3. **Possession under Duly Recorded Deed—Presumption.**—*Forest v. Jackson*, 56 N. H. 357.

So in *Bracken v. Jones*, 63 Tex. 184, it was held that where the party who sets up limitation enters under a recorded deed, which on its face discloses a conflict and assumes to convey title to the land occupied, the true owner, whose land is thus held adversely, is notified of the adverse claim.

If the hostile character of the possession is so openly manifested that his observation as a man reasonably careful of his interests would be sufficient to discover it, he will be deemed to have notice. Thus, where one of two tenants in common conveys to a third person by deed purporting to convey the whole land, and the deed is recorded by the grantee, who enters under it, such entry is hostile in its nature, and the mere fact of possession by a stranger is enough to put him on inquiry, and charge him with notice. So the making of valuable improvements, paying the taxes upon the land, and receiving the rents and profits without accounting or offering to account, are circumstances indicating an adverse holding, and their effect upon the cotenant is the same as if notice were directly communicated to him. The means of knowledge being furnished by the open and notorious character of the possession, he is chargeable with actual notice. *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100.

cannot be dispensed with by recording the deed.¹

In Constructive Notice the Element of Quantity becomes material, there being a stronger presumption where a whole tract is cleared and occupied than where the possession has been of but a small quantity.²

When Possession is Originally Taken and Held under the True Owner, the assertion of the adverse claim must be brought home to the true owner.³

e. POSSESSION MUST BE EXCLUSIVE.—The possession to be effectual must be exclusive, not only of the owner, but of all other persons.⁴

How Shown.—The exclusive use and adverse possession are to be shown by such acts of ownership, occupation, etc., as the land in the nature of things allows.⁵ The exercise of rights in common with the public generally, as in the case of a public street or fishing-ground, is not sufficient.⁶

Exclusive Claim to Entire Tract Unnecessary.—There need not be an exclusive claim to the entire title.⁷

f. POSSESSION MUST BE CONTINUOUS.—(1) *General Rule.*—Continuity of possession is an essential element of an adverse holding which will ripen into title, and if there be an interruption of the holding the term of adverse possession is closed; for the moment the dispossession terminates, the possession is by construction of law considered as having returned to him who holds the

When one takes a conveyance of land in the actual, open, notorious, and hostile possession of another claiming to hold adversely to the grantor, he takes it with notice of all the rights of the possessor that he would have learned if he had duly and fully inquired of the person in possession. It is not enough that such inquiry must be made of the person holding adversely to the grantor. *Canfield v. Hard*, 58 Vt. 217.

But it is not sufficient that some former deed in his claim of title has been recorded. *Wimberly v. Bailey*, 58 Tex. 222.

Possession under Bond.—Possession under title bond is sufficient to charge a purchaser from the obligor with notice of the obligee's color of title. *Spitler v. Scofield*, 43 Iowa 571.

1. *Bates v. Norcross*, 14 Pick. (Mass.) 224; *Coburn v. Hollis*, 3 Met. (Mass.) 125; *Roberts v. Richards*, 84 Me. 1.

2. *Alexander v. Polk*, 39 Miss. 737.

Extending an Enclosure over the Line of Another for a few feet and claiming title to the strip so cut off is not that open and notorious possession required. *Carrol v. Gillion*, 33 Ga. 539; *Brown v. Cockerell*, 33 Ala. 38; *Bracken v. Jones*, 63 Tex. 184.

Coterminous Proprietors.—When a dividing fence is run beyond the true line, whether from inadvertence, ignorance, or convenience on the part of the owner; and with no intention to claim up to it as the dividing line, his possession is not adverse to the adjoining proprietor, nor can it, when accompanied by acts of ownership, and continued for the length of time prescribed by the statute, perfect a title as against such adjoining proprietor. *Brown v. Cockerell*, 33 Ala. 38.

In *Harper v. Morse*, 114 Mo. 317, it was held that title by adverse possession cannot originate between the landlords of adjacent tracts of land in possession of the same tenant without notice of the adverse claim brought home to the other proprietor.

3. *Creekmur v. Creekmur*, 75 Va. 430;

Chalfin v. Malone, 9 B. Mon. (Ky.) 496, 50 Am. Dec. 525; *Hoyt v. Jones*, 31 Wis. 389.

4. **Possession must be Exclusive—California.**—*Unger v. Mooney*, 63 Cal. 595, 49 Am. Rep. 100; *Semple v. Cook*, 50 Cal. 26; *Lovell v. Frost*, 44 Cal. 471; *Thompson v. Pioche*, 44 Cal. 517.

Delaware.—*Bartholomew v. Edwards*, 1 Houst. (Del.) 17.

Illinois.—*McClellan v. Kellogg*, 17 Ill. 498.

Maine.—*Putnam Free School v. Fisher*, 34 Me. 172.

Massachusetts.—*Pray v. Pierce*, 7 Mass. 381, 5 Am. Dec. 59; *Bates v. Norcross*, 14 Pick. (Mass.) 224; *Kennebeck v. Springer*, 4 Mass. 418.

Minnesota.—*Washburn v. Cutter*, 17 Minn. 361.

New Hampshire.—*Little v. Downing*, 37 N. H. 355.

New York.—*Cahill v. Palmer*, 45 N. Y. 478.

West Virginia.—*Core v. Faupel*, 24 W. Va. 238.

For in case of common possession by two or more persons the law adjudges the rightful possession to him who has the legal title; and no length of holding in such case can give title by possession against such legal title. *Bartholomew v. Edwards*, 1 Houst. (Del.) 17.

The exclusive possession must have a character that does not ordinarily belong to it, and that character must be proved to the satisfaction of the jury like any other fact. *Russell v. Davis*, 38 Conn. 562.

Joint Occupancy—Husband and Wife.—In *Hendricks v. Rasson*, 53 Mich. 575, it was held that a husband could not hold adversely to his wife premises of which they are in joint occupancy as a family.

5. *Mooney v. Cooledge*, 30 Ark. 640.

6. **Exercise of Rights in Common with the Public.**—*Boulo v. New Orleans, etc.*, R. Co., 55 Ala. 480; *Tracy v. Norwich, etc.*, R. Co., 39 Conn. 382.

7. *Wilklow v. Lane*, 37 Barb. (N. Y.) 244.

legal title, and upon the resumption of the adverse possession a new time is fixed from which the statutory period will begin to run.¹ Indeed it has been said that "if there be one element more distinctly material than another, in conferring title, when all requisites are so, it is the existence of a continuous adverse possession."²

Continuity in Point of Locality.—There must be continuity in point of locality as well, for possession of part of a tract of land cannot be joined to the possession of another part so as to make up the period.³

(2) **Interruption of Possession**—(a) **Re-entry and Intrusion.**—As a general rule it may be stated that an entry upon, or possession of, the lands claimed by another, which in the first instance would suffice to effect a disseisin or ouster of the true owner, will break the continuity of the possession of the holder claiming by adverse possession.

1. **Continuity of Possession—United States.**—*Christy v. Alford*, 17 How. (U. S.) 601.

Alabama.—*Ross v. Goodwin*, 88 Ala. 390; *Bell v. Denson*, 56 Ala. 444; *Riggs v. Fuller*, 54 Ala. 141; *Taylor v. Dugger*, 66 Ala. 444; *Philippi v. Philippi*, 61 Ala. 41; *Ladd v. Dubroca*, 61 Ala. 25; *M'Arthur v. Carrie*, 32 Ala. 75, 70 Am. Dec. 529.

Arkansas.—*Sharp v. Johnson*, 22 Ark. 84.

California.—*Central Pac. R. Co. v. Shachelford*, 63 Cal. 261; *San Francisco v. Fulde*, 37 Cal. 353, 99 Am. Dec. 278.

Connecticut.—*Smith v. Chapin*, 31 Conn. 530; *Fanning v. Willcox*, 3 Day (Conn.) 258.

Florida.—*Townsend v. Edwards*, 25 Fla. 582.

Georgia.—*Denham v. Holeman*, 26 Ga. 191, 71 Am. Dec. 198.

Illinois.—*Morrison v. Kelly*, 22 Ill. 623, 74 Am. Dec. 169.

Indiana.—*Steeple v. Downing*, 60 Ind. 479; *Law v. Smith*, 4 Ind. 56; *McEntire v. Brown*, 28 Ind. 347.

Kentucky.—*Trotter v. Cassady*, 3 A. K. Marsh. (Ky.) 366, 13 Am. Dec. 183; *May v. Jones*, 4 Litt. (Ky.) 23; *Wickliffe v. Ensor*, 9 B. Mon. (Ky.) 258.

Maryland.—*Casey v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; *Ringgold v. Malott*, 1 Har. & J. (Md.) 316; *Hall v. Gittings*, 2 Har. & J. (Md.) 112.

Massachusetts.—*Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Haynes v. Boardman*, 119 Mass. 414; *Melvin v. Proprietors*, 5 Met. (Mass.) 15, 38 Am. Dec. 384.

Michigan.—*Yelverton v. Steele*, 40 Mich. 538; *Yelverton v. Hilliard*, 38 Mich. 355; *Shearer v. Middleton*, 88 Mich. 621.

Minnesota.—*Witt v. St. Paul, etc., R. Co.*, 38 Minn. 129.

Mississippi.—*Nixon v. Porter*, 38 Miss. 401.

Missouri.—*Wilkerson v. Eilers*, 114 Mo. 245; *Adkins v. Tomlinson*, 121 Mo. 487; *Dausch v. Crane*, 109 Mo. 323; *Bowman v. Lee*, 48 Mo. 335; *Fugate v. Pierce*, 49 Mo. 441; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *Scruggs v. Scruggs*, 43 Mo. 142; *Bradley v. West*, 60 Mo. 33.

New York.—*Union Dime Sav. Inst. v. Wilmot*, 94 N. Y. 221, 46 Am. Rep. 137; *Doe v. Campbell*, 10 Johns. (N. Y.) 477; *Wheeler v. Spinola*, 54 N. Y. 377; *Townshend v. Thomson*, 60 N. Y. Super. Ct. 454.

North Carolina.—*Andrews v. Mulford*, 1 Hayw. (N. Car.) 311; *Ruffin v. Overby*, 105 N. Car. 78; *Mobley v. Griffin*, 104 N. Car. 112.

Pennsylvania.—*Pederick v. Searle*, 5 S. & R. (Pa.) 240; *Groft v. Weakland*, 34 Pa. St. 308.

South Carolina.—*Hill v. Saunders*, 6 Rich. (S. Car.) 62; *King v. Smith, Rice* (S. Car.) 10; *Turnipseed v. Busby*, 1 McCord (S. Car.) 279; *Steedman v. Hilliard*, 3 Rich. (S. Car.) 101.

Texas.—*Satterwhite v. Rosser*, 61 Tex. 166; *Holstein v. Adams*, 72 Tex. 485; *Smith v. Estill*, 87 Tex. 264.

Upon Every Discontinuance of the Possession of the Wrongdoer the possession of the rightful owner is, by operation of law, restored, and nothing short of an actual adverse and continuous possession for the statutory period can destroy his title or vest title in the wrongdoer. *Casey v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; *McEntire v. Brown*, 28 Ind. 347.

The Moment the Premises Become Vacant, that moment the owner, by reason of his legal title, will be regarded in the constructive possession, and the adverse possession of the wrongdoer at an end. *Snyder, J., in Core v. Faupel*, 24 W. Va. 238.

Nothing to be Left to Conjecture.—As was said in *Ruffin v. Overby*, 105 N. Car. 78, in proving continuous adverse possession nothing must be left to conjecture. The testimony, if believed, must show the continuity of the possession for the full statutory period, in plain terms or by necessary implication.

2. *Groft v. Weakland*, 34 Pa. St. 308.

3. *Potts v. Gilbert*, 3 Wash. (U. S.) 475; *Griffith v. Schwenderman*, 27 Mo. 412.

A Roving Possession from one part of a tract to another will not bar the right of entry of the owner upon any part which has not been held adversely for the statutory period. *Messer v. Reginnitter*, 32 Iowa 312.

Changing Fence.—When the fence is removed or taken away and re-erected on a different part of the land before the statute of limitations has run its full time, it follows from the change in the possession that the part of the land where the old structure stood was not in the actual possession of the trespasser for the requisite time. *Peoria, etc., R. Co. v. Tamplin*, 156 Ill. 285.

By the True Owner.—Such an entry upon or occupation of the land, by the true owner, for any portion of the period of adverse possession by the claimant, will, as a general rule, break the continuity and destroy the adverse possession.¹

Nature of Re-entry Required.—It is not every entry, however, by the owner that will disturb the adverse possession, but to effect this he must assert his claim to the land by acts of ownership; an entry by stealth, or for other purposes than those connected with a right to enter, will not break the continuity of the adverse possession in another.²

1. Re-entry by True Owner—United States.—*Henderson v. Griffin*, 5 Pet. (U. S.) 158.

California.—*Thompson v. Pioche*, 44 Cal. 508.

Massachusetts.—*Allen v. Holton*, 20 Pick. (Mass.) 465.

New Hampshire.—*Wendell v. Moulton*, 26 N. H. 41; *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219.

New York.—*Jackson v. Leonard*, 9 Cow. (N. Y.) 653.

North Carolina.—*Malloy v. Bruden*, 86 N. Car. 251.

Wisconsin.—*Cornell University v. Mead*, 80 Wis. 387; *Finn v. Wisconsin River Land Co.*, 72 Wis. 546; *Warren v. Putnam*, 63 Wis. 414; *Smith v. Sherry*, 54 Wis. 130; *Lewis v. Disher*, 32 Wis. 504; *Wilson v. Henry*, 35 Wis. 241; *Haseltine v. Mosher*, 51 Wis. 443.

An Entry, in Order to Work a Legal Interruption, must be made under such circumstances as to enable the party in possession, by the use of reasonable diligence, to ascertain the right and claim of the party making the entry. *Wing v. Hall*, 47 Vt. 182.

Intention to Resume Actual Possession.—In *Altamus v. Campbell*, 9 Watts (Pa.) 31, 34 Am. Dec. 494, *Gibson, C.J.*, said: "There must be an explicit declaration, or an act of notorious dominion, by which the claimant challenges the right of the occupant; or it cannot, perhaps, be better defined than by saying that the entry must bear, on the face of it, an unequivocal intent to resume the actual possession."

Possession Surrendered under Threat of Legal Proceedings.—In *Gould v. Carr*, 33 Fla. 535, *Mabry, J.*, after reviewing many cases said: "The correct rule, we think, to be deduced from the law on the subject is that the adverse possessor, the inception of whose title is founded in wrongdoing, must not yield or surrender his possession under the pressure of any legal methods used to oust him, if he can legally prevent it; and if he does, and an entry adverse to him is made, the continuity of his possession will be broken." To the same effect is *Shaffer v. Lowry*, 25 Pa. St. 252.

Tearing down Division Fence.—In *Donovan v. Bissell*, 53 Mich. 462, it was held that tearing down the fence between one's self and next neighbor after asserting a right to the land enclosed did not break the adverse possession of the claimant.

Forcible Entry.—A forcible intrusion into the possession of the premises will not suspend the operation of the statute. In *Ferguson v. Bartholomew*, 67 Mo. 212, the court

said: "A rule which would allow the owner of land to arrest the operation of the statute of limitations by a forcible intrusion upon the peaceable possession of an adverse occupant, and his expulsion from the premises, would be followed by the most pernicious consequences. Violence and disorder would speedily ensue, and for the peaceful methods of the law would be substituted the hostile conflicts of opposing claimants." See also *Cary v. Edmonds*, 71 Mo. 523; *San José v. Trimble*, 41 Cal. 536; *Gould v. Carr*, 33 Fla. 523; *Pella v. Scholte*, 24 Iowa 283, 95 Am. Dec. 729; *Ladd v. Dubroca*, 61 Ala. 25; *Beard v. Ryan*, 78 Ala. 37.

Joint Possession.—Joint possession by the legal owner, and the claimant by possession, at any time within the statutory period will stop the running of the statute. *Larwell v. Stevens*, 2 McCrary (U. S.) 311. See also *supra*, this title, *Possession must be Exclusive*.

Forfeiture for Taxes.—In *Armstrong v. Morrill*, 14 Wall. (U. S.) 120, where the lands of A in the adverse possession of B were forfeited to the state for nonpayment of taxes, but were allowed by subsequent and private act to be redeemed by the original owner, it was held that the forfeiture to the state broke, in point of law, the continuity of the adverse possession, and that such adverse possession (though it might have been in fact continuous) having been, in law, thus broken, was neither restored upon the redemption so as to be continuous in law, nor was it so affected as that the persons holding adversely could tack the adverse possession subsequent to the redemption. See also *Braxton v. Rich*, 47 Fed. Rep. 178; *Wettig v. Bowman*, 47 Ill. 17.

Undelivered Deed.—In *Sullivan v. Eddy*, 154 Ill. 199, it was held that the continuity of adverse possession was not interrupted by an undelivered deed from the possessor to a third person, although the latter subsequently reconveyed for the purpose of removing the apparent cloud on the title.

Death of Real Owner.—Where adverse possession begins during the lifetime of the real owner, it does not cease at his death by operation of law, but, if maintained, continues as against all parties claiming by or through him, whether minors, married women, persons of unsound mind, or otherwise. *Lynch v. Cannon*, 7 Houst. (Del.) 386.

2. Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186; *Fuller v. Fletcher*, 44 Fed. Rep. 34.

Where the land in question was timber land, unenclosed, and used for no other purpose than to supply wood, rails, and other timber, and the defendant, who had the

Entry for Purpose of Discovering Evidence of Adverse Occupation.—A mere entry to see if there is any evidence of an adverse possession is not, as a matter of law, conclusive evidence of an interruption.¹

Mere Oral Assertions of Right without actual entry and claim of possession will not interfere with the adverse possession.²

An Entry with a Proposed Purchaser, pointing out the land and claiming it, and the subsequent execution of a deed, have been held to amount to a re-entry.³

And a Re-entry upon Any Part of the Land in the constructive possession of an adverse claimant interrupts the possession, at least as to the unenclosed portions of the tract.⁴

Any Interruption, for However Short a Time, may stop the running of the statute.⁵

Question for Jury.—As to whether the possession has been continuous or adverse, the question is for the jury to determine.⁶

Entry by Another Adverse Claimant.—Entry and possession by another than the real owner claiming title will operate as an interruption.⁷

Mere Intrusion Unknown to the Possessor.—The mere intrusion of a trespasser not brought to the knowledge of a party in possession, nor continued long enough to raise a presumption that it was known to him, is not an interruption.⁸

Interruption during Suspension of Statute.—An interruption, although occurring during a period when the statute was suspended, is sufficient to destroy the continuity of the possession.⁹

patent title, so used it up to the time when the tax title vested in the plaintiff, and continued so to use it thereafter for a time exceeding the period prescribed by the statute of limitations, it was held that the tax title was barred, notwithstanding the exercise by plaintiff during that time of certain acts of ownership which, however, did not amount to an ouster of the defendant. *Brett v. Farr*, 66 Iowa 684; *Ellsworth v. Low*, 62 Iowa 178; *Griffith v. Carter*, 64 Iowa 193.

1. *Bowen v. Guild*, 130 Mass. 121.

2. *Kimball v. Ladd*, 42 Vt. 747.

3. *Brickett v. Spofford*, 14 Gray (Mass.) 514; *Warner v. Bull*, 13 Met. (Mass.) 1; *Knox v. Jenks*, 7 Mass. 488; *Oakes v. Marcy*, 10 Pick. (Mass.) 195.

4. *Hunnicutt v. Peyton*, 102 U. S. 333; *Evitts v. Roth*, 61 Tex. 81.

In *Chandler v. Rushing*, 38 Tex. 591, it was held that where a portion of a tract was held by constructive possession, and the other portion by actual possession, the conveyance of the part actually held stopped the running of the statute as to the part constructively held.

5. *Brolaskey v. McClain*, 61 Pa. St. 146.

Interruption even for a single day has been held sufficient. *Olwine v. Holman*, 23 Pa. St. 279.

6. *Bowen v. Guild*, 130 Mass. 121; *Stevens v. Taft*, 11 Gray (Mass.) 33; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Groft v. Weakland*, 34 Pa. St. 304; *O'Hara v. Richardson*, 46 Pa. St. 385; *Holliday v. Cromwell*, 37 Tex. 437.

7. See *infra*, this title, *Tacking*.

Where one has in good faith entered upon and continued in possession of land under a paper title which he took believing it to be good, the maintenance of such possession during a portion of the three years next after the recording of a tax deed of the land interrupts the running of the three-year limita-

tion in favor of the tax-title claimant, and defeats the tax title to the extent of such actual possession and of the constructive possession following upon it. *Stephenson v. Wilson*, 50 Wis. 95.

Where one holding land permissively under bonds for titles conveyed it absolutely (the vendee taking possession), and subsequently rebought from his vendee and resold to another vendee, the adverse possession was broken, and the possession of the first and last vendees could not be tacked so as to make a good prescriptive title. *Hines v. Rutherford*, 67 Ga. 606; *Rutherford v. Hobbs*, 63 Ga. 243.

8. *Bell v. Denson*, 56 Ala. 444; *Farmer v. Eslava*, 11 Ala. 1028; *Beard v. Ryan*, 78 Ala. 37; *Woodstock Iron Co. v. Roberts*, 87 Ala. 436; *Whalley v. Small*, 29 Iowa 288; *Duren v. Sinclair*, 22 S. Car. 361.

Entry of One Having Unperfected Title to Collect Rent.—In *Donahue v. O'Connor*, 45 N. Y. Super. Ct. 278, it was held that there was no interruption where one having an unperfected title entered and collected rent.

Passage of Inhabitants over Beach to Gather Seaweed.—The adverse possession of a beach by a town is not affected by the passage of inhabitants of the town over the beach to gather seaweed or procure sand, or by their using the beach as a place of temporary deposit for the seaweed. *New Shoreham v. Ball*, 14 R. I. 566.

9. *Malloy v. Bruden*, 86 N. Car. 251.

Claimants Compelled to Leave Country by Military Order.—So in *Holliday v. Cromwell*, 37 Tex. 437, where it was attempted to excuse the interruption by showing that the claimants had been compelled by military rule to leave the country, but it appeared that the parties having title were similarly affected, it was held to be not a good defense.

Burning of Fence by Army—Fence Replaced in Reasonable Time.—In *McColgan v. Langford*,

Possession Interrupted by Casualty.—And though the possession be interrupted by casualty the continuity may be broken.¹

(b) **Acknowledgment of Superior Title—Rule Stated.**—Any act of recognition or acknowledgment of a superior title in another, during the period of adverse possession, will, as a general rule, amount to an interruption of the continuity and defeat the operation of the statute.²

Presumption from Agreement to Arbitrate or Suspend Suit.—Recognition of the true title may be presumed from an agreement to arbitrate or suspend suit.³

6 Lea (Tenn.) 116, it was held that an instruction as follows was proper: "If such possession was disturbed by the act of war by an army quartering thereon, who burned the fence, such interference would not arrest the running of the statute if it be shown that the defendants resumed their actual possession as soon thereafter as they reasonably could do." The court on appeal said: "Surely the temporary destruction of the fences by an army, or an accidental fire, would not arrest the running of the statute if the fence be replaced in a reasonable time."

Temporary Interruption of Actual Residence by Violence of Strangers.—And in *Clark v. Potter*, 32 Ohio St. 49, it was held that the temporary interruption of actual residence on the land, caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenable for the time being, would not stop the running of the statute. In this case the neighbors of the adverse claimant, on account of objectionable tenants placed upon the land, tore down the house and fences and removed the timber; but the claimant, though he neither resided on it nor had a tenant thereon, continued to pay taxes and to exercise other acts of ownership and control.

1. **Abandonment on Account of Encroachments of River.**—In *Western v. Flanagan*, 120 Mo. 61, the land held adversely was submerged for years, so that the occupant was forced to abandon the possession. It was held that the time during which it was thus submerged could not be counted in favor of either the holder of the legal title or the adverse claimant.

2. **Acknowledging Superior Title.**—*Davis v. Collins*, 43 Fed. Rep. 31; *Ingersoll v. Lewis*, 11 Pa. St. 212, 51 Am. Dec. 536; *Sailor v. Hertzogg*, 2 Pa. St. 184; *Criswell v. Altemus*, 7 Watts (Pa.) 566.

In *Garlington v. Copeland*, 32 S. Car. 57, where it appeared that A bought a parcel of land and entered into possession of it, in 1864, without having taken a deed, and in 1868 the administrator of A's grantor filed a bill alleging that the land belonged to his decedent's estate, and that in 1875 under an agreement the administrator discontinued the suit, and the plaintiffs, who claimed under A, surrendered to him the possession of the land, it was held that the surrender was abandonment of adverse possession by the plaintiffs, which related back to the commencement of the suit in 1868.

When Acknowledgment to be Made.—The acknowledgment must be shown to have been made before the statute has closed upon the title of the party making it. *Bradford v. Guthrie*, 4 Brews. (Pa.) 361.

Execution of Quitclaim.—Where the grantee under an invalid tax deed agreed orally to execute a quitclaim deed to the original owner upon repayment of the amount of taxes paid by him with interest, it was held that this agreement operated as a waiver and abandonment of the constructive possession obtained by the grantee and stopped the running of the statute in his favor. *Cornell University v. Mead*, 80 Wis. 387.

And in *Warren v. Putnam*, 63 Wis. 419, where it appeared that within three years after the recording of a tax deed the grantee therein quitclaimed to the original owner, but the quitclaim deed was not recorded; and subsequently he conveyed the land to a third person, who had no notice of the quitclaim deed, and who duly recorded his conveyance, and the lands remained unoccupied for more than three years after the tax deed was recorded;—it was held that the quitclaim deed to the original owner was an abandonment and surrender by the tax-title claimant of the constructive adverse possession which arose in his favor upon the recording of his tax deed, and that the statute of limitations ceased thereupon to run in his favor, but ran thereafter in favor of the original owner, and at the expiration of the three years from the recording of the tax deed all right of action in favor of those claiming title thereunder.

A Disclaimer of Part, however, will not affect the adverse possession of the remainder. *Barnett v. Templeman* (Tex., 1895), 31 S. W. Rep. 78.

Submitting to Erroneous Assessment.—In *Clarke v. Dougan*, 12 Pa. St. 87, it was held that an assessment of warranted land for a disseising settler, of a less quantity than is called for by the warrant and survey, if made by his procurement, or even with his knowledge and acquiescence, will lose to him his constructive possession, by detaching it from the landmarks that had sustained it.

Attornment.—In *Russell v. Erwin*, 38 Ala. 44, it was held that, though an attornment by a tenant to a stranger, who claims to own the land, was ineffectual to create the relation of landlord and tenant, nevertheless it destroyed the adverse character of his possession as against such claimant.

But in *Haynes v. Boardman*, 119 Mass. 414, it was said that it could not be stated as a matter of law that the payment of rent, or an admission of title, by a tenant of the demandant or his grantor, without the knowledge of his landlord, would alone operate to interrupt an otherwise continuous adverse occupation.

3. *Hunt v. Guilford*, 4 Ohio 317; *Devyr v. Schaefer*, 55 N. Y. 446.

Possession Part of Period in Subordination to True Owner.—Though the possession be continuous, yet if for part of the time it was in recognized subordination to the true owner, the two periods cannot be united to make up the period of limitation.¹

Purchase of Outstanding Claims.—Neither the purchase nor the attempt to purchase outstanding claims or an ostensible title on the part of one in the adverse possession of the property will necessarily amount to a waiver or non-claim on his part, or interrupt the adverse holding.² But the purchase of an outstanding claim or title may be made in such a way as to amount to a clear recognition of another's right.³

Agreement to Arbitrate.—In *Perkins v. Blood*, 36 Vt. 273, it was held that the running of the statute of limitations would be interrupted by an agreement to arbitrate the dispute in a contest for the possession of land, and that the defendant in possession should continue in possession pending the arbitration.

But in *Breston v. Beall*, 14 Ky. L. Rep. 61, (Ky., 1892) 19 S. W. Rep. 175, where the holder of certain land claims, which were unsettled, signed a writing appointing an agent with power of attorney to adjust such claims, agreeing to give him one half of the land as compensation, and it was also agreed that the claim which the agent himself had to the same land would not be affected, it was held that adverse possession of the agent of part of the same land was not interfered with.

Agreement Not to Bring Suit.—In *Dietrick v. Noel*, 42 Ohio St. 18, 51 Am. Rep. 788, it was held that adverse possession loses its adverse character when the holder thereof, for a sufficient consideration, agrees with the true owner that suit to recover such possession shall not be brought during the lifetime of each of them.

In *East Hampton v. Kirk*, 84 N. Y. 215, it appeared that R., a former owner of the defendant's land, brought an action for trespass against one who had gathered seaweed upon the beach. R. discontinued the action under an agreement with the town, and agreed not to sue again. It was held that this did not entitle plaintiffs to a charge to the jury that R. thereby relinquished his adverse possession; that it was at most evidence bearing upon that question for the consideration of the jury.

Agreement to Vacate.—In *Eldridge v. Parish*, 6 Tex. Civ. App. 35, it was held that an agreement by one in possession to vacate in consideration of the conveyance of other land by the claimants stopped the running of the statute.

1. *Clark v. Kirby* (Tex. Civ. App., 1894), 25 S. W. Rep. 1096. In this case it was held that a plea of adverse possession could not be sustained when the defendant did not take possession with intent to hold in hostility to the owner, but subsequently concluded to do so, and there was no evidence as to when the possession became hostile.

2. *United States*.—*Jackson v. Huntington*, 5 Pet. (U. S.) 438; *Alexander v. Pendleton*, 8 Cranch (U. S.) 462; *Leffingwell v. Warren*, 2 Black (U. S.) 605.

Arizona.—*Singer Mfg. Co. v. Tillman* (Arizona, 1889), 21 Pac. Rep. 818.

California.—*Cannon v. Stockmon*, 36 Cal. 538, 95 Am. Dec. 205; *Schuhman v. Garratt*, 16 Cal. 100.

Michigan.—*Chapin v. Hunt*, 40 Mich. 595; *Johnstone v. Scott*, 11 Mich. 246.

Missouri.—*Macklot v. Dubreuil*, 9 Mo. 477, 43 Am. Dec. 550; *Mattison v. Ausmuss*, 50 Mo. 551; *Funkhouser v. Lay*, 78 Mo. 458; *Mather v. Walsh*, 107 Mo. 121.

New York.—*Jackson v. Dieffendorf*, 3 Johns. (N. Y.) 269; *Jackson v. Given*, 8 Johns. (N. Y.) 137, 5 Am. Dec. 328; *Jackson v. Harrington*, 9 Cow. (N. Y.) 86; *Jackson v. Rightmyre*, 16 Johns. (N. Y.) 327; *Jackson v. Oltz*, 8 Wend. (N. Y.) 440; *Jackson v. Newton*, 18 Johns. (N. Y.) 355.

Pennsylvania.—*Owens v. Myers*, 20 Pa. St. 134, 57 Am. Dec. 693.

Tennessee.—*Cooper v. Great Falls Cotton Co.*, 94 Tenn. 588; *Headrick v. Fritts*, 93 Tenn. 270.

Texas.—*Cuellar v. Dewitt*, 5 Tex. Civ. App. 568; *McLane v. Canales* (Tex. Civ. App., 1894), 25 S. W. Rep. 29.

In *Tobey v. Secor*, 60 Wis. 310, it was held that an attempt or negotiation by one party after litigation was threatened, to purchase the lands in controversy which he had held adversely for the statutory period, was not a submission to the title of the other party and an abandonment of such adverse holding.

In *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205, *Sawyer, C. J.*, said: "A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or by buying one, forego any right to claim the benefit of the statute of limitations as to all others."

In *Dean v. Goddard*, 55 Minn. 290, it was held that the continuity of adverse possession was not broken by the party in possession taking written conveyances of the premises from other parties claiming an interest therein.

3. *Long v. Young*, 28 Ga. 130.

In *Headrick v. Fritts*, 93 Tenn. 270, *Wilkes, J.*, said: "It may safely be assumed as a general proposition that if a defendant in possession of disputed territory concede that the true title is in another, and offer to purchase from him, then the continuity of adverse possession is broken. But there is a broad difference between the cases where

The Purchase of a Tax Title to land is not an admission by the purchaser of another's right.¹

But the Offer to Purchase or Rent the Property, and not merely to purchase an outstanding or adverse claim or title to quiet his possession or protect him from litigation, is a clear and unequivocal recognition of the title of him from whom he would purchase the land.²

(c) *Suit by True Owner—Recovery.*—When the possession has been delivered to the real owners by virtue of a recovery in a court of justice, the act of limitation is avoided and the continuity of the adverse possession is broken.³

Suit Unsuccessful or Dismissed.—There is no interruption or suspension of the adverse possession caused by an action of ejectment brought by the owner against the adverse holder and afterwards dismissed,⁴ or which is unsuccessful.⁵ Nor will, according to the weight of authority, a recovery without an entry stop the running of the statute.⁶

the real title is conceded and acknowledged to be in another, and an offer or contract is made to buy the title from him as the true owner, and the cases where there is a new offer to buy in an outstanding claim for the purpose of quieting a title already held, in order to prevent litigation. The defendant in possession has the right to buy in an outstanding hostile claim in order to quiet his own title and possession under a different title, and he may make such purchase or offer to purchase of the real owner without prejudice to his own adverse holding, provided he buys in such hostile title in order to quiet his own, and not merely as a recognition of the superiority of the adverse title, and his desire to hold under it. Each case will depend upon its own facts and circumstances, and the intention of the parties as to whether the fact of purchase is intended as an acknowledgment of the true title or a mere effort to extinguish an adverse claim; and the solution does not depend merely upon the question whether the party from whom the purchase is made or attempted is or is not the true owner. Every claimant is presumed to have some title, and the defendant is not required, at his peril, to determine that he is buying from the true owner, but he may buy any adverse claim, whether well or ill founded."

1. *Hayes v. Martin*, 45 Cal. 559; *Mather v. Walsh*, 107 Mo. 121; *Ridgeway v. Holliday*, 59 Mo. 444; *Omaha, etc., Land, etc., Co. v. Hansen*, 32 Neb. 449; *Griffith v. Smith*, 27 Neb. 47.

2. *Blight v. Rochester*, 7 Wheat. (U. S.) 535; *Abbey Homestead Assoc. v. Willard*, 48 Cal. 614; *Central Pac. R. Co. v. Mead*, 63 Cal. 112; *Pacific Mut. L. Ins. Co. v. Stroup*, 63 Cal. 150; *McCracken v. San Francisco*, 16 Cal. 591; *Koons v. Steele*, 19 Pa. St. 203.

3. *Pedrick v. Searle*, 5 S. & R. (Pa.) 240.

And an Order of Court requiring the conveyance of the land interrupts the possession. *Gower v. Quinlan*, 40 Mich. 572.

One Remaining in Possession after Adverse Decree.—One who continues in possession or resumes possession after a decree quieting title against him and declaring it to be vested in another is presumed to have possession in subordination to the real owner, and he cannot assert adverse possession without

formal express notice thereof to the owner. *Root v. Woolworth*, 150 U. S. 401; *Hintrager v. Smith*, 89 Iowa 270.

Acquiescence.—Where, before the expiration of the statutory period, the true boundary line between the lands in dispute was established and acquiesced in by the adverse claimant, it was held that though he continued in possession for the entire period his possession was not continuous adverse possession. *Heinz v. Cramer*, 84 Iowa 497.

4. *Langford v. Poppe*, 56 Cal. 73.

5. *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654.

An entry under a power of attorney from the owner as administrator of another would be unavailable. *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654.

6. *Doe v. Reynolds*, 27 Ala. 364; *Smith v. Hornback*, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; *Jackson v. Haviland*, 13 Johns. (N. Y.) 229; *Forbes v. Caldwell*, 39 Kan. 14; *Smith v. Trabue*, 1 McLean (U. S.) 87; *Bright v. Stevens*, 1 Houst. (Del.) 240; *Carpenter v. Natoma Water, etc., Co.*, 63 Cal. 616; *Doe v. Reynolds*, 27 Ala. 364; *Gould v. Carr*, 33 Fla. 523. But see *Brolaskey v. McClain*, 61 Pa. St. 146.

As was said in *Smith v. Trabue*, 1 McLean (U. S.) 88: "It is true, the judgment fixes the right of entry in the lessor of the plaintiff, if he can make an entry without force. But if he fail to make his entry, either with or without a writ of possession, the statute of limitations will continue to operate against the right. A mere entry while the tenant remains in possession will not oust him, but he must be turned out of possession, or acknowledge the right of the lessor of the plaintiff by consenting to hold under him. Nothing short of this will stop the statute."

But a recovery and the attorning of the defendant's tenant to the plaintiff, under the pressure of a writ of *habere facias possessionem*, is sufficient to break the continuity of the possession. *Groft v. Weakland*, 34 Pa. St. 304.

And in contemplation of law the enforcement of a writ of possession in an action of ejectment puts an end to the adverse possession of defendant as of the day of the in-

(d) **Abandonment.**—Where one in possession leaves the land with a purpose to abandon it, the possession is lost.¹

But the Mere Fact that the Premises are Vacant at Times, provided there is no intention to abandon them, will not defeat the continuity of the possession.²

The Mere Lapse of Time between successive acts of occupancy does not *per se*, as a matter of law, show conclusively an abandonment of the first possession, but it is a question of fact for the jury.³

stitution of the suit. *Dunn v. Miller*, 75 Mo. 260.

1. *Harper v. Tapley*, 35 Miss. 506; *Brown v. Chicago, etc., R. Co.*, 101 Mo. 484; *Holcombe v. Austill*, 19 Ga. 604.

Presumption.—In *Russell v. Slaton*, 25 Ga. 193, it was held that where a man who has been holding land without a title to it voluntarily abandons it the presumption is that he has not been holding it adversely, but in subordination to the title of the true owner, and therefore he cannot insist upon such possession, to make out title in him, under the statute of limitations.

Illustrations.—In *Congdon v. Morgan*, 14 S. Car. 587, where the defendant died, and plaintiffs took possession, but were ousted by defendant's heirs, it was held that there was not a continuous possession cast by descent.

In *Phillipson v. Flynn*, 83 Tex. 580, an unexplained break of seventeen months in the occupancy of the land was held to be fatal to the claim of adverse possession.

In *Doe v. Roe*, 32 Ga. 572, where it appeared that in 1847 the claimant had entered upon a lot of land, planted it in peas, and the next year in corn, but he neither lived on nor cultivated the land until 1852, it was held that there was not such a continuous possession as to constitute title.

Permitting the enclosure to decay has been held to interrupt the possession. *Borel v. Rollins*, 30 Cal. 408.

In *Whittlesey v. Hoppenyan*, 72 Wis. 140, where the fence had been allowed to decay, and there was no proof of other possession, it was held that this was not a continued occupation.

In *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137, it was held that the accidental burning of the fences did not interrupt the continuity of the possession.

Beginning the erection of a house, leaving it partly built, and returning some months afterwards to finish and occupy it, was held to break the continuity of possession in *Byrne v. Lowry*, 19 Ga. 27.

If the first settler or warrant holder abandons and another settles on the land and afterwards abandons it also, the first claimant by going on and perfecting his title will prevail against the other. *Holtzapfel v. Phillibaum*, 4 Wash. (U. S.) 356.

2. *Stettinische v. Lamb*, 18 Neb. 619; *Hughes v. Pickering*, 14 Pa. St. 297; *Fugate v. Pierce*, 49 Mo. 441; *Crispen v. Hannavan*, 50 Mo. 536; *Harper v. Tapley*, 35 Miss. 506; *Hudgins v. Crow*, 32 Ga. 367; *Downing v. Mayes*, 153 Ill. 330; *Tarleton v. Kirkpatrick*, 1 Tex. Civ. App. 107; *De la Vega v. Butler*, 47 Tex. 529; *Alabama State Land Co. v. Kyle*, 99

Ala. 474; *Holdfast v. Shepard*, 6 Ired. (N. Car.) 361.

3. *King v. Sears*, 91 Ga. 577; *Aldrich v. Griffith*, 66 Vt. 390; *Patchin v. Stroud*, 28 Vt. 394; *De la Vega v. Butler*, 47 Tex. 529.

In *Webb v. Richardson*, 42 Vt. 473, *Peck, J.*, said: "To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy necessary to constitute a continuous possession depend somewhat on the condition of the property and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If in the intermediate time between the different acts of occupancy there is no existing intention to continue the possession, or return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates and cannot afterwards be connected with a subsequent occupation, so as to be made available toward gaining title; while such continual intention might, and generally would, preserve the possession unbroken. This principle is tersely stated in the civil law thus: 'A man may retain possession by intention alone, yet this is not sufficient for the acquisition of possession.'"

So a Short Absence on Business from the premises will not affect the possession. *Cunningham v. Patton*, 6 Pa. St. 355; *Sailor v. Hertzog*, 10 Pa. St. 206.

If One Member of the Family Remains, there will be no interruption. *Cunningham v. Brumback*, 23 Ark. 336.

Possession by Agent.—Possession may be continued by an agent. *Omaha, etc., Land, etc., Co. v. Parker*, 33 Neb. 775.

The absence of the defendant, or the absence of any vendor under whom he claims from the state, has no effect to prevent the running of the statute in his favor. It is the possession of the land by himself or tenants, not his personal presence, which avails him. *Hunton v. Nichols*, 55 Tex. 217. See also *Zoll v. Carnahan*, 83 Mo. 35.

Presumption as to Continuance.—In some cases it is affirmed that adverse possession having taken place it is presumed to continue until adverse possession is proved to have been taken by another. In *Clements v. Lampkin*, 34 Ark. 598, the court said: "The possession of Topp's vendee, once established by material acts of visible, notorious ownership, which was done by putting negroes upon it and making a deadening, long

The Intention to Return, however, would not, it seems, make any difference where the appearances of ownership are lacking, for whatever may be the mind of the claimant, he must be judged by his acts.¹

When the Statutory Bar is Complete.—Of course when the title has been acquired by adverse possession an interruption of the actual occupation will not affect the title.² The continuity of possession has reference to the time the statute is running, and is not necessary after the bar has attached.³

(3) **Tacking—Rule Stated.**—The several possessions of successive disseisors cannot be tacked together so as to make a continuous possession, but where there is such a privity of estate or title as that the several possessions can be referred to the original entry they may be joined, and are regarded as a continuous possession, as in the case of landlord and tenant, ancestor and heirs, and vendor and vendee.⁴

known afterwards as the Lampkin deadening, must be presumed to have continued until open, notorious, and adverse possession be shown to have been taken by another."

1. *Susquehanna, etc., R., etc., Co. v. Quick*, 68 Pa. St. 189.

In *Stephens v. Leach*, 19 Pa. St. 262, Gibson, J., said: "A man does not discontinue his possession by locking up his house in town, or suspending his cultivation in the country, provided he do not suffer the building in the one case or the fields in the other to be thrown open, but he is bound to continue a positive appearance of ownership by treating the property as his own, and holding it within his exclusive control. An intention to resume a suspended intrusion, of which the owner of the title may know nothing, is short of the requirement of the statute. The question is not what did the outgoing occupant intend, but what did he do. Did he keep his flag flying and present a hostile front to adverse pretensions? An adverse possession ought to be such as to challenge the right of all the world; but when an occupant evacuates the place and suffers it to go to wreck he hauls down his colors, and his challenge is withdrawn."

The purpose to continue or abandon is to be gathered from the acts of the party. If he has left the premises, but continues acts of ownership and claim to the possession, his rights are not interrupted. When, however, the claimant deserts the premises and for a while exercises no rights thereon, but afterwards returns to the premises, his possession is interrupted, and the two possessions cannot be added together. *Tegarden v. Carpenter*, 36 Miss. 404.

Whether or not the adverse claimant left the possession *animo revertendi* is for the consideration of the jury; but the court may decide whether or not, from the facts of the case, such a question arises. *McCall v. Pryor*, 17 Ala. 533; *Wilson v. Glenn*, 68 Ala. 383; *King v. Sears*, 91 Ga. 577; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Patchin v. Stroud*, 28 Vt. 394; *O'Hara v. Richardson*, 46 Pa. St. 385; *Jackson v. Joy*, 9 Johns. (N. Y.) 102; *Van Gorden v. Jackson*, 5 Johns. (N. Y.) 440; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315.

And in the absence of a finding of abandonment it may be presumed that possession had

continued. *Langdon v. Templeton*, 66 Vt. 180.

2. *Sherman v. Kane*, 86 N. Y. 57; *Spofford v. Bennett*, 55 Tex. 293; *Jones v. Hughes* (Pa., 1889), 16 Atl. Rep. 849.

3. *Jacks v. Chaffin*, 34 Ark. 534; *Todd v. Kauffman*, 19 D. C. 304; *Hoffman v. Bell*, 61 Pa. St. 444.

In *Schall v. Williams Valley R. Co.*, 35 Pa. St. 191, it was held that such a title was an absolute one and indefeasible, and that the subsequent neglect to keep up the possession conferred no equity on a purchaser of the outstanding paper title, upon which the statute of limitations had closed. In delivering the opinion of the court Woodward, J., said: "The common-law distinction between the right of possession and the right of property, as elements of title, is very much disregarded by us, and, so far as concerns the operation of the statute of limitations, is altogether lost sight of. Hence, we have numerous cases in our books in which titles, under the statute, are spoken of as titles against all the world, as indefeasible, as equally perfect with any known to the law, as title against the true owner, as capable of being lost only by grant or adverse possession, and not by neglect—as a perfect title even against a *bona fide* purchaser without notice. *Leeds v. Bender*, 6 W. & S. (Pa.) 318; *Gregg v. Blackmore*, 10 Watts (Pa.) 192; *Creswell v. Altemus*, 7 Watts (Pa.) 566; *Sailor v. Hertzogg*, 2 Pa. St. 184; *Bunting v. Young*, 5 W. & S. (Pa.) 196."

But in *Vickery v. Benson*, 26 Ga. 582, it was held that the abandonment after the lapse of the statutory period would defeat the title so acquired.

4. **Tacking—General Rule—United States.**—*Doswell v. De la Lanza*, 20 How. (U. S.) 29; *Walden v. Gratz*, 1 Wheat. (U. S.) 292; *Shuffleton v. Nelson*, 2 Sawy. (U. S.) 540; *Christy v. Alford*, 17 How. (U. S.) 601.

Alabama.—*Louisville, etc., R. Co. v. Phil-yan*, 88 Ala. 264; *Riggs v. Fuller*, 54 Ala. 146.

Florida.—*Wade v. Doyle*, 17 Fla. 527; *Coogler v. Rogers*, 25 Fla. 853.

Georgia.—*Roe v. Tait*, 38 Ga. 439.

Iowa.—*Kilbourne v. Lockman*, 3 Iowa 380.

Kentucky.—*Adams v. Tiernan*, 5 Dana (Ky.) 394; *Winn v. Wilhite*, 5 J. J. Marsh. (Ky.) 521; *Tucker v. Price*, 17 Ky. L. Rep. 11 (Ky., 1895), 29 S. W. Rep. 857.

Where there is No Privity.—The different entries or acts of possession at different times, by different persons between whom there is no privity or connected

Maryland.—Casey v. Inloes, 1 Gill (Md.) 496, 39 Am. Dec. 658; Armstrong v. Risteau, 5 Md. 275, 59 Am. Dec. 115.

Massachusetts.—Sawyer v. Kendall, 10 Cush. (Mass.) 241; Leonard v. Leonard, 7 Allen Mass. 277; Melvir v. Proprietors, 5 Met. (Mass.) 15; Wade v. Lindsey, 6 Met. (Mass.) 407; Ward v. Bartholomew, 6 Pick. (Mass.) 409; Allen v. Holton, 20 Pick. (Mass.) 458.

Missouri.—Chouquette v. Barada, 28 Mo. 491; Shaw v. Nicholay, 30 Mo. 99.

New Hampshire.—Edmunds v. Griffin, 41 N. H. 530; Lock v. Whitney, 63 N. H. 597.

New York.—Brandt v. Ogden, 1 Johns. (N. Y.) 156; Doe v. Campbell, 10 Johns. (N. Y.) 477; Jackson v. Thomas, 16 Johns. (N. Y.) 293; Simpson v. Downing, 23 Wend. (N. Y.) 316.

Oregon.—Rowland v. Williams, 23 Oregon 515; Low v. Schaffer, 24 Oregon 239.

Pennsylvania.—Hunt v. Devling, 8 Watts (Pa.) 403; Schrack v. Zubler, 34 Pa. St. 38.

Texas.—Portis v. Hill, 3 Tex. 273; Wheeler v. Moody, 9 Tex. 377; Horton v. Crawford, 10 Tex. 382; Mims v. Rafel, 73 Tex. 300; Warren v. Frederichs, 76 Tex. 647.

Utah.—Wells v. Wells, 7 Utah 68.

Vermont.—Winslow v. Newell, 19 Vt. 164.

West Virginia.—Jarrett v. Stevens, 36 W. Va. 445.

There must be privity of grant or descent or some judicial or other proceeding which shall connect the possessions so that the latter shall apparently hold by right of the former. Crispin v. Hannavan, 50 Mo. 536; Adkins v. Tomlinson, 121 Mo. 487.

In Potts v. Gilbert, 3 Wash. (U. S.) 475, Washington, J., said: "The court is perfectly clear, that where different persons enter upon land in succession, each retaining the possession for a period short of twenty-one years, the last possessor, who may be the defendant, cannot tack the possessions of his predecessors to his own, so as to make out continuity of possession sufficient to bar the entry of the owner. The possession of A, the first occupant, cannot be the possession of B, the next occupant; because the moment A quits the actual possession the legal possession of the real owner is restored, and the entry of B constitutes him a new disseisor; and if he seeks to bar the entry of the owner, he must show an actual adverse possession, continued in himself for twenty-one years. There is no privity between A and B."

As was said by Bigelow, J., in Sawyer v. Kendall, 10 Cush. (Mass.) 244: "The general rules of law respecting successive disseisins are well settled. To make a disseisin effectual to give title under it to a second disseisor, it must appear that the latter holds the estate under the first disseisor, so that the disseisin of one may be connected with that of the other. Separate successive disseisins do not aid one another, where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between

them, other than that derived from the mere possession of the estate; their several consecutive possessions cannot be tacked, so as to make a continuity of disseisin, of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have been a privity of estate between the several successive disseisors. To create such privity there must have existed, as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or deviser and devisee."

Husband and Wife—Widow.—In Sawyer v. Kendall, 10 Cush. (Mass.) 241, it was held that a wife had no such privity of estate with her husband in land of which he dies in adverse possession to the real owner, and that her continued adverse possession after his decease could not be tacked to his to give her a complete title by disseisin.

The reason upon which this rests is that dower is a mere right conferring no title to the land or right of entry until assignment is made. McEntire v. Brown, 28 Ind. 347; Marr v. Gilliam, 1 Coldw. (Tenn.) 488.

But the duration of the possession by a husband, of land claimed by him to belong to his wife and to which he made no claim in any other right, may be added to the duration of his widow's possession immediately following his death, to make an adverse possession, and sustain the title of the widow or her grantee. Holton v. Whitney, 30 Vt. 405.

Widow and Heirs.—In Hickman v. Link, 97 Mo. 482, it was held that the possession of a widow before assignment of dower and that of the deceased husband's heirs may be tacked.

Administrator.—In Bullen v. Arnold, 31 Me. 583, it was held that the occupation of an administratrix could not be added to that of an intestate. See also Shaw v. Nicholay, 30 Mo. 99.

But in Spotts v. Hanley, 85 Cal. 155, it was held that the possession of an administrator under a judgment in his favor might be added to that of the defendants claiming under him.

Life Tenant and Remainderman.—There is no privity between one in possession of land under a will, under color and claim of only a life estate, and one in possession after the termination of the life estate, under the same will, claiming a remainder; and therefore the possession of the tenant will not enure to the remainderman. Austin v. Rutland R. Co., 45 Vt. 215. See also Bleidorn v. Pilot Mountain Coal, etc., Co., 89 Tenn. 204.

Execution and Judicial Sale.—Privity may be established between successive occupants by execution, and a conveyance by the officer making it. Kendrick v. Latham, 25 Fla. 819.

In Cooper v. Great Falls Cotton Co., 94 Tenn. 588, it was held that connected adverse possession of land, held pending suit

claims, are but a succession of trespasses, and neither can furnish a support to the other.¹

How the Requisite Privity may Arise.—The privity required to constitute continuous adverse possession may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the original entry;² as between testator and devisee, or ancestor and heir, the disseisin

to foreclose a mortgage thereon successively, by the purchaser at the original sale in such suit, and by his vendee under title bond, and by the purchaser at a second sale made for the purchase price, are all held under and enure to the benefit of the mortgagor's title or color of title. See also *Atchison v. Pease*, 96 Mo. 566.

In *Miller v. Bumgardner*, 109 N. Car. 412, where the plaintiff took possession of land under a deed from a married woman without privy examination, and remained in possession for six years, and until it was purchased by the defendant under execution against the plaintiff, it was held that in an action under a deed executed by such married woman with privy examination the defendant might assert the plaintiff's adverse possession under the first deed and that of himself as the purchaser under execution, the joint possession being for more than the statutory period.

In *Carson v. Dundas*, 39 Neb. 503, where in an action of ejectment title had been adjudicated in the plaintiff, but the defendant in possession decreed to have a lien upon the land, and the land ordered sold to satisfy it, it was held that the purchaser at a sale under such a decree could not, in a subsequent action of ejectment against him, tack the prior possession of the lienors to his own possession, subsequent to the sale, for the purpose of establishing a title by adverse possession against another who claimed under the same source of title as the plaintiff. See also *Marsh v. Griffin*, 53 Ga. 330.

Sheriff's Deed.—In *Kendrick v. Latham*, 25 Fla. 819, it was held that a sheriff's deed conveying a prior adverse occupant's interest in the land to the succeeding occupant was not sufficient evidence to establish privy between them or connect their possessions, because it was not of itself evidence of the sheriff's authority to sell, but that judgment and execution should have been shown.

And in *Hester v. Coats*, 22 Ga. 56, it was held that an invalid sheriff's deed would not constitute privy between the person whose property is sold and the purchaser.

Promoters and Corporation.—In *Reformed Church v. Schoolcraft*, 65 N. Y. 134, it was held that the possession of the members and officers of a corporation prior to the formal organization might be continued by the corporation.

Corporation and Its Successor.—The possession of a corporation may be tacked by its successor. *Miner v. New York Cent., etc.*, R. Co., 123 N. Y. 242.

Possession of Receiver.—In *Verdery v. Savannah, etc.*, R. Co., 82 Ga. 675, it was held that whilst realty of which a debtor has had adverse possession is in the hands of a receiver the statute of limitations continues to

run in favor of such debtor's title against strangers to the pending litigation, and the possession of the receiver may be tacked to that of the debtor and to that of the purchaser of the premises, at a sale made under a decree in the cause, to make out the full period.

In *North Carolina* it has been settled by repeated adjudications that an adverse possession of lands for thirty years raises a presumption of a grant from the state, and it is not necessary even that there should be a privy or connection among the successive tenants. *Rogers v. Mabe*, 4 Dev. (N. Car.) 180; *Wallace v. Maxwell*, 10 Ired. (N. Car.) 110, 51 Am. Dec. 380; *Reed v. Earnhart*, 10 Ired. (N. Car.) 516; *Melvin v. Waddell*, 75 N. Car. 361; *Davis v. McArthur*, 78 N. Car. 357; *Cowles v. Hall*, 90 N. Car. 330.

1. *Ross v. Goodwin*, 88 Ala. 390; *Thompson v. McLaughlin*, 66 Ill. 407.

2. *Alexander v. Pendleton*, 8 Cranch (U. S.) 462; *Smith v. Chapin*, 31 Conn. 530; *Fanning v. Willcox*, 3 Day (Conn.) 258; *Kendrick v. Latham*, 25 Fla. 819; *Weber v. Anderson*, 73 Ill. 439; *Kruse v. Wilson*, 79 Ill. 233; *Faloon v. Simshauser*, 130 Ill. 649; *Scheetz v. Fitzwater*, 5 Pa. St. 126; *Cook v. Dennis*, 61 Tex. 246; *Chilton v. Wilson*, 9 Humph. (Tenn.) 399; *Vandall v. St. Martin*, 42 Minn. 163.

In *McNeely v. Langan*, 22 Ohio St. 32, the court said: "The mode adopted for the transfer of the possession may give rise to questions between the parties to the transfer; but as respects the rights of third persons, against whom the possession is held adversely, it seems to us to be immaterial, if successive transfers of possession were in fact made, whether such transfers were effected by will, by deed, or by mere agreement either written or verbal."

A *feme covert* died in December, 1854, leaving a will, which was admitted to probate, but was not executed in due form to pass real estate, because the consent of her husband in writing was not annexed thereto, and also because it was not executed sixty days before her death. By said will she devised a farm to her husband for life, with remainder in fee to her nephew. Under it her husband, on the 1st of January, 1855, entered into possession of the property, claiming title as tenant for life, and so continued in possession until the 5th of February, 1868, when he united with the nephew in a sale and conveyance to J., who thereupon entered upon said property, and continued in possession up to the 11th of April, 1882, when the heirs at law of the testatrix brought ejectment against him. It was held that the claim of title and possession of the husband, as tenant for life under the will, being hostile to the title

commenced by the former is continued in the latter in accordance with his title, and is referred to the original entry.¹

Continuity Shown by Parol.—No paper evidence of a transfer of possession is necessary when the property is held under the claim of the first entryman, but the continuity may be shown by parol.²

Prior Possession must have been Bona Fide.—But it must appear that the character of the previous possession was *bona fide*.³

Cannot Rely upon Grantor's Possession of Other Lands.—Where the grantee relies upon the deed to show the privity of estate he cannot have the benefit of the grantor's possession of lands which are not mentioned in the deed.⁴

of the heirs at law, was as against them adverse and exclusive; that the purchaser from the husband and nephew having immediately taken and held possession under the conveyance to him, his possession was added or tacked to the possession of the husband, making a continuous adverse possession of more than twenty years, which was a flat bar to the right of the plaintiffs as heirs at law. *Hanson v. Johnson*, 62 Md. 25, 50 Am. Rep. 199.

Agreement for Purchase.—A vendee in possession under a contract of purchase is in privity with his vendor, and is entitled to have the time when he held possession under his vendor added to that after receiving his deed in determining whether colorable title was matured into a perfect title by possession. *Brown v. Brown*, 106 N. Car. 451.

Fraudulent Deeds.—In *Clark v. Chase*, 5 Sneed (Tenn.) 636, it was held that parties claiming to hold under successive deeds, although such deeds were fraudulent, might tack their several possessions.

In *South Carolina* it is held that where possession originally was wrongful, until it ripened into a right by lapse of time, or by descent cast, there was no estate, no right of property, which could be conveyed by deed. Consequently the purchaser from a party thus in possession of lands of another acquired nothing by his deed. They were, as to the real owners, mere trespassers, who could not tack their successive trespasses together so as to defeat the right of him who had the title. *Mazyck v. Wight*, 2 Brev. (S. Car.) 151; *King v. Smith*, Rice (S. Car.) 11; *Pegues v. Warley*, 14 S. Car. 180.

In *Pegues v. Warley*, 14 S. Car. 180, it was held that the possession of successive purchasers of a tract of land covered by the lien of a judgment, who derived title from the judgment debtor, could not be united so as to make up the statutory period necessary to give title by adverse possession.

1. *Haynes v. Boardman*, 119 Mass. 414; *Witt v. St. Paul, etc., R. Co.*, 38 Minn. 129; *Low v. Schaffer*, 24 Oregon 239.

2. **When Paper Evidence of Transfer Unnecessary.**—*Vance v. Wood*, 22 Oregon 77; *Rowland v. Williams*, 23 Oregon 515; *Crispen v. Hannavan*, 50 Mo. 549; *Cunningham v. Patton*, 6 Pa. St. 357; *Scheetz v. Fitzwater*, 5 Pa. St. 131; *Weber v. Anderson*, 73 Ill. 439; *Baker v. Hale*, 6 Baxt. (Tenn.) 46.

As was said by *Napton, J.*, in *Menkens v. Blumenthal*, 27 Mo. 203: "Whether one occupant receives his possession from a prior

one, or is a mere intruder upon an abandoned lot, is a question of fact which may be determined by any testimony which is legitimate and pertinent. We know of no rule of evidence which confines the proof to deeds or written instruments."

And in *Shuffleton v. Nelson*, 2 Sawy. (U. S.) 545, *Deady, J.*, said: "Where the possession is actual, it may commence in parol without deed or any writing; and I am of the opinion, both upon reason and authority, that it may be transferred or pass from one occupant to another by a parol bargain and sale, accompanied by delivery. All the law requires is continuity of possession, where it is actual."

A contrary opinion, however, is expressed in *Simpson v. Downing*, 23 Wend. (N. Y.) 316.

3. *Hammond v. Crosby*, 68 Ga. 770; *Worthy v. Kinamon*, 44 Ga. 297.

In *Farrow v. Bullock*, 63 Ga. 360, it was held that the defendant in ejectment could not tack the possession of a grantor, whose possession originated in fraud of the true owner, to his own possession in order to complete the term of years necessary to give him title, although he himself was an innocent purchaser from such fraudulent grantor.

4. *Ablard v. Fitzgerald*, 87 Wis. 516; *Allis v. Field*, 89 Wis. 327; *Sheppard v. Wilmott*, 79 Wis. 15; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Cooper v. Ord*, 60 Mo. 420; *Smith v. Reich*, 80 Hun (N. Y.) 287; *Heflin v. Burns*, 70 Tex. 347; *Graeven v. Dieves*, 68 Wis. 317.

When a vendor conveys by deed lands particularly designated, or described by numbers, metes, and bounds, the purchaser acquires title, or color of title, only to the lands within the designated numbers and boundaries; and if he claims adverse possession, under color of title, of adjoining lands outside of those numbers and boundaries, because his vendor was in possession thereof at the time his conveyance was executed, he must show that the possession thereof was delivered to him, as a part of the lands sold and conveyed; otherwise he cannot tack his vendor's prior possession to his own subsequent possession for the purpose of making out a title under the statute of limitations. *Humes v. Bernstein*, 72 Ala. 546.

In *Erck v. Church*, 87 Tenn. 575, where it appeared that the purchaser by mistake enclosed land not conveyed in his deed, and held the land thus enclosed as his own for less than the statutory period, and then conveyed to B by a deed, containing the description identical with his own deed, and B went

III. COLOR OF TITLE—1. Definition.—Color of title is that which in appearance is title, but which in reality is no title.¹ Where a person is said to have color of title, the phrase implies that some act has been done or some event has occurred by which some title, good or bad, has been conveyed to him.²

2. Distinguished from Claim of Title.—Color is not to be confounded with claim of title, which is also spoken of indifferently as claim of right, claim of

into possession of the whole and held it as his own long enough to make out the period of limitation by tacking his possession to that of A, it was held that the possession of the land enclosed by mistake could not be tacked.

And in *Witt v. St. Paul, etc., R. Co.*, 38 Minn. 122, where A entered and occupied the land, which consisted of several lots, and the land was subsequently sold for taxes, and still later the owner of the tax title conveyed his interest in some of the lots to A, who subsequently conveyed to B by a description which recited, "intending to convey only those lots * * * which have been quitclaimed to said parties of the first part, or either of them, by conveyance of tax titles," it was held that the possession of B must be referred to the deed, and that as to those lots not included in the tax deed there was not privity between him and A, he merely succeeding to the possession of the lots; but there was no unity of possession under the original hostile entry by A.

Substituted Deed.—In *Weaver v. Wilson*, 48 Ill. 125, it was held that where a deed giving color of title misdescribed the land and a new deed is substituted, the statute will run from the date of the last deed.

1. *Wright v. Mattison*, 18 How. (U. S.) 50; *McIntyre v. Thompson*, 10 Fed. Rep. 531; *Black v. Tennessee Coal, etc., Co.*, 93 Ala. 109; *Knight v. Lawrence*, 19 Colo. 425; *McLellan v. Omodt*, 37 Minn. 157; *Swift v. Mulkey*, 17 Oregon 532; *Wood v. Conrad*, 2 S. Dak. 334; *Edgerton v. Bird*, 6 Wis. 527, 70 Am. Dec. 473.

2. Other Definitions.—By color of title is meant the semblance or appearance of title. *Field v. Columbet*, 4 Sawy. (U. S.) 523.

Color of title is such title as is in appearance good and sufficient, but which in reality is not good and effectual. *Baker v. Swan*, 32 Md. 355.

Color of title is "that which the law will consider *prima facie* a good title, but which by reason of some defect not appearing on its face does not amount to title." *Bernal v. Gleim*, 33 Cal. 676.

Definitions Assuming Necessity of a Writing.—The definitions of color of title frequently assume the necessity of a writing. Thus the phrase has been variously defined to be: an apparent title, founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like, 8 Wait Act. and Def. 17; *Brooks v. Bruyn*, 35 Ill. 394; *Wood v. Conrad*, 2 S. Dak. 334; some written document which appears to be a title to land, but is not a good title, *Oliver v. Pullam*, 24 Fed. Rep. 127; an apparent though not real title to lands, founded upon a deed which purports to convey them, *Seigneuret v. Fahey*, 27 Minn. 60; a writing upon its face professing to pass title to land, *Keener v.*

Goodson, 89 N. Car. 273; that which has the semblance of title, but which in fact is no title, and is anything in writing, however defective or imperfect, purporting to convey title to land, and defines the extent of the claim, *Hutch. L. Tit.*, § 389; *Swann v. Thayer*, 36 W. Va. 46; anything in writing which serves to define the extent of the claim, *Field v. Boynton*, 33 Ga. 239; *Burdell v. Blain*, 66 Ga. 169 (see *Walls v. Smith*, 19 Ga. 8); anything in writing purporting to convey title to the land, which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title, *Veal v. Robinson*, 70 Ga. 809.

"Any writing which purports to convey land and describes the same is color of title, though the writing is invalid, and conveys no title. *Fugate v. Pierce*, 49 Mo. 441; *Hamilton v. Boggess*, 63 Mo. 233; *Hickman v. Link*, 97 Mo. 482." *Black, J.*, in *Allen v. Mansfield*, 108 Mo. 343.

Somewhat similar to the foregoing definitions is the description of color of title as any writing which purports to convey the title to land by apt words of transfer, and clearly defines the extent of the claim. *Wood Lim. Act.*, § 259, citing *Hall v. Law*, 102 U. S. 461; *Lynde v. Williams*, 68 Mo. 360; *State Bank v. Smyers*, 2 Strobb. (S. Car.) 24; *Johnson v. M'Millan*, 1 Strobb. (S. Car.) 143.

Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Gittens v. Lowry*, 15 Ga. 336; *White v. Rowland*, 67 Ga. 556, 44 Am. Rep. 731. For a very similar definition see *Tate v. Southard*, 3 Hawks (N. Car.) 119, 14 Am. Dec. 578.

Definition by Texas Statute.—Under a *Texas* statute (*Hart. Dig.*, art. 2391) defining color of title to be "a consecutive claim of transfer down to him, her, or them in possession without being regular," etc., the courts of that state have said that the definition of color of title of this statute was certainly very different from that which has been given by courts to these terms; that is, "that which in appearance is title, but which in reality is no title." And it was said that this is not the color of title defined in the statute, and that the statute having defined the terms, it must be looked to for their meaning. *Marsh v. Weir*, 21 Tex. 97.

Of American Origin.—The doctrine of color of title seems to be peculiar to the law of the *United States*. See *Tate v. Southard*, 3 Hawks (N. Car.) 119, 14 Am. Dec. 578.

ownership, claim of appropriation, and hostile claim.¹ That color of title is not synonymous with these is apparent from the fact that, whether the adverse possession is under color of title or not, there must be a claim of title.²

3. Not Essential to Adverse Possession.—Color of title, unless expressly required by statute, is not essential to the acquisition of title by adverse possession; one who enters upon and occupies a tract of land under a claim of ownership may, even though he is a mere intruder and has no colorable title thereto, acquire title by adverse possession to so much of the tract as he actually occupies.³ But where a person enters upon and actually occupies

1. See *Allen v. Mansfield*, 108 Mo. 343; *Mylar v. Hughes*, 60 Mo. 105.

That the courts have frequently confused color of title with claim of right is quite apparent on an examination of the authorities. See *Sedgw. & W. Tr. T. to L.*, §§ 763, 764, where instances of the misuse of the phrase are pointed out.

In *Hamilton v. Wright*, 30 Iowa 480, Cole, J., said: "The distinction between adverse possession under 'color of title' and under a 'hostile claim' finds a fair illustration in the statement of the case and the opinion of the court in the case of *Clagett v. Conlee*, 16 Iowa 487. There the defendant himself testified 'that he never claimed any title, either decree title, tax title, sheriff's title, nor any other kind of title, except the title or right of a settler or squatter; and that he had so informed the owners of the decree title,' under which the plaintiff in that action claimed. The court held 'that to constitute an adverse possession, it must be held under a *claim of title*,' following *Jones v. Hockman*, 12 Iowa 101, and *Wright v. Keithler*, 7 Iowa 92. In the first two cases the terms 'color of title' and 'claim of title' are so used as to afford grounds for the possible construction that they were regarded as synonymous terms. But they are not such, and were not so used; and a fair construction of the language is, that the defendant may rely upon either a color of title or a claim of title."

2. See *supra*, this title, *What Constitutes Adverse Possession*, subdivision *Ouster—Claim of Title*; *infra*, this title, *Extent of Adverse Possession*, subdivision *Claim of Right to Whole Tract*.

Instrument Insufficient to Give Color Evidence of Claim of Title.—It may be stated as a general rule, that a writing which is insufficient to constitute color of title and thereby create constructive possession, may nevertheless be introduced in evidence by the grantee to show his claim of title to the land in controversy and the character of his possession. *Pillow v. Roberts*, 13 How. (U. S.) 477. And see *Sedgw. & W. Tr. T. to L.*, § 765, citing *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 604; *Rout v. McFerrin*, 37 Miss. 51, 75 Am. Dec. 409; *Atkinson v. Patterson*, 46 Vt. 765; *Stevens v. Brooks*, 24 Wis. 330.

3. *Sedgw. & W. Tr. T. to L.*, § 729.
United States.—*McIntyre v. Thompson*, 10 Fed. Rep. 531.

Alabama.—*Dothard v. Denson*, 75 Ala. 482.

Illinois.—*Weber v. Anderson*, 73 Ill. 439.

Iowa.—*Hamilton v. Wright*, 30 Iowa 480.

Mississippi.—*Welborn v. Anderson*, 37 Miss. 155.

Missouri.—*Bushey v. Glenn*, 107 Mo. 331; *Mather v. Walsh*, 107 Mo. 121.

Nebraska.—*Fitzgerald v. Brewster*, 31 Neb. 51; *Omaha, etc., Loan, etc., Co. v. Barrett*, 31 Neb. 803.

New York.—*Humbert v. Trinity Church*, 24 Wend. (N. Y.) 604.

Oregon.—*Swift v. Mulkey*, 14 Oregon 59.

Pennsylvania.—*Munshower v. Patton*, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678; *Overfield v. Christie*, 7 S. & R. (Pa.) 173; *Watson v. Gregg*, 10 Watts (Pa.) 289, 36 Am. Dec. 176.

Virginia.—*Kincheloe v. Tracewells*, 11 Gratt. (Va.) 587; *Creekmur v. Creekmur*, 75 Va. 430.

Washington.—*Moore v. Brownfield*, 7 Wash. 23.

See also *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115; *Clemens v. Runckel*, 34 Mo. 41, 84 Am. Dec. 69; *Devacht v. Newsam*, 3 Ohio 57; *Day v. Alverson*, 9 Wend. (N. Y.) 223. And see *infra*, this title, *Extent of Adverse Possession*, subdivision *Without Color of Title*.

Adverse possession extends to all the land possessed, even though some of it be omitted by mistake from the deed under which the possessor claims. *Vandall v. St. Martin*, 42 Minn. 163.

Tennessee Doctrine.—The rule that color of title is not essential to the acquisition of title to land by adverse possession seems not to have been recognized in *Tennessee*. Under the *Tennessee Limitation Act of 1797*, the courts of that state have decided, for the reason that by that act not only the right of possession is barred, but also the right of property, that there must be color of title combined with the possession. *Barton v. Shall, Peck* (Tenn.) 215; *Waterhouse v. Martin, Peck* (Tenn.) 392; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 186; *Powell v. Harman*, 2 Pet. (U. S.) 241.

It has also been held under the *Tennessee Act of 1819*, c. 28, that a naked possession without color or pretense of right gives the right of possession only, and not the title in fee. *Wallace v. Hannum*, 1 Humph. (Tenn.) 443, 34 Am. Dec. 659. And see *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493.

Statutes Requiring Color of Title.—Some statutes of limitation for the recovery of real property expressly provide that to constitute a bar to the plaintiff's right of recovery at the time limited, the possession must have been taken and held under color of title. As

part of a tract of land, under a claim of ownership of the entire tract, and also has color of title to the whole, his adverse possession will extend beyond his *possessio pedis*, or actual occupancy, and, generally speaking, he will be deemed constructively to be in possession to the extent of the land to which he has colorable title.¹ And this is the principal, if not the only, effect of color of title on the adverse possession—to extend the possession beyond the claimant's actual occupancy.²

4. What Constitutes—*a. WHETHER A WRITING IS NECESSARY—*(1) *In General.*—Color of title is commonly claimed by virtue of some written instrument. And it has sometimes been held that it is only upon some writing that color of title can be based.³ But other authorities favor the rule that a writ-

in the state of *Kentucky*, for instance, there was one statute limiting the right of action to twenty years, and another limiting it to seven years, where the party in possession had title and actual residence on the land. Under the former statute it was held that an adversary possession of twenty years barred an ejectment without any paper title whatever, the statute not requiring it, *Taylor v. Buckner*, 2 A. K. Marsh. (Ky.), 18, 12 Am. Dec. 354; *Herndon v. Wood*, 2 A. K. Marsh. (Ky.) 44; *Chiles v. Jones*, 4 Dana (Ky.) 483; while under the latter statute it was held that the adverse possession of seven years must have been by actual residence, under a title legal or equitable, *Anderson v. Turner*, 3 A. K. Marsh. (Ky.) 133; *Robinson v. Neal*, 5 T. B. Mon. (Ky.) 214; *Poage v. Chinn*, 4 Dana (Ky.) 54.

So the fifteenth section, or the three years statute, of the *Texas* act (Pasc. Dig., art. 4622), required the adverse possession to have been taken and held under a title deducible of record from the commonwealth to the parties in possession. See *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; *Thompson v. Cragg*, 24 Tex. 596.

1. *Swift v. Mulkey*, 14 Oregon 59. And see *infra*, this title, *Extent of Adverse Possession*, subdivision *Under Color of Title*.

2. *Adverse Possession with or without Color of Title.*—The principal difference between adverse possession with color, and that without, is that in the former the possession is considered coextensive with the boundaries of the land conveyed; in the latter it is limited by the actual occupation.

Alabama.—*Lucy v. Tennessee, etc.*, R. Co., 92 Ala. 246; *Ryan v. Kilpatrick*, 66 Ala. 332; *Black v. Tennessee Coal, etc.*, R. Co., 93 Ala. 109.

Illinois.—*Norris v. Ile*, 152 Ill. 190; *Goewey v. Urig*, 18 Ill. 238; *Dills v. Hubbard*, 21 Ill. 328; *Turney v. Chamberlain*, 15 Ill. 271.

Indiana.—*Bell v. Longworth*, 6 Ind. 273.

Missouri.—*Chapman v. Templeton*, 53 Mo. 463; *Long v. Higginbotham*, 56 Mo. 245; *Schultz v. Lindell*, 30 Mo. 310; *DeGraw v. Taylor*, 37 Mo. 310.

New York.—*Sillman v. Paine*, 70 Hun (N. Y.) 459.

Ohio.—*Humphries v. Huffman*, 33 Ohio St. 395.

Pennsylvania.—*Ege v. Medlar*, 82 Pa. St. 86; *Green v. Kellum*, 23 Pa. St. 254.

Texas.—*Claiborne v. Elkins*, 79 Tex. 380;

Evans v. Foster, 79 Tex. 48; *Whitehead v. Foley*, 28 Tex. 268.

Vermont.—*Swift v. Gage*, 26 Vt. 224.

Virginia.—*Creekmur v. Creekmur*, 75 Va. 430.

Wisconsin.—*McEvoy v. Loyd*, 31 Wis. 142.

3. *Cook v. Long*, 27 Ga. 280.

Missouri.—In a number of early *Missouri* cases the courts seem to favor the view that it does not always require a written instrument to constitute color of title. In *Rannels v. Rannels*, 52 Mo. 108, the court held that where a man made a verbal gift of a defined tract of land to his sister, had it surveyed for her, and put her in possession under this survey and the descriptions in his own deed, she was in possession of the whole tract under color of title. The court, in delivering the opinion in this case, said: "It is not necessary that this color of title should be created by deed or other instrument of writing. It may be created by an act *in pais* without writing." This case was cited with approval in a dictum in the subsequent case of *Cooper v. Ord*, 60 Mo. 421; also in the case of *Hughes v. Israel*, 73 Mo. 538. In this last case, where the facts were that the parties to a deed undertook by verbal contract to rescind the deed, and the grantor thereafter remained in the actual possession of a part of the land, claiming title under the rescission, it was held that he was in under color of title, and that his possession extended to the whole tract described in the deed.

But in other *Missouri* cases it would seem that a different view is taken as to the essentials of color of title. Thus in *Fugate v. Pierce*, 49 Mo. 441, it was said that constructive possession is never based upon a claim merely; "there must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries, as well as actual possession." And this doctrine was approved in *Long v. Higginbotham*, 56 Mo. 245. In *Crispen v. Hannan*, 50 Mo. 536, it was said that the claim must be "evidenced by some paper, or proceeding, or relation, that makes the claimant the apparent owner of the whole." In a later case, *Allen v. Mansfield*, 108 Mo. 343, it was said that "these cases all lead to the conclusion that to constitute color of title there must be some documentary evidence." And it has been held that while a possession under a verbal gift may be adverse to the

ing is not essential, that color of title may arise from an act *in pais* without a writing.¹

owner, a verbal gift does not give color of title. *Allen v. Mansfield*, 108 Mo. 343; *McGrath v. Mitchell*, 56 Mo. App. 626.

Of the case of *Rannels v. Rannels*, 52 Mo. 108, cited above, Black, J., in *Allen v. Mansfield*, 108 Mo. 343, says: "According to the statement, the donee and her heirs had actual possession of the entire tract as against the donor." And while it is admitted that the conclusion reached in that case is right on the facts given in the statement, the learned judge not only asserts that, so far as it defines color of title, "it is clearly exceptional in its character," but intimates that it should not be given the force of a decision on that question.

Execution Sale without Deed.—*North Carolina*.—An attachment, execution, and sale were held not to constitute color of title in the defendant within the meaning of that phrase as used in the *North Carolina* Act of 1715, for the reason that, the purchase being proved by parol only, one of the essentials of color of title was lacking. *Tate v. Southard*, 3 Hawks (N. Car.) 119, 14 Am. Dec. 578.

Georgia.—A sale under execution will not give color of title unless a deed is executed. *Baird v. Evans*, 58 Ga. 350.

Statutory Requirement of Writing.—The statutes of some of the states require that there must be a writing to constitute color of title.

Colorado.—See *Mills' Annotated Colorado Stat.* (1891), § 2923. *Knight v. Lawrence*, 19 Colo. 425.

Florida.—Under the *Florida* statute, the actual possession of part of a tract of land, which will give constructive possession to the whole, must be under a claim founded "upon a written instrument as being a conveyance of the premises in question." *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334.

Illinois.—The *Illinois* statute of 1839, which is incorporated in the Revised Statutes, c. 24, pp. 104, 105, §§ 8-10 inclusive, says that the adverse claimant "shall be held and adjudged the legal owner *** to the extent and according to the purpose of his or her paper title." Under this statute color of title can only be derived from a written instrument. *Wright v. Mattison*, 18 How. (U. S.) 50; *Woodward v. Blanchard*, 16 Ill. 427; *Shackelford v. Bailey*, 35 Ill. 391; *Bride v. Watt*, 23 Ill. 507; *Rigor v. Frye*, 62 Ill. 507; *Dickenson v. Breeden*, 30 Ill. 279; *Morrison v. Norman*, 47 Ill. 477; *Huls v. Buntin*, 47 Ill. 396; *McClellan v. Kellogg*, 17 Ill. 498.

A parol partition does not constitute color of title for the purpose of adverse possession against the cotenant. *Sontag v. Bigelow*, 142 Ill. 143.

Texas.—The *Texas* statute has been construed to require a paper title. *Finch v. Trent*, 3 Tex. Civ. App. 568.

1. *Teabout v. Daniels*, 38 Iowa 158.

This rule has frequently been preferred by text writers. See 2 *Smith L. Cas.* (8th Am. ed.) 711.

Where parties to a deed under-took by verbal contract to rescind the deed, and the grantor thereafter remained in the actual possession of a part of the land, claiming it under the rescission, he was held to be in possession under color of title. *Hughes v. Israel*, 73 Mo. 538.

In *McCall v. Neely*, 3 Watts (Pa.) 69, it is said by Chief Justice Gibson that the words "color of title" do not necessarily import the accompaniment of the usual documentary evidences. And this language is quoted, apparently with approval, in *Green v. Kellum*, 23 Pa. St. 254, 62 Am. Dec. 332.

The case of *Bell v. Longworth*, 6 Ind. 273, is sometimes cited in support of this view. In this case the court, while denying the right of a mere intruder to extend his possession beyond the limits of his enclosure, use this language: "But where a party is in possession, under and pursuant to a state of facts which of themselves show the character and extent of his entry and claim, the case is entirely different; and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no colorable title does more." While the language used in the opinion in this case is very broad as to what will constitute color of title, it is to be observed that Longworth claimed the land under a written assignment of a certificate of purchase from the United States. See *Allen v. Mansfield*, 108 Mo. 343.

Surveys.—One who entered upon a specific tract of land which had been surveyed and marked out by public authority, so that its boundaries were well known by the name of the tract and number of the survey, and who improved a considerable portion of the same, claiming the whole as his own and exercising acts of ownership over the whole, and who thus occupied for over twenty years, was held to have disseised the true owner, to have been in under color of title to the whole survey, and to be entitled to protection as owner of the land not under actual cultivation as well as the other. *McCall v. Neely*, 3 Watts (Pa.) 69. This case has been commented upon in subsequent decisions, and it has been said that "it is not likely that Judge Gibson would have held that a claimant merely to a legal subdivision of land under our ordinary congressional surveys, who should occupy only a part, would have color of title to the whole, although his claim may be *bona fide*. The different mode of issuing the patents, with their special surveys; the possession and claim of the occupant, so referring to the patent and special survey as to indicate the boundary of his claim; the fact that with the knowledge of its holder he had for more than the statutory period exercised acts of ownership over the whole by continuously paying taxes, and otherwise,—would distinguish it from the case at bar had there been no instrument or proceeding to indicate the extent of

(2) *Parol Gift or Purchase*.—Where the first-stated rule prevails, it is held that a parol purchase or gift of land does not confer color of title thereto upon the donee.¹ But in those jurisdictions where it is considered that color of title need not necessarily be based upon a writing, it is held that a parol gift or purchase may give color of title.²

(3) *Descent Cast*.—Stating that there are other modes of acquiring color of title than through a paper conveyance, the courts have held that where a person dies in possession of land and the possession devolves upon and is continued by his heirs, their possession is under color of title.³

b. INOPERATIVE CONVEYANCES—(1) *General Rule*.—Color of title is merely a semblance of title. Hence the fact that the claimant's supposed title is invalid is of no importance on the question of whether or not the instrument under which he claims constitutes color of title; a purported conveyance which passes nothing may constitute a colorable title.⁴

the occupant's claim." Bliss, J., in *Crispen v. Hannavan*, 50 Mo. 536. See also *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586.

Equitable Title.—It has been said that possession of part of a tract under an equitable title, by which the boundary is defined, will be construed to extend to the whole in the same way that it would had the title been a legal one. *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

1. So it has been held that the adverse possession of one who enters upon land under a parol gift must be limited to his actual occupancy. *Allen v. Mansfield*, 108 Mo. 343, *criticising* *Rannels v. Rannels*, 52 Mo. 108; *McGrath v. Mitchell*, 56 Mo. App. 626.

And it has been held that one going into possession of land, under parol purchase, can hold only to the extent of his actual possession. *Cook v. Long*, 27 Ga. 280.

2. Thus it has been held that a parol vendee, entering under his purchase, is in possession of the whole land, although only a portion is actually occupied. *Niles v. Davis*, 60 Miss. 750; *Davis v. Bowmar*, 55 Miss. 671; *Davis v. Davis*, 68 Miss. 478.

3. *Teabout v. Daniels*, 38 Iowa 158; *Hamilton v. Wright*, 30 Iowa 480. See *King v. Rowan*, 10 Heisk. (Tenn.) 675.

4. **General Rule as to Inoperative Conveyances**.—*Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Conyers v. Kenan*, 4 Ga. 308, 48 Am. Dec. 226; *Brooks v. Bruyn*, 35 Ill. 394; *Hanna v. Renfro*, 32 Miss. 125; *Welborn v. Anderson*, 37 Miss. 155; *Nash v. Fletcher*, 44 Miss. 609; *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; *Hill v. Wilton*, 2 Murph. (N. Car.) 14; *Swift v. Mulkey*, 17 Oregon 532; *Whiteside v. Singleton*, Meigs (Tenn.) 207; *Swann v. Thayer*, 36 W. Va. 46; *Cooley v. Porter*, 22 W. Va. 120; *Core v. Faupel*, 24 W. Va. 247; *Hickman v. Link* (Mo., 1888), 13 West. Rep. 215.

Continued, open, and exclusive possession for the statutory period, under claim and color of title, is sufficient to give a good title thereto, without regard to the regularity and validity of the colorable title, or to the defects or insufficiency of the instruments confirming it. *Grant v. Fowler*, 39 N. H. 101;

Farrar v. Fessenden, 39 N. H. 268; *Elliott v. Pearce*, 20 Ark. 508; *Cofer v. Brooks*, 20 Ark. 542; *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586.

In *Brooks v. Bruyn*, 35 Ill. 393, in an action of ejectment, where the defense was adverse possession under the statute of limitations with color of title, the court, by Beckwith, J., said: "Any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title, and because it does not, for some reason, have that effect, it passes only color or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title, because the grantor had none to convey, or had no authority, in law or in fact, to convey one, or whether such want of authority appears on the face of the instrument, or *aliunde*. The instrument fails to pass an absolute title, for the reason that the grantor was not possessed of some one or more of these requisites, and therefore it gives the semblance, or color only, of what its effect would be if they were not wanting."

To the same effect see *Dickenson v. Breeden*, 30 Ill. 279; *Cook v. Norton*, 43 Ill. 391. And see *Winstanley v. Meacham*, 58 Ill. 97.

Although it has been said that "an absolute nullity, as a void deed, judgment, etc., will not constitute color of title" (*Bernal v. Gleim*, 33 Cal. 668), this statement is far too broad. If an instrument is correct in form and made by a person having a perfect title, the grantee would not be under the necessity of using it as basis for a claim of title under the statute of limitations. *Rawson v. Fox*, 65 Ill. 200; *Sater v. Meadows*, 68 Iowa 507. In *Pillow v. Roberts*, 13 How. (U. S.) 472, it was said that the defendant, who claimed the land under a tax title, was not bound to show that all the prerequisites of the law had been complied with in order to entitle him to set up the bar of the statute of limitation. If the court should require such proof before the defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he could be entitled to it.

(2) *What Sufficient.*—But while color of title may originate by a writing which is in fact void, there is considerable conflict as well as a marked confu-

In *Wright v. Mattison*, 18 How. (U. S.) 50, it is said that the courts have concurred "in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title: the inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith."

Instruments Constituting Color of Title.—The following invalid instruments have been held to give color of title:

A County Treasurer's Deed, which, while insufficient to convey title, purported to convey land for delinquent drain taxes assessed thereon. *Hecock v. Van Dusen*, 80 Mich. 359.

A Void Deed—*United States*.—*Ewing v. Bur-*
net, 11 Pet. (U. S.) 53; *Hall v. Law*, 102 U. S. 466.

Indiana.—*Irey v. Markey*, 132 Ind. 546.

Iowa.—*Sater v. Meadows*, 68 Iowa 507.

Mississippi.—*Welborn v. Anderson*, 37 Miss. 155.

New York.—*Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525; *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Sinclair v. Jack-*
son, 8 Cow. (N. Y.) 583; *Jackson v. Waters*, 12 Johns. (N. Y.) 365; *Livingston v. Peru*
Iron Co., 9 Wend. (N. Y.) 511.

Wisconsin.—*Zwietusch v. Watkins*, 61 Wis. 615; *Edgerton v. Bird*, 6 Wis. 527, 70 Am. Dec. 473.

Possession under a deed of which there has not been a delivery may nevertheless, the grantee believing that he is the owner, be under color of title. *Stewart v. Stewart* (Wis., 1895), 63 N. W. Rep. 886.

A Void Mortgage Foreclosure—*Illinois*.—*Chickering v. Failes*, 26 Ill. 508; *Mason v. Ayers*, 73 Ill. 121; *Hinkley v. Greene*, 52 Ill. 223.

An Invalid Sale under a Trust Deed.—*Gebhard v. Sattler*, 40 Iowa 152.

A Mortgagor's Deed to Mortgaged Premises.—A deed to mortgaged premises, absolute on its face, and purporting to convey the title to the land described in it, executed by a mortgagor to the mortgagee, for a sufficient consideration. *McCagg v. Heacock*, 42 Ill. 153.

Patents, etc.—A void patent for land or grant from the state. *Gregg v. Tesson*, 1 Black (U. S.) 150; *Logan v. Jelks*, 34 Ark. 547; *Sanford v. Cloud*, 17 Fla. 557; *Moody v. Fleming*, 4 Ga. 118, 48 Am. Dec. 210. See *Charle v. Saffold*, 13 Tex. 94; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 56.

Where a defendant in an execution denies the validity of the sale of land thereunder, and subsequently enters on and holds the premises adversely, the patent and deeds under which he held before the sale are sufficient to give color of title in aid of such adverse possession. *Gaines v. Saunders*, 87 Mo. 557.

A grant from the state, purporting to be made in obedience to acts of the General Assembly providing for the relief of persons

whose title-deeds had been destroyed by the burning of the court-house of a particular county. *Kron v. Hinson*, 8 Jones (N. Car.) 347. Compare *Oliver v. Pullam*, 24 Fed. Rep. 127.

A Void Certificate.—*Hannibal, etc., R. Co. v. Clark*, 68 Mo. 371.

A certificate of purchase of swamp land under the *California* Civil Code. *Goodwin v. McCabe*, 75 Cal. 584.

A Void Judgment or Decree of Court.—*Huls v. Buntin*, 47 Ill. 396; *Whiteside v. Singleton*, *Meigs* (Tenn.) 207. And compare *Melia v. Simmons*, 45 Wis. 334.

Sheriff's Deed, Return, or Record.—An invalid or informal sheriff's deed, *Webber v. Clarke*, 74 Cal. 11; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Hester v. Coats*, 22 Ga. 56; *Sutton v. McLoud*, 26 Ga. 638; *Simmons v. Lane*, 25 Ga. 178; *Baily v. Doolittle*, 24 Ill. 577; *Fritz v. Joiner*, 54 Ill. 101; *Riggs v. Dooley*, 7 B. Mon. (Ky.) 236; *Brien v. Sargent*, 13 La. Ann. 198; *North v. Hammer*, 34 Wis. 425; *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; *Northrop v. Wright*, 7 Hill (N. Y.) 476; a sheriff's deed upon the sale of land for taxes, *Brooks v. Bruyn*, 35 Ill. 392; a sheriff's deed, though unaccompanied by execution, *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; a sheriff's deed unaccompanied by judgment or execution, *Kendrick v. Latham*, 25 Fla. 819; a sheriff's deed in fact void because the land was out of the sheriff's bailiwick, *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; a *fiat facias* with entries of levies thereon, in which a tract of land is described and which is by one of said entries returned as sold by the sheriff, and purchased by one under whom defendant claims, *Walls v. Smith*, 19 Ga. 8; a record of sale kept by a sheriff, *Field v. Boynton*, 33 Ga. 239.

Wills.—A bequest of land under a will, *University Trustees v. Blount*, Term (N. Car.) 13; *Den v. Turner*, 1 Murph. (N. Car.) 14; *Charle v. Saffold*, 13 Tex. 94; *Henley v. Wilson*, 81 N. Car. 405. See *Green v. Mizelle*, 54 Miss. 220; although the will is that only of a life tenant, *Den v. Satterfield*, 1 Murph. (N. Car.) 413. See *Teabout v. Daniels*, 38 Iowa 158; *Green v. Mizelle*, 54 Miss. 220 (compare *Callender v. Sherman*, 5 Ired. (N. Car.) 711); a paper purporting to be a will, and proved many years before, *McConnell v. McConnell*, 64 N. Car. 342.

A testator, by will dated 1824, devised all his estates, and all other estates of which he might be possessed at the time of his death, to his wife for life, with remainder over. He purchased a freehold estate after the date of his will. After his death his widow entered into possession of all of the estates of which he died possessed, believing she was entitled so to do under the will; and she continued in possession more than twenty years. It was held that she had acquired title by adverse possession. *Paine v. Jones*, L. R. 18 Eq. 320.

Defective Condemnation Proceedings.—*Coga-*

sion in the authorities on the question as to what are the requisites of an instrument in order that it may have the effect of conferring color of title.

(a) **Defects in Title Appearing dehors the Immediate Conveyance.**—It appears to be a quite generally accepted rule, that if the instrument under which the claimant enters upon land is regular upon its face, this will suffice to give him color of title, and he is not ordinarily required to go beyond the writing to see whether it actually passes title or is in fact void.¹

No Title in Grantor.—Thus an instrument which on its face purports to convey land gives color of title even though the grantor has no title to the land,² or the estate which he has therein is different from the one which he pretends to convey.³

bill v. Mobile, etc., R. Co., 92 Ala. 252; *Mobile, etc., R. Co. v. Cogsbill,* 85 Ala. 456; *Mississippi, etc., R. Co. v. Devaney,* 42 Miss. 555, 2 Am. Rep. 608.

Deed Conveying Life Estate.—A deed conveying a life estate is color of title, and, when accompanied by adverse possession for the required time, will ripen into a good title to the life estate so granted. *Staton v. Mullis,* 92 N. Car. 623. But a deed cannot have the effect of giving color of title beyond the estate which it professes to pass. Hence a conveyance of a life estate does not give color of title to the fee. *McRae v. Williams,* 7 Jones (N. Car.) 430.

1. *United States.*—*Wright v. Mattison,* 18 How. (U. S.) 50.

Alabama.—*Pugh v. Youngblood,* 69 Ala. 295.

California.—*Packard v. Moss,* 68 Cal. 123.

Georgia.—*Beverly v. Burke,* 9 Ga. 443, 54 Am. Dec. 351.

Illinois.—*Holloway v. Clark,* 27 Ill. 486; *Phillips v. People,* 11 Ill. App. 340; *Busch v. Huston,* 75 Ill. 343; *Foster v. Letz,* 86 Ill. 415; *Stubblefield v. Borders,* 92 Ill. 279.

Indiana.—*Cain v. Hunt,* 41 Ind. 466; *Buckley v. Taggart,* 62 Ind. 236.

Kansas.—*Shoat v. Walker,* 6 Kan. 66; *Carithers v. Weaver,* 7 Kan. 110; *Sapp v. Morrill,* 8 Kan. 677.

Minnesota.—*Seigneuret v. Fahey,* 27 Minn. 60.

Texas.—*Kilpatrick v. Sisneros,* 23 Tex. 114; *Charle v. Saffold,* 13 Tex. 94; *Wofford v. McKinna,* 23 Tex. 36, 76 Am. Dec. 53.

Wisconsin.—*Edgerton v. Bird,* 6 Wis. 527, 70 Am. Dec. 473.

Deed Made under Unconstitutional Statute.—A deed given under a special act of the legislature, which act is held unconstitutional and void, gives color of title. *Fagan v. Rosier,* 68 Ill. 84.

2. *United States.*—*Pike v. Evans,* 94 U. S. 6. *Georgia.*—*McCamy v. Higdon,* 50 Ga. 629; *McMullin v. Erwin,* 58 Ga. 427.

Illinois.—*Russell v. Mandell,* 73 Ill. 136; *Fagan v. Rosier,* 68 Ill. 84; *Brooks v. Bruyn,* 18 Ill. 539; *Prettyman v. Wilkey,* 19 Ill. 241; *Davis v. Easley,* 13 Ill. 98.

Indiana.—*O'Donahue v. Creager,* 117 Ind. 372.

Maine.—*Kennebec Purchase v. Laboree,* 2 Me. 275, 11 Am. Dec. 79.

New Jersey.—*Ocean Beach Assoc. v. Yard,* 48 N. J. Eq. 72.

New York.—*Bogardus v. Trinity Church,* 4 Paige (N. Y.) 200.

South Dakota.—*Wood v. Conrad,* 2 S. Dak. 334.

Texas.—*Midkiff v. Stephens* (Tex. Civ. App., 1895), 29 S. W. Rep. 54.

Vermont.—*Hunt v. Taylor,* 22 Vt. 556.

Virginia.—*Nowlin v. Reynolds,* 25 Gratt. (Va.) 137.

It makes no difference that the grantor had neither title nor possession, provided the deed is not void on its face, and the party relying upon it believes in good faith that he has acquired an interest under it. *Webber v. Clarke,* 74 Cal. 11.

Instances.—A deed by the husband purporting to convey the separate property of his wife may give color of title. *McDonough v. Jefferson County,* 79 Tex. 535. And so of an administrator's deed of property to which the deceased had no title. *Woodstock Iron Co. v. Roberts,* 87 Ala. 436.

Color of title may be derived from a deed by the husband of a life tenant given after her death and purporting to convey the fee. *Forest v. Jackson,* 56 N. H. 357.

A probated will devising land held by the testator under claim of adverse possession and payment of taxes for nine years before his death, to his widow and children, who continue in possession and pay taxes, is sufficient color of title in *Illinois* to establish, after the lapse of seven years, their legal ownership, there being no proof of bad faith. *Baldwin v. Ratcliff,* 125 Ill. 376.

Conveyance of the Fee by a Mortgagee.—A deed from one who has only the title of a mortgagee may give color of title. *Stevens v. Brooks,* 24 Wis. 326.

Deed by One of Tenants in Common.—If real estate is held in common, and one tenant assumes to convey the entire land, or any specific part of it, by metes and bounds, his deed will furnish color of title. *Weisinger v. Murphy,* 2 Head (Tenn.) 674. Compare *Saunders v. Silvey,* 55 Tex. 46.

Deed Based on Partition Sale.—A deed executed in pursuance of a partition sale purporting to be of the entire interest in the land is color of title. *Amis v. Stephens,* 111 N. Car. 172.

3. **Conveyance of Fee by Life Tenant.**—A warranty deed conveying the fee executed by a life tenant is color of title, although his claim of title is based upon a tax deed issued to himself when he was under legal obliga-

Fraud on Part of Grantor.—A deed may give color of title although it is fraudulent on the part of the grantor.¹

Want of Capacity in Grantor.—And it would seem that a deed to land by one who, although the owner, lacks the legal capacity to convey, may give color of title.²

No Authority in Person Acting as Agent or Attorney.—It has been held that where a deed to land is executed by a person who pretends to act as the owner's agent or attorney, but who in fact has no authority to act as such, the instrument may give color of title.³

No Authority in Person Acting Officially.—A deed by a person acting in an official or representative capacity, as a public officer, an administrator or executor, has been held to give color of title, even though the grantor had no authority to execute the conveyance.⁴

tion to pay taxes. *Lewis v. Pleasants*, 143 Ill. 271.

Deed of Fee by Life Tenant.—A will may give color of title although it is only that of a life tenant. *Den v. Satterfield*, 1 Murph. (N. Car.) 413. See *Teabout v. Daniels*, 38 Iowa 158; also *Callender v. Sherman*, 5 Ired. (N. Car.) 711.

Conveyance of Fee by Tenant by Curtesy.—If a husband, seised as tenant by curtesy, gives a deed in fee, and the grantee enters and continues in possession, claiming to own the whole estate absolutely, such possession will be regarded as adverse to the wife, and those claiming under her, from the period of the husband's death. *Constantine v. Van Winkle*, 6 Hill (N. Y.) 177. See *Mellus v. Snowman*, 21 Me. 201; *Bruce v. Wood*, 1 Met. (Mass.) 542, 35 Am. Dec. 380; *Miller v. Shackelford*, 3 Dana (Ky.) 289; *Meraman v. Caldwell*, 8 B. Mon. (Ky.) 32.

1. *Gregg v. Sayre*, 8 Pet. (U. S.) 253; *Griffin v. Stamper*, 17 Ga. 108.

In Fraud of Creditors.—A deed which is fraudulent as to the grantor's creditors is voidable only, and therefore gives the grantee color of title. *Harper v. Tapley*, 35 Miss. 506. But it has been held that a conveyance in fraud of creditors cannot be used as color of title until they have notice of the facts constituting the fraud, as the statute of limitations does not begin to run in favor of the grantee until that time. *Garvin v. Garvin*, 47 S. Car. 435.

2. **Deed by Married Woman.**—Hence it would seem that a deed from a married woman may give color of title to the grantee. See *Sanborn v. French*, 22 N. H. 246.

In 1854 certain land belonging to C. was levied upon and sold to satisfy a judgment against him alone. In 1856 his wife executed a deed, in which he did not join, to one claiming under the sheriff's sale. In 1864 C. died, his wife surviving. In an action by the latter, in 1884, against a remote grantee to recover one third of the land, it was held that while her deed was void, it was sufficient to convey color of title; that the plaintiff's cause of action to avoid the deed which gave color of title accrued when her grantee took possession under the deed in 1856, as there was then an adverse possession of all the land; also, that the defendant and his grantors having been in possession more than

twenty years under color of title conferred by the plaintiff's deed, the action was barred by the statute of limitations, the plaintiff's disability of coverture not postponing the time when the statute began to run. *Wright v. Kleyla*, 104 Ind. 223. See *Hunter v. O'Neal*, 4 Baxt. (Tenn.) 494.

Deed by Person Non Compos Mentis.—And it has been held that colorable title may be derived from the deed of a person *non compos mentis*. *Ellington v. Ellington*, 103 N. Car. 54.

Deed from Infant.—And the deed of an infant has been held to give colorable title. *Murray v. Shanklin*, 4 Dev. & B. (N. Car.) 276.

3. Where a deed was executed in the name of the owner by a person who, while professing to have authority, in fact had none, it was held that the grantee obtained a colorable title. *Hill v. Wilton*, 2 Murph. (N. Car.) 14. And so of a bond for a title executed by one as the owner's agent, without authority. *Millen v. Stines*, 81 Ga. 655.

A Deed by an Assumed Agent in His Own Name has been held to give color of title. *Payne v. Blackshear*, 52 Ga. 637.

Deed under Power of Attorney Giving No Authority.—It has been held that where a power of attorney, upon being produced, clearly showed that the attorney had no authority to convey the land, the deed purporting to be made by virtue of the power therein nevertheless constituted a color of title. *Hill v. Wilton*, 2 Murph. (N. Car.) 14; *Smith v. Allen*, 112 N. Car. 223.

Power of Attorney Not Produced.—It has been held that a deed purporting to be executed by virtue of a power of attorney may be sufficient to confer colorable title upon the grantee without producing the power of attorney. *Brackett v. Persons Unknown*, 53 Me. 228, 87 Am. Dec. 548; *Munro v. Merchant*, 28 N. Y. 9. See *Thompson v. Burhans*, 61 N. Y. 60.

4. **Conveyance by Public Officer without Authority.**—In *Texas* it has been held that the deed of an assessor under the statutes will support the plea of limitation of five years, without proof of his authority to sell. *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53.

In *Mississippi*, a deed by the president of the board of police, in proper form, duly executed and recorded, and purporting to con-

Irregular Appointment of Person Acting Officially.—It seems that the deed of a person who assumes to act in a representative or official capacity may have the effect of passing colorable title to the grantee although his appointment is irregular and void.¹

Irregularities in Proceedings on Which the Conveyance is Based.—A deed which is executed pursuant to a decree of a court of competent jurisdiction gives color of title even though the decree is void.²

vey the fee, was held to give color of title though he had not the legal authority to make the conveyance. *Welborn v. Anderson*, 37 Miss. 155.

But it was held in *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157, that the deed of commissioners of highways was not color of title, when such commissioners could not in any case be party grantors in a deed of conveyance.

Deed by Administrator without Authority.—An administrator's deed under a will without power of sale, or without authority, was held to give color of title. *Crispen v. Hannavan*, 50 Mo. 556; *Riggs v. Fuller*, 54 Ala. 141. And so of an agreement of partition, where one of the parties was an administrator, and acted in the premises without an order of the court. *McMullin v. Erwin*, 58 Ga. 427.

A and B, as administrators of C, entered into a written agreement to partition lands held in common. B had not obtained an order of court. It was held that A had color of title. *Shiels v. Lamar*, 58 Ga. 590.

But it has been held that when, at a sale of lands made by an executor under orders of the probate court, a conveyance is made to the purchaser, without a report or confirmation of the sale, without a report that the purchase money has been paid, and without an order of the court to make titles, such a conveyance will be ignored, and the purchaser does not hold adversely so that his possession will ripen into a title by the expiration of ten years. *Casey v. Morgan*, 67 Ala. 441.

Deed by Trustee Having no Authority.—A deed purporting to convey land in fee, under a void sale, made under a deed of trust, by a trustee having no legal authority, has been held to give color of title. *Swann v. Thayer*, 36 W. Va. 46; *Swann v. Young*, 36 W. Va. 57.

1. The title to the lands was in a trustee for a lunatic. One claiming to be guardian of the lunatic, but acting under a void appointment, obtained an order of the probate court for the sale of the lands, and sold and conveyed them. The purchaser, and those claiming under him, had had possession of the lands under claim of right and of ownership for a length of time sufficient to bar the right of entry under the statute. The whole proceedings under which the sale and conveyance were made were void, because the order appointing the guardian was invalid and void. It was held that the statute of limitations ran in favor of the derivative purchaser, although the possession of the irregularly appointed guardian was but the possession of the lunatic, in whose right he assumed control and made the sale. *Molton v. Henderson*, 62 Ala. 426.

Deed by Master in Chancery, Executed after Expiration of Term.—A deed made by a clerk or master in equity, after he goes out of office, on a sale made by him while in office, is color of title, though not otherwise operative. *Williams v. Council*, 4 Jones (N. Car.) 206.

2. *Huls v. Buntin*, 47 Ill. 396; *Whiteside v. Singleton*, Meigs (Tenn.) 207.

A deed executed pursuant to a void decree by a commissioner appointed by the court may give color of title. *Hall v. Law*, 102 U. S. 461. And so of a deed by an administrator or executor pursuant to a sale under a void order of the probate court. *Balkham v. Woodstock Iron Co.*, 43 Fed. Rep. 648; *Nash v. Fletcher*, 44 Miss. 609; *Crispen v. Hannavan*, 50 Mo. 536. Or a guardian's deed, although the decree of sale is void. *Molton v. Henderson*, 62 Ala. 426; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73; *Lowery v. Davis* (Ala., 1890), 8 So. Rep. 79.

No Jurisdiction of Person.—A deed made under a decree of a court of equity without jurisdiction of the person has been held to give color of title. *Mullan v. Carper*, 37 W. Va. 215.

A deed made in pursuance to an order for sale of the lands of a decedent to pay debts, the order having been made without any service of process on certain of the devisees, was held to give color of title. *McCulloh v. Daniel*, 102 N. Car. 529, followed in *Amis v. Stephens*, 111 N. Car. 172.

An administrator's deed, void as against heirs for want of notice, they being minors, will give color of title. *Vancleave v. Milliken*, 13 Ind. 105; *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49.

And a partition and assignment of shares of the land among tenants in common, even where one of the cotenants was not a party to the decree, constituted color of title to each of the tenants for the share set off to him under the decree. *Hassett v. Ridgely*, 49 Ill. 200; *Hinkley v. Greene*, 52 Ill. 223.

It has been held that where there was an ineffectual effort to obtain a strict foreclosure, as where the holder of the equity of redemption was not made a party, the mortgage and decree became color of title. *Chickering v. Failes*, 26 Ill. 507.

Sale under Trust Deed without Giving Sufficient Notice.—In *Gebhard v. Sattler*, 40 Iowa 152, it was held that a sale under a deed of trust without giving sufficient notice constituted color of title.

Sheriff's Deed Founded on a Sale under a Void Judgment.—A sheriff's deed, although founded upon a void or voidable judgment, may give color of title. *Packard v. Moss*, 68 Cal. 123.

Forged Deed.—It has been held that a deed which is regular upon its face, but is in fact void because it is forged, may give color of title to the grantee entering thereunder without knowledge of the forgery.¹

Break in Chain of Title.—To constitute colorable title it is not necessary that the title when traced back to its source prove an apparently legal and valid title.²

(b) **Defects on Face of Writing**—*aa. IN GENERAL.*—The authorities are more especially conflicting as to the effect which is to be given to defects in the title, which are discoverable by an inspection of the instrument, in rendering the purported conveyance inoperative as color of title. Thus, courts of respectable authority have enunciated the general rule, that an instrument which is defective on its face, either by reason of being defectively executed or because it discloses or recites facts which show that it must be inoperative as a conveyance, is not such instrument as supplies color of title to the person claiming land thereunder.³ But the correctness of the rule thus

Administration of Estate of Living Person.—But it has been held that proceedings in administering and settling the estate of a person represented to be dead but actually still alive are void for all purposes, and an entry and continuous occupation under such proceedings, exclusive of any other right, will not bar an action to recover the land. *Melia v. Simmons*, 45 Wis. 334.

Succession Sale in Louisiana.—It has been held in *Louisiana*, that where a deed under which the party claims title as vendee at a succession sale, does not recite that it was made under order of court, and is otherwise silent as to the observance of the formalities essential to the legality of such a sale, and where the evidence shows that the auctioneer, in selling, departed from the terms of the order authorizing a sale, such title cannot serve as the basis for the commencement of the prescription of ten years. *Ford v. Mills*, 46 La. Ann. 331.

1. *Griffin v. Stamper*, 17 Ga. 108; *Stamper v. Griffin*, 20 Ga. 312, 65 Am. Dec. 628; *Parker v. Waycross, etc.*, R. Co., 81 Ga. 387; *Millen v. Stines*, 81 Ga. 655, *distinguishing Simmons v. Lane*, 25 Ga. 178.

2. *Dickenson v. Breeden*, 30 Ill. 279.

The claimant is not required to trace the title through a chain to any source to constitute color of title. *Woodward v. Blanchard*, 16 Ill. 424, *overruling Irving v. Brownell*, 11 Ill. 412; *Rawson v. Fox*, 65 Ill. 200. So in *Coleman v. Billings* 89 Ill. 190, it is said that it is not necessary that the title should purport, when traced back to its source, to be an apparently legal title. See also *Moore v. Brown*, 11 How. (U. S.) 424.

Statutes Requiring Chain of Transfers.—Under the *Texas* statute of limitations (Hart Dig., art. 2391; *Sayles' Tex. Civ. Stat.*, art. 3192), which defines the term "title" to mean "a regular chain of transfer from or under the sovereignty of the soil," and "color of title" to be "a consecutive claim of such transfer down to him, her, or them in possession, without being regular," etc., it seems that there must be an apparent chain of title in order to constitute colorable title. *Marsh v. Weir*, 21 Tex. 97.

Under this statute there can be no color of title unless there is a consecutive chain of

transfer from or under the sovereignty of the soil to the one in possession. Color of title cannot exist where there is a complete hiatus in the chain. *Osterman v. Balawin*, 6 Wall. (U. S.) 116; *League v. Atchison*, 6 Wall. (U. S.) 112.

3. To give color of title the instrument or conveyance must be good in point of form, profess to convey the entire title, and be properly executed. *LaFrombois v. Jackson*, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; *Dufour v. Camfranc*, 11 Martin (La.) 715; *Frique v. Hopkins*, 4 Martin N. S. (La.) 224.

In *Frique v. Hopkins*, 4 Martin N. S. (La.) 224, Martin, J., says: "The correct doctrine we think is this: that if the title under which the acquisition is made be null in itself from defect of form, or discloses facts which show the person from whom it is acquired has no title, it cannot form the basis of this prescription, because the party acquiring must be presumed to know the law, and consequently wants the *animo domini* which is indispensable in cases of this kind. But where the title is free from these defects, and the property is not transferred by want of title in the party making the transfer, then it forms a good ground for the prescription; or, in other words, the inquiry is whether the error be one of fact or of law." This opinion was followed in *Hoskins v. Helm*, 4 Litt. (Ky.) 310, 14 Am. Dec. 133.

Texas.—So it is held that, under the *Texas* statute, the instrument must have all the constituent parts, tested by itself, of a good and perfect deed. *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53.

California Authorities.—In certain early *California* cases it was said that an instrument, to give color of title, must be regular upon its face and *prima facie* give a good title, and that a deed void upon its face cannot aid the adverse possession of an occupant. *Woodworth v. Fulton*, 1 Cal. 295; *Sunol v. Hepburn*, 1 Cal. 254; *Bernal v. Gleim*, 33 Cal. 668. In the last case cited it was held that a sheriff's deed executed immediately after an execution sale without waiting for the time given by law for redemption was insufficient to give color of title. But of these cases it is said in *Wilson v. Atkinson*, 77 Cal. 485, decided in 1888, that they "were based upon

laid down has been questioned.¹ And some of the authorities support the general proposition that a defect in the title, even though appearing upon the face of the instrument, which will deprive the writing of the character of giving color of title, must be such as would be readily detected by a person who does not have any special knowledge of the law.² And it is apparent that the broad rule that a writing, to give color of title must be executed in accordance with all the requisite formalities of a valid instrument, has not always been applied.

bb. OMISSION OF SEAL.—Thus it has been held that an instrument purporting

the peculiar language of the Spanish law, and are of but little weight in determining what should be the rule under the present code provisions."

Tax Deeds.—It has been decided that a tax deed which is not regular upon its face does not give color of title. *O'Mulcahy v. Florer*, 27 Minn. 449. Thus it has been held that an instrument purporting to be a deed from an officer authorized to sell for taxes, which upon its face showed that the officer had not complied with the requisitions of the statute, did not give color of title. *Moore v. Brown*, 11 How. (U. S.) 424. And a tax deed which showed that the tax certificate was assigned by the county treasurer, he not having authority to make such assignment, the tax laws conferring that power upon the county clerk, was held not to give color of title. *Shoat v. Walker*, 6 Kan. 65. And see the title **TAX TITLES**.

Instrument Which on its Face Shows Grantor without Title.—It has been held that an instrument is not sufficient to give color of title if it discloses upon its face facts which show that the person purporting to convey the estate had no title to it. *Dufour v. Camfranc*, 11 Martin (La.) 715; *Marsh v. Weir*, 21 Tex. 97. So it was held that a bond signed by "A as agent" showed no color of title in the grantees, as the grantor disclaims title on the face of it. *Simmons v. Lane*, 25 Ga. 178.

Under "Occupying Claimants' Acts."—It has been held that a person who is in possession of land under an instrument which, upon its face, does not appear to give him any title or right of possession, cannot be said to be holding under color of title within the meaning of the Occupying Claimants' Act. *O'Mulcahy v. Florer*, 27 Minn. 449; *McLellan v. Omodt*, 37 Minn. 157. See the title **OCCUPYING CLAIMANTS' ACTS**.

1. *Hamilton v. Boggess*, 63 Mo. 233.

2. *Wilson v. Atkinson*, 77 Cal. 485.

It has been said that a deed must be held to give color of title, even though a person of legal learning and experience may, by a critical examination, discover defects in the instrument fatal to its validity as a muniment of title. The court therefore deemed it unnecessary to determine whether a tax deed which showed a sale and conveyance of several distinct parcels of land *en masse*, where the statute in force required a separate sale and conveyance of each lot or parcel of land sold at a tax sale, was or was not void upon its face; it nevertheless was sufficient

to give colorable title. *De Foresta v. Gast*, 20 Colo. 307.

Rule of the North Carolina Cases.—According to the *North Carolina* cases the rule is that the defect which will make a writing ineffectual to give color of title must be such that a person uneducated in the law could be expected to know that it invalidates the instrument as a legal conveyance. Thus it has been held that the instrument must be so obviously defective that no man of ordinary capacity would be misled by it. *Tate v. Southard*, 3 Hawks (N. Car.) 119, 14 Am. Dec. 578; *McConnell v. McConnell*, 64 N. Car. 342. And it has been said that color of title requires a person to have "some written document of title, professing to pass the land, and one not so obviously defective that it could not have misled a man of ordinary capacity." *Dobson v. Murphy*, 1 Dev. & B. (N. Car.) 586; *Ellington v. Ellington*, 103 N. Car. 54; *Avent v. Arrington*, 105 N. Car. 390. In the last case cited *Avery, J.*, said of an unsealed instrument, after expressing the opinion that it conferred color of title, that "it was in form a deed that purported to convey the entire estate in the land, and only one educated in the law could be expected to understand that a seal was necessary to make it in reality a deed, and vest the legal estate in the grantee." The cases of *Barger v. Hobbs*, 67 Ill. 592, and *Watts v. Parker*, 27 Ill. 224, are cited as "direct authority to sustain this view." This view certainly finds support in the language of *Lumpkin, J.*, in *Beverly v. Burke*, 9 Ga. 443, 54 Am. Dec. 351, to the effect that color of title is "a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law."

The general rule that every man is presumed to know the law, it has been said, has no application in determining what is and what is not color of title, *Perry v. Perry*, 99 N. Car. 270; and in endeavoring to ascertain whether or not a particular instrument is so obviously defective as not to give color of title this rule is to be excluded, *McConnell v. McConnell*, 64 N. Car. 342.

In *North Carolina*, where a sheriff's deed recites the execution under which the sheriff sold the land, and it appears that the execution was tested and signed by the deputy clerk instead of the clerk himself, it would enure as color of title, notwithstanding the constitution requires all writs to bear teste and be signed by the clerks of the respective courts. *Den v. Putney*, 3 Murph. (N. Car.) 562.

to convey title to land is sufficient to give color of title, even though it is without a seal.¹

cc. DEFECTIVE ACKNOWLEDGMENT.—It has been held that an instrument may be sufficient to give color of title although it is defectively acknowledged, or not acknowledged at all.²

Omission of Wife's Privy Examination.—So a deed from the husband and wife, but lacking the privy examination of the latter, has been held to give color of title.³

dd. INSUFFICIENTLY WITNESSED.—It would seem that it might be held, in line with the decisions relating to the omission of a seal and proper acknowledgment, that the want of sufficient subscribing witnesses to a deed is only a formal defect in the instrument which will not prevent it giving color of title.⁴

(e) Instrument must Apparently Convey Title—aa. IN GENERAL.—But notwithstanding the marked conflict in the authorities, both apparent and real, on the question as to what constitutes color of title in particular instances, the cases quite generally agree that an instrument cannot be deemed to give color of title unless it apparently transfers title to the holder.⁵

1. *Barger v. Hobbs*, 67 Ill. 592; *Kruse v. Wilson*, 79 Ill. 233; *Hamilton v. Boggess*, 63 Mo. 233; *Jackson v. Newton*, 18 Johns. (N. Y.) 361. See *Pillow v. Roberts*, 13 How. (U. S.) 472.

The decision in the above-cited case of *Kruse v. Wilson*, 79 Ill. 233, seems to be controlled, in some measure, by the fact that the grantor in the unsealed sheriff's deed could have been compelled to execute a sufficient deed, and also that the successor of the sheriff who neglected to put a scrawl to the deed, upon the discovery of the omission, made a perfect deed to the grantee in the defective deed. "This deed," it was said, "on every principle of right and justice, should have relation back to the time of the execution of the defective deed."

Unsealed Writing Competent to Prove Claim of Title.—But whether an unsealed instrument gives color of title or not, it may, on the principle that an instrument which is insufficient to constitute color of title is nevertheless competent evidence of claim of title and to show the character of the possession, be introduced in evidence to show that the possession thereunder was adverse. *McCoy v. Dickinson College*, 5 S. & R. (Pa.) 254. See also *Avent v. Arrington*, 105 N. Car. 392.

2. *McInerny v. Irvin*, 90 Ala. 275, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 301, 303; *Cramer v. Clow*, 81 Iowa 255; *Dalton v. St. Louis Bank*, 54 Mo. 105.

A deed acknowledged by one only of the parties grantor was held to give color of title. *Torrey v. Forbes*, 94 Ala. 135.

3. *Watson v. Mancill*, 76 Ala. 600; *Pearse v. House*, 2 Hayw. (N. Car.) 386; *Perry v. Perry*, 99 N. Car. 270; *Smith v. Allen*, 112 N. Car. 223; *Fry v. Baker*, 59 Tex. 404.

A deed executed by husband and wife, purporting to convey the homestead, but without the necessary certificate of acknowledgment showing the wife's voluntary assent and signature, is totally inoperative and ineffectual as a conveyance of title; but, possession being delivered and held under it, it may constitute color of title, and be admissible to show the extent of the grantee's possession. *Watson v. Mancill*, 76 Ala. 600.

A deed of conveyance of land in fee executed by a married woman alone, without any privy examination, is an assurance of title purporting to convey an estate in fee which will perfect the title of an adverse holder of land. The disseisin occasioned by the possession of the grantee of such a deed would be a disseisin of the joint estate of husband and wife, and their joint right of action would be barred in seven years, and the title of the husband not only barred, but extinguished, and the heirs of the wife, if she died before the husband, would have only three years after her death and the extinguishment of the husband's right within which to bring suit for the recovery of the land. *Hanks v. Folsom*, 11 Lea (Tenn.) 555.

4. See *McInerny v. Irvin*, 90 Ala. 275; *Lyles v. Kirkpatrick*, 9 S. Car. 265.

But it has been held that two papers, offered as the will of a deceased owner, not on their face professing to devise the land, there being but one subscribing witness to the document, and, although it was in the handwriting of the deceased, it having never been proved as a will, and there being no evidence that it had been lodged in the hands of a third person for safe keeping, or had been found among the valuable papers or effects of the deceased, as the statute required, did not give color of title. *Callender v. Sherman*, 5 Ired. (N. Car.) 711.

5. *Dickenson v. Breeden*, 30 Ill. 293; *Coleman v. Billings*, 89 Ill. 183; *Kruse v. Wilson*, 79 Ill. 241; *Bolden v. Sherman*, 110 Ill. 418.

There can be no color of title in an occupant of land who does not hold under an instrument or proceeding or law purporting to transfer the title or give the right of possession. *Deffebach v. Hawke*, 115 U. S. 392.

It has been said that to give color of title the conveyance must be good in form, contain a description of the property, and be duly executed (*La Frombois v. Jackson*, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463), and, containing these requirements, it will give color of title, although in fact invalid and insufficient to pass the title, or actually void or voidable. *Hall v. Law*, 102 U. S. 466; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Murray v. Shanklin*, 4

bb. MUST HAVE GRANTOR AND GRANTEE.—There must be a party grantor as well as grantee, in order that an instrument may furnish color of title.¹

Grant from Foreign Government or State.—A grant from a foreign government has been considered not to confer color of title.² So a grant by one of the states of the Union, of lands lying in another state, will not, it has been held, confer color of title.³

cc. MUST DESCRIBE THE LAND.—In order that an instrument may confer color of title it must contain a description of the land; for, although it is of no importance that the title is defective, yet, if no land is described, nothing can pass.⁴ Accordingly, an instrument which contains no description of the land,⁵ or by mistake describes a tract entirely different from the one intended,⁶ or an instrument which contains a description so vague and indefinite that the land cannot be identified or distinguished from other lands,⁷ cannot be said to give

Dev. & B. (N. Car.) 289; Packard v. Moss, 68 Cal. 123; Zwietusch v. Watkins, 61 Wis. 615; Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473.

"Wherever an instrument, by apt words of transfer from grantor to grantee, whether such grantor acts under the authority of judicial proceedings or otherwise, in form passes what purports to be the title, it gives color of title." Hall v. Law, 102 U. S. 461. And see Field v. Columet, 4 Sawy. (U. S.) 523.

1. This rule was announced in Pittsburgh, etc., R. Co. v. Reich, 101 Ill. 157, where it was held that the deed of commissioners of highways was not color of title, when such commissioners could not in any case be party grantors in a deed of conveyance.

Deed by Person Non Compos Mentis.—It has, however, been held that a deed from a person non compos gave color of title. Ellington v. Ellington, 103 N. Car. 54.

Deed by Infant.—The deed of an infant is color of title. Murray v. Shanklin, 4 Dev. & B. (N. Car.) 276.

Deeds by Indians.—It has been said that a grant by any of the aboriginal natives of this country, being not from an acknowledged legitimate source, gives no color of title. Ang. Lim. of Act., § 412, citing Jackson v. Hudson, 3 Johns. (N. Y.) 384, 3 Am. Dec. 500; Thompson v. Gotham, 9 Ohio 170; Cocke v. Dotson, 1 Overt. (Tenn.) 169.

Mistake in Name of Grantee.—It has been held that where a grantee takes a deed accidentally executed to him by a wrong name, and enters into possession under it, it will, under the Illinois statute, constitute color of title. Elston v. Kennicott, 46 Ill. 187.

2. As to the effect of a grant of land by the French government in Canada, prior to the treaty between Great Britain and France in 1763, the courts have said that they could not notice any title to land not derived from our own government. Jackson v. Ingraham, 4 Johns. (N. Y.) 163; Jackson v. Waters, 12 Johns. (N. Y.) 365.

3. A land office warrant and patent, issued by the state of Virginia, and granting certain lands, which, though described and declared to be located within that state, were located within the state of Maryland, were held not to give color of title. Baker v. Swan, 32 Md. 359. Here the court, by Alvey, J., said: "The title papers originating in Virginia, for land

described as, and declared to be located within that state, are simply void as to titles within the limits of this state, and never being intended to operate upon lands beyond the limits of Virginia, they have nothing upon their face of a colorable character from which a party could suppose that his possession under them was justified."

4. Ang. Lim., § 408.

Color of Title Limited to Land Described.—Hence a person cannot claim color of title, and corresponding constructive possession, to lands upon which he enters, beyond what his deed purports to convey. Russell v. Erwin, 38 Ala. 48; U. S. v. Cameron (Arizona, 1889), 21 Pac. Rep. 177; Dubuque v. Coman, 64 Conn. 475; Hinchman v. Whetstone, 23 Ill. 185; Brooks v. Bruyn, 35 Ill. 394; Shackleford v. Bailey, 35 Ill. 391; Woods v. Banks, 14 N. H. 101; Minot v. Brooks, 16 N. H. 376; Bellows v. Jewell, 60 N. H. 420; Tate v. Southard, 3 Hawks (N. Car.) 119, 14 Am. Dec. 578.

Contradictory Description.—Where a deed purported to convey two lots by their numbers, the plat and stakes showing the precise location, but the description including six feet on another lot, it was held to give color of title to the entire lots as shown by the plat and stakes, which prevail over distances. Bolden v. Sherman, 110 Ill. 418.

5. Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525. In this case the deed purported to convey seven hundred and eighty-three acres, but, upon surveying out the lands according to the description given in the instrument, it was found that only a line had been described. The court said: "No land is included, consequently the deed is a nullity." And it was held that under this deed adverse possession was confined to the *possessio pedis*.

A deed does not give color of title where the only description of the land is by reference to another deed, itself not recorded. McDonough v. Jefferson County, 79 Tex. 525; or in which the description is equally indefinite. McKinzie v. Stafford (Tex. Civ. App., 1894), 27 S. W. Rep. 790.

6. Elofrson v. Lindsay (Wis., 1895), 63 N. W. Rep. 89.

7. Louisville, etc., R. Co. v. Boykin, 76 Ala. 560; Black v. Tennessee Coal, etc., Co., 93 Ala. 109; Gudger v. Barnes, 4 Heisk.

color of title, and the claimant thereunder will have adversary possession only of the land which he actually occupies.¹

Sufficiency of Description.—The description must be sufficiently accurate to identify or furnish the means of identifying the land under the maxim *certum est quod certum reddi potest*.² If the land can be identified from the description it is sufficient.³

dd. MUST CONTAIN WORDS OF CONVEYANCE.—Color of title being an apparent title, an instrument must, in order to give colorable title, show an apparent transfer of the title. A writing does not constitute color of title unless it purports or professes, as by apt words of transfer, to convey the title.⁴

Executory Contract of Purchase and Bond to Convey.—Consequently, as a mere executory contract or bond to convey does not itself purport to transfer title, but only promises a conveyance in the future, such instrument does not ordinarily confer color of title.⁵

(Tenn.) 570; Kilpatrick v. Sisneros, 23 Tex. 113; Berrendo Stock Co. v. Kaiser, 66 Tex. 352; Blakey v. Morris, 89 Va. 717.

In Humphries v. Huffman, 33 Ohio St. 395, it was held that a conveyance of one hundred acres out of a described plat of six hundred acres, without further description of the one hundred acres, was void, and could not be relied upon as conveying color of title. For similar cases see Shackleford v. Bailey, 35 Ill. 387; Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53; McKinzie v. Stafford (Tex. Civ. App., 1894), 27 S. W. Rep. 790.

Under the Iowa statute providing that "the purchaser in good faith at any judicial or tax sale * * * has color of title," etc., it was held that an alleged defect in the description in the tax deed did not deprive the purchaser of color of title under the sale. Childs v. Shower, 18 Iowa 261.

1. In Absence of Written Instrument.—In the absence of a written instrument to define the limits of the adverse claim there must be some visible acts, signs, or indications which are apparent to all, showing the extent of the boundaries of the land claimed to amount to color of title. Cooper v. Ord, 60 Mo. 420; Rannels v. Rannels, 52 Mo. 108.

2. Dickens v. Barnes, 79 N. Car. 492; Brown v. Coble, 76 N. Car. 391; Capps v. Holt, 5 Jones Eq. (N. Car.) 153.

Thus, land described as "one tract of land lying and being in the county aforesaid, adjoining the land of A and B, containing twenty acres more or less," was held insufficient. Dickens v. Barnes, 79 N. Car. 490.

A devise by a testator of all the lands belonging to him in a particular state, it has been held, does not give the devisee color of title to those lands in the particular state to which his deviser had not a good, but only a colorable, title. Holbrook v. Forsythe, 112 Ill. 306, 21 Cent. L. J. 170.

3. Henley v. Wilson, 81 N. Car. 405. See Lynde v. Williams, 68 Mo. 360; Jackson v. Frost, 5 Cow. (N. Y.) 346; Coleman v. Billings, 89 Ill. 183.

In the case of a written agreement to divide land, made by tenants in common, though it does not describe the line with certainty, yet if it contains certain *indicia* by which a surveyor can ascertain the line agreed upon, the paper gives color of title to the extent of

the true dividing line. McMullin v. Erwin, 58 Ga. 427; McNamara v. Seaton, 82 Ill. 498.

In Henley v. Wilson, 81 N. Car. 407, the demise was of "all my land on both sides of Haw river in Chatham county, and all the mills and appurtenances and improvements belonging thereto, said property being known as the McClennahan mills." The court held that the description was sufficient for the conveyance to operate as color of title.

Conveyance of All Grantor's Property in Specified Territory.—A grant of land in the patent of B, and of all other lands belonging to the grantor, in the province of New York, was held good. Jackson v. DeLancey, 11 Johns. (N. Y.) 368. So a conveyance granting land in a particular town or city was held sufficient to convey color of title. Harmon v. James, 7 Smed. & M. (Miss.) 118, 45 Am. Dec. 296; Prettyman v. Walston, 34 Ill. 191.

4. Reservation of Land.—Where a patent is issued for land, reserving land within its limits "previously granted," possession under such patent but outside of the land previously granted has been held not to give constructive possession of the excepted land, and it has been held that the patent was not color of title to the land so excepted, though the burden was on the party claiming under the exception to show that the land in question came within the exception. Eastern Carolina Land, etc., Co. v. Frey, 112 N. Car. 158; Basnight v. Smith, 112 N. Car. 229.

Administrator's Sale.—The sale by the administrator of a solvent estate, of the land of his intestate, under a license from the court of probate, gives no title or color of title to the purchaser, unless it be accompanied by a deed of conveyance from the administrator. Livingston v. Pendergast, 34 N. H. 544.

5. Osterman v. Baldwin, 6 Wall. (U. S.) 116; Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Dunlap v. Daugherty, 20 Ill. 404; Rigor v. Frye, 62 Ill. 507; Hardin v. Crate, 78 Ill. 533; King v. Travis, 4 Hayw. (Tenn.) 280; Wilson v. Kilcannon, 4 Hayw. (Tenn.) 182; Ellege v. Cooke, 5 Lea (Tenn.) 622.

It seems that in Texas a bond for title will constitute color of title because such an instrument is regarded and treated there "as a species of title," which may be recorded, and upon which trespass to try title may be

Tax Certificates.—Since a certificate of purchase at a tax sale does not purport to pass any title, either in fee or any other estate, it does not give color of title.¹

Pre-emption Certificate and Claim.—It has been held that a pre-emption claim does not give color of title.² And for the reason that a certificate of a land office showing that at one time a certain person was entitled to a pre-emption does not purport to convey the land, the courts have held that a writing of this kind does not give color of title.³

(d) **Unrecorded Instruments.**—The mere fact that an instrument is unrecorded does not deprive it of the character of giving color of title.⁴

(e) **Quitclaim Deeds.**—A quitclaim deed may give color of title.⁵

(f) **Lost Deed.**—A deed executed and delivered, but subsequently lost, gives

maintained. *Miller v. Alexander*, 8 Tex. 36; *Scarborough v. Arrant*, 25 Tex. 129; *Elliott v. Mitchell*, 47 Tex. 445.

Ambiguity in Instrument as to Whether or Not it is a Conveyance.—Where on its face the written color of title under which land has been claimed and held adversely for about fifteen years, during which time there has been no obstacle to bringing suit for its recovery, is ambiguous in respect to whether its terms ought to be construed as a deed conveying land *in presenti* or as testamentary paper, public policy and the general principle on which prescription rests require that the doubt should be given in favor of the occupant and against the adverse claimant. *Westmoreland v. Westmoreland*, 92 Ga. 233.

1. *Bride v. Watt*, 23 Ill. 507; *Dickenson v. Breeden*, 30 Ill. 279; *McKeighan v. Hopkins*, 14 Neb. 361. See the article **TAX TITLES**.

2. Although a pre-emption claim might be, in the language of the act, such "evidence or right to land, recognized by the laws of this government," as would maintain trespass to try title, yet until perfected it is neither such title nor color of title as can support limitation. *Buford v. Bostick*, 58 Tex. 63; *Clark v. Smith*, 59 Tex. 275.

3. *Spellman v. Curtenius*, 12 Ill. 409.

4. *United States v. Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493.

California.—*Packard v. Moss*, 68 Cal. 123.

Illinois.—*Dickenson v. Breeden*, 30 Ill. 279; *Rawson v. Fox*, 65 Ill. 200.

Mississippi.—*Hanna v. Renfro*, 32 Miss. 125.

New Hampshire.—*Minot v. Brooks*, 16 N. H. 374; *Bellows v. Jewell*, 60 N. H. 420.

North Carolina.—*Doe v. McArthur*, 2 Hawks (N. Car.) 35, 11 Am. Dec. 738; *Hardin v. Barrett*, 6 Jones (N. Car.) 159; *Kron v. Hinson*, 8 Jones (N. Car.) 347; *Chastien v. Philips*, 11 Ired. (N. Car.) 255; *Davis v. Higgins*, 91 N. Car. 382; *Hunter v. Kelly*, 92 N. Car. 285; *Brown v. Brown*, 106 N. Car. 451; *Turner v. Williams*, 108 N. Car. 210; *Lewis v. John L. Roper Lumber Co.*, 109 N. Car. 19.

In *Minot v. Brooks*, 16 N. H. 374, it was held that an unrecorded quitclaim deed of all a grantor's title, under a collector's deed, though the collector's deed conveyed no interest, is color of title.

And so of a deed from one in possession of land under color of title, though the deed

was not recorded. *Bellows v. Jewell*, 60 N. H. 420.

Where possession has been had under a valid but unrecorded paper title for upwards of twenty years, it will be established thereby as against a title derived from a subsequent conveyance recorded first, and the latter will be removed as a cloud upon the former. *Jaques v. Lester*, 118 Ill. 246.

Georgia.—In *Georgia* it is held that a deed which has not been recorded cannot be given in evidence as color of title without proof of its execution. *Hightower v. Williams*, 38 Ga. 597.

5. **Quitclaim Deed as Giving Color of Title.**—*Torrey v. Forbes*, 94 Ala. 135; *McCamy v. Higdon*, 50 Ga. 629; *Holloway v. Clark*, 27 Ill. 486; *Swift v. Mulkey*, 14 Oregon 59; *McDonough v. Jefferson County*, 79 Tex. 535; *Parker v. Newberry*, 83 Tex. 428.

In *Holloway v. Clark*, 27 Ill. 486, Walker, J., in delivering the opinion of the court, said of a quitclaim deed, that "if the grantee were required to see that it passed paramount title, before he could rely upon it as color, he would not need the protection of the statute. All know, that a quitclaim deed is as effectual to pass title, as a deed containing full covenants. A deed of release passes all of the grantor's title, and a deed of bargain and sale, with full covenants for title, conveys no more, or greater estate. The covenants form no part of the operative part of the deed, to pass title, but oblige the grantor, on the failure of the title, or breach of any covenant, to make it good, by compensation in damages. All persons in the community know that a quitclaim deed conveys the grantor's title, and it purports to have, and has, that effect. We all know that the language used in a deed of bargain and sale cannot enlarge the estate granted, but only purports to convey the grantor's title. This the quitclaim deed does, by another mode of expression. In law, they both purport to accomplish the same thing, independent of the effect of the covenants."

In *New Hampshire* it has been held that a quitclaim deed by one who is not shown to have either color of title or possession does not give colorable title. *Woods v. Banks*, 14 N. H. 101. But a quitclaim deed by one having colorable title to the lands gives color of title to the grantee. *Minot v. Brooks*, 16 N. H. 374; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575.

color of title; and actual possession of part of a lot, claiming possession of the whole under such lost deed, is equal to actual possession of the entire lot without color of title to any part of it.¹

(g) *A Question of Law.*—The question of what is sufficient to give colorable title is one of law, and, when the facts are shown, it is for the court to determine whether or not they amount to color of title.²

5. *Good Faith.*—It has occasionally been said that reliance upon anything as conferring color of title must be in good faith in order that the thing relied on shall afford color of title.³ But it would probably be more correct to say that such good faith is required in order that a person entering upon land under color of title may be deemed to be constructively in possession of the whole, though actually occupying only part of the land; or, in other words, that there can be no constructive possession, unless the occupying claimant relies in good faith upon the validity of his apparent title.⁴

IV. EXTENT OF ADVERSE POSSESSION.—The extent of the land held by an adversary possession is largely controlled by the question of whether the possession is by a mere intruder, or by a person who has a colorable title. There is, in this respect, an obvious and important distinction to be observed between these two possessions.

1. *Without Color of Title.*—Where a person enters, not under color of title, but merely assuming the possession with a claim of right, the ouster of his predecessor and his own subsequent possession extends no farther than to what he occupies, cultivates, encloses, or otherwise excludes the owner from; in this case there must be an actual possession of the entire parcel claimed, and that possession cannot be extended by construction.⁵

1. *Harbison v. School Dist. No. 1*, 89 Mo. 184.

2. *Wright v. Mattison*, 18 How. (U. S.) 50; *McIntyre v. Thompson*, 10 Fed. Rep. 531; *Van Gunden v. Virginia Coal, etc., Co.*, 52 Fed. Rep. 838; *Black v. Tennessee Coal, etc., Co.*, 93 Ala. 109; *Packard v. Moss*, 68 Cal. 123; *Woodward v. Blanchard*, 16 Ill. 427; *Fagan v. Rosier*, 68 Ill. 84.

3. Note, 2 Sm. L. Cas. (8th ed.) 710. And see *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *McCamy v. Higdon*, 50 Ga. 629; *McMullin v. Erwin*, 58 Ga. 427; *Bowman v. Wettig*, 39 Ill. 428; *Smith v. Young*, 89 Iowa 338; *Welborn v. Anderson*, 37 Miss. 163; *Barrett v. Stradl*, 73 Wis. 399, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), 277, 279, 292.

"An entry is by color of title when it is made under a *bona fide* and not pretended claim to a title existing in another." Gibson, C.J., in *McCall v. Neely*, 3 Watts (Pa.) 69, quoted with approval in *Green v. Kellum*, 23 Pa. St. 254, 62 Am. Dec. 332. See *Ege v. Medlar*, 82 Pa. St. 98.

4. *The Correct View as to the Relation of Good Faith to adverse possession under color of title is considered to be that it is essential to constructive possession, and not that it is one of the component elements of color of title.* It does not seem that it can be correct to consider that the same instrument might in the hands of one person give color of title, and in the hands of another person, for reasons wholly extrinsic to the instrument and depending entirely on the *quo animo* of the grantee, not have that effect; but, rather, that the writing may or may not have the effect of extending the grantee's possession beyond his *possessione pedis*, or actual occu-

pancy, accordingly as the possession thereunder is or is not taken in good faith.

On the one hand, when the question of whether or not a particular instrument gives color of title arises, it does not involve an inquiry into the good faith of the grantee, but is to be determined solely from the writing or transaction which is relied upon as giving color of title. In accordance with this view, we find that the question of what constitutes color of title is one of law, exclusively for the determination of the court (see *supra*, this title, *Color of Title—A Question of Law*), which could not be the case if the question of good faith, which is a question of fact for the jury (see *infra*, this title, *Extent of Adverse Possession—Good Faith*), were one of the elements of color of title. When, on the other hand, the question of whether a claimant is or is not to be deemed to have constructive possession beyond his actual occupancy arises, the inquiry is, first, whether or not he has a colorable title; second, among other matters, whether he entered in good faith. As is said in the case of *Wright v. Mattison*, 18 How. (U. S.) 56, the question is whether there is an apparent or colorable title, under which an entry or a claim has been made in good faith. And see *Hardin v. Gouveneur*, 69 Ill. 140.

The requirement of good faith in the law of adverse possession will therefore be treated in connection with constructive possession. See *infra*, this title, *Extent of Adverse Possession—Good Faith*.

5. *United States.*—*Brown v. Leete*, 6 Sawy. (U. S.) 332; *Potts v. Gilbert*, 3 Wash. (U. S.) 475.

Alabama.—*Dothard v. Denson*, 75 Ala.

2. Under Color of Title.—a. GENERAL RULE—CONSTRUCTIVE POSSESSION.—Where a person, having a colorable title thereto, enters upon land which is not

482; *Bell v. Denson*, 56 Ala. 444; *Hawkins v. Hudson*, 45 Ala. 482; *Burks v. Mitchell*, 78 Ala. 61.

Arkansas.—*Ferguson v. Peden*, 33 Ark. 150.

California.—*Kimball v. Stormer*, 65 Cal. 116; *Kimball v. Lohmas*, 31 Cal. 154; *Gordon v. Booker*, 97 Cal. 586; *Reyburn v. Booker* (Cal., 1893), 32 Pac. Rep. 594.

Connecticut.—*Bryan v. Atwater*, 5 Day (Conn.) 181, 5 Am. Dec. 136; *Tracy v. Norwich, etc., R. Co.*, 39 Conn. 382; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680.

Georgia.—*Hall v. Gay*, 68 Ga. 442; *Anderson v. Dodd*, 65 Ga. 402; *Hammond v. Crosby*, 68 Ga. 767; *Whittington v. Wright*, 9 Ga. 23; *Royall v. Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198.

Illinois.—*Bristol v. Carroll County*, 95 Ill. 84; *Schneider v. Botsch*, 90 Ill. 577; *Coleman v. Billings*, 89 Ill. 183; *Weber v. Anderson*, 73 Ill. 439; *Fisher v. Bennehoff*, 121 Ill. 426.

Indiana.—*Silver Creek Cement Corp. v. Union Lime and Cement Co.*, 138 Ind. 297, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 253, 292.

Iowa.—*Booth v. Small*, 25 Iowa 177; *Hamilton v. Wright*, 30 Iowa 480.

Kansas.—*Anderson v. Burnham*, 52 Kan. 454.

Kentucky.—*M'Kinny v. Kenny*, 1 A. K. Marsh. (Ky.) 460; *Smith v. Morrow*, 5 Litt. (Ky.) 210; *Hunter v. Chrisman*, 6 B. Mon. (Ky.) 465; *West v. McKinney*, 92 Ky. 638.

Maine.—*Jewett v. Hussey*, 70 Me. 433; *Abbott v. Abbott*, 51 Me. 584; *Lincoln v. Edgecomb*, 31 Me. 345; *Hitchings v. Morrison*, 72 Me. 334; *Otis v. Moulton*, 20 Me. 205.

Maryland.—*Davidson v. Beatty*, 3 Har. & M. (Md.) 621.

Massachusetts.—*Burrell v. Burrell*, 11 Mass. 297; *Melvin v. Proprietors*, 5 Met. (Mass.) 15, 38 Am. Dec. 384; *Kennebeck Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227.

Michigan.—*Marble v. Price*, 54 Mich. 466; *Campau v. Campau*, 44 Mich. 31.

Minnesota.—*Seymour v. Carli*, 31 Minn. 81; *Washburn v. Cutter*, 17 Minn. 361.

Mississippi.—*Hanna v. Renfro*, 32 Miss. 125; *Huntington v. Allen*, 44 Miss. 654; *Alexander v. Polk*, 39 Miss. 737.

Missouri.—*St. Louis v. Gorman*, 29 Mo: 593, 77 Am. Dec. 586.

Nebraska.—*Haywood v. Thomas*, 17 Neb. 237; *Omaha, etc., R. Co. v. Rickards*, 38 Neb. 847; *Gatling v. Lane*, 17 Neb. 77, 80.

New Hampshire.—*Riley v. Jameson*, 3 N. H. 23, 14 Am. Dec. 325; *Boynton v. Hodgdon*, 59 N. H. 247; *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491, 90 Am. Dec. 575; *Enfield v. Day*, 7 N. H. 457, 28 Am. Dec. 360; *Hale v. Glidden*, 10 N. H. 401; *Smith v. Hosmer*, 7 N. H. 436, 28 Am. Dec. 354.

New York.—*Brandt v. Ogden*, 1 Johns. (N. Y.) 158; *Robinson v. Phillips*, 65 Barb. (N. Y.) 429, 56 N. Y. 634; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Crary v. Goodman*, 22 N. Y. 170; *Baldwin v. Brown*, 16 N. Y. 359;

Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

North Carolina.—*Clarke v. Wagner*, 74 N. Car. 791; *Scott v. Elkins*, 83 N. Car. 424; *Parker v. Banks*, 79 N. Car. 480; *Moore v. Thompson*, 69 N. Car. 120; *Asbury v. Fair*, 111 N. Car. 251; *Loftin v. Cobb*, 1 Jones (N. Car.) 406, 62 Am. Dec. 173.

Ohio.—*Humphries v. Huffman*, 33 Ohio St. 395.

Oregon.—*Wilson v. McEwan*, 7 Oregon 87.

Pennsylvania.—*Miller v. Shaw*, 7 S. & R. (Pa.) 129; *Hall v. Powel*, 4 S. & R. (Pa.) 456, 8 Am. Dec. 722; *Ege v. Medlar*, 82 Pa. St. 86; *Mead v. Leffingwell*, 83 Pa. St. 187; *Jones v. Porter*, 3 P. & W. (Pa.) 134; *Brown v. McKinney*, 9 Watts (Pa.) 567, 36 Am. Dec. 139; *Cluggage v. Duncan*, 1 S. & R. (Pa.) 111; *Burns v. Swift*, 2 S. & R. (Pa.) 436.

Texas.—*Whitehead v. Foley*, 28 Tex. 268; *Bracken v. Jones*, 63 Tex. 184; *Cantagrel v. Von Lupin*, 58 Tex. 570.

Virginia.—*Creekmur v. Creekmur*, 75 Va. 431; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 587.

West Virginia.—*Jarrett v. Stevens*, 36 W. Va. 445.

Vermont Doctrine.—The rule that one who enters upon land without color of title has no constructive possession whatever, and can acquire no title by possession beyond his actual occupation or *possessio pedis*, has, it is asserted, been somewhat extended in *Vermont*.

In *Hodges v. Eddy*, 38 Vt. 327, it is asserted that in that state a more liberal doctrine has been maintained, and that it is now settled "that where a person without title or color of title enters upon a vacant lot, and actually occupies a portion of it, and the lot has a definite boundary marked upon the land, such person, by claiming to be the owner to the boundary lines of the lot, has a constructive possession of the whole, and will acquire a title to the whole by such partial occupation for fifteen years, and such entry and claim give him a good prior possession of the whole which is a good title against all the world, except the true owner of the lot. See *Crowell v. Bebee*, 10 Vt. 33, 33 Am. Dec. 172; *Ralph v. Bayley*, 11 Vt. 521."

The rule which seems to prevail in this state is that where one enters upon land without color of title, and there is a definite boundary marked upon the tract, possession of a part only, with claim of title to the boundaries, will constitute constructive possession of the whole. *Hodges v. Eddy*, 38 Vt. 327. It is enough if the claim of title be in writing, capable of being produced on request, or if it is distinctly indicated upon the land by unequivocal monuments, such as would arrest the attention of counter-claimants, *Swift v. Gage*, 26 Vt. 224; or by the manner of occupation, *Buck v. Squiers*, 23 Vt. 498. In *Shedd v. Powers*, 28 Vt. 652, the court say that in the absence of all proper title a mere marked line might be so made as to be sufficiently indicative of a claim of title,

in any adversary possession, his possession is, as a general rule, deemed to be coextensive with the boundaries as described in the writing or transaction which gives him colorable title to the land.¹ The possession which may be

without any other monument. But where the line by which one claims by adverse possession is not marked so as to be discernible, the fact that he has enclosed the tract in dispute by a fence, which embraces lands beyond such line, will not give him constructive possession to the line. *Wood v. Willard*, 37 Vt. 377, 86 Am. Dec. 716. And see, generally, *Stevens v. Hollister*, 18 Vt. 294, 46 Am. Dec. 154; *Spaulding v. Warren*, 25 Vt. 316; *Paine v. Hutchins*, 49 Vt. 315; *Langdon v. Templeton*, 66 Vt. 173.

Indiana Doctrine.—In *Bell v. Longworth*, 6 Ind. 273, Perkins, J., says: "When a party is in possession of land, claiming an adverse title, the question must always arise, To what extent does his claim reach, what lands does his claim of title cover? And where there is nothing but naked possession to evidence it, his title must, from necessity, be limited to the lands over which he has exercised a visible authority, known to others, as owner; to those, in short, from which he has excluded the former owner and others. * * * But where a party is in possession under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim, the case is entirely different; and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and extent of the claim, and no colorable title does more; for such title alone does not give right; and possession under such facts as above indicated would be constructive notice, on general principles of law, to all the world, of the character of the claim of title."

1. *United States*.—*Hunnicut v. Peyton*, 102 U. S. 333; *Pike v. Evans*, 94 U. S. 6; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; *Clymer v. Dawkins*, 3 How. (U. S.) 674; *Kingman v. Holtzhaus*, 59 Fed. Rep. 305; *Smith v. Gale*, 144 U. S. 509; *Van Gunden v. Virginia Coal, etc., Co.*, 52 Fed. Rep. 838.

Alabama.—*Childress v. Calloway*, 76 Ala. 130; *Humes v. Bernstein*, 72 Ala. 546; *Burks v. Mitchell*, 78 Ala. 61; *Cogsbill v. Mobile, etc., R. Co.*, 92 Ala. 252; *Stovall v. Fowler*, 72 Ala. 77; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

California.—*Kile v. Tubbs*, 23 Cal. 431; *Packard v. Moss*, 68 Cal. 123; *Davis v. Perley*, 30 Cal. 630; *Hicks v. Coleman*, 25 Cal. 135, 85 Am. Dec. 103; *Bernal v. Gleim*, 33 Cal. 676; *Dougherty v. Miles*, 97 Cal. 568.

Georgia.—*Janes v. Patterson*, 62 Ga. 527; *Grimes v. Ragland*, 28 Ga. 123; *Veal v. Robinson*, 70 Ga. 809; *McCamy v. Higdon*, 50 Ga. 629; *Wiley v. Warmock*, 30 Ga. 701; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Royall v. Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *Field v. Boynton*, 33 Ga. 239; *Walker v. Hughes*, 90 Ga. 52.

Illinois.—*Barger v. Hobbs*, 67 Ill. 592; *Goewey v. Urig*, 18 Ill. 238; *Fairman v. Beal*, 14 Ill. 244; *Turner v. Chamberlain*, 15 Ill.

274; *Williams v. Ballance*, 23 Ill. 193, 74 Am. Dec. 187; *Brooks v. Bruyn*, 35 Ill. 394; *Coleman v. Billings*, 89 Ill. 183; *Grand Tower Min., etc., Co. v. Gill*, 111 Ill. 541.

Indiana.—*Bell v. Longworth*, 6 Ind. 273.

Iowa.—*Tremaine v. Weatherby*, 58 Iowa 615; *Teabout v. Daniels*, 38 Iowa 158; *Colvin v. McCune*, 39 Iowa 502; *Chicago, etc., R. Co. v. Allfree*, 64 Iowa 500.

Kentucky.—*Daniel v. Ellis*, 1 A. K. Marsh. (Ky.) 60, 10 Am. Dec. 707; *Taylor v. Buckner*, 2 A. K. Marsh. (Ky.) 18, 12 Am. Dec. 354; *Chiles v. Conley*, 9 Dana (Ky.) 385; *McLawrin v. Salmons*, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563.

Maine.—*Gardner v. Gooch*, 48 Me. 487.

Maryland.—*Casey v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; *Cheney v. Ringgold*, 2 Har. & J. (Md.) 87; *Hammon v. Ridgely*, 5 Har. & J. (Md.) 245, 9 Am. Dec. 522; *Baker v. Swan*, 32 Md. 355; *Parker v. Wallis*, 60 Md. 15, 45 Am. Rep. 703.

Massachusetts.—*Marcy v. Stone*, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; *Sparhawk v. Bullard*, 1 Met. (Mass.) 95; *Poignand v. Smith*, 8 Pick. (Mass.) 272; *Kennebeck Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227.

Michigan.—*Carpenter v. Monks*, 81 Mich. 103; *Clark v. Campau*, 92 Mich. 573.

Mississippi.—*Welborn v. Anderson*, 37 Miss. 155; *Davis v. Davis*, 68 Miss. 478; *Wilson v. Williams*, 52 Miss. 487.

Missouri.—*De Graw v. Taylor*, 37 Mo. 310; *Lynde v. Williams*, 68 Mo. 360; *Long v. Higginbotham*, 56 Mo. 249; *Schultz v. Lindell*, 30 Mo. 310; *Hargis v. Kansas City, etc., R. Co.*, 100 Mo. 210; *Chapman v. Templeton*, 53 Mo. 463; *Ware v. Johnson*, 55 Mo. 500; *Mylar v. Hughes*, 60 Mo. 105; *Callahan v. Davis*, 103 Mo. 444.

New Hampshire.—*Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Waldron v. Tuttle*, 4 N. H. 371.

New Jersey.—*Den v. Hunt*, 20 N. J. L. 487.

New York.—*Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; *Jackson v. Olitz*, 8 Wend. (N. Y.) 440; *Crary v. Goodman*, 22 N. Y. 170; *Munro v. Merchant*, 28 N. Y. 9; *Northport Real Estate, etc., Co. v. Hendrickson* (Supreme Ct.), 19 N. Y. Supp. 942, 139 N. Y. 440; *Donohue v. Whitney*, 133 N. Y. 178; *Thompson v. Burhans*, 61 N. Y. 52; *Wright v. Saddler*, 20 N. Y. 320; *Weeks v. Martin* (Supreme Ct.), 10 N. Y. Supp. 656.

North Carolina.—*Lewis v. John L. Roper Lumber Co.*, 113 N. Car. 55; *McLean v. Smith*, 106 N. Car. 172; *Ruffin v. Overby*, 105 N. Car. 78; *Davis v. Higgins*, 91 N. Car. 382; *Lenoir v. South*, 10 Ired. (N. Car.) 237; *Bynum v. Thompson*, 3 Ired. (N. Car.) 578; *Carson v. Mills*, 1 Dev. & B. (N. Car.) 546, 30 Am. Dec. 143; *Scott v. Elkins*, 83 N. Car. 424; *Johnson v. Parker*, 79 N. Car. 475; *Staton v. Mullis*, 92 N. Car. 624.

had, under this rule, of a more extensive portion of the land described in the instrument giving color of title than is actually occupied by the claimant, is commonly called constructive possession.¹

Limitation of the General Rule.—To the general rule certain limitations have been asserted. Thus, the authorities have sometimes applied the qualification that the rule must be applied with reference to the nature and extent of the land. And it has been held that in order that that part of the land which is not actually possessed may be deemed constructively so, it must be for use with or subservient to the part of which the claimant has actual possession; in other words, constructive possession will extend only to such land as is used in connection with the land actually possessed, and to only so much as is reasonable and proper for that purpose according to the custom of the country.² But the actual occupancy of only a part of a tract under color of title will give constructive possession of the remainder if it is, according to the customs of the country, naturally subservient to and used in connection with the part actually occupied.³

b. PREREQUISITES TO CONSTRUCTIVE POSSESSION—(1) *Color of Title*.—There can be no constructive possession of a tract of land unless the claimant has color of title thereto.

Ohio.—Humphries v. Huffman, 33 Ohio St. 395; Smith v. McKay, 30 Ohio St. 409.

Oregon.—Swift v. Mulkey, 14 Oregon 59, 17 Oregon 532.

Pennsylvania.—Hollinshead v. Nauman, 45 Pa. St. 145; Culler v. Motzer, 13 S. & R. (Pa.) 356, 15 Am. Dec. 604; Olewine v. Messmore, 128 Pa. St. 470; Altemus v. Long, 4 Pa. St. 254, 45 Am. Dec. 688; Waggoner v. Hastings, 5 Pa. St. 300; Allen v. Grove, 18 Pa. St. 377; Nearhoff v. Addleman, 31 Pa. St. 279; Ege v. Medlar, 82 Pa. St. 86; Holloway v. Jones, 143 Pa. St. 564.

South Carolina.—Johnson v. M'Millan, 1 Strobb. (S. Car.) 143; State Bank v. Smyers, 2 Strobb. (S. Car.) 24; Eifert v. Read, 1 Nott & M. (S. Car.) 374; Congdon v. Morgan, 14 S. Car. 587; M'Colman v. Wilkes, 3 Strobb. (S. Car.) 465, 51 Am. Dec. 637; Alston v. Collins, 2 Spears (S. Car.) 450; Golson v. Hook, 4 Strobb. (S. Car.) 23.

Tennessee.—Peck v. Houston, 5 Lea (Tenn.) 227; Jones v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; Hebard v. Scott (Tenn., 1895), 32 S. W. Rep. 390.

Texas.—Whitehead v. Foley, 28 Tex. 285; Cantagrel v. Von Lupin, 58 Tex. 570; Evitts v. Roth, 61 Tex. 81; Hodges v. Ross, 6 Tex. Civ. App. 437; Thompson v. Cragg, 24 Tex. 582; Porter v. Miller, 84 Tex. 204; Tarlton v. Kirkpatrick, 1 Tex. Civ. App. 107.

Vermont.—Crowell v. Bebee, 10 Vt. 33, 33 Am. Dec. 172; Hubbard v. Austin, 11 Vt. 129; Ralph v. Bayley, 11 Vt. 521; Stevens v. Hollister, 18 Vt. 294, 46 Am. Dec. 154; Spaulding v. Warren, 25 Vt. 316; Jakeway v. Barrett, 38 Vt. 316; Swift v. Gage, 26 Vt. 224; Aldrich v. Griffith, 66 Vt. 390.

Virginia.—Creekmur v. Creekmur, 75 Va. 430; Overton v. Davison, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Anderson v. Harvey, 10 Gratt. (Va.) 397; Andrews v. Roseland Iron, etc., Co., 89 Va. 393.

West Virginia.—Core v. Faupel, 24 W. Va. 238; Holly River Coal Co. v. Howell, 36 W. Va. 489; Adams v. Alkire, 20 W. Va. 480; White v. Ward, 35 W. Va. 418.

Washington.—Upper v. Lowell, 7 Wash. 460.

Wisconsin.—Edgerton v. Bird, 6 Wis. 527, 70 Am. Dec. 473; McEvoy v. Loyd, 31 Wis. 143; Cornell University v. Mead, 80 Wis. 387; Pepper v. O'Dowd, 39 Wis. 538; Furlong v. Garrett, 44 Wis. 111; Hacker v. Horlemus 74 Wis. 21.

Constructive Possession as against the True Owner.—Although the opinion has sometimes been expressed that there can be no constructive possession as against the true owner of the land, and that such possession operates only against those who have no title (Griffith v. Schwenderman, 27 Mo. 412; McDonald v. Schneider, 27 Mo. 405), this view is clearly a mistaken one, and can apply only to cases of mixed possession where both claimants actually occupy a part, claiming the whole by adverse titles. Crispin v. Hannavan, 50 Mo. 536. See *infra*, this section, subdivision *Mixed Possession*.

1. Thompson v. Burhans, 79 N. Y. 93.

"Constructive possession is a possession in law without possession in fact." Hodges v. Eddy, 38 Vt. 327.

2. Thompson v. Burhans, 61 N. Y. 52, 79 N. Y. 93; Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525. See also Pepper v. O'Dowd, 39 Wis. 550.

The doctrine of constructive possession is enforced for the protection of *bona fide* settlers, who go upon land for the purpose of actual cultivation. Where one takes possession of a few acres of land in a township, not for the ordinary purpose of settlement, but to gain a title by possession, he cannot be considered as constructively in possession of the entire township. Chandler v. Spear, 22 Vt. 388.

3. Argotsinger v. Vines, 82 N. Y. 308.

Actual possession under color of title, of part of a tract of land, may give possession to the entire tract, provided it consists of a single tract of a proper size to be managed and used in one body, according to the usual manner of business of the country. Murphy v. Doyle, 37 Minn. 113.

Constructive Possession Limited to Colorable Title.—Hence the adversary possession of land under color of title cannot be extended by construction to embrace more than the land which is described in the instrument giving the color of title.¹

Derived from Several Writings.—And it seems that it is immaterial whether the color of title is in one instrument covering the entire tract, or several instruments each purporting to convey a portion thereof, and that the actual possession of either part so conveyed by separate instruments will give constructive possession to all if they constitute one tract.²

(2) **Actual Possession of Part of Land.**—But there must be something more than the instrument which confers the color of title and a mere entry under it. In order to entitle a person who claims, under color of title, to the benefit of the doctrine of constructive possession, there must be an entry upon and actual possession for the statutory period of some part of the land covered by the color of title.³

Alienation of the Part Actually Occupied.—The constructive is dependent upon the

1. *Kentucky.*—*M'Kinny v. Kenny*, 1 A. K. Marsh. (Ky.) 460; *Smith v. Morrow*, 5 Litt. (Ky.) 210; *Hunter v. Chrisman*, 6 B. Mon. (Ky.) 463.

New Hampshire.—*Enfield v. Day*, 7 N. H. 457, 28 Am. Dec. 360. See also *Hale v. Glidden*, 10 N. H. 397.

New York.—*Crary v. Goodman*, 22 N. Y. 171; *Pope v. Hanmer*, 74 N. Y. 240.

North Carolina.—*McRae v. Williams*, 7 Jones (N. Car.) 430.

Texas.—*Thompson v. Cragg*, 24 Tex. 582.

Wisconsin.—*McEvoy v. Loyd*, 31 Wis. 142.

2. *Braxton v. Rich*, 47 Fed. Rep. 178; *Overton v. Davison*, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; *Wharton v. Bunting*, 73 Ill. 16. See *Webb v. Richardson*, 42 Vt. 465. But see *Carson v. Mills*, 1 Dev. & B. (N. Car.) 546, 30 Am. Dec. 143.

Deed of Land Consisting of Former Parcels.—The mere fact that an entire undivided tract of land which is conveyed by a deed thereof was formerly made up of different parcels lying contiguous to each other, with the title, or color of title, of the several parcels derived, at some former period, from different sources, does not, it has been held, take it out of the general rule as to constructive possession, although in such deed conveying the entire tract the several parcels of which it is composed are separately described. *Webb v. Richardson*, 42 Vt. 465. But see, *contra*, *Carson v. Mills*, 1 Dev. & B. (N. Car.) 546, 30 Am. Dec. 143.

3. **Actual Possession of Part.**—*Wood Lim. Act.*, § 267; *Church of Jesus Christ, etc., v. Church of Christ*, 60 Fed. Rep. 937; *Childress v. Calloway*, 76 Ala. 130; *Parks v. Barnett* (Ala., 1894), 16 So. Rep. 136; *Walls v. Smith*, 19 Ga. 8; *Moingona Coal Co. v. Blair*, 51 Iowa 448; *Thayer v. M'Lellan*, 23 Me. 419; *Abell v. Harris*, 11 Gill & J. (Md.) 371; *Mylar v. Hughes*, 60 Mo. 105; *Norfleet v. Hutchins*, 68 Mo. 597; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Cushing v. Miller*, 62 N. H. 517; *Turner v. Moore*, 81 Tex. 206.

The statute does not begin to run in favor of the holder of a tax deed by merely recording it. *Baldwin v. Merriam*, 16 Neb. 199.

There can be no constructive adverse pos-

session against the owner when there has been no actual possession which he could treat as a trespass, and bring suit for. *Steedman v. Hilliard*, 3 Rich. (S. Car.) 101. And see also *Slice v. Derrick*, 2 Rich. (S. Car.) 627; *Gourdin v. Davis*, 2 Rich. (S. Car.) 481, 45 Am. Dec. 745. But such acts of possession are not necessarily sufficient. There must be a disseisin of the owner; an actual possession by the claimant. The owner is not bound to consider a mere act of trespass to be a disseisin. *Clarke v. Courtney*, 5 Pet. (U. S.) 354.

Where a grantee's deed by mistake includes a tract of land that was not in fact sold, and he takes possession of only that land which he actually purchased, he does not obtain possession of the land which was included in his deed by mistake. *De Forest v. Walters* (Supreme Ct.), 60 N. Y. St. Rep. 1.

Necessity of Acts of Ownership over Unoccupied Portion.—There are cases which seem to require of a person claiming a right to land by virtue of his adverse possession under color of title, in order that he may have constructive possession beyond the portion in actual occupancy by substantial enclosures or under cultivation, that he shall, for the requisite period of time, exercise such acts of ownership over the other portions of the land as are calculated to assert to the world a claim of right or will amount to actual possession. *Den v. Hunt*, 20 N. J. L. 492. So in *Foulke v. Bond*, 41 N. J. L. 547, where the foregoing case is quoted from *with approval*, it seems to be required that there be "a substantial holding coextensive with the boundaries in the deed." But this requirement is not generally made. The commonly accepted view is that, where the entry is under color of title, if there is a sufficient actual possession of a part, no acts of ownership need be shown upon the remainder of the land. *Sedgw. & W. Tr. Tit. to L.*, § 771.

In *Missouri*, however, the requirement that there must be an exercise, "during the period of such possession," of the "usual acts of ownership over the whole tract so claimed," has been superadded by statute. *Norfleet v. Hutchins*, 68 Mo. 597.

actual possession, and must continue or fail with it. Consequently, if the occupying claimant conveys that part of the tract which constituted his actual possession, but not the whole tract, he loses the constructive possession of the balance, unless he takes actual possession of some part thereof.¹

The Possession Required.—Even though the entry is under a color of title, the possession required is, in every respect except that of extent, practically the same as that which is required when there is no color of title; an actual, visible, notorious, distinct, and hostile possession, continuous for the prescribed period, must appear in order to form a bar to the assertion of the legal title by the true owner.²

Under Instrument Describing Land in Separate Parcels.—It seems that the mere fact that the instrument under which the entry is made describes the land in separate parcels does not prevent the application of the general rule; and that, if the land is in fact one entire undivided tract, the claimant will have constructive possession of the whole, even though his actual occupancy is limited to one of the portions which are separately described in the conveyance.³

Where Land Claimed Consists of Separate Tracts.—Where the instrument which confers the color of title purports to convey and describes several tracts which do not constitute one entire undivided tract, the possession of one of such tracts will not give constructive possession of another granted in the same conveyance.⁴

Under Title Void as to Part Only.—In the case where a person who has a good

1. *Cunningham v. Frandtzen*, 26 Tex. 34. See *Chandler v. Rushing*, 38 Tex. 591.

2. *Baker v. Swan*, 32 Md. 355; *Little v. Downing*, 37 N. H. 355; *McRoberts v. Bergman* (Supreme Ct.), 11 N. Y. Supp. 108.

Color of title does not dispense with the necessity of the possession being continuous. *Hamilton v. Icard*, 114 N. Car. 532.

3. **Undivided Tract of Several Parcels.**—The mere fact that an entire undivided tract, conveyed by deed, was formerly made up of different parcels, with the title, or color of title, of the several parcels derived from different sources, does not prevent the application of the general rule. *Northport Real Estate, etc., Co. v. Hendrickson*, 139 N. Y. 440; although the deed conveying the tract describes the parcels of which it is composed separately. *Webb v. Richardson*, 42 Vt. 465. *Contra*, *Carson v. Mills*, 1 Dev. & B. (N. Car.) 546, 30 Am. Dec. 143.

Where a deed conveying five contiguous lots described them by their numbers, and named the aggregate quantity of land conveyed, and referred to the whole as "five tracts or lots of land containing two hundred two and one half acres each," and the several tracts described really constituted but one tract, the whole lying together in one body, it was held that the possession, under such a deed, of a part of the land thus conveyed, would embrace the whole tract described in the deed. *Johnson v. Simerly*, 90 Ga. 612, explaining *Barber v. Shaffer*, 76 Ga. 285. But see *Griffin v. Lee*, 90 Ga. 224.

Although the testimony went to show that the whole tract was under a common enclosure, and although subdivided into several lots was subject to a common use, the refusal by the court to instruct the jury that evidence of actual possession of one of these lots was not to be considered in determining whether

this possession extended to the whole tract was held entirely proper. *Kerr v. Nicholas*, 88 Ala. 351.

4. **Separate and Distinct Tracts.**—*Brown v. Bocquin*, 57 Ark. 97; *Grimes v. Ragland*, 28 Ga. 123; *Wiley v. Warmock*, 30 Ga. 701; *Morris v. McClary*, 43 Minn. 346; *Schultz v. Lindell*, 30 Mo. 310; *Thompson v. Burhans*, 61 N. Y. 52; *Pepper v. O'Dowd*, 39 Wis. 538.

The *Missouri* courts have stated and applied the principle that where a large tract embraces several smaller ones, actual possession of one of the smaller lots only by the person claiming the large tract will not be a defense against a superior title to any one of the other small lots. *Tayon v. Ladew*, 33 Mo. 205; *Leeper v. Baker*, 68 Mo. 400; *Hickman v. Link*, 97 Mo. 482.

And in the case of *Church of Jesus Christ, etc., v. Church of Christ*, 60 Fed. Rep. 937, it is held that it is not sufficient that a party under a colorable deed should occupy one lot, where a tract is divided up into lots with separate streets, and acquire title by limitation to a lot not connected, and not occupied, by merely claiming title thereto.

So it is held that where two separate lots, included in the same deed, belong to different owners, an entry into one can in no way operate as a disseisin in relation to the other. *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Turner v. Moore*, 81 Tex. 206.

Where one in possession of a very large survey of land, claiming title thereto, sells several distinct tracts located in different portions of said survey, his actual possession of one parcel of the original tract does not, it has been held, give him a constructive possession of all the remaining portions of the tract not actually conveyed, they being severed from the portion actually occupied. *West v. McKinney*, 92 Ky. 638.

title to one portion of a tract of land, but a merely colorable title to another part, enters upon and actually occupies the part to which he has a valid title, it would seem, though the question has not yet been definitely settled by the authorities, that such entry and possession will not give him constructive possession of that part to which he has only color of title.¹

Possession, by Mistake, of Land Not Covered by Colorable Title.—It sometimes happens that a person, by mistake or inadvertence, enters upon a tract of land different from that which is described in the instrument under which he claims. In such case there will be no constructive possession created; whatever adverse possession such claimant may have is limited to his actual possession.² But he may make a claim of right, and by his actual occupancy have adverse possession to the extent of such actual possession.³

(3) *Claim of Right to Whole Tract.*—The fact that a person enters under color of title does not dispense with the necessity for a claim of right; constructive possession is dependent not only on color of title and actual possession of part of the land, but also on a claim of title to the whole.⁴ Where the possession, whether under color of title or not, is greater in extent than the claim, it is the latter which determines the amount of land gained by adverse possession.⁵

Color of Title, Evidence of.—But the entry under color of title, together with the

1. *Deed Void in Part.*—In *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190, Parker, C. J., said: "We are of opinion that the rule cannot apply to a case where a party, having a deed which embraces land to which his grantor had good title, and other land to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into that part which he could not lawfully convey. There is no notice in such case to the owner of the land thus embraced in the deed, and no possession which can be deemed adverse to him. If it may be said that the color of title gives such a constructive seisin and possession that the grantee could maintain trespass against any person who did not show a better right (that is, a title or prior possession), there is nothing in the nature of it which can give it the character of a disseisin, or possession adverse to the true owner, so as to bind him." And this rule is in strict analogy with that applicable in the case of conflicting boundaries. See *infra*, this section, *Overlapping Boundaries*.

While the case of *Wharton v. Bunting*, 73 Ill. 16, seems, at first blush, to support the contrary of the rule stated in the foregoing case, it turns largely upon the construction of the phrase "actual residence," as used in the *Illinois* statute of limitations. And it is not clear but that there was actual possession of both tracts. Mr. Justice Breese said: "The occupancy of the farm, the two tracts being under one enclosure as one field, was open, notorious, exclusive, and adverse to the owner or claimant of any one of the tracts, and as much notice to him as if a house for a residence was erected on each subdivision, and such house actually occupied."

2. *M'Kinny v. Kenny*, 1 A. K. Marsh. (Ky.) 460; *McEvoy v. Loyd*, 31 Wis. 142.

3. *Possession by Mistake.*—*Swettenham v.*

Leary, 18 Hun (N. Y.) 286. See *supra*, this title, *What Constitutes Adverse Possession—Intent*.

In *Metcalfe v. McCutchen*, 60 Miss. 145, the facts were these: A was the owner of the west half of a certain section of land, and B was the owner of the east half of the same section. B had been in possession of a part of the west half for more than ten years (the period necessary to establish a title by adverse possession), claiming title thereto in the belief that it was in the east half, and not intending to claim any part of the west half, but recognizing A's title to all of that half. It was held that the possession of a part of the west half by B had been adverse, and vested him with the title to that part as against A, though he had claimed it in the mistaken belief that it was in the east half, and embraced within the calls of his deed thereto. Compare *Grube v. Wells*, 34 Iowa 148; *Napier v. Simpson*, 1 Overt. (Tenn.) 453.

J., owning a lot of land on the south side of Green street, in P., with a frontage of one hundred and twenty-six feet, conveyed a piece thereof with a frontage of sixty feet to the defendant, the latter supposing that by the terms of his deed his lot extended to a certain fence which would give him a frontage of sixty-six feet. Soon after the delivery of his deed the defendant entered, occupied, and cultivated the lot to the fence for more than twenty consecutive years. It was held that if the defendant claimed title to the fence during his entire occupation, his title ripened into an absolute title by disseisin, although he was mistaken as to the true bound. *Hitchings v. Morrison*, 72 Me. 331.

4. *Wade v. Johnson*, 94 Ga. 348; *Parish v. Kaspere*, 109 Ind. 586; *Bakewell v. McKee*, 101 Mo. 337; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 587; *Creekmur v. Creekmur*, 75 Va. 430.

5. *Wood v. Willard*, 37 Vt. 377, 86 Am. Dec. 716.

color of title itself, is generally regarded as an assertion of such a claim.¹ And the color of title, it has been said, "may be looked to for the purpose of showing the character and extent of the claim, and the intent with which the entry was made."²

(4) *Good Faith—In General.*—While a person who accepts a defective title to land and goes into possession under it, knowing the defect, may nevertheless by virtue of his adverse possession under claim of title alone,³ plead the statute of limitations in bar against any action brought for the recovery of the land,⁴ yet the general rule is that possession under a defective title by a grantee who knows the defect must be limited to his actual occupancy. In other words, to entitle a claimant under color of title to the benefit of the doctrine of constructive possession, there must be a *bona fide* reliance upon the merely apparent title as being good and valid. Therefore, if the instrument constituting color of title was obtained by fraud on the part of the grantee, or with a knowledge by him that it conveys no title, he cannot have the advantage of an entry under color of title.⁵

1. Sedgw. & W. Tr. Tit. to L., § 761.

2. *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 604.

3. *Good Faith Not Essential to Acquisition of Title by Actual Possession.*—The requirement of good faith in an adverse claimant is generally held to be material only when a person is claiming constructive possession under color of title, and does not apply when there is a disseisin of the true owner, and an actual, open and adverse possession which exposes the claimant to an action by the true owner. Hence the opinion has been expressed that actual adverse possession by the defendant for the statutory period under a junior grant constituted a bar to an action by the senior grantee, even though the defendant's grant was obtained by fraud with knowledge of the senior grant. *Oliver v. Pullam*, 24 Fed. Rep. 127. See *Den v. Leggat*, 3 Murph. (N. Car.) 539.

In *Love v. Shields*, 3 Yerg. (Tenn.) 405, where there was no question of constructive possession beyond the actual possession of the claimant under a void tax deed, it was held that the act of limitations would prove a bar to an action of ejectment, although the defendant, when he received his deed, knew that the person conveying to him had no title.

On the general proposition that, except when expressly required by the statute, the question of the claimant's good faith has no application where there is actual adverse possession, see *Smith v. Roberts*, 62 Ala. 83; *Brady v. Huff*, 75 Ala. 80; *Bryan v. Atwater*, 5 Day (Conn.) 181, 5 Am. Dec. 136; *French v. Pearce*, 8 Conn. 443, 21 Am. Dec. 680; *Weber v. Anderson*, 73 Ill. 439; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Munro v. Merchant*, 26 Barb. (N. Y.) 402; *Foulke v. Bond*, 41 N. J. L. 541; *Kinney v. Vinson*, 32 Tex. 128.

Good faith on the part of the occupant is sometimes made an essential element of adverse possession. *Wood Lim. of Act.*, § 259, where *Louisiana* is instanced.

The second section of the *Illinois* Act of 1839 provides in effect that, when one has acquired color of title in good faith to vacant and unoccupied lands, and has paid taxes

thereon for seven successive years from the time this color of title was acquired, and afterwards gets into possession of the land under such title, he acquires title by adverse possession. See *McCagg v. Heacock*, 42 Ill. 153.

4. *Reliance by Claimant with Color, on Claim of Title Only.*—It seems to be a general rule that a person who either originally enters under or subsequently acquires a colorable title may wholly discard such title, and, merely relying upon his claim of title, may acquire title by adverse possession to the extent of his actual adverse occupancy.

In the case of *Strange v. Durham*, 2 Bay (S. Car.) 429, the defendant had entered into possession of land under a deed which he knew to give no title, and held the premises for the statutory period. In his defense to the plaintiff's action, he relinquished all claim under the deed and rested solely upon his possessory right. The plaintiff contended that as the defendant went into possession of the land by virtue of a void deed, which he knew to be defective, he could not afterwards relinquish his claim to it and set up title by possession alone, though it was admitted that he might have done so if he had not accepted this conveyance. But it was held that the defendant set up a good defense.

And it has been held that one who is in adverse possession of land does not impair his right to rely upon the statute of limitations by purchasing the land at a tax sale and receiving a tax deed therefor. *Hayes v. Martin*, 45 Cal. 559; *Griffith v. Smith*, 27 Neb. 47; *Omaha, etc., Land, etc., Co. v. Hansen*, 32 Neb. 449.

5. *Reay v. Butler*, 95 Cal. 206; *Crispen v. Hannavan*, 50 Mo. 536; *Den v. Hunt*, 20 N. J. L. 487; *Foulke v. Bond*, 41 N. J. L. 527; *Texas Land Co. v. Williams*, 51 Tex. 51. See *Gregg v. Sayre*, 8 Pet. (U. S.) 253; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *McCamy v. Higdon*, 50 Ga. 629; *McMullin v. Erwin*, 58 Ga. 427; *Bowman v. Wettig*, 39 Ill. 428; *Smith v. Young*, 89 Iowa 338; *Welborn v. Anderson*, 37 Miss. 163; *Ege v. Medlar*, 82 Pa. St. 98.

The fact that the color of title is based upon

Fraud must be Actual.—But a grantee will not be deprived of the legal advantages of an entry under color of title, unless it be for actual fraud on his part.¹

Knowledge of Defect must be Actual.—And the rule that what is sufficient to put a person on inquiry operates as notice does not apply in such case,² so that it is only actual knowledge that the title supposed to have been acquired is invalid, and not such knowledge as would arise from the legal construction of the instrument, which will deprive the claimant of the benefit of the doctrine of constructive possession.³

A Question of Fact.—The question of what is good faith in a person claiming under color of title is one of fact for the jury.⁴

c. MIXED POSSESSION.—(1) *Definition.*—Mixed possession may be defined as the actual possession, at the same time, of parts of the same tract of land, by two or more persons each claiming the whole under a separate conveyance or other instrument giving at least color of title.⁵

(2) *When True Owner is in Possession of Part.*—In cases of mixed possession, the true title prevails against the one merely colorable, and carries with it the constructive possession.⁶ Hence, when the true owner of a tract of land

a quitclaim deed does not of itself negative good faith. *McCamy v. Higdon*, 50 Ga. 629.

Illinois Decisions.—Under the *Illinois* statute it is held that the *bona fides* of the claimant will be presumed until the contrary appears. *Dawley v. Van Court*, 21 Ill. 460; *Brooks v. Bruyn*, 35 Ill. 394; *Milliken v. Marlin*, 66 Ill. 13; *Hardin v. Gouveneur*, 69 Ill. 140; *Russell v. Mandell*, 73 Ill. 163; *Hodgen v. Henrichsen*, 85 Ill. 262; *Davis v. Hall*, 92 Ill. 85.

Active or constructive notice of irregularities does not necessarily impute bad faith to the party chargeable with notice. *Davis v. Hall*, 92 Ill. 85. Compare *Bowman v. Wettig*, 39 Ill. 416; *Stubblefield v. Borders*, 92 Ill. 279.

Failure to record a deed which constitutes the color of title is not a presumption of bad faith. *Rawson v. Fox*, 65 Ill. 200.

Under the *Illinois* statute it has been said that the words "good faith," as used in the statute, must receive a practical, common-sense construction. The statute was intended to protect a purchaser of land who bought and paid his money under the belief that he was acquiring title. *Winters v. Haines*, 84 Ill. 585; *Woodward v. Blanchard*, 16 Ill. 424; *Rawson v. Fox*, 65 Ill. 200; *Davis v. Hall*, 92 Ill. 85.

1. Actual Fraud Necessary.—In *Foulke v. Bond*, 41 N. J. L. 527, the law upon this point is stated by Depue, J., as follows: "A grantee will not be deprived of the legal advantages of an entry under color of title, unless it be for actual fraud on his part. He will not be prejudiced even though the grantor be justly chargeable with fraud in making the conveyance, unless he personally participated in the fraud. If his deed purports on its face to convey good title and he has accepted it in good faith, he is entitled to the benefits to be derived from an entry under color of title. *Gregg v. Sayre*, 8 Pet. (U. S.) 244. * * * The doctrine of constructive notice does not apply in such a case. There must be proof of actual fraud. Mere neglect to inquire into the state of the title is not sufficient evidence of fraud."

2. See *Foulke v. Bond*, 41 N. J. L. 527; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 558.

3. *Foulke v. Bond*, 41 N. J. L. 527. See *Wilson v. Atkinson*, 77 Cal. 485; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 558.

4. *United States.*—*Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493; *Wright v. Mat-tison*, 18 How. (U. S.) 50.

Georgia.—*Walls v. Smith*, 19 Ga. 8.

Illinois.—*Woodward v. Blanchard*, 16 Ill. 427; *Milliken v. Marlin*, 66 Ill. 13; *Rawson v. Fox*, 65 Ill. 200; *Paris v. Lewis*, 85 Ill. 597; *Hardin v. Gouveneur*, 69 Ill. 140; *Hodgen v. Henrichsen*, 85 Ill. 259; *McCagg v. Heacock*, 34 Ill. 476, 85 Am. Dec. 327; *McConnel v. Street*, 17 Ill. 253; *Russell v. Mandell*, 73 Ill. 136; *Smith v. Ferguson*, 91 Ill. 304; *Hardin v. Crate*, 78 Ill. 533.

Minnesota.—*Seigneuret v. Fahey*, 27 Minn. 60.

Mississippi.—*Hanna v. Renfro*, 32 Miss. 125.

Missouri.—*Crispen v. Hannavan*, 50 Mo. 536; *Gaines v. Saunders*, 87 Mo. 557.

New Jersey.—*Foulke v. Bond*, 41 N. J. L. 527.

Pennsylvania.—*Green v. Kellum*, 23 Pa. St. 254, 62 Am. Dec. 332.

5. *Wood Lim. of Actions*, § 261; *Crispen v. Hannavan*, 50 Mo. 536.

6. True Owner in Possession of Part.—"The rule is well settled that title draws to it the possession, and it remains with the owner of the legal title until he is divested of it by an actual, adverse possession; and, while he is in possession of a part of the premises, his possession is entitled to the benefit of the constructive possession, and can only be ousted by, and to the extent of, the actual occupation of a mere intruder." *Wood on Lim. of Actions*, § 261, *citing*, among other cases, *Hall v. Powel*, 4 S. & R. (Pa.) 456, 8 Am. Dec. 722, where it is said by Duncan, J.: "There would appear to be no clearer principle of reason and of justice than this, that if the rightful owner is in the actual occupancy of a part of his tract by himself, or tenant, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law, the possessor by wrong would be more

is in actual possession of a portion thereof, a person who enters into actual possession of another portion, whether he has or has not color of title, will be deemed to be in possession only to the extent of his actual occupation; the true owner is constructively in possession of the remainder.¹ And even though a person enters upon land under color of title, and by his actual possession of part and claim of title to the whole obtains constructive possession of the entire tract, if the owner of the true title afterwards, and before the title by adverse possession is perfected, enters upon the same tract in another place, claiming the whole, the constructive possession thus acquired by the former is overcome by that of the latter, so that he can acquire title by adverse possession, as against the true owner, to only that portion of the land which he actually occupies.²

(3) *When Neither Claimant Has True Title.*—If a person enters under color of title, and by actually occupying a part, claiming the whole, obtains constructive possession of the entire tract to which his color of title extends, this possession cannot be defeated by a subsequent entry and occupancy of a portion of the same tract, even though under color of title to the whole, where neither claimant shows himself to be in possession of the true title.³ But a

favored than the rightful possessor. Here are two, each in actual possession and occupation of part of a surveyed tract, the owner and an intruder. Who, then, is in possession of the part not occupied by enclosure by either? The man who has no right but by disseisin of a part, or he who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of mixed constructive possession, the legal seisin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the title."

And in *Barr v. Gratz*, 4 Wheat. (U. S.) 213, Story, J., says: "Where two persons are in possession of land at the same time, under different titles, the law adjudges him to have the seisin of the estate who has the better title."

1. *United States.*—*Barr v. Gratz*, 4 Wheat. (U. S.) 213; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Green v. Lister*, 8 Cranch (U. S.) 229; *Santee River Cypress Lumber Co. v. James*, 50 Fed. Rep. 360; *Hunnicut v. Peyton*, 102 (U. S.) 333; *Braxton v. Rich*, 47 Fed. Rep. 178.

California.—*Davis v. Perley*, 30 Cal. 630; *Labor v. Los Angeles Orphan Asylum*, 97 Cal. 270; *McCormick v. Sutton*, 97 Cal. 373.

Georgia.—*Whittington v. Wright*, 9 Ga. 23. *Kentucky.*—*Chiles v. Jones*, 7 Dana (Ky.) 528.

Maryland.—*Cheney v. Ringgold*, 2 Har. & J. (Md.) 87; *Hoye v. Swan*, 5 Md. 246; *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts.—*Brimmer v. Long Wharf*, 5 Pick. (Mass.) 131; *Codman v. Winslow*, 10 Mass. 146; *Bellis v. Bellis*, 122 Mass. 414.

Mississippi.—*Jones v. Gaddis*, 67 Miss. 761.

Missouri.—*Schultz v. Lindell*, 30 Mo. 310; *Crispen v. Hannavan*, 50 Mo. 536; *Bradley v. West*, 60 Mo. 33; *Ozark Plateau Land Co. v. Hays*, 105 Mo. 143; *Goltermann v. Schiermeyer*, 111 Mo. 404.

New York.—*Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511.

North Carolina.—*Scott v. Elkins*, 83 N. Car. 424.

Pennsylvania.—*Royer v. Benlow*, 10 S. & R. (Pa.) 303.

Texas.—*Claiborne v. Elkins*, 79 Tex. 380; *Turner v. Moore*, 81 Tex. 206; *Ballard v. Perry*, 28 Tex. 347.

Vermont.—*Stevens v. Hollister*, 18 Vt. 294, 46 Am. Dec. 154; *Jakeway v. Barrett*, 38 Vt. 316; *Hodges v. Eddy*, 38 Vt. 344.

Virginia.—*Taylor v. Burnside*, 1 Gratt. (Va.) 165.

2. *Hunnicut v. Peyton*, 102 U. S. 333; *Semple v. Cook*, 50 Cal. 26; *Altamus v. Long*, 4 Pa. St. 254, 45 Am. Dec. 688; *Hull v. Woods* (Tex. Civ. App., 1894), 25 S. W. Rep. 458.

3. *Title in Neither Claimant.*—*Sedgw. v. Waite*, Tr. Tit. to L. § 753; *Hubbard v. Barry*, 21 Cal. 321; *Whitford v. Drexel*, 118 Ill. 600; *Schultz v. Arnot*, 33 Mo. 172; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *Shumway v. Phillips*, 22 Pa. St. 151; *Wilson v. Palmer*, 18 Tex. 592; *Ralph v. Bayley*, 11 Vt. 521; *Tapscott v. Cobbs*, 11 Gratt. (Va.) 172.

The doctrine that when a party enters under claim and color of title, his or her possession is to be deemed co-extensive with the description in the deed under which the entry is made, does not apply to such of the described tract as may at the time be in the actual occupancy of another. *Goewey v. Urig*, 18 Ill. 238; *East St. Louis, etc., R. Co. v. Nugent*, 147 Ill. 254.

In *Williams v. McAiley*, Cheves (S. Car.) 200, there were an old grant and two junior grants, all of the same land, with possession by each of the junior grantees, of different parts, claiming the whole, for the statutory period; it was held that the junior grantee who first entered had such actual possession as at the expiration of ten years gave him a title to all the land within his claim, except the part in the actual occupancy of the other junior grantee.

In *Owens v. Goode*, 3 Strobb. (S. Car.) 474, there were an old grant with which another

prior constructive possession must yield to a subsequent actual possession, so that the possession of the subsequent claimant will extend to the part which he actually occupies, and may ripen into title by adverse possession.¹

d. OVERLAPPING BOUNDARIES—Constructive Possession Follows Title.—The same principle which is applied in the case of mixed possession, namely, that constructive possession follows the true title, is applicable to the case of interfering or overlapping boundaries.²

Where the Owner Has Possession—General Rule.—The general rule seems to be that, where the person having the better title is in possession of any part of his land, either within or outside of the interlock, he is constructively in possession of all the land in conflict, except such part as is in the actual possession of the person claiming under the merely colorable title.³

Both Parties in Possession outside of Overlap.—Thus, where the instruments under which two rival claimants assert title describe in part the same land, and neither claimant is in actual possession of any part of the overlapping portion, but each is in actual possession of a part or all of that portion of the tract described in the instrument under which he claims which is not within the interference, the person who has the better title will be considered to be in constructive possession of the overlapping part.⁴

Both Parties in Possession of Part of Overlap.—And if both have actual possession of party was connected; a plat which covered part of the old grant and the other land; occupancy by the defendant, under that plat, of the part outside the old grant; a junior grant to the plaintiff, of all the land within the old grant; occupancy by him, for the statutory period, on a part of it outside of the defendant's plat after abandonment, by an agent of plaintiff's, of a possession which had been for a few years held on the part within the defendant's plat; entry by defendant upon the part within his plat covered by the old grant; action of trespass to try titles brought against him. It was held that as there was no *pedis possessio* of the part which was covered by both claims and by the old grant, but there was *pedis possessio* on either side outside of that parcel, the defendant's possession, being first extended to his whole claim, where it was not interrupted by an actual occupancy, attached again, as soon as the actual occupancy within his claim was abandoned, and prevented the extension of plaintiff's subsequent possession to the same part, which was thus already occupied by the prior virtual possession of defendant; and that upon this virtual possession the defendant might have maintained trespass *quare clausum fregit* against the person who had entered upon his claim and abandoned possession, at any time before that person had held ten years.

1. *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *Davis v. White*, 27 Vt. 751. See *Hodges v. Eddy*, 38 Vt. 327. In *Stevens v. Hollister*, 18 Vt. 294, 46 Am. Dec. 154, it was held that the doctrine of constructive possession can only be defeated by a subsequent actual adverse possession of a disseisor.

2. *Crispen v. Hannavan*, 50 Mo. 536; *Burns v. Swift*, 2 S. & R. (Pa.) 436.

3. See *McDonald v. Schneider*, 27 Mo. 405; *Waddle v. Stuart*, 4 Sneed (Tenn.) 534; *Napier v. Simpson*, 1 Overt. (Tenn.) 448; *Frisby v. Withers*, 61 Tex. 135; *Evitts v. Roth*, 61 Tex. 81.

Where two or more claimants are in possession of land, each actually occupying a part of the same, and each having color of title to the whole, the junior must yield to the senior possession or title, as to the part claimed by both through constructive possession under color of title, on the same principle that the possession of an adverse claimant must be confined to what he actually occupies, though he has color of title to the whole tract, if the rightful owner is still in the actual possession of any part of the same, or recovers possession of some part of it. *Sedgw. & Wait, Trial of Tit. to Land*, § 753.

4. *Kentucky*.—*Bodley v. Logan*, 2 J. J. Marsh. (Ky.) 254.

North Carolina.—*Fitzrandolph v. Norman*, Term (N. Car.) 127; *Smith v. Bryan*, Busb. (N. Car.) 183; *Bryan v. Carleton*, 1 Tayl. (N. Car.) 103; *Carson v. Mills*, 1 Dev. & B. (N. Car.) 546; *Williams v. Buchanan*, 1 Ired. (N. Car.) 535, 35 Am. Dec. 760; *Baker v. McDonald*, 2 Jones (N. Car.) 244; *McLean v. Murchison*, 8 Jones (N. Car.) 38; *McAllister v. Devane*, 76 N. Car. 57; *Kitchen v. Wilson*, 80 N. Car. 191; *Brady v. Maness*, 91 N. Car. 135; *McLean v. Smith*, 106 N. Car. 172.

Pennsylvania.—*Altemus v. Long*, 4 Pa. St. 254, 45 Am. Dec. 688.

South Carolina.—*Alston v. Collins*, 2 Spears (S. Car.) 459; *Renneker v. Warren*, 17 S. Car. 139.

Tennessee.—*White v. Lavender*, 5 Sneed (Tenn.) 648.

Virginia.—*Cline v. Catron*, 22 Gratt. (Va.) 378.

So in *Pennsylvania* it is held that where two surveys run into each other, and the owners of both are in possession, or both are out of possession, the law gives the constructive possession of the interference to him who has the better right. *Waggoner v. Hastings*, 5 Pa. St. 300; *Seigle v. Louderbaugh*, 5 Pa. St. 490; *Fitch v. Mann*, 8 Pa. St. 503.

a part of the overlap, the true owner is in constructive possession of all that is not actually occupied by the other.¹

Possession by Holder of Inferior Title inside, and by Owner outside, of Overlap.—Or even if the person having the merely colorable title is in actual possession of a portion of the interference, and the true owner is at the same time in actual possession of some part of that portion of his land which does not lie within the limits of the defective title, the latter has the constructive possession of all that part of the overlap which is not in the actual possession of the former.²

Where Owner does Not Have Possession—General Rule.—If the true owner has no actual possession of any part of his land, the claimant having the inferior title to the overlap may obtain constructive possession thereof by the actual occupancy of some part of it, but not by the actual occupancy of some part of his grant lying outside of the interlock.

Possession of Overlap by Claimant under Colorable Title.—Of course, if the person claiming under the inferior title is in actual possession of a part of the interference, and the true owner has actual possession of no part of his land, then the

1. *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201; *McLean v. Smith*, 106 N. Car. 172. See also *Green v. Harman*, 4 Dev. (N. Car.) 158.

2. *Hunnicut v. Peyton*, 102 U. S. 333. See also *Cline v. Catron*, 22 Gratt. (Va.) 378; *Turpin v. Saunders*, 32 Gratt. (Va.) 39. But see *Fox v. Hinton*, 4 Bibb (Ky.) 559; *Ware v. Bryant* (Ky., 1893), 21 S. W. Rep. 873; *Williams v. Miller*, 7 Ired. (N. Car.) 186; *Crech v. Jones*, 5 Sneed (Tenn.) 631; *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 497; *Bleidorn v. Pilot Mountain Coal, etc., Co.*, 89 Tenn. 204.

North Carolina Cases.—There is a series of cases in *North Carolina* in which, after stating the generally accepted rule that when a tract of land is, as to part, included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed, although not included in both deeds, the possession of the part included in both deeds is in him whose deed or patent is the oldest, the courts lay down the broad rule that if one of them is actually settled for the statutory period upon the part comprehended in both deeds he will obtain title by adverse possession, though his title was originally the weaker one. *Borrets v. Turner*, 2 Hayw. (N. Car.) 97; *Slade v. Griffin*, 2 Hayw. (N. Car.) 178; *Sawyer v. Sexton*, 2 Hayw. (N. Car.) 67; *Williams v. Buchanan*, 1 Ired. (N. Car.) 535, 35 Am. Dec. 760; *Bryan v. Carleton*, 1 Tayl. (N. Car.) 103; *Doe v. Morrison*, 1 Hawks (N. Car.) 467. It does not clearly appear from the reports of these cases whether there was an actual possession of the whole or of only part of the tract in dispute. But in *Green v. Harman*, 4 Dev. (N. Car.) 158, where the defendant claimed title by adverse possession to the whole of an overlap, although he had been in actual occupancy of only a part thereof, the court questioned whether "when the portion into which the actual entry is made, and possession taken, is very minute, so that an owner of reasonable diligence and ordinary vigilance might remain ignorant that it

included his land, or might fairly mistake the character of the possession, the disseisin shall extend beyond the occupancy." * * * As to the occupancy necessary to give adverse possession to the whole interference, *Ruffin, C.J.*, continued: "I think it may be properly declared that it must be of as much as will reasonably denote, both to the other proprietor and to the jury, that the party intended to usurp a possession beyond those boundaries to which his title is acknowledged by all parties. If the defendant had not a good title to adjoining land, his entry on the land of the lessor of the plaintiff would be distinct notice, and could not be deceptive. But when his possession for the most part is rightful, and admitted to be so, and only wrongful to a very inconsiderable extent, it seems to me that he cannot have the benefit of it beyond its actual bounds, unless from that and other circumstances the jury may reasonably infer that he intended to make open claim under his deeds to the land covered by both."

But in *Hamilton v. Icard*, 114 N. Car. 532, there is a dictum to the effect that occupation of the interference by those claiming under a grant is necessary in order to limit the constructive possession of one who is seated on the lappage and claims under color of title for the statutory period.

Actual Possession of One of Two Adjoining Tracts Not Extended by Construction to the Other.

—Where two adjoining parcels of land were conveyed to the same person by one deed, but separately described, and the tracts so conveyed extended side by side into the land of another who had the better title, but who, though in possession of that part of his land which was not within the overlap, was not in actual possession of any part of the interference, the actual possession by the grantee of the overlapping portion of one of the tracts, it was held, did not give constructive possession to the overlapping portion of the other parcel, although it adjoined the former. *Carson v. Mills*, 1 Dev. & B. (N. Car.) 546, 30 Am. Dec. 143.

possession of the former is not confined to his actual occupancy, but is coextensive with the boundaries of the land described in his conveyance.¹

Possession outside of Overlap by Such Claimant.—But if the actual possession of such claimant is of that part which does not come within the conflict, his possession will not, although the person having the better title is not in actual possession of any part of his tract, be extended by construction to that part which lies within the interference.²

1. *Fox v. Hinton*, 4 Bibb (Ky.) 559; *Whitley County Land Co. v. Lawson*, 94 Ky. 603; *Hamilton v. Icard*, 114 N. Car. 532; *Turpin v. Saunders*, 32 Gratt. (Va.) 39.

Subsequent Entry by Owner.—A subsequent entry of the true owner upon any part of his land is an ouster of the intruder from the part of which he has constructive possession. *Altemus v. Long*, 4 Pa. St. 254, 45 Am. Dec. 688; *Hunnicut v. Peyton*, 102 U. S. 333; *Evitts v. Roth*, 61 Tex. 81; *Parker v. Baines*, 65 Tex. 609; *Hull v. Woods* (Tex. Civ. App., 1894), 25 S. W. Rep. 458. And see *Boomer v. Gibbs*, 114 N. Car. 76. But in *Fox v. Hinton*, 4 Bibb (Ky.) 559, it was held that a subsequent entry made under the better title, but not within the interference, does not give the person making it the possession within the interference of either the part which was actually occupied under the merely colorable title, or of that part of which the prior occupant had constructive possession; the entry, to be good for such purpose, should be made upon the land included in the interference.

2. *United States*.—*White v. Burnley*, 20 How. (U. S.) 235. See also *Oliver v. Pullam*, 24 Fed. Rep. 130.

Kentucky.—*Smith v. Mitchel*, 1 A. K. Marsh. (Ky.) 207; *Voorhies v. Bridgeford*, 3 A. K. Marsh. (Ky.) 27; *Pogue v. M'Kee*, 3 A. K. Marsh. (Ky.) 128; *Franklin Academy v. Hall*, 16 B. Mon. (Ky.) 472; *Smith v. Frame*, 3 A. K. Marsh. (Ky.) 231; *King v. Hunt* (Ky., 1890), 13 S. W. Rep. 214.

Missouri.—*Schultz v. Lindell*, 30 Mo. 310.

North Carolina.—*Smith v. Ingram*, 7 Ired. (N. Car.) 175; *Boomer v. Gibbs*, 114 N. Car. 76.

Tennessee.—*Talbot v. M'Gavock*, 1 Yerg. (Tenn.) 262.

Texas.—*Peyton v. Barton*, 53 Tex. 298; *Bunton v. Cardwell*, 53 Tex. 408; *Parker v. Bains*, 59 Tex. 18; *Parker v. Baines*, 65 Tex. 611; *Meyer v. Kirlicks* (Tex. Civ. App., 1894), 25 S. W. Rep. 652.

Virginia.—*Koiner v. Rankin*, 11 Gratt. (Va.) 420.

No Actual Possession of Overlap by Either Claimant.—In *Trimble v. Smith*, 4 Bibb (Ky.) 257, which was an action of ejectment, the parties made an agreed case, from which it appears that the plaintiff derived title to the land in controversy under a patent bearing date the 2d of December, 1785, and the defendants under a patent of a later date, interfering in part with each other; that the defendants had settled upon and occupied for more than twenty years before the commencement of the action that part of the land included in their patent which was not within

the interference, but had not settled upon or occupied that part which was within the interference until within less than twenty years before the institution of the suit; and that the plaintiff had not, nor had any one under whom he claims, been in the actual possession of any part of the land covered by his patent, previous to the bringing of the action." Boyle, C. J., in delivering the opinion of the court, said: "The question presented by the agreed case is, whether the entry or settlement by the defendants upon that part of the land covered by their patent which is not within the interference between the two patents should be construed to give them the possession of the land included within the interference? For if it ought not to be so construed, then they were not in possession of the land in dispute for twenty years prior to the commencement of the action, and consequently the plaintiff's right of entry was not tolled. Where there is no adverse possession there can be no doubt that a man by an entry into part of a tract may acquire the possession of the whole, provided he may lawfully enter upon the whole; but to construe an entry into part to which he has right, to give him possession of another part to which he has no right, would be making an act which was right in itself tortious by construction. This would be wholly unwarranted by any precedent, and in direct violation of the principle of law which requires, where an act is done which is susceptible of a twofold construction, one of which is consistent with law and the other not, that the former should prevail."

Pennsylvania Doctrine as to Conflicting Surveys.—In *Pennsylvania*, where by statute as well as by the courts much force is given to surveys by a person going into adverse possession of lands, it was at one time held that where two surveys run into one another, and the junior warrant holder occupies his survey, although not that part which interferes with the other, and the elder one does not occupy his, the possession of the former extends, by operation of law, to the interference as well as to the rest of the tract. *Waggoner v. Hastings*, 5 Pa. St. 300; *Seigle v. Louderbaugh*, 5 Pa. St. 490; *Kite v. Brown*, 5 Pa. St. 291; *Hole v. Rittenhouse*, 19 Pa. St. 305.

But the case of *Waggoner v. Hastings*, 5 Pa. St. 300, which seems to have been the first *Pennsylvania* case in which the rule above stated was definitely asserted, was overruled by *Hole v. Rittenhouse*, 25 Pa. St. 491. And it is now, by this and later decisions, finally settled that there must in such case be an actual occupancy, or *pedis possessio*, within the interference, to give title by ad-

V. SUBJECTS OF ADVERSE POSSESSION—1. General Rule.—As a general rule, the property subject to adverse possession is realty held in private right. Special and exceptional instances occur in which peculiarities arise either from the nature of the right affected or from the character of the persons in whom the title is vested.¹

2. The Several Classes of Property Considered—*a.* PERSONALTY.—It has been held that adverse possession of a chattel for the period of limitations not only bars the remedy, but destroys the right, and vests such title in the possessor as will enable him to maintain an action for the possession of the chattel against the original owner.²

***b.* MINES.**—Title to a mine, mining claim,³ or quarry⁴ may be acquired by

verse possession. *Ament v. Wolf*, 33 Pa. St. 333; *Ewing v. Alcorn*, 40 Pa. St. 492; *O'Hara v. Richardson*, 46 Pa. St. 385; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115; *McArthur v. Kitchen*, 77 Pa. St. 62.

1. See sections immediately following.

2. Personal Property—Slaves—United States.—*Brent v. Chapman*, 5 Cranch (U. S.) 358.

Alabama.—*Sims v. Canfield*, 2 Ala. 555; *Doyle v. Boulter*, 7 Ala. 246; *Howell v. Hair*, 15 Ala. 194; *Newcombe v. Leavitt*, 22 Ala. 631. See also *Goodman v. Munks*, 8 Port. (Ala.) 84; *Benje v. Creagh*, 21 Ala. 151.

Georgia.—*Paschal v. Davis*, 3 Ga. 256; *Wynne v. Lee*, 5 Ga. 217.

Kentucky.—*Smart v. Baugh*, 3 J. J. Marsh. (Ky.) 363; *Thompson v. Caldwell*, 3 Litt. (Ky.) 136; *Stanley v. Earl*, 5 Litt. (Ky.) 281, 15 Am. Dec. 66; *Clarke v. Baker*, 7 J. J. Marsh. (Ky.) 194. See also *Cook v. Wilson*, Litt. Sel. Cas. (Ky.) 437; *Orr v. Pickett*, 3 J. J. Marsh. (Ky.) 269; *Middleton v. Carroll*, 4 J. J. Marsh. (Ky.) 143.

Mississippi.—*Clark v. Slaughter*, 34 Miss. 65.

South Carolina.—*Cockfield v. Hudson*, 1 Brev. (S. Car.) 311; *Gregg v. Bigham*, 1 Hill (S. Car.) 299, 26 Am. Dec. 181. See also *Cholett v. Hart*, 2 Bay (S. Car.) 156.

Tennessee.—*Kegler v. Miles*, 1 Mart. & Y. (Tenn.) 426, 17 Am. Dec. 819; *Wade v. Cantrell*, 1 Head (Tenn.) 346; *Bradford v. Caldwell*, 2 Head (Tenn.) 496; *Partee v. Badget*, 4 Yerg. (Tenn.) 174, 26 Am. Dec. 220; *Harderson v. Hays*, 4 Yerg. (Tenn.) 507; *Davis v. Mitchell*, 5 Yerg. (Tenn.) 281; *M'Donald v. M'Donald*, 8 Yerg. (Tenn.) 145; *Williams v. Walton*, 8 Yerg. (Tenn.) 387, 29 Am. Dec. 122; *McKissick v. McKissick*, 6 Humph. (Tenn.) 75; *Knight v. Jordan*, 6 Humph. (Tenn.) 101. See also *Turner v. Turner*, 2 Sneed (Tenn.) 27; *Elliott v. Holder*, 3 Head (Tenn.) 698; *Rogers v. Winton*, 2 Humph. (Tenn.) 178; *Turner v. Grainger*, 5 Humph. (Tenn.) 347; *Martin v. Youngblood*, 8 Humph. (Tenn.) 581; *Wheaton v. Weld*, 9 Humph. (Tenn.) 773; *Prince v. Broach*, 5 Sneed (Tenn.) 318.

Texas.—*Winburn v. Cochran*, 9 Tex. 123; *Cochrane v. Winburn*, 13 Tex. 143; *Epperson v. Young*, 19 Tex. 475; *Thurmond v. Trammell*, 28 Tex. 371, 91 Am. Dec. 321.

Virginia.—*Newby v. Blakey*, 3 Hen. & M. (Va.) 57; *Garland v. Enos*, 4 Munf. (Va.) 504; *Elam v. Bass*, 4 Munf. (Va.) 301; *Spotswood v. Dandridge*, 4 Hen. & M. (Va.) 139; *Layne v. Norris*, 16 Gratt. (Va.) 236.

See also *Garth v. Barksdale*, 5 Munf. (Va.) 101; *Shelby v. Guy*, 11 Wheat. (U. S.) 361; *Campbell v. Holt*, 115 (U. S.) 620.

Other Chattels.—*Morris v. Lyon*, 84 Va. 331; *Garrett v. Vaughan*, 1 Baxt. (Tenn.) 113; *Chapin v. Freeland*, 142 Mass. 383, 56 Am. Rep. 701; *Preston v. Briggs*, 16 Vt. 124; *Merrill v. Bullard*, 59 Vt. 389; *Bowyer v. Robertson* (Tex. Civ. App., 1895), 29 S. W. Rep. 916; *Connor v. Hawkins*, 71 Tex. 582.

Contracts.—The bar created by the statute of limitations does not extinguish or discharge a contract, but merely takes away the remedy provided for its enforcement. There is no such thing as adverse possession in the case of a contract. *Jones v. Jones*, 18 Ala. 248.

3. Mines.—*Harris v. Equator Min., etc., Co.*, 8 Fed. Rep. 863; *Pardee v. Murray*, 4 Mont. 234; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Stephenson v. Wilson*, 50 Wis. 95. See also *Nessler v. Bigelow*, 60 Cal. 98; *McTarnahan v. Pike*, 91 Cal. 540; *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37; and the title MINES AND MINING CLAIMS.

Where one has entered upon land under a claim of title founded upon a written instrument as a conveyance, his occupation of the land by mining operations, prosecuted as continuously as the nature of the business and the custom of the country will permit, constitutes an adverse possession. *Stephenson v. Wilson*, 50 Wis. 95, 37 Wis. 482; *Wilson v. Henry*, 40 Wis. 594, 35 Wis. 241. See also *Sydnor v. Palmer*, 29 Wis. 226.

Mere Digging for Coal in the Winter, and abandoning the property the rest of the year, will not constitute such permanent use and possession of wild lands as will defeat the title of a purchaser at a tax sale. *Jackson v. Stoetzel*, 87 Pa. St. 302.

4. Quarry.—*Colvin v. McCune*, 39 Iowa 502; *Moore v. Thompson*, 69 N. Car. 120.

The operations of building a shed, quarrying rock, erecting a lime-kiln, and cutting wood to burn it for the purpose of making lime on the land in dispute, continued interruptedly for more than seven years, constitute such a possession as will give a good title to the person claiming adversely under it. *Moore v. Thompson*, 69 N. Car. 120.

Where the claimant of a tract of timber and quarry land assumed entire possession, paid the taxes, cut timber and quarried stone, and permitted others to quarry stone thereon for payment, it was held that this

adverse possession. Adverse possession of the surface of the land does not necessarily include possession of the minerals below it, where the title to the latter has been severed by deed from that to the surface.¹

c. WATER.—The continuous and uninterrupted adverse possession and user of water for the statutory period will create title to such use. But a mere claim of a right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto. It is the actual appropriation, followed by open, notorious, continuous, and exclusive possession, under a claim of title, for the time limited by statute, that gives the right.²

d. EASEMENTS.—The adverse, uninterrupted, and exclusive use of an easement for the statutory period is sufficient to create a title to the easement.³ But the claim of a mere easement or other right in land, less than the entire fee, does not confer any adverse right to the fee. To have that effect under the statute, the claim must be for the entire title, exclusive of the title of any other person.⁴

Right of Way.—To acquire a right of way by prescription there must be an adverse use of the way for the statutory period, and this use must be continuous and as of right. If the use is interrupted by the owner of the land, by obstructions placed upon it, in the exercise of his right to prevent the use of the way, the continuity of the use is broken. Whether the interruption is acquiesced in by the claimant of the right of way, in such manner that the subsequent use must be regarded as permissive, is a question for the jury upon the facts.⁵

e. PUBLIC LANDS.—Adverse possession cannot be held as against the United States, and the mere possession of land the legal title to which is in the United States, although open, exclusive, and uninterrupted for the statutory period, creates no impediment to a recovery by the government, nor by

was adverse possession. *Colvin v. McCune*, 39 Iowa 503.

1. *Caldwell v. Copeland*, 37 Pa. St. 427, 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Plummer v. Hillside Coal, etc., Co.*, 160 Pa. St. 483; *Algonquin Coal Co. v. Northern Coal, etc., Co.*, 162 Pa. St. 114. See also *Kingsley v. Hillside Coal, etc., Co.*, 144 Pa. St. 613.

2. *Water.*—*Cox v. Clough*, 70 Cal. 345.

The full treatment of this portion of the law of adverse possession may be found under the title **WATERCOURSES**.

No Adverse User against United States.—There can be no adverse user of water so as to ripen into a prescriptive title thereto, as against the United States. *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Mathews v. Ferrea*, 45 Cal. 51; *Wilkins v. McCue*, 46 Cal. 656; *Vansickle v. Haines*, 7 Nev. 249. See also *Jatunn v. Smith*, 95 Cal. 154; and *infra*, this section, **Public Lands**.

3. **Easements.**—*Coolidge v. Learned*, 8 Pick. (Mass.) 504; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *Stearns v. Jones*, 12 Allen (Mass.) 582; *Mayville v. Wilcox*, 61 Hun (N. Y.) 223.

For a full discussion of this branch of the law of adverse possession see the title **EASEMENTS**.

Tunnel.—The use of a tunnel constructed under a road by license from the road trustees, in whom the soil of the road is vested, which has remained in the uninterrupted and exclusive possession of the constructors and their successors in title for the period of lim-

itations, is not a mere easement, but amounts to exclusive possession and occupation, which, being continued for the statutory length of time, will bar an action by the adjoining proprietors. *Bevan v. London Portland Cement Co.*, 3 Rep. 47, 67 L. T. 615.

Burial Lot.—The burial of a dead body is the only possession necessary to ultimately create complete ownership of the easement of a burial lot; and as long as the lot is enclosed as a burial-place, or even without enclosure, as long as gravestones stand marking the place as a burial-ground, the possession is necessarily actual, adverse, and notorious, and there can be no actual ouster of possession by an intruder, nor running of the statute of limitations in his favor, while such gravestones stand indicating the previous burial of another. *Hook v. Joyce*, 94 Ky. 450. See also *Bonham v. Loeb* (Ala., 1895), 18 So. Rep. 300; *Conger v. Weyant* (Supreme Ct.), 7 N. Y. Supp. 809.

4. *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48; *Dothard v. Denson*, 75 Ala. 482. See also *Roe v. Strong*, 107 N. Y. 350; *Coleman v. State*, 134 N. Y. 564, 47 N. Y. St. Rep. 609; *Texas, etc., R. Co. v. Wilson*, 83 Tex. 153.

5. **Right of Way.**—*Webster v. Lowell*, 142 Mass. 324.

The use of a private way without a claim of right to such use is not of such adverse character as will form the basis of presumptive right. *Dexter v. Tree*, 117 Ill. 532; *Drda v. Schmidt*, 47 Ill. App. 267. See the titles **EASEMENTS**; **HIGHWAYS**; **PRIVATE WAYS**.

one who, within the statutory period before bringing suit, has received a conveyance of the land.¹

f. STATE LANDS—General Rule.—Statutes of limitation do not run against a state unless by their terms the state is especially included within their operation. This is equally true of statutes of limitation barring the right of entry to lands after a certain period of adverse possession. Hence title to land owned by a state cannot be acquired by an adverse possession.²

1. Lands Owned by United States—United States.—*Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Lindsey v. Miller*, 6 Pet. (U. S.) 666; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, 50 Mo. 85; *Oaksmith v. Johnston*, 92 U. S. 343; *Sparks v. Pierce*, 115 U. S. 408. See also *Burgess v. Gray*, 16 How. (U. S.) 48; *Harrison v. Ulrichs*, 39 Fed. Rep. 654.

Alabama.—*Wright v. Swan*, 6 Port. (Ala.) 84; *Kennedy v. Townsley*, 16 Ala. 239; *Iverson v. Dubose*, 27 Ala. 418; *Farley v. Smith*, 39 Ala. 38; *Jones v. Walker*, 47 Ala. 175. See also *Dillingham v. Brown*, 38 Ala. 311.

California.—*Doran v. Central Pac. R. Co.*, 24 Cal. 245; *Mathews v. Ferrea*, 45 Cal. 51; *Gardiner v. Miller*, 47 Cal. 570; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Nessler v. Bigelow*, 60 Cal. 98; *Anzar v. Miller*, 90 Cal. 342; *McTarnahan v. Pike*, 91 Cal. 540.

Illinois.—*Cook v. Foster*, 7 Ill. 652. See also *Thompson v. Prince*, 67 Ill. 281; *Hughes v. Stevers*, 95 Ill. 391.

Iowa.—*Durham v. Hussman*, 88 Iowa 29. *Kansas.*—*Wood v. Missouri, etc., R. Co.*, 11 Kan. 323; *Janes v. Wilkinson* (Kan., 1895), 42 Pac. Rep. 735.

Missouri.—*Shepley v. Cowan*, 52 Mo. 559.

Ohio.—*Wood v. Ferguson*, 7 Ohio St. 288.

Wisconsin.—*Whitney v. Gunderson*, 31 Wis. 359; *Knight v. Leary*, 54 Wis. 459.

See also *Sater v. Meadows*, 68 Iowa 507; *Casey v. Anderson* (Mont., 1895), 42 Pac. Rep. 761; and *supra*, this section, *Water*.

Where the Legal Title to Land Remains in the United States until the patent is issued, the statute of limitations cannot be held to commence running prior to the date of the patent to such land. *Simmons v. Ogle*, 105 U. S. 271; *Farley v. Smith*, 39 Ala. 38; *Bonner v. Phillips*, 77 Ala. 427; *Wagnon v. Fairbanks* (Ala., 1895), 17 So. Rep. 20; *Wiggins v. Kirby* (Ala., 1895), 17 So. Rep. 354; *Gardiner v. Miller*, 47 Cal. 570; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Hagar v. Spect*, 48 Cal. 406; *Galindo v. Wittenmeyer*, 49 Cal. 12; *Manly v. Howlett*, 55 Cal. 94; *Ross v. Evans*, 65 Cal. 439; *Anzar v. Miller*, 90 Cal. 342; *Iowa Railroad Land Co. v. Adkins*, 38 Iowa 351; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92, 50 Mo. 85; *McIlhinney v. Ficke*, 61 Mo. 329; *Miller v. Dunn*, 62 Mo. 216; *Hammond v. Johnston*, 93 Mo. 198; *Smith v. McCorkle*, 105 Mo. 135. See also *Hammond v. Coleman*, 4 Mo. App. 307; *Mills v. Traver*, 35 Neb. 292; *Van Sickle v. Haines*, 7 Nev. 249; *Treadway v. Wilder*, 12 Nev. 108.

See further, as to the time when title from the United States is perfected, and hence when the statute of limitations begins to run, *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653; *Henshaw v. Bissell*, 15 Wall. (U. S.) 255; *Bicknell v. Comstock*, 113 U. S. 149; *Dilling-*

ham v. Brown, 38 Ala. 311; *San José v. Trimble*, 41 Cal. 536; *Mathews v. Ferrea*, 45 Cal. 51; *Wilkins v. McCue*, 46 Cal. 656; *Norris v. Moody*, 84 Cal. 143; *Jatunn v. Smith*, 95 Cal. 154; *Gay v. Ellis*, 33 La. Ann. 249; *Peting v. De Lore*, 71 Mo. 13; *Carroll v. Patrick*, 23 Neb. 834; *Steele v. Boley*, 6 Utah 308.

A Receipt containing a description of the land, issued by the receiver of the land office upon the payment of the purchase money to the government, is such a conveyance of the premises as section 4211 of the *Wisconsin Rev. Stat.* 1878 contemplates as a proper foundation for adverse possession. *Cawley v. Johnson*, 21 Fed. Rep. 492.

Land Office Certificates operate as a severance of the land from the public domain, and when accompanied by actual possession are sufficient evidence of title to support prescriptive rights based thereon against the holder of a patent subsequently issued. *Gay v. Ellis*, 33 La. Ann. 249.

The Right of Entry or Action of a person claiming under a patent from the United States, or any one succeeding to his rights, may be barred by adverse possession for the period of limitation. *Coker v. Ferguson*, 70 Ala. 284; *Hughes v. Stevers*, 95 Ill. 391.

The Statute of Limitations cannot Avail a Pre-emption Claimant, whose pre-emption claim is of land already held by a private individual under patent, or location and survey which would entitle him to a patent. *Clark v. Smith*, 59 Tex. 275. See also *Sutton v. Carabjal*, 26 Tex. 497; *Buford v. Bostwick*, 58 Tex. 63.

A Person in Possession in Subordination to the Title of the United States may hold adversely as to another claimant. *Francœur v. Newhouse*, 14 Sawy. (U. S.) 600. See also *Hayes v. Martin*, 45 Cal. 559.

2. State Lands—United States.—*Armstrong v. Morrill*, 14 Wall. (U. S.) 120; *Webber v. Harbor Com'rs*, 18 Wall. (U. S.) 57.

Alabama.—*Swann v. Lindsey*, 70 Ala. 507; *Swann v. Gaston*, 87 Ala. 569. See also *Miller v. State*, 38 Ala. 600; *Alabama State Land Co. v. Kyle*, 99 Ala. 474.

Delaware.—*Walls v. M'Gee*, 4 Harr. (Del.) 108.

Georgia.—*Brinsfield v. Carter*, 2 Ga. 143; *Smead v. Doe*, 6 Ga. 158; *Kirschner v. Western, etc., R. Co.*, 67 Ga. 760; *Glaze v. Western, etc., R. Co.*, 67 Ga. 761.

Kentucky.—*Chiles v. Calk*, 4 Bibb (Ky.) 554.

Louisiana.—*State v. Buck*, 46 La. Ann. 656.

Maine.—*Cary v. Whitney*, 48 Me. 516. See also *Kinsell v. Daggett*, 11 Me. 309.

Maryland.—*Hall v. Gittings*, 2 Har. & J. (Md.) 112.

Adverse Possession by Statute.—In several states statutes have been enacted limiting the period within which the state may maintain an action for the recovery of real estate which has been held adversely.¹

Ohio.—Wallace v. Miner, 6 Ohio 367; Duke v. Thompson, 16 Ohio 34. See also Clark v. Southard, 16 Ohio St. 408.

South Carolina.—State v. Arledge, 2 Bailey (S. Car.) 401, 23 Am. Dec. 145; Harlock v. Jackson, 3 Brev. (S. Car.) 254.

Texas.—Smith v. Power, 23 Tex. 29; Ellis v. State, 3 Tex. Civ. App. 170.

Virginia.—Staats v. Board, 10 Gratt. (Va.) 400; Levasser v. Washburn, 11 Gratt. (Va.) 572; Hurst v. Dulany, 84 Va. 701.

Hawaii.—Kahoomana v. Moehomia, 3 Hawaiian 635; Thurston v. Bishop, 7 Hawaiian 421. See also Harris v. Carter, 6 Hawaiian 195.

See also Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; Munshower v. Patton, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678; Troutman v. May, 33 Pa. St. 455; Wilson v. Hudson, 8 Verg. (Tenn.) 398; Coleman v. Thurmond, 56 Tex. 514.

Adverse possession might be set up against the lord proprietary of Maryland. Kelly v. Greenfield, 2 Har. & M. (Md.) 121; Russell v. Baker, 1 Har. & J. (Md.) 67. See also Hall v. Gittings, 2 Har. & J. (Md.) 114; Cheney v. Ringgold, 2 Har. & J. (Md.) 87.

Adverse Possession against State Board of Proprietors.—It has been held in *New Jersey* that title by adverse possession can be acquired against the board of proprietors. Cornelius v. Giberson, 25 N. J. L. 1; Yard v. Ocean Beach Assoc., 49 N. J. Eq. 306.

No Adverse Possession before Patent.—The defendant in ejectment may not avail himself of his possession anterior to the date of the plaintiff's patent. Chiles v. Calk, 4 Bibb (Ky.) 554; Jackson v. Vail, 7 Wend. (N. Y.) 125; Wallace v. Miner, 6 Ohio 367; Smith v. Power, 23 Tex. 29. See also Udell v. Peak, 70 Tex. 547.

It was held in *California* that the statute of limitations did not commence to run against title to marsh and overflowed lands founded upon a certificate of purchase from the state, until the lands had been certified to the state by the United States. Packard v. Moss, 63 Cal. 123.

As to the validity of a patent issued upon a land certificate not obtained in strict accordance with law, and the effect of such certificate as a foundation for adverse possession in *Texas*, see Spofford v. Bennett, 55 Tex. 293. See also League v. Rogan, 59 Tex. 427.

Land Covered by Water.—Adverse possession for twenty years of land covered by water, within the ebb and flow of the tide, where the soil is vested in the state, will not confer such title thereto as will enable a party to maintain trespass against one who enters thereon and catches fish without permission from the person claiming it. Sollers v. Sollers, 77 Md. 148, 20 L. R. A. 95. Compare, as to law in *Massachusetts*, Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132; Tufts v. Charlestown, 117 Mass. 401; Eastern R.

Co. v. Allen, 135 Mass. 13. See also Lakeman v. Burnham, 7 Gray (Mass.) 437.

Great Pond.—It was held in *Massachusetts* that a prescriptive right to lower the waters of a great pond, the title to which is in the commonwealth, might be acquired by the uninterrupted adverse exercise of this power by an individual for a great number of years, where such use amounts to no greater public nuisance than the abridgment of the ordinary use of the property by the public, and where there is a statute permitting the acquisition by disseisin of a complete title against the state. Atty.-Gen. v. Revere Copper Co., 152 Mass. 444. See also Hittinger v. Eames, 121 Mass. 539.

Permissive Possession.—Where a county had for forty years used for its purposes certain rooms in the state house, it was held, in an action of ejectment brought by the state to recover the rooms, that in the absence of proof to the contrary it would be presumed that such use and occupation were by sufferance merely, and without any intent on the part of the county to appropriate the rooms to itself; and that such mere permissive possession could not ripen into title. Pulaski County v. State, 42 Ark. 118.

1. Adverse Possession by Statute—Massachusetts.—As to the operation of adverse possession against the state, in *Massachusetts*, under Public Statutes 1882, c. 196, § 11, see Piper v. Richardson, 9 Met. (Mass.) 155; Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132.

Mississippi.—See Green v. Irving, 54 Miss. 450, 28 Am. Rep. 360.

New York.—"The people of the state will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either (1) the cause of action accrued within forty years before the action is commenced; or (2) the people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time." *New York Code Civ. Pro.*, § 362; People v. Arnold, 4 N. Y. 508; People v. Van Rensselaer, 9 N. Y. 317, reversing People v. Van Rensselaer, 8 Barb. (N. Y.) 189; People v. Livingston, 8 Barb. (N. Y.) 253; People v. Trinity Church, 22 N. Y. 44, affirming People v. Trinity Church, 30 Barb. (N. Y.) 537; Matter of State Reservation, 37 Hun (N. Y.) 537, 16 Abb. N. Cas. (N. Y.) 159, 395; Genesee Valley Canal R. Co. v. Slaughter, 49 Hun (N. Y.) 35, 14 Civ. Pro. Rep. (N. Y.) 420, 1 N. Y. Supp. 554, 17 N. Y. St. Rep. 241.

In an action of ejectment brought by the people, proof that the premises claimed were vacant and unoccupied within the period necessary to be shown to establish title by adverse possession against them is *prima facie* sufficient to authorize a recovery. Wendell v. Jackson, 8 Wend. (N. Y.) 283, 22 Am.

Presumption of Grant.—Under certain circumstances long-continued adverse possession of state lands may be sufficient to raise the presumption of a grant from the state.¹

g. PROPERTY OF MUNICIPAL AND QUASI-MUNICIPAL CORPORATIONS—(1) Property Dedicated to Public Uses—Highways, Streets, Parks, etc.—The decisions of the courts as to whether title to highways, streets, parks, or other public property can be acquired against a municipal or quasi-municipal corporation by adverse possession have been conflicting. Each side of the question is supported by a long list of authorities.²

Dec. 635; *People v. Denison*, 17 Wend. (N. Y.) 312. See also *Genesee Valley Canal R. Co. v. Slaight*, 14 Civ. Pro. Rep. (N. Y. Suprem. Ct.) 420, 1 N. Y. Supp. 554.

North Carolina.—Under the *North Carolina Code of Civil Procedure*, § 18, adverse possession for thirty years, which was formerly held to constitute a presumption of a grant, is an absolute bar against the state; but a person claiming title under this statute must show a privity between himself and his predecessors in possession, and also that the possession was held up to known and visible boundaries. *Price v. Jackson*, 91 N. Car. 11; *Phipps v. Pierce*, 94 N. Car. 514. See also *Mobley v. Griffin*, 104 N. Car. 112; *Walker v. Moses*, 113 N. Car. 527.

As to necessity for proof of these facts under former law, see *Yount v. Miller*, 91 N. Car. 331. See also note, *infra*, *Presumption of Grant*.

South Carolina.—As to present law in this state see *Busby v. Florida Cent., etc., R. Co.* (S. Car., 1895), 23 S. E. Rep. 50.

1. Presumption of Grant—North Carolina.—Prior to the Code of Civil Procedure of *North Carolina* adverse possession of land for thirty years was sufficient to raise a presumption of a grant from the state. *Fitzrandolph v. Norman*, Term (N. Car.) 127; *Rogers v. Mabe*, 4 Dev. (N. Car.) 180; *Candler v. Lunsford*, 4 Dev. & B. (N. Car.) 407; *Simpson v. Hyatt*, 1 Jones (N. Car.) 517; *Taylor v. Gooch*, 3 Jones (N. Car.) 467; *Wallace v. Maxwell*, 10 Ired. (N. Car.) 110, 51 Am. Dec. 380; *Reed v. Earnhart*, 10 Ired. (N. Car.) 516; *Melvin v. Waddell*, 75 N. Car. 361; *Davis v. McArthur*, 78 N. Car. 357; *Hill v. Overton*, 81 N. Car. 393; *Cowles v. Hall*, 90 N. Car. 330; *Dills v. Hampton*, 92 N. Car. 568; *Davidson v. Arledge*, 97 N. Car. 172; *Pearson v. Simmons*, 98 N. Car. 281. See also *Bullard v. Barksdale*, 11 Ired. (N. Car.) 461.

And it was not necessary that there should be privity or connection among the successive tenants. *Fitzrandolph v. Norman*, Term (N. Car.) 127; *Candler v. Lunsford*, 4 Dev. & B. (N. Car.) 407; *Reed v. Earnhart*, 10 Ired. (N. Car.) 516; *Davis v. McArthur*, 78 N. Car. 357; *Cowles v. Hall*, 90 N. Car. 330; *Davidson v. Arledge*, 97 N. Car. 172; *Pearson v. Simmons*, 98 N. Car. 281. See also *Taylor v. Gooch*, 3 Jones (N. Car.) 467; *Melvin v. Waddell*, 75 N. Car. 361; *Dills v. Hampton*, 92 N. Car. 568.

Break in Possession.—Under this law a break of several years in the continuity of the possession was not sufficient to rebut the presumption of a grant. *Reed v. Earn-*

hart, 10 Ired. (N. Car.) 516; *Cowles v. Hall*, 90 N. Car. 330; *Mallett v. Simpson*, 94 N. Car. 37. But see *Malloy v. Bruden*, 86 N. Car. 251.

Texas.—For the law in *Texas*, as to presumption of grant from the state arising from long-continued adverse possession, see *Lewis v. San Antonio*, 7 Tex. 288; *Herndon v. Casiano*, 7 Tex. 322; *Paul v. Perez*, 7 Tex. 338; *Smith v. Power*, 23 Tex. 29; *Taylor v. Watkins*, 26 Tex. 688; *Yancey v. Norris*, 27 Tex. 40; *Walker v. Hanks*, 27 Tex. 535; *Biencourt v. Parker*, 27 Tex. 558; *Forrest v. Woodall*, 33 Tex. 363; *Paschal v. Dangerfield*, 37 Tex. 273; *Turner v. Rogers*, 38 Tex. 582; *Von Rosenberg v. Haynes*, 85 Tex. 357; *Texas, etc., R. Co. v. Uribe*, 85 Tex. 386.

Exercise of Easement in Excess of Grant—Presumption.—Where an easement is granted to be exercised within certain limits, and the grantee openly exercises a privilege in excess of the limit continuously and without interruption for twenty-one years under a claim of right, the law may presume a second grant superadded to the first covering a larger right. *Gehman v. Erdman*, 105 Pa. St. 371. See also *Tracy v. Norwich, etc., R. Co.*, 39 Conn. 382; and for a general treatment of this branch of the subject see the title **PRESCRIPTION**.

2. Cases Holding that Title can be Acquired against Municipality—Arkansas.—*Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19, 5 Am. & Eng. Corp. Cas. 453; *Helena v. Hornor*, 58 Ark. 151.

Connecticut.—*Litchfield v. Wilmot*, 2 Root (Conn.) 288. See also *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86; *Brownell v. Palmer*, 22 Conn. 107; *Cody v. Fitzsimmons*, 50 Conn. 209; *Derby v. Alling*, 40 Conn. 410.

Kentucky.—*Rowan v. Portland*, 8 B. Mon. (Ky.) 232; *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610; *Alves v. Henderson*, 16 B. Mon. (Ky.) 131; *Cornwall v. Louisville, etc., R. Co.*, 87 Ky. 72; *Terrill v. Bloomfield* (Ky., 1893), 21 S. W. Rep. 1041. See also *Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *Bosworth v. Mt. Sterling* (Ky., 1890), 13 S. W. Rep. 920; *Kentucky Statutes* 1894, § 2546.

Michigan.—*Big Rapids v. Comstock*, 65 Mich. 78; *Essexville v. Emery*, 90 Mich. 183; *Flynn v. Detroit*, 93 Mich. 590.

Minnesota.—*St. Paul v. Chicago, etc., R. Co.*, 45 Minn. 387; *St. Paul, etc., R. Co. v. Minneapolis*, 45 Minn. 400; *Wayzata v. Great Northern R. Co.*, 50 Minn. 438. See also *St. Paul, etc., R. Co. v. Hinckley*, 53 Minn. 398.

Nebraska.—*Meyer v. Lincoln*, 33 Neb. 566; *Lewis v. Baker*, 39 Neb. 636.

(2) *Property Held in Private Right.*—By some of the courts holding the negative side of the question above mentioned, especially in the more recent deci-

Ohio.—*Cincinnati v. First Presbyterian Church*, 8 Ohio 299, 32 Am. Dec. 718; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Cincinnati v. Evans*, 5 Ohio St. 594; *Oxford Tp. v. Columbia*, 38 Ohio St. 87. See also *Lane v. Kennedy*, 13 Ohio St. 42.

Texas.—*Galveston v. Menard*, 23 Tex. 349; *Ostrom v. San Antonio*, 77 Tex. 345. But see *Coleman v. Thurmond*, 56 Tex. 514, *distinguishing Galveston v. Menard*, 23 Tex. 349. (See Act of 1887, Sayles' Texas Civil Statutes, art. 3200, by which the law in this state is changed.)

Vermont.—*Knight v. Heaton*, 22 Vt. 480.

West Virginia.—*Wheeling v. Campbell*, 12 W. Va. 36; *Taylor v. Phillippi*, 35 W. Va. 554; *Teass v. St. Albans*, 38 W. Va. 1.

See also *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109.

Street.—In *Wheeling v. Campbell*, 12 W. Va. 36, the city sought to enjoin the defendants from building a house upon a portion of the street, concerning the original dedication of which there was no question. The defendants set up an adverse possession, and were met by the doctrine of *nullum tempus*, but it was held that the city was barred. After an extended review of the authorities on both sides of this question, the court, by Johnson, J., said: "As we have seen, the courts of last resort in the states of Pennsylvania, New Jersey, Rhode Island, and Louisiana have held that the maxim *nullum tempus occurrit regi* is not restricted in its application to sovereignty, but that it applies to municipal corporations, as trustees of the rights of the public; while, on the other hand, the highest courts of Vermont, Massachusetts, New York, Connecticut, Maryland, Virginia, North Carolina, South Carolina, Mississippi, Texas, Missouri, Kentucky, Ohio, Illinois, and Iowa have restricted the application of the maxim to sovereignty alone; and most of said courts have in express terms, in cases requiring the decision, held that municipal corporations, like natural persons, are subject to limitation statutes. While able judges have held the former doctrine, we have Chancellor Kent, Judges Redfield, Marshall, Moncure, Ranney, and other eminent jurists holding to the latter; and Judge Dillon, perhaps no less distinguished than any of the others, on both sides of the question."

Where lot owners are allowed by statute to use a portion of the street in front of their lots in a prescribed manner, a long-continued use inconsistent with or in violation of the statute will establish a right to claim the land so used by adverse possession. *Flynn v. Detroit*, 93 Mich. 590.

Alley.—It was held in *Texas* that an action brought by a city to recover an alley dividing a city block was barred by ten years' adverse possession thereof, such alleys being expressly excepted from the operation of the Act of 1887 (Sayles' Civ. Stat., art. 3200), providing that limitation will not affect a city as to lands, streets, sidewalks, grounds, etc. *Fol-*

som v. McGregor (Tex. Civ. App., 1895), 30 S. W. Rep. 846.

Town Site.—A party who has been in the open, notorious, exclusive, adverse possession of a portion of a town site for a period of time sufficient to bar an action against him to recover possession thereof, thereby acquires an absolute title to said land, and may protect his possession by injunction against unlawful acts of the city authorities in attempting to open streets. *Schock v. Falls City*, 31 Neb. 599.

Public Square.—Where the original proprietor of a city remained in open and adverse possession of a public square, with the knowledge of the city, for the statutory period for the limitation of real actions, and there was some doubt as to whether the land had ever been dedicated to the public, it was held that the right of the city to maintain an action for the recovery thereof was barred. *Pella v. Scholte*, 24 Iowa 283, 95 Am. Dec. 729. In delivering the opinion of the court Dillon, C. J., said: "Of course it is well understood that statutes of limitations do not constructively apply to the state or sovereignty. But the principle has not, so far as we know, been extended to municipal or public corporations. On the contrary, it has been expressly held that these corporations are within the statute of limitations the same as natural persons" (citing cases in *Ohio*, *Kentucky*, and *New York*).

"Whether there may not be some limitations on this general doctrine, arising out of the want of knowledge of the public corporation or its officers of its rights, or of the adverse right sought to be asserted against it, we need not stop to examine. For in this case the right claimed by the defendant has been openly asserted by him, and fully known to the city ever since its first organization. The present case is, therefore, a proper one for the application of the statute, or the principle of repose upon which it rests. * * * In conclusion, it is deemed proper to add that the foregoing views in relation to the statute of limitations, and adverse possession, are to be taken in connection with the special facts of this case, and would not necessarily apply to a case where the dedication was *general, unlimited, and for the whole public*, and not *restricted*, or for the primary benefit of the contemplated municipality, and hence under its special control and guardianship; or to a case where the public corporation was ignorant of its rights or those of the public, or that these had been encroached upon, or that a hostile right was being asserted against it."

See also the view of the writer of the foregoing opinion in 2 Dillon Munic. Corp. (4th ed.), § 677; and also *Wheeling v. Campbell*, 12 W. Va. 36; *Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19, 5 Am. & Eng. Corp. Cas. 453, where these views in connection with each other are criticised apparently without reference to the qualification expressed in the opinion just quoted.

sions, a distinction is made between property held by a municipality in a private capacity and that held for the benefit of the whole public, strictly so called.

Highway.—Under the Public Statutes of *Massachusetts* (1882), c. 54, § 1, it was held that where fences had been maintained within the limits of a highway under a claim of right for more than seventy years, the owner acquired an absolute right to continue them there, as against the public. *Cutter v. Cambridge*, 6 Allen (Mass.) 20. See also, as to the construction of a similar statute in *Maine* (Rev. Stat. 1883, c. 18, § 95), *Stetson v. Bangor*, 73 Me. 357; *Charlotte v. Pembroke Iron Works*, 82 Me. 391.

It was held in *Webber v. Chapman*, 42 N. H. 326, 80 Am. Dec. 111, that enclosing and occupying a highway adversely, uninterruptedly, and under a claim of right, for more than twenty years, will vest in the occupant a prescriptive right to the land as against the public and all persons claiming any public right or easement therein. The doctrine established in this case has since been abrogated by statute. Pub. Stat. *New Hampshire* 1891, c. 77, § 7. See also *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513.

Cases Holding that Title cannot be Acquired against Municipality.—*Alabama*.—*Reed v. Birmingham*, 92 Ala. 339; *Webb v. Demopolis*, 95 Ala. 116; *Ham v. Dadeville* (Ala., 1893), 14 So. Rep. 9.

California.—*Hoadley v. San Francisco*, 50 Cal. 275; *People v. Pope*, 53 Cal. 437; *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, 6 Am. & Eng. Corp. Cas. 115; *San Leandro v. Le Breton*, 72 Cal. 170; *Yolo County v. Barney*, 79 Cal. 375, 12 Am. St. Rep. 152; *Orefia v. Santa Barbara*, 91 Cal. 621; *Board of Education v. Martin*, 92 Cal. 209; *San Francisco v. Bradbury*, 92 Cal. 414; *Archer v. Salinas*, 93 Cal. 43; *Mills v. Los Angeles*, 90 Cal. 522; *Ames v. San Diego*, 101 Cal. 390.

Illinois.—*Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479. See also *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Piatt County v. Goodell*, 97 Ill. 84; *Lee v. Mound Station*, 118 Ill. 304; *Chicago v. Middlebrooke*, 143 Ill. 265.

Indiana.—*Brooks v. Riding*, 46 Ind. 15; *Sims v. Frankfort*, 79 Ind. 446; *Cheek v. Aurora*, 92 Ind. 107, 4 Am. & Eng. Corp. Cas. 512; *Wolfe v. Sullivan*, 133 Ind. 331; *Schmidt v. Draper*, 137 Ind. 249. See also *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 117; *Greene County v. Huff*, 91 Ind. 333; *Hamilton v. State*, 106 Ind. 361; *Collett v. Vanderburgh County*, 119 Ind. 27.

Louisiana.—*Thibodeaux v. Maggioli*, 4 La. Ann. 73; *New Orleans v. Magnon*, 4 Martin (La.) 2; *Ingram v. Police Jury*, 20 La. Ann. 226; *Shreveport v. Walpole*, 22 La. Ann. 526; *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217.

Mississippi.—*Vicksburg v. Marshall*, 59 Miss. 563. Compare *Clements v. Anderson*, 46 Miss. 581.

Missouri.—The *Missouri* Act of 1865 (Rev. Stat. 1889, § 6772) provides that "nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered, or appropriated to any public, pious,

or charitable use, or to any lands belonging to this state." *State v. Warner*, 51 Mo. App. 174; *St. Louis v. Missouri Pac. R. Co.*, 114 Mo. 13; *Williams v. St. Louis*, 120 Mo. 403.

This act is not retrospective in its operation. *Abernathy v. Dennis*, 49 Mo. 468; *School Directors v. Goerges*, 50 Mo. 194; *McCartney v. Alderson*, 54 Mo. 320; *Connecticut Mut. L. Ins. Co. v. St. Louis*, 98 Mo. 422. See also *St. Charles County v. Powell*, 22 Mo. 525; *Wickersham v. Woodbeck*, 57 Mo. 59; *Budd v. Collins*, 69 Mo. 129.

New Jersey.—*Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 547; *Cross v. Morristown*, 18 N. J. Eq. 305; *Tainter v. Morristown*, 19 N. J. Eq. 46; *State v. Trenton*, 36 N. J. L. 198; *Price v. Plainfield*, 40 N. J. L. 608.

New York.—*Driggs v. Phillips*, 103 N. Y. 77.

Pennsylvania.—*Com. v. Alburger*, 1 Whart. (Pa.) 469; *Rung v. Shoneberger*, 2 Watts (Pa.) 23, 26 Am. Dec. 95; *Barter v. Com.*, 3 P. & W. (Pa.) 253; *Com. v. McDonald*, 16 S. & R. (Pa.) 390; *Penny Pot Landing v. Philadelphia*, 16 Pa. St. 79; *Kopf v. Utter*, 101 Pa. St. 27; *Com. v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599. See also *Susquehanna County v. Deans*, 33 Pa. St. 131; *Kittaning Academy v. Brown*, 41 Pa. St. 269; *Philadelphia v. Philadelphia, etc., R. Co.*, 58 Pa. St. 253; *Stevenson's Appeal* (Pa., 1886), 6 Atl. Rep. 266.

Rhode Island.—*Simmons v. Cornell*, 1 R. I. 519; *Almy v. Church* (R. I., 1893), 26 Atl. Rep. 58.

South Carolina.—*Crocker v. Collins*, 37 S. Car. 327.

Virginia.—*Taylor v. Com.*, 29 Gratt. (Va.) 780; *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860.

See also *Grogan v. Hayward*, 4 Fed. Rep. 161; *Simplot v. Chicago, etc., R. Co.*, 16 Fed. Rep. 350; *District of Columbia v. Washington, etc., R. Co.*, 1 Mackey (D. C.) 361; *Devaux v. Detroit, Harr. (Mich.)* 98; *Sims v. Chattanooga*, 2 Lea (Tenn.) 694; *Memphis v. Lenore*, 6 Coldw. (Tenn.) 412.

In *Com. v. Alburger*, 1 Whart. (Pa.) 469, Sergeant, J., said: "Individuals may reasonably be held to a limited period to enforce their right against adverse occupants, because they have interest sufficient to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right."

In *Richmond v. Poe*, 24 Gratt. (Va.) 149, where the holder of a lot and those under whom he claimed had been in possession by actual enclosure for more than sixty years, and there was no proof that the original owner had ever dedicated the land to the public, and the city had never been in possession, the city was enjoined from interfering with the land in question for the purpose of widening the street, unless and until it should acquire the legal right to do so in the mode

These courts, while maintaining that no encroachment by an individual, however long continued, upon property held on a public trust and dedicated

prescribed by law. The court, in affirming the decree of the court below, adopted the opinion of the chancellor, who rendered the decree in the lower court. In this opinion the chancellor said: "But in this case the ground was enclosed, and there was adverse possession for over thirty-five years, acquiesced in by the city; and this would have destroyed the right of the city, if it ever existed." This case has been cited (see *Wheeling v. Campbell*, 12 W. Va. 36) as sustaining the doctrine that adverse possession will operate against a municipal corporation, but it is not noticed in the Virginia cases holding the contrary. See also *Devaux v. Detroit*, Harr. (Mich.) 98; *Varick v. New York*, 4 Johns. Ch. (N. Y.) 53; *Manchester Cotton Mills v. Manchester*, 25 Gratt. (Va.) 825.

The Enclosure and Occupation of a Portion of a Street by an adjoining lot owner and those under whom he claims do not destroy the rights of the public in such strip of ground and vest the title thereto in the party so enclosing it. *Brooks v. Riding*, 46 Ind. 15.

No Prescription for Public Nuisance.—Since the occupation of a highway by an individual is a nuisance which no lapse of time will enable him to prescribe, such occupation, though continuing for twenty years, will not vest title thereto in the occupant, nor enable him to maintain an action of trespass against the city authorities for removing a building placed thereon by him. *Driggs v. Phillips*, 103 N. Y. 77. See also *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *Walker v. Caywood*, 31 N. Y. 51; *Kellogg v. Thompson*, 66 N. Y. 88.

But a simple encroachment continuing for thirty years, but not constituting a public nuisance, cannot be abated as such by the commissioners of highways. *Peckham v. Henderson*, 27 Barb. (N. Y.) 207.

Partial Encroachment on Public Road.—Where there is a continued use of the part of the road left open, and there is nothing to authorize a presumption that any part of it had been abandoned or would not be occupied as soon as the public convenience should require, a partial encroachment by an adjacent owner by putting a fence or planting a hedge within the legal limits of the road, though continued for many years, does not constitute such adverse possession as will confer title. *Fox v. Hart*, 11 Ohio 414; *Lane v. Kennedy*, 13 Ohio St. 42; *McClelland v. Miller*, 28 Ohio St. 488. See also *Webb v. Butler County*, 52 Kan. 375; *Nail, etc., Co. v. Furnace Co.*, 46 Ohio St. 544; *State v. Wertzel*, 62 Wis. 184.

The use by adjoining landowners of the sides of a public highway by sowing grain or pasturing cattle thereon does not of itself show either an abandonment of the road by the public or its adverse possession by the person so using it. *Watkins v. Lynch*, 71 Cal. 21.

Where a railroad company was empowered to construct its road across a public highway on condition that the usefulness of the highway would not be impaired, it was held, in

an action to secure the performance of such condition, that the statute of limitations was not an available defense. *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338.

Adverse User of Abandoned Highway.—Where a private right of way by prescription was claimed over what had formerly been a public highway, but had been abandoned and fenced up, it was held that the right of way could have been acquired only by adverse user, which must have commenced after the abandonment of the highway. *Black v. O'Hara*, 54 Conn. 17. See also *Flick's Estate (Pa. Orph. Ct.)*, 6 Kulp. 329.

Where the state began the construction of a canal, but before its completion conveyed its right therein to a corporation for public purposes, and the corporation abandoned it as a highway, and abutting lot owners filled up the channel and retained exclusive and continuous possession of the land for more than twenty years, it was held that they acquired title thereto by prescription, as against one asserting a mere private proprietary interest therein. *Collett v. Vanderburgh County*, 119 Ind. 27.

Gate across Private Road—South Carolina.—A gate, which may be opened and shut at pleasure, erected by the owner of the land across a private road used by the public, is not such an obstruction as will extinguish the right of way, however long it may be continued. *Barnwell v. Magrath*, 1 McMull. (S. Car.) 174, 36 Am. Dec. 254; *Bowen v. Learn*, 6 Rich. (S. Car.) 298; *State v. Pettis*, 7 Rich. (S. Car.) 390.

Navigable River.—The plea of prescription is not available in favor of parties obstructing the navigation of a river used as a public highway. *Olive v. State*, 86 Ala. 88; *Ingram v. Police Jury*, 20 La. Ann. 226; *Arundel v. McCulloch*, 10 Mass. 70. See the title **NAVIGABLE WATERS.**

Where the Possession is Not Adverse, but under and according to the rights of a municipality, or not inconsistent with them, the rights of the latter are not barred by one not having legal title. *Little Rock v. Wright*, 58 Ark. 142; *Hempsted v. Huffman*, 84 Iowa 398; *Olean v. Steyner*, 135 N. Y. 341, 48 N. Y. St. Rep. 66; *Kittanning Academy v. Brown*, 41 Pa. St. 269; *Carter v. LaGrange*, 60 Tex. 636; *Reilly v. Racine*, 51 Wis. 526. See also *Marble v. Price*, 54 Mich. 466; *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286.

The mere permitting the original dedicatory to remain in possession of a public street or square, where he at the time disclaims hostility to the public, would not be a bar under the statute of limitations, even if the statute were applicable in such cases. *Lee v. Mound Station*, 118 Ill. 304. See also *Little Rock v. Wright*, 58 Ark. 142.

Continuous possession of land laid out for a street, but never completed as such, though kept up for more than twenty years by one holding no deed from any former occupant, where such possession is not inconsistent with

to the public use, confers any title on the adverse occupant, but is a public nuisance, and is abatable as such,¹ yet hold that as to property of which the legal title is in the municipality, and which may be alienated by it, the municipality is subject to limitation laws to the same extent as private individuals.²

(3) *Equitable Estoppel*.—In cases where the circumstances would make it highly inequitable or oppressive to enforce public rights to property dedicated to the use of the public which has been encroached upon by private individuals, the courts occasionally interpose by holding the municipality estopped from doing so.³

the rights of the city, is not such adverse possession as will affect the rights of the city authorities to complete the street. *Henshaw v. Hunting*, 1 Gray (Mass.) 203.

The grant to a railroad of a joint and mutual use of a highway with the public cannot be set up as a bar under the statute of limitations, such use by the railroad not being adverse. *Pittsburg, etc., R. Co. v. Reich*, 101 Ill. 157. See also *Indianapolis, etc., R. Co. v. Ross*, 47 Ind. 25.

Admission of Right of Public.—Where a person who has obstructed a highway by placing fences thereon has admitted during the period of limitations the right of the public to the land as a highway by promising to remove the fences, he cannot claim title to the land by adverse possession. *Devoe v. Smeltzer*, 86 Iowa 385.

Incomplete Dedication.—Where the dedication of land to the public is not made complete by acceptance, such land is not exempt from the running of the statute of limitations in favor of an adverse holder. *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542.

1. See cases cited in note immediately preceding. See also 2 Dillon Munic. Corp. (4th ed.), § 675.

2. **Land Held in Private Right—California**.—*San Francisco v. Straut*, 84 Cal. 124; *Ames v. San Diego*, 101 Cal. 390.

Illinois.—*Piatt County v. Goodell*, 97 Ill. 84; *Chicago v. Middlebrooke*, 143 Ill. 265.

Indiana.—*Bedford v. Willard*, 133 Ind. 562; *Bedford v. Green*, 133 Ind. 700.

Rhode Island.—*Mowry v. Providence*, 10 R. I. 52.

See also *Pella v. Scholte*, 24 Iowa 298, 95 Am. Dec. 729; *Davies v. Huebner*, 45 Iowa 574; *Simplot v. Chicago, etc., R. Co.*, 16 Fed. Rep. 350; *Cincinnati v. First Presbyterian Church*, 8 Ohio 299, 32 Am. Dec. 718; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Oxford Tp. v. Columbia*, 38 Ohio St. 87; 2 Dillon Munic. Corp. (4th ed.), § 675.

See criticism of this doctrine in *Wheeling v. Campbell*, 12 W. Va. 36.

Illustrations—Swamp Land.—Where a person acquired claim and color of title at a tax sale to swamp land belonging to a county, in which the general public had no interest in common with the citizens of the county, and paid the taxes thereon, and remained in possession a number of years under such claim and color of title, it was held that the rights of the county in the land were barred by the statute of limitations. *Piatt County v. Goodell*, 97 Ill. 84.

Beach and Water-lot Property in which the city has the legal estate for a term of years may be acquired by adverse possession. *San Francisco v. Straut*, 84 Cal. 124.

Poor-house Tract.—Where the city granted a tract of land to the borough of Erie, Pa., reserving a certain number of acres to be selected by the commissioners for a poor-house for Erie county, it was held that adverse possession of a strip left after the location of the poor-house tract would bar the title of the borough to such strip. *Evans v. Erie County*, 66 Pa. St. 222. In this case the court, by Sharswood, J., said, without any reference to any former *Pennsylvania* decisions to the contrary: "That the statute of limitations runs against a county or other municipal corporation, we think cannot be doubted. The prerogative is that of the sovereign alone: *nullum tempus occurrit reipublica*. Her grantees, though artificial bodies created by her, are in the same category with natural persons."

Burying-ground.—Where land which had been dedicated by a city for burying-ground, training-ground, etc., had been adversely occupied for the statutory period of limitations, it was held that title thereto might be acquired by the adverse occupant, the dedication being a dedication to a charitable use, not for the whole public, but for a limited portion thereof only. *Mowry v. Providence*, 10 R. I. 52.

Compare, as to—

School-house Site, reserved by the city for its use, *Board of Education v. Martin*, 92 Cal. 209. But see *Oxford Tp. v. Columbia*, 38 Ohio St. 87; *Hargis v. Congressional Tp.*, 29 Ind. 70.

Engine Lot reserved for use of city, *San Francisco v. Bradbury*, 92 Cal. 414.

Hospital Site, purchased by the board of supervisors of a county and dedicated to the public use, *Yolo County v. Barney*, 79 Cal. 375, 12 Am. St. Rep. 152.

3. **Equitable Estoppel**.—*Chicago, etc., R. Co. v. Joliet*, 79 Ill. 25; *Chicago, etc., R. Co. v. People*, 91 Ill. 251; *People v. Maxton*, 38 Ill. App. 152; *Collett v. Vanderburgh County*, 119 Ind. 27; *Hamilton v. State*, 106 Ind. 361; 2 Dillon Munic. Corp. (4th ed.), § 675. See also *Winnetka v. Prouty*, 107 Ill. 218; *Lee v. Mound Station*, 118 Ill. 304; *Greene County v. Huff*, 91 Ind. 333; *Bell v. Burlington*, 68 Iowa 296; *Manko v. Chambersburgh*, 25 N. J. Eq. 168; *Crocker v. Collins*, 37 S. Car. 327; *Sims v. Chattanooga*, 2 Lea (Tenn.) 694.

Illustrations.—Where the owner of land ad-

VI. EFFECT OF ADVERSE POSSESSION.—By adverse possession of land for the statutory period of limitation the adverse holder acquires a title in fee simple which is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title, but to divest his estate and vest it in the party holding adversely for the required period of time,¹ so that he may

joining a highway, relying upon a survey duly made and recognized by the public as correct, made valuable improvements on his land with reference to the line thus established, and remained in open and notorious possession for more than ten years, it was held that although a resurvey made the line of his land extend several feet into the highway, so long as the improvements did not obstruct the road, nor prevent any necessary improvement thereof, the authorities might be enjoined from removing them. *Crismon v. Deck*, 84 Iowa 344.

In an action to recover damages resulting from the removal by the city officers of a portion of a building erected within the street lines, where it appeared that the owner had in good faith placed his building upon the apparent and reputed line of the street as it was shown to him by the city surveyor, and had from the time of the erection of the building continued for many years in the uninterrupted, exclusive, and adverse possession of the ground, it was held that the plaintiff could recover. *Cincinnati v. Evans*, 5 Ohio St. 594.

In *Lane v. Kennedy*, 13 Ohio St. 42, Peck, J., said, with reference to the case last cited: "The erection of such a building in such a place was ample notice to the city authorities that he thereby intended a permanent appropriation to his private and individual benefit of a portion of the public easement, and called for immediate and effective measures upon their part to prevent it. The case was, in this view of it, rightly determined; but as will be seen by a reference to the facts therein stated, it might with equal if not greater propriety have been placed upon the ground of an estoppel *in pais* on the part of the city authorities, the building having been located by the city surveyor, and upon lines previously established and built upon." See also *Elster v. Springfield*, 49 Ohio St. 82.

Absence of Estoppel—Illustrations.—The occupation of a public street under a baseless claim of right, by the construction of a mill-race therein, without any inducement or encouragement from the city, though continued without protest for ten years, does not estop the city from setting up a claim for the use of the street and removing the obstruction. *Waterloo v. Union Mill Co.*, 72 Iowa 437; *Davies v. Huebner*, 45 Iowa 575; *Bell v. Burlington*, 68 Iowa 296.

Where there had not been a total cessation of the use of a street by the public, it was held that the occupancy of a small space in the street by structures of a temporary character not inconsistent with the right of the public would not estop the city from demanding the removal of such structures. *Check v. Aurora*, 92 Ind. 107.

Merely permitting the owner of the abut-

ting lot to partially enclose an unopened street, and to occupy it for sixteen years, does not estop the city to insist upon its rights therein. *Solberg v. Decorah*, 41 Iowa 501.

Doctrine of Equitable Estoppel Rejected—Alabama.—A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction. *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62.

1. Adverse Possession Vests Title—England.—*Taylor v. Horde*, 1 Burr. 60, 2 Smith Lead. Cas. 606; *Doe v. Prosser*, Cowp. 217; *Tarzwel v. Barnard*, Cowp. 595; *Stokes v. Berry*, 2 Salk. 421 (reported in *Ld. Raym.* 741, as *Stocker v. Berney*); *Beckford v. Wade*, 17 Ves. Jr. 87.

United States.—*Leffingwell v. Warren*, 2 Black (U. S.) 599; *Jackson v. Huntington*, 5 Pet. (U. S.) 402; *Bicknell v. Comstock*, 113 U. S. 149; *Probst v. Board of Domestic Missions*, 129 U. S. 182; *Sharon v. Tucker*, 144 U. S. 548; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586; *Croxall v. Shererd*, 5 Wall. (U. S.) 268; *Stellwagen v. Tucker*, 144 U. S. 548.

Alabama.—*Doe v. Eslava*, 11 Ala. 1028; *Barclay v. Smith*, 66 Ala. 230; *Hoffman v. White*, 90 Ala. 354; *Newsome v. Snow*, 91 Ala. 641, 24 Am. St. Rep. 934; *Lucy v. Tennessee, etc., R. Co.*, 92 Ala. 246; *Murray v. Hoyle*, 92 Ala. 561.

Arkansas.—*Wilson v. Spring*, 38 Ark. 181.

California.—*Simson v. Eckstein*, 22 Cal. 580; *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205; *Langford v. Poppe*, 56 Cal. 73; *Sharp v. Blankenship*, 59 Cal. 288; *Johnson v. Brown*, 63 Cal. 391; *Furlong v. Cooney*, 72 Cal. 322.

Connecticut.—*Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Price v. Lyon*, 14 Conn. 279; *Sherwood v. Barlow*, 19 Conn. 471; *Thill v. Bishop*, 38 Conn. 494; *Clark v. Gilbert*, 39 Conn. 94.

Florida.—*Doe v. Roe*, 13 Fla. 602.

Georgia.—*Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *Doe v. Lancaster*, 5 Ga. 39.

Illinois.—*Turney v. Chamberlain*, 15 Ill. 272; *Hinchman v. Whetstone*, 23 Ill. 185; *Weber v. Anderson*, 73 Ill. 439; *Kerr v. Hitt*, 75 Ill. 51; *Hubbard v. Stearns*, 86 Ill. 35; *La-Valle v. Strobel*, 89 Ill. 370; *Faloon v. Simshauser*, 130 Ill. 649; *East St. Louis, etc., R. Co. v. Nugent*, 147 Ill. 254.

- Indiana*.—Bowen v. Preston, 48 Ind. 367; Brown v. Anderson, 90 Ind. 93; Roots v. Beck, 109 Ind. 472; Riggs v. Riley, 113 Ind. 208; Irely v. Mater, 134 Ind. 238; McKinney v. Lanning, 139 Ind. 170; Tewksbury v. Howard, 138 Ind. 103, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 301.
- Iowa*.—DeLong v. Mulcher, 47 Iowa 445; Williams v. Thomas, 65 Iowa 183; Snell v. Iowa Homestead Co., 59 Iowa 701.
- Kentucky*.—Chiles v. Jones, 4 Dana (Ky.) 479; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98; Marshall v. McDaniel, 12 Bush (Ky.) 378; Logan v. Bull, 78 Ky. 607; Sutton v. Pollard (Ky., 1895), 29 S. W. Rep. 637.
- Maine*.—School Dist. No. 4 v. Benson, 31 Me. 381, 52 Am. Dec. 618.
- Maryland*.—Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115; Stump v. Henry, 6 Md. 201, 61 Am. Dec. 300.
- Massachusetts*.—Steel v. Johnson, 4 Allen (Mass.) 425; Stearns v. Hendersass, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; Morse v. Sherman, 155 Mass. 222.
- Michigan*.—Bunce v. Bidwell, 43 Mich. 545.
- Minnesota*.—Seymour v. Carli, 31 Minn. 81; Brown v. Morgan, 44 Minn. 432; Dean v. Goddard, 55 Minn. 290.
- Mississippi*.—Ellis v. Murray, 28 Miss. 129; Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Dixon v. Cook, 47 Miss. 220; Niles v. Davis, 60 Miss. 750; Geohegan v. Marshall, 66 Miss. 676.
- Missouri*.—Biddle v. Mellon, 13 Mo. 335; Blair v. Smith, 16 Mo. 273; Schultz v. Arnot, 33 Mo. 172; Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Merchants' Bank v. Evans, 51 Mo. 335; Dalton v. St. Louis Bank, 54 Mo. 105; Barry v. Otto, 56 Mo. 177; Ridgeway v. Holliday, 59 Mo. 444; Lynde v. Williams, 68 Mo. 360; Allen v. Mansfield, 82 Mo. 688.
- Nebraska*.—Horbach v. Miller, 4 Neb. 31; Gatling v. Lane, 17 Neb. 77; Haywood v. Thomas, 17 Neb. 237; Stettinsche v. Lamb, 18 Neb. 619; Parker v. Starr, 21 Neb. 680; Tex v. Pflug, 24 Neb. 666; Tourtelotte v. Pearce, 27 Neb. 57; D'Gette v. Sheldon, 27 Neb. 829; Petersen v. Townsend, 30 Neb. 373; Alexander v. Wilcox, 30 Neb. 793; Omaha etc., Loan, etc., Co. v. Barrett, 31 Neb. 803; Omaha, etc., Land, etc., Co. v. Hansen, 32 Neb. 449; Ballou v. Sherwood, 32 Neb. 666; Alexander v. Meadville, 33 Neb. 219; Black v. Leonard, 33 Neb. 745; Malcom v. Hanson, 32 Neb. 50.
- New Hampshire*.—Gage v. Gage, 30 N. H. 420; Grant v. Fowler, 39 N. H. 101.
- New Mexico*.—Gildersleeve v. New Mexico Min. Co. (N. Mex., 1891), 27 Pac. Rep. 318.
- New York*.—Rock v. Doerr (Supreme Ct.), 15 N. Y. Supp. 14; Reformed Church v. Schoolcraft, 65 N. Y. 134; Millard v. McMullin, 68 N. Y. 345; Sherman v. Kane, 86 N. Y. 57; New York v. Carleton, 113 N. Y. 284; Freund v. Ostrander, 66 Hun (N. Y.) 326, 50 N. Y. St. Rep. 256, 21 N. Y. Supp. 344.
- North Carolina*.—Doe v. Newbern Academy, 2 Hawks (N. Car.) 233; Case v. Staton, 4 Ired. (N. Car.) 32; Clayton v. Cagle, 97 N. Car. 300.
- Ohio*.—Thompson v. Green, 4 Ohio St. 216.
- Oregon*.—Parker v. Metzger, 12 Oregon 407; Joy v. Stump, 14 Oregon 361; Logus v. Hutson, 24 Oregon 528.
- Pennsylvania*.—Graffius v. Tottenham, 1 W. & S. (Pa.) 488; Pederick v. Searle, 5 S. & R. (Pa.) 236; Munshower v. Patton, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678; Watson v. Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Brown v. M'Coy, 2 W. & S. (Pa.) 307, note; Green v. Kellum, 23 Pa. St. 254, 62 Am. Dec. 332; Moore v. Luce, 29 Pa. St. 260, 72 Am. Dec. 629; Schall v. Williams Valley R. Co., 35 Pa. St. 191; Bonnell v. Bonnell (Pa., 1888), 14 Atl. Rep. 168.
- South Carolina*.—Middleton v. Dupuis, 2 Nott & M. (S. Car.) 310.
- Tennessee*.—Trim v. McPherson, 7 Coldw. (Tenn.) 15.
- Texas*.—Robertson v. Wood, 15 Tex. 1, 65 Am. Dec. 140; Bruce v. Washington, 80 Tex. 368; Hardin v. Clark, 1 Tex. Civ. App. 565.
- Vermont*.—Vermont University v. Reynolds, 3 Vt. 542, 23 Am. Dec. 234; Austin v. Bailey, 37 Vt. 219, 86 Am. Dec. 703; Hughes v. Graves, 39 Vt. 359, 94 Am. Dec. 331; Hodges v. Eddy, 41 Vt. 485, 98 Am. Dec. 612.
- Wisconsin*.—McMillan v. Wehle, 55 Wis. 685.
- As to effect of adverse possession on title to personal property, see *supra*, this title, *Personal Property*.
- Bar to Ejectment.—United States.**—Wilkes v. Elliot, 5 Cranch (C. C.) 611.
- Alabama*.—Smith v. Roberts, 62 Ala. 83.
- Arkansas*.—Tyler v. Tyler (Ark., 1886), 2 S. W. Rep. 466; Cooper v. Lee, 59 Ark. 460.
- Illinois*.—Lavalie v. Strobel, 89 Ill. 370; Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 9 Am. St. Rep. 581; Horner v. Reuter, 152 Ill. 106.
- Indiana*.—Riggs v. Riley, 113 Ind. 208.
- Kentucky*.—Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Layson v. Galloway, 4 Bibb (Ky.) 100; M'Intire v. Funk, 5 Litt. (Ky.) 33; Hammond v. Williams (Ky., 1888), 9 S. W. Rep. 711; Henderson v. Bonar (Ky., 1889), 11 S. W. Rep. 809.
- Michigan*.—Curbay v. Bellemer, 70 Mich. 106; Cook v. Hopkins, 68 Mich. 514.
- Mississippi*.—Kirkman v. Mays (Miss., 1893), 12 So. Rep. 443.
- Nebraska*.—McKesson v. Hawley, 22 Neb. 692; Hardy v. Riddle, 24 Neb. 670.
- Ohio*.—Thompson v. Green, 4 Ohio St. 216; Thompson v. Casson, 4 Ohio St. 233.
- Tennessee*.—Ramsey v. Monroe, 3 Sneed (Tenn.) 329.
- See also the title **EJECTMENT**.
- Bar to Relief in Equity.**—Floyd v. Johnson, 2 Litt. (Ky.) 109, 13 Am. Dec. 255; Reed v. Bullock, Litt. Sel. Cas. (Ky.) 510, 12 Am. Dec. 345.
- See also the following cases as to the effect of adverse possession to create title or as a bar to an action to recover lands:
- England*.—Haigh v. West (1893), 2 Q. B. 19.
- United States*.—Quindaro Tp. v. Squier, 2 C. C. A. 142, 4 U. S. App. 569; Inman v. Barnes, 2 Gall. (U. S.) 315; Griffith v. Bradshaw, 4 Wash. (U. S.) 171; McIntyre v. Thompson, 10 Fed. Rep. 531; Cross v. Sabina,

13 Fed. Rep. 308; *Lafauci v. Kinler*, 27 Fed. Rep. 442; *Meeks v. Olpherts*, 100 U. S. 564; *Lewis v. Barnhart*, 145 U. S. 56.

Alabama.—*Bozeman v. Bozeman*, 82 Ala. 389; *Wilson v. Glenn*, 68 Ala. 383.

Arkansas.—*Finley v. Hogan*, 60 Ark. 499.

California.—*Williams v. Sutton*, 43 Cal. 65; *Ohm v. San Francisco*, 92 Cal. 437; *Bennett v. Green*, 74 Cal. 425.

Illinois.—*Johnson v. Filsom*, 118 Ill. 219; *Jaques v. Lester*, 118 Ill. 246; *Illinois Cent. R. Co. v. O'Connor*, 154 Ill. 550.

Indiana.—*Bell v. Longworth*, 6 Ind. 273; *Vancleave v. Milliken*, 13 Ind. 105; *Sims v. Frankfort*, 79 Ind. 446; *Lafayette Second Nat. Bank v. Corey*, 94 Ind. 457; *Wright v. Wright*, 97 Ind. 444; *McWhorter v. Heltzell*, 124 Ind. 129; *Paxton v. Sterne*, 127 Ind. 289; *Souders v. Jeffries*, 107 Ind. 552; *Walker v. Hill*, 111 Ind. 228; *Davidson v. Bates*, 111 Ind. 391.

Iowa.—*Tremaine v. Weatherby*, 58 Iowa 615; *Mendenhall v. Price*, 88 Iowa 203.

Kentucky.—*Skyle v. King*, 2 A. K. Marsh. (Ky.) 385; *Gay v. Moffit*, 2 Bibb (Ky.) 506, 5 Am. Dec. 633; *Sanders v. Barbee* (Ky., 1887), 3 S. W. Rep. 528; *Dorch v. Thompson*, 12 B. Mon. (Ky.) 379; *Larman v. Huey*, 13 B. Mon. (Ky.) 436.

Maine.—*Clancey v. Houdlette*, 39 Me. 451; *Abbott v. Abbott*, 51 Me. 575.

Maryland.—*Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434.

Massachusetts.—*Peele v. Chever*, 8 Allen (Mass.) 89.

Michigan.—*De Mill v. Moffat*, 49 Mich. 125; *Chesebro v. Powers*, 70 Mich. 370.

Minnesota.—*Jellison v. Halloran*, 44 Minn. 199; *Davis v. Townsend*, 45 Minn. 523; *Seymour v. Carli*, 31 Minn. 81.

Missouri.—*Crockett v. Morrison*, 11 Mo. 3; *Key v. Jennings*, 66 Mo. 356; *Cummings v. Powell*, 16 Mo. App. 559.

New York.—*Jackson v. Dieffendorf*, 3 Johns. (N. Y.) 269; *Jackson v. Harder*, 4 Johns. (N. Y.) 202, 4 Am. Dec. 262; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; *Cahill v. Palmer*, 45 N. Y. 478.

North Carolina.—*King v. Rhew*, 108 N. Car. 696, 23 Am. St. Rep. 76.

Pennsylvania.—*Graham v. Craig* (Pa.), 33 Leg. Int. 24; *Yeakle v. Nace*, 2 Whart. (Pa.) 123; *Pipher v. Lodge*, 4 S. & R. (Pa.) 310, 16 S. & R. (Pa.) 214; *Parker v. Southwick*, 6 Watts (Pa.) 377; *Overfield v. Christie*, 7 S. & R. (Pa.) 173; *Brown v. McKinney*, 9 Watts (Pa.) 565, 36 Am. Dec. 139; *Crow v. Kightlinger*, 25 Pa. St. 343; *Baldrige v. McFarland*, 26 Pa. St. 338; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Bassett v. Hawk*, 118 Pa. St. 94.

Tennessee.—*Rutherford v. Franklin*, 1 Swan (Tenn.) 321; *Peck v. Houston*, 5 Lea (Tenn.) 227; *Shields v. Riverside Imp. Co.*, 90 Tenn. 633; *Bon Air Coal, etc., Co. v. Parks*, 94 Tenn. 263.

Texas.—*Von Rosenberg v. Haynes*, 85 Tex. 357; *Texas, etc., R. Co. v. Uribe*, 85 Tex. 386; *Evans v. Foster*, 79 Tex. 48.

Hawaii.—*Kailianu v. Lumai*, 8 Hawaiian 256.

See, generally, the cases cited through-

out this article, in most of which the question of the effect of adverse possession is directly or indirectly involved.

A clear, adverse possession for twenty years makes a title to lands which a purchaser at a judicial sale may not refuse; but he will not be required to accept title where there are circumstances that may prevent the possession from being adverse. *Shriver v. Shriver*, 86 N. Y. 575; *Seymour v. DeLancey*, *Hopk. Ch. (N. Y.)* 436, 14 Am. Dec. 552. See also *O'Connor v. Huggins*, 113 N. Y. 511.

Adverse possession for the period of limitations vests a perfect title in the occupant, even as against one of whose claim he is ignorant. *Leeds v. Bender*, 6 W. & S. (Pa.) 315; *McKinley v. Neely*, 1 Phila. (Pa.) 76. See also *Calhoun v. Cook*, 9 Pa. St. 226.

Bed of Lake.—One who, by adverse possession, acquires title to land bordering on a non-navigable lake acquires title also to the bed of the lake up to its middle line. *Ridgway v. Ludlow*, 58 Ind. 248.

Cemetery Lot.—Possession for more than twenty years under a claim of title will defeat an action of ejectment for a cemetery lot. *Conger v. Weyant* (Supreme Ct.), 7 N. Y. Supp. 809.

Land Certificate—Texas.—The right which one has through an unlocated land certificate is an intangible thing, which vests in the true owner and cannot be adversely passed by another; and adverse possession of such certificate for more than two years before it was located does not give title to the land located by virtue of it. *Barker v. Swenson*, 66 Tex. 407; *Boone v. Miller*, 73 Tex. 557.

Dower.—Adverse possession of land for the statutory period during the life of the husband does not bar the widow's right to dower. *Hart v. McCollum*, 28 Ga. 478; *Boling v. Clark*, 83 Iowa 481; *Williams v. Williams*, 89 Ky. 381; *Durham v. Angier*, 20 Me. 242; *Moore v. Frost*, 3 N. H. 126. See title DOWER.

No Title by Adverse Possession—Colorado.—There being no statute in *Colorado* as to acquiring title by adverse possession, and the common law as it stood in the fourth year of James I. having been adopted (Gen. Stat. 170), it was held that twenty-one years' adverse possession of lands in that state was no bar to an action of ejectment by the holder of the fee-simple title. *Latta v. Clifford*, 45 Fed. Rep. 108. See also *Mill's Ann. Stat.* 1891, c. 29, § 431.

Adverse Possession of Land for a Period Less than That Prescribed by the statute of limitations confers no title. *Durfee v. Peoria, etc., R. Co.*, 140 Ill. 435. But a prior possession, under a claim of right, short of the period which creates a bar, under the statute of limitations, will prevail over a subsequent possession when no other evidence of title appears on either side. *Smoot v. Lecatt*, 1 Stew. (Ala.) 590; *McCall v. Pryor*, 17 Ala. 533; *Marston v. Rowe*, 43 Ala. 271; *Currier v. Gale*, 9 Allen (Mass.) 522; *Jackson v. Hazen*, 2 Johns. (N. Y.) 22; *Smith v. Lorillard*, 10 Johns. (N. Y.) 338. See also *Allen v. Rivington*, 2 Saund. 111; *Badger v. Lyon*, 7 Ala. 564.

maintain an action of ejectment for the recovery of the land even as against the holder of such paper title who has ousted him.¹

VII. EVIDENCE—1. A Question of Law and Fact.—Adverse possession is usually a mixed question of law and fact, to be left to the jury under the instructions of the court. What state of facts will constitute adverse possession is a question of law to be decided by the court.² Whether these facts exist so that there has been an adverse possession, is a question of fact to be determined by the jury.³

Title Once Acquired by Adverse Possession cannot be Divested by Subsequent Declarations or admissions of the adverse holder. Byers v. Sheplar (Pa., 1886), 5 Cent. Rep. 293; Bruce v. Washington, 80 Tex. 368; Williams v. Rand (Tex. Civ. App., 1895), 30 S. W. Rep. 509. But see Cook v. Long, 27 Ga. 280; Long v. Young, 28 Ga. 130.

1. Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Langford v. Poppe, 56 Cal. 73; Neale v. Lee, 19 D. C. 5; Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115; Jackson v. Olitz, 8 Wend. (N. Y.) 440; Barnes v. Light, 116 N. Y. 34. See also Riverside Co. v. Townshend, 120 Ill. 9.

2. **What Constitutes Adverse Possession—Question of Law for Court.**—Jackson v. Huntington, 5 Pet. (U. S.) 402; Collins v. Johnson, 57 Ala. 304; Potts v. Coleman, 67 Ala. 221; Paxson v. Bailey, 17 Ga. 600; Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177; Baker v. Swan, 32 Md. 355; Washburn v. Cutter, 17 Minn. 361; Magee v. Magee, 37 Miss. 138; Macklot v. Dubreuil, 9 Mo. 477, 43 Am. Dec. 550; Boogher v. Neece, 75 Mo. 383; Harper v. Morse, 114 Mo. 317; Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95; Armstrong v. Caldwell, 53 Pa. St. 284; Holliday v. Cromwell, 37 Tex. 437. See also Shackleford v. Bailey, 35 Ill. 387; Woodward v. Blanchard, 16 Ill. 424.

Where the Facts are Admitted or Undisputed the court may decide directly the question arising from them as to title by prescription as a matter of law, without submitting the facts to the jury. Verdery v. Savannah, etc., R. Co., 82 Ga. 675.

3. **Whether the Requisite Facts Exist—Question for the Jury—United States.**—Jackson v. Huntington, 5 Pet. (U. S.) 402; Ewing v. Burnet, 11 Pet. (U. S.) 41. See also Jackson v. Porter, 11 Paine (U. S.) 457.

Alabama.—Herbert v. Hanrick, 16 Ala. 581; Benje v. Creagh, 21 Ala. 151; Collins v. Johnson, 57 Ala. 304.

California.—Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

Georgia.—Beverly v. Burke, 9 Ga. 440, 54 Am. Dec. 351; Saterfield v. Randall, 44 Ga. 576; Paxson v. Bailey, 17 Ga. 600.

Indiana.—Hearick v. Doe, 4 Ind. 164; Wiggins v. Holley, 11 Ind. 2.

Kentucky.—Dubois v. Marshall, 3 Dana (Ky.) 336; Cardwell v. Spriggs, 7 Dana (Ky.) 36; Bowles v. Sharp, 4 Bibb (Ky.) 550; Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177.

Maine.—Kinsell v. Daggett, 11 Me. 309. See also Schwartz v. Kuhn, 10 Me. 274, 25 Am. Dec. 239.

Maryland.—Baker v. Swan, 32 Md. 355.

Massachusetts.—Morrison v. Chapin, 97 Mass. 72; Bowen v. Guild, 130 Mass. 121; Fitchburg R. Co. v. Page, 131 Mass. 391, 7 Am. & Eng. R. Cas. 86; Beckman v. Davidson, 162 Mass. 347. See also Stevens v. Taft, 11 Gray (Mass.) 33.

Michigan.—De Mill v. Moffat, 45 Mich. 410; Sauers v. Giddings, 90 Mich. 50; Pendill v. Marquette County Agricultural Soc., 95 Mich. 491; Judson v. Duffy, 96 Mich. 255; Yelverton v. Steele, 40 Mich. 538. See also Miller v. Beck, 68 Mich. 76.

Minnesota.—Washburn v. Cutter, 17 Minn. 361.

Mississippi.—Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Magee v. Magee, 37 Miss. 138; Huntington v. Allen, 44 Miss. 654. See also Grafton v. Grafton, 8 Smed. & M. (Miss.) 77.

Missouri.—Macklot v. Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

New Hampshire.—Atherton v. Johnson, 2 N. H. 31.

New Jersey.—Colgan v. Pellens, 48 N. J. L. 27; Den v. Sinnickson, 9 N. J. L. 149; Foulke v. Bond, 41 N. J. L. 527; North Hudson County R. Co. v. Vanderbeck (N. J., 1887), 13 Atl. Rep. 45, 49 N. J. L. 693; Johnston v. Fitzgeorge, 50 N. J. L. 470.

New York.—Jackson v. Joy, 9 Johns. (N. Y.) 102; Jackson v. Stephens, 13 Johns. (N. Y.) 495; Gross v. Welwood, 90 N. Y. 638; Barnes v. Light, 116 N. Y. 34. See also Northrop v. Wright, 24 Wend. (N. Y.) 221.

North Carolina.—Parker v. Banks, 79 N. Car. 480.

Pennsylvania.—McMasters v. Bell, 2 P. & W. (Pa.) 180; Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95; Hoopes v. Garver, 15 Pa. St. 517; Thompson v. Kauffelt, 110 Pa. St. 209; Mason v. Ammon, 117 Pa. St. 127; Bennett v. Morrison, 120 Pa. St. 390, 6 Am. St. Rep. 711; Thompson v. Philadelphia, etc., Coal, etc., Co., 133 Pa. St. 46. See also Read v. Goodyear, 17 S. & R. (Pa.) 350; Hatch v. Smith, 4 Pa. St. 109; Bonnell v. Bonnell (Pa., 1888), 14 Atl. Rep. 168.

South Carolina.—Rogers v. Madden, 2 Bailey (S. Car.) 321; Harrington v. Wilkins, 2 McCord (S. Car.) 289. See also Busby v. Florida Cent., etc., R. Co. (S. Car., 1895), 23 S. E. Rep. 50.

Texas.—Broxson v. McDougal, 70 Tex. 64; Holliday v. Cromwell, 37 Tex. 437. See also Hartman v. Huntington (Tex. Civ. App., 1895), 32 S. W. Rep. 562.

Vermont.—Hall v. Dewey, 10 Vt. 593; Webb v. Richardson, 42 Vt. 465; Adams v. Fullam, 43 Vt. 592.

Wisconsin.—Whitney v. Powell, 2 Pin

2. Burden of Proof.—The burden of proving adverse possession rests upon the party alleging it.¹

3. Clear Proof Required.—The doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by inference, but only by clear and positive proof.²

(Wis.) 115; *McPherson v. Featherstone*, 37 Wis. 632; *Ayers v. Reidel*, 84 Wis. 276. See also *Allen v. Allen*, 58 Wis. 202.

Hawaii.—*Paulo v. Malo*, 4 Hawaiian 536. See also *Kaaihue v. Crabbe*, 3 Hawaiian 768.

See also *Fisher v. Muecke*, 82 Iowa 547; *Joy v. Stump*, 14 Oregon 361; *Martin v. Youngblood*, 8 Humph. (Tenn.) 581.

Ouster.—Ouster is a question of fact, which it is the province of the jury to determine; and the facts and circumstances which go to establish the ouster ought, under the proper instructions from the court, to be submitted to the jury. *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Oglesby v. Hollister*, 76 Cal. 136; *Cummings v. Wyman*, 10 Mass. 464; *Highstone v. Burdette*, 54 Mich. 329, 61 Mich. 54; *Washburn v. Cutter*, 17 Minn. 361; *Harmon v. James*, 7 Smed. & M. (Miss.) 111, 45 Am. Dec. 296; *Blackmore v. Gregg*, 2 W. & S. (Pa.) 182; *O'Hara v. Richardson*, 46 Pa. St. 385; *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654; *Hall v. Dewey*, 10 Vt. 593; *Purcell v. Wilson*, 4 Gratt. (Va.) 16; *Hacker v. Horlemus*, 74 Wis. 21. See also *Clark v. Crego*, 47 Barb. (N. Y.) 599; *Taylor v. Hill*, 10 Leigh (Va.) 477.

What constitutes adverse possession is a question of law; but the intention of the possession is one of fact. *Magee v. Magee*, 37 Miss. 138.

And possession and acts of ownership cannot be declared, as a matter of law, to amount to an adverse possession. The character of the possession is a question for the jury. *Trufant v. White*, 99 Ala. 526; *Nashville, etc., R. Co. v. Hammond* (Ala., 1894), 15 So. Rep. 935; *Harrison v. Spencer*, 90 Mich. 586.

Jury in Doubt.—If on the whole evidence the jury is in doubt whether the possession is adverse or permissive, the adverse claimant's title must fail. *Brown v. King*, 5 Met. (Mass.) 173.

1. Burden of Proof—Alabama.—*Collins v. Johnson*, 57 Ala. 304; *Potts v. Coleman*, 67 Ala. 221; *Alexander v. Wheeler*, 69 Ala. 332; *Dothard v. Denson*, 72 Ala. 541; *Lucy v. Tennessee, etc., R. Co.*, 92 Ala. 246. See also *Hancock v. Kelly*, 81 Ala. 368.

California.—*Tuffree v. Polhemus* (Cal., 1895), 41 Pac. Rep. 806.

Delaware.—*Doe v. Jefferson*, 5 Houst. (Del.) 477.

Illinois.—*Bolden v. Sherman*, 101 Ill. 483.

Massachusetts.—*Brown v. King*, 5 Met. (Mass.) 173.

Mississippi.—*Alexander v. Polk*, 39 Miss. 737.

Missouri.—*Lynde v. Williams*, 68 Mo. 360; *Wilkerson v. Thompson*, 82 Mo. 317.

New Hampshire.—*Lund v. Parker*, 3 N. H. 49.

New Jersey.—*Rowland v. Updike*, 28 N. J. L. 101.

New York.—*Howard v. Howard*, 17 Barb. (N. Y.) 663; *Bissing v. Smith* (Supreme Ct.), 33 N. Y. Supp. 123; *Doherty v. Matsell*, 119 N. Y. 646.

North Carolina.—*Bryan v. Spivey*, 109 N. Car. 57; *Parker v. Banks*, 79 N. Car. 480.

Oregon.—*Rowland v. Williams*, 23 Oregon 515.

Pennsylvania.—*Hood v. Hood*, 2 Grant's Cas. (Pa.) 229; *Armstrong v. Caldwell*, 53 Pa. St. 284; *McDermott v. Hoffman*, 70 Pa. St. 31. See also *Barnhart v. Pettit*, 22 Pa. St. 135.

Tennessee.—*Elliott v. Holder*, 3 Head (Tenn.) 698.

Texas.—*Smith v. Estill*, 87 Tex. 264.

Hawaii.—*Kaaihue v. Crabbe*, 3 Hawaiian 768.

See also *Taylor v. Philippi*, 35 W. Va. 554.

Ouster.—The burden of proving ouster rests upon the party alleging it. *Van Bibber v. Frazier*, 17 Md. 436; *Highstone v. Burdette*, 54 Mich. 329, 61 Mich. 54.

In *Bazille v. Murray*, 40 Minn. 48, it is held that the burden of proof is upon the party claiming title by adverse possession to show not only that he had once held adversely, but that the possession was maintained for the full statutory period. But see *infra*, this section, *Presumptions of Law*.

Where the plaintiff in ejectment has introduced evidence tending to prove that he was ousted within the period of limitations, the burden is shifted upon the defendant claiming by adverse possession to show that the ouster occurred so long before, that the period of limitation had run since. *Highstone v. Burdette*, 54 Mich. 329.

When the party claiming by adverse possession has established a *prima facie* case the burden of proof is shifted, and it is incumbent on the opposite party to rebut the presumption of law raised by the evidence. *Bryan v. Spivey*, 109 N. Car. 57. See also *Staton v. Mullis*, 92 N. Car. 625; *Miller v. Bumgardner*, 109 N. Car. 412.

In *Davis v. Davis*, 68 Miss. 478, it was held that, in ejectment, when the defendant recognizes the title to have originally been in the plaintiff, and claims the land merely by a parol gift followed by adverse possession, the only issue is the character of the possession, and the burden of proof is on the defendant. The court cites 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 303.

2. Clear and Positive Proof Required—United States.—*Heermans v. Schmaltz*, 10 Biss. (U. S.) 323.

Connecticut.—*Huntington v. Whaley*, 29 Conn. 391.

Illinois.—*Bryan v. East St. Louis*, 12 Ill. App. 390; *McClellan v. Kellogg*, 17 Ill. 498; *Jackson v. Berner*, 48 Ill. 203. See also *Hurlbut v. Bradford*, 109 Ill. 397.

4. Presumptions of Law.—As a general rule, where the possession of land is separated from the title the law will not presume that the possession is ad-

Iowa.—Grube v. Wells, 34 Iowa 148. See also Weing v. Holcomb, 73 Iowa 143.

Michigan.—Yelverton v. Steele, 40 Mich. 538; Campau v. Campau, 45 Mich. 367; Marble v. Price, 54 Mich. 466.

New Hampshire.—Riley v. Jameson, 3 N. H. 23, 14 Am. Dec. 325; Hale v. Glidden, 10 N. H. 397; Campbell v. Campbell, 13 N. H. 483.

New York.—Brandt v. Ogden, 1 Johns. (N. Y.) 156; Wickham v. Conklin, 8 Johns. (N. Y.) 220; Jackson v. Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; Jackson v. Waters, 12 Johns. (N. Y.) 365; Howard v. Howard, 17 Barb. (N. Y.) 663.

Pennsylvania.—Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

South Carolina.—Rochell v. Holmes, 2 Bay (S. Car.) 487.

Tennessee.—Elliott v. Holder, 3 Head (Tenn.) 698.

Wisconsin.—Sydnor v. Palmer, 29 Wis. 226; Furlong v. Garrett, 44 Wis. 111; Graeven v. Dieves, 68 Wis. 321; Fairfield v. Barrette, 73 Wis. 463.

See also Coburn v. Hollis, 3 Met. (Mass.) 125; Rowland v. Updike, 28 N. J. L. 101.

The proof furnished by a defendant in ejectment relying on adverse possession must be sufficiently definite and certain to locate and identify the land so possessed. Hughes v. Israel, 73 Mo. 538.

The evidence to prove adverse possession need not be free from doubt. The question is to be decided by the weight of the evidence. Jones v. Hughes (Pa., 1889), 16 Atl. Rep. 849.

Slight Proof Held Sufficient.—It was held in *Hawaii*, that where the nature of the land in controversy rendered it difficult to get satisfactory testimony as to the occupation of it, slight proof of adverse possession was sufficient. Mahukaliilili v. Hobron, 5 Hawaiian 104. See also Bowen v. Guild, 130 Mass. 121; Houghton v. Wilhelmy, 157 Mass. 521.

For Cases where the Evidence was Held Sufficient to Show Adverse Possession, see: *Illinois*.—Horner v. Reuter, 152 Ill. 106.

Iowa.—Meyer v. Weigman, 45 Iowa 579.

Kentucky.—Strutton v. Strutton (Ky., 1888), 9 S. W. Rep. 826.

Massachusetts.—Parker v. Proprietors, 3 Met. (Mass.) 91, 37 Am. Dec. 121; Morse v. Sherman, 155 Mass. 222.

Minnesota.—Jellison v. Halloran, 44 Minn. 199; Wood v. Springer, 45 Minn. 299; St. Paul v. Chicago, etc., R. Co., 45 Minn. 387.

Mississippi.—Kirkman v. Mays (Miss., 1893), 12 So. Rep. 443; Niles v. Davis, 60 Miss. 750; Nelson v. Ratliff (Miss., 1895), 18 So. Rep. 487.

Nebraska.—McKesson v. Hawley, 22 Neb. 692; Crawford v. Galloway, 29 Neb. 261; Hardy v. Riddle, 24 Neb. 670; Petersen v. Townsend, 30 Neb. 373; Malcom v. Hanson, 32 Neb. 50; Omaha, etc., Loan, etc., Co. v. Barrett, 31 Neb. 803.

New York.—Scholle v. New York (Supreme Ct.), 6 N. Y. Supp. 785.

Oregon.—Rowland v. Williams, 23 Oregon 515.

Texas.—Motley v. Corn (Tex., 1889), 11 S. W. Rep. 850; Myers v. Evans, 81 Tex. 317.

Washington.—Bellingham Bay Land Co. v. Dibble, 4 Wash. 764; Flint v. Long (Wash., 1895), 41 Pac. Rep. 49; Rogers v. Miller (Wash., 1895), 42 Pac. Rep. 525.

Wisconsin.—Pioneer Wood Pulp Co. v. Chandos, 78 Wis. 526.

Hawaii.—Paulo v. Malo, 6 Hawaiian 390.

See also Colgan v. Pellens, 48 N. J. L. 27; Palmer v. Saft (Super. Ct.), 3 N. Y. Supp. 250, 56 N. Y. Super. Ct. 594; Thiers v. Holmes (Tex., 1888), 9 S. W. Rep. 191.

See generally, as to the evidence held sufficient or insufficient to sustain a plea of adverse possession, as well as to the admissibility of evidence, *supra*, this title, *What Constitutes Adverse Possession*.

Actual adverse possession under a claim of right or ownership distinct from and hostile to the title of the true owner, being an open and patent fact, furnishes evidence of its own existence, and is the equivalent of actual notice of the claim under which it is held. Murray v. Hoyle, 92 Ala. 561. See also Lucy v. Tennessee, etc., R. Co., 92 Ala. 246; Knowles v. Brown, 69 Iowa 11.

Where the evidence that the defendant in an action to try title to lands had held continuous adverse possession by his tenants for the period of limitations, was uncontradicted, it was held that the court erred in holding this evidence insufficient to sustain the defense of the statute of limitations. Mims v. Rafel, 73 Tex. 300.

Where a witness swears to his possession and to repeated acts of ownership by himself extending over many years, and this testimony is before the jury unchallenged, it is proper for the court to assume the legal possession to have been testified to, and to so present the case in the charge to the jury. Staton v. Mullis, 92 N. Car. 623.

For Cases where the Evidence was Held Insufficient to Show Adverse Possession, see: *Alabama*.

—Wiggins v. Kirby (Ala., 1895), 17 So. Rep. 354; Bonham v. Loeb (Ala., 1895), 18 So. Rep. 300.

Arkansas.—Brookfield v. Stephens, 40 Ark. 366; Richards v. Howell, 60 Ark. 215.

California.—Greer v. Tripp, 56 Cal. 209; Roman Catholic Archbishop v. Shipman, 79 Cal. 238; Smith v. Smith, 80 Cal. 323; Gage v. Downey, 94 Cal. 241; Tappendorff v. Downing, 76 Cal. 169.

Illinois.—Irving v. Brownell, 11 Ill. 402; School Trustees v. Schroll, 120 Ill. 509.

Kansas.—Gildehaus v. Whiting, 39 Kan. 706.

Kentucky.—Orr v. Pickett, 3 J. J. Marsh. (Ky.) 269.

Massachusetts.—Coburn v. Hollis, 3 Met. (Mass.) 125.

Michigan.—Rayner v. Lee, 20 Mich. 384; Yelverton v. Steele, 40 Mich. 538; Millard v. Hayward (Mich., 1895), 65 N. W. Rep. 104.

verse, but every presumption is in favor of possession in subordination to the title of the true owner.¹ But where one is shown to have been in possession

Nebraska.—Gue v. Jones, 25 Neb. 634; Mills v. Traver, 35 Neb. 292.

Nevada.—McDonald v. Fox, 20 Nev. 364.

Tennessee.—Morelock v. Barnard (Tenn., 1886), 2 S. W. Rep. 32; Kirkman v. Brown, 93 Tenn. 476; Garrett v. Belmont Land Co., 94 Tenn. 459.

Texas.—Donlon v. Lyons (Tex., 1891), 15 S. W. Rep. 578; Overand v. Menczer, 83 Tex. 122; Hartman v. Huntington (Tex. Civ. App., 1895), 32 S. W. Rep. 562.

Wisconsin.—Furlong v. Garrett, 44 Wis. 111.

Hawaii.—Judd v. Kuanalewa, 6 Hawaiian 329.

See also Bolton v. Hamilton, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509; Eddy v. St. Mars, 53 Vt. 462, 38 Am. Rep. 695.

Where the evidence showed that during a period of twenty-one years a landholder and his predecessor in title had annually cut the grass on a small plat of ground in a highway, had planted a row of trees thereon, which were removed within a few years, and had occasionally piled lumber on the road against the fence, it was held that the evidence failed to establish a claim to the soil by adverse possession against the holder of the legal title. Bliss v. Johnson, 94 N. Y. 235.

The fact that the defendant in an action to recover land, and his grantors, gathered seaweed from the premises, when taken in connection with the fact that they claimed to prevent others from doing so and took it under a claim of exclusive right as owners, is some evidence of adverse possession. East Hampton v. Kirk, 84 N. Y. 215, 38 Am. Rep. 505.

Posting a Notice on land, notifying the owner that the notifier intended to hold the land, is not sufficient proof of adverse possession. Lynde v. Williams, 68 Mo. 360.

Proof of a Recorded Deed is not sufficient without proof of possession taken and held under it. Lipscomb v. McClellan, 72 Ala. 151.

Enclosure.—The mere act of enclosing the land is not evidence of adverse possession. Russell v. Davis, 38 Conn. 562. See *supra*, this title, *Essential Elements—By Enclosure*.

The Record of a Survey is not evidence of title or possession. Oatman v. Fowler, 43 Vt. 462.

1. Presumption of Law is in Favor of True Owner—*United States*.—Heermans v. Schmaltz, 10 Biss. (U. S.) 323.

Alabama.—Brown v. Cockerell, 33 Ala. 38; Alexander v. Wheeler, 69 Ala. 332; Dothard v. Denson, 72 Ala. 541; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246. See also Scruggs v. Decatur Mineral, etc., Co., 86 Ala. 173; Robinson v. Allison, 97 Ala. 596.

Arkansas.—Pulaski County v. State, 42 Ark. 118.

California.—Sharp v. Daugney, 33 Cal. 505.

Connecticut.—Huntington v. Whaley, 29 Conn. 391.

Illinois.—Bryan v. East St. Louis, 12 Ill. App. 390.

Iowa.—Grube v. Wells, 34 Iowa 148.

Maine.—Mowe v. Stevens, 61 Me. 592.

Mississippi.—Alexander v. Polk, 39 Miss. 737.

New Hampshire.—Riley v. Jameson, 3 N. H. 23, 14 Am. Dec. 325; Lund v. Parker, 3 N. H. 49; Campbell v. Campbell, 13 N. H. 483. See also Blaisdell v. Martin, 9 N. H. 253.

New York.—Jackson v. Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; Jackson v. Waters, 12 Johns. (N. Y.) 365; Howard v. Howard, 17 Barb. (N. Y.) 663; Doherty v. Matsell, 119 N. Y. 646. See also Smith v. Lorillard, 10 Johns. (N. Y.) 338; Jackson v. Thomas, 16 Johns. (N. Y.) 301; Jackson v. Rightmyre, 16 Johns. (N. Y.) 314; Jackson v. Parker, 3 Johns. Cas. (N. Y.) 124.

Pennsylvania.—Rung v. Schoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95.

Wisconsin.—Sydnor v. Palmer, 29 Wis. 226; Wilson v. Henry, 35 Wis. 241; Graeven v. Dieves, 68 Wis. 317; Fairfield v. Barrette, 73 Wis. 463.

See also Foulke v. Bond, 41 N. J. L. 527; Anderson v. Jackson, 69 Tex. 346; Layne v. Norris, 16 Gratt. (Va.) 236; and compare Ruffin v. Overby, 88 N. Car. 369.

Lapse of Time.—Adverse possession must be proved to the satisfaction of the jury like any other fact, and cannot be assumed, as a matter of law, from mere exclusive possession, however long continued. Russell v. Davis, 38 Conn. 563; Grube v. Wells, 34 Iowa 148; Skinner v. Crawford, 54 Iowa 119; McDonald v. Fox, 20 Nev. 364. See also Ricard v. Williams, 7 Wheat. (U. S.) 60; Boone v. Miller, 73 Tex. 557; and *supra*, this title, *Essential Elements—Possession must be Hostile*.

An ouster or disseisin is not to be presumed from the mere fact of sole possession; but it may be proved by such possession accompanied by a notorious claim of exclusive right. Ricard v. Williams, 7 Wheat. (U. S.) 59; Oglesby v. Hollister, 76 Cal. 136; Miller v. Myles, 46 Cal. 535; Parker v. Proprietors, 3 Met. (Mass.) 91, 37 Am. Dec. 121.

Where the possession of one person is shown to have once been in subordination to the title of another, it will not be adjudged afterwards adverse to such title without clear and positive proof of its having distinctly become so, for every presumption is in favor of the possession continuing in the same subordination to the title. Hood v. Hood, 2 Grant's Cas. (Pa.) 229.

Where Adverse Possession of Land is Once Taken under Color of Title it is presumed to continue, in the absence of proof of interruption within the period of limitations. Elyton Land Co. v. McElrath, 53 Fed. Rep. 763; Marston v. Rowe, 43 Ala. 271; Wilson v. Spring, 38 Ark. 181. See also Currier v. Gale, 9 Allen (Mass.) 522.

The Burden of Proving Abandonment or Interruption is upon the adverse party. Wilson v. Spring, 38 Ark. 181.

Title Decreed with Plaintiff—Entry by Defendant.—The subsequent possession of a defendant after the court has decreed the title to be

of land for the period of limitation, apparently as owner, and such possession is not explained or otherwise accounted for, it will be presumed to have been adverse; but this presumption may be rebutted by proof that the possession in its origin was not adverse, but permissive; and sometimes the condition of the property and the circumstances accompanying the occupancy itself will rebut the presumption that it was adverse or under a claim of right.¹

5. What Evidence Admissible—Invalid Deed.—A defective or invalid deed, although insufficient to convey title, is admissible in evidence to show the character and extent of the adverse claimant's possession.²

in the plaintiff is presumed to be in subordination to the latter. *Root v. Woolworth*, 150 U. S. 401.

England—Entry by Second Son upon Death of Father—Presumption.—In *England*, it is held that where upon the death of the father the second son enters without title, his possession and entry are presumed to be for the use of the elder son, against whom the statute of limitations will not run. *Dowell v. Byrne*, Beat. 373; *Gilbert on Tenures* 28. And see *Fairclaim v. Shackleton*, 5 Burr. 2604; *Reading v. Royston*, 2 Salk. 423; *Page v. Selfby*, Bull. N. P. 1026.

1. *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Alexander v. Wheeler*, 69 Ala. 332; *Worcester v. Lord*, 56 Me. 265, 96 Am. Dec. 456; *Dow v. McKenney*, 64 Me. 138; *Morse v. Churchill*, 41 Vt. 649; *Ayers v. Reidel*, 84 Wis. 276. See also *Potts v. Coleman*, 67 Ala. 221; *Gildehaus v. Whiting*, 39 Kan. 706; *Hartman v. Huntington* (Tex. Civ. App., 1895), 32 S. W. Rep. 562.

Presumption of Ouster.—Exclusive possession by one tenant in common for a great number of years without any accounting to, or recognition of right in, his fellow commoner, or any evidence explaining why the cotenant neglected to assert his right, is evidence from which the jury may infer actual ouster and adverse possession. *Doe v. Prosser*, Cowp. 217; *Culley v. Doe*, 11 Ad. & El. 1008, 39 E. C. L. 303; *Lefavour v. Homan*, 3 Allen (Mass.) 354; *Rickard v. Rickard*, 13 Pick. (Mass.) 251; *Law v. Patterson*, 1 W. & S. (Pa.) 184; *Mehaffy v. Dobbs*, 9 Watts (Pa.) 363; *Frederick v. Gray*, 10 S. & R. (Pa.) 182. See also *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509; *Calhoun v. Cook*, 9 Pa. St. 226; *Doe v. Bird*, 11 East 49.

Demand for and refusal of possession are not ouster, but they are such evidence as will authorize a court to find an ouster. *Phelan v. Smith*, 100 Cal. 158.

Where A had enclosed land and cultivated it for over twenty years, and it appeared that during this time his brother B built a house on the premises, B being a man of wealth and A in moderate circumstances, and evidence was given tending to show that B built the house because he was the owner of the land, it was held that it was competent to rebut this evidence by showing that B acquiesced in the fact that A owned the premises, and was building the house for him. *Tindale v. Powell* (Supreme Ct.), 34 N. Y. Supp. 659.

Where the defendant claimed title to a spring through adverse possession by him-

self and his grantors, it was held that parol evidence was admissible to show that at the time of the execution of the deed to the land his grantors informed him that they held under a deed in which their grantor reserved title to the spring. *Hamilton v. Gray* (Vt., 1895), 31 Atl. Rep. 314.

Where the plaintiff in ejectment has been in possession of the land for nearly thirty years, the fact that the land was embraced in a deed to the defendant is not sufficient to defeat the plaintiff's title. *Jones v. Graham*, 80 Ga. 591.

A Written Recognition of the Title of a person not in actual possession of the land, and an offer to purchase such title by the party in possession, effectually rebut the allegation of adverse possession. *Miller v. Keene*, 5 Watts (Pa.) 348. See also *Bradford v. Guthrie*, 4 Brews. (Pa.) 357.

Correspondence.—The correspondence and other transactions between the grantor of a right of way and the officers of the grantee, a railroad company, which occurred before the execution of the deeds and covenant relating to the right of way, are admissible in evidence as tending to prove permissive occupation, and to rebut the idea of adverse possession by the railroad. *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422.

A Deed Executed by the Plaintiff Claiming by Adverse Possession conveying land to the defendant, together with oral testimony that the plaintiff held the land as the tenant of the defendant, is competent evidence to show that the possession was not adverse. *Rogencamp v. Converse*, 15 Neb. 105.

Offer to Purchase Title.—Where the defendant in ejectment relied on adverse possession as a defense, it was held that an instruction which in effect withdrew from the consideration of the jury evidence that the defendant while in possession offered to pay the adverse claimant for the land, thus tending to disprove the defense, was erroneous. *Liggett v. Morgan*, 98 Mo. 39.

See also, as to evidence required to rebut a plea of adverse possession, *Von Glahn v. Brennan*, 81 Cal. 261; *Saunders v. Moore* (Ky., 1888), 7 S. W. Rep. 910; *Snow v. Orleans*, 126 Mass. 453; *Ramsey v. Glenny*, 45 Minn. 401, 22 Am. St. Rep. 736; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605.

2. Defective Sheriff's Deed.—Where the defendant in an action to recover land set up as a defense the adverse possession of a third party claiming under a sheriff's deed, it was held that such deed was admissible to show the extent of the adverse possession,

Record of Suit.—The record of a former suit involving title to the land in controversy is admissible as evidence of adverse possession.¹

Declarations.—The declarations of the occupant of the land are admissible to show the character of his possession, where such declarations may be regarded as *res gestæ*, or are made against his interest.²

although it was insufficient to convey title on account of ambiguity in the description of the land. *Branch v. Baker*, 70 Tex. 190.

Where the defendants in an action to try title claimed under a deed conveying a part of the land in controversy, it was held that the deed, to the extent of the land included by it, was admissible as a basis for the plea of the statute of limitations. *Overand v. Menczer*, 83 Tex. 122.

An Administrator's Deed, void because of the disqualification of the judge to pass upon the acts of the administrator, is a legally sufficient basis for a plea of the statute of limitations. *Halbert v. Martin* (Tex. Civ. App., 1895), 30 S. W. Rep. 388.

A Tax Deed, though void as a conveyance of title, is admissible as evidence of the character and extent of the possession of the party claiming by adverse possession. *Oglesby v. Hollister*, 76 Cal. 136; *Wilson v. Atkinson*, 77 Cal. 485; *Murphy v. Doyle*, 37 Minn. 113; *Ricker v. Butler*, 45 Minn. 545. See also *supra*, this title, *Color of Title*.

1. **The Record of a Suit** in which the real owner recovered the land from the adverse holder, is admissible to show that the possession was adverse. *Faulcon v. Johnston*, 102 N. Car. 264, 11 Am. St. Rep. 737.

Where a person claims title to land by adverse possession for the period of limitations, it is competent for him to show that during his occupancy he asserted ownership by bringing an action of trespass against others who attempted to enjoy the premises, and that he prosecuted the suit to final adjudication. In such case it is immaterial which way the case was decided, the only effect of the evidence being to show that he was claiming the land in dispute. *Hollister v. Young*, 42 Vt. 403. See also *Morrison v. Chapin*, 97 Mass. 72; *Hickman v. Link*, 97 Mo. 482.

A Judgment Roll in a forcible entry case is admissible to show adverse possession. *Unger v. Roper*, 53 Cal. 39. See also *McCourtney v. Fortune*, 57 Cal. 617; *Fredericks v. Judah*, 73 Cal. 604.

2. **Declarations Admissible to Show Character of Possession.**—*Stockton v. Staples Sav. Bank*, 98 Cal. 189; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205; *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; *Kennedy v. Wible* (Pa., 1887), 11 Atl. Rep. 98; *Lochhausen v. Laughter*, 4 Tex. Civ. App. 291; *Webb v. Richardson*, 42 Vt. 465. See also *Ricard v. Williams*, 7 Wheat. (U. S.) 60; *Turnley v. Hanna*, 82 Ala. 139; *Lick v. Diaz*, 44 Cal. 479; *Collins v. Lynch*, 167 Pa. St. 635; *Hasson v. Klee*, 168 Pa. St. 510. See, generally, the titles **ADMISSIONS; DECLARATIONS; RES GESTÆ**.

The declarations of a person claiming by

adverse possession, made while in possession of the premises, as well as the understanding of his neighbors, are proper evidence to show the character of his claim. *Kennedy v. Wible* (Pa., 1887), 11 Atl. Rep. 98.

The declarations of the party claiming by adverse possession are admissible to show that his possession was continuous, and also its adverse character; and it is not necessary that they should be made on the land in dispute. *Webb v. Richardson*, 42 Vt. 465.

The declarations of the party in possession are admissible only when a part of the *res gestæ* or against the interest of the party making them. *Saugatuck Cong. Soc. v. East Saugatuck School Dist.*, 53 Conn. 478; *Seymour v. Over River School Dist.* (Conn., 1885), 4 Atl. Rep. 246. In delivering the opinion of the court in these cases, *Carpenter, J.*, said: "Possession does not receive its adverse character from the declarations of the party in possession, except when such declarations may be regarded as *res gestæ*. The mere declarations of a party cannot be admitted in his own favor. It follows that the mere absence of such declarations cannot be shown by the adverse party against him. A party is not bound to make public proclamation that he holds adversely. Therefore whatever he says or omits to say is a matter of no importance, unless he speaks against his interest or fails to speak when required to do so. The adverse character of the possession is ordinarily, if not always, shown by the facts of the case, and not from loose and casual declarations. Therefore the absence of such declarations has no tendency to prove that the possession is not adverse."

Declarations of Grantee Not in Possession—Tax Returns.—Declarations made by the grantee when the grantor was not present, who had never entered into possession of the land, and tax books showing that the grantee had returned the land as his property for taxation, are not admissible to show an adverse holding by the grantee. *Parrott v. Baker*, 82 Ga. 364.

Declarations Admissible to Show that Possession is Not Adverse.—*Clements v. Wheeler*, 62 Ga. 53; *McNamee v. Moreland*, 26 Iowa 96; *Hale v. Silloway*, 1 Allen (Mass.) 21; *Bradford v. Guthrie*, 4 Brews. (Pa.) 351; *Sailor v. Hertzogg*, 2 Pa. St. 182, 4 Whart. (Pa.) 259; *Calhoun v. Cook*, 9 Pa. St. 226; *St. Clair v. Shale*, 9 Pa. St. 252; *Breidegam v. Hoffmaster*, 61 Pa. St. 223; *Leger v. Doyle*, 11 Rich. (S. Car.) 109, 70 Am. Dec. 240. See also *Curlee v. Smith*, 91 N. Car. 172.

The declarations of the party in possession that he held as agent of another are admissible. *Kirkland v. Trott*, 66 Ala. 417; *Lucy v. Tennessee, etc., R. Co.*, 92 Ala. 246.

General Reputation.—It has been held that a party claiming by adverse possession may, for the purpose of establishing his claim, introduce evidence that the land was generally understood to belong to him and was called his.¹ Some courts, however, have denied the admissibility of evidence of this nature.²

ADVERSE USER.—See USER, and the title ADVERSE POSSESSION.

ADVERSUS.—See VERSUS.

ADVERTISE. (See also ADVERTISEMENTS.)—"Advertise" is defined to mean to publish notice of, to issue a written or printed account of.³

Declarations by Husband Binding on Wife.—Where husband and wife claim title by adverse possession, and the possession of the wife is the possession of the husband, the acts and declarations of the latter, although not authorized nor acquiesced in by the wife, are admissible to show that such holding was not adverse. *Hurley v. Lockett*, 72 Tex. 262.

Declarations by Alleged Tenants.—The declarations of the occupants of land are admissible against parties claiming by adverse possession where there is no other evidence that such occupants held as tenants of the adverse claimants than the general statement of the latter that they were in possession by agents and tenants. *Hurley v. Lockett*, 72 Tex. 262.

Declarations by Infant Son against Father Claiming Adversely.—Declarations by a boy nine years old, who was a devisee of the former owner of the land, and who lived with his father, the adverse holder, to the effect that he was the owner of the land on which they lived, were held inadmissible to break the continuity of the adverse possession of the father. *Douglas v. Irvine*, 126 Pa. St. 643.

Landlord's Disclaimer Admissible against Tenant.—Where the defendant in an action of ejectment set up as a defense the adverse possession of his landlord, it was held competent to show that in a prior ejectment suit the landlord disclaimed any title to the premises. *Dillon v. Center*, 68 Cal. 561.

1. *Sparrow v. Hovey*, 44 Mich. 63. See also *Kennedy v. Wible* (Pa., 1887), 11 Atl. Rep. 98.

2. Possession cannot be Established by Evidence of General Reputation in the community, nor by "what was understood and recognized," nor by the fact that a witness did not know of any adverse possession, nor by the declarations of the grantee in a deed that the property was his, such declarations not being admissible, save to characterize a possession otherwise proved. *Walker v. Hughes*, 90 Ga. 52.

Evidence that the land in dispute was formerly called the "Barney Crocker lot" was held inadmissible for the purpose of showing that the title was reputed to be in Barney Crocker, under whom the claimants sought to establish their title by adverse possession. *Howland v. Crocker*, 7 Allen (Mass.) 153, *distinguishing* *Green v. Chelsea*, 24 Pick. (Mass.) 71. See also *Woodstock Iron Co. v. Roberts*, 87 Ala. 436.

Other Evidence Admitted—The Testimony of

Witnesses who have been living on the grounds and are familiar with the character of the fences, etc., is admissible to show the character of the possession. *Silverer v. Hansen*, 77 Cal. 579.

When the character of the possession is in issue it cannot be proved by general reputation, nor by the opinion of individuals as to the actual condition of the property; but a witness may testify that a party went into the possession of lands, "and thereafter controlled them," the control of the property not being the opinion of the witness, but a collective statement of his conclusion of fact. *Woodstock Iron Co. v. Roberts*, 87 Ala. 436. See also *Abbett v. Page*, 92 Ala. 571.

The testimony of a witness that a certain person was in possession of lands is the statement of a simple fact, and as such is admissible on an issue of adverse possession as evidence of actual possession and occupation. *Bryan v. Spivey*, 109 N. Car. 57.

Evidence is admissible to show that a person, since dead, was in occupation. *Lick v. Diaz*, 44 Cal. 479.

Payment of Taxes.—*Murray v. Hudson*, 65 Mich. 670; *Murphy v. Doyle*, 37 Minn. 113. See also *Hurlbut v. Bradford*, 109 Ill. 397; *Chapman v. Templeton*, 53 Mo. 463; *Austin v. King*, 97 N. Car. 339; *Faulcon v. Johnston*, 102 N. Car. 264, 11 Am. St. Rep. 737; *Ruffin v. Overby*, 105 N. Car. 78; *Paine v. Hutchins*, 49 Vt. 314. But see *Sioux City, etc., Town Lot, etc., Co. v. Wilson*, 50 Iowa 422; *Raymond v. Morrison*, 59 Iowa 371. See *supra*, this title, *By Payment of Taxes*.

Assessment of Lands to party claiming adversely. *Sauers v. Giddings*, 90 Mich. 50. But see *Zeilin v. Rogers*, 21 Fed. Rep. 103; and see also *McDermott v. Hoffman*, 70 Pa. St. 31.

Certificate of Entry.—Alabama State Land Co. v. *Kyle*, 99 Ala. 474. See also the following cases as to evidence admitted to show the character of possession: *Zeilin v. Rogers*, 21 Fed. Rep. 103; *Kerr v. Nicholas*, 88 Ala. 346; *Hughes v. Israel*, 73 Mo. 538; *Craig v. Craig* (Pa., 1887), 11 Atl. Rep. 60; *Collins v. Lynch*, 167 Pa. St. 635; *Fossett v. McMahan*, 74 Tex. 546.

Contest of Claim.—Evidence that the claim of the adverse holder was "contested" while he was in possession is properly excluded, the only contest available to affect such claim being a suit prosecuted to judgment. *Bullock v. Smith*, 72 Tex. 545.

3. *Darst v. Doom*, 38 Ill. App. 401. And in that case the owner of land agreed to pay a

ADVERTISEMENTS. (See also the titles NOTICE; NEWSPAPERS; STATUTES; and ENCYC. OF PL. AND PR., title PUBLICATION.)—"Advertisements" are notices published either by handbills or in a newspaper.¹

ADVICE.—Advice implies the giving of counsel.²

real-estate agent, for the land sold, fifty dollars, "in full for all trouble in showing and *advertising* said land." The trial court instructed that "the plaintiff could *advertise* the land mentioned in the contract, introduced in evidence, within the meaning and intent of said contract, by showing the same to prospective buyers and trying to sell same, and describing same to those who would likely buy; and to comply with the terms of said contract it was not necessary to *advertise* the same in a newspaper, unless the word *advertise* among real-estate men in the neighborhood of said land was generally understood and known to contemplate such advertisement." This was held to be error. The Appellate Court said: "Language and terms employed in a contract in general are to be construed in accordance with the general understanding and common acceptance of the terms and language used therein, and we think that the term *advertising* as used in the contract, taken in connection with the subject matter and other conditions thereof, should be construed to mean to publish a notice in some newspaper in the usual way that such notices are *advertised*. The word *advertise* is defined by Webster to mean 'to publish notice of,' 'to publish a written or printed account of.'" Bouvier defines *advertisement* to mean 'a notice published in handbills or a newspaper.'"

Advertising Chart.—As to the meaning of this term in a contract, and as to the admission of parol evidence to explain it, see *Stoops v. Smith*, 100 Mass. 66, 1 Am. Rep. 85.

1. Bouv. Law Dict., followed in *Darst v. Doom*, 38 Ill. App. 400.

Constable's Notice of Sale.—In *Com. v. Johnson*, 3 Pa. Dist. Rep. 222, it was held that the *Pennsylvania* act making it a misdemeanor to mutilate, destroy, tear down, or remove any "show-bills, play-bills, posters or programmes, or other advertisements," did not apply to a constable's notice of sale. The court based its decision upon the principle that the term *advertisements* must be read in connection with the other words of the stat-

ute, and was evidently intended to apply to *advertisements* of a like character with those already enumerated.

Lottery Laws.—In *Com. v. Hooper*, 5 Pick. (Mass.) 42, it was held that a signboard erected at a person's place of business, giving notice that lottery tickets were for sale, was an *advertisement* within the meaning of the *Massachusetts* statute against lotteries. And see also the title LOTTERIES.

Advertisement of Reward.—See the title REWARDS.

Public Sales.—See SHERIFF'S SALES; JUDICIAL SALES; TAX SALES.

General Principles.—It may be well to state generally, first, that *advertisements* should be sufficiently full and precise in their terms, as to time, persons, place, and description, to identify the subject matter, notice of which is intended to be given; and, second, that an *advertisement* cut from a newspaper is not a handbill. *Clark v. Chambers*, 1 Pittsb. (Pa.) 222. See also the titles SHERIFF'S SALES; JUDICIAL SALES; TAX SALES; NOTICE. Nor is a mere *advertising* sheet a newspaper, for the purposes of *advertisement* required by law. *Tyler v. Bowen*, 1 Pittsb. (Pa.) 225. See also the title NEWSPAPERS.

Where an *advertisement* is directed to be inserted in a particular paper, the course pointed out must be pursued, and all other local requirements must likewise be complied with. If not otherwise expressly provided, the paper is to be one printed in the English language. *Road in Upper Hanover*, 44 Pa. St. 277; *Tyler v. Bowen*, 1 Pittsb. (Pa.) 225. And see the titles NOTICE; SHERIFF'S SALES; JUDICIAL SALES; TAX SALES; STATUTES.

2. In *Norcum v. D'Ench*, 17 Mo. 99, power was given by the testator to his widow to sell and dispose of his property with the *advice* and consent of the executor. It was held that the refusal of the executor to give his consent did not prevent a valid sale; *advice* meant general *advice*, and not consent to each act; and therefore a court of equity would on application authorize the sale.

ADVICE OF COUNSEL.

By A. S. H. BRISTOW.

I. LIABILITY OF ATTORNEY, 894.

1. *To Client*, 894.
 - a. *For Improper or Erroneous Advice*, 894.
 - b. *For Failure to Advise*, 896.
2. *To Third Persons*, 896.
3. *For Contempt in Giving Improper Advice*, 896.

II. THE ADVICE A PRIVILEGED COMMUNICATION, 897.

III. THE ADVICE AS A DEFENSE, 897.

1. *To Clients Generally*, 897.
 - a. *In Actions Generally*, 897.
 - b. *Contempt*, 898.
 - c. *Perjury*, 898.
 - d. *Libel and Slander*, 899.
 - e. *False Arrest and Imprisonment*, 899.
 - f. *Malicious Prosecution*, 899.
 - (1) *General Rule*, 899.
 - (2) *Disclosure of Facts by Client*, 900.
 - (3) *Requisites as to the Advice Given*, 903.
 - (4) *Qualifications of the Attorney*, 903.
 - (5) *Good Faith of Client in Acting upon Advice*, 906.
 - (6) *Effect of Advice as Evidence*, 906.
2. *To Trustees*, 907.

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ATTORNEY AND CLIENT*; *CONTEMPT*; *CRIMINAL LAW*; *FALSE IMPRISONMENT*; *LIBEL AND SLANDER*; *MALICIOUS PROSECUTION*; *PERJURY*.

I. LIABILITY OF ATTORNEY—1. To Client—*a. FOR IMPROPER OR ERRONEOUS ADVICE—Attorney's Undertaking.*—In rendering to a client an opinion or advice as to any matter concerning which he is consulted, the undertaking of the attorney is that he possesses the requisite knowledge and experience to advise in such matters, and that he will use reasonable care and skill in investigating the law and the facts, and in forming his opinion therefrom; and for a failure to comply with the undertaking in any of these respects he is liable to his client for the resulting damages.¹

1. *Alabama*.—*Pinkston v. Arrington*, 98 Ala. 489.

Illinois.—*Chase v. Heaney*, 70 Ill. 268. See also *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

Indiana.—*Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 320.

Iowa.—*Thomas v. Schee*, 80 Iowa 237.

Maryland.—*Cochrane v. Little*, 71 Md. 323.

Minnesota.—*Ryan v. Long*, 35 Minn. 394.

New York.—*Gihon v. Albert*, 7 Paige (N. Y.) 278.

See also *National Sav. Bank v. Ward*, 100 U. S. 195; *Peckinbaugh v. Quillin*, 12 Neb. 586.

Question of Fact for the Jury.—In *Pinkston v. Arrington*, 98 Ala. 489, it was held that whether or not due care had been exercised by an attorney was a question of fact for the jury.

No Warranty of Correctness of Opinion.—The undertaking extends no further, however, and the attorney cannot be held to warrant the correctness of his opinions or advice.¹

Attorney may Not Profit by His Erroneous Advice.—Where an attorney ignorantly and mistakenly, though honestly, gives advice to his client, and then by a negotiation entered into, or otherwise, gains an advantage over his client in respect to the property which is the subject matter of the advice, he will be looked upon as the agent or trustee of the client, and will not be allowed to profit by his own mistake or ignorance.²

Where the Advice is Fraudulent.—Similarly, where an attorney deceives his client by false advice, or knowingly permits him to be deceived by the false advice of others, he violates his duty, and will not be permitted to avail himself of a negotiation entered into under such circumstances.³

Erroneous Opinion as to Sufficiency of Security.—In *Howell v. Young*, 5 B. & C. 259, 11 E. C. L. 219, an attorney was employed to ascertain whether certain mortgages were a sufficient security for a loan of three thousand dollars, and falsely informed his client that they were. It was held in an action against the attorney that the client might recover at once for all the probable loss he was likely to sustain from the invalidating of the security.

Ignorance of Change of Statute.—The estate of an attorney is liable after his death for damages to a client from erroneous advice given in a case in ignorance of the recent change of the statute applicable. *A. B.'s Estate*, Tuck. (N. Y.) 247.

Advising Client Not to Answer Questions on a Reference.—In *Gihon v. Albert*, 7 Paige (N. Y.) 278, it was held that if the counsel has advised the client not to answer a question put to him under an order of reference where there is no real doubt as to its propriety or where an answer cannot injure the client if he is honest, the counsel will be liable for damages resulting from such advice.

Evidence—Opinions.—In *Cochrane v. Little*, 71 Md. 323, an action against an attorney for giving improper advice, it was held proper to admit the testimony of other lawyers as to whether or not in their opinion the advice given by defendant was such as a prudent and careful lawyer of ordinary capacity and intelligence would or ought to have given under the circumstances; it would be otherwise, however, as to a question the object of which was to elicit witness's opinion of the extent of the client's knowledge of law on certain points.

1. *Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 320; *Bowman v. Tallman*, 40 How. Pr. (N. Y. Ct. App.) 1. See also *Gott v. Brigham*, 41 Mich. 227.

Where Question Submitted to Attorney has Not been Passed upon by Supreme Court.—Thus where an attorney, before the Supreme Court of the state had decided that a mortgage executed by a husband and wife upon land held by them as tenants by entireties was void as to both of them, advised his clients that such a mortgage was good, there was no such mistake as to render him liable in damages. *Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 18 Am. St. Rep. 320.

In *Bowman v. Tallman*, 40 How. Pr. (N. Y. Ct. App.) 1, it was held that where the advice given depends upon the construction of a will and also upon the application of a statute, no authoritative interpretation of which had been given by the courts, an error in the advice is not such negligence as to deprive the attorney of his right to compensation.

A Mere Error of Judgment upon a Controverted Point of Law has been held to be no ground for holding the attorney liable for damages resulting therefrom, no evidence of negligence appearing. *Mowill v. Graham*, 27 Tex. 646.

2. *Bulkley v. Wilford*, 2 Cl. & F. 174; *Doster v. Scully*, 27 Fed. Rep. 782. See also *Rogers v. Marshall*, 3 McCrary (U. S.) 78; *Trotter v. Smith*, 59 Ill. 240.

3. *Doster v. Scully*, 27 Fed. Rep. 782; *Rogers v. Marshall*, 3 McCrary (U. S.) 76; *Herrick v. Lynch*, 150 Ill. 283; *Smith v. Thompson*, 7 B. Mon. (Ky.) 305; *Looff v. Lawton*, 97 N. Y. 478. See *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Yardley v. Cuthbertson*, 108 Pa. St. 395, 56 Am. Rep. 218.

In *Bulkley v. Wilford*, 2 Cl. & F. 177, Lord Eldon said: "Whether you meant fraud, whether you knew that you were the heir at law of the testator or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it if you had known what you ought as an attorney to have known; and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance; for I carry it so far, you shall not take advantage of your own ignorance. It is too dangerous to the interests of mankind that those who are bound to advise, and who being bound to advise ought to be able to give sound and sufficient advice—it is too dangerous to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others."

An Attorney Who Advises a Devise of Property to Himself on pretense that he will make use of it for another, while intending nevertheless to appropriate it for his own use, is guilty of a gross fraud and breach of confidence, and will be held liable. *Hooker v. Axford*, 33 Mich. 453.

6. FOR FAILURE TO ADVISE.—An attorney will be held liable in damages to his client where he is guilty of neglect or want of skill in failing to advise him concerning matters which come within his duties as attorney.¹

2. To Third Persons.—In addition to his liability to his client, an attorney may become liable to an action by a third party for advising the commission of a wrongful act against the latter.²

3. For Contempt in Giving Improper Advice.—An attorney is liable to fine in giving advice which amounts to contempt of court.³ Where, however, he has

Sale by Client to Attorney—Duty to Advise.—

It is well settled that an attorney cannot, in any case, sustain a purchase from his client without showing that he communicated to him disinterested advice and information necessary for him to form a correct judgment as to the real value of the subject of the purchase and as to the propriety of selling for the price offered. *Rogers v. Marshall*, 3 McCrary (U. S.) 76; *White v. Whaley*, 3 Lans. (N. Y.) 327; *Evans v. Ellis*, 5 Den. (N. Y.) 640; *Howell v. Ransom*, 11 Paige (N. Y.) 538. See also *Montesquieu v. Sandys*, 18 Ves. Jr. 308; *Holman v. Loynes*, 18 Jur. 839; *Rhodes v. Bate*, L. R. 1 Ch. 252.

See the titles ATTORNEY AND CLIENT; UNDUE INFLUENCE.

Thus an Attorney Who Purchases an Interest in a Judgment and obtains a power of attorney to collect stands in a relation of trust and confidence to the party owning the judgment. In order to recover on the contract he must prove that he took no advantage, but gave to his client all the information he possessed or could obtain on the subject, and advised him as he would have done in relation to a third person offering to become a purchaser. *White v. Whaley*, 3 Lans. (N. Y.) 327.

Conveyance to Defraud Creditor.—A conveyance intended by both parties to hinder and delay the creditors of the grantor cannot, even as against the latter, be sustained in favor of the grantee or his assignee with notice, by reason of the fact that the grantee was the attorney and counsel of the grantor, and as such advised and received the conveyance. Attorney and client, when parties to such a transaction, are not considered *in pari delicto*, but the client will be relieved if it can be done without injury to an innocent purchaser. *Goodenough v. Spencer*, 15 Abb. Pr., N. S. (N. Y. Supreme Ct.) 248.

Statutory Liability to Treble Damages.—In *Looff v. Lawton*, 97 N. Y. 478, it was held that the provision of the Revised Statute (2 New York Rev. Stat. 97, § 68) making an attorney "who shall be guilty of any deceit or collusion * * * with intent to deceive the court or any party liable for treble damages" has reference to a suit pending, and does not include a transaction between an attorney and his client before proceedings have been commenced or an action brought.

Unlicensed Attorney.—In *Freelove v. Cole*, 41 Barb. (N. Y.) 318, it was held that the rule, as stated in the text, applies to an unlicensed attorney.

1. In *Jamison v. Weaver*, 81 Iowa 212, it was held that it is part of an attorney's duty, employed to prosecute an appeal to final de-

cision, to advise his client concerning the expenses necessary in the prosecution, and that he is liable in damages for failure to perform such duty.

In *Cohn v. Heusner* (C. Pl.), 30 N. Y. Supp. 244, it was held that an attorney who is employed merely to examine title to property on the security of which the client contemplates advancing money, or to prepare the necessary legal documents, is not chargeable with neglect of duty in failing to advise his client as to the value of the security, such duty not belonging to the profession.

2. *Revill v. Pettit*, 3 Metc. (Ky.) 314; *Peck v. Chouteau*, 91 Mo. 138, 60 Am. Rep. 236; *Peckinbaugh v. Quillin*, 12 Neb. 586.

Advising Officer to Make a Wrongful Attachment.—In *Peckinbaugh v. Quillin*, 12 Neb. 586, where an attorney in an attachment suit, in addition to his ordinary duties in suing out the writ, specially advised and directed the legal seizure of property and assisted in its conversion by being present at the sale and bidding off portions of it for his client, it was held that his liability was equal to that of the officer by whom the seizure and sale were made.

Advising Justice of the Peace to Do Wrongful Act.—Where an attorney advised the justice of the peace to act alone in an examining court and commit to jail one charged with a felony, it was held that the attorney was liable in an action by the party committed. *Revill v. Pettit*, 3 Metc. (Ky.) 314.

3. *Reynolds v. Parkes*, 2 Dem. (N. Y.) 399. See also *Wells v. Com.*, 21 Gratt. (Va.) 500.

In *Reynolds v. Parkes*, 2 Dem. (N. Y.) 399, where a person attended before a referee, though not subpoenaed, for the purpose of making a deposition in behalf of the respondent in a certain proceeding, accompanied by one claiming to be counsel for the witness and for the petitioner, and submitted to be sworn, and thereafter, upon the counsel being directed to retire, the witness, by his advice, though directed to remain, retired with him and refused to testify, it was held that the counsel was guilty of contempt of court.

Advice Held Not to Constitute Contempt.—A., being indicted for an assault and battery and bound by recognizance to answer the charge, was advised by his attorney that if he, A., could not procure a continuance of the cause on affidavit, "he then could escape and forfeit his recognizance, which would work a continuance of said cause until the next term at a trifling cost." It was held that the attorney was not guilty of contempt. *Ingle v. State*, 8 Blackf. (Ind.) 574.

acted honestly and in good faith in giving such advice, though he may have erred in judgment, he is not liable.¹

II. THE ADVICE A PRIVILEGED COMMUNICATION.—The advice which an attorney gives to his client is a privileged communication, which the law will not permit the attorney,² nor compel the client,³ to disclose. Thus, an attorney when called as a witness at a trial cannot be permitted or compelled to produce one of his client's letters and testify as to his own reply to it.⁴

Justice Requires such a Rule, for, otherwise, no man would dare to consult a professional adviser with a view to his defense or the enforcement of his rights.⁵

Waiver by Client.—This privilege, however, may be waived by the client, in which case he⁶ or his attorney⁷ may testify as to the advice given.

III. THE ADVICE AS A DEFENSE—1. **To Clients Generally**—*a.* **IN ACTIONS GENERALLY**—**Violation of Law.**—It is a general rule that the advice of counsel furnishes no excuse to the client for the violation of law, and cannot be relied upon as a defense in either civil⁸ or criminal⁹ actions.

1. *Wells v. Com.*, 21 Gratt. (Va.) 500. In this case, Anderson, J., in delivering the opinion of the court, said: "An attorney, then, who would corruptly conspire with his client to obstruct the due administration of the law and to bring the authority of a court of justice into contempt by resisting and obstructing the execution of its lawful decrees, by whatever contrivance, even though it should be by procuring the interference of another court which had no appellate or supervisory power, or jurisdiction of the subject matter of the suit, in abuse of its powers, to enjoin and inhibit the officers of said court and other persons from the execution or performance of said decrees, is at least as guilty of an offense against public justice and of a contempt of court as his client, and as justly liable to summary punishment. But where, as I have said, the attorney has acted in good faith, although he may have erred in judgment, he is not liable. To vindicate his conduct, it is not necessary to be shown that he was right in his opinions, but it is necessary to be shown that he was acting in good faith for what he believed to be the interest of his client, and not from disrespect to the court or from a design to oust it from its lawful jurisdiction."¹⁰

2. *Bluck v. Galsworthy*, 7 Jur. N. S. 91; *Higbee v. Dresser*, 103 Mass. 523. See also *Lengsfeld v. Richardson*, 52 Miss. 443. Compare *Dunn v. Amos*, 14 Wis. 115.

3. *State v. White*, 19 Kan. 445, 27 Am. Rep. 137.

Production of Documents Containing Legal Advice.—In *Garland v. Scott*, 3 Sim. 396, it was held that the court will not order a defendant to produce letters of his solicitor containing legal advice.

4. *Higbee v. Dresser*, 103 Mass. 523.

5. *State v. White*, 19 Kan. 445, 27 Am. Rep. 137.

6. *Passmore v. Passmore*, 50 Mich. 626, 45 Am. Rep. 62.

7. Upon the trial of one indicted for perjury in falsely swearing respecting the existence of a partnership, it was held that the attorney whom the defendant had consulted respecting the partnership might be intro-

duced for the defendant and asked what advice he gave in the matter about which the defendant was charged to have sworn falsely. *State v. McKinney*, 42 Iowa 205.

8. **Action Ex contractu.**—Where an officer was sued on his official bond for certain breaches of duty, it was held that it was no defense that he acted under the legal opinion of the attorney-general of the state. *Dodd v. State*, 18 Ind. 56. See *Farmers', etc., F. Ins. Co. v. Bowen*, 40 Mich. 147.

Actions Ex delicto.—The advice of counsel is, in general, admissible to rebut the presumption of wantonness and malice in actions *ex delicto*, and may be considered by way of mitigation of exemplary damages. Thus in *Cochrane v. Tuttle*, 75 Ill. 361, where, in an action on the case by the plaintiff for being wrongfully put out of a house, a portion of which she claimed to have rented from the defendant, there being no force or violence used, the defendant offered to prove that he acted upon competent legal advice in what he did, which the court refused to admit, it was held that the proof was admissible, not in bar of the action or in mitigation of actual damages, but in mitigation of any exemplary damages, and that the court erred in refusing to admit it. See also *Green v. Jones*, 39 Ga. 522; *Jasper v. Purnell*, 67 Ill. 361.

But in **Order to Render the Advice of Counsel Admissible Evidence in Mitigation of Damages** it must appear that the advice was given upon a full and fair statement of the facts, or of such of them as were material to the question on which counsel was consulted. *Shores v. Brooks*, 81 Ga. 468, 12 Am. St. Rep. 332. See also *Jackson v. Mather*, 7 Cow. (N. Y.) 301.

For further discussion of this question see *infra*, this title, *False Arrest and Imprisonment*.

For instances where the advice of counsel constitutes a complete defense to an action *ex delicto*, see *infra*, this title, *Libel and Slander; Malicious Prosecution*.

9. **Criminal Actions.**—*Barnett v. State*, 89 Ala. 170; *Forwood v. State*, 49 Md. 531; *People v. Kane* (Supreme Ct.), 15 N. Y. Supp. 613; *Weston v. Com.*, 111 Pa. St. 251.

b. CONTEMPT—General Rule—Advice of Counsel No Justification.—The fact that a party, in committing an act of contempt, acted under the erroneous advice of counsel will, in general, afford him no justification.¹

Qualifications.—In certain cases, however, the advice of counsel may be a palliation to some extent of the offense;² but to what extent must depend upon the character of the advice and the circumstances under which it was given.³ Thus, where an act of contempt appears to be not at all wilful or defiant, but committed merely in the exercise of a supposed right, under advice taken and given in good faith, it does not deserve punishment beyond the requirement to pay an amount sufficient to compensate the adverse party for the injuries sustained, and to meet the necessary expenses of the proceedings.⁴

c. PERJURY—Where the Question is One of Fact.—On a prosecution for perjury, where the matter testified to is purely one of fact and involves no question of law, the defendant cannot be permitted to prove that he acted under legal advice, especially when it does not appear that he truly stated the facts to the attorney.⁵

Where a Question of Law is Involved.—But when the truth or falsity of the matter charged as being wilfully and corruptly false is a mixed question of law and

In *Barnett v. State*, 89 Ala. 165, McClellan, J., said: "The general rule unquestionably is, that the advice of counsel can afford no protection against the punitive consequences of criminal acts. Whatever the rights of a defendant are in respect to the doing of the act charged, they are available to him in defense whether he was advised of them or not, and no amount of assurance, even from those learned in the law, of the existence of rights in the premises, which in point of fact do not exist, can justify or excuse an act otherwise criminal. The giving of such assurance or advice neither increases nor diminishes criminality in any degree, and evidence of it is therefore irrelevant."

On the Trial of One Charged with Murder testimony that the defendant had consulted counsel, and had by counsel been advised that he had a legal right to maintain possession of the land, in a dispute about which the alleged murder took place, was held not to be admissible in evidence. *Weston v. Com.*, 111 Pa. St. 257.

For modifications of the doctrine as stated in the text, see *infra*, this title, *Contempt; Perjury*.

1. *Georgia*.—*Smith v. Cook*, 39 Ga. 191.

New Jersey.—*Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422.

New York.—*Capet v. Parker*, 3 Sandf. (N. Y.) 662; *Ciancimino's Towing, etc., Co. v. Ciancimino* (Supreme Ct.), 17 N. Y. Supp. 125.

North Carolina.—*Green v. Griffin*, 95 N. Car. 50.

Ohio.—*Myers v. State*, 46 Ohio St. 473, 15 Am. St. Rep. 638.

South Carolina.—*Columbia Water Power Co. v. Columbia*, 4 S. Car. 388.

2. *Columbia Water Power Co. v. Columbia*, 4 S. Car. 388; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864. See also *Lindsay v. Hatch*, 85 Iowa 332.

Two factions were each endeavoring to obtain control of the affairs of a company, and one of them obtained an injunction to restrain the defendant from attempting to act as busi-

ness manager of the company or to enter on its premises for that purpose. Afterwards defendant was elected business manager of the company by his faction, and was advised by counsel that he was entitled to take possession of the office of the company and administer its affairs, which he did by entering the office with his party, ejecting the office boy, procuring the safe to be opened, and discharging an employee of the company. This was held to be a violation of the injunction order, whether his election was or was not valid, but it was also held that, having acted under the advice of counsel and no loss or damage to the company having accrued therefrom, defendant's term of imprisonment should be reduced from thirty to ten days. *Ciancimino's Towing, etc., Co. v. Ciancimino* (Supreme Ct.), 17 N. Y. Supp. 125.

3. *People v. Compton*, 1 Duer (N. Y.) 512; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

In *People v. Compton*, 1 Duer (N. Y.) 512, it was held that when a manifest contempt is proved, a statement in general words that the guilty party acted under the advice of counsel will never be accepted by the court as excusing or palliating his misconduct, and that to enable the court to regard such advice the names of the counsel, the information that was laid before them, and the exact import of their advice must be fully stated.

4. *United States*.—*Roberts v. Walley*, 14 Fed. Rep. 167; *Matthews v. Spangenberg*, 15 Fed. Rep. 813.

Michigan.—*Chapel v. Hull*, 60 Mich. 167.

New York.—*Lansing v. Easton*, 7 Paige (N. Y.) 364; *People v. St. Louis, etc., R. Co.*, 19 Abb. N. Cas. (N. Y. Supreme Ct.) 1; *Hawley v. Bennett*, 4 Paige (N. Y.) 163; *Rogers v. Paterson*, 4 Paige (N. Y.) 450; *Power v. Athens*, 19 Hun (N. Y.) 165.

See also *Denver, etc., R. Co. v. Atchison, etc., R. Co.*, 5 McCrary (U. S.) 287; *Harrell v. Feagin*, 59 Ga. 821; *Fraas v. Barlement*, 25 N. J. Eq. 84.

5. *Barnett v. State*, 89 Ala. 165.

fact, if the facts are fully and in good faith laid before counsel and upon them he advises as a matter of law that a certain statement may be made which will be the truth, and, acting upon this advice, the client swears to the statement, believing he has been correctly advised, it cannot be said that this oath is wilfully and corruptly false, and hence the charge of perjury cannot be predicated upon it.¹

d. LIBEL AND SLANDER.—In an action for libel or slander the fact that the defendant acted upon the advice of counsel, given upon a full and fair statement of the facts, is to be considered in determining whether or not he acted maliciously.²

e. FALSE ARREST AND IMPRISONMENT.—While the advice of counsel cannot be a complete defense to an action for false arrest or imprisonment, yet, when counsel has been consulted in good faith and has been correctly informed of the facts, his advice will be a circumstance to be taken into consideration by way of mitigating the damages to which his client should be subjected.³

f. MALICIOUS PROSECUTION.—(1) *General Rule.*—In an action for malicious prosecution, if it appears that the defendant laid before counsel a full and fair statement of the facts relevant to the prosecution, and acted honestly and in good faith upon the advice given him, however erroneous it may have been, there will be sufficient evidence of probable cause, the idea of malice will be negatived, and the action cannot be maintained.⁴

1. *U. S. v. Conner*, 3 McLean (U. S.) 573; *U. S. v. Stanley*, 6 McLean (U. S.) 409; *Hood v. State*, 44 Ala. 81; *Barnett v. State*, 89 Ala. 165; *State v. McKinney*, 42 Iowa 205; *Com. v. Clark*, 157 Pa. St. 258.

Withholding Certain Items from Bankrupt's Schedule.—In *U. S. v. Conner*, 3 McLean (U. S.) 574, it was held that where a bankrupt having submitted the facts in regard to his property fairly to his counsel, and acting under the advice thus given, withholds certain items from his schedule, he is not guilty of perjury. In giving the opinion in this case the court said: "A bankrupt is bound to exhibit a true schedule of all his property, and if he fails to do this, wilfully and fraudulently, he is guilty of perjury; but if he, being unacquainted with the requirements of the law, shall be advised by his counsel, after the facts have been fully stated to him, that certain items of property are not required to be stated on his schedule, and he omits them, he is not guilty of perjury. He acts fairly in submitting the facts to his counsel, and by acting under his advice he shows a desire to conform to the law."

2. *Hill v. Ward*, 13 Ala. 310; *Weil v. Israel*, 42 La. Ann. 955; *Like v. McKinstry*, 41 Barb. (N. Y.) 186, 4 Keyes (N. Y.) 397.

Compare Myers v. State, 46 Ohio St. 473, 15 Am. St. Rep. 638.

Slander of Title.—In an action for slander-ing another's title to a slave the defendant, to rebut the presumption of malice, may prove that he was advised by a lawyer to forbid the sale of a slave in order to render his claim under a mortgage effectual. *Hill v. Ward*, 13 Ala. 310. See the article SLANDER OF TITLE.

3. *Philadelphia F. Assoc. v. Fleming*, 78 Ga. 733; *Block v. Meyers*, 33 La. Ann. 776; *Mortimer v. Thomas*, 23 La. Ann. 165; *Joselyn v. McAllister*, 22 Mich. 300.

The Advice of One Not an Attorney, but who

sometimes advises his neighbors for pay, is not admissible in evidence as advice of counsel in an action for false imprisonment. *Livingston v. Burroughs*, 33 Mich. 511.

4. *England.*—*Ravenga v. Mackintosh*, 2 B. & C. 693, 9 E. C. L. 225.

United States.—*Stewart v. Sonneborn*, 98 U. S. 187; *Burnap v. Albert*, Taney's Dec. (U. S.) 244; *Blunt v. Little*, 3 Mason (U. S.) 102; *Blunk v. Atchison*, etc., R. Co., 38 Fed. Rep. 311; *Cogswell v. Bohn*, 43 Fed. Rep. 411.

Alabama.—*Chandler v. McPherson*, 11 Ala. 916; *Leaird v. Davis*, 17 Ala. 27.

Arkansas.—*Lemay v. Williams*, 32 Ark. 166.

California.—*Bliss v. Wyman*, 7 Cal. 257; *Levy v. Brannan*, 39 Cal. 485; *Jones v. Jones*, 71 Cal. 89; *Dawson v. Schloss*, 93 Cal. 194.

Illinois.—*Beidler v. Beirnaert*, 25 Ill. App. 422; *Ross v. Innis*, 26 Ill. 260; *Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75; *Ames v. Snider*, 69 Ill. 377; *Palmer v. Richardson*, 70 Ill. 544; *Anderson v. Friend*, 71 Ill. 476; *Davie v. Wisher*, 72 Ill. 262; *Skidmore v. Bricker*, 77 Ill. 167; *Roy v. Goings*, 112 Ill. 656.

Indiana.—*Wright v. Hanna*, 98 Ind. 217.

Iowa.—*Parkhurst v. Masteller*, 57 Iowa 474.

Kansas.—*Schippel v. Norton*, 38 Kan. 567.

Louisiana.—*Gould v. Gardner*, 9 La. Ann. 12; *Phillips v. Bonham*, 16 La. Ann. 387.

Maryland.—*Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; *Cooper v. Utterbach*, 37 Md. 282.

Massachusetts.—*Wills v. Noyes*, 12 Pick. (Mass.) 327; *Allen v. Codman*, 139 Mass. 136; *Donnelly v. Daggett*, 145 Mass. 314.

Michigan.—*Stanton v. Hart*, 27 Mich. 539.

Mississippi.—*Connery v. Manning* (Mass., 1895), 39 N. E. Rep. 558; *Whitfield v. Westbrook*, 40 Miss. 311.

Missouri.—*Sappington v. Watson*, 50 Mo. 83.

(2) *Disclosure of Facts by Client.*—In order for the advice of counsel to constitute a complete defense the client is required to make a full and fair dis-

Nebraska.—Jonasen v. Kennedy, 39 Neb. 313.

Nevada.—Ricord v. Central Pac. R. Co., 15 Nev. 169.

New Hampshire.—Eastman v. Keasor, 44 N. H. 518.

New York.—Ames v. Rathbun, 55 Barb. (N. Y.) 194; Richardson v. Virtue, 2 Hun (N. Y.) 208; Willard v. Holmes (C. Pl.), 51 N. Y. St. Rep. 569; Kingsbury v. Garden, 45 N. Y. Super. Ct. 224.

Ohio.—Ash v. Marlow, 20 Ohio 119.

Pennsylvania.—Leahy v. March, 155 Pa. St. 459; Walter v. Sample, 25 Pa. St. 275; Emerson v. Cochran, 111 Pa. St. 619; Smith v. Walter, 125 Pa. St. 453; McClafferty v. Philp, 151 Pa. St. 86.

Rhode Island.—Bartlett v. Brown, 6 R. I. 37, 75 Am. Dec. 675; Newton v. Weaver, 13 R. I. 616.

South Dakota.—Jackson v. Bell (S. Dak., 1894), 58 N. W. Rep. 671.

Texas.—Gulf, etc., R. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743.

In *Walter v. Sample*, 25 Pa. St. 275, Woodward, J., in delivering the opinion of the court, said: "Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases, and when the client is instructed that they do he has taken all the precaution demanded of a good citizen."

Misnomer of the Offense in a Complaint.—In *Bartlett v. Brown*, 6 R. I. 37, 75 Am. Dec. 675, it was held that where the prosecutor, a laboring man, truly stated his cause of complaint to a counsellor at law for his advice and direction, and, pursuing that advice, signed and swore to a complaint prepared for him by the counsel under a misrecollection of the statute, the misnomer of the offense in the complaint would not support an action for malicious prosecution, even in case of the most express malice in prosecuting, inasmuch as there was probable cause for the prosecution in the form in which it was made.

In Mitigation of Damages.—In an action for malicious prosecution it has been held that where advice was taken and followed in good faith the defendant, while he might be liable to actual damages if the advice was bad, was not liable to exemplary damages. *Chambers v. Upton*, 34 Fed. Rep. 473.

Wrongful Attachment.—Also in an action to recover exemplary damages for wilfully suing out a wrongful attachment it has been held that the advice of counsel might be a defense against exemplary damages, but not against actual damages. *Raver v. Webster*, 3 Iowa 502a, 66 Am. Dec. 96.

Georgia Code.—It has been held that under the *Georgia Code* the advice of counsel,

though of itself no protection to the defendant in a suit for malicious prosecution, is nevertheless a circumstance tending to show the absence of malice, and the existence of probable cause, and should go before the jury as a circumstance in the case which, when weighed with other circumstances, may, according to the evidence of each case, relieve the defendant, or make the damages nominal, or mitigate them. *Fox v. Davis*, 55 Ga. 298.

Cases Holding that Advice of Counsel Negatives Malice.—The following cases hold that the effect of the advice of counsel received under conditions as laid down in the text is to negative malice:

United States.—*Brewer v. Jacobs*, 22 Fed. Rep. 217.

Arkansas.—*Lemay v. Williams*, 32 Ark. 167.

Indiana.—*Wright v. Hanna*, 98 Ind. 217; *Paddock v. Watts*, 116 Ind. 147, 9 Am. St. Rep. 832.

Iowa.—*Center v. Springs*, 2 Iowa 393; *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96.

Louisiana.—*Womack v. Fudicker* (La., 1895), 16 So. Rep. 645.

Maine.—*Soule v. Winslow*, 66 Me. 452.

Maryland.—*Cooper v. Utterbach*, 37 Md. 282.

Michigan.—*Stanton v. Hart*, 27 Mich. 541.

Missouri.—*Williams v. Vanmeter*, 8 Mo. 339.

North Carolina.—*Thurber v. Eastern Bldg., etc., Assoc.*, 116 N. Car. 75; *Davenport v. Lynch*, 6 Jones (N. Car.) 545; *Beal v. Roberson*, 8 Ired. (N. Car.) 276.

Pennsylvania.—*Sommer v. Wilt*, 4 S. & R. (Pa.) 24.

Texas.—*Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85; *Ramsey v. Arrott*, 64 Tex. 320.

Cases Holding that Advice of Counsel Establishes Probable Cause.—The following cases hold the advice of counsel evidence to establish probable cause:

United States.—*Stewart v. Sonneborn*, 98 U. S. 187.

California.—*Potter v. Seale*, 8 Cal. 217; *Levy v. Brannan*, 39 Cal. 485.

District of Columbia.—*Porter v. White*, 5 Mackey (D. C.) 180.

Illinois.—*Leyenberger v. Paul*, 40 Ill. App. 516; *Ross v. Innis*, 26 Ill. 260; *Murphy v. Larson*, 77 Ill. 172; *Anderson v. Friend*, 85 Ill. 135.

Kansas.—*Schippel v. Norton*, 38 Kan. 567.

Massachusetts.—*Olmstead v. Partridge*, 16 Gray (Mass.) 383.

Michigan.—*Le Clear v. Perkins* (Mich., 1894), 61 N. W. Rep. 357.

Missouri.—*Sharpe v. Johnston*, 59 Mo. 567; *Fugate v. Millar*, 109 Mo. 281.

Nevada.—*Ricord v. Central Pac. R. Co.*, 15 Nev. 169.

New York.—*Hall v. Suydam*, 6 Barb. (N. Y.) 83; *Richardson v. Virtue*, 2 Hun (N. Y.) 208; *Kingsbury v. Garden*, 45 N. Y. Super. Ct. 224.

closure to his counsel of all facts material to the prosecution which are within his knowledge,¹ or which he could have ascertained by the exercise of reason-

Pennsylvania.—Laughlin *v.* Clawson, 27 Pa. St. 328; Fisher *v.* Forrester, 33 Pa. St. 501.

Texas.—Lenoir *v.* Marlin (Tex. Civ. App., 1895), 30 S. W. Rep. 566.

Vermont.—St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 295.

Cases Holding that Advice of Counsel is Evidence Both to Establish Probable Cause and to Negative Malice.—In the following cases it is held that the effect of advice of counsel is both to establish probable cause and to negative malice:

England.—Ravenga *v.* Mackintosh, 2 B. & C. 693, 9 E. C. L. 225.

United States.—Burnap *v.* Moore, Taney's Dec. (U. S.) 244; Blunt *v.* Little, 3 Mason (U. S.) 102.

Alabama.—Leaird *v.* Davis, 17 Ala. 27; Chandler *v.* McPherson, 11 Ala. 916.

California.—Bliss *v.* Wyman, 7 Cal. 257; Jones *v.* Jones, 71 Cal. 89; Dawson *v.* Schloss, 93 Cal. 194.

Illinois.—Palmer *v.* Richardson, 70 Ill. 544; Collins *v.* Hayte, 50 Ill. 350, 99 Am. Dec. 521; Wicker *v.* Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Davie *v.* Wisher, 72 Ill. 263; Skidmore *v.* Bricker, 77 Ill. 167; Roy *v.* Goings, 112 Ill. 656.

Indiana.—McCarthy *v.* Kitchen, 59 Ind. 500.

Iowa.—Mesher *v.* Iddings, 72 Iowa 553; Acton *v.* Coffman, 74 Iowa 17.

Louisiana.—Gould *v.* Gardner, 8 La. Ann. 12; Phillips *v.* Bonham, 16 La. Ann. 387; Cointement *v.* Cropper, 41 La. Ann. 303.

Maine.—Stevens *v.* Fassett, 27 Me. 266.

Maryland.—Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329.

Massachusetts.—Stone *v.* Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; Wills *v.* Noyes, 12 Pick. (Mass.) 327; Wilder *v.* Holden, 24 Pick. (Mass.) 11; Donnelly *v.* Daggett, 145 Mass. 314.

Michigan.—Thurston *v.* Wright, 77 Mich. 96.

Minnesota.—Gilbertson *v.* Fuller, 40 Minn. 413; Moore *v.* Northern Pac. R. Co., 37 Minn. 147.

Mississippi.—Whitfield *v.* Westbrook, 40 Miss. 311.

Missouri.—Sappington *v.* Watson, 50 Mo. 83.

New Hampshire.—Eastman *v.* Keasor, 44 N. H. 518.

New York.—Willard *v.* Holmes (C. Pl.), 51 N. Y. St. Rep. 569; Ames *v.* Rathbun, 55 Barb. (N. Y.) 194.

Ohio.—Ash *v.* Marlow, 20 Ohio 119.

Pennsylvania.—Walter *v.* Sample, 25 Pa. St. 275; Emerson *v.* Cochran, 111 Pa. St. 619; Smith *v.* Walter, 125 Pa. St. 453; McClafferty *v.* Philp, 151 Pa. St. 86; Leahey *v.* March, 155 Pa. St. 458.

Rhode Island.—Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675.

Texas.—Gulf, etc., R. Co., *v.* James, 73 Tex. 12, 15 Am. St. Rep. 743.

1. *England.*—Hewlett *v.* Cruchley, 5 Taunt. 277.

United States.—Blunk *v.* Atchison, etc., R. Co., 38 Fed. Rep. 311; Cuthbert *v.* Galloway, 35 Fed. Rep. 466; Miller *v.* Chicago, etc., R. Co., 41 Fed. Rep. 898.

Alabama.—Motes *v.* Bates, 80 Ala. 382; Jordan *v.* Alabama G. S. R. Co., 81 Ala. 220.

California.—Dawson *v.* Schloss, 93 Cal. 194; Weinburg *v.* Soms (Cal., 1893), 33 Pac. Rep. 341; Bliss *v.* Wyman, 7 Cal. 257.

Illinois.—Anderson *v.* Friend, 71 Ill. 475, 85 Ill. 135; Roy *v.* Goings, 112 Ill. 656; Wicker *v.* Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75.

Indiana.—Galloway *v.* Stewart, 49 Ind. 156, 19 Am. Rep. 677; Paddock *v.* Watts, 116 Ind. 147, 9 Am. St. Rep. 832; Flora *v.* Russell (Ind., 1894), 37 N. E. Rep. 593.

Iowa.—Logan *v.* Maytag, 57 Iowa 107.

Kansas.—Clark *v.* Baldwin, 25 Kan. 121.

Maine.—Stevens *v.* Fassett, 27 Me. 267; Thompson *v.* Mussey, 3 Me. 309; White *v.* Carr, 71 Me. 555, 36 Am. Rep. 353.

Massachusetts.—Donnelly *v.* Daggett, 145 Mass. 314.

Michigan.—Webster *v.* Fowler, 89 Mich. 303; Huntington *v.* Gault, 81 Mich. 144; Perry *v.* Sulier, 92 Mich. 72; Thompson *v.* Price, 100 Mich. 558; Smith *v.* Austin, 49 Mich. 286; Peterson *v.* Toner, 80 Mich. 350.

Minnesota.—Moore *v.* Northern Pac. R. Co., 37 Minn. 147; Norrell *v.* Vogel, 39 Minn. 107.

Missouri.—Sappington *v.* Watson, 50 Mo. 83; Hill *v.* Palm, 38 Mo. 13.

Nebraska.—Jonasen *v.* Kennedy, 39 Neb. 315.

New York.—Willard *v.* Holmes (C. Pl.), 21 N. Y. Supp. 998; Howe *v.* Oldham, 69 Hun (N. Y.) 57; Thompson *v.* Lumley, 50 How. Pr. (N. Y. C. Pl.) 105.

Ohio.—Ash *v.* Marlow, 20 Ohio 120.

Pennsylvania.—Barhight *v.* Tammany, 158 Pa. St. 545.

Rhode Island.—Newton *v.* Weaver, 13 R. I. 616.

South Dakota.—Jackson *v.* Bell (S. Dak., 1894), 58 N. W. Rep. 671.

Tennessee.—Hall *v.* Hawkins, 5 Humph. (Tenn.) 357.

Texas.—Lenoir *v.* Marlin (Tex. Civ. App., 1895), 30 S. W. Rep. 566.

Vermont.—St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294.

Wisconsin.—Sherburne *v.* Rodman, 51 Wis. 474; Palmer *v.* Broder, 78 Wis. 483.

In delivering the opinion of the court in Barhight *v.* Tammany, 158 Pa. St. 545, McCollum, J., said: "Any evasion or concealment by the prosecutor in his statement of the case to his counsel, or any failure on his part to make a full disclosure of all the facts within his knowledge concerning it, will deprive him of the protection which advice founded upon an honest, fair, and full presentation of the case affords. An incomplete and unfair statement warrants an inference that the advice was sought as a mere cover

able diligence,¹ and this rule holds true though he honestly supposed such

for the prosecution, and an opinion based on such statement is an unsatisfactory reply to evidence of malice and want of probable cause. The legal advice which constitutes a defense to an action for malicious prosecution must rest on an honest and full presentation to counsel of all the facts within the knowledge of the prosecutor, or which he has reasonable ground for believing he is able to prove."

Omission of Material Facts.—In an action for malicious prosecution of special proceedings for an order of arrest and false imprisonment, it appeared that defendant was a member of a firm doing business as photographers in New York, and also of a like firm in Philadelphia; that the firms divided territory between themselves, and were not to encroach upon that of each other; that the New York firm was to have Connecticut, and appointed plaintiff agent for that territory, agreeing that he should have the exclusive right there and certain commissions, and that he should collect all moneys and turn them over weekly with a statement of receipts and disbursements; that this agreement was subsequently changed so that the firm were to charge him with what was furnished him at agreed prices, he to pay his own expenses and make collections at his own risk; that on settlement there was an ultimate balance against plaintiff at the agreed rates, which he refused to pay, claiming damages in consequence of an agent of the other firm having encroached upon his territory; that thereupon, on the ground that this balance was received by plaintiff in a fiduciary capacity, an order of arrest was procured by defendant, under which plaintiff was arrested on Friday, and committed to jail, but was released on the following Monday, the order having been dissolved. It was held that, defendant having admitted that he did not, at the time of applying for the order of arrest, lay before his counsel the facts with reference to the doing of business by the agent of the Philadelphia firm in plaintiff's territory, or the change from selling for the New York firm to purchasing from them, the advice of counsel was not a shelter from liability. *Cuthbert v. Galloway*, 35 Fed. Rep. 467.

In *Roy v. Goings*, 112 Ill. 656, a mortgagor of crops grown by him, before the maturity of the debt, gathered a load of beans from the land and took them to his residence, about two miles distant, to thresh them. The mortgagee, on learning this, posted notices for a foreclosure of the mortgage, and forbade the mortgagor removing any more of the crops, and threatened to have him arrested if he did. The latter, claiming he had the right to gather the beans, and denying the mortgagee's right to foreclose, gathered another load of beans, in open day, under claim of right, whereupon the mortgagee had him arrested and imprisoned on a charge of larceny. In an action for malicious prosecution by the mortgagor against the mortgagee the latter sought to justify under the advice

of the state's attorney. It was held that he should have disclosed to the attorney, whose advice he sought, that the plaintiff took the property openly, in daylight, as anyone would his own property, and that plaintiff had insisted that the mortgagee had no right to foreclose, and that he had claimed the right to gather and preserve the beans in order to protect himself, as he had been advised he might do.

In an action for malicious prosecution it was shown that the plaintiff, before the prosecution, requested the defendant to examine the supposed stolen property in his possession, which the defendant refused to do. This was a material fact, under the circumstances, which should have been stated when the defendant sought legal advice with respect to the prosecution. *Norrell v. Vogel*, 39 Minn. 107.

False Statements.—The plaintiff found the cows of the defendant in his garden, and sent a messenger to defendant requesting him to come and pay the damage done by the cows, and to take them away. The defendant thereupon went to an attorney and told him that he had heard that the plaintiff had his cows, and had secreted them, and that he could not find them, and the attorney advised the defendant to cause the arrest of the plaintiff for larceny, which was done. It was held that the defendant misrepresented the facts to his attorney, and was not protected by the advice of counsel. *Wild v. Odell*, 56 Cal. 136.

There need Not be Gross Negligence.—If the person seeking such advice purposely, carelessly, or negligently fails to give such full statement, the advice will not avail as a defense. It need not amount to gross negligence. *Scotten v. Longfellow*, 40 Ind. 24.

Proof that Counsel Knew All the Facts.—In order to avail himself of the defense of advice of counsel it devolves upon the defendant to prove that, before receiving the advice, he had fairly and fully communicated to his counsel, or at least that his counsel knew, all the facts within the defendant's knowledge tending to prove or disprove probable cause for the prosecution. *Dawson v. Schloss*, 93 Cal. 202.

1. *United States.*—*Blunk v. Atchison*, etc., R. Co., 38 Fed. Rep. 311.

Alabama.—*Jordan v. Alabama G. S. R. Co.*, 81 Ala. 220; *Steed v. Knowles*, 79 Ala. 446; *Motes v. Bates*, 80 Ala. 382.

Colorado.—*Whitehead v. Jessup*, 2 Colo. App. 76.

Illinois.—*Anderson v. Friend*, 71 Ill. 475; *Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75.

Indiana.—*Galloway v. Stewart*, 49 Ind. 156, 19 Am. Rep. 616.

Maine.—*White v. Carr*, 71 Me. 555, 36 Am. Rep. 353; *Stevens v. Fassett*, 27 Me. 267.

Maryland.—*Cooper v. Utterbach*, 37 Md. 282.

Minnesota.—*Moore v. Northern Pac. R. Co.*, 37 Minn. 147.

Missouri.—*Pipkin v. Hauke*, 15 Mo. App. 373; *Sappington v. Watson*, 50 Mo. 83;

facts were immaterial.¹

After-acquired Knowledge Not Communicated.—Where the client receives advice favorable to the prosecution, and subsequently acquires material information which does not warrant the prosecution, and which is not communicated to the counsel for his further opinion, then the advice previously given can be no protection.²

Requisites as to Evidence of Facts Communicated.—Evidence to establish the defense must show that facts and circumstances were communicated to the counsel, and not conclusions drawn from those facts and circumstances; since the inference as to what circumstances will constitute a proper disclosure is for the jury, and not for the witness, to draw.³

(3) **Requisites as to the Advice Given.**—**The Statement that the Plaintiff was Liable to Prosecution Sufficient.**—It is sufficient if the attorney stated to the client that the plaintiff in the action was liable to prosecution,⁴ and it is improper to limit the inquiry as to whether the counsel advised the suit to be brought.⁵

Advice must be Given before Prosecution.—To constitute a defense the advice must be given before prosecution, and not afterwards.⁶

(4) **Qualifications of the Attorney.**—To entitle the defendant to the benefit of the rule making the advice of counsel a defense in an action for malicious prosecution, it is necessary for the counsel selected to be a licensed attorney,⁷

Sharpe v. Johnston, 59 Mo. 557; Hill v. Palm, 38 Mo. 13.

Ohio.—Ash v. Marlow, 20 Ohio 120.

Vermont.—St. Johnsbury, etc., R. Co. v. Hunt, 59 Vt. 294.

Doctrine Questioned.—In Johnson v. Miller, 69 Iowa 562, 58 Am. Rep. 231, it was held that one who seeks advice of counsel about the commencement of a criminal prosecution must, in order that he may be protected from liability, on the ground of such advice, in an action for malicious prosecution, make known to counsel a full and fair statement of all the facts known to him. If he has reasonable ground to believe that facts exist which would tend to exculpate the accused, he must either make further inquiry in relation to such facts and communicate to counsel the information obtained, or else inform counsel of his belief of their existence, in order that counsel may investigate, and take the information gained into account in forming an opinion. But he is not required to do more than this, and an instruction that defendants were bound to submit to counsel all facts which they could have ascertained by reasonable diligence was held to be erroneous.

Examination by Prosecutor into Character of His Informant Unnecessary.—It was held in Jordan v. Alabama G. S. R. Co., 81 Ala. 220, that the advice of counsel on a full and fair statement of the facts does not cease to be a defense because the prosecutor could, by the exercise of reasonable diligence and prudence, have learned that those on whose information he acted were of bad character for truth and veracity, there having been no known facts and circumstances calculated to arouse suspicion as to the truth of their statements.

1. Hill v. Palm, 38 Mo. 13; Sharpe v. Johnston, 59 Mo. 557; Forbes v. Hagman, 75 Va. 168.

2. Ash v. Marlow, 20 Ohio 119. See also Cole v. Curtis, 16 Minn. 183.

In Kansas if, after the filing of an original complaint, those who instituted the prosecution learned facts showing the innocence of the accused, they are not liable for malicious prosecution for merely withholding such information from the prosecuting attorney, but they are liable if they still insist upon, urge, and demand prosecution. Blunk v. Atchison, etc., R. Co., 38 Fed. Rep. 311.

3. Blunt v. Little, 3 Mason (U. S.) 102; Porter v. Knight, 63 Iowa 366; Jonassen v. Kennedy, 39 Neb. 313. See also Forbes v. Hagman, 75 Va. 168.

4. Sharpe v. Johnston, 59 Mo. 557.

5. Collins v. Hayte, 50 Ill. 338, 99 Am. Dec. 521.

6. Blunt v. Little, 3 Mason (U. S.) 102. In delivering the opinion of the court in this case, Story, J., said: "I think it ought not to be permitted to any person, after the commencement of his suit, to repel the imputation of malice or prove probable cause by subsequently getting the opinions of counsel in his favor. What would this be but to encourage unfounded suits, and to enable parties to get rid of the effects of their own misconduct by matters *ex post facto*? What constitutes probable cause of action is, when the facts are given, matter of law upon which the court are to decide, and it cannot be proper to introduce certificates of counsel to establish what the law is. If the party acts upon the advice of counsel, however mistaken, in commencing his suit, and is honestly misled, there is some ground to excuse his act. But when he has gone on without such advice and in point of law has no probable cause of action, it is, I think, conceding too much to allow the subsequent opinion of counsel to change the legal rights of the parties."

7. Murphy v. Larson, 77 Ill. 172; McCullough v. Rice, 59 Ind. 580; Straus v. Young,

reputable in character,¹ and considered in the community as competent to give legal advice on all matters pertaining to the law.² Thus evidence that the defendant acted upon the advice of a pettifogger,³ a justice of the peace,⁴

36 Md. 246; *Olmstead v. Partridge*, 16 Gray (Mass.) 381; *Beal v. Robeson*, 8 Ired. (N. Car.) 276; *Sutton v. McConnell*, 46 Wis. 269.

Where Person Advising Holds Himself out as Attorney—Mitigation of Damages.—In *Murphy v. Larson*, 77 Ill. 175, it was held that it was not sufficient as a bar to an action for malicious prosecution that the person advising the prosecution held himself out as an attorney at law, and was believed to be such by the party consulting him, when in reality he was not. It was at the same time held, however, that where a party before instituting a criminal prosecution in good faith consults one whom he supposes a licensed attorney and learned in the law and competent to advise, but who in fact is not licensed, and acts upon his advice, the advice so given is competent evidence in an action for malicious prosecution on the question of malice and in reduction of any exemplary damages that may be claimed, but not in bar of the action or in reduction of any actual damages.

Attorney Not in Actual Practice.—In an action for the wrongful suing out of an attachment it was held that the plaintiff in the attachment might show that he consulted an attorney by profession, but not in actual practice, and that he advised the suing out of the attachment. *Charles City Plow, etc., Co. v. Jones*, 71 Iowa 235.

Private Counsel.—Whether the advice of private counsel, instead of the district attorney, is a complete defense, has been a question in *Wisconsin*. *Plath v. Braunsdorff*, 40 Wis. 112.

1. *Murphy v. Larson*, 77 Ill. 172; *Roy v. Goings*, 112 Ill. 656; *Davie v. Wisher*, 72 Ill. 262; *Beidler v. Beirnaert*, 25 Ill. App. 422; *Walter v. Sample*, 25 Pa. St. 275; *Newton v. Weaver*, 13 R. I. 616.

Where the proof showed that the criminal prosecution was instituted on the advice of the state's attorney, and also that such attorney was habitually intemperate, the jury were instructed that to entitle the defendant to protect himself on account of the advice of an attorney he must have communicated the facts within his knowledge, etc., to a respectable attorney in good standing, and have acted in good faith on his advice. It was held that there was no error in the instructions in requiring the communication to have been made to an attorney in good standing, the court not being prepared to hold that an attorney is in good standing merely because of his holding a commission as state's attorney. *Roy v. Goings*, 112 Ill. 656.

2. *United States*.—*Bright v. Patton*, 5 Mackey (D. C.) 534.

Georgia.—*Rigden v. Jordan*, 81 Ga. 668.

Illinois.—*Davie v. Wisher*, 72 Ill. 262; *Beidler v. Beirnaert*, 25 Ill. App. 422.

Maryland.—*Straus v. Young*, 36 Md. 246.

Massachusetts.—*Olmstead v. Partridge*, 16 Gray (Mass.) 381.

Minnesota.—*Moore v. Northern Pac. R. Co.*, 37 Minn. 147.

New York.—*Laird v. Taylor*, 66 Barb. (N. Y.) 139.

North Carolina.—*Beal v. Robeson*, 8 Ired. (N. Car.) 276.

Pennsylvania.—*Walter v. Sample*, 25 Pa. St. 275.

Wisconsin.—*Sutton v. McConnell*, 46 Wis. 269.

In *Olmstead v. Partridge*, 16 Gray (Mass.) 381, Bigelow, C. J., in delivering the opinion of the court, said: "The law wisely requires that a party who has instituted a groundless suit against another should show that he acted on the advice of a person who by his professional training and experience and as an officer of the court may be reasonably supposed to be competent to give safe and prudent counsel on which a party may act honestly and in good faith, although to the injury of another. But it would open the door to great abuses of legal process if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better means of judging of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself."

Advice of Attorney-General of the State.—In *Gilbertson v. Fuller*, 40 Minn. 413, it was held that the rule making the advice of counsel a defense to an action for malicious prosecution is especially pertinent and relevant when the prosecution is commenced upon the suggestion and with the indorsement of the attorney-general of the state.

3. *Stanton v. Hart*, 27 Mich. 539.

4. *District of Columbia*.—*Coleman v. Henrich*, 2 Mackey (D. C.) 189.

Alabama.—*Marks v. Hastings*, 101 Ala. 165.

Georgia.—*Rigden v. Jordan*, 81 Ga. 668.

Indiana.—*McCullough v. Rice*, 59 Ind. 581; *Burgett v. Burgett*, 43 Ind. 78.

Maryland.—*Straus v. Young*, 36 Md. 246.

Maine.—*Finn v. Frink*, 84 Me. 261.

Massachusetts.—*Olmstead v. Partridge*, 16 Gray (Mass.) 381.

North Carolina.—*Beal v. Robeson*, 8 Ired. (N. Car.) 276.

Oregon.—*Gee v. Culver*, 12 Oregon 228.

Pennsylvania.—*Brobst v. Ruff*, 100 Pa. St. 91, 45 Am. Rep. 358; *Beihof v. Loeffert*, 159 Pa. St. 374.

Compare Johnson v. Daws, 5 Cranch (C. C.) 285; *Ball v. Rawles*, 93 Cal. 222; *Monaghan v. Cox*, 155 Mass. 487.

Police Justice.—The rule as stated in the text applies to a police justice. *Sutton v. McConnell*, 46 Wis. 269.

Where the Attorney Advising is at the Same Time Justice of the Peace before Whom the Complaint is Made.—It seems to be the better doctrine that where the advice depended upon as a defense is given by a counsellor-at-law who is at the same time the justice before whom the complaint is made, it is admissible in evidence. *Monaghan v. Cox*, 155 Mass.

a police officer,¹ or other layman,² will not be admissible in evidence as a justification.

Where the Attorney is Personally Interested in the Subject Matter.—The doctrine has been laid down that a party who consults an attorney-at-law in regard to his legal right to bring an action against another when the attorney is interested in the subject matter of the suit, and known by him when consulting to be so interested, cannot show the opinion of such attorney as a justification for bringing such suit, although the opinion is honestly given.³ On the other hand, there is authority for the rule that counsel are not necessarily incapable of giving a direct opinion because of their pecuniary interest in the result, and that the question in every such case is, whether the party has honestly sought the advice of competent and trustworthy counsel and acted in good faith on the advice given him.⁴

487; *Turner v. Dinnegar*, 20 Hun (N. Y.) 467. Compare *Marks v. Hastings*, 101 Ala. 174; *Cooney v. Chase*, 81 Mich. 203.

In *Monaghan v. Cox*, 155 Mass. 487, *Barker, J.*, said: "While all magistrates should, so far as possible, keep themselves unbiased, and should ordinarily refrain from expressing an opinion on matters which are to come before them judicially, there are cases in which they are to exercise discretion and are required to take preliminary action, when they may properly state their views in reference to the phase of the case presented. Upon the question whether, under certain circumstances stated, a formal complaint of this or that character ought to be made and a warrant issued, we cannot say that it is improper for such magistrates to give advice. And it follows that no good reason now exists why, in this commonwealth, evidence that a complaint was made upon the advice of such a magistrate should be inadmissible upon the question of probable cause."

But in *Marks v. Hastings*, 101 Ala. 174, *Haralson, J.*, said: "Does the fact that the magistrate is also a practicing attorney have a different effect? We think not. The policy of the law forbids a justice of the peace to act as an attorney or to advise in regard to a prosecution intended to be instituted before him."

In What Capacity a Justice who is at the Same Time an Attorney Acted—A Question for the Jury.—An instruction in a suit for malicious prosecution for the arrest of the plaintiff on a criminal charge, that if the defendant acted upon the advice of counsel learned in the law, after placing all the facts before him, no recovery could be had, is properly qualified by the statement that the jury might take into account the fact whether the defendant paid the counsel anything, or employed him in any way as his counsel, or distinguished him from a magistrate, it appearing that he was a justice of the peace as well as an attorney-at-law. *Cooney v. Chase*, 81 Mich. 203.

1. *Coleman v. Heinrich*, 2 Mackey (D. C.) 180.

Mitigation of Damages.—In *Hirsch v. Feeney*, 83 Ill. 548, it was held that in a suit for malicious prosecution the advice given defendant by police officers might be proved as showing the circumstances under which the prosecution was instituted, and to mitigate damages, but not as a defense.

Detectives.—In an action for malicious prosecution, the defendant will not be permitted to show that he acted under the advice of a detective. *Breitmesser v. Stier*, 13 Phila. (Pa.) 80.

In *Hirsch v. Feeney*, 83 Ill. 550, *Walker, J.*, said: "The law has never regarded the advice of detectives as being a justification for instituting mistaken criminal proceedings. It, on the contrary, is believed that such persons, from the very nature of their business, become more suspicious than ordinary persons."

2. *Coleman v. Heinrich*, 2 Mackey (D. C.) 189; *Straus v. Young*, 36 Md. 246.

City Alderman.—But in *Pennsylvania* the advice of a city alderman has been held to afford protection to a party in an action for malicious prosecution. *Rosenstein v. Feigel*, 6 Phila. (Pa.) 532; *Thomas v. Painter*, 10 Phila. (Pa.) 409. *Briggs, J.*, in delivering the opinion of the court in the latter case, said: "Much may be said in the maintenance of such doctrine. An alderman is an officer of constitutional creation, invested with great power in bringing offenders to justice; he is a conservator of the peace, and specially commissioned to inquire into all charges of an alleged criminal nature."

3. *White v. Carr*, 71 Me. 557, 36 Am. Rep. 353.

Question for the Jury.—In an action for malicious prosecution, where the defendant claims that he acted under advice of counsel, it is for the jury to say whether the fact that the attorney and counsellor whose advice he sought was the attorney in a civil suit to recover of the plaintiff the sum alleged in the criminal proceeding to have been embezzled, made the attorney an improper person to consult; whether he was carrying on the suit under such circumstances and with such motives as prejudiced him and rendered him unfit to give fair and impartial advice in the premises. *Watt v. Corey*, 76 Me. 87. See also *Charles City Plow, etc., Co. v. Jones*, 71 Iowa 238.

4. In *Charles City Plow, etc., Co. v. Jones*, 71 Iowa 234, an action on an attachment bond for the wrongful suing out of the attachment, it was held that the attachment plaintiff might show, for the purpose of rebutting the charge of malice, that he sought the advice of counsel and acted under such advice in suing out the attachment, even though the counsel

(5) *Good Faith of Client in Acting upon Advice.*—Where the defendant, in an action for malicious prosecution, relies on the fact that he was advised by counsel, he must show that he acted in good faith upon the advice, believing that there was good cause for the prosecution, and not seeking to procure an opinion in order to shelter himself.¹ If counsel is sought simply to enable him to use the criminal laws for his own private gain and advantage,² or if the attorney and client conspire to institute a malicious prosecution,³ the client cannot justify himself by the other's advice.

(6) *Effect of Advice as Evidence—Not a Defense, per se.*—A resort to professional advice does not necessarily establish a conclusive presumption against malice and in favor of a probable cause, and hence does not constitute an independent and substantive defense to an action for malicious prosecution.⁴ Such evidence is admissible, however, as tending to establish a defense.

A Question of Fact for the Jury.—Whether or not the defense is established is a

consulted were stockholders or officers of the attachment plaintiff, which was a corporation.

1. *Ravenga v. Mackintosh*, 2 B. & C. 693, 9 E. C. L. 225; *Dawson v. Schloss*, 93 Cal. 202; *Acton v. Coffman*, 74 Iowa 17; *Johnson v. Miller*, 82 Iowa 693; *Cointement v. Cropper*, 41 La. Ann. 303; *Stevens v. Fassett*, 27 Me. 266; *Sparling v. Conway*, 75 Mo. 510; *Messman v. Ihlenfeldt*, 89 Wis. 585.

In *Pipkin v. Hauke*, 15 Mo. App. 373, Lewis, J., said: "The prosecuting witness may have given to the attorney all the facts he knew about the case, and may yet have believed the accused to be innocent of any crime, notwithstanding the attorney's advice, and so may have caused the arrest purely for the purpose of injury and degradation upon the accused. The jury should have been told that if the defendant acted in good faith upon the advice of the attorney, believing that it was correct, and that the accused was guilty of a violation of the criminal law, then the verdict ought to be in his favor."

Where the Defendant Subsequently Ascertained the Innocence of the Plaintiff.—After the advice of counsel is received, if a person swears out a warrant against another person and, before causing the arrest, he ascertains that the party against whom the warrant was issued is innocent of the charge, he is not justified in proceeding even though he was protected by professional advice in taking out the warrant. *Ash v. Marlow*, 20 Ohio 110; *Cole v. Curtis*, 16 Minn. 182. Compare *Lunk v. Atchison*, etc., R. Co., 38 Fed. Rep. 311.

Where Attorney Entertained Doubts.—In an action for malicious prosecution where it was shown that the attorney-general who preferred an indictment entertained doubts in regard to the proper construction of the statute upon which the indictment was framed; that the defendant seemed to hesitate whether or not he would prosecute, and that the attorney left it to the defendant to decide, it was held that there was no such advice of counsel as could be relied on in good faith by the defendant. *Kendrick v. Cypert*, 10 Humph. (Tenn.) 294.

In an action for malicious prosecution, where the district attorney testified that he said to the defendant when he came to him to start the prosecution, "I did not think he

could convict under the testimony. I gave him reasons for it. I told him my opinion was that he had not a very good case;" and the defendant testified that he consulted other lawyers besides the district attorney, and that they advised him that the prosecution could be maintained, but he did not produce such lawyers as witnesses,—it was held that there was conclusive evidence that the defendant did not believe that the plaintiff was guilty of the crime with which he was charged. *Vann v. McCreary*, 77 Cal. 434.

Client must Show that He Followed the Advice.

—In *People v. Long*, 50 Mich. 249, it was held that a client cannot rely upon the advice of counsel to show that he has acted in good faith unless he also shows that he has followed the advice.

2. *Neufeld v. Rodeminski*, 144 Ill. 83; *Grundy v. Crescent News, etc., Co.*, 38 La. Ann. 974; *Glascock v. Bridges*, 15 La. Ann. 672; *Galloway v. Burr*, 32 Mich. 332; *Kendrick v. Cypert*, 10 Humph. (Tenn.) 296; *Jacobs v. Crum*, 62 Tex. 401.

In *Neufeld v. Rodeminski*, 144 Ill. 83, Shope, J., in delivering the opinion of the court, said: "If the criminal prosecution against appellee was instituted for the mere purpose of coercing him into payment of a debt or the surrender of some right claimed, and not in the interest of public justice or to vindicate the law and punish crime, and was falsely made, the fact that he procured the advice of counsel will not shield him from the consequences of his wrongful act, done, not in good faith upon such advice, but with the sinister motive of personal gain."

3. *Hamilton v. Smith*, 39 Mich. 222.

4. *United States v. Brewer v. Jacobs*, 22 Fed. Rep. 217.

Arkansas v. Lemay v. Williams, 32 Ark. 166.

Georgia v. Fox v. Davis, 55 Ga. 298.

Indiana v. Lytton v. Baird, 95 Ind. 349.

New York v. Laird v. Taylor, 66 Barb. (N. Y.) 139.

South Carolina v. Hogg v. Pinckney, 16 S. Car. 388.

Texas v. Jacobs v. Crum, 62 Tex. 401; *Glasgow v. Owen*, 69 Tex. 160; *Ramsey v. Arrott*, 64 Tex. 320; *Gulf, etc., R. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743.

question of fact to be found by the jury from all the facts and circumstances taken in connection with such advice.¹ Thus it is for the jury to determine whether the party has fairly and fully communicated to his counsel the facts within his knowledge and used reasonable diligence to ascertain the truth,² as also whether he acted in good faith upon the advice received from counsel.³

2. To Trustees.—In England, it seems to be a well-settled rule, that where a trustee has made a payment out of the trust funds to a party not authorized by the terms of the trust to receive it, he will be held personally responsible for the misapplication, to the parties who can establish a better right, notwithstanding the fact that such misapplication was the result of ill advice of counsel.⁴

United States.—But this doctrine has been repudiated by certain cases in this country, which hold that trustees who have acted in good faith and under the advice of counsel are not responsible for an error of judgment or mistake of law.⁵

ADVISE.—To advise is to give advice to; to offer an opinion as worthy or expedient to be followed; to counsel.⁶

1. *United States.*—*Brewer v. Jacobs*, 22 Fed. Rep. 217.

Georgia.—*Fox v. Davis*, 55 Ga. 298.

Illinois.—*Fadner v. Filer*, 27 Ill. App. 506.

Indiana.—*Lytton v. Baird*, 95 Ind. 349.

Maryland.—*Turner v. Walker*, 3 Gill & J. (Md.) 387, 22 Am. Dec. 329.

Michigan.—*Thompson v. Price*, 100 Mich. 558.

New York.—*Laird v. Taylor*, 66 Barb. (N. Y.) 139.

North Carolina.—*Thurber v. Eastern Bldg., etc., Assoc.*, 116 N. Car. 75.

South Carolina.—*Hogg v. Pinckney*, 16 S. Car. 388.

Texas.—*Gulf, etc., R. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743; *Glasgow v. Owen*, 69 Tex. 169; *Ramsey v. Arrott*, 64 Tex. 320.

West Virginia.—*Vinal v. Core*, 18 W. Va. 4.

2. *McLeod v. McLeod*, 73 Ala. 42; *Beidler v. Beirnaert*, 25 Ill. App. 422; *Anderson v. Friend*, 71 Ill. 479; *Webster v. Fowler*, 89 Mich. 303; *Leahey v. March*, 155 Pa. St. 458; *Smith v. Walter*, 125 Pa. St. 453; *Vinal v. Core*, 18 W. Va. 4.

3. *Ravenga v. Mackintosh*, 2 B. & C. 693, 9 E. C. L. 225; *Potter v. Seale*, 8 Cal. 226; *Anderson v. Friend*, 71 Ill. 479; *Beidler v. Beirnaert*, 25 Ill. App. 422; *Sharpe v. Johnston*, 76 Mo. 662; *Hall v. Suydam*, 6 Barb. (N. Y.) 88; *Leahey v. March*, 155 Pa. St. 458; *Vinal v. Core*, 18 W. Va. 4.

4. 1 *Lewin on Trusts* 476; *Doyle v. Blake*, 2 Sch. & L. 246; *In re Knight's Trusts*, 27 Beav. 49; *Peers v. Ceeley*, 15 Beav. 209; *Boulton v. Beard*, 3 DeG. M. & G. 608. *Compare Vez v. Emery*, 5 Ves. Jr. 141.

Effect of Advice of Counsel as to Costs.—But in *Angier v. Stannard*, 3 Myl. & K. 571, it was held that where the trustee has acted *bona fide* under advice of counsel, which has misled him, he will not be made to pay the costs of the suit which has been thus occasioned. See *Stott v. Milne*, 25 Ch. Div. 710. *Compare Poole v. Pass*, 1 Beav. 600.

5. *Ohio.*—*Miller v. Proctor*, 20 Ohio St. 442.

Pennsylvania.—*Neff's Appeal*, 57 Pa. St. 91;

Appeal of Chambersburg Sav. Fund, etc., Assoc., 76 Pa. St. 203; *During's Appeal*, 13 Pa. St. 224; *Bradley's Appeal*, 89 Pa. St. 514; *King v. Morrison*, 1 P. & W. (Pa.) 188. *Compare Gilbert's Appeal*, 78 Pa. St. 266.

See the title TRUSTS AND TRUSTEES.

6. *Long v. State*, 23 Neb. 45. In that case it was held, that it was not error in a judge, in a charge defining "accessories," to use the words "requested, *advised*, incited," instead of the statutory words "aid, abet, or procure."

Advise and Instruct.—The *California* code authorized the court to *advise* the jury to acquit. It was held that, where the court instructed the jury to acquit and the jury brought in a verdict of "not guilty," the defendant could not again be placed in jeopardy. The court said: "The court was only authorized to *advise* the jury to acquit, and the jury were not bound by the advice. (Penal Code, § 1118.) Here the bill of exceptions reads that the court 'instructed' the jury, but the jury retired and deliberated before rendering the verdict 'not guilty.' They were permitted to retire for deliberation, and found a verdict. *Non constat* that they did not act on the evidence. The request of the defendant that the court 'instruct' should have been denied, but the court was authorized to *advise* an acquittal. It is no reason for setting aside the direction, that the defendant consented to a verdict in his favor." *People v. Horn*, 70 Cal. 18.

Advise Distinguished from Persuade.—"It has been suggested that 'persuades' should be construed to mean *advise*; and that the mere act of advising a slave to leave his master's service, with the intent to go to a state where he might enjoy freedom, would constitute the offense. There are two conclusive objections to such a construction. *Advise* has not the same meaning with 'persuade'; and the rules for construing penal statutes do not permit us to strike out any of the necessary requisites to make an offense, as implied from the language used. 'Persuade' embraces in its meaning more than *advise*; and we

ADVOCATE.—See the title ATTORNEY AND CLIENT.

ADVOWSON. (See also the title HEREDITAMENTS.)—An advowson, in modern times and in ordinary language, has, no doubt, been used to mean the perpetual right of presentation to a church or ecclesiastical benefice. Lord Coke, however, defines it thus: "Advowson—*advocatio*, signifying an advowing or taking into protection, is as much as *jus patronatus*."¹

AEROLITE.—See note 2.

AFFAIRS.—"Affairs" is well defined to be business, something to be transacted, matter, concern. Public affairs are matters relating to government.²

could not treat it as the synonym of *advise* without dispensing with what the word used clearly implies is a part of the offense." *Wilson v. State*, 38 Ala. 414.

1. *Atty.-Gen. v. Chaplains*, 21 Eng. L. & Eq. 417.

2. **Property in.**—In *Goddard v. Winchell*, 86 Iowa 82, it was held, where an *aerolite* weighing sixty-six pounds buried itself in the ground where it fell, to the depth of three feet, that it thereupon became the property of the owner of the soil, rather than of one who discovered it the next day after its fall and dug it up out of the ground. The court said: "The subject of the dispute is an *aerolite*, of about sixty-six pounds weight, that 'fell from the heavens' on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing 'on the earth.' It was in the earth, and in a very significant sense immovable; that is, it was only movable as parts of the earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as 'unclaimed by any owner,' and, because unclaimed, 'supposed to be abandoned by the last proprietor,' as should be the case under the rule invoked by the appellant. * * * No similar question has, to our knowledge, been determined in a court of last resort. In 15 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, page 388, is the following language: 'An *aerolite* is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel.' It cites the case of *Maas v. Amana Soc.*, 16 Alb. L. J. 76, and 13 Irish Law Times 381, each of which periodicals contains an editorial notice of such a case having been decided in *Illinois*, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of 'Accretions.' In 20 Alb. L. J. 299 is a letter to the editor from a correspondent, calling attention to a case determined in France, where an *aerolite* found by a peasant was held not to be the property of the 'proprietor of the field,' but that of the finder."

3. *Montgomery v. Com.*, 91 Pa. St. 133.

County Affairs. (See also COUNTY and the title STATUTES.)—County *affairs* are those relating to the county in its organic and corporate capacity and included within its governmental or corporate powers. *Hankins v. New York*, 64 N. Y. 22. But see the cases below.

The *Pennsylvania* constitution provided that the legislature should not pass any local or special law relating to the "*affairs* of counties." In *Morrison v. Bachert*, 17 W. N. C. (Pa.) 353, 112 Pa. St. 322, it was held that the words "*affairs* of counties" meant such *affairs* as affected the people of the county; therefore a local act which regulated the fees of a county officer which were paid by the people of the county was held unconstitutional. The court said: "It was held by the learned judge of the court below, however, that an act regulating the fees of the prothonotary or other county officer was not a law 'regulating the *affairs* of counties,' and he defines the '*affairs* of counties' to be such 'as concern counties in their governmental and corporate capacity.' This will not do. It is too narrow a construction of the constitution. * * * The word *affairs* is one of broad signification, and the convention used it understandingly. Mr. Buckalew, who was a prominent member of that body, thus refers to this subject in his very excellent work on the constitution, at page 72: 'In the *Pennsylvania* provision the word *affairs* is the important one to be examined. It was obviously borrowed from the constitutions which were in 1873 of most recent formation, in which it was made to supply the word "business" found in the earlier constitutions above mentioned. The substitution of a French for a Saxon word, *affairs* for "business," was probably made in consequence of judicial opinions which had assigned a somewhat restricted effect to the word "business," as found in the earlier constitutions, and was intended to give to the prohibition upon local legislation a more extended application."

In *Com. v. Patton*, 88 Pa. St. 258, and *Scowden's Appeal*, 96 Pa. St. 422, it was held that an act authorizing the holding of special sessions of courts of certain counties was unconstitutional within this clause.

In *Frost v. Cherry*, 122 Pa. St. 417, it was held that an act for the repeal of a section of the *Pennsylvania* Fence Law, to be effective in a county upon the vote of the people, was a special act within the prohibition.

In *Montgomery v. Com.*, 91 Pa. St. 133, it was held that an act directing the school directors of a township to levy a tax to re-

AFFECT—AFFECTING.—See note 1.

AFFIDAVIT. (For a full treatment of the subject AFFIDAVITS see 1 ENCYC. PL. AND PR. 309; as to affidavit of merits see 1 ENCYC. PL. AND PR. 338. See generally the title OATH.)—An affidavit is a formal,² written³ (or printed),

imburse parties for money advanced to pay commutation money for drafted men was unconstitutional.

Affairs of a Railroad.—*Affairs* is a word of large import, and a receiver of a railroad having the management of the *affairs* thereof must necessarily have the control and management of the entire road. *Tompkins v. Little Rock, etc., R. Co.*, 15 Fed. Rep. 13.

1. In *U. S. v. Rhodes*, 1 Abb. (U. S.) 33, it is said: "It is by no means true as a universal proposition, that none are *affected*, in the legal sense of the term, by a case, but those who are parties to the record." Citing *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738.

Affect in the Sense of "Affect Injuri-ously" or "Beneficially."—In *Tyler v. Wells*, 2 Mo. App. 538, it is said: "Undoubtedly a party may be beneficially *affected* as well as injuriously *affected* by anything, and the word *affect* standing alone may be said to be equivocal." But in that case the court, construing the act *in pari materia*, felt compelled to construe the word *affect*, standing alone and unqualified, to mean "*affect* injuriously."

And in a case where a statute provided that an act should not *affect* any confirmed claims to the lands a similar construction was given to *affect*. The court said: "It is unnecessary to give the various definitions of the word *affect*. It is enough to say that it is often used in the sense of acting injuriously upon persons and things; and in this sense, we are all of opinion, it was used in this proviso." *Ryan v. Carter*, 93 U. S. 84.

To the same effect see *Baird v. St. Louis Hospital Assoc.* (Mo., 1893), 21 S. W. Rep. 11, 116 Mo. 419.

Affect and Vary.—"When it is said that parol evidence shall not *affect* written instruments, the vice of the argument turns upon the use of the word *affect*; for if it means to 'vary it,' it is true, and if it is to be carried beyond that meaning, it is not true; there is nothing so clear as the jurisdiction of the court to *affect* a written instrument by parol testimony." *Davis v. Symonds*, 1 Cox Ch. 407.

Affecting Judgment.—Review was allowed upon intermediate orders *affecting* the judgment. The court said: "Whatever can be regarded as *affecting* the necessary means of obtaining a judgment must be regarded as *affecting* the judgment itself." *Blakeley v. Frazier*, 11 S. Car. 135.

Affecting a Substantial Right.—Within a statute providing that the court may disregard errors not *affecting* a substantial right, it was held that *affecting* a substantial right related only to the subject matters of litigation, and not to the mere matters of practice. *Rahn v. Gunnison*, 12 Wis. 528.

In *Oatman v. Bond*, 15 Wis. 23, it was said that an order which *affected* a substantial right, within a clause that such orders should be appealable, is one which determines the action.

Lot Affected by Change of Grade.—In *Strowel v. Milwaukee*, 31 Wis. 526, where it was provided that when a grade has already been established and is afterwards changed, all costs, damages, and charges arising therefrom shall be paid by the city to the owner whose lots are *affected*, the court said: "We agree with the counsel for the plaintiff that the word *affected* has reference to the phrase 'costs and charges' previously mentioned. The property is *affected* when it is burdened with the expense of grading the street."

In English Statute.—A judgment entered upon a warrant of attorney given by a benefited clergyman to secure payment of an annuity need not be registered, under 8 Geo. II., c. 6; for though it may be enforced by sequestration, yet the benefice is not *affected* by the judgment. *Cottle v. Warrington*, 5 B. & Ad. 453, 27 E. C. L. 105.

Real Estate Affected.—A suit for the specific execution of a contract for the sale of land is a suit concerning real estate whereby the same may be *affected*, under the *Missouri* code. *Ensworth v. Holly*, 33 Mo. 370.

An action brought to set aside a deed and to compel a conveyance is an action "*affecting* the title to real property or an estate therein." *Warren v. Wilder* (Ct. App.), 23 N. Y. St. Rep. 108; *Nichols v. Voorhis*, 74 N. Y. 28. See also the title JUSTICE OF THE PEACE.

2. **Oath and Affidavit.**—For the formal requisites of an affidavit see 1 ENCYC. PL. AND PR. 309. A bare oath (or affirmation) need not contain these formal requisites, but as every *affidavit* includes the oath (or affirmation), a defective *affidavit* may be valid as an oath (or affirmation) to show what facts were testified to. *Burns v. Doyle*, 28 Wis. 460.

Where a statute requires an oath, it will be complied with if the matter is reduced to the form of an *affidavit*, signed and sworn to by the proper officer. *Edwards v. McKay*, 73 Ill. 570; *Osborne v. Milman*, 56 L. J. Q. B. 263.

Where a party arrested upon execution moved for his discharge, and the order refusing such discharge recited that the execution was issued upon the oath of a certain person, and not upon his *affidavit* as the statute required, it was held that this did not vitiate the proceedings, it appearing that the execution was issued upon an *affidavit*. *In re Heath*, 40 Kan. 335.

But *affidavits* are very different from official and promissory oaths, which are not at all in the nature of evidence. *State v. Green*, 15 N. J. L. 88.

3. There is no such thing as an unwritten *affidavit*. *Windley v. Bradway*, 77 N. Car. 333.

In *Hawkins v. Gibson*, 1 Leigh (Va.) 480, it is said, "The term *affidavit* in the statute [a bail statute] imports an oath in writing."

"It must be in writing. * * * It is sufficient that it be made before an officer authorized by law to administer it, and that

voluntary,¹ *ex parte*² statement, sworn (or affirmed) to before an officer authorized to take it.³

he reduce it to writing, and certify officially to the fact of its having been made before him. *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326; *Crist v. Parks*, 19 Tex. 234; *Alford v. Cochrane*, 7 Tex. 488." *Morris v. State*, 2 Tex. App. 503.

The word *affidavit*, *ex vi termini*, means an oath reduced to writing. *Grove v. Campbell*, 9 Yerg. (Tenn.) 10.

But in *Baker v. Williams*, 12 Barb. (N. Y.) 527, it was held that an *affidavit* to obtain an attachment against a witness for nonattendance need not be an oath in writing. The application may be oral. The court said: "In common parlance, the word is understood to mean any form of legal oath which may be taken. The words 'oath,' 'deposition,' 'testimony,' and *affidavit*, when used in reference to legal proceedings, convey to the unprofessional ear the same meaning as do the verbs to swear, to make oath, to depose, to testify, and to make *affidavit*; and we know as well that each has its own distinctive legal technical meaning. The statute in which the word in question is found was passed for the people at large, and the language, I think, should be understood and interpreted as it would be received by ordinary intelligent persons, who are not supposed to be acquainted with technical legal distinctions." See also *Soule v. Chase*, 1 Robt. (N. Y.) 234.

1. The law presumes that the performance of every act required by it is voluntary, and no *affidavit* is valid unless obtained by legal means and for a legal purpose. Where *affidavits* can only be compelled for legal use as evidence, they cannot be compelled merely for information. *Dudley v. McCord*, 65 Iowa 671.

In *Robb v. McDonald*, 29 Iowa 330, 4 Am. Rep. 211, and *State v. Seaton*, 61 Iowa 563, it was held by a divided court that a justice's decision as to his jurisdiction to require an *affidavit* was final, and that a party refusing to make an *affidavit* was in contempt, except in cases of gross abuse of authority. An *affidavit* is also voluntary in the sense of not being made under cross-examination. See next note.

2. **Distinguished from Deposition.**—The term "deposition" is often used as a generic expression, to comprehend all written evidence verified by oath, *affidavits* included; but there is a clear distinction between the two, in that in taking depositions the opposite party can always cross-examine, while *affidavits* are *ex parte*.

"A deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an *affidavit* is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is to be used." *Stimpson v. Brooks*, 3 Blatchf. (U. S.) 456.

By the *Kansas* Code notice to the adverse party is the distinctive criterion. *Atchison v. Bartholow*, 4 Kan. 124. And so in *South Dakota*. *State v. Henning*, 3 S. Dak. 492.

"It differs from a deposition in this, that

in the latter the opposite party has an opportunity to cross-examine the witness, whereas an *affidavit* is always taken *ex parte*." *Bouv. L. Dict.*, title Affidavit, quoted in *Woods v. State*, 134 Ind. 42.

3. In *State v. Green*, 15 N. J. L. 88, it was held that an *affidavit*, when offered to be read in evidence, must appear to have been made before the proper officer and in compliance with all legal requirements. The court cannot stop to inquire into the competency of the officer.

False Affidavit.—In *U. S. v. Ingraham*, 49 Fed. Rep. 155, it was held that an indictment for presenting a false *affidavit* need not aver that the officer before whom it was taken was authorized to administer oaths. The court said: "The word *affidavit* relates to the form of the false paper which is presented, and not to its legal character. If Remington were not a justice of the peace, or if he did not administer the oath, and his signature to the jurat were forged, I think the paper would still be a false *affidavit* within the meaning of the statute."

Other Definitions.—An *affidavit* is a declaration in writing, sworn to before a magistrate. *Brooks v. Snead*, 50 Miss. 418.

An *affidavit* is a statement in writing, signed and made upon oath before an authorized magistrate. *Watt v. Carnes*, 4 Heisk. (Tenn.) 534.

An *affidavit* is a written declaration under oath, made without notice to the adverse party (Civil Code *Kentucky*, § 505). *Bishop v. McQuerry*, 13 Bush (Ky.) 418. The definition of the *South Dakota* Code is the same. *State v. Henning*, 3 S. Dak. 492.

"An *affidavit* is 'a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath.' (Bouvier's Law Dict.)" *Metcalf v. Prescott*, 10 Mont. 293. See also *Barhydt v. Alexander*, 59 Mo. App. 188; *Morris v. State*, 2 Tex. App. 503; *Woods v. State*, 134 Ind. 42.

An *affidavit* is a voluntary oath before some officer of the court to evince the truth of a certain matter. 3 Black. Com. 304, quoted in *Gill v. Ward*, 23 Ark. 16; *Shelton v. Berry*, 19 Tex. 155, 70 Am. Dec. 326.

An *affidavit* is simply a declaration on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths. *Harris v. Lester*, 80 Ill. 307.

An *affidavit* is a statement of facts under oath, reduced to writing, and certified to by the officer before whom the same is made. It is usually, though not necessarily, unless required by statute, signed by the affiant. *State v. Sullivan*, 39 S. Car. 400.

"An *affidavit* is an oath in writing, signed by the party deposing, sworn before and attested by him who hath authority to administer the same." *Bac. Abr.*, title Affidavits; *Knapp v. Duclou*, 1 Mich. N. P. 189, criticised in *Crist v. Parks*, 19 Tex. 235; *Gill v. Ward*, 23 Ark. 16; *Soule v. Chase*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 48.

AFFILIATION.—See the titles BASTARDY; LEGITIMACY.

AFFINITY. (As to the disqualification of judge or juror on account of affinity to a party see the titles JUDGE; JURY AND JURY TRIAL. And see the titles INCEST; RELATIONSHIP; SUCCESSION.)—Affinity is the relation contracted by marriage between a husband and his wife's kindred, and between a wife and her husband's kindred, in contradistinction from consanguinity, or relation by blood.¹ A number of authorities define affinity as the connection which arises from marriage between the husband and the blood-

Complaint.—Under the extradition laws of Congress the term "complaint" is not necessarily or presumptively equivalent to *affidavit*. State v. Richardson, 34 Minn. 115.

Pleading.—An *affidavit* is not a pleading. Johnson v. Laughlin, 7 Kan. 359.

Findings of Fact and Conclusions of Law.—In Boyd v. Anderson, 18 Nev. 351, it was held that the findings of fact and the conclusions of law required to be found and filed by the court were not *affidavits* within the statute permitting reference to be made, in an argument for a new trial, to the *affidavits* in the case.

Subscription by Affiant. (See also 1 ENCYC. PL. AND PR. 309.)—In Watts v. Womack, 44 Ala. 605, it was held that it was not essential to an *affidavit* that the name of the affiant should be subscribed. The court said: "The word *affidavit* is a very broad term. It may mean an oath reduced to writing and subscribed by the party making it, or only an oath in writing without such subscription. The legal definition of the word *affidavit* is 'an oath in writing, sworn before some judge or officer of a court or other person legally authorized to administer it; a sworn statement in writing. To make *affidavit* to a thing is to testify to it upon oath in writing.' 1 Burrill Law Dict. 68; Shelton v. Berry, 19 Tex. 154, 70 Am. Dec. 326; 3 Black. Com. 304, marg.; 1 Bouv. Law Dict. (12th ed.), p. 96, § 97." The definition in the above case was approved in Wright v. Smith, 66 Ala. 546.

Testimony and Affidavit.—The Indiana criminal code disqualified any person as a juror who had read reports of the testimony of witnesses and formed an opinion. In Woods v. State, 134 Ind. 35, it appeared that a juror had formed an opinion, based upon an *affidavit* of a witness which had been widely published in the papers. Upon the question whether the *affidavit* was included in the term "testimony" as used in the statute, the court, after quoting Bouvier's definition (set out above), says: "According to this definition of the word *affidavit*, it may contain evidence, and if evidence, then it is in a sense testimony, because it is the statement of facts witnessed by the affiant, only differing from a deposition in that the adverse party had no opportunity to cross-examine the witness. Webster defines the word 'testimony' as a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' Bouvier's Law Dictionary, title Testimony, defines the word to mean 'the statement made by a witness under oath or affirmation.' Under these definitions of the words 'testimony' and *affidavit* they approach very close to the same mean-

ing, so far as the question here involved is concerned."

Jurat of Clerk. (See also 1 ENCYC. OF PL. AND PR. 309.)—In Williams v. Stevenson, 103 Ind. 243, it was held, where no jurat was attached to an *affidavit* as to the posting of notices, that the trial court might hear evidence that such *affidavit* was in fact sworn to at the proper time before the clerk, and might order that officer to affix his jurat thereto, as of that date. The court said: "The statute required an *affidavit* in proof of the posting of notices, but it did not prescribe any particular and formal parts of which the *affidavit* should consist. The jurat of the officer is not the *affidavit* nor any part of it. It is simply evidence of the fact that the *affidavit* was properly sworn to by the affiant." See also Kruse v. Wilson, 79 Ill. 233; Cook v. Jenkins, 30 Iowa 452.

Answer.—In Servoss v. Stannard, 2 Code Rep. (N. Y. Supreme Ct.) 56, the court said: "The word *affidavit* in section 226 [of the code] can hardly be construed to mean 'answer.' We find the words 'answer' and *affidavit* throughout the code applied to different objects, and certainly in their ordinary acceptance they are not synonymous. There are some words in the code which the legislature intended should have a signification different from that usually assigned them; these have been enumerated and their arbitrary definition given. The word *affidavit* is not among the words to which the legislature have attached a peculiar meaning; and I see nothing in the code, nor am I aware of any decision, which would justify me in holding that an answer, verified in conformity with the code, is an *affidavit*." To the same effect see Blatchford v. New York, etc., R. Co., 7 Abb. Pr. (N. Y. Supreme Ct.) 324; Gawtry v. Doane, 51 N. Y. 84. The section referred to, namely, 226, was to the effect that when application was made upon *affidavit* on the part of the defendant, the plaintiff might oppose the same by *affidavit*.

1. Carman v. Newell, 1 Den. (N. Y.) 26. In Spear v. Robinson, 29 Me. 545, the court said: "By the marriage one party thereto holds by *affinity* the same relation to the kindred of the other that the latter holds by consanguinity; and no rule is known to us under which the relation by *affinity* is lost on a dissolution of the marriage more than that by blood is lost by the death of those through whom it is derived."

"The connection between the husband and his wife's parents, and the wife and her husband's parents." Cooper's Justinian 422, quoted in Waterhouse v. Martin, Peck (Tenn.) 389.

relatives of the wife, and between the wife and the blood-relatives of the husband; or, in other words, they hold that it does not include persons related to the spouse simply by affinity: and it would seem that this definition was supported by the weight of authority.¹

This definition, however, does not cover all the cases; for while there is no question that the blood-relations of the husband and the blood-relations of the wife are not related to each other by affinity,² yet it has been held in a number of cases that relationship by affinity may exist between the husband and the spouse of a blood-relation of the wife. Thus, it has been held that where two marry sisters, they are related to each other by affinity, though the husband of a wife's sister is certainly not the wife's blood-relation, and the case therefore does not fall within the definition given above.³

1. 1 Bl. Com. 434; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 333; *Higbe v. Leonard*, 1 Den. (N. Y.) 186; *Solinger v. Earle*, 45 N. Y. Super. Ct. 84; *Oneal v. State*, 47 Ga. 248; *Hume v. Commercial Bank*, 10 Lea (Tenn.) 2, 43 Am. Rep. 290; *Poydras v. Livingston*, 5 Martin (La.) 293.

Or as sometimes stated, the *consanguinei* of the wife are the *affines* of the husband, and *vice versa*; but the *affines* of the wife are not those of the husband, nor are the *affines* of the husband those of the wife. 2 Steph. Com. 285.

So, in *Chinn v. State*, 47 Ohio St. 575, it is held that a husband was not related by *affinity* to his wife's brother's wife. *Citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 315. But see the cases in the note after the next.

2. **Between Kinsman of Wife and Kinsman of Husband.**—"*Affinity* is the tie arising from marriage, betwixt the husband and the blood-relations of the wife, and betwixt the wife and the blood-relations of the husband; but there is no *affinity* betwixt the kinsmen of the wife and those of the husband, or *vice versa*. Thus, say the books, the husband's brother and the wife's sister have no *affinity*. The same must be true of the husband's brother and the wife's brother. See title 'Affinity,' in the law dictionaries of Tomlin, Bouvier, Abbott, and Rapalje and Lawrence. There is no *affinity* between the blood-relatives of the husband and blood-relatives of the wife. *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 331; *Carman v. Newell*, 1 Den. (N. Y.) 25; *Spear v. Robinson*, 29 Me. 531; *Waterhouse v. Martin*, Peck (Tenn.) 374. *Ex p. Harris*, 26 Fla. 77.

"The juror Bryant, being a cousin of the stepfather of the deceased, was related by *affinity* to the mother of the deceased, but bore no relation to deceased himself, and was a competent juror." *Kirby v. State*, 89 Ala. 69.

In *Higbe v. Leonard*, 1 Den. (N. Y.) 186, it is said: "'A husband is related by *affinity* to all the *consanguinei* of his wife and, *vice versa*, the wife to the husband's *consanguinei*; for, the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by *affinity*.'" "But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife." If this rule be correct, and I think it is, although the justice was related by *affinity* to the two sisters of Higbe, the

plaintiff, there was no such relation between him and Higbe."

"The father of a son, whose wife is the aunt of the plaintiff, is not connected by *affinity* with the plaintiff; nor *vice versa*; for the son only has formed the connection, with which the father is not affected." *Waterhouse v. Martin*, Peck (Tenn.) 390.

That the sister and niece of a juror are the wives of two of the brothers of a party to a suit, constitutes no ground of disqualification. *Johnson v. Richardson*, 52 Tex. 482.

Upon a trial for murder, a juror stated that the sons of his wife by a former marriage were second cousins of the deceased; and this was held not to disqualify him. *Moses v. State*, 11 Humph. (Tenn.) 232.

A juror whose brother is joined in marriage with a sister of one of the parties, is not disqualified to sit in the trial. *Chase v. Jennings*, 38 Me. 44.

It is not a good cause of principal challenge to a juror that his sister is the wife of the nephew of the party; but if made to the favor of the juror, it would be sufficient to induce triers to exclude him from the jury. *Rank v. Shewey*, 4 Watts (Pa.) 218.

3. *Markham v. Lee*, cited in *Mounson v. West*, 1 Leon 89, and see the note to *Cain v. Ingham*, 7 Cow. (N. Y.) 478; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 333; *Charles v. John*, Year Book 41 Edw. III., p. 9.

In *Foot v. Morgan*, 1 Hill (N. Y.) 654, it was held that a justice of the peace whose wife is the sister of A's wife cannot take jurisdiction of a cause in which A is the plaintiff; because such relation between the plaintiff and a juror is a cause of challenge for the juror, or, if the sheriff is thus related to the plaintiff, a cause of challenge to the array on the ground of *affinity*.

Husband of Aunt and Husband of Niece.—Within a statute disqualifying a judge from presiding where he is related by consanguinity or *affinity* within the fourth degree to either party, it was held that the husband of an aunt and the husband of the niece were related within the fourth degree of *affinity*. The court said: "*Affinity* is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband. It is used in contradistinction to 'consanguinity.'

The death of the spouse terminates the relationship by affinity.¹

AFFIRM—AFFIRMATIVE. (See also AFFIRMANCE.)—*Affirm* means to ratify or confirm and not to destroy.²

AFFIRMANCE. (See also AFFIRM. Compare REVERSAL; and see ENCYC. PL. AND PR., title JUDGMENTS.)—A decision upholding the validity of a judgment.³

It is no real kindred. A person cannot by legal succession receive an inheritance from a relation by *affinity*, neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of *affinity* are computed in the same way as those of consanguinity." *Kelley v. Neely*, 12 Ark. 657, 56 Am. Dec. 289.

But in *Hume v. Commercial Bank*, 10 Lea (Tenn.) 2, 43 Am. Rep. 290, and in *Poydras v. Livingston*, 5 Martin (La.) 293, the contrary was held, viz.: that although a man is related to his wife's sister by *affinity*, he is not so to his wife's sister's husband. To the same effect is *Chinn v. State*, 47 Ohio St. 575.

1. *Carman v. Newell*, 1 Den. (N. Y.) 26; *Cain v. Ingham*, 7 Cow. (N. Y.) 478; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *State v. Shaw*, 3 Ired. (N. Car.) 532. See also *Bigelow v. Sprague*, 140 Mass. 425. But see *Spear v. Robinson*, 29 Me. 531.

In *Cain v. Ingham*, 7 Cow. (N. Y.) 478, there was a deficiency of jurors, and the sheriff summoned one A, whose father had married the widow of the defendant's brother. A's father died before the trial, and his widow was also the widow of the defendant's brother. It was held that there was no ground of challenge to A on his alleged *affinity*.

It seems that the husband of a sister of a decedent leaving issue is not a competent juror in a suit brought by the widow. *Dearmond v. Dearmond*, 10 Ind. 191.

A juror who had married the sister of a party in another case depending on the same principles as the one on trial, was excused from sitting though his wife was then dead. *Hartford Bank v. Hart*, 3 Day (Conn.) 491, 3 Am. Dec. 274.

Birth of Issue.—If, however, the marriage has resulted in issue who are still living, the relationship by *affinity* continues, and a challenge to a juror must be sustained. *Jaques v. Com.*, 10 Gratt. (Va.) 690; *Mounson v. West*, 1 Leon 88; *Dearmond v. Dearmond*, 10 (Ind.) 191; *Bigelow v. Sprague*, 140 Mass. 425.

2. *Planters' Bank v. Calvit*, 3 Smed. & M. (Miss.) 194, 41 Am. Dec. 616.

"Reverse" and *affirm* are not appropriate terms, where the correctness of the order or decree below is made to depend upon the production of new testimony." *Mitchell v. Lenox*, 14 Wend. (N. Y.) 665.

Affirmative Relief.—By the *Minnesota Code*, a plaintiff may dismiss his action at any time before trial, unless *affirmative relief* is demanded in the answer. The court, in *Koerper v. St. Paul, etc., R. Co.*, 40 Minn. 134,

thus construes "*affirmative relief*": "The correctness of this ruling presents the main point in the case, and this all turns upon the question whether the relief demanded in the answer is *affirmative*, within the meaning of the statute. It seems to us that the relief to which the statute refers as *affirmative* is only that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action, or failed to establish it. In other words, the answer must be in the nature of a cross-action, thereby rendering the action defendant's as well as plaintiff's. The relief demanded in the answer in this case is clearly not of this kind. It is entirely conditioned and dependent upon plaintiffs establishing their right of recovery."

Affirmative Representation.—See the title REPRESENTATIONS.

Affirmative Proof.—See PROOF.

3. *Drummond v. Husson*, 14 N. Y. 60. The court in that case said: "A dismissal of the appeal for want of prosecution is clearly not an *affirmance* of the judgment. This court has decided nothing whatever in respect to the validity of the judgment."

Not a New Judgment—Lien.—In *Planters' Bank v. Calvit*, 3 Smed. & M. (Miss.) 143, 41 Am. Dec. 616, it was held that the *affirmance* by the Court of Appeals of a judgment of an inferior court did not extinguish the lien of that judgment. The court said: "To me it seems a contradiction that the judgment of *affirmance*, the act which declares that the judgment was regular and constituted a perfect lien from the time it was rendered in the Circuit Court, should be considered as the act which destroys the validity of the lien. *Affirm* means to ratify or confirm, and not to destroy."

Same—Justice of Peace.—Where a justice's judgment for less than fifteen dollars is *affirmed*, a readjudication by the appellate court, that the respondent recover the amount of such judgment together with interest thereon from the time of its rendition, will not be deemed a new judgment or anything more than a simple *affirmance*. *Wold v. Ordway*, 68 Wis. 176.

Smaller Judgment—Bond.—If an appeal be entered, from a judgment rendered by a county court, to the Supreme Court, and the appellee recover judgment in the Supreme Court, although for a less sum than he recovered in the county court, it is an *affirmance* of the judgment of the county court within the meaning of the condition of the recognizance for the prosecution of such appeal. *Page v. Johnson*, 1 D. Chip. (Vt.) 338.

Same—Costs.—But upon the question of

AFFIRMATION.—See ENCYC. OF PLEADING AND PRACTICE, p. 377, and the title OATHS, in this work.

AFFIRMATIVE PREGNANT.—An affirmative pregnant is an allegation implying some negative in favor of the adverse party.¹

AFFIX.—See the titles FIXTURES; SEALS.

costs, it was held in *Housel v. Higgins*, 47 N. J. L. 72, that if the plaintiff appeals from judgment in his favor before a justice of the peace, and on appeal receives an increase of debt or damages, he is not entitled to costs of appeal on *affirmance*, and that costs on appeal will be given only to a successful party who has judgment in his favor on the appeal. Scudder, J., delivering the opinion of the court in this case, said: "The terms *affirmance* or 'reversal' used in section 84 of the Small Cause Act (Rev., p. 554) are employed to indicate the successful or unsuccessful party on the appeal. In *Robinson v. Hedges*, 3 N. J. L. 262, the plaintiff obtained judgment before the justice, the defendant appealed, the judgment below was reversed and judgment rendered for a less amount, with the costs of appeal. The court said the defendant was actually the successful party, and should not pay costs to his adversary on the appeal; that the more reasonable rule would be that his adversary pay costs to him, but the practice had been in such cases for neither party to pay costs, on the principle that the error was in the judgment of the justice, and not the fault of the plaintiff. On certiorari the judgment was reversed as to the costs and affirmed as to the debt. See also *Cheeseman v. Cade*, 24 N. J. L. 632, where the judgment on appeal was for less than the amount recovered before the justice, and it was held that the Court of Common Pleas erred in allowing costs to the plaintiff. The proper form of judgment on appeal is given in *Hendricks v. Craig*, 5 N. J. L. 654, and *Woodruff v. Badgley*, 12 N. J. L. 367. The entry on the minutes should be specific both as to the debt or damages and the costs in each court. In the present case the plaintiffs have appealed from their own judgment, and a judgment of *affirmance* has been entered in the form prescribed in *Hendricks v. Craig*, 5 N. J. L. 654; for damages, costs below, and costs on appeal. The amount of the judgment for damages has not been reduced, and they may therefore hold the costs below; but the amount has not been increased, consequently they are not the successful party on the appeal, in fact, and should recover no costs. There should be judgment of *affirmance*, but no costs allowed the plaintiffs on

appeal. This is the view expressed in Pennington's Treatise 73, where it says costs in the Common Pleas must be given to the successful party, generally. Griffith's Treatise, 137, says: 'If a party appeals from a judgment in his own favor (because less than he thought due to him, as he may), and recovers either more or less than before the justice, the appellee in that case is to pay no costs on the appeal, nor to recover any, but the appellant will be entitled to recover the costs below.' The practice now would be to give the appellant costs on his appeal if he recovers more, but none if he recovers the same or less; for in the first case he is successful, in the latter he is not. But as the appellee is not successful in reversing the judgment of the plaintiffs in either case, he can have no costs on appeal. Each party must pay his own costs in the Court of Common Pleas. That must be the rule in this cause, for here the appellants, who are the plaintiffs and had judgment below, recovered but one dollar—the same amount that was given in the justice's court. As there has been no increase of damages, they are not entitled to costs on the appeal."

1. Gould on Pleading (5th ed.), p. 295, *followed* in *Fields v. State*, 134 Ind. 46. See also *Jones v. Jones*, 16 M. & W. 699; *Ex p. Wall*, 107 U. S. 275.

In an Instruction.—In *Fields v. State*, 134 Ind. 46, the court, after quoting the definition given in the text, says: "The law relating to affirmatives and negatives pregnant, so far as we are aware, has been confined to the rules of pleading in civil actions, and has no place in criminal law; but a proposition of law in an instruction to a jury, stated in the form of an *affirmative pregnant*, is subject to all the objections against it as a rule of pleading, and is likely to be much more misleading and harmful. The jury may have understood the court as instructing them that they could only acquit the defendant if the reasonable hypothesis consistent with his innocence did not contradict any credible evidence given in the cause. The court did not so instruct them, but an inference to that effect was implied." See generally, ENCYC. PL. AND PR., title INSTRUCTIONS.

AFFRAY.

I. DEFINITION, 915.

II. ELEMENTS OF THE OFFENSE, 916.

III. SUPPRESSION OF AFFRAYS, 917.

IV. PUNISHMENT, 918.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see 1 *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, p. 382.

For other matters of *SUBSTANTIVE LAW and EVIDENCE related to this subject*, see the following titles in this work: *ACCESSORY*; *ACCOMPLICE*; *AIDER AND ABETTOR*; *ARREST*; *ASSAULT AND BATTERY*; *BREACH OF THE PEACE*; *CRIMINAL LAW*; *DUELING*; *FALSE IMPRISONMENT*; *PRIZE FIGHT*; *RIOT*; *ROUT*; *SELF-DEFENSE*; *UNLAWFUL ASSEMBLY*.

I. DEFINITION.—An affray is the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people.¹

1. 2 Bishop New Cr. Law, § 1.

At Common Law an affray was defined as the fighting of two or more persons in some public place to the terror of the people. Bouv. L. Dict., title Affray; 2 Bl. Com. (Broom & Had. ed.) 168; McClellan v. State, 53 Ala. 640; Thompson v. State, 70 Ala. 26; Childs v. State, 15 Ark. 204; State v. Brewer, 33 Ark. 176; Com. v. Simmons, 6 J. J. Marsh. (Ky.) 614; State v. Allen, 4 Hawks (N. Car.) 356; State v. Wilson, Phil. (N. Car.) 237; State v. Woody, 2 Jones (N. Car.) 335; State v. Stanly, 4 Jones (N. Car.) 290; State v. Perry, 5 Jones (N. Car.) 9, 69 Am. Dec. 768; State v. Sumner, 5 Strobb. (S. Car.) 53; Simpson v. State, 5 Yerg. (Tenn.) 356. See also Supreme Council v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298; People v. Judson, 11 Daly (N. Y.) 1; State v. Davis, 65 N. Car. 298.

An affray is the fighting of two or more persons in a public place. Wilkes v. Jackson, 2 Hen. & M. (Va.) 355; O'Neill v. State, 16 Ala. 65.

Fighting in a Private Place is only an assault. Timothy v. Simpson, 1 C. M. & R. 757; Reg. v. Hunt, 1 Cox C. C. 177.

Appearing in Public Place Armed with Dangerous Weapons.—It has been stated that appearing in a public place armed with dangerous or unusual weapons to the terror of the people is an affray at common law. State v. Huntly, 3 Ired. (N. Car.) 418, 40 Am. Dec. 416; State v. Davis, 65 N. Car. 298; 1 Russ. on Cr. (9th ed.) 407, citing 1 Hawk. P. C., c. 63, §§ 2, 4. See also State v. Lanier, 71 N. Car. 288 Compare Simpson v. State, 5

Yerg. (Tenn.) 356; 2 Bishop's New Criminal Law, § 3, par. 2.

Affray Distinguished from Riot.—If a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen, on a sudden quarrel, to engage in fighting, they are not guilty of riot, but of affray only (of which none are guilty but those who actually engage in it), the object of their meeting being innocent and lawful, and the breach of the peace happening unexpectedly, without previous intention. Hawk. P. C., c. 65, § 3.

Statutes Defining Affray have been enacted in many of the states, in some of which the common-law definition has been adopted.

In *Georgia* an affray is defined as "the fighting of two or more persons in some public place, to the terror of the citizens and disturbance of the public tranquillity." Ga. Code 1882, § 4515. See Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

For the definition of affray in *Texas* see Penal Code 381. Shelton v. State, 30 Tex. 432.

In some states the common-law definition has been modified. Thus:

In *Indiana* it is enacted, "If two or more persons, by agreement, fight in any public place, the persons so offending are guilty of an affray." Ind. Annot. Stat. 1894, § 2063. See Fritz v. State, 40 Ind. 18; Supreme Council v. Carrigus, 104 Ind. 133, 54 Am. Rep. 298.

In *Iowa*, "If two or more persons voluntarily, or by agreement, engage in any fight

II. ELEMENTS OF THE OFFENSE—Actual Fighting—Abusive Language.—In general, to constitute an affray there must be actual fighting.¹ The mere use of abusive or quarrelsome words by which another person is provoked to violence does not of itself make the person using them guilty of an affray.² But it has been held that if one person by using such language towards another as is calculated or intended to bring on a fight induces the other to strike him, he is guilty of an affray although he did not himself strike a blow.³ Abusive language, accompanied by acts calculated to terrify the people and disturb the public tranquillity, is sufficient to constitute an affray, although there be no actual fighting.⁴

By Two or More Persons.—The fighting must be by or between two or more persons.⁵ This distinguishes affrays from riots, routs, and unlawful assem-

or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place, to the disturbance of others, they are guilty of an affray." Iowa Annot. Code (1888), § 4065.

See, further, the several state statutes.

In *Kentucky*, where there is no statutory definition, an affray was defined as "a disturbance of the public peace, by a fighting with the mutual consent of the combatants." *Duncan v. Com.*, 6 Dana (Ky.) 295. But see *Com. v. Simmons*, 6 J. J. Marsh. (Ky.) 614.

Justification—Self-defense.—A person who engages in a fight in a public place, wilfully, is guilty of an affray, and it is immaterial that he fought under a reasonable apprehension that his antagonist intended to make a violent assault upon him; nor is it any defense that in the course of the conflict he fired a shot, believing that he and his sons were in danger of great bodily harm. *State v. Harrell*, 107 N. Car. 944.

Where there was an opportunity to escape from the apprehended danger, a plea of self-defense is untenable. *State v. Downing*, 74 N. Car. 184.

Burden of Proof.—Where a person on trial for an affray admits that he fought with a deadly weapon, the burden of proof is on him to show, to the satisfaction of the jury, such facts as will justify his conduct. *State v. Barringer*, 114 N. Car. 840. See also *State v. Weathers*, 98 N. Car. 685.

Liability of Affrayers.—Persons fighting with pistols in a public street are liable in an action of trespass for injuries to a passer-by, caused by a shot fired during the combat, and it is immaterial whether the shot was fired by the defendants in the action or by some one else participating in the fight. *Murphy v. Wilson*, 44 Mo. 313. 100 Am. Dec. 290.

But affrayers are not liable for injuries done by outsiders, and where one of the combatants in a fight was killed by a blow from an outsider breaking into the ring, it was held that the persons encouraging the fight by their presence were not answerable. *Rex v. Murphy*, 6 C. & P. 103, 25 E. C. L. 301.

1. **Actual Fighting Necessary.**—*Simpson v. State*, 5 Verg. (Tenn.) 356. See also, in connection with this and the other notes to this section, *supra*, this title, *Definition*.

2. **Abusive Language.**—*O'Neill v. State*, 16 Ala. 65. It was held in this case that a

charge that if one person by insulting language provoked another to attack him, he was guilty of an affray whether he resisted or not, was erroneous.

Where it appeared that one of the parties to a fight was willing to fight, but wished to go outside of the corporate limits to do so, and yet by abusive language provoked the other to strike the first blow, so that a fight ensued in the street, it was held that he was guilty of an affray. *State v. Sumner*, 5 Strobb. (S. Car.) 53.

To the same effect see *Pollock v. State*, 32 Tex. Crim. Rep. 29.

3. *State v. Perry*, 5 Jones (N. Car.) 9, 69 Am. Dec. 768; *State v. Davis*, 80 N. Car. 351, 30 Am. Rep. 86; *State v. Fanning*, 94 N. Car. 940, 55 Am. Rep. 653. See also *State v. Robbins*, 78 N. Car. 431.

Where A and B quarreled at the gate in front of B's house, and B ordered A to leave, and upon his refusal to do so went into the house and procured a pistol, and A, having meanwhile retired some distance from the gate, on seeing him with the pistol, returned and dared him to shoot, which he did, it was held that both were guilty of an affray. *State v. Downing*, 74 N. Car. 184.

Intention.—A party on trial for an affray cannot be heard to say that he did not intend to bring about a breach of the peace. *State v. King*, 86 N. Car. 603.

4. *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517. In this case A and B had an altercation in a public street, at the instance of A, who first accosted B, whereupon B drew his knife and cut at A, who also drew his knife from his pocket, but was prevented by the bystanders from using it. It was held that, while the words alone of the parties, independent of their acts, would not have constituted an affray, their words accompanied by their acts, respectively, in drawing their knives and attempting to use them, made the parties guilty of an affray. See also *State v. Fanning*, 94 N. Car. 940, 55 Am. Rep. 653.

5. *Thompson v. State*, 70 Ala. 26; *Simpson v. State*, 5 Verg. (Tenn.) 356; *Pollock v. State*, 32 Tex. Crim. Rep. 29. See also *State v. Priddy*, 4 Humph. (Tenn.) 429.

Three defendants may be convicted of an affray on proof that they fought, not as antagonists against each other, but as common antagonists against a fourth person. *Thompson v. State*, 70 Ala. 26.

blies, which require three persons at least to constitute them.¹

Accessories.—All who aid, assist, and abet an affray are guilty as principals.²

Mutual Consent.—Under the common-law definition, it is not necessary, in order to constitute an affray, for the fighting to be by mutual consent; but in some states this definition has been so modified by statute as to involve an agreement to fight.³

In a Public Place.—The fighting must be in a public place.⁴ It is this circumstance that distinguishes an affray from an assault,⁵ which is included in the former.⁶ The fighting need not originate in a public place; if it commences in a private place, but is carried by the movement of the participants into a public place, it will be an affray.⁷

Terror of the People.—The fighting in a public place must be to the terror of the people.⁸ It seems that the existence of terror, as a matter of fact, does not require proof; but where the fighting is proved to have been in a public place, the law will sufficiently infer terror.⁹

III. SUPPRESSION OF AFFRAYS—Arrest by Private Person.—If an affray be made to the breach of the peace, any person may, without a warrant from a magistrate, restrain any of the offenders in order to preserve the peace; but a private person is not justified in arresting, or giving in charge to a policeman without a warrant, a party who has been engaged in an affray, unless the affray be still continuing or there be reason to apprehend that it will be renewed.¹⁰

1. 2 Bl. Com. (Broom & Had. ed.) 170; People v. Judson, 11 Daly (N. Y.) 1 (Astor Place Riot Case). See also the titles RIOT; ROUT; UNLAWFUL ASSEMBLY.

2. Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; Curlin v. State, 4 Yerg. (Tenn.) 143. See also Rex v. Murphy, 6 C. & P. 103, 25 E. C. L. 301; and the titles ACCESSORY; AIDERS AND ABETTORS.

3. Mutual consent of the parties is not essential to an affray. Cash v. State, 2 Overt. (Tenn.) 198; Saddler v. Republic, Dall. (Tex.) 610. See *supra*, this title, *Definition*.

Evidence of Agreement—Indiana.—Where the only evidence was that the parties were seen in close combat, lying on the ground, it was held that these circumstances would not warrant the presumption that the parties fought by agreement. Klum v. State, 1 Blackf. (Ind.) 377.

4. **Public Place.**—Reg. v. Hunt, 1 Cox C. C. 177; McClellan v. State, 53 Ala. 640; State v. Weekly, 29 Ind. 206; State v. Sumner, 5 Strobb. (S. Car.) 53; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Heflin, 8 Humph. (Tenn.) 84; Pollock v. State, 32 Tex. Crim. Rep. 29. See also State v. Priddy, 4 Humph. (Tenn.) 429.

The Essential Ingredient of the Offense is that it is done in some public place, whereby terror and alarm may be occasioned to other persons. Childs v. State, 15 Ark. 204. This case was decided in 1854.

By the *Arkansas Act of 1868* it is provided that "if two or more persons shall, by agreement, fight to the terror of any citizen of this state, the person or persons so offending shall be deemed guilty of an affray." Ark. Dig. of Stat. 1884, § 1798; State v. Brewer, 33 Ark. 176.

A Field Surrounded by a Forest, and one mile from any highway or any other public place, does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together will-

ingly at such place, guilty of an affray. Taylor v. State, 22 Ala. 15.

Place at Considerable Distance from Highway.—Where a fight took place in the presence of a great crowd of persons, but at a considerable distance from any highway, and ceased on the appearance of the peace officers, it was held to be no affray, the place being to all intents and purposes private. Reg. v. Hunt, 1 Cox C. C. 177.

An Enclosed Lot Ninety Feet Distant from the Street of a country town, and visible from the street, is a public place, within the common-law definition of affray. Carwile v. State, 35 Ala. 392. See also the title PUBLIC PLACE.

5. 2 Bl. Com. (Broom & Had. ed.) 168; McClellan v. State, 53 Ala. 640; Childs v. State, 15 Ark. 204; Cash v. State, 2 Overt. (Tenn.) 198; State v. Sumner, 5 Strobb. (S. Car.) 53; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Heflin, 8 Humph. (Tenn.) 84; Saddler v. Republic, Dall. (Tex.) 610; Wilkes v. Jackson, 2 Hen. & M. (Va.) 355.

6. McClellan v. State, 53 Ala. 640; Thompson v. State, 70 Ala. 26; Childs v. State, 15 Ark. 204; State v. Brewer, 33 Ark. 176; State v. Allen, 4 Hawks (N. Car.) 356; State v. Stanly, 4 Jones (N. Car.) 290.

7. **Need Not Originate in Public Place.**—State v. Billings, 72 Mo. 662; Wilson v. State, 3 Heisk. (Tenn.) 278.

8. **Must be to the Terror of the People.**—State v. Warren, 57 Mo. App. 502; Simpson v. State, 5 Yerg. (Tenn.) 356. See also Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

It is not the mere fighting that constitutes the gravamen of the offense; it is because the violence is committed in a public place, to the terror of the people, that the crime is called an affray, instead of an assault and battery. Cash v. State, 2 Overt. (Tenn.) 198; Saddler v. Republic, Dall. (Tex.) 610.

9. State v. Sumner, 5 Strobb. (S. Car.) 53.

10. Price v. Seeley, 10 Cl. & F. 28; State v.

Separating Combatants—Killing.—Any person present is justified in endeavoring to part the combatants, whatever consequences may ensue; ¹ but, as a general rule, he will not be justified in killing one to protect the other. ²

Arrest by Officer.—A constable may, without a warrant, apprehend a person for an affray; but he has such power only when the affray took place in his presence or was still continuing at the time of the apprehension, ³ or where it is likely a felony will be committed. ⁴

IV. PUNISHMENT.—At common law, affray is punishable by fine and imprisonment, the measure of the punishment being regulated by the circumstances of the case; for where there is a material aggravation, the punishment proportionally increases. ⁵ The aggravation may result from the dangerous tendency of the affray, from the character of the persons against whom it is committed, or from the place where it occurs. ⁶ In many of the states, the punishment for affray is prescribed by statute. ⁷

AFFREIGHTMENT.—See the titles CHARTER-PARTY; FREIGHT.

AFORE.—This term signifies priority in point of time. ⁸

AFORESAID. (See also SAID.)—This word generally means next before; ⁹

Weed, 1 Lead. C. C. 177; Timothy v. Simpson, 5 Tyr. 244, 1 C. M. & R. 757, 6 C. & P. 499, 25 E. C. L. 509; Phillips v. Trull, 11 Johns. (N. Y.) 486.

1. 2 Bl. Com. (Broom & Had. ed.) 169; 1 Hawk. P. C. 136.

2. 1 East P. C., ch. v., § 58, p. 291.

Where a person who is neither assaulted nor threatened dismounts from his horse, arms himself with a club, and interposes between two persons about to fight in the road, and kills one of them, he is guilty of murder. Johnston's Case, 5 Gratt. (Va.) 660. See also People v. Cole, 4 Park. Cr. Rep. (N. Y.) 35; Conner v. State, 4 Verg. (Tenn.) 137, 26 Am. Dec. 217; and the title HOMICIDE.

3. Cook v. Nethercote, 6 C. & P. 741, 25 E. C. L. 627; Reg. v. Curvan, 1 Moo. C. C. 132; U. S. v. Pignel, 1 Cranch (C. C.) 310; Taylor v. Strong, 3 Wend. (N. Y.) 384; City Council v. Payne, 2 Nott & M. (S. Car.) 478. See also Main v. McCarty, 15 Ill. 441; Vandever v. Mattocks, 3 Ind. 479.

A Constable may Break open Doors to suppress an affray or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over. 2 Bl. Com. (Broom & Had. ed.) 169; 1 Hawk. P. C. 137; 2 Hale P. C. 95. See also Com. v. Tobin, 108 Mass. 426, 11 Am. Rep. 375.

4. Coupey v. Henley, 2 Esp. 540. See also, as to the suppression of affrays, the titles ARREST; FALSE IMPRISONMENT.

5. 2 Bl. Com. (Broom & Had. ed.) 169. See also Skains v. State, 21 Ala. 218.

6. 2 Bl. Com. (Broom & Had. ed.) 169; 1 Hawk. P. C., c. 63, §§ 21-23; 1 Russell on Crimes (9th Am. ed.), p. 406.

7. See the several state statutes.

8. The statute 3 Hen. VII., c. 10, enables a defendant in error "to recover his costs and damages for his delay" if a writ of error be sued out "afore execution had." It was held that the writ is sued out "afore execution had" if an execution has issued before the writ, but has been rendered ineffectual by proceedings taken adversely to the plain-

tiff below. Newlands v. Holmes, 4 Q. B. 859, 45 E. C. L. 859.

9. Simpson v. Robert, 35 Ga. 181.

Purposes Aforesaid.—The words "purposes aforesaid" in § 32 of the English Railways Clauses Consolidation Act, 1845, refer to the purposes mentioned in the former part of the same section only. Fenwick v. East London R. Co., L. R. 20 Eq. 544.

Places Aforesaid.—Aforesaid naturally refers to places named immediately before. Peake v. Screech, 7 Q. B. 610, 53 E. C. L. 610.

As Aforesaid.—12 and 13 Vict., c. 92, § 3, enacts that any person who shall keep or use or act in the management of any place for fighting or baiting animals shall be liable to a penalty; and by way of proviso, in order to obviate the difficulty of proving who such person was, defines that every person who receives money for the admission to any place kept or used for any of the purposes aforesaid "shall be deemed to be a keeper thereof," and then adds that every person who shall encourage, aid, or assist at the fighting or baiting of any bull, etc., "or other animal aforesaid," shall be also liable to a penalty. Mellor, J., said: "Looking to the frame of the section, and considering also that it is a penal enactment, I think that the words 'as aforesaid' mean, 'in any place kept or used for any of the purposes aforesaid.'" Morley v. Greenhalgh, 3 B. & S. 379, 113 E. C. L. 379; affirming Clark v. Hague, 2 El. & El. 281, 105 E. C. L. 281.

County Aforesaid—Deed.—By a parish indenture which purported to be made between the church-warden, etc., of D. parish in the county of N. of the one part, and A. B. of C., in the county of L., of the other part, it was witnessed that the said church-warden, etc., of D. parish, with the consent of two of his majesty's justices of the peace for the said county, dwelling in or near said parish, had bound, etc. The justices in their written consent on the margin of the indenture described themselves as justices "of the county aforesaid." It was held that the words "county aforesaid" had the same meaning

as the words "said county," and that it sufficiently appeared by reference to the latter words that the consenting justices were justices of the county of N. Rex v. Countesthorpe, 2 B. & Ad. 487, 22 E. C. L. 128.

County Aforesaid—Indictment. (See also ENCYC. OF PLEADING AND PRACTICE, titles INDICTMENT and VENUE.)—Where two counties have been mentioned in the body of the indictment, and the offense is stated to have been committed in the county *aforesaid*, without showing certainly which county is meant, the indictment is insufficient. State v. McCracken, 20 Mo. 411.

Thus in Bell v. Com., 8 Gratt. (Va.) 605, it is said: "So that two counties had been previously mentioned before the county in which the larceny was committed is stated, and then the county where the larceny was committed is stated by the words 'in the county *aforesaid*,' without stating to which of the previously named counties the word *aforesaid* had reference. This manner of stating the county where the theft was committed is insufficient. 1 Chitty's Cr. Law 160; Archbold's Pleading and Evidence in Criminal Cases 49; 2 Gabbett's Cr. Law 205; 1 Wms. Saund. 308, note 1. According to some of these authorities, the word *aforesaid* refers to the county last before named. If this be the correct construction, the word *aforesaid* referred to the county of Roanoke, and then the Circuit Court of Campbell had no jurisdiction; and according to a part of these authorities, it is uncertain to which of the counties before named the word referred; and the court cannot say in which county the offense was committed. But whichever of these may be the true construction, all the authorities agree that the indictment is bad."

In Reg. v. Hunt, 10 Q. B. 926, 59 E. C. L. 926, the first count of the indictment charged a conspiracy to defraud the prosecutor of his money by bringing an unfounded action on promises against him, which came on to be tried at the assizes for "the county of Surrey." The second count charged another conspiracy "at the parish *aforesaid* in the county *aforesaid*;" and the objection was, that as the county last named was Surrey, it appeared that the Middlesex jury could have had no jurisdiction to try the indictment. The court pointed out that the only "parish *aforesaid*" was alleged to be in the county of Middlesex.

In Reg. v. Albert, 5 Q. B. 41, 48 E. C. L. 41, Denman, C. J., said: "The objection as now presented to us brings the question to this: whether the parish of St. Stephen, Coleman Street, sufficiently appears by the indictment to be in the city of London. The act 22 Car. II., c. 11, shows that it is within the city; and where an indictment mentions a parish in a county, and afterwards an act is alleged to have been done in the 'county *aforesaid*,' that averment as to place is sufficient."

Where but one county has been named, a reference to the county *aforesaid* is sufficient, *aforesaid* being synonymous with "last named," "before named." Reeves v. State, 20 Ala 35.

Same—Declaration.—It was held in Sutton v. Fenn, 2 W. Bl. 847, that in declarations the county *aforesaid*, where more than one is named, always refers to the margin.

Brought up as Aforesaid.—The provision of the English Bankruptcy Act was to apply when the prisoner was "brought up as *aforesaid*" before the registrar. In Bramwell v. Eglinton, 5 B. & S. 56, 117 E. C. L. 56, it was said: "It is difficult to see how the words 'brought up as *aforesaid*' can apply where the registrar goes to the prisoner."

Will—When and So Soon as She shall Marry as Aforesaid.—Under a will a rent charge was devised to L. for life, subject to a restriction as to her marriage (mentioned in one of the preceding items of the will); the testator then said: "When and so soon as she shall marry as *aforesaid*, then upon trusts," etc. It was held that the clause "when and so soon as she shall marry as *aforesaid*" did not make the marriage of L. according to the terms of the previous devise to her a condition precedent to the vesting of the estates. Beaumont v. Squire, 17 Q. B. 906, 79 E. C. L. 906.

Will—Her Part Aforesaid.—Testator devised as follows: "I give and bequeath to my daughter, Mary Gell, all the houses, out-houses, garden and other property which I now hold under the trustees of the poor of the township of Almondbury, for the term of 999 years; and I also give one half part of my books to my daughter, Mary Gell, *aforesaid*, the other half to my widow, Sarah Gell, to be equally divided by T. S. If my daughter Mary should happen to die unmarried, it is my will then that her part *aforesaid* shall be equally divided," etc. Abbott, C. J., said: "I think the expression 'her part *aforesaid*' applies to the whole, which by the former part of the will had been given to the daughter." Doe v. Gell, 2 B. & C. 680, 9 E. C. L. 218.

Will—Under Age as Aforesaid.—Where a will having contemplated the possibility of the death of testator's daughter under twenty-one years of age without leaving a husband, gave certain directions "in case of the death of his daughter under age as *aforesaid*," it was held that "as *aforesaid*" meant "under age and not leaving a husband." Weddell v. Mundy, 6 Ves. Jr. 341.

Will—Gift for Life.—A successive gift in manner *aforesaid* following a prior gift for life was held also to be a gift for life. Doe v. Woodall, 3 C. B. 349, 54 E. C. L. 349.

Aforesaid in the Sense of Such.—For the use of "as *aforesaid*" in the sense of "such," see Walker v. Petchell, 1 C. B. 652, 50 E. C. L. 652.

Time Aforesaid.—A sheriff's deed recited that the grantor, having taken on execution the equity of redemption which J. S. had at 9 A.M. on January 27, 1865, "being the time when the same was attached on mesne process," in certain land, having given specified notices, and "having for sufficient cause duly adjourned the sale once not exceeding seven days," sold the said equity on December 23, 1865. The grant in the deed was of

yet a different signification will be given to it if required by the context and the facts of the case.¹

AFORETHOUGHT.—Premeditated, or thought of before.²

AFOUL.—See note 3.

all the right to redeem which J. S. had at the "time *aforesaid*." It was held that the "time *aforesaid*" referred to the time of attachment, and not to the day of sale. *Sanborn v. Chamberlin*, 101 Mass. 409.

From the Day and Year Aforesaid.—It has been held that "from" was to be taken as including the day on which the contract containing the above clause was entered into. *Wilkinson v. Gaston*, 9 Q. B. 137, 58 E. C. L. 137.

Voyage or Voyages Aforesaid.—The United States chartered a vessel to go to N. and return. It was further stipulated that the charter should continue so long as the vessel was required by the United States. The United States also agreed to employ the vessel "for the voyage or voyages *aforesaid*." It was held that the contract only embraced the employment of the vessel when on such voyage or voyages, and did not extend to demurrage. *Mitchell v. U. S.*, 96 U. S. 162. See the titles CHARTER-PARTY; DEMURRAGE.

1. *Simpson v. Robert*, 35 Ga. 181; *Rex v. Bellamy*, 1 B. & C. 505, 8 E. C. L. 214.

The words "as *aforesaid*" do not necessarily apply to the preceding section alone, but may refer to others also. *Reg. v. Eastern Counties R. Co.*, 2 Q. B. 347, 42 E. C. L. 706.

So as Aforesaid.—In *Reg. v. Craddock*, T. & M. 361, Williams, J., was of the opinion that the words "so as *aforesaid*" meant "as I said before;" but Pollock, C.B., doubted whether they were intended to refer to the matter immediately preceding.

The National Bank Act Provides that "every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located. * * * And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than *aforesaid* shall be held and adjudged a forfeiture," etc. The question before the court was whether *aforesaid* applied only to the immediately preceding clause, "when no rate is fixed by the laws of the state or territory," or to the whole section. It was held that there was no rule of grammatical construction which limited its reference to the paragraph immediately preceding. *Central Nat. Bank v. Pratt*, 115 Mass. 544, 15 Am. Rep. 138. See also *Hintermister v. Chittenango First Nat. Bank*, 64 N. Y. 212, *overruling* *Whitehall First Nat. Bank v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438; also the title NATIONAL BANKS.

2. **Malice Aforethought.** (See the title MURDER.)—"Premeditated" and *aforethought*

are synonymous, and 'premeditated malice' and 'malice *aforethought*' are in sense and meaning the same." *Edwards v. State*, 25 Ark. 446; *People v. Ah Choy*, 1 Idaho 319; *State v. Curtis*, 70 Mo. 598.

In *Brannigan v. People*, 3 Utah 493, the court said: "Webster says, 'To premeditate is to think, consider, resolve in the mind beforehand; to have formed in the mind by previous thought or meditation; previously contrived, designed, or intended; deliberate; wilful.' That is, 'premeditated' includes within its meaning meditation and deliberation. He says that '*aforethought* is premeditated; prepenze; as malice *aforethought*.' That is, *aforethought* includes premeditated; malice *aforethought* is malice premeditated; and that malice premeditated is malice *aforethought*. He uses them interchangeably. Bouvier says 'premeditation' is a 'design formed to commit a crime, or to do some other thing, before it is done. A deliberation and a continual persistence which indicates more perversity than will.' That is, premeditation is more than will, and includes deliberation. He says: '*Aforethought* is premeditated, prepenze; that is, *aforethought* includes premeditation.' Both of these standard authors give substantially the same or equal force and effect to the meaning of the word *aforethought* that they do to the word 'premeditated.'"

The legal meaning of malice *aforethought* in cases of homicide is not confined to homicide committed in cold blood, with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, when the act is done with such cruel circumstances as are ordinary symptoms of a wicked, depraved, and malignant spirit. *U. S. v. Cornell*, 2 Mason (U. S.) 91.

"Murder is the voluntary killing of any person, of malice prepenze or *aforethought*, either express or implied by law; the sense of which word 'malice' is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*." *East P. C.*, c. 5, § 2, *quoted* in *Com. v. Webster*, 5 Cush. (Mass.) 306, 52 Am. Dec. 711.

So malice *aforethought* is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart. *State v. Pike*, 49 N. H. 404, 6 Am. Rep. 533; *Com. v. Drum*, 58 Pa. St. 9; *Jones v. State*, 29 Ga. 594.

3. **Action for Slander.**—"The statement that the plaintiff had been caught *afoul* of a cow does not warrant the innuendo that he was guilty of the crime of bestiality. The most usual signification of the word 'foul,' as an adjective, is unclean, filthy, dirty. The phrase 'to fall foul' is not an uncommon one. The definition of it given in Webster's Dic-

AFRICAN.—See NEGRO; MULATTO; COLORED PERSONS; and the titles SLAVERY; CIVIL RIGHTS; SCHOOLS.

AFTER. (See also the title TIME, COMPUTATION OF.)—This word is used in reference to time to denote a sequence; it also refers to order in point of right or enjoyment; subject to.¹

tionary is, to rush on with haste, rough force, and unreasonable violence; to run against, as, 'the ship fell foul of her consort.' Dr. Johnson gives the following example: 'In his sallies, their men might fall foul of each other.' If the defendant had been in the practice, by the words laid, to impute the crime of bestiality, or if he had used them on this occasion in that sense, and they were so understood by the hearers, there should have been a special averment to that effect." *Harper v. Delp*, 3 Ind. 231.

1. **Subject to Order in Point of Right or Enjoyment.**—Where a clause in a will was: "It is my will that, *after* settling my estate, my wife have the interest of the remainder of my personal estate," the court said: "'*After* settling my estate' seems equivalent to 'subject to the settlement.' The word *after* does not always or necessarily refer to time, but to order in point of right or enjoyment." *Lamb v. Lamb*, 11 Pick. (Mass.) 378. See also *King v. King*, 14 R. I. 146.

In *Hooper v. Hooper*, 9 Cush. (Mass.) 128, the fourth clause of the will was: "I give to my sons each one ninth part of my estate, real and personal, *after* providing for the bequest to my wife." It was said that the word *after* used in such a connection is often and properly construed to mean "subject to," "*after* taking out, deducting, or appropriating."

In *Treadwell v. Cordis*, 5 Gray (Mass.) 353, it was said: "The term *after* does not always designate the time at which one thing is to be done in reference to something else, but it expresses the relative priority and subordination of one claim to another in matter of right. So we think it does here; the residue is to be formed subject to the payment of debts and charges, although they may be actually paid afterwards."

"Many cases turn upon the use of the term *after* in a will; that is, *after* the payment of debts and legacies, as if that fixed the time for the payment of the residue. Here, it may be remarked, that phraseology is not used, but when that phrase is used it is obvious that it does not necessarily or commonly fix the time of payment, but rather the order and priority of claims." *Minot v. Amory*, 2 Cush. (Mass.) 387.

After the Payment. (See also the titles LEGACIES AND DEVICES; WILLS.)—The words in a will, "*after* my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate for the payment of debts. *Fenwick v. Chapman*, 9 Fet (U. S.) 461.

In *Shallcross v. Finden*, 3 Ves. Jr. 738, Arden, M.R., said: "The words '*after* payment of my debts' mean that he will not give anything until his debts are paid. He could not help paying his debts out of his personal estate; he could not give a pecuniary legacy,

but *after* his debts paid. Therefore, if I do not make that construction, part of the will is perfectly nugatory. I agree that if a testator does manifest in any part of his will that his debts shall be paid, they are to be paid before any disposition of what he has power to dispose of. '*After* payment of his debts' means that until his debts are paid he gives nothing; that everything he has shall be subject to his debts. To give those words any effect, they must charge the real estate. I am very clearly of opinion that wherever a testator says he wills that his debts shall be paid, that will ride over every disposition, either as against his heir-at-law or devisee; and the words '*after* my debts paid' mean the same thing."

Where a testator directed his trustees to pay the annual sum of one hundred pounds to his mother for life, and from and "*after* the payment" of the said annual sum of one hundred pounds, and subject thereto, he declared that they should stand possessed of his estate upon trusts, the income of the whole estate proving insufficient to pay the annuity, it was held that the terms of the gift over made the annuity a charge upon the *corpus*, out of which it must be paid annually. *Birch v. Sherratt*, L. R. 2 Ch. 644.

After in Sense of Upon.—A contract to pass title to a chattel *after* payment of the purchase price is by the law regarded as if it read "upon" such payment. However, the promise on the one part cannot be enforced until that on the other part is performed. *Hawley v. Kenoyer*, 1 Wash. Ter 609.

After the Fact Committed—Trespass—Illegal Distraint.—Under the statute 53 Geo. III., c. 127, § 12, which requires that an action for anything done in pursuance of the act shall be commenced within three calendar months *after* the fact committed, an action of trespass for seizing, taking and carrying away, and distraining and selling the plaintiff's goods, under a warrant of distress for arrears of a church rate, may be brought within three calendar months *after* the sale. For, said the court: "The fact committed under color or in pursuance of the statute is not merely the seizure, but the sale also. The seizure of the goods is made not absolutely, but with a view to their detention only until the amount should be paid, and their subsequent sale if it should not; and the seizure, when a sale has taken place, is but a part of the entire act complained of, and which forms the real grievance to the plaintiff. And this circumstance distinguishes the present case from those in which the seizure was for a forfeiture, and was in its nature absolute, and must be considered as intended to deprive the plaintiff of his property immediately." *Collins v. Rose*, 5 M. & W. 194.

After Conviction. (See also CONVICTION, and the title PARDON.)—Under the governor's

The word "after," like "from," "succeeding," "subsequent," and similar words, where it is not expressly declared to be exclusive or inclusive, is suscep-

power to grant a pardon conferred by the Constitution of *Virginia*, art. 4, § 5, which declares that "he shall have power to remit fines and penalties in such cases, and under such rules and regulations, as may be prescribed by law; and, except when the prosecution has been carried on by the house of delegates, to grant reprieves and pardons *after conviction*," it was held that the governor has authority to pardon a person "convicted" of a felony by a verdict of the jury, before sentence is passed upon him by the court. *Moncure, J.*, said: "It thus appears that the word 'conviction,' as used in our laws, ordinarily signifies the finding of the jury by verdict that the prisoner is guilty, or something equivalent thereto; but the word sometimes denotes the final judgment." *Blair v. Com.*, 25 Gratt. (Va.) 850.

Under a similar provision it was held that a pardon may be granted pending an appeal; and when the case is called for argument upon the merits, the pardon may be pleaded in bar, since the words "*after conviction*" denote a verdict of guilty rendered by a jury. *State v. Alexander*, 76 N. Car. 231, 22 Am. Rep. 675.

In *Arkansas* it has been held that the power to pardon "*after conviction*," vested in the governor by the Constitution of 1864, is not prohibitory of the exercise of that power by the legislature *before conviction*. *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600.

After Repairs.—A lease provided that all *after repairs* were to be at the expense of the lessee. The court, in construing this, said: "To what does the word *after* refer? It is very clear—to all the expenses which may be necessary after the property is thoroughly repaired. Thus the contract is, that the lessor shall put it in complete order, and the lessee shall keep it so until the termination of the lease." *Mattocks v. Cullum*, 6 Pa. St. 457.

After the Passing or Passage. (See also the title STATUTES.)—An act in contemplation of law comes into effect from the commencement of the day on which it received the royal assent; and inasmuch as the law takes no notice of the fractions of a day, where the right of a single woman who is delivered of a bastard child to apply for an order of affiliation depends on the birth of her child "*after the passing of the act*," it is sufficient if the child is born on the day the act receives the royal assent. *Tomlinson v. Bullock*, 4 Q. B. Div. 230.

"From the impracticability of deciding at what particular moment of time the president gives his seal to a bill, we have never heard of such inquiry being made, and the least which courts have ever said on such occasions is that where an act is to take place from the day of its passing, * * * it must embrace the whole of that day." *U. S. v. Williams*, 1 Paine (U. S.) 261.

"The statute was to take effect from its passage; and it is a general rule that where the computation is to be made from an act

done, the day on which the act is done is to be included." *Arnold v. U. S.*, 9 Cranch (U. S.) 120.

After Which.—The terms "*after which*," "*whereupon*," "*upon which*," are interchangeable. *Lee v. Cook*, 1 Wyoming 419.

After Verdict.—The statute Geo. IV., c. 50, enacts that the party who shall apply for a special jury shall pay the costs occasioned thereby, unless the judge before whom the cause is tried shall immediately *after* the verdict certify that the cause was proper to be tried by a special jury. It was held that a defendant who had applied for a special jury was not entitled to the costs of that jury, where the judge who tried the cause nonsuited the plaintiff on his opening, even though the judge had certified as above. *Wood v. Grimwood*, 10 B. & C. 700, 21 E. C. L. 151.

After Work.—Under a fire-insurance policy which required an examination of the mill "thirty minutes *after work*," it was held that the assured were bound, by their representation that the mill was examined thirty minutes *after work*, to make such examination thirty minutes *after* the extra work as well as *after* regular work; and also that the question what is a cessation of work at the factory, from which the thirty minutes are to be computed, is a question for the jury, under all the circumstances of each particular case. *Houghton v. Manufacturers' Mut. F. Ins. Co.*, 8 Met. (Mass.) 114, 41 Am. Dec. 489. See the title FIRE INSURANCE.

After Death.—"Generally a bequest *after* the death of a particular person, to whom an antecedent interest is given in the same will, is held not to denote a condition that the legatee shall survive such a person, not to define when the interest shall vest, but only to mark the time when the gift shall take effect in possession, that possession being deferred merely on account of the life interest limited to the person on whose death the gift is to take full effect. See note to *Malin v. Keighley*, 2 Ves. Jr. 335, and cases there collected; *King v. King*, 1 W. & S. (Pa.) 205." *Chew's Appeal*, 37 Pa. St. 29.

After Date. (See also the titles BILLS AND NOTES; DATE; TIME, COMPUTATION OF.)—"It is entirely clear, from *Pugh v. Leeds, Cowp.* 714, that the words 'from' or '*after* the date,' or 'the day of the date,' include the day when they are used in a conveyance to create an estate; but it is just as clear, from other cases about to be noticed, that they exclude it when they are used in an instrument to perpetuate the evidence of a debt. Indeed, it seems, from what is said in *Preston on Conveyancing*, p. 387, that the distinction sprung out of that decision, previous to which the general rule was to exclude the day in both cases. * * * It is now a settled rule that as the law rejects fractions of a day, it views it for most purposes as an indivisible point, and consequently that 'the date,' or 'the day of the date,' being coextensive with

tible of different significations, and is used in different senses and with an exclusive or inclusive meaning, according to the subject to which it is applied; and as it would deprive it of some of its proper significations to affix one invariable meaning to it in all cases, it would, of course, in many of them, pervert it from the sense of the writer or speaker. Its true meaning therefore, in any particular case, must be collected from the context and subject matter, which are the only means by which the intention is ascertained.¹

the entire day, excludes it when it occurs in a bill, note, or bond." Taylor v. Jacoby, 2 Pa. St. 495, 45 Am. Dec. 615.

The words in the Stamp Act, 55 Geo. III., c. 184, schedule pt. 1 (title "Bill of Exchange"), which imposes a certain duty on bills "exceeding two months *after* date," mean the time expressed on the face of the bill, not the time when it actually issued. Williams v. Jarrett, 5 B. & Ad 32, 27 E. C. L. 26.

The words "*after* date of appointment," and "from such date," which occur in § 1556 of the U. S. Rev. Stat., fixing the annual pay of passed assistant surgeons of the navy, refer not to the original entry of the officer into the service as an assistant surgeon, but to the notification by the secretary of the navy that he has passed his examination for promotion to the grade of surgeon, and will thereafter, until such promotion, be considered a passed assistant surgeon. U. S. v. Moore, 95 U. S. 760.

Within and After.—"For the space of one month *after* the return day," and "within one month from the return day," are equivalent expressions. Gore v. Hedges, 7 T. B. Mon. (Ky.) 521.

After Peace.—The words "ten days *after* peace is made between the United States and the Confederate States," used in a bond to specify the time at which the money is payable, means "ten days *after* peace," and does not render the ratification of a treaty of peace between the powers mentioned a condition precedent to the payment. Chapman v. Wacaser, 64 N. Car. 532.

Sunday. (See also the title SUNDAY.)—On the question, under the Georgia statute giving four days within which appeals may be entered, as to whether Sunday is to be counted as one of the "four days *after*," etc., the court said: "Our judgment, therefore, is that four clear days, as they are called in the old books, or working days, as they might perhaps be more appropriately designated, are allowed for entering appeals; and that whether Sunday be the first or last or an intervening day, it is not to be counted." Neal v. Crew, 12 Ga. 100.

After Judgment.—Under a motion by persons who had given bond, under Stat. 1 and 2 Vict., c. 110, § 8 (for abolition of arrest on mesne process), to be allowed to render their principal *after* verdict against him and before judgment (said section reading as follows: "If a creditor of a trader shall file an affidavit in the court of bankruptcy that his debt is justly due, * * * and if such trader shall not within twenty-one days * * * enter into a bond * * * to pay * * * or to render himself * * * according to the practice of

such court * * * *after* judgment shall have been recovered," etc.), the court said: "Some doubt existed as to the words '*after* judgment' in the eighth section; namely, whether they apply to the whole preceding matter or not; as to which we think that, at all events, they do not apply to a render 'according to the practice of such court;' and as bail would by that practice have been at liberty to render a defendant *after* verdict and before judgment, we think that the obligors in this bond must be at liberty to do the same." Owston v. Coates, 10 Ad. & El. 193, 37 E. C. L. 88.

An order discharging a defendant from imprisonment, under "the act for the relief of persons imprisoned on civil process," though entered by the judge of another court, who is authorized by law to take jurisdiction of such proceedings, is a "special order made *after* final judgment," within the meaning of the three hundred and thirty-sixth section of the Practice Act, and an appeal therefrom taken more than sixty days *after* the entry of the order is too late. Wells v. Anthony, 35 Cal. 696.

1. Sands v. Lyon, 18 Conn. 27. To the same effect see State v. Mounts, 36 W. Va. 190; Arnold v. U. S., 9 Cranch (U. S.) 119; Pearpoint v. Graham, 4 Wash. (U. S.) 240; Webster v. French, 12 Ill. 304. See also the title TIME, COMPUTATION OF.

Exclusive of First Day.—Where a statute enacted that warrants of attorney to confess judgment should be filed "within twenty-one days *after* the execution," it was held that the twenty-one days for filing are to be reckoned exclusive of the day of execution. Williams v. Burgess, 12 Ad. & El. 635, 40 E. C. L. 142.

"The language of the statute is that writs of *fi. fa.* may be issued, etc., '*after* the expiration of thirty days from the entry of such judgment.' According to the rule of construing statutes adopted by this court, the computation of the thirty days excludes the day of entering the judgment; in other words, as to the first and last days, one is to be counted exclusively and the other inclusively." Commercial Bank v. Ives, 2 Hill (N. Y.) 355. See also Butts v. Edwards, 2 Den. (N. Y.) 164; Page v. Weymouth, 47 Me. 238; Judd v. Fulton, 10 Barb. (N. Y.) 117; Sheets v. Selden, 2 Wall. (U. S.) 190.

Where an act has to be done within so many days *after* a given event, the day of such event is not to be reckoned, and the party to do the act has the whole of the last day of the described time in which to do it. Williams v. Burgess, 10 L. J. Q. B. 10, 13 Ad. & El. 635, 40 E. C. L. 142; Robinson v. Waddington, 18 L. J. Q. B. 250. And if a

AFTER-ACQUIRED PROPERTY.—See the title *FUTURE-ACQUIRED PROPERTY*.

AFTER-ACQUIRED TITLE.—See the titles *ESTOPPEL*; *VENDOR AND PURCHASER*.

AFTER-BORN CHILDREN.—See *POSTHUMOUS*; and the titles *SUCCESSION*, *UNBORN CHILDREN*; *WILLS*.

AFTERNOON.—Subsequent to or following noon or midday; generally used of the earlier part of that time as distinguished from evening.¹

AFTERWARD—AFTERWARDS.—Subsequent in order of time.²

time *after* an event has to expire before something else is done, that means clear time. *Blunt v. Heslop*, 7 L. J. Q. B. 216, 8 Ad. & El. 577, 35 E. C. L. 461.

1. **Intoxicating Liquors.** (See also the title *INTOXICATING LIQUORS*).—Under an act of parliament prohibiting the keeping open a place for the sale of liquor during "the usual hours of *afternoon* divine service" in the parish church, where the evening service was read in the church at six P.M., but there was an *afternoon* service at two P.M. in the parish workhouse, and the innkeeper had his place open for the reception of customers at half-past six o'clock P.M., Erle, J., said: "The question is, What was the usual hour of *afternoon* divine service? The word *afternoon* has two senses. It may mean the whole time from noon to midnight, or it may mean the earlier part of that time as distinguished from the evening. I think that in this act it is used in the latter sense, and that the intention of the legislature was to prohibit the opening of public-houses during the usual hour of divine service in the *afternoon*, if there was one in the church. In *Newport Pagnell* divine service was in the workhouse." *Crompton, J.*, said: "The legislature has not said that it shall be penal to keep open an inn during evening service, but during *afternoon* divine service. * * * Was, then, this evening service, performed at six o'clock, *afternoon* service? No; it certainly was evening service. In the parish of *Newport Pagnell* since 1836 there is no *afternoon* service in the church; it is in the workhouse; and the hours at which the evening service is performed in the church are no more the usual hours of *afternoon* divine service than they would be if the *afternoon* divine service, instead of being performed in the workhouse, was performed in the church." The conviction was quashed. *Reg. v. Knapp*, 2 El. & Bl. 447, 75 E. C. L. 447.

Same—**Complaint.**—In *People v. Husted*, 52 Mich. 626, it was held that a complaint for not closing a saloon "at the hour of nine o'clock" on a specified day, and for keeping it open "until twenty minutes past eleven o'clock in the *afternoon* of said day," was not bad for failing to show that nine o'clock at night was meant, and for using the word *afternoon*. The court said: "Counsel for defendant insists that the complaint names an impossible time, and he cites Webster's and Worcester's unabridged dictionaries to prove that the word *afternoon* signifies from 'noon' until 'evening,' and that 'night' is the time from sunset until sunrise. Accurately and properly speaking the definitions are correct.

But we think the distinction as applied to the complaint in this case is too critical. The pleader was not referring to the period of time between 'noon' and 'evening,' but to the hours that had elapsed since the hour of noon, and when that is stated to be until twenty minutes past eleven o'clock, it is pretty certain that in this latitude it was after the hour of nine o'clock at night."

Adjournment—Hour.—In *Edwards v. Hance*, 12 N. J. L. 108, it was held that if a justice, after hearing a cause, takes time to consider the same, he must either make an adjournment to a regular day and hour, or give notice to the parties of the day and hour when judgment will be rendered; and it is not sufficient that the justice should say that he will render judgment on Monday *afternoon*.

2. **As Soon Afterwards as Practicable.** (See also *SOON*; *REASONABLE TIME*; and the title *FIRE INSURANCE*.)—Under a Canadian statute requiring the assured to give notice of his loss, and to deliver "as soon *afterwards* as practicable" a particular account, it has been held that the words "as soon *afterwards* as practicable" mean within a reasonable time. *Parsons v. Queen Ins. Co.*, 43 U. C. Q. B. 271. See also *Cammell v. Beaver, etc.*, Mut. F. Ins. Co., 39 U. C. Q. B. 1.

Immediately Afterwards.—Where an act of parliament prohibited the recovery of any costs on a verdict of less than forty shillings, unless the judge certified "*immediately afterwards*" on the back of the record that the trespass was malicious, etc., it was held that "*immediately afterwards*" meant within a reasonable time, and that a delay of ten days, during which no application was made to the judge, although there was nothing to prevent it, was not a compliance with the statute, and that a certificate made after such lapse of time was too late and must be set aside. *Forsdike v. Stone*, L. R. 3 C. P. 607.

There Afterwards—Assault and Battery.—A count in a declaration, after stating the assault by the defendant, alleged that he beat the plaintiff with a plank, and there *afterwards* continued his assault with four parts of a two-and-a-half-inch rope. It was held that the count was not defective as alleging assault and battery with a *continuando*. The court said: "Unless the declaration can be shown to allege the trespass with a *continuando* in form, there is no ground for arresting the judgment. An action is said to be laid with a *continuando* when the injury is alleged to have been committed by continuation from one day to another, or at divers

AGAINST.—In opposition to; in contradiction to.¹

days and times between such a day and such a day. It does not appear that the trespass in this case is so alleged as to be brought within the legal and technical import of a *continuando*. 'There *afterwards* continuing his said assault' may be understood to imply nothing more than a continuance of the trespass, without intermission of time longer than was sufficient to change the instruments used; first beating the plaintiff with the plank, and *afterwards* with the rope; he continuing, the whole time of the beating with both the instruments, lashed over the cask, so that there never was a cessation of the first assault nor of the beating." *Benson v. Swift*, 2 Mass. 53.

Synonym of Thereafter.—In *Sleigh v. Strider*, 5 Call (Va.) 442, the court said: "The word *afterwards* can never be applied but to a thing spoken of before. * * * If the sense contended for by Mr. Call were the proper sense of the law, the word *afterwards* would be construed as the word 'hereafter.' But I am confident that there is not a lexicon in the English language in which it will be found in that sense. Its synonym is 'thereafter.'"

1. Where an indictment charged that the defendant "in and upon one" A B, "did feloniously, purposely, and with premeditated malice make an assault, and then and there, at and *against* the said" A B, "did feloniously, purposely, and with premeditated malice shoot a certain pistol, then and there loaded with gunpowder and leaden shot, which he," the defendant, "then and there in his hand had and held, with intent," etc., the court held that the indictment sufficiently charged an assault and battery, saying: "The particular meaning of the word *against* depends, to a very considerable extent, on the connection in and the purposes for which it is used. To push or run *against* a person implies, in common parlance, a coming in contact or collision with the person so pushed or run *against*. To say that a stone was hurled at and *against* a person would very naturally make the impression that such person was hit by the stone. It is said that where one person wilfully pushes a drunken man *against* another person, from which an injury ensues, it constitutes an assault and battery. See 1 Russell on Crimes 1021. Although the words used in this indictment are not the most appropriate that might have been selected for the purpose, we are of the opinion that an assault and battery is sufficiently charged against the appellee." *State v. Prather*, 54 Ind. 63.

Testifying Against. (See also the title **WITNESSES**).—In *Seabright v. Seabright*, 28 W. Va. 415, it was held that the word *against*, as testifying against executors, administrators, heirs-at-law, etc., did not mean on opposite sides of the suit, but as having opposite interests in the suit. See also *Coffman v. Hedrick*, 32 W. Va. 124.

The exception, in the statute removing the disqualification of parties as witnesses, that neither party shall be allowed to testify

against the other as to transactions with a deceased person, does not prevent a party from being called to testify for the other. *Dudley v. Steele*, 71 Ala. 426.

Proceedings Against. (See also the title **UNITED STATES COURTS**).—The Revised Statutes of the United States provide that, pending habeas corpus in the federal courts, or appeals thereupon, the proceedings in a state court *against* the prisoner shall be deemed null and void. It was held that the settlement of a state of facts at the request of the defendant and a hearing of an appeal brought by him were not proceedings *against* him. *State v. Humason*, 4 Wash. 413. The court in that case said: "No precedent in such a case as this is cited to our attention, but we are inclined, under the circumstances, not to grant the motion. It is clear that, inasmuch as the appellant had voluntarily betaken himself to another and a superior jurisdiction for the adjudication of the question at issue, he had no right to demand or have, at the hands of the superior judge, any action whatever in his case. But the action taken was not one *against* him in the sense of the statute. He moved for it himself, no objection was made by the other side, and the act of settling the statement was performed solely for his benefit, and no possible result of the action can make his condition worse than it was before."

Against the Form of the Statute. (For an exhaustive treatment of this subject see **ENCYC. OF PL. AND PR.**, title **INDICTMENT**).—Technical words which must be used in framing an indictment for a breach of the statute complained of.

If one statute subjects an act to a pecuniary penalty, and a subsequent statute makes it a felony, an indictment for the felony concluding "*against* the form of the statute" (in the singular number only) is right. *Rex v. Pim*, Russ. & R. C. C. 425. To the same effect is *State v. Wilbor*, 1 R. I. 199, 36 Am. Dec. 245.

Where, in trover by the assignees of a bankrupt, the defendant pleaded that before the bankruptcy he advanced the bankrupt a sum of money upon the deposit of the goods in respect of which the action was brought, and the assignees filed a replication that it was corruptly and "*against* the form of the statute," and agreed between the defendant and the bankrupt that the latter should pay the defendant for the loan of the money £10 per cent, it was held, on a special demurrer, that the averment of the contract being *against* the form of the statute was not a sufficient allegation that it was illegal; and that the replication should have alleged what particular statute it was in contravention of. *Turquand v. Moseden*, 7 M. & W. 504.

In an action upon the case for infringement of copyright, although the court refused to allow a count founded on a common-law right to be joined with counts under a statute upon the same cause of action, it was held that, notwithstanding the words "*against* the form of the statute" in counts framed upon the statute, a plaintiff might give in evidence, under those counts, an infringement of his

common-law right. *Boozey v. Tolkien*, 5 C. B. 476, 57 E. C. L. 476.

Same—North Carolina.—The constitution of North Carolina omitted the provision that an indictment should conclude "*against* the peace and dignity of the state." In *State v. Kirkman*, 104 N. Car. 911, it was held that a judgment would not be arrested for the omission of the words. The court said: "The omission in the present constitution of the requirement that indictments shall conclude '*against* the peace and dignity of the state,' was not made without a purpose, and is in accord with the manifest tendency to simplify criminal as well as civil proceedings, and to try all causes upon their merits, stripped of useless refinements and technicalities, which never aid, and often hinder, the due administration of justice. This tendency is shown in many decisions of this court, which hold to be sufficient indictments concluding '*against* the act of assembly,' '*against* the statute,' '*against* the form of the statute,' etc. (*State v. Tribatt*, 10 Ired. (N. Car.) 151; *State v. Moses*, 2 Dev. (N. Car.) 452; *State v. Smith*, 63 N. Car. 234; *State v. Evans*, 69 N. Car. 40; *State v. Davis*, 80 N. Car. 384.) In *State v. Parker*, 81 N. Car. 531, above cited, the court held sufficient an indictment concluding '*against* the peace and dignity,' omitting the words 'of the state,' though it would seem that the omitted words were precisely the material ones required by the constitutional provision of 1776."

Complaint.—Where a complaint was made in this form: "F., on oath, complains *against* P., at M., on the first of February in the year 1844 did sell to C. one glass of spirituous liquors," etc., it was held that the word *against* might be rejected as surplusage, and that the complaint without that word was sufficient. *Com. v. Penniman*, 8 Met. (Mass.) 519.

Against her Will. (See also the title RAPE.)—In statutes defining the crime of rape, this expression means "without her consent," and the crime is committed if the woman's consent has not been obtained, even though no violence has been used. "The earlier and more weighty authorities," says Gray, J., in a case where a woman had been ravished while insensible, "show that the words '*against* her will,' in the standard definitions, mean exactly the same thing as 'without her consent;' and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded. * * * We are therefore unanimously of the opinion that the crime which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman without her consent, while she was, as he knew, wholly insensible, so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape." *Com. v. Burke*, 105 Mass. 376, 7 Am. Rep. 531. To the same effect are *Fizell v. State*, 25 Wis. 364; *Whittaker v. State*, 50 Wis. 521, 36 Am. Dec. 856; *Com. v. Burke*, 105 Mass. 380, 7 Am. Rep. 531.

So the inducing a woman, by misrepresentation, fraud, and falsehood, to go to the

house where she was defiled, although no force was used to take her there, is within the provision of the New York statute (2 Rev. Stat. 664, § 25) declaring the punishment for the offense of taking a "woman unlawfully, *against* her will, with the intent to compel her by force, menace, or duress to be defiled." *Beyer v. People*, 86 N. Y. 369.

In the Sense of Without.—In a devise on marrying "with consent," followed by a gift over on marrying *against* consent, the latter word was construed as "without" to effect the alternative. *Long v. Ricketts*, 2 Sim. & S. 179; *Creagh v. Wilson*, 2 Vern. 573.

Against Law. (See also ENCYC. OF PL. AND PR., titles NEW TRIAL; VERDICT.)—Where it appears that the jury, in rendering their verdict, must either have disregarded the law as given in the instructions of the court, or else have found a fact wholly contrary to the evidence, the verdict is "*against* law." *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15.

Whatever else may be meant by the expression "decision *against* law," we think there is no doubt that it includes a case where the decision is based upon findings which do not determine all of the material issues of fact raised by the pleadings. *Knight v. Roche*, 56 Cal. 18.

When a court draws erroneous conclusions of law from its finding of facts, it is a "decision *against* law," for which a new trial should be granted under Code Civ. Pro., § 657, subdiv. 6. *Simmons v. Hamilton*, 56 Cal. 493.

In the Extradition Act of 1870 (33 and 34 Vict., c. 52), which enumerated as extraditable crimes "crimes by bankrupts *against* bankruptcy law," no mention was made of accessories; and in 1873 it was held that this could not be extended to complicity, by a person not himself a bankrupt, in a fraudulent bankruptcy. *In re Counhay*, L. R. 8 Q. B. 410.

An English act of 1873 authorized that indictable offenses under the laws for the time being in force in relation to bankruptcy might be made the subject of extradition treaties. By such a treaty, among other crimes for which extradition was to be granted were "crimes *against* bankruptcy law." A warrant for the apprehension of a fugitive criminal by virtue of such a treaty, which described the offense as "the commission of crimes *against* bankruptcy law" within the jurisdiction of the foreign power demanding the extradition, was held good. *Ex p. Terraz*, 4 Exch. Div. 63.

The words, "any crime or offense *against* the laws of China," in the provision of the Hong Kong ordinance No. 2 of 1850, must be limited to those ordinary crimes and offenses which are punished by the laws of all nations, and which are not peculiar to the laws of China. *Atty.-Gen. v. Kwok-a-Sing*, L. R. 5 P. C. 179.

A verdict contrary to an instruction of the court upon a point of law is a verdict *against* law. *Declez v. Save*, 71 Cal. 553, citing *Emerson v. Santa Clara County*, 40 Cal. 546. In that case (*Emerson v. Santa Clara County*, 40 Cal. 546), *Crockett, J.*, dissented because no injury had been done the party.

AGE.

I. DEFINITION, 927.

II. TIME AT WHICH A CERTAIN AGE IS ATTAINED, 927.

CROSS-REFERENCES.

See, generally, the title INFANTS.

As to Capacity to Commit Crime, see the title CRIMINAL LAW.

As to Proof of Age, see the titles PEDIGREE; CRIMINAL LAW; RAPE.

As to Age of Consent, see the title RAPE.

As to Conflict of Laws as to Age of Majority, see the titles CONFLICT OF LAWS; INFANTS.

I. DEFINITION.—The term “age” signifies in the law those periods in the lives of persons of both sexes which enable them to do certain acts which, before they had arrived at those periods, they were prohibited from doing. As, for example, a male at the age of twelve years may take the oath of allegiance; at fourteen, which is his age of discretion, he may consent to marriage or choose his guardian; and at twenty-one he may alien his lands, goods, and chattels. A female at nine years of age is dowable; at twelve may consent to marriage; at fourteen is at years of discretion, and may choose a guardian; and at twenty-one may alien her lands, etc. But the full age of either male or female is twenty-one, until which time they are considered as infants.¹

II. TIME AT WHICH A CERTAIN AGE IS ATTAINED.—By a large number of authorities it is said that an infant attains the age of twenty-one on the first moment of the day next before the twenty-first anniversary of his birth, and this doctrine has the support of the *United States* cases.² On the contrary,

1. Brown's Law Dict.; Bouvier's Law Dict.; Co. Litt. 78.

“Twenty-one Years” and “Full Age.”—In *Kohne's Estate*, Pars. Eq. Cas. (Pa.) 408, it is said: “The phrases ‘arrive at twenty-one years’ and ‘arrive at full age’ are synonymous, and would convey to the mind identically the same idea in any question in which our tribunal were acting on our own citizens; and they must always be so considered, at least *prima facie*, when found in such an instrument as the present, executed by one of our own citizens, within our own territory, and operating on property exclusively within our own jurisdiction.”

2. 1 Bl. Com., p. 463; 1 Jarman on Wills (6th ed.), p. 35; Met. Contracts 38; Swinburne on Wills, pt. 2, § 2; Bingham's Infancy, p. 2. See also 8 Vin. Ab., Dev. G., pl. 20; 7 Bac. Ab., Wills, B. 300; *Ross v. Morrow*, 85 Tex. 172; *Hamlin v. Stevenson*, 4 Dana (Ky.) 597; *Wells v. Wells*, 6 Ind. 447; *In re Richardson*, 2 Story (U. S.) 571; *Phelan v. Douglass*, 11 How. Pr. (N. Y. Supreme Ct.) 192.

A person who was born on the eighth day of September, 1852, would become of the full age of twenty-one years if he should live to the seventh day of that month in 1873. He would be entitled to be considered as having attained his majority at the earliest minute of that day. *Bardwell v. Purrington*, 107 Mass. 425.

Illegal Voting.—In *State v. Clarke*, 3 Harr. (Del.) 557, a presentment was made against the defendant for illegal voting. The presentment set forth that defendant was born on the 7th of October, 1819, and voted at the election held on the 6th of October, 1840. It was held that the defendant was of full age at the time he voted and that the presentment must be quashed. The court said: “When can a person make a valid will; when can he execute a deed for land; when make any contract or do any act which a *man* may do, and an *infant*, that is, a person under the age of twenty-one years, cannot do? On this question the law is well settled; it admits of no doubt. A person is ‘of the age of twenty-one years’ the day *before* the twenty-first

it is strongly argued that the precise period when one attains the age of twenty-one years is on the first moment of the twenty-first anniversary of his birth, and not on the day preceding.¹

anniversary of his birthday. It is not necessary that he shall have entered upon his birthday, or he would be more than twenty-one years old. He is therefore of age the day before the anniversary of his birth; and as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday; and upon any and every moment of that day may do any act which any man may lawfully do. (1 Chit. Gen. Prac. 766.) 'It is to be observed that a person becomes of age on the first instant of the last day of the twenty-first year next before the anniversary of his birth; thus, if a person were born at any hour of the first of January, A.D. 1801 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the 31st of December, A.D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes; because there is not in law in this respect any fraction of a day; and it is the same whether a thing is done upon one moment of the day or another.'

Capacity to Commit Crime.—In *Lenhart v. State* (Tex. Crim. App., 1894), 27 S. W. Rep. 260, it was held, within a statute providing that the burden of proof should be on the state to show capacity to commit crime, where the person charged was between the age of nine and thirteen, that where the prisoner was born between twelve and two o'clock A. M. of October 27, 1880, and the crime was committed at ten o'clock at night October 26, 1893, he was thirteen years of age. The court said: "It is insisted that, under the evidence, appellant was between the ages of nine and thirteen years at the time of the burglary, and therefore the burden of proof was on the state to show appellant 'had discretion sufficient to understand the nature and illegality of the act constituting the offense.' Pen. Code, art. 34. If appellant was under thirteen years of age at the time the offense was committed, the contention is sound, and the court erred in refusing to give special instructions requested by appellant. If he had passed or reached that age, then the statute does not apply. The statute has fixed the age for the purpose indicated, and there is no question of legislative authority to do so. But the position is not well taken. He was thirteen years of age the day before the anniversary of his birthday. Such is the view expressed in all the authorities accessible."

3. Minor's Theory.—"By the common law, the precise period when one attains the age of twenty-one years is on the first moment of the twenty-first anniversary of his birth; for the law in general admits no fraction of a day (Sir Robert Howard's Case, 2 Salk. 625, 1 Ld. Raym. 480) and the doctrine of Blackstone and his annotator (1 Bl. Com. 463, and note 12), that full age is attained on the first moment of the day preceding such

anniversary, depends on dicta only, is contrary to reason and good sense, is capable (by going back one day at a time) of being refuted by the *reductio ad absurdum*, and is at war with the only direct adjudication on the subject (Sir Robert Howard's Case, just mentioned).

"The confusion of thought in reference to the subject seems to arise from not distinguishing between the last moment of the day preceding the twenty-first anniversary of birth and the first moment of the anniversary itself. Hence it becomes customary to say loosely that the infant attains his age on the last moment of the day preceding, when in fact it is not so until that last moment is past and the first moment of the next day is begun. The conclusion is then drawn from this unwarranted assumption, that, as the law knows no fraction of a day, the infant is of age on the first moment of the day preceding the twenty-first anniversary of birth. But it is apparent that, if it is allowable to confound thus the first moment of the anniversary with the last moment of the day preceding, it is, by parity of reason, in like manner allowable to confound the first moment of such preceding day with the last moment of the day before that; and thus, as no fraction of a day is acknowledged, the party is of age on the first moment of this last-named day, and by parity of reason, on the first moment of the day before that, etc.; thus, it is apprehended, reducing the proposition to an absurdity.

"The citations in 1 Bl. Com. 463, note 12, all refer to the same case—*Herbert v. Turball*—which is reported most at large in 1 Keb. 589. The proposition is a mere dictum, not necessary to the decision of the case, nor, so far as it appears, involved in it at all; and, although not denied (for there was no occasion to contest it), was stated by only two of the four judges. In the case as reported in Raym. 84 the dictum is wholly omitted.

"The doctrine is repeatedly mentioned afterwards, as by Lord Holt in *Fitz-Hugh v. Dennington*, 2 Ld. Raym. 1094, and by the Court of C. B. in *Roe v. Hersey*, 3 Wils. 274, but always by way of illustration only, without any direct adjudication on the point." 1 Minor's Inst. 514.

Lile's Comment.—Professor Lile, in his Notes on 1 Minor's Institutes, p. 103, says: "It is indeed true that one may, *in law*, attain his majority before he is, *in fact*, twenty-one years old,—but not before the arrival of the twenty-first anniversary of his birth. Thus, if one were born at 11.59 P.M., on the first day of January, 1870, he would attain his majority at 12.01 A.M. on January 1, 1891,—twenty-three hours and fifty-eight minutes before he has actually lived twenty-one years,—because the law knows no fraction of a day. If he is twenty-one years of age at any moment of January 1, he is legally of age on

every moment of that day. Whatever happens during the twenty-four hours of the day is, in law, considered as happening on the first moment of that day—the day being considered as a unit of time. But to say, in the case stated, that the *propositus* attains his majority on December 31, 1890, because the law knows no fraction of a day, is a *non sequitur*. And, as our author clearly shows, by such reasoning one may be proved to be twenty-one years old on the day before he was born. The day of which the law knows no fraction consists of the twenty-four hours between twelve o'clock midnight and twelve o'clock the next midnight, and not of any other combination of twenty-four hours that may be selected. And herein lies the fallacy of the rule laid down by Blackstone and his followers. They make a new and unwarranted combination of twenty-four hours, embracing parts of two days, and in attempting to apply the very reasonable maxim that the law knows no fraction of a day, they reach a conclusion as absurd as it is unwarranted."

Sir Robert Howard's Case.—Though Mr. Minor's reasoning is strong, the case cited by him, Howard's Case, 2 Salk. 625, hardly bears him out. That case was as follows: A policy of insurance was made to insure the life of Sir Robert Howard for one year from the day of the date thereof; the policy was dated on the 3d day of September, 1697. Sir Robert died on the 3d day of September, 1698, about one o'clock in the morning. *Et per* Holt, C.J., in an action hereupon it was ruled at the sittings at Guildhall: 1st. That from the day of the date excludes the day, but from the date includes it, so that the day of the date is excluded. 2d. That the law makes no fraction in a day; yet in this case, he dying after the commencement and before the end of the last day, the insurer is liable, because the insurance is for a year, and the year is not complete till the day be over. Yet if A. be born on the third day of September, and on the second day of September twenty-one years afterwards he makes his will, this is a good will; for the

law will make no fraction of a day, and by consequence he was of age.

Redfield's Theory.—"Where a term of time is allowed for the accomplishment of any required duty, as a general thing, the full term is to be computed, exclusive of the day from which it is reckoned. Thus, if a period of accumulation is reckoned by years, it will be completed upon the recurrence of the anniversary of the day from which it is computed. *Gorst v. Lowndes*, 11 Sim. 434.

"But there seems to be one remarkable exception. The early case cited by Lord Holt, Ch.J., *Fitz-Hugh v. Dennington*, 6 Mod. 259, 2 Salk. 585, wherein his lordship said: 'It has been adjudged that if one be born on the first of February at eleven o'clock at night, and the last day of January in the one and twentieth year, at one of the clock in the morning, he makes his will and dies, yet such will is good, for he then was of age,' seems to have maintained its ground for nearly two centuries without question. * * * It is safe to say that this presents an unbroken array of authority which will not be liable to be affected by any dissent from us. But we feel compelled to declare that the rule thus established in computing the age of capacity seems to us to form a very singular departure, both from all other legal modes of computing time, and equally from the commonly received notions upon the subject. We cannot comprehend why this reckoning should be carried back any further, in computing a period from one's birth, than in computing the same period from his death, where the actual period may be carried back or forward, as the case may be, nearly a whole day. But to carry it back two full days beyond the real date, as the computation of the age of majority does, in certain contingencies, seems scarcely less than a blunder; which, for the good sense of the thing, we should be glad to see set right. It has also been decided that one attains his twenty-fifth year at the end of his twenty-fourth year. *Grant v. Grant*, 4 Y. & C. 256." *Redfield on the Law of Wills*, p. 19.

AGENCY.

By THE EDITORIAL STAFF.

I. DEFINITIONS, 937.

1. *Contract of Agency*, 937.
2. *Principal*, 938.
3. *Agent*, 938.
4. *The Power or Authority*, 938.

II. CLASSES OF AGENTS, 939.

III. COMPETENCY OF PARTIES, 939.

1. *Competency to be Principal*, 939.
 - a. *Individuals*, 939.
 - (1) *In General*, 939.
 - (2) *Persons Naturally Incompetent*, 940.
 - (a) *Persons Non Compos Mentis*, 940.
 - (b) *Drunkards*, 940.
 - (3) *Persons Legally Incompetent*, 940.
 - (a) *Infants*, 940.
 - (b) *Married Women*, 942.
 - (c) *Alien Enemies*, 942.
 - b. *Partnerships*, 943.
 - (1) *Generally*, 943.
 - (2) *Implied Power to Appoint Agents*, 944.
 - c. *Joint Tenants and Tenants in Common*, 944.
 - d. *Corporations*, 944.
2. *Competency to be Agent*, 945.
 - a. *In General*, 945.
 - b. *Various Persons*, 945.
 - (1) *Alien Enemies*, 945.
 - (2) *Infants*, 945.
 - (3) *Persons Non Compos Mentis*, 945.
 - (4) *Slaves*, 946.
 - (5) *Married Women*, 946.
 - (a) *As Agent for Her Husband*, 946.
 - (b) *As Agent for Third Persons*, 947.
 - (6) *Husband as Wife's Agent*, 947.

IV. APPOINTMENT, 948.

1. *Necessity*, 948.
2. *Requisites*, 948.
 - a. *When Made by Natural Persons*, 948.
 - b. *When Made by Corporations*, 950.
3. *Modes*, 952.
 - a. *In General*, 952.
 - b. *Express*, 952.
 - (1) *Under Seal*, 952.
 - (2) *By Parol*, 955.
 - c. *Implied*, 957.
 - (1) *From the Relation of the Parties*, 957.
 - (2) *From Conduct*, 959.
4. *Adoption of the Agent of Another*, 966.
5. *Evidence*, 967.
 - a. *In General*, 967.
 - b. *Where the Appointment is in Writing*, 970.

AGENCY.

V. DELEGATION, 971.

1. *Delegation of Authority by Principal, 971.*
 - a. *General Rule, 971.*
 - b. *Exceptions to the Rule, 971.*
 - (1) *Personal Acts, 971.*
 - (2) *Illegal and Immoral Acts, 971.*
2. *Delegation of Authority by Agent, 972.*
 - a. *General Rule: Delegatus Non Potest Delegare, 972.*
 - b. *Rule Applied to Various Classes of Agents, 973.*
 - (1) *Public Officers in General, 974.*
 - (2) *Officers and Agents of Municipal Corporations, 975.*
 - (3) *Officers and Agents of Private Corporations, 976.*
 - (4) *Arbitrators, 976.*
 - (5) *Personal Representatives and Trustees, 977.*
 - (6) *Attorneys at Law, 978.*
 - (7) *Factors and Brokers, 978.*
 - c. *Qualifications of General Rule, 978.*
 - (1) *Ministerial, Executive, or Mechanical Duties, 978.*
 - (2) *Authority to Redelagate Implied, 979.*
 - (a) *Usage of Trade, 979.*
 - (b) *Necessity, 979.*
 - (c) *Nature of Agency, 980.*
3. *Subagents, 980.*
 - a. *Definition, 980.*
 - b. *Responsibility of Principal for Acts of Subagent, 980.*
 - c. *Responsibility of Agent for Acts of Subagent, 981.*
 - d. *Responsibility of Subagent, 983.*
 - (1) *To Principal, 983.*
 - (2) *To Agent, 983.*
 - e. *Rights of Subagent, 984.*
 - (1) *Against Principal, 984.*
 - (2) *Against Agent, 985.*

VI. NATURE AND EXTENT OF AUTHORITY, 985.

1. *Authority, General and Special, 985.*
 - a. *Distinction between General and Special Agencies, 985.*
 - b. *Third Parties must Ascertain Agent's Authority, 987.*
 - c. *When Principal is Bound, 988.*
 - (1) *In General, 988.*
 - (2) *General Agencies, 990.*
 - (3) *Special Agencies, 993.*
 - d. *Authority Modified by Instructions, 994.*
 - (1) *General Agents, 994.*
 - (2) *Special Agents, 995.*
 - e. *Authority as Affected by Usage or Custom, 996.*
2. *Powers Prima Facie Incident to Every Authority, 997.*
3. *Construction of Authority, 998.*
 - a. *Written Authorities, 998.*
 - b. *Where Authority is Ambiguous, 1001.*
 - c. *Implied Authorities, 1002.*
4. *Construction and Scope of Certain Particular Authorities, 1003.*
 - a. *To Sell Generally, 1003.*
 - (1) *Consideration must be in Money, 1003.*
 - (2) *Time of Sale, 1005.*
 - (3) *Power Exhausted by Sale, 1005.*
 - b. *To Sell Real Estate, 1005.*
 - (1) *Sufficiency of Power, 1005.*
 - (2) *Certainty and Extent of Power, 1007.*
 - (3) *Must be in Manner Authorized, 1008.*
 - (4) *When may Receive Payment, 1008.*
 - (5) *When may Sell on Credit, 1009.*
 - (6) *Authority Not Extended by Construction, 1010.*
 - (7) *Powers Implied, 1010.*
 - c. *To Sell Personality, 1012.*
 - (1) *Must Act within Authority, 1012.*
 - (2) *When can Sell on Credit, 1014.*
 - (3) *May Give Exclusive Right to Sell, 1014.*

AGENCY.

- (4) *Guaranty to Maintain Price*, 1014.
- (5) *Power to Warrant*, 1014.
- (6) *Power to Receive Payment*, 1014.
- (7) *Powers of Traveling Salesmen*, 1017.
- d. *To Mortgage*, 1017.
- e. *To Lease*, 1018.
- f. *To Purchase*, 1020.
 - (1) *Must Observe Authority*, 1020.
 - (2) *To Purchase on Credit*, 1020.
 - (3) *Implied Powers*, 1021.
- g. *To Manage Business or Property*, 1022.
- h. *To Receive Payment*, 1025.
 - (1) *From What Authority will be Implied*, 1025.
 - (2) *Payment must be in Money*, 1027.
 - (3) *Time of Payment*, 1029.
 - (4) *Powers Implied*, 1029.
- i. *To Settle*, 1031.
- j. *To Draw and Indorse Negotiable Instruments*, 1032.
 - (1) *Express or Implied Power*, 1032.
 - (2) *Subject to Strict Interpretation*, 1033.
 - (3) *Must be for Benefit of Principal*, 1034.
- k. *To Ship*, 1034.
- l. *To Employ*, 1034.
- m. *To Borrow or Lend*, 1035.

VII. MANNER OF EXECUTION OF AUTHORITY, 1035.

- 1. *General Rule*, 1035.
- 2. *Formal Execution*, 1035.
 - a. *General Rule*, 1035.
 - b. *Instruments under Seal*, 1036.
 - (1) *Application of General Rule*, 1036.
 - (2) *Imperfect Execution*, 1038.
 - (a) *Agent Bound*, 1038.
 - (b) *Agent Not Bound*, 1040.
 - (c) *Conveyances of Estates*, 1041.
 - c. *Negotiable Instruments*, 1042.
 - (1) *Application of General Rule*, 1042.
 - (2) *Signature in Agent's Name*, 1044.
 - (3) *Signature in Principal's Name*, 1046.
 - (4) *Undisclosed Principal*, 1046.
 - (5) *Principal Impliedly Disclosed*, 1047.
 - (6) *Agent as Payee and Indorser*, 1047.
 - d. *Simple Contracts other than Negotiable Instruments*, 1050.
 - (1) *General Rule—Intention Controlling*, 1050.
 - (2) *Execution in Principal's Name*, 1051.
 - e. *Admissibility of Parol Evidence*, 1051.
 - (1) *Instruments under Seal*, 1051.
 - (2) *Negotiable Instruments*, 1052.
 - (a) *Action between the Original Parties*, 1052.
 - (b) *Action by Bona Fide Holder*, 1054.
 - (3) *Simple Contracts other than Negotiable Instruments*, 1054.
 - f. *Public Officers*, 1056.
 - g. *Joint Agents*, 1057.

VIII. DUTIES AND LIABILITIES INTER SE, 1058.

- 1. *Of Agent to Principal*, 1058.
 - a. *Fidelity to Instructions*, 1058.
 - (1) *General Rule*, 1058.
 - (a) *In Case of Remunerated Agent*, 1058.
 - (b) *In Case of Unremunerated Agent*, 1060.
 - (2) *Qualifications and Exceptions*, 1061.
 - (a) *Circumstantial Variance*, 1061.
 - (b) *Illegal or Immoral Acts*, 1061.
 - (c) *In Case of Necessity or Emergency*, 1061.
 - (d) *Uncertainty and Ambiguity in Instructions*, 1062.
 - (3) *Effect of Established Usage or Custom*, 1062.
 - (4) *Departure from Instructions—Nature of Liability*, 1062.

AGENCY.

- b. Reasonable Skill and Diligence, 1063.*
 - (1) *Agency for Reward, 1063.*
 - (a) *Rule and Its Extent, 1063.*
 - (b) *Duty as to Insurance, 1068.*
 - (c) *Duty to Advise Principal of Matters Material to His Interest, 1069.*
 - (2) *Gratuitous Agency, 1070.*
 - (a) *Ordinary Agencies, 1070.*
 - (b) *Agencies Implying Peculiar Knowledge or Skill, 1070.*
- c. Good Faith and Loyalty, 1071.*
 - (1) *Necessity and Extent of Rule, 1071.*
 - (2) *Making Profit out of Agency, 1072.*
 - (3) *Acting for Both Parties, 1073.*
 - (4) *Letting Contract to Himself, 1075.*
 - (5) *Uniting Opposite Characters of Buyer and Seller, 1075.*
 - (a) *Statement of Rule, 1075.*
 - (b) *Agent to Purchase, Purchasing from Himself, 1077.*
 - (c) *Agent to Sell, Purchasing for Himself, 1077.*
 - (d) *Adoption of Transaction by Principal, 1080.*
 - (e) *Dealing Directly with Principal, 1081.*
 - (6) *Agent to Purchase, Purchasing for Himself, 1082.*
 - (7) *Acquiring Adverse Interests, 1085.*
- d. Keeping and Rendering Accounts, 1086.*
 - (1) *General Principles, 1086.*
 - (2) *Commingle Principal's Property with His Own, 1089.*
 - (3) *Disputing Principal's Title, 1091.*
 - (4) *Demand by Principal for Accounting, 1091.*
 - (5) *Interest, 1093.*
 - (6) *Accounting in Equity, 1094.*
- 2. Of Principal to Agent, 1095.*
 - a. Remuneration for Services Rendered, 1095.*
 - (1) *How the Right may be Derived, 1095.*
 - (a) *Special Agreement, 1095.*
 - (b) *When Promise to Pay Implied, 1096.*
 - (c) *Where Unauthorized Acts are Ratified, 1101.*
 - (2) *When the Right may be Deemed to have Attached, 1101.*
 - (a) *General Rule, 1101.*
 - (b) *Where Service has Not been Faithfully Performed, 1101.*
 - (c) *Where Service has Not been Completely Performed, 1103.*
 - aa. Where Agency is Revoked by Principal, 1103.*
 - (aa) *Agency Revocable at the Pleasure of Principal, 1103.*
 - (bb) *Agent Discharged for Cause, 1103.*
 - (cc) *Agent Wrongfully Discharged, 1104.*
 - bb. Where Law Operates to Revoke Agency, 1108.*
 - (aa) *Death of Principal, 1108.*
 - (bb) *Sickness or Death of Agent, 1108.*
 - cc. Where Agency is Renounced by Agent, 1109.*
 - (aa) *Where He Reserves the Right to Renounce at Will, 1109.*
 - (bb) *Where He Has Good Cause, 1110.*
 - (cc) *Where He Has Not Good Cause, 1111.*
 - dd. Where Agency is Terminated by Mutual Consent, 1113.*
 - (e) *Where Agency is Illegal, 1114.*
 - (3) *Amount of Remuneration, 1114.*
 - (a) *Where there is an Express Agreement, 1114.*
 - (b) *Where there is no Express Agreement, 1115.*
 - (c) *Where Agent Serves beyond Stipulated Time, 1116.*
 - (d) *Where Additional Duties are Imposed upon Agent Employed at Fixed Salary, 1116.*
 - b. Reimbursement, 1117.*
 - (1) *For Advances of Expenditures, 1117.*

AGENCY.

- (2) *For Loss and Damage Sustained*, 1117.
- c. *Agent's Right to Lien*, 1119.
- d. *Agent's Right of Stoppage in Transitu*, 1119.

IX. RIGHTS, DUTIES, AND LIABILITIES AS TO THIRD PARTIES, 1119.

1. *Of Agent to Third Parties*, 1119.

a. *On Contract*, 1119.

(1) *When Acting with Authority*, 1119.

(a) *Principal Disclosed*, 1119.

aa. *In General*, 1119.

bb. *When Agent Pledges His Own Credit*, 1120.

cc. *When Agent Unintentionally Binds Himself*, 1121.

dd. *When Acting for Foreign Principal*, 1121.

ee. *When Principal is Irresponsible*, 1122.

(b) *Agency Undisclosed*, 1122.

(2) *When Acting with No Authority*, 1124.

(a) *In General*, 1124.

(b) *When He Has Knowledge of His Want of Authority*, 1125.

(c) *When He Bona Fide Believes He Has Authority*, 1125.

aa. *When in Fact He Has None*, 1125.

bb. *Acting in Excess of Authority Actually Possessed*, 1126.

(d) *Third Party must be Ignorant of Want of Authority*, 1127.

(e) *Nature of Liability—Form of Action*, 1127.

b. *For Money Paid to Agent*, 1129.

(1) *In General*, 1129.

(2) *When Paid under Mistake*, 1130.

(3) *When Money is Illegally Received*, 1131.

c. *In Tort*, 1131.

(1) *For Nonfeasance and Misfeasance*, 1131.

(2) *For Fraud and Malice*, 1135.

2. *Of Principal to Third Parties*, 1136.

a. *Liability Civilly*, 1136.

(1) *Agent's Acts Generally*, 1136.

(2) *On Contract*, 1137.

(a) *Liability of Principal Generally*, 1137.

(b) *Where the other Party has Elected to Hold Agent Liable*, 1138.

aa. *In General*, 1138.

bb. *Requisites of an Election a Question for the Jury*, 1138.

cc. *Within What Time the Party must Elect*, 1139.

(c) *Liability of Undisclosed Principal*, 1139.

aa. *On Simple Contracts*, 1139.

bb. *On Contracts under Seal*, 1141.

cc. *On Negotiable Contracts*, 1141.

dd. *Where Principal has Settled with Agent*, 1142.

(3) *Representations—Admissions*, 1143.

(4) *Delivery or Payment to Agent*, 1143.

(5) *Notice to Agent*, 1144.

(a) *Rule Stated*, 1144.

(b) *Must Relate to Business within Scope of Agency*, 1146.

(c) *Must be of Important Facts*, 1149.

(d) *When Notice must be Had*, 1149.

(6) *In Tort*, 1151.

b. *Liability Criminally*, 1161.

3. *Of Third Parties to Agent*, 1161.

a. *In General*, 1161.

b. *Agent's Right of Action against Third Parties*, 1162.

(1) *On Contract*, 1162.

(a) *When Made with Agent Personally*, 1162.

aa. *General Rule*, 1162.

bb. *When Agent is Ostensible Principal*, 1164.

cc. *On Instruments under Seal*, 1165.

AGENCY.

- (b) *When Agent Has Beneficial Interest*, 1165.
- (c) *Payments made under Mistake of Fact, or on Illegal Contracts*, 1166.
- (2) *In Tort*, 1166.
 - (a) *For Injury to Principal's Property in Agent's Possession*, 1166.
- (3) *For His Own Personal Injury*, 1166.
- c. *Principal's Right to Control Action Brought by Agent*, 1167.
- d. *Defenses to Actions Brought by Agent*, 1167.
- e. *Limit of Agent's Recovery*, 1167.
 - (1) *On Contract*, 1167.
 - (2) *In Tort*, 1167.
- 4. *Of Third Parties to Principal*, 1168.
 - a. *On the Agent's Contracts*, 1168.
 - (1) *Principal may Maintain Action*, 1168.
 - (a) *When Disclosed*, 1168.
 - (b) *When Undisclosed*, 1168.
 - aa. *In General*, 1168.
 - bb. *Subject to Equities*, 1169.
 - cc. *Exceptions*, 1171.
 - b. *For Property Wrongfully Transferred to Third Party*, 1172.
 - (1) *When Principal may Recover*, 1172.
 - (a) *In General*, 1172.
 - (b) *Property Bartered, Pledged, or Mortgaged*, 1174.
 - (c) *Property Used to Pay Agent's Debt*, 1174.
 - aa. *By Agent*, 1174.
 - bb. *By Seizure under Execution or Attachment*, 1175.
 - (d) *Securities*, 1175.
 - (2) *Principal may Follow Property*, 1175.
 - c. *For Money Wrongfully Paid to or Appropriated by Third Party*, 1176.
 - (1) *When Principal may Recover*, 1176.
 - (a) *In General*, 1176.
 - (b) *Proceeds of Restrictively Indorsed Paper*, 1177.
 - (c) *Money Lost on Wager Contracts*, 1177.
 - (2) *Principal may Follow Fund*, 1177.
 - d. *For Money Paid under Mistake of Fact*, 1178.
 - e. *For Breach of Warranty and Misrepresentation*, 1178.
 - f. *For Surreptitious Dealings of Third Party with Agent*, 1178.
 - g. *In Tort*, 1179.
 - (1) *Injury to Property in Agent's Possession*, 1179.
 - (2) *Loss of Service by Wrongful Act of Third Party*, 1179.
 - h. *Principal's Right of Action Superior to Agent's*, 1180.
 - (1) *In General*, 1180.
 - (2) *Third Party Cannot Dispute Agency*, 1180.
 - i. *Defenses to Principal's Action*, 1180.
 - (1) *Payment to Agent*, 1180.
 - (2) *Fraudulent Acts of Agent*, 1180.
 - (3) *Judgments when Conclusive*, 1181.

X. RATIFICATION, 1181.

- 1. *Nature*, 1181.
- 2. *Who may Ratify*, 1182.
- 3. *What Acts may be Ratified*, 1184.
 - a. *In General*, 1184.
 - b. *Torts*, 1185.
 - c. *Criminal Acts—Forgery*, 1185.
- 4. *Prerequisites to Valid Ratification*, 1187.
 - a. *Designation of Principal*, 1187.
 - b. *Acts Done in Capacity of Agent*, 1188.
 - c. *Knowledge of Material Facts*, 1189.
 - d. *Ratification of Whole Act*, 1192.
 - e. *Mutuality—How Far Necessary*, 1193.
- 5. *Implied Ratification*, 1195.
 - a. *In General*, 1195.
 - b. *By Accepting Benefits*, 1196.
 - c. *By Silent Acquiescence*, 1203.
 - (1) *General Rule*, 1203.

AGENCY.

- (2) *Where Act is Done by a Stranger*, 1208.
- d. *By Suit*, 1209.
- 6. *Ratification of Instruments under Seal*, 1211.
- 7. *Effect of Ratification*, 1213.
 - a. *In General*, 1213.
 - b. *As between Principal and Agent*, 1214.
 - c. *Liability of Principal and Agent to Third Parties*, 1214.
 - d. *As to Intervening Rights*, 1215.

XI. TERMINATION, 1215.

- 1. *By Act of Parties*, 1215.
 - a. *In Accordance with Agreement*, 1215.
 - b. *Revocation by Principal*, 1216.
 - (1) *In General*, 1216.
 - (2) *When Agency is Coupled with an Interest*, 1217.
 - (3) *How Effected*, 1219.
 - (4) *When Effective—Notice of Revocation*, 1220.
 - c. *Renunciation by Agent*, 1222.
- 2. *By Operation of Law*, 1222.
 - a. *Death of Principal*, 1222.
 - b. *Death of Agent*, 1226.
 - c. *Insanity of Either Party*, 1226.
 - d. *Bankruptcy of Either Party*, 1227.
 - e. *Marriage of Feme Sole*, 1228.
 - f. *Effect of War*, 1228.
 - g. *Accomplishment of Purpose—Lapse of Time*, 1229.

CROSS-REFERENCES.

As to matters of PROCEDURE, see the titles ACCOUNTS AND ACCOUNTING; PRINCIPAL AND AGENT, in the ENCYCLOPEDIA OF PLEADING AND PRACTICE.

As to ADMISSIONS BY AGENTS, see the title ADMISSIONS, Vol. I., p. 670.

As to Agents filling in blanks in instruments, see the title ALTERATION OF INSTRUMENTS.

As to Banks as collecting agents, see the title BANKS AND BANKING.

As to Agent's right to lien, see the title LIENS.

As to Agent's right of stoppage in transitu, see the title STOPPAGE IN TRANSITU.

As to the running of the statute of limitations between principal and agent, see the title LIMITATION OF ACTIONS.

As to particular classes of agents, see the titles: ARBITRATION AND AWARD; ATTORNEY AND CLIENT; AUCTIONS AND AUCTIONEERS; BILL AND NOTE BROKERS; BROKERS; COLLECTION AGENCIES; COMMERCIAL TRAVELERS OR DRUMMERS; COMMISSION MERCHANTS OR FACTORS; CONTRACTORS; CUSTOM-HOUSE BROKERS; DEL CREDERE COMMISSION; EMPLOYMENT AGENCIES; EXCHANGE BROKERS; FORWARDING MERCHANTS; INSURANCE BROKERS; MASTERS OF VESSELS; MERCANTILE AGENCIES; NOTARY PUBLIC; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PAWNBROKERS; PROMOTERS; PUBLIC OFFICERS; REAL-ESTATE BROKERS; SHIP BROKERS; STOCK BROKERS.

As to other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles: ACCOMMODATION PAPER, Vol. I., p. 334; ACCOUNTS, Vol. I., p. 433; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; BAILMENT; BANKRUPTCY; BILLS AND NOTES; CONTRACTS; DAMAGES; ELECTION OF REMEDIES; EMBEZZLEMENT; EXECUTORS AND ADMINISTRATORS; FRAUD AND MISREPRESENTATION; FELLOW SERVANTS; GUARDIAN AND WARD; HUSBAND AND WIFE; ILLEGAL CONTRACTS; ILLEGAL SALES; IMPLIED WARRANTY; INFANTS; INSURANCE; JOINT TENANTS; MASTER AND SERVANT; NEGLIGENCE; NOTICE; PAROL EVIDENCE; POWER OF ATTORNEY; POWERS; PARTNERSHIP; PAYMENT; RECEIVERS; RECEIVERS OF RAILROADS; SALES; SEAL; SET-OFF—RECOUPMENT AND COUNTERCLAIM; SETTLEMENTS; SOCIETIES AND CLUBS; TENANTS IN COMMON; TRUSTS AND TRUSTEES; USAGES AND CUSTOMS; USURY; WARRANTY.

I. DEFINITIONS¹—1. **Contract of Agency.**—Agency² is the relation, created either by express or implied contract,³ or by law,⁴ whereby one party *sui juris*,⁵ called the principal, constituent, or employer, delegates the transaction of some lawful business, with more or less discretionary power, to another

1. **Explanation of the Scope of this Title.**—The treatment of the title "Agency" which is contained in the following pages is confined to an exhaustive presentation of the general principles of the subject. A statement of the law relating to the particular classes of agents, as "Auctioneers," "Brokers," etc., is to be found under other titles in this work, and is not within the limits or purpose of this article. Authorities upon these topics are used only as illustrating general doctrines. Occasionally precision of statement has rendered it necessary to point out and differentiate the rules of law peculiar to certain classes of agents; but this has been done only in connection with a general exposition of the subject in hand, and in all such cases the reader should refer for a complete discussion to the title treating of the special class of agents indicated. An examination of the table of cross-references given at the head of this article will, in connection with this explanation, indicate what the reader should or should not look for in these pages.

2. **Story on Agency, § 3.**

The Popular Idea of the Term "Agency" is a relation created by an agreement, express or implied, made between the parties before the performance of the act in question and with reference to it. *Pells v. Snell*, 31 Ill. App. 164.

Claim of Title in Principal Sufficient.—To constitute a valid agency, where property is its subject, it is not essential that the principal should have a legal or equitable title, or more than a naked claim of title. It may be created for the acquisition of title, legal or equitable, or for the protection of an asserted title. *Hardenbergh v. Bacon*, 33 Cal. 356.

Under the Civil Law—Mandate or Procuration.—A mandate is defined as "a contract of agency, by which the mandator confides a matter of business, or his business generally, to an agent called the mandatary. If the authority or appointment be in writing, the mandate is also called procuration. Mandatary qualifications exist where a person induces another to repose credit in a third person. It answers somewhat to our modern letter of credit." *Century Dictionary*.

Under the Codes—Georgia.—"The relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf." *Ga. Code*, § 2178.

California, Dakota, and Montana.—An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called "agency." *Cal. Code*, § 2295; *Dak. Code*, § 1337; *Mont. Code*, § 3070. See *Wisp v. Hazard*, 66 Cal. 461.

Louisiana.—A mandate, procuration, or letter of attorney is an act by which one person gives powers to another to transact

for him, and in his name, one or several affairs. A mandate may take place in five different manners: for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third person and that of the party granting it; and finally, for the interest of the mandatary and a third person. *La. Code*, arts. 2985, 2986.

Ostensible Agency.—Under the *California Code*, as also under the codes of *Dakota* and *Montana*, agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. *Cal. Civil Code*, §§ 2298, 2299, 2300; *Dak. Code*, §§ 1340, 1341, 1342; *Mont. Civil Code*, §§ 3073, 3074, 3075. See further, as to the definition and application of ostensible agency, *Wisp v. Hazard*, 66 Cal. 460; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138; *Robinson v. Nevada Bank*, 81 Cal. 106; *Quay v. Presidio*, etc., R. Co., 82 Cal. 1; *Harris v. San Diego Flume Co.*, 87 Cal. 526; *Heald v. Hendy*, 89 Cal. 634; *World's Columbian Exposition v. Richards*, 57 Ill. App. 601; *Hurd v. Marple*, 10 Ill. App. 418; *Pardridge v. LaPries*, 84 Ill. 51; *Wilcox v. Chicago*, etc., R. Co., 24 Minn. 269; *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 149, 69 Am. Dec. 678; *Kasson v. Noltner*, 43 Wis. 646. See also *Green v. Hinkley*, 52 Iowa 633.

See *infra*, this title, *Nature and Extent of Authority*.

The Law of Partnership is logically a branch of the law of agency. See *Cox v. Hickman*, 8 H. L. Cas., at pp. 303, 311; *Worrall v. Munn*, 5 N. Y. 240. See also the title **PARTNERSHIP**.

An agreement to manage the business of another for a certain per cent. of the income, bearing the same proportion of the losses, does not necessarily render the agent a partner. *Grinton v. Strong*, 148 Ill. 587.

3. *Noyes v. Landon*, 59 Vt. 569, 2 Kent's Com. 612.

The Contract of Mandate may be Tacit as well as Expressed, and the acts of the principal must be fairly and liberally construed toward those who contract with the agent as well as toward the agent; and where the law does not require the contract to be in writing, the power to execute it may be in the simplest form, and the intention of the parties may be gathered as much from their acts as from their agreements. *Ball v. Bender*, 22 La. Ann. 493.

4. As where the law authorizes the wife to pledge her husband's credit even against his will, see *infra*, this title, *Appointment—Implied from the Relation of the Parties*.

5. **Story on Agency, § 3.** See *infra*, this title, *Competency of Parties—Competency to be Principal*.

party, called the agent, attorney, proxy, or delegate, who undertakes to manage the affair and render to him an account thereof.¹

2. Principal.—The principal is the party whom the agent represents and from whom he derives his authority; he is the one primarily and originally concerned in the contract of agency.²

3. Agent.—The term "agent" is one of very wide application, and includes a great many classes of persons to which distinctive appellations are given—as factors, brokers, attorneys, cashiers of banks, clerks, consignees, etc.³ Indeed, any one who undertakes to transact some business or to manage some affair for another, by authority and on account of the latter, and to render an account of it, is denominated an agent.⁴ He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal might or could do.⁵

Subagent.—A subagent is a person selected by an agent to perform a part or all of the duties of the employment.⁶

4. The Power or Authority.—The right on the part of the agent to act in the name or on behalf of another is termed his authority or power to act, and this, if conferred formally by an instrument in writing and under seal, is said to be conferred by a letter of attorney or power of attorney.⁷

1. 2 Kent's Com. 612; Story on Agency, § 2.

Illustrations—Contracts Held to Constitute Relationship of Principal and Agent.—An agreement whereby a committee who were to represent creditors and were authorized to take possession of mines, employ men, purchase horses, carts, etc., prepare for market and sell kaolin, and appropriate the proceeds in accordance with the scheme of distribution adopted by the creditors and made a part of the agreement—said agreement fixing the committee's compensation and reserving a right to revoke their powers—was held not to be a mere license to work the mines, but a contract of agency. *Hickman v. Bingaman* (Pa., 1889), 17 Atl. Rep. 20.

Where money was furnished to a party with which to purchase grain, and the understanding was that his compensation should be a share of the property remaining after paying back the sum furnished, with eight per cent. interest, it was held not to be a loan, but a contract of agency, and that the grain so purchased belonged to the person who furnished the money. *Van Sandt v. Dows*, 63 Iowa 594, 50 Am. Rep. 759.

A contract between B. and S. stipulated that B. should appoint S. his agent for the sale of harvesters, for which S. was to pay one third in cash on delivery, and give his note for the balance. As he made sales he was to deduct the amount of cash advanced by him from the cash proceeds, and have the notes received by him made in the name of B., his own notes being taken up as he transmitted those of the parties to whom he sold. The court held that the relation between B. and S. was that of principal and agent, and that the transactions between them were not conditional sales. *Bayliss v. Davis*, 47 Iowa 340. See also *Eldridge v. Benson*, 7 Cush. (Mass.) 483.

Contracts Held Not to Constitute Relationship of Principal and Agent.—The plaintiffs gave to the defendant an option of five days to endeavor to sell a block of land for whatever sum it would bring, and upon whatever

terms he might make, provided they should receive therefor the sum of ten thousand dollars, and agreed that defendant should have whatever sum he could realize from the land above that amount. The court held that the relation thus created between them was rather that of vendor and purchaser, under a contract of sale, than one of principal and agent. *Robinson v. Easton*, 93 Cal. 82.

It was held in *Gibney v. Curtis*, 61 Md. 192, that a person to whom goods are consigned to be sold, and who is at liberty to sell them at any price and on any terms he pleases, he paying a fixed price for them to the owner, is not an agent, but a vendee. See also *Ex p. White*, L. R. 6 Ch. 397.

2. *Adams v. Whittlesey*, 3 Conn. 567.

Undisclosed Principals.—As to undisclosed principals, see *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties*.

3. See *infra*, this title, *Classes of Agents*, and the cross-references there given.

4. *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512; *Metzger v. Huntington*, 139 Ind. 501, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 333; *Flesh v. Lindsay*, 115 Mo. 1, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 333.

5. *Board v. Cronk*, 6 N. J. L. 122.

"An Agent is a substitute, or a person employed to manage the affairs of another. The test on this inquiry is, Who derives the benefit? The person receiving goods or employing workmen, for his own advantage, is a principal; and he who receives or employs workmen for another, is an agent." *Adams v. Whittlesey*, 3 Conn. 567.

Peculiar Meaning of "Agent" may be Shown.—It is competent to show that a word has acquired a peculiar meaning in a certain business—as, for instance, "agent," in the piano trade; and to construe it accordingly when it is made use of in reference to that business. *Whittemore v. Weiss*, 33 Mich. 348.

6. See *infra*, this title, *Delegation—Subagents*.

7. *Evans on Agency*, § 2 (Ewell's ed.). See generally, for a discussion of the various

II. CLASSES OF AGENTS.—Agents have various duties and liabilities, dependent upon the nature and extent of the authority delegated to them and the end sought to be accomplished by their appointment. They are, accordingly, variously classified.¹ The most broadly recognized division is that based upon the extent of the authority, and includes universal, general, and special or particular agents.² Other classifications, made for convenience of treatment, are based upon the nature of the agency, including public³ and private,⁴ mercantile and nonmercantile agents;⁵ upon the obligations of the agent in selling, including *del credere* agents and agents *not del credere*;⁶ and upon the degree of skill required of them, including gratuitous and remunerated or paid agents,⁷ professional and nonprofessional agents.⁸

III. COMPETENCY OF PARTIES—1. **Competency to be Principal**—*a. INDIVIDUALS*—(1) *In General*.—By the common law, whenever a person has power to do a thing in his own right, he may do it by an agent.⁹ In general, any person *sui juris*, unless prohibited by the municipal law to which he is subject, is capable of becoming either principal or agent.¹⁰

How Disability Determined.—To determine who may or who may not be a principal or an agent, recourse must be had to the rules of disability recognized by the law of contracts generally.¹¹ The same disabilities, however, do not apply to both principal and agent.

Kinds of Incompetency.—Incompetency to contract is of two kinds—natural or legal. Natural incompetency is directly traceable to a mental defect, whether chronic or temporary, curable or incurable, and may arise from a variety of causes, as in the case of lunatics, idiots, and drunkards. Legal incompetency is traceable to some provision of law, as in the case of aliens, infants, married women, outlaws, and convicts. Incompetency to contract may be either absolute or limited; its effect may be either to make a contract altogether void, or to give to one party the rights denied to the other.¹²

kinds of authority and their construction, *infra*, this title, *Nature and Extent of Authority*. See also the title **POWER OF ATTORNEY**.

Proof of one's "acting" for another, without proof of his authority so to act, does not show the relation of principal and agent. *Walsh v. St. Paul Trust Co.*, 39 Minn. 23.

Acts in the Presence of Principal.—An act done by one in the presence and under the control of another is regarded not as the exercise of a delegated authority, but as the personal act of the party in whose behalf it is performed; but it is otherwise where the act is done by a person's direction, in his absence, and beyond his control. *Kidder v. Prescott*, 24 N. H. 263; *Hanson v. Rowe*, 26 N. H. 327; *People v. Smith*, 20 Johns. (N. Y.) 63; *Ball v. Dunsterville*, 4 T. R. 313. See also *Andover v. Grafton*, 7 N. H. 298.

Naked Authority.—A naked authority is where the principal delegates the power to the agent wholly for the benefit of the former. 1 Bouv. Inst. 1302.

Authority Coupled with an Interest.—An authority is coupled with an interest when it is given to the agent for a valuable consideration or when it is a part of a security. Such an authority is irrevocable. 1 Bouv. Inst. 1303; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Boone v. Clarke*, 3 Cranch (C. C.) 389; *Marziou v. Pioche*, 8 Cal. 522; *Creager v. Link*, 7 Md. 259. See *infra*, this title, *Termination*.

1 Evans on Agency (Ewell's ed.), § 2.

2. As to general and special agents and

their powers, see *infra*, this title, *Nature and Extent of Authority*.

3. See the title **PUBLIC OFFICERS**.

4. See this title *passim*, and the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.

5. See the titles **COMMISSION MERCHANTS OR FACTORS**; **AUCTION AND AUCTIONEERS**; **MERCANTILE AGENCIES**; **COMMERCIAL TRAVELERS OR DRUMMERS**; **FORWARDING MERCHANTS**; **MASTERS OF SHIPS**, etc.

As to commercial agents in the law of nations, see the titles **CONSULS AND AMBASSADORS**, and **INTERNATIONAL LAW**.

6. See the title **DEL CREDERE AGENTS**.

7. See the title **BAILMENTS**, and the cross-references there given.

8. See the titles **ATTORNEY AND CLIENT**; **ATTORNEY-GENERAL**; and **PROSECUTING ATTORNEY**, etc.

9. Evans on Agency (Ewell's ed.), § 9; *Ferguson v. Morris*, 67 Ala. 389; *Combes' Case*, 9 Coke 75; Com. Dig., tit. Attorney, C. 1.

10. Story on Agency, § 5; *Lea v. Bringier*, 19 La. Ann. 197. See also 12 Albany L. J. 337.

11. Evans on Agency, § 10.

Any person having capacity to contract may employ an agent. Bishop on Contracts, § 1034.

Codes.—This rule has been incorporated into the codes of several of the states. *California Code*, § 2296; *Dakota Code*, § 1338; *Georgia Code*, § 2181; *Montana Code*, § 3070.

12. Evans on Agency, § 10.

(2) *Persons Naturally Incompetent*—(a) *Persons Non Compos Mentis*—In General.—A lunatic, idiot, or other person of unsound mind, cannot appoint an agent.¹ The reason given for this is, that they are generally incapable of executing a perfectly valid contract.²

(b) *Drunkards—Their Contracts Generally*.—Drunkenness does not make a contract void, but voidable only,³ and it may be ratified by the intoxicated party⁴ or his representative⁵ when he becomes sober.⁶

(3) *Persons Legally Incompetent*—(a) *Infants*⁷—Appointment of Agents.—An infant, being unable to enter into a binding contract, cannot appoint an agent⁸

For a full discussion of the question of capacity to contract see, generally, the title CONTRACTS, and the titles treating of the various classes of persons incapacitated—*e.g.*, MARRIED WOMEN.

1. Married women, lunatics, infants, and other persons not *sui juris* are incapable of appointing an agent or attorney. *Snyder v. Sponable*, 1 Hill (N. Y.) 567.

A note executed by the son of an adjudged lunatic, in the assumed character of her agent, is void. *Lee v. Morris*, 3 Bush (Ky.) 211.

2. Story on Agency, § 6; *Tarback v. Bispham*, 2 M. & W. 2.

The Power of Attorney of a Lunatic, or of a *non compos mentis*, is void. *Dexter v. Hall*, 15 Wall. (U. S.) 9.

Whether Lunatic Wholly Incapable of Appointing Agent.—Mr. Evans, in his work on Agency, p. 10, says: "Mr. Justice Story lays it down broadly that idiots, lunatics, and other persons not *sui juris* are wholly incapable of appointing an agent. This cannot be accepted without qualification as the law of this country [*England*], for it has been distinctly laid down by the Court of Exchequer Chamber, after a review of the cases, that when one of the parties to a contract is of unsound mind, and the fact is unknown to the other contracting party, no advantage having been taken of the lunatic, this unsoundness of mind will not vacate a contract, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored altogether to their original position. (*Molton v. Camroux*, 4 Exch. 17.) It is conceived that the same result would take place if the contract were made through another, who acted upon the authority of the lunatic, without having been aware or taken advantage of his state of mind. The principle of the above decision was acted upon in a more recent case. *Beavan v. M'Donnell*, 9 Exch. 309."

Cause of Lunacy Immaterial.—It seems to be immaterial from what cause such a state of mind arises, whether by the act of Providence, or from the party's own imprudence. *Menkins v. Lightner*, 18 Ill. 282; *Wigglesworth v. Steers*, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602. See also *Bliss v. Connecticut*, etc., R. Co., 24 Vt. 424.

For a full discussion of this subject see the title INSANITY.

3. *McGuire v. Callahan*, 19 Ind. 128; *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Taylor v. Patrick*, 1 Bibb (Ky.) 168; *Eaton*

v. Perry, 29 Mo. 96; *Williams v. Inabnet*, 1 Bailey (S. Car.) 343; *Barrett v. Buxton*, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; *Arnold v. Hickman*, 6 Munf. (Va.) 15.

4. *Mansfield v. Watson*, 2 Iowa 111; *Reinicker v. Smith*, 2 Har. & J. (Md.) 421; *Carpenter v. Rodgers*, 61 Mich. 384; *Matthews v. Baxter*, L. R. 8 Exch. 132.

5. *Broadwater v. Darne*, 10 Mo. 277.

6. For further discussion of this subject see the titles CONTRACTS, and COMMON DRUNKARD.

7. For a full discussion of infants' contracts generally, see the titles CONTRACTS, and INFANTS.

8. *Doe v. Roberts*, 16 M. & W. 778; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Tapley v. McGee*, 6 Ind. 56; *Fetrow v. Wiseman*, 40 Ind. 155; *Armitage v. Widoe*, 36 Mich. 124; *Turner v. Bondalier*, 31 Mo. App. 582; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Brown v. Canton*, 4 Lans. (N. Y.) 409; *Robbins v. Mount*, 4 Robt. (N. Y.) 553; *Holden v. Curry*, 85 Wis. 504. See also *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Robinson v. Weeks*, 56 Me. 106; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; *Cheshire v. Barrett*, 4 McCord (S. Car.) 244, 17 Am. Dec. 735.

Codes.—It has also been enacted by the codes of several states that infants cannot delegate authority. *California Civil Code*, § 2296; *Dakota Rev. Code* (1885), § 15; *Montana Civil Code*, § 3071.

Rescission by Agent.—In *Towle v. Dresser*, 73 Me. 252, it was held that the rescission of a minor's contract, through the intervention of an agent employed by him for that purpose, was not manifestly or necessarily prejudicial, and therefore not void.

Ratification.—In *Ward v. Steamboat "Little Red"*, 8 Mo. 358, it was held that an infant can become party to a contract, not required to be made by deed, made without authority from him, by his subsequent adoption of it, as well as by his previous express consent. Although, as was said in *Armitage v. Widoe*, 36 Mich. 124, an infant cannot affirm what he cannot authorize.

Infant Partner.—The infant member of a firm cannot recover his portion of the purchase money paid to a vendor, the contract being binding as to the other partners, and they having the right to control the firm's funds. *Sadler v. Robinson*, 2 Stew. (Ala.) 520.

So where the adult member of a firm made a promissory note in the name of the firm and the infant, after coming of full age, rati-

or an attorney;¹ and a power or warrant of attorney made by an infant is not voidable only, but absolutely void.²

fied it, it was held good against the infant. *Whitney v. Dutch*, 14 Mass. 462, 7 Am. Dec. 229. But see *Furlong v. Bartlett*, 21 Pick. (Mass.) 401. See also *Moley v. Brine*, 120 Mass. 324.

Where an agent of an insurance company makes a fraudulent settlement with the infant member of a firm, for a loss occasioned to the firm property, the firm cannot maintain an action on the policy, without first restoring, or offering to restore, what has been received under the settlement. *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479.

Prejudicial and Beneficial Agents.—If an infant should execute a letter of attorney to another, to take livery of lands on a feoffment to him, it will be good, because intended for his benefit. See *Com. Dig. tit. Infant*, B. 1; 1 Roll. Abr. 730, 1-10; *Zouch v. Parsons*, 3 Burr. 1808; *Combes' Case*, 9 Coke 76 b; 2 Kent's Com. 233.

But if an infant should make a feoffment, and execute a letter of attorney to another, to make livery in his name to the feoffee, it will be void, for such feoffment and livery will be intended to be to his prejudice. See *Waple v. Hastings*, 3 Harr. (Del.) 403; *Pyle v. Cravens*, 4 Litt. (Ky.) 18; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Lawrence v. McArter*, 10 Ohio 37; *Knox v. Flack*, 22 Pa. St. 337; *Zouch v. Parsons*, 3 Burr. 1804; *Combes' Case*, 9 Coke 76; *Doe v. Roberts*, 16 M. & W. 778.

In *Pottenger v. Stuart*, 3 Har. & J. (Md.) 347, *Kilty, C.*, in delivering the opinion of the court, said: "In cases of intestacy, or there being no contrary direction by will, a female above the age of sixteen would be capable of authorizing any person, by a common order, to receive her estate, by which she would be bound as far as any payment or delivery should be made. But it is not so clear that she would be bound by a settlement made by her agent, although specially authorized by her."

1. *Oliver v. Woodroffe*, 4 M. & W. 650; *Foxwist v. Tremaine*, 2 Saund. 213; *Philpot v. Bingham*, 55 Ala. 439; *Flexner v. Dickerson*, 72 Ala. 318; *McCloskey v. Sweeney*, 66 Cal. 53; *Wambole v. Foote*, 2 Dakota 1; *Cole v. Pennoyer*, 14 Ill. 158; *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481; *Deford v. State*, 30 Md. 179; *Wainwright v. Wilkinson*, 62 Md. 146; *Robbins v. Mount*, 4 Robt. (N. Y.) 553.

See also *In re Cahill's Estate*, 74 Cal. 56; *Weaver v. Jones*, 24 Ala. 424; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

Delivery by Agent.—It seems an infant cannot make delivery of a chattel sold by him, by attorney, but must make manual delivery of it in person. *Stafford v. Robt*, 9 Cow. (N. Y.) 626; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77. But see 1 Am. Lead. Cas. (4th ed.) 248, where the doctrine is questioned.

Parent Acting for Infant.—In *Benziger v. Miller*, 50 Ala. 206, it was held that the infant's parent may make a contract of employ-

ment for him, and either the infant or parent may sue for the breach of such contract. But see *Patterson v. Lippincott*, 47 N. J. L. 460, 54 Am. Rep. 178. See also the title MASTER AND SERVANT.

As to conveyances made by parent for minor child, see *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Hall v. Jones*, 21 Md. 439; *Alsworth v. Cordtz*, 31 Miss. 32; *Belton v. Briggs*, 4 Desaus. (S. Car.) 465.

A contract made by a father in the name of his infant son, but without the knowledge of his son, does not bind the son until he has assented to it, and does not confer rights upon him. *Armitage v. Widoe*, 36 Mich. 124; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

Infant Appearing by Attorney, without Guardian ad Litem.—In *Townsend v. Cox*, 45 Mo. 403, the court, by *Wagner, J.*, said: "A judgment rendered against an infant, appearing by attorney, may be set aside or recalled. (*Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Randalls v. Wilson*, 24 Mo. 76.) * * * Judge Napton, in *Fulbright v. Cannefox*, 30 Mo. 425, in speaking on the subject of judgments against infants, where there was an appearance by attorney, says: 'Such judgments are not nullities, but may be set aside on terms.' And it is the conceded and established rule, that all judicial acts against an infant, as judgments and decrees, without a guardian *ad litem*, are not void, but are voidable or confirmable at the option of the infant. *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196, 41 Am. Dec. 497; *Bloom v. Burdick*, 1 Hill (N. Y.) 131, 37 Am. Dec. 299; *Barber v. Graves*, 18 Vt. 292; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153; *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161; *Allison v. Taylor*, 6 Dana (Ky.) 87, 32 Am. Dec. 68; *Bourne v. Simpson*, 9 B. Mon. (Ky.) 454; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Swan v. Horton*, 14 Gray (Mass.) 179."

Appearance by Attorney of Infant Executor.—Executors must join in an action, though some of them are under age; and they may all sue or appear by an attorney; and such as are of full age may make an attorney for those who are under age. *Foxwist v. Tremaine*, 2 Saund. 213.

2. *England.*—*Saunderson v. Marr*, 1 H. Bl. 75; *Zouch v. Parsons*, 3 Burr. 1704; *Ashlin v. Langton*, 4 M. & S. 719, 30 E. C. L. 362; *Oliver v. Woodroffe*, 4 M. & W. 650.

United States.—*Dexter v. Hall*, 15 Wall. (U. S.) 9.

Alabama.—*Glass v. Glass*, 76 Ala. 371; *Philpot v. Bingham*, 55 Ala. 435.

Delaware.—*Waples v. Hastings*, 3 Harr. (Del.) 403; *Carnahan v. Allderice*, 4 Harr. (Del.) 99.

Indiana.—*Pickler v. State*, 18 Ind. 266; *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481.

Kentucky.—*Pyle v. Cravens*, 4 Litt. (Ky.) 18.

Missouri.—*Turner v. Bondalier*, 31 Mo. App. 582.

(b) **Married Women—By Common Law.**—By the common law a married woman could not appoint another to act in her stead, since all her contracts were not voidable, but void.¹

By Statute.—The disability of the wife has, however, in many of the states been removed by statute, and she is now capable of acting not only for herself, but by an agent, with generally no express limitation upon her power of appointment. She may now undoubtedly appoint her husband or other person² as agent, to perform those business acts which she may lawfully do for herself.³

(c) **Alien Enemies—Appointment of Agents.**⁴—No agent can be appointed by a citizen of one government or state to act in the territory of the other during the

New York.—Bennett v. Davis, 6 Cow. (N. Y.) 393.

Ohio.—Lawrence v. McArter, 10 Ohio 37.

Pennsylvania.—Knox v. Flack, 22 Pa. St. 337.

See also *Cole v. Pennoyer*, 14 Ill. 158; *Dana v. Coombs*, 6 Me. 89; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Cummings v. Powell*, 8 Tex. 81; *Duvall v. Graves*, 7 Bush (Ky.) 461.

Feoffment by Attorney.—Thus, if an infant makes a feoffment by letter of attorney, it is *nil operatur*; but it is otherwise if he makes a feoffment in person. *Doe v. Roberts*, 16 M. & W. 778.

Warrant of Attorney by Infant and Another.—Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the court may order it to be vacated as against the latter, and to stand against the other parties. *Ashlin v. Langton*, 4 M. & S. 719, 30 E. C. L. 362; *Motteux v. St. Aubin*, 2 W. Bl. 1133; *Yates v. Lyon*, 61 Barb. (N. Y.) 205.

Infant's Acts by Agent Held Valid.—Some authorities permit an infant to act by agent, or attorney, within limits not well defined, yet including the signing of a promissory note; for example, when the authorization is not under seal. *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 562. See also *Belton v. Briggs*, 4 Desaus. (S. Car.) 465; *Ward v. Steamboat "Little Red,"* 8 Mo. 358; *Keegan v. Cox*, 116 Mass. 289; *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446; *Moley v. Brine*, 120 Mass. 324.

1. *Phillips v. Burr*, 4 Duer (N. Y.) 113; *Oulds v. Sansom*, 3 Taunt. 261; *Wambole v. Foote*, 2 Dakota 1.

Confessing Judgment.—A bond and warrant of attorney to confess judgment by a married woman and her husband was void as to her, and a sale of her real estate upon such a judgment and execution did not divest her title. *Read v. Jewson*, cited in 4 T. R. 362, note; *Roberts v. Pierson*, 2 Wils. 3; *Patton v. Stewart*, 19 Ind. 233; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592; *Dorrance v. Scott*, 7 Whart. (Pa.) 313, 31 Am. Dec. 509.

But in *Maclean v. Douglas*, 3 B. & P. 128, the court refused to set aside upon summary application a judgment entered upon a warrant of attorney given by a *feme covert*. See also *Wilkins v. Wetherill*, 3 B. & P. 220.

Agent to Contract with Husband.—A married woman cannot appoint an attorney for the purpose of contracting with her husband for her separate maintenance. *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485.

A Conveyance of a Wife's Lands must be executed by her in person, and she cannot appoint an agent to convey for her to a third person. *Gillespie v. Worford*, 2 Coldw. (Tenn.) 638. See *Sumner v. Conant*, 10 Vt. 9; and compare *Holladay v. Daily*, 19 Wall. (U. S.) 606.

2. **Wife may Appoint Attorney in Relation to Her Separate Estate.**—A married woman may manage her separate estate as well by an agent as in person, and may appoint her husband agent for that purpose. *Kenton Ins. Co. v. McClellan*, 43 Mich. 564; *Patten v. Patten*, 75 Ill. 446; *McLaren v. Hall*, 26 Iowa 297; *Porter v. Haley*, 55 Miss. 66, 30 Am. Rep. 502; *Wilcox v. Todd*, 64 Mo. 388; *Hall v. Callahan*, 66 Mo. 316; *Hord v. Taubman*, 79 Mo. 101; *Henry v. Sneed*, 99 Mo. 407; *Flesh v. Lindsay*, 115 Mo. 1; *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9; *Conway v. Smith*, 13 Wis. 140; *Todd v. Lee*, 15 Wis. 365; *Leonard v. Rogan*, 20 Wis. 540; *Beard v. Dedolph*, 29 Wis. 136; *Meyers v. Rahte*, 46 Wis. 655. See also *Smith v. Sweeny*, 35 N. Y. 291.

In *Vail v. Meyer*, 71 Ind. 159, the court said: "It may be conceded, as a general rule, that a married woman cannot appoint an agent. But a married woman holds and enjoys her real estate as if she were sole, and it becomes essential to its enjoyment that she have the power to make improvements by building new or repairing old buildings upon it. Contracts for this purpose * * * she can make whereby the builder, mechanic, or materialman may acquire a lien under the law. And we think it follows that she may make such contracts in person, or by an agent whom she may appoint for that purpose. So far as she is enabled to contract, she may contract in person or by agent." See also *Buckley v. Wells*, 33 N. Y. 525.

3. See also the titles **POWER OF ATTORNEY**, and **POWERS**; and, for a full discussion of married women's contracts generally, see the titles **HUSBAND AND WIFE**; **MARRIED WOMEN**; and **SEPARATE PROPERTY OF MARRIED WOMEN**.

4. For the further discussion of this subject see the titles **ALIEN, WAR**. See also *infra*, this title, **Termination—By Operation of Law—Effect of War**.

existence of war between such governments or states;¹ but, according to the weight of authority, the existence of war between two governments does not, *ipso facto*, terminate an agency established prior thereto by residents respectively of the hostile sections.²

b. PARTNERSHIPS³—(1) *Generally*.—Partners are competent to be principals, and may appoint agents for the conduct of their business.⁴

1. An individual has no power to appoint an agent for any purpose in the enemy's territory after hostilities have actually commenced. *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72. See also *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562; *New York L. Ins. Co. v. Davis*, 95 U. S. 431; *Jackson Ins. Co. v. Stewart*, 6 Am. L. Reg. N. S. 732; *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

2. *United States*.—*Conn v. Penn*, Pet. (C. C.) 496; *Denniston v. Imbrie*, 3 Wash. (U. S.) 396; *Ward v. Smith*, 7 Wall. (U. S.) 447; *U. S. v. Lapene*, 17 Wall. (U. S.) 601; *Montgomery v. U. S.*, 15 Wall. (U. S.) 395; *Anderson v. Cape Fear Bank*, 1 Fed. Cas. 838, No. 354; *Botts v. Crenshaw*, 3 Fed. Cas. 976, No. 1690; *Cocks v. Izard*, 5 Fed. Cas. 1154, No. 2934; *Douglas' Case*, 14 Ct. of Cl. 1. *Louisiana*.—*Monseaux v. Urquhart*, 19 La. Ann. 482.

New York.—*Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; *Clarke v. Morey*, 10 Johns. (N. Y.) 73; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562; *Griswold v. Waddington*, 15 Johns. (N. Y.) 64; *Sands v. New York L. Ins. Co.*, 59 Barb. (N. Y.) 556.

Virginia.—*King v. Hanson*, 4 Call (Va.) 259; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614, 3 Am. Rep. 218; *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

See also *Quigley's Case*, 13 Ct. of Cl. 367; *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142; *Robinson v. International L. Assur. Soc.*, 42 N. Y. 54, 1 Am. Rep. 490; and *infra*, this title, *Termination—By Operation of Law—Effect of War*.

War does Not Ipso Facto Terminate Agency.—In *Buford v. Speed*, 11 Bush (Ky.) 341, it was held that a person serving in the army of one belligerent cannot have an agent within the territory of the other to transact ordinary business, but may for some purposes. The court said: "It was distinctly held in *Ward v. Smith*, 7 Wall. (U. S.) 452, that a bank which had been appointed the agent of the creditor before the commencement of the war, to collect certain bonds, might lawfully receive payment pending the war, although the creditor was then a public enemy; and the same doctrine was again recognized in *Montgomery v. U. S.*, 15 Wall. (U. S.) 395."

But it was held in *Blackwell v. Willard*, 65 N. Car. 555, 6 Am. Rep. 749, that where a citizen and resident of *New York* had a suit pending in *North Carolina* previous to the civil war and during the war, payment of the indebtedness to the attorney or agent of such nonresident was void, as the war terminated the relation of attorney and client.

In *New York L. Ins. Co. v. Davis*, 95 U. S. 425, it was held that an agent of a northern life insurance company had no right to re-

ceive premiums in a southern state which was in insurrection. The court, by Bradley, J., declared that war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority; and that, disregarding contracts for ransom and other matters of absolute necessity, the only exception to this rule recognized by authority is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. "But this indulgence," proceeded the learned judge, "is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though if so transmitted without the debtor's connivance he will not be responsible for it. *Washington, J.*, in *Conn v. Penn*, Pet. (C. C.) 496; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200."

See also *Stoddard's Case*, 4 Ct. of Cl. 511, to the effect that war suspends the relation of principal and agent between citizens of belligerent states. Also *Howell v. Gordon*, 40 Ga. 302, and *Conley v. Burson*, 1 Heisk. (Tenn.) 145, to the effect that war revokes an agent's authority.

Mutual Consent Essential.—In order for the relationship of principal and agent to continue during a state of warfare between the countries of which the respective parties are citizens, the mutual consent of the parties is essential.

In *New York L. Ins. Co. v. Davis*, 95 U. S. 425, the court said: "In order to the subsistence of the agency during the war, it must have the assent of the parties thereto—the principal and the agent.* * * It is not enough that there was an agency prior to the war. It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong." See also *Fretz v. Stover*, 22 Wall. (U. S.) 198.

Partnership Dissolved by War.—A partnership between persons residing in two different countries is at least suspended, if not *ipso facto* determined, by the breaking out of war between those countries; and one partner could not, therefore, bind the firm by any act of his as the agent of the firm during the continuance of the war. *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *New Orleans Bank v. Matthews*, 49 N. Y. 12.

3. For a full discussion of this subject see the title **PARTNERSHIP**. See also *infra*, this title, *Appointment*.

4. Story on Agency, §39; *Chemung Canal*

(2) *Implied Power to Appoint Agents.*—Each partner has implied power to appoint an agent, and engage such services as are necessary to conduct the ordinary business of the joint enterprise;¹ and an agent thus appointed is the agent of the partnership as a whole, and not of the partners individually.²

c. *JOINT TENANTS AND TENANTS IN COMMON.*³—A joint tenant or tenant in common has no implied authority to appoint an agent to act for the other co-owners,⁴ and the appointment of an agent by one will therefore bind that one only;⁵ but all may join in the appointment of an agent.⁶

d. *CORPORATIONS.*⁷—A corporation as well as an individual may be a principal, and since it is a mere artificial being, and can only act through the instrumentality of an agent, it has the power to appoint such agents as are necessary to conduct the business for which it was organized.⁸

Bank v. Bradner, 44 N. Y. 680; *North America Bank v. Embury*, 21 How. Pr. (N. Y. Supreme Ct.) 14.

Partnerships.—"The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the first section of his work on Partnership." Per Lord Wensleydale in *Cox v. Hickman*, 8 H. L. Cas. 268.

So far as a partner acts for himself, in his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may properly be deemed an agent. Story on Partnership, § 1, citing *Baring v. Lyman*, 1 Story (U. S.) 396. See also *State v. Bancroft*, 22 Kan. 170.

1. *England.*—*Cox v. Hickman*, 8 H. L. Cas. 268; *Beckham v. Drake*, 9 M. & W. 79.

Alabama.—*Lucas v. Darien Bank*, 2 Stew. (Ala.) 280.

Iowa.—*Paton v. Baker*, 62 Iowa 704.

Kansas.—*Wheatley v. Tutt*, 4 Kan. 240.

Massachusetts.—*Durgin v. Somers*, 117 Mass. 55.

Michigan.—*Burgan v. Lyell*, 2 Mich. 102, 55 Am. Dec. 53; *Harvey v. McAdams*, 32 Mich. 472; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459.

Montana.—*Nolan v. Lovelock*, 1 Mont. 224.

New York.—*Mead v. Shepard*, 54 Barb. (N. Y.) 474.

Vermont.—*Carley v. Jenkins*, 46 Vt. 721.

See also *Bullen v. Sharp*, L. R. 1 C. P. 86; *Smith v. Cisson*, 1 Colo. 29; *Frye v. Saunders*, 21 Kan. 26, 30 Am. Rep. 421; *North America Bank v. Embury*, 21 How. Pr. (N. Y. Supreme Ct.) 14; *Potter v. Moses*, 1 R. I. 430.

Partners may Appoint Agents.—Each partner is a principal, and it is implied in the very nature of their connection that each has a right to depute and appoint an agent to act for both in matters relative to their joint interests. *Tillier v. Whitehead*, 1 Dall. (Pa.) 269.

2. *Accountable to Firm.*—*Johnston v. Brown*, 18 La. Ann. 330; *Coons v. Renick*, 11 Tex. 134, 60 Am. Dec. 230.

An attorney employed by one of the partners to make collections is the attorney of the firm, and accountable as well to one part-

ner as another, and equally subject to the direction and control of one as the other of the partners. *Ayer v. Ayer*, 41 Vt. 346. See also *Holloway v. Turner*, 61 Md. 217; *Beste v. Creditors*, 15 La. Ann. 55.

3. For a full discussion of this subject see the title *JOINT TENANTS*.

4. Story on Agency, § 39; Evans on Agency (Ewell's ed.) *23; Comyns's Digest, tit. Estates, K. 1.

5. *Permyer v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177. See also *Sewell v. Holland*, 61 Ga. 608; *Murray v. Haverly*, 70 Ill. 318; *Tipping v. Robbins*, 64 Wis. 546.

6. *Holladay v. Daily*, 19 Wall. (U. S.) 606; *Reiman v. Hamilton*, 111 Mass. 245; *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Noe v. Christie*, 51 N. Y. 270. See also *Keay v. Fenwick*, 1 C. P. Div. 745; *Jones v. Phipps*, L. R. 3 Q. B. 567; *Louisiana Trustees, etc., v. Dupuy*, 31 La. Ann. 305; *Cunningham v. Washburn*, 119 Mass. 224.

7. For a full discussion of this subject see the titles *CORPORATIONS*; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*. See also *infra*, this title, *Appointment*.

8. *Corporations as Principals.*—*Philadelphia, etc., R. Co. v. Quigley*, 21 How. (U. S.) 202; *Totterdell v. Fareham Blue Brick, etc., Co.*, L. R. 1 C. P. 674; *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Atchison, etc., R. Co. v. Reecher*, 24 Kan. 228; *Frankfort Bank v. Johnson*, 24 Me. 490; *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 275; *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *Clark v. Farrington*, 11 Wis. 321; *Hurlbut v. Marshall*, 62 Wis. 590.

Treated as Natural Persons.—The force of modern decisions seems to place corporations, with regard to their mode of appointing agents and making contracts in general, upon the same footing with natural persons. *Angell and Ames on Corporations*, § 138; *Argenti v. San Francisco*, 16 Cal. 266.

Mutual Companies.—It is as indispensable that mutual companies, as others, shall transact their business through officers and agents, and in the absence of express provisions in their charters limiting their appointment or the scope of their powers and duties it must be presumed that each person, in becoming a member of the company, impliedly consents that it shall be represented

2. Competency to be Agent—*a.* IN GENERAL.—Agents are not required to possess the same qualifications as principals. It is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Indeed, it may be stated as a general rule that all persons of sane mind are capable of becoming agents. Thus, at common law, monks, infants, *femes covert*, persons attainted, outlawed, or excommunicated, villains or aliens, might be agents for others. Any one, in fact, except a lunatic, imbecile, or infant of tender years, may be an agent.¹

b. **VARIOUS PERSONS—(1) Alien Enemies.**—The principle that, during the existence of war between two governments or states, no person can be appointed by a citizen of one government or state to act as his agent in the territory of the other has been fully treated elsewhere.²

(2) **Infants.**³—An infant may be an agent, and contracts made in that character by an infant are binding upon the principal.⁴

(3) **Persons Non Compos Mentis.**⁵—An idiot, lunatic, or other person other-

by such officers and agents as are reasonably necessary for the transaction of its business, and that they shall possess the powers and perform the duties ordinarily possessed and performed by such officers and agents. Protection L. Ins. Co. v. Foote, 79 Ill. 368.

Member of Corporation as Agent.—A corporation may employ one of its members as an agent. Stoddert v. Port Tobacco Parish, 2 Gill & J. (Md.) 227. And in Lathrop v. Commercial Bank, 8 Dana (Ky.) 117, 33 Am. Dec. 481, it is said that a corporation may exist wherever the law of its creation shall be recognized, and may act, there being no local law to the contrary, wherever an agent may go and could act in his own right.

Modern Doctrine as to Corporation Agents.—In San Antonio Gas Co. v. Harber, 1 Tex. App. Civ. Cas., § 1123, the court, by Quinan, J., said: "It was an ancient and technical rule that a corporation could act and speak only by its common seal; but that rule is long ago repudiated, and it is now well settled that acts of a corporation evidenced by vote, written or unwritten, are as complete authority to its agents as if done under the corporate seal, and that it may be as well bound by express promises made through its agents as by deed, and that promises may as well be implied from its acts and the acts of its agents as in case of individuals. (Maine Stage Co. v. Longley, 14 Me. 444; Merrick v. Burlington, etc., Plank Road Co., 11 Iowa 74; Blunt v. Walker, 11 Wis. 334; 78 Am. Dec. 709; 2 Kent 288; Story on Agency 61.) And an agent of a corporation acting within the scope of his authority may bind his principal in the same way as if he were the agent of a natural person. The general rule is that the declarations and admissions of an agent of a corporation stand upon the same footing as those of an individual. (Henderson v. San Antonio, etc., R. Co., 17 Tex. 560, 67 Am. Dec. 675.)"

1. **United States.**—Conn v. Penn, Pet. (C. C.) 523.

Alabama.—Governor v. Dailey, 14 Ala. 469; Powell v. State, 27 Ala. 51; Stanley v. Nelson, 28 Ala. 514; Lyon v. Kent, 45 Ala. 656; Lang v. Waters, 47 Ala. 624.

Louisiana.—Lea v. Bringier, 19 La. Ann. 197.

Massachusetts.—Brown v. Hartford F. Ins. Co., 117 Mass. 479; Com. v. Holmes, 119 Mass. 195.

Michigan.—Reeves v. Kelly, 30 Mich. 132. **New Hampshire.**—Pickering v. Pickering, 6 N. H. 120.

Pennsylvania.—Mackinley v. McGregor, 3 Whart. (Pa.) 369; Stall v. Meek, 70 Pa. St. 181.

South Carolina.—Chastain v. Bowman, 1 Hill (S. Car.) 270.

Tennessee.—Cantrell v. Colwell, 3 Head (Tenn.) 471.

Vermont.—Felker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532; Chase v. Snow, 52 Vt. 525.

Codes.—By the codes of several of the states it is enacted that any person may be an agent. *California Civil Code*, § 2296; *Dakota*, § 1338; *Montana*, § 3071. Under the *Georgia Code*, § 2181, any person may be appointed an agent who is of sound mind.

The Reason that persons not *sui juris* may be agents is that "the execution of a naked authority can be attended with no manner of prejudice to the persons under such incapacities or disabilities [as monks, infants, etc.], or to any other person who by law may claim any interest of such disabled persons after their death." Bacon's Abridgment, Authority, B.

2. See *supra*, this title, *Competency to be Principal—Alien Enemies*.

3. See also the titles *INFANTS*, and *CONTRACTS*.

For a full discussion of the question of infants' contracts for labor, see the title *MASTER AND SERVANT*.

As to the competency of infants to execute powers, see the title *POWERS*. See also *Thompson v. Lyon*, 20 Mo. 155; *Duvall v. Graves*, 7 Bush (Ky.) 461.

4. *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479; *Com. v. Holmes*, 119 Mass. 195; *Chase v. Snow*, 52 Vt. 525.

Under the *Georgia Code*, § 2181, the principal is bound by the acts of his infant agent.

5. For a discussion of the question of the

wise *non compos mentis* cannot do any act as an agent or attorney binding upon the principal, for they have not any legal discretion or understanding to bestow upon the affairs of others any more than upon their own.¹

(4) *Slaves*.—It was uniformly held, during the existence of slavery in the United States, that a master might constitute his slave his agent.²

(5) *Married Women*.—(a) *As Agent for Her Husband*.³—A *feme covert* may act as the agent or attorney of her own husband, and as such, with his consent, bind him by her contract or other act.⁴

termination of agent's authority by reason of insanity, see *infra*, this title, *Termination*. See also the title *INSANITY*.

1. Story on Agency (9th ed.), § 7.

2. *Slaves*.—Governor v. Daily, 14 Ala. 469; Powell v. State, 27 Ala. 51; Stanley v. Nelson, 28 Ala. 514; Lyon v. Kent, 45 Ala. 656; Chastain v. Bowman, 1 Hill (S. Car.) 270. Mechem on Agency, § 60; Wharton on Agency, § 14. In Chastain v. Bowman, 1 Hill (S. Car.) 270, the court said: "It is not questioned that a master may constitute his slave his agent, and I cannot conceive of any distinction between the circumstances which constitute a slave and a freeman an agent; they are both the creatures of the principal, and act upon his authority. There is no condition, however degraded, which deprives one of the right to act as a private agent; the master is liable even for the act of his dog, done in pursuance of his command."

3. For further discussion of this subject, see *infra*, this title, *Appointment*. See also the titles *HUSBAND AND WIFE*; *MARRIED WOMEN*; and *SEPARATE PROPERTY OF MARRIED WOMEN*.

4. *Agency of Wife for Husband—England*.—Anonymous, 1 Stra. 527; Plimmer v. Sells, 3 N. & M. 422, 28 E. C. L. 404; Clifford v. Burton, 1 Bing. 199, 5 E. C. L. 471; Prestwick v. Marshall, 7 Bing. 565, 20 E. C. L. 242; Lane v. Ironmonger, 13 M. & W. 368; Free-stone v. Butcher, 9 C. & P. 643, 38 E. C. L. 269.

Alabama.—Lang v. Waters, 47 Ala. 636.

Arkansas.—Dunnahoe v. Williams, 24 Ark. 264.

California.—Honey v. Sargent, 54 Cal. 396.

Connecticut.—Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Shelton v. Pendleton, 18 Conn. 417.

Indiana.—Mickelberry v. Harvey, 58 Ind. 523.

Massachusetts.—Camerlin v. Palmer Co., 10 Allen (Mass.) 539.

Mississippi.—McKee v. Kent, 24 Miss. 131.

Missouri.—Singleton v. Mann, 3 Mo. 464.

North Carolina.—Cox v. Hoffman, 4 Dev. & B. (N. Car.) 180; Hughes v. Stokes, 1 Hayw. (N. Car.) 372.

New Hampshire.—Pickering v. Pickering, 6 N. H. 120; Davis v. Lane, 10 N. H. 156.

New York.—Fenner v. Lewis, 10 Johns. (N. Y.) 38; Hopkins v. Mollinieux, 4 Wend. (N. Y.) 465; Minard v. Mead, 7 Wend. (N. Y.) 68; Church v. Landers, 10 Wend. (N. Y.) 79; Miller v. Delamater, 12 Wend. (N. Y.) 438; Riley v. Suydam, 4 Barb. (N. Y.) 222; Galusha v. Hitchcock, 29 Barb. (N. Y.) 194; Goodwin v. Kelly, 42 Barb. (N. Y.) 194; Edgerton v.

Thomas, 9 N. Y. 40; Dacy v. New York Chemical Mfg. Co., 2 Hall (N. Y.) 550.

Pennsylvania.—Abbott v. Mackinley, 2 Miles (Pa.) 220; Mackinley v. McGregor, 3 Whart. (Pa.) 369; Leeds v. Vail, 15 Pa. St. 185; Stall v. Meek, 70 Pa. St. 181.

South Carolina.—White v. Deland, 12 Rich. (S. Car.) 308.

Tennessee.—Cantrell v. Colwell, 3 Head (Tenn.) 471.

Vermont.—Curtis v. Ingham, 2 Vt. 287; Gray v. Otis, 11 Vt. 628; Felker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532; Sawyer v. Cutting, 23 Vt. 486.

Wisconsin.—Birdsall v. Dunn, 16 Wis. 235; Savage v. Davis, 18 Wis. 608; Weisbrod v. Chicago, etc., R. Co., 18 Wis. 44, 86 Am. Dec. 743; O'Conner v. Hartford F. Ins. Co., 31 Wis. 160. See also Butts v. Newton, 29 Wis. 632.

See also *Georgia* Code 1882, § 1759; *New Mexico* Comp. Laws 1884, § 1089; Bacon's Abridg., Authority, B; Emerson v. Blonden, 1 Esp. 142; Palethorp v. Furnish, 2 Esp. 511, note; Fowler v. Shearer, 7 Mass. 14; Burns v. Lynde, 6 Allen (Mass.) 305.

How Created.—The agency of the wife may be created either verbally or by writing. The addition of a seal to the instrument appointing her will not have the effect of destroying the agency. Goodwin v. Kelly, 42 Barb. (N. Y.) 194.

Illustrations.—Where a wife, by her husband's direction, makes a demand for a deed and an offer of payment, she is for that purpose his agent, and may testify in his behalf to such demand and offer. Meade v. Gilfoyle, 64 Wis. 18.

A wife is deemed agent of her husband in receiving money from the sale of her separate property, under a foreclosure of his mortgage thereof. Fahie v. Pressey, 2 Oregon 23, 80 Am. Dec. 401. See also Reakter v. Sanford, 5 W. & S. (Pa.) 104; Offley v. Clay, 2 M. & G. 172, 40 E. C. L. 317.

As to a wife's power coupled with an interest, see Cheney v. Pierce, 38 Vt. 515.

Wife as Husband's Agent—Limitations of Doctrine.—In Jenkins v. Flinn, 37 Ind. 352, the court said: "Where the wife engages in business, with the knowledge and consent of the husband, the business is regarded as that of the husband, the wife as his agent, and he as bound for the performance of contracts which she may make relating to such business;" citing Abbott v. Mackinley, 2 Miles (Pa.) 220; Glann v. Younglove, 27 Barb. (N. Y.) 480; Cropsey v. McKinney, 30 Barb. (N. Y.) 47; Mackinley v. McGregor, 3 Whart. (Pa.) 369; Godfrey v. Brooks, 5 Harr. (Del.) 390,

(b) **As Agent for Third Persons.**—A married woman is capable of being appointed and acting as the agent of a third person, without the consent of her husband. She may act as the agent of another even in a contract with her own husband.¹

(6) **Husband as Wife's Agent**²—Appointment.—The wife may constitute her husband as her agent within the sphere wherein she is competent to appoint an agent.³

Rotch v. Miles, 2 Conn. 638; *Switzer v. Valentine*, 4 Duer (N. Y.) 96. The court continued: "As a qualification of the rule last stated, it seems to be satisfactorily established by the cases, that where the wife incurs the indebtedness, and the credit is given to her exclusively, and where, therefore, there can be no presumption that she was acting as the agent of the husband merely, the husband is not liable;" citing *Bentley v. Griffin*, 5 Taunt. 356; *Carter v. Howard*, 39 Vt. 106; *Moses v. Fogartie*, 2 Hill (S. Car.) 335; *Swett v. Penrice*, 24 Miss. 416.

1. *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; *Weisbrod v. Chicago*, etc., R. Co., 18 Wis. 40, 86 Am. Dec. 743; *Birdsall v. Dunn*, 16 Wis. 235; *Comyns's Dig.*, Attorney, C. 4.

Contra.—Georgia Code (1882), § 2181: "A *feme covert* cannot be an agent for another than her husband except by his consent, in which case he is bound by her acts." See also *Tucker v. Cocke*, 32 Miss. 184.

A Feme Covert may Execute a Power without her Husband's Co-operation or consent, and her acts, as agent or trustee, impose no legal liability on him. His knowledge and consent do not confer, by operation of law, any authority on him to do any act in the scope of his wife's agency, so as to bind her principal; nor does the unity of the marriage relation operate to delegate to him an agency specially and personally conferred upon the wife. *Pullman v. State*, 78 Ala. 33.

2. For further discussion of this question see the titles HUSBAND AND WIFE; MARRIED WOMEN; and SEPARATE PROPERTY OF MARRIED WOMEN. See also *infra*, this title, *Appointment*.

3. **Agency of Husband for Wife**—Alabama. — *Louisville Coffin Co. v. Stokes*, 78 Ala. 372.

Georgia.—*Foster v. Jones*, 78 Ga. 150. See also *Miller v. Watt*, 70 Ga. 385.

Illinois.—*Brownell v. Dixon*, 37 Ill. 198; *Wortman v. Price*, 47 Ill. 22; *Bergen v. Keiser*, 17 Ill. App. 505; *Haight v. McVeagh*, 69 Ill. 624; *Walker v. Carrington*, 74 Ill. 446; *Patten v. Patten*, 75 Ill. 446; *Bennett v. Stout*, 98 Ill. 47; *Cubberly v. Scott*, 98 Ill. 38. See also *Wilson v. Loomis*, 55 Ill. 352.

Indiana.—*Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *Griffin v. Ransdell*, 71 Ind. 440; *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99.

Iowa.—*McLaren v. Hall*, 26 Iowa 297; *Rockford Second Nat. Bank v. Gaylord*, 66 Iowa 582; *Price v. Seydel*, 46 Iowa 606; *Miller v. Hollingsworth*, 36 Iowa 163. See also *Carn v. Royer*, 55 Iowa 650; *Corning v. Fowler*, 24 Iowa 584.

Kansas.—*Hardten v. State*, 32 Kan. 637.

Louisiana.—*Jones v. Read*, 1 La. Ann. 200.

Massachusetts.—*Jones v. Smith*, 121 Mass. 15; *McIntyre v. Knowlton*, 6 Allen (Mass.) 565; *Coolidge v. Smith*, 129 Mass. 554; *Arnold v. Spurr*, 130 Mass. 347.

Michigan.—*Rankin v. West*, 25 Mich. 195; *McBain v. Seligman*, 58 Mich. 294.

Minnesota.—*Hossfeldt v. Dill*, 28 Minn. 469; *Ladd v. Newell*, 34 Minn. 107.

But under the Minnesota statutes (1894), § 5534, the husband cannot, as the attorney or agent of his wife, make a valid lease of her real estate. *Sanford v. Johnson*, 24 Minn. 172.

Mississippi.—*Ross v. Baldwin*, 65 Miss. 570.

Missouri.—*Eystra v. Capelle*, 61 Mo. 578; *Rodgers v. Pike County Bank*, 69 Mo. 560.

Montana.—*Palmer v. Murray*, 8 Mont. 174.

Nebraska.—*Edgerly v. Gregory*, 17 Neb. 348.

New Hampshire.—*Hall v. Young*, 37 N. H. 134; *Albin v. Lord*, 39 N. H. 196; *Hutchins v. Colby*, 43 N. H. 159. See also *Coffin v. Morrill*, 22 N. H. 352.

New Jersey.—*Kutcher v. Williams*, 40 N. J. Eq. 436.

New York.—*Buckley v. Wells*, 33 N. Y. 518; *Martin v. Rector*, 101 N. Y. 77; *Zimmermann v. Erhard*, 58 How. Pr. (N. Y. C. Pl.) 13; *Gage v. Dauchy*, 34 N. Y. 293; *Knapp v. Smith*, 27 N. Y. 277; *Freiberg v. Branigan*, 18 Hun (N. Y.) 344; *Kluender v. Lynch*, 2 Abb. App. Dec. (N. Y.) 549; *Merchant v. Bunnell*, 3 Abb. App. Dec. (N. Y.) 280; *O'Leary v. Walter*, 10 Abb. Pr. N. S. (Brooklyn City Ct.) 445; *Bogert v. Gulick*, 45 How. Pr. (N. Y. Supreme Ct.) 385; *Abbey v. Deyo*, 44 N. Y. 343; *Bodine v. Killeen*, 53 N. Y. 93; *Owen v. Cawley*, 36 N. Y. 604; *Woodworth v. Sweet*, 51 N. Y. 11; *Alvord v. Haynes*, 13 Hun (N. Y.) 26; *Nash v. Mitchell*, 71 N. Y. 199, 27 Am. Rep. 38; *Noel v. Kinney*, 106 N. Y. 74, 60 Am. Rep. 423; *Voorhees v. Bonesteel*, 16 Wall. (U. S.) 16. See also *Hauptman v. Catlin*, 20 N. Y. 247; *Sherman v. Elder*, 24 N. Y. 381; *Rush v. Dilks*, 43 Hun (N. Y.) 282; *Jones v. Walker*, 63 N. Y. 612; *Draper v. Stouvenel*, 35 N. Y. 512; *Coakley v. Chamberlain*, 8 Abb. Pr. N. S. (N. Y. Super. Ct.) 42.

North Carolina.—*Harper v. Dail*, 92 N. Car. 394.

Ohio.—*Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806.

Oregon.—*King v. Voos*, 14 Oregon 91.

Pennsylvania.—*Johnston v. Johnston*, 31 Pa. St. 450; *Gibbs, etc., Mfg. Co. v. Goe*, 1 Penny. (Pa.) 238; *Baxter v. Maxwell*, 115 Pa. St. 469; *Shuster v. Kaiser*, 111 Pa. St. 215; *Seeds v. Kahler*, 76 Pa. St. 262; *Early v. Rolfe*, 95 Pa. St. 58; *Troxell v. Stockberger*, 15 W. N. C. (Pa.) 117; *Spering v. Laughlin*, 113 Pa. St. 209. See also *Grabill v. Moyer*, 45 Pa. St. 530; *Mann's Appeal*, 50 Pa. St. 375; *Teller v. Anathan*, 14 W. N. C. (Pa.) 191.

IV. APPOINTMENT—1. Necessity.—In order to create an agency there must be an appointment of the agent by the principal, and an acceptance of such appointment.¹ This follows from the fact that agency is one form of contract,² and must possess the essential elements of every contract.³ Like other contracts it may be implied as well as express; and the appointment is, in some cases, presumed by law.⁴ Subject to these exceptions, however, an agency cannot exist but by the will of the principal.⁵

2. Requisites—*a.* **WHEN MADE BY NATURAL PERSONS—Intention.**—An appointment presupposes an intelligent act on the part of the principal. There must be either an actual intention to appoint,⁶ or an apparent intention nat-

South Carolina.—Greig v. Smith, 29 S. Car. 436; McCord v. Blackwell, 31 S. Car. 125; Brown v. Thomson, 31 S. Car. 436, 17 Am. St. Rep. 40.

Virginia.—Penn v. Whiteheads, 12 Gratt. (Va.) 74.

West Virginia.—Miller v. Peck, 18 W. Va. 95.

Wisconsin.—Dayton v. Walsh, 47 Wis. 113, 32 Am. Rep. 757; Livesley v. Lasalette, 28 Wis. 38; Austin v. Austin, 45 Wis. 523; Lavassar v. Washburne, 50 Wis. 200.

In *Weisbrod v. Chicago, etc., R. Co.*, 18 Wis. 35, 86 Am. Dec. 743, the court said: "If it is no violation of the common-law principle of the unity of husband and wife for the wife to act as the agent or attorney of her husband, the conclusion would seem irresistibly to follow that it is no infringement of the same principle to allow the husband to act as the agent of the wife in cases where by law she is *sui juris*, and capable of acting for herself."

1. Must be Appointment by Principal and Acceptance by Agent.—*Markwick v. Hardingham*, 15 Ch. Div. 349, 43 L. T. 647; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197; *Anderson v. State*, 22 Ohio St. 305; *Farmers', etc., Bank v. Chester*, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318; *Marks v. Sullivan*, 8 Utah 406. In this last case the court, by Zane, C.J., said: "The employment of an agent is a transaction in the making of which the principal and agent each represents himself."

One cannot be liable as agent when he has never accepted the appointment as such. *Collar v. Ford*, 45 Iowa 331.

The appointment of an agent does not go into effect until it has been accepted by the appointee. *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *Beebe v. De Baun*, 8 Ark. 510.

Presumption of Acceptance.—But acceptance may ordinarily be presumed from the exercise of the power conferred. *Delano v. Smith Charities*, 138 Mass. 63. Compare *Blake v. Bayley*, 16 Gray (Mass.) 531.

In general the agent is presumed to have accepted unless he declines. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

2. Robinson's Elementary Law, § 179.

3. Agency must Have Essential Elements of Other Contracts.—*Central Trust Co. v. Bridges*, 6 C. C. A. 539, 57 Fed. Rep. 764. Here the court, by Taft, J., said: "An agency is created—authority is actually conferred—very much as a contract is made: i.e., by an

agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them."

4. Created by Law.—*Anderson v. Sanderson*, 2 Stark. 204, 3 E. C. L. 377; *Beigh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Olcott v. Gabert*, 86 Tex. 121.

5. General Rule—Will of Principal Necessary.—*Evans on Principal and Agent* (2d ed.), s.p. 20; *Pole v. Leask*, 33 L. J. Ch. 155, 9 Jur. N. S. 829, 8 L. T. 605; *Rust v. Eaton*, 24 Fed. Rep. 830; *Rochester First Nat. Bank v. Bentley*, 27 Minn. 87; *Graves v. Horton*, 38 Minn. 66; *Dugan v. Lyman* (N. J. Eq., 1892), 23 Atl. Rep. 657; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315; *McGoldrick v. Willits*, 52 N. Y. 612.

Where there is No Evidence of Express Appointment, ratification, or facts constituting an estoppel, there is no proof sufficient to establish agency. *Alexander v. Rollins*, 84 Mo. 657, 14 Mo. App. 109.

The Authority is Complete where Permission to do a thing is given; there need be no direction or request on the part of the principal. *Fay v. Richmond*, 43 Vt. 25.

The Principal cannot be Bound by a False Agent's Conduct Alone, even though the third party believes from such conduct that he has authority; on which belief he acted. *Leu v. Mayer*, 52 Kan. 419.

Possession of Stock.—One is not made the agent of the purchaser simply by having been placed in possession of stock sold, until such time as the agent of the purchaser should arrive. *Lowenstein v. Goodbar*, 69 Miss. 808.

In Order to Transfer the Property of Another a person must have been clothed with authority to act as agent or owner, which authority may be real or apparent. *McGoldrick v. Willits*, 52 N. Y. 612.

One in Possession of Mortgaged Property, with Power to Collect Rents, etc.—A person is not constituted the agent of a junior mortgagee from the fact that the latter consented to the placing of such person in possession of the mortgaged property, with authority to collect rents and pay expenses and interest on the first mortgage loan. *Kansas, etc., Coal Co. v. Millett*, 50 Mo. App. 382.

6. Actual Intention.—*Felton v. McClave*, 46 N. Y. Super. Ct. 53.

usually inferable from the words or actions of the alleged principal;¹ otherwise there is, in general, no agency.²

Correspondence as to Sale of Real Estate.—Thus, correspondence between a property owner and a real-estate agent, mentioning prices and terms, but evincing no intention on the part of the former to make the latter his agent, would not constitute an appointment.³

Advancing Money to Carry on Business.—Similarly, advancing money to another to enable him to carry on business does not make such person an agent.⁴

An Agreement to Become a Surety on a Bond does not make the principal an agent to negotiate the loan.⁵

Promise to Accept Indorsement.—Nor does the promise to accept the indorsement of a third party make the debtor an agent to secure such indorsement.⁶

A Mere Contractor is not the agent of the one with whom he contracts.⁷

One Employed to Receive and Report Bids.—Nor is one employed to receive and report bids an agent to deal with the property.⁸

An Agreement by a Purchaser Made with a Vendor that a third party shall have a mortgage lien does not make the vendor the purchaser's agent to execute the mortgage.⁹

The Agent need Not be Appointed Directly, however, but the relation may arise out of an agreement to employ the agent of another, such person then becoming the agent of the first party;¹⁰ but, in order to have the effect of appointment, a contract between other persons must be clearly made with that intention.¹¹

Agent Appointing Agent.—Where a known agent appoints one as agent of the common principal, the relation is with such principal, not with the appointing agent.¹²

1. **Intention Implied from Conduct of Principal.**—*Central Trust Co. v. Bridges*, 6 C. C. A. 539, 57 Fed. Rep. 764, where the court, by Taft, J., said: "One may be liable for the acts of * * * his agent on one of two grounds: first, because by his conduct * * * he has held the other out as his agent; or, second, because he has actually conferred authority on the other to act as such."

The private intentions or understanding of the parties will not affect the relation of agency, if the conditions which constitute agency exist. *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768.

2. *Security Co. v. Graybeal*, 85 Iowa 543; *Matteson v. Gillett*, 86 Hun (N. Y.) 386.

A statement by one of several landowners to the others that he would give the right of way across his land to a railroad was held not sufficient to constitute such other persons his agents to make a tender of such right of way to the railroad. *Chicago, etc., R. Co. v. Estes*, 71 Iowa 603.

3. *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395. In this case the expression "I will sell," or its equivalent, accompanied by a specification of terms, by the owner of land was held not to confer authority on another as agent to make a contract of sale.

So the **Sending of a Price-list of Lands** by the owner, in response to an inquiry, does not establish an agency in the inquirer. *Stewart v. Pickering*, 73 Iowa 652.

4. *Perkins v. Huntington* (Supreme Ct.), 15 N. Y. Supp. 71.

5. *Hayes v. Burkam*, 94 Ind. 311.

6. *Hunter v. Fitzmaurice*, 102 Ind. 449; *Harris v. Bradley*, 7 Yerg. (Tenn.) 310.

7. *Hughes v. Cincinnati, etc., R. Co.*, 39 Ohio St. 461.

8. *Chadburn v. Moore*, 67 L. T. 257; *Dempster v. West*, 69 Ill. 613.

One who Merely Solicits Orders for Sales, for a commission to be allowed upon sales to be effected through such solicitation, is not thereby constituted an agent with authority to make an absolute sale. *Clough v. Whitcomb*, 105 Mass. 482.

9. *Hyde v. Boston, etc., Co.*, 21 Pick. (Mass.) 90.

10. Thus the agents of a bank that had stipulated with a shipper of cotton that shipments should be made only to such agents, are made, by such stipulation, *pro re nata*, the agents of the shipper. *Ball v. State Bank*, 8 Ala. 590.

11. Thus A is not the agent of B by virtue of a verbal agreement whereby A was to purchase property at a sale of which B was to take possession for the purpose of making a resale and to retain the surplus, if any, after the return of the purchase price to A. *Haynes v. Crutchfield*, 7 Ala. 189. See also *Cravens v. Cravens*, 1 Morr. (Iowa) 285.

12. *Hobson v. Jones*, L.R. 9 Eq. 456; *Jones v. U. S.*, 1 Ct. of Cl. 383; *Murphy v. Emigration Com'rs*, 28 N. Y. 134; *Olifiers v. Belmont*, 12 Misc. Rep. (N. Y. C. Pl.) 160, 275; *Bingaman v. Hickman*, 115 Pa. St. 420.

But the Appointing Agent must Have Authority.—Thus the officer of a lessee railroad company has no authority to bind the lessor company by an agreement with one employed as a claim agent of such company as to his expenses to a designated amount, in the absence of special authority. *Galveston, etc.,*

If the Requisites of an Appointment are Found, it is immaterial what terms were used or by what name the transaction was called.¹

Intention to Create Agency.—The agency is to be established or disproved by the facts taken as a whole, and elements apparently characterizing the transaction as of a different nature must often be disregarded where the general intention to create an agency appears.² The converse of this is true; and, if such general intention does not appear, the relation will not be created although there exist some elements of agency.³

Duration.—There is no implied agreement, from the mere fact of employment, that the business in which the agent is employed shall be carried on for any particular period;⁴ but such an agreement may be expressly made or implied from the terms used.⁵

Compensation.—It is not necessary that the agent be paid by salary or commission; the law does not look at the compensation.⁶

b. WHEN MADE BY CORPORATIONS—General Rule as to Power to Appoint.—A corporation, as well as a natural person, may have an agent.⁷

R. Co. v. Scheidemantel (Tex. Civ. App., 1893), 24 S. W. Rep. 328.

A lighterman who was employed by a vendor to carry away corn from a storehouse for the purchaser, though such conduct was not usual, but who was afterwards paid by the purchaser, was held to be the agent of the purchaser for the transportation of the grain, possession having passed to the purchaser according to custom while the grain was yet in store. *McCready v. Wright*, 5 Duer (N. Y.) 571.

1. *Willcox, etc., Sewing Mach. Co. v. Ewing*, 141 U. S. 627; *Banks v. Flint*, 54 Ark. 40; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *Van Sandt v. Dows*, 63 Iowa 594, 50 Am. Rep. 759; *Hart v. Niagara F. Ins. Co.*, 27 L. R. A. 86. In this last case it was held that although a policy issued by an insurance company provides that no person shall be deemed its agent "unless authorized in writing," it cannot deny that one sent out to solicit business is its agent.

One who is told to get certain articles and take them to another, which he agrees to do is, in respect to that matter, an agent. *Cooksie v. State*, 26 Tex. App. 72.

2. **How Established or Disproved.**—*Davis v. Patrick*, 122 U. S. 138; *American Mortg. Co. v. King* (Ala., 1895), 16 So. Rep. 889; *Miller v. Louisville, etc., R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722; *Gist v. Harkrider* (Ark., 1891), 15 S. W. Rep. 187; *Van Sandt v. Dows*, 63 Iowa 594, 50 Am. Rep. 759. See *Bayliss v. Davis*, 47 Iowa 340.

B purchased A's outstanding draft in pursuance of an agreement by A to pay him liberally for his time and expenses while engaged in assisting him out of a financial difficulty, and took A's note as payment. It was held that B was the agent of A in purchasing the draft, and the discount at which it was secured must enure to the benefit of A. *Noyes v. Landon*, 59 Vt. 569. See also *supra*, this title *Definitions—Contract of Agency*, where illustrations of contracts held to constitute the relation of agency are collected in the notes.

3. **Presence of Some Elements of Agency—Intention.**—*Ex p. White*, L. R. 6 Ch. 397, 24

L. T. 45; *Evans v. Cincinnati, etc., R. Co.*, 78 Ala. 341; *Ex p. Robinson*, 86 Ala. 622; *Merck v. American Freehold Land Mortg. R. Co.*, 79 Ga. 213; *Storm Lake Bank v. Missouri Valley L. Ins. Co.*, 66 Iowa 617; *Willis v. Toledo, etc., R. Co.*, 72 Mich. 160; *Fortescue v. Makeley*, 92 N. Car. 56.

Instances.—Where A leased a hotel from the owners, paying them twenty per cent. of the gross results of the whole business after deducting two hundred dollars a month for his services, it was held that third parties were not justified in dealing with A as agent of the owners for the purpose of purchasing supplies for the hotel. But it would be otherwise if the company in its relations with such person treated him as its agent for the procurement of supplies, notwithstanding the character of the contract. *Freiberg v. Beach Hotel, etc., Imp. Co.*, 63 Tex. 449. See also *Beecher v. Venn*, 35 Mich. 466.

The relation is that of purchaser and vendor, and not principal and agent, where a person has goods consigned to him to sell, and he is bound if he sells to pay a fixed price to his employer within a limited time after the sale, but under an agreement that he may sell to his customers upon any price and for any time he pleases. *Ex p. White*, L. R. 6 Ch. 397, 24 L. T. 45.

4. *Rhodes v. Forwood*, L. R. 1 App. Cas. 256; *Brooke v. Barnes*, 1 Mackey (D. C.) 5; *Reed v. Baggott*, 5 Ill. App. 257.

5. *Turner v. Goldsmith*, 64 L. T. 301 (Q. B., 1891); *Gundlach v. Fischer*, 59 Ill. 172.

6. Where one bid off property at a sheriff's sale, in pursuance of an agreement previously made with another by which the latter was to receive a portion of the property at a certain price, the relation is that of principal and agent, and not vendor and vendee. *Wright v. Calhoun*, 19 Tex. 412.

7. **Authority of Corporation to Appoint Agents.**—*McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 275.

Under a general allegation in pleading, where a corporation is said to have done an act, it may be shown that proper authority had been given by it to an officer or agent to perform an act similar to the one which has

Seal—Early Doctrine.—It was formerly held that in appointing such agent the corporation must act under its corporate seal.¹

Modern Doctrine.—This is no longer the rule; and corporations, so far as the necessity of a seal is concerned, are subject to the same rules as private individuals.²

Vote of Directors.—Appointments are regularly made by vote of the corporation directors,³ but such vote is not essential; the corporation will be bound by the acts of its officers in making appointments, either express or implied, so long as such appointments fall within the scope of their duties.⁴

been done. *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Nelson v. Eaton*, 26 N. Y. 410.

Charter.—The authority to appoint an agent by a corporation to perform services in accordance with the general objects and purposes of the incorporation need not be specifically mentioned in the charter. *Kitchen v. Cape Girardeau, etc.*, R. Co., 59 Mo. 514.

1. Corporate Seal—Ancient Rule.—Potter on Corporations, § 141; Wharton on Agency and Agents, § 58; Story on Agency (7th ed.), § 52; Com. Dig., tit. Franchises, F. 12, 13; *East London Water Works Co. v. Bailey*, 4 Bing. 286, 13 E. C. L. 435; *Rex v. Bigg*, 3 P. Wms. 419.

2. Corporate Seal—Modern Rule—England.—*Yarborough v. Bank of England*, 16 East 6. *United States.*—*Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 338; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738; *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Clark v. Washington*, 12 Wheat. (U. S.) 40; *Bank of the Metropolis v. Gutschlick*, 14 Pet. (U. S.) 19; *Columbia Bank v. Patterson*, 7 Cranch (U. S.) 299.

Colorado.—*Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248.

Connecticut.—*Swazey v. Union Mfg. Co.*, 42 Conn. 556.

Illinois.—*Rockford, etc., R. Co. v. Wilcox*, 66 Ill. 417; *Gowen Marble Co. v. Tarrant*, 73 Ill. 608; *Darst v. Gale*, 83 Ill. 136.

Indiana.—*Ross v. Madison*, 1 Ind. 282.

Iowa.—*Merrick v. Burlington, etc., Plank Road Co.*, 11 Iowa 75.

Kansas.—*Atchison, etc., R. Co. v. Reecher*, 24 Kan. 228.

Kentucky.—*Waller v. State Bank*, 3 J. J. Marsh. (Ky.) 201; *Lee v. Flemingsburg*, 7 Dana (Ky.) 28; *Muir v. Louisville, etc., Canal Co.*, 8 Dana (Ky.) 161.

Maine.—*Maine Stage Co. v. Longley*, 14 Me. 444; *Lime Rock Bank v. Macomber*, 29 Me. 564; *Stanwood v. Laughlin*, 73 Me. 112.

Maryland.—*Union Bank v. Ridgely*, 1 Har. & G. (Md.) 413; *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392.

Massachusetts.—*Burrill v. Nahant Bank*, 2 Met. (Mass.) 163, 35 Am. Dec. 395; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367; *Essex Turnpike Corp. v. Collins*, 8 Mass. 292; *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298.

Michigan.—*Detroit v. Jackson*, 1 Dougl. (Mich.) 106; *Jhons v. People*, 25 Mich. 499; *Taymouth v. Koehler*, 35 Mich. 26.

Mississippi.—*Petrie v. Wright*, 6 Smed. & M. (Miss.) 647.

Missouri.—*Kiley v. Forsee*, 57 Mo. 390; *Southgate v. Atlantic, etc., R. Co.*, 61 Mo. 89.

Nevada.—*Steel v. Solid Silver, Gold, etc., Min. Co.*, 13 Nev. 486.

New Hampshire.—*Flint v. Clinton Co.*, 12 N. H. 430; *Goodwin v. Union Screw Co.*, 34 N. H. 378.

New York.—*Pusey v. New Jersey West Line R. Co.*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 434; *Middletown v. Rondout, etc., R. Co.*, 43 How. Pr. (N. Y. Supreme Ct.) 489; *Danforth v. Schoharie, etc., Turnpike Road*, 12 Johns. (N. Y.) 227; *Peterson v. New York*, 17 N. Y. 449.

North Carolina.—*Buncombe Turnpike Co. v. M'Carson*, 1 Dev. & B. (N. Car.) 306.

Pennsylvania.—*Kelsey v. Crawford County Nat. Bank*, 69 Pa. St. 426; *Adams Express Co. v. Schlessinger*, 75 Pa. St. 246.

South Carolina.—*Garvey v. Colcock*, 1 Nott & M. (S. Car.) 231.

Tennessee.—*Smiley v. Chattanooga*, 6 Heisk. (Tenn.) 604.

Ratification.—In *Reynolds v. Collins*, 78 Ala. 94, it was held that one may be proved to be the agent of the corporation the same as in the case of a natural person. A ratification of his acts will be sufficient.

Parol.—Where it appears that the appointment of an agent of a corporation has not been in writing, and the act of incorporation does not require that such appointment should be in writing, it may be proved by parol evidence. *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146, 33 Am. Dec. 460.

No Formalities are Required in the appointment of agents by a corporation, but they may be appointed in the same manner as by an individual; and the use of the corporate seal is not necessary unless it be so expressly provided by the company's charter. *Santa Clara Min. Assoc. v. Meredith*, 49 Md. 389, 33 Am. Rep. 264; *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *White v. State*, 69 Ind. 273. **3. Green's Brice's Ultra Vires** (2d Am. ed.) 451.

4. Acts of Corporate Officers.—*Beach on Corporations*, § 181; *Angell & Ames on Corporations*, pp. 162, 209; *Story on Agency* (7th ed.), §§ 52, 53; 2 *Kent Com.* (12th ed.), pp. 288, 292.

England.—*Yarborough v. Bank of England*, 16 East 6.

United States.—*U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Bank of the Metropolis v. Gutschlick*, 14 Pet. (U. S.) 19.

Alabama.—*Bates v. State Bank*, 2 Ala. 451; *Reynolds v. Collins*, 78 Ala. 94.

Connecticut.—*Bulkley v. Derby Fertilizer Co.*, 2 Conn. 252, 7 Am. Dec. 271; *State v. Kin*, 58 Conn. 98.

Illinois.—*Singer Mfg. Co. v. Holt*, 86 Ill. 455, 29 Am. Rep. 43.

Implied Appointment.—The doctrine of implied appointments applies to corporations in the same way that it does to individuals.¹

Authority to Execute Sealed Instruments.—Authority to execute an instrument under seal may be conferred without affixing the corporate seal.² A vote of the directors is sufficient.³ This applies to both private and public corporations.⁴ Such a vote may be proved by evidence other than the corporation records.⁵

3. Modes—*a.* IN GENERAL.—Appointments are either express or implied. If the former, they may be under seal, in writing not under seal, or oral.⁶

b. EXPRESS—(1) *Under Seal*—General Rules.—It is an almost invariable rule of the common law, that authority to execute an instrument under seal must be conferred by an instrument under seal,⁷ and that even a written authority

Maine.—*Maine Stage Co. v. Longley*, 14 Me. 444.

Massachusetts.—*Hayden v. Middlesex Turnpike Corp.*, 10 Mass. 397, 6 Am. Dec. 143.

New Jersey.—*Baptist Church v. Mulford*, 8 N. L. J. 182.

New York.—*Danforth v. Schoharie*, etc., Turnpike Road, 12 Johns. (N. Y.) 227; *Kortright v. Commercial Bank*, 20 Wend. (N. Y.) 91; *Troy Turnpike*, etc., Co. v. M'Chesney, 21 Wend. (N. Y.) 296; *Smith v. New York Stock*, etc., Clearing House Co. (Supreme Ct.), 53 N. Y. St. Rep. 649.

1. **Appointment by Implication.**—*Abbott's Trial Evidence*, pp. 41, 42; *Everett v. U. S.*, 6 Port. (Ala.) 166; *Alabama*, etc., *Rivers R. Co. v. Kidd*, 29 Ala. 221; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495.

The Appointment as well as the Authority may be implied from the adoption of the agent's acts by the corporation or by its directors. *Equitable Gaslight Co. v. Baltimore Coal Tar*, etc., Co., 65 Md. 73.

Where One Openly and Notoriously Acts as Agent of a corporation, he will be presumed to have been appointed as such. *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43.

Officers Making Promissory Notes.—The authority of the officers of a corporation to issue its promissory note can be inferred from its acquiescence in, or recognition of, the acts of the accredited officers in the regular course of its authorized business, and need not be expressly provided for in the by-laws, or conferred by formal resolution of the board of directors. *Hannibal First Nat. Bank v. North Missouri Coal*, etc., Co., 86 Mo. 125.

ratification of Acts of Supposed Agent.—It is sufficient to establish the agency, and the appointment will be implied, if the corporation has confirmed the acts of the supposed agent, or accepted his services without objection; and in such case it is liable for the amount of his services, and cannot, by denying the validity of the appointment, evade payment. *Alabama G. S. R. Co. v. Hill*, 76 Ala. 303; *Reynolds v. Collins*, 78 Ala. 94.

2. **Conferring Authority to Execute Sealed Instruments**—*United States.*—*Columbia Bank v. Patterson*, 7 Cranch (U. S.) 305.

Connecticut.—*New Haven Sav. Bank v. Davis*, 8 Conn. 204; *Union Mfg. Co. v. Pitkin*, 14 Conn. 187; *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 603.

Maine.—*Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22.

Massachusetts.—*Burrill v. Nahant Bank*, 2 Met. (Mass.) 163, 35 Am. Dec. 395.

New Hampshire.—*Atkinson v. Bemis*, 11 N. H. 44; *Tenney v. East Warren Lumber Co.*, 43 N. H. 355.

New York.—*Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

3. **Vote of Directors.**—*New Haven Sav. Bank v. Davis*, 8 Conn. 204; *Union Mfg. Co. v. Pitkin*, 14 Conn. 187; *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 603.

4. **Public Corporations**—The Authority of Public Agents is created by law. *Mechem on Public Officers*, § 828.

Municipal Corporations may appoint an agent by resolution. 1 *Beach on Public Corporations*, § 163.

Where the inhabitants of a town, at a town meeting legally convened, appointed one an "agent to settle with the railroad company and sell the balance of the town landing if he thinks it will be for the interest of the town to do so, and to settle all other matters with the railroad company," it was held that the agent was authorized to execute a deed. *Nobleboro v. Clark*, 68 Me. 87, 28 Am. Rep. 22. As to private corporations see the authorities in the preceding note.

5. 1 *Beach on Private Corporations*, § 182; *Troy Turnpike*, etc., Co. v. M'Chesney, 21 Wend. (N. Y.) 296; *Smiley v. Chattanooga*, 6 Heisk. (Tenn.) 604.

The agency of one who acts for a corporation may be proved by parol. *Maine Stage Co. v. Longley*, 14 Me. 444.

6. *Mechem on Agency*, § 81; *Allis v. Goldsmith*, 22 Minn. 123; *Taylor v. Conner*, 41 Miss. 722, 97 Am. Dec. 419; *Patridge v. Commercial F. Ins. Co.*, 17 Hun (N. Y.) 95.

7. **Common-law Rule.**—2 *Kent's Commentaries* (12th ed.), p. 614; *Story on Agency* (7th ed.), § 49; *Paley on Agency* (Lloyd, 3d ed.), pp. 157, 158; *Evans on Principal and Agent* (2d ed.), *21.

England.—*Steiglitz v. Egginton*, 1 Holt 141, 3 E. C. L. 63; *Berkeley v. Hardy*, 5 B. & C. 355, 11 E. C. L. 251, 2 Eng. Rul. Cas. 273; *Elliot v. Davis*, 2 B. & P. 338.

Alabama.—*Elliott v. Stocks*, 67 Ala. 336.

Georgia.—*Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Rowe v. Ware*, 30 Ga. 278.

will be insufficient.¹ The instrument claimed to have been executed cannot go to the jury until this authority is proved.² This rule applies to deeds of land, bonds, and all other instruments requiring seals.³

Exception—Executed in Presence and at Request of Principal.—If, however, the execution is in the presence of the principal and at his request, the actual signing and sealing may be done by another having merely a parol authority, the execution being regarded as the immediate act of the principal.⁴

Seal Regarded as Surplusage.—If the contract, to which one having parol authority only affixes a seal, would be good as a simple contract, its validity will not be affected by the presence of the seal, which will be regarded as surplusage.⁵

Illinois.—Maus v. Worthing, 4 Ill. 26; Watson v. Sherman, 84 Ill. 263.

Indiana.—Rhode v. Louthain, 8 Blackf. (Ind.) 413.

Kentucky.—M'Murtry v. Frank, 4 T. B. Mon. (Ky.) 39; Cummins v. Cassily, 5 B. Mon. (Ky.) 75; Jackson v. Murray, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53; Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 264.

Maine.—Spofford v. Hobbs, 29 Me. 148, 48 Am. Dec. 521; Wheeler v. Nevins, 34 Me. 54; Baker v. Freeman, 35 Me. 485.

Massachusetts.—Banorjee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

Minnesota.—Dickerman v. Ashton, 21 Minn. 538.

Mississippi.—Adams v. Power, 52 Miss. 828.

Missouri.—Shuetze v. Bailey, 40 Mo. 69.

New Hampshire.—Gage v. Gage, 30 N. H. 420; Haydock v. Duncan, 40 N. H. 46.

New Jersey.—Smith v. Perry, 29 N. J. L. 74; Long v. Hartwell, 34 N. J. L. 116; Waggoner v. Watts, 44 N. J. L. 127.

New York.—Lawrence v. Taylor, 5 Hill (N. Y.) 107; Van Ostrand v. Reed, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Hanford v. McNair, 9 Wend. (N. Y.) 54; Blood v. Goodrich, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; Wells v. Evans, 20 Wend. (N. Y.) 251; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330.

North Carolina.—Delius v. Cawthorn, 2 Dev. (N. Car.) 90; Graham v. Holt, 3 Ired. (N. Car.) 300, 40 Am. Dec. 408; Kime v. Brooks, 9 Ired. (N. Car.) 218; Harshaw v. McKesson, 65 N. Car. 688; Humphreys v. Finch, 97 N. Car. 303.

Ohio.—McNaughten v. Partridge, 11 Ohio 223, 38 Am. Dec. 731.

Pennsylvania.—Vanhorne v. Frick, 6 S. & R. (Pa.) 90; Gordon v. Bulkeley, 14 S. & R. (Pa.) 331; Cooper v. Rankin, 5 Binn. (Pa.) 613.

Tennessee.—Mosby v. Arkansas, 4 Sneed (Tenn.) 327; Cain v. Heard, 1 Coldw. (Tenn.) 163; Boyd v. Dodson, 5 Humph. (Tenn.) 37; Smith v. Dickinson, 6 Humph. (Tenn.) 262, 44 Am. Dec. 306.

Virginia.—Preston v. Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153.

Wisconsin.—Dodge v. Hopkins, 14 Wis. 630.

But a Sheriff Need Not be Authorized under Seal to make any conveyance required in the performance of his duty. *People v. Boring*, 8 Cal. 407.

1. *Berkeley v. Hardy*, 5 B. & C. 355, 11 E. C. L. 251, 2 Eng. Rul. Cas. 273.

2. *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237.

3. **A General Authority by Parol from an Assignee in Bankruptcy** to his co-assignees does not authorize them to execute a release by deed in his name. *Williams v. Walsby*, 4 Esp. 220.

In *Alabama*, authority to convey land may be conferred by a writing not under seal. *Alabama G. S. R. Co. v. South*, etc., *Alabama R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401.

4. **Executed in the Presence and at Request of Principal.**—Story on Agency (7th ed.), § 51; Tiedeman on Real Property (2d ed.), § 805; *Hibblewhite v. M'Morine*, 6 M. & W. 214; *Ball v. Dunsterville*, 4 T. R. 314; *Lovelace's Case*, W. Jones 268; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *McMurtry v. Brown*, 6 Neb. 368; *Lord v. Lord*, 58 N. H. 10, 42 Am. Rep. 565.

In *Meyer v. King*, 29 La. Ann. 570, the court, by De Blanc, J., said: "Authority was delegated for only one object, was not to be exercised out of the interested parties' presence, lasted the space of time required to write a name, and expired when the last letter of the principal's name fell from the agent's pen. In such a case the act itself is the act of the principal, not of the agent."

Filling Blanks.—So if blanks be filled in the presence of the principal the act is valid. *Hudson v. Revett*, 5 Bing. 368, 15 E. C. L. 467.

Recognizance.—Where one's name was signed by another to a recognizance of bail for a stay of execution, in the presence of the former, but without authority under seal, it was binding. *Croy v. Busenbark*, 72 Ind. 48.

5. *Alabama.*—*Morrow v. Higgins*, 29 Ala. 448.

California.—*Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Love v. Sierra Nevada Lake Water*, etc., Co., 32 Cal. 639, 91 Am. Dec. 602.

Georgia.—*Drumright v. Philpot*, 6 Ga. 424, 60 Am. Dec. 738.

Illinois.—*Ingraham v. Edwards*, 64 Ill. 526.

Massachusetts.—*Tapley v. Butterfield*, 1 Met. (Mass.) 515, 35 Am. Dec. 374.

Minnesota.—*Dickerman v. Ashton*, 21 Minn. 538; *Thomas v. Joslin*, 30 Minn. 388.

Mississippi.—*Adams v. Power*, 52 Miss. 828.

Missouri.—*Riley v. Minor*, 29 Mo. 439.

New Hampshire.—*Despatch Line of Packets*

Insertions in Deeds.—Deeds are frequently delivered into the hands of others to be filled in. The question whether such insertions may be made by an agent not holding authority under seal, has given rise to much discussion. The earlier view, and the one still held to by many courts, is that they cannot.¹ Many authorities take the opposite view, however, and regard the principal as bound on the ground of estoppel.²

v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey.—*Long v. Hartwell*, 34 N. J. L. 116; *Wagoner v. Watts*, 44 N. J. L. 126.

New York.—*Lawrence v. Taylor*, 5 Hill (N. Y.) 113; *Everit v. Strong*, 5 Hill (N. Y.) 163; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Wood v. Auburn*, etc., R. Co., 8 N. Y. 160.

Pennsylvania.—*Baum v. Dubois*, 43 Pa. St. 265.

One who, on behalf of the defendant, entered into a contract in his own name for the purchase of a tract of land from the plaintiff, making part payment thereon with money furnished by the defendant, which contract he assigned to the defendant, in whom the title finally vested on account of the contract, was the agent of the defendant, who is liable to the plaintiff for the balance of the purchase price with interest and damages. *Moore v. Granby Min., etc., Co.*, 80 Mo. 86.

Where a Seal is Not Necessary to the Validity of a Lease, it is not necessary that an agent's authority to execute the same should be under seal. *Lehman v. Nolting*, 56 Mo. App. 549.

1. Insertions in Deeds by Agents without Authority under Seal—Authorities Conflicting—England.—*Swan v. North British Australasian Co.*, 2 H. & C. 175; *Taylor v. Great Indian Peninsula R. Co.*, 4 De G. & J. 559; *Hibblewhite v. M'Morine*, 6 M. & W. 200.

United States.—*Drury v. Foster*, 2 Wall. (U. S.) 24.

Arkansas.—*Cross v. State Bank*, 5 Ark. 525; *Adamson v. Hartman*, 40 Ark. 58.

California.—*Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Wunderlin v. Cadogan*, 50 Cal. 613.

Georgia.—*Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549.

Maryland.—*Byers v. McClanahan*, 6 Gill & J. (Md.) 250.

Mississippi.—*Williams v. Crutcher*, 5 How. (Miss.) 71, 35 Am. Dec. 422.

North Carolina.—*M'Kee v. Hicks*, 2 Dev. (N. Car.) 379; *Davenport v. Sleight*, 2 Dev. & B. (N. Car.) 381, 31 Am. Dec. 420. Compare *Humphrey v. Finch*, 97 N. Car. 303, 2 Am. St. Rep. 293.

Ohio.—*Ayres v. Harness*, 1 Ohio 368, 13 Am. Dec. 629.

South Carolina.—*Lamar v. Simpson*, 1 Rich. Eq. (S. Car.) 71, 42 Am. Dec. 345; *Permynter v. M'Daniel*, 1 Hill (S. Car.) 267, 26 Am. Dec. 179.

Tennessee.—*Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439.

Virginia.—*Harrison v. Tiernans*, 4 Rand. (Va.) 177; *Preston v. Hull*, 23 Gratt. (Va.) 600, 14 Am. Rep. 153.

2. Alabama.—*Boardman v. Gore*, 1 Stew. (Ala.) 517, 18 Am. Dec. 73; *Gibbs v. Frost*, 4 Ala. 720.

Georgia.—*Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867; *Willis v. Rivers*, 80 Ga. 557.

Indiana.—*Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334.

Iowa.—*Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470.

Maine.—*South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535.

Massachusetts.—*Smith v. Crooker*, 5 Mass. 538; *White v. Duggan*, 140 Mass. 18; *Phelps v. Sullivan*, 140 Mass. 36, 54 Am. Rep. 442.

Minnesota.—*State v. Young*, 23 Minn. 551.

Missouri.—*Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435.

New York.—*Woolley v. Constant*, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246; *Matter of Kerwin*, 8 Cow. (N. Y.) 118.

Oregon.—*Cribben v. Deal*, 21 Oregon 211, 28 Am. St. Rep. 746.

Pennsylvania.—*Stahl v. Berger*, 10 S. & R. (Pa.) 170, 13 Am. Dec. 666; *Wiley v. Moor*, 17 S. & R. (Pa.) 438, 17 Am. Dec. 696; *Ogle v. Graham*, 2 P. & W. (Pa.) 132.

Texas.—*Ragsdale v. Robinson*, 48 Tex. 379.

Wisconsin.—*Vliet v. Camp*, 13 Wis. 198; *Nelson v. McDonald*, 80 Wis. 605, 27 Am. St. Rep. 71.

Authority Implied from Circumstances is Sufficient.—*Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486.

In *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267, it is held that where a blank paper is signed by one party and delivered to another, the holder is made the agent as upon a general letter of credit, to fill up the paper as he thinks proper.

But see *Davidson v. Lanier*, 4 Wall. (U. S.) 447, which held that such holder is not thereby given power to fill up such paper at pleasure.

A Court of Equity can Reform the Deed and do away with any doubts where blanks are filled in by one having verbal authority only. *Burnside v. Wayman*, 49 Mo. 356.

A Surety is Bound by anything that may be inserted in a bond which he has intrusted to his principal to be filled up and delivered to the obligee, although such insertion be contrary to his orders, if the obligee has no notice of the breach of instructions. *White v. Duggan*, 140 Mass. 18.

The Power to Fill Blanks is Exhausted when the blanks have been filled; thereafter the agent has no authority to make changes. *Matter of Decker*, 6 Cow. (N. Y.) 60.

An Assignment of a Mortgage acknowledged and executed in blank, and delivered to the mortgagee's son to find a purchaser, fill in the assignee's name, and deliver the instrument, which he did, the assignee having no knowledge of the son's agency in the transaction, was held to be a valid assignment.

When Conveyances by Agents with Parol Authority Binding as Contracts of Sale.—In cases where a seal is required conveyances made by agents having parol authority are often binding on the principal as contracts of sale, by creating equities in favor of the grantees, which a court of chancery will confirm and protect.¹

(2) *By Parol*—General Rule.—Except in cases where the statute expressly provides that a seal is necessary, or where the exercise of the authority must be under seal, a parol appointment is sufficient.² This appointment may be made orally if there is no statutory provision requiring it to be in writing.³

Instances.—Thus parol appointment is sufficient to authorize an agent to assign a patent,⁴ to seize chattels under a mortgage,⁵ to redeem land sold for taxes,⁶ to make an entry on lands to toll the statute of limitations,⁷ to confess judgment in a suit already brought,⁸ or to fill blanks in negotiable and other unsealed instruments.⁹ An appointment of an agent to make a binding contract for the sale of lands may be made either orally¹⁰ or in writ-

Phelps v. Sullivan, 140 Mass. 36, 54 Am. Rep. 442.

By virtue of an oral agreement between two parties to a deed for the sale of a lot of gravel, a surveyor was held to be authorized to fill in the quantity of gravel from specifications and profiles made by him, after the delivery of the deed, and in the plaintiff's absence. Vose v. Dolan, 108 Mass. 155, 11 Am. Rep. 331.

Authority to fill in the blanks of an undertaking after the same has been signed may be implied. Palacios v. Brasher, 18 Colo. 593.

1. **Interposition of Equity.**—Story on Agency (7th ed.) 49; Harrison v. Jackson, 7 T. R. 206; Williams v. Walsby, 4 Esp. 220; Berkeley v. Hardy, 5 B. & C. 355, 11 E. C. L. 251; Ledbetter v. Walker, 31 Ala. 175; Jackson v. Murray, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53; Hanford v. McNair, 9 Wend. (N. Y.) 54; McNaughten v. Partridge, 11 Ohio 223, 38 Am. Dec. 731; Baum v. Dubois, 43 Pa. St. 260.

A deed signed and executed by an agent without authority under seal, although not sufficient to make a conveyance, will give an equitable title, which will bar a suit in equity to have the sale set aside. Watson v. Sherman, 84 Ill. 203; Jones v. Marks, 47 Cal. 242.

The principal will be bound in equity to convey under a deed made by an agent with parol authority. Groff v. Ramsey, 19 Minn. 44; Morrow v. Higgins, 29 Ala. 448.

But in Allen v. Goldsmith, 22 Minn. 123, it was held that an oral direction to sell, where an insufficient power of attorney had been given, conferred no additional authority.

2. Story on Agency (7th ed.), § 50; Mechem on Agency, §§ 88, 89, 90, 91; 2 Kent's Commentaries (12th ed.) 613; 1 Parsons on Contracts (8th ed.) *47.

England.—Higgins v. Senior, 8 M. & W. 844.

Alabama.—Ledbetter v. Walker, 31 Ala. 175.

Illinois.—Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 756; Paris v. Lewis, 85 Ill. 597.

Massachusetts.—Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160.

Missouri.—Johnson v. McGruder, 15 Mo. 365; Brooks v. Jameson, 55 Mo. 505; Rice v. Groffmann, 56 Mo. 434.

New Jersey.—Doughaday v. Crowell, 11 N. J. Eq. 201.

New York.—Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678.

North Carolina.—Brookshire v. Brookshire, 8 Ired. (N. Car.) 74, 47 Am. Dec. 341.

Pennsylvania.—Miles v. Cook, 1 Grant's Cas. (Pa.) 58.

Vermont.—Pickett v. Pearsons, 17 Vt. 470. Although formerly it was held that the authority to act as attorney or agent must be by deed. Bac. Abr., tit. Authority A; Gordon v. Bulkeley, 14 S. & R. (Pa.) 331.

3. Kentucky General Statutes, § 20, c. 22, providing that "no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal," applies as well to private as to official obligations. Covington First Nat. Bank v. Gaines, 87 Ky. 597, Ragan v. Chenault, 78 Ky. 546.

In Louisiana, in order to bind another by the execution of a promissory note, an express authority is necessary. Avery v. Lauve, 1 La. Ann. 457.

4. **Agent to Assign Patent.**—Van Ostrand v. Reed, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529.

If the assignment is made in an instrument under seal by one acting as attorney, it must, in order to bind the principal, be executed in the name of the principal and purport to be sealed with his seal. Machesney v. Brown, 29 Fed. Rep. 145.

5. **Agent to Seize Chattels under a Mortgage.**—Reid v. McGowan, 28 S. Car. 74.

6. **Agent to Redeem Lands from Tax Sale.**—Gracie v. White, 18 Ark. 17.

7. **Agent to Make Entry on Lands.**—Miles v. Cook, 1 Grant's Cas. (Pa.) 58.

8. **Agent to Confess Judgment in Suit Already Brought.**—Dial v. Farrow, 1 Spears (S. Car.) 114.

9. **Agent to Fill Blanks in Unsealed Instruments.**—3 Kent Commentaries (12th ed.) *89, Angle v. North Western Mut. L. Ins. Co. 92 U. S. 331. See the title ALTERATION OF INSTRUMENTS.

10. **Agent to Contract for Sale of Lands.**—England.—Heard v. Pilley, L. R. 4 Ch. 548.

Alabama.—Andrews v. Jones, 10 Ala. 400, Ledbetter v. Walker, 31 Ala. 175.

Illinois.—Watson v. Sherman, 84 Ill. 263.

Kansas.—Rottman v. Wasson, 5 Kan. 552

ing,¹ and, in general, authority may be given orally to execute a written instrument,² as a note or a bill,³ or a contract for a lease.⁴

Where Statute Requires a Writing.—Even if an authority in writing is expressly required by statute to give validity to certain instruments, one acting under a verbal appointment only may bind the principal by a signature to such instrument, signed in his presence and at his request.⁵

A Written Authority to Convey Land must be clear and unequivocal.⁶

Kentucky.—*Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

Minnesota.—*Minor v. Willoughby*, 3 Minn. 225; *Brown v. Eaton*, 21 Minn. 409; *Dickerman v. Ashton*, 21 Minn. 538.

Mississippi.—*Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257.

Missouri.—*Johnson v. McGruder*, 15 Mo. 365; *Riley v. Minor*, 29 Mo. 439.

New Jersey.—*Doughaday v. Crowell*, 11 N. J. Eq. 201; *Long v. Hartwell*, 34 N. J. L. 116.

New York.—*Mortimer v. Cornwell*, 1 Hoffm. Ch. (N. Y.) 351; *McWhorter v. McMahan*, 10 Paige (N. Y.) 386; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 530; *Moody v. Smith*, 70 N. Y. 598.

North Carolina.—*Blacknall v. Parish*, 6 Jones Eq. (N. Car.) 70, 78 Am. Dec. 239.

Wisconsin.—*Dodge v. Hopkins*, 14 Wis. 630.

Pennsylvania.—Under the *Pennsylvania* statute, the authority of an agent who makes a contract for the conveyance of land must be in writing. *Parrish v. Koons*, 1 Pars. Eq. Cas. (Pa.) 79. See also *Frailey v. Waters*, 7 Pa. St. 221.

Even if the authority is required by statute to be in writing, it is not necessary where the execution is in the presence of the principal and at his request. *Rockford, etc., R. Co. v. Shunick*, 65 Ill. 223. See also *Wallace v. McCullough*, 1 Rich. Eq. (S. Car.) 426; *Bissell v. Terry*, 69 Ill. 184.

Parol agency, to charge the realty of the principal, should be express and clearly established. *Challoner v. Bouck*, 56 Wis. 652.

1. *Lyon v. Pollock*, 99 U. S. 668; *Peabody v. Hoard*, 46 Ill. 242; *Smith v. Allen*, 86 Mo. 178; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Baum v. Dubois*, 43 Pa. St. 260.

The Contents of a Letter Which has been Lost, directing the sale of real estate by an agent, when clearly proved, will sustain a contract made by the agent according to the terms of the writing, although the authority be denied. *Stadleman v. Fitzgerald*, 14 Neb. 290.

A Telegram may be a Sufficient Written Authority. *Chappell v. McKnight*, 108 Ill. 570.

2. Authority to Execute Written Instruments.—*Paley on Agency* (Lloyd, 3d ed.) *159; *Welch v. Hoover*, 5 Cranch (C. C.) 444; *Small v. Owings*, 1 Md. Ch. 363; *Shaw v. Nudd*, 8 Pick. (Mass.) 9; *Webb v. Browning*, 14 Mo. 354; *Tebbetts v. Levy* (City Ct.), 34 N. Y. St. Rep. 58.

A Note Signed by One Having Parol Authority for that purpose is as much the principal's

note as though it had been signed with his own hand by writing his name in full or by placing his cross or other mark thereon; and this is true whether the principal can sign his name or not. *Handyside v. Cameron*, 21 Ill. 588, 74 Am. Dec. 119.

Authority to Sign Principal's Name to Articles of Association.—It is not necessary that an agent be authorized by deed in order to sign his principal's name to a memorandum of association of a company. *In re Whitley*, 32 Ch. Div. 337, 55 L. J. Ch. 540, 54 L. T. 912, 2 Eng. Rul. Cas. 276.

Authority to Sign Principal's Name to Bill of Sale of Mining Claim.—Authority to an agent to sign the grantor's name to a bill of sale of a mining claim, the grantor having previously agreed with the grantee as to the terms of the sale, may be given orally. *Patterson v. Keystone Min. Co.*, 30 Cal. 360.

3. Bills and Notes.—*Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; *Bank of North America v. Embury*, 33 Barb. (N. Y.) 323, 21 How. Pr. (N. Y.) 14; *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774.

4. Contract for Lease.—*Taylor on Landlord and Tenant*, § 137; *Paley on Agency* (Lloyd, 3d ed.) *159, *189. See *infra*, this title, *Nature and Extent of Authority—Construction and Scope of Certain Particular Authorities*, subdivision *To Lease*.

5. Statute Requiring Writing—Executing Verbal Authority in Presence and at Request of Principal.—*Durrell v. Evans*, 31 L. J. Exch. 337, 1 H. & C. 174; *Meyer v. King*, 29 La. Ann. 567; *Price v. Durin*, 56 Barb. (N. Y.) 647; *Harvey v. Stevens*, 43 Vt. 653.

6. Written Authority to Convey Land must be Unequivocal.—*Sullivan v. Leer*, 2 Colo. App. 141. See also *infra*, this title, *Nature and Extent of Authority—Construction and Scope of Certain Particular Authorities*, subdivision *To Sell Real Estate*.

In order to authorize one in writing to sign a principal's name to a contract to sell land, the words used must be unequivocal in their meaning and import, and must manifest the intention to do something more than to employ a broker. Verbal authority "to sell," or "to close a bargain" is not enough. 1 *Warvelle on Vendor and Purchaser*, p. 213; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617.

Where the authority of an agent to sell land is required by statute to be evidenced by a writing, that requirement is not complied with by letters written by owners of the property to third persons showing merely that a certain real-estate agent was employed by him to solicit and negotiate for prices, nor by a telegram to such agent to "hold on," in reply to one from him asking if the

Construction.—Such instruments are construed according to the rules governing the construction of writings generally.¹ The writing need not employ apt terms in creating the agency, but will be read in connection with surrounding circumstances, and, if the meaning can be ascertained, will stand.²

The English Statute of Frauds did not require an authority in writing, except in cases falling under the first and third sections.³

Indirect Appointment.—An agent may be appointed, not only directly, but through another, as by referring an applicant to that other, with the information that such other will make all arrangements and give directions as to work.⁴

c. IMPLIED—(1) *From the Relation of the Parties.*—The appointment of an agent need not be by express language, but may be, and often is, implied from the relation of the parties.⁵

Presumption of Law.—Certain relations are so well defined that, upon proof of their existence, an agency will arise as a presumption of law.⁶

Wife as Agent of Husband.—Thus the wife is the agent of the husband in matters pertaining to the household.⁷ If he does not provide her with necessaries

owner would take a certain price. *Albertson v. Ashton*, 102 Ill. 50.

1. *Bissell v. Terry*, 69 Ill. 184.

Authority by Letter—When it Commences.—Authority of an agent contained in letters sent to him begins at the time of mailing the letters. *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674.

2. **Writing Conferring Authority Read in Connection with Surrounding Circumstances.**—*Bissell v. Terry*, 69 Ill. 184; *Trickett v. Tomlinson*, 13 C. B. N. S. 663, 106 E. C. L. 663, 7 L. T. 678.

The Word "Sell" in a power of attorney to "sell or lease any and all real estate" was held to be proof of ample authority to execute a deed of conveyance. *Hemstreet v. Burdick*, 90 Ill. 444.

And where the power of attorney contained no words of conveyance it was held to be otherwise. *Tharp v. Brenneman*, 41 Iowa 251.

A written agreement reciting that the first party appoints the second party agent for the sale of wagons, requiring the latter to indorse all commercial paper taken in payment, and to guarantee payment, and to make an account of sales, giving the second party's own note for balance due for a certain time, and expressly providing that the transaction shall be an absolute sale, creates a mere agency. *Lenz v. Harrison*, 148 Ill. 598, *affirming* 47 Ill. App. 170.

3. **English Statute of Frauds—First and Third Sections.**—*Paley on Agency* (Lloyd, 3d ed.), pp. 158, 260; 2 *Kent's Commentaries* (12th ed.), p. 614; 3 *Parsons on Contracts* (8th ed.), side p. 13; *Benjamin on Sales* (1888, Bennett), § 205.

England.—*Maclean v. Dunn*, 4 Bing. 722; *Gosbell v. Archer*, 2 Ad. & El. 500, 29 E. C. L. 159; *Fitzmaurice v. Bayley*, 6 El. & Bl. 868; *Coles v. Trecothick*, 9 Ves. Jr. 234; *Graham v. Musson*, 7 Scott 769; *Emmerson v. Heelis*, 2 Taunt. 46.

California.—*Rutenberg v. Main*, 47 Cal. 213.

Illinois.—*Johnson v. Dodge*, 17 Ill. 433.

Kentucky.—*Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53; *Falbot v.*

Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747.

Mississippi.—*Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257.

New York.—*Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286.

North Carolina.—*Blacknall v. Parish*, 6 Jones Eq. (N. Car.) 70, 78 Am. Dec. 239.

See also the title **FRAUDS, STATUTE OF**.

4. **Agent Appointed through Another.**—*Lyman v. Otley*, 47 Ill. App. 82; *Morse v. Thurber*, 7 Misc. Rep. (N. Y. C. Pl.) 707; *Pennsylvania R. Co. v. Flanagan*, 112 Pa. St. 558.

Instances.—Where the manager of a company refers one applying for employment to another whom he represents as having charge of the salesmen, he is estopped to deny that such person had authority to employ the applicant as a drummer. *Mook v. Parke*, 9 Misc. Rep. (N. Y. C. Pl.) 90.

One who, on going to another's place of business in response to an invitation in writing, finds a person assuming to employ hands, who gave him employment for several weeks, for which he was paid from time to time, has a right to assume that the person employing him had authority, notwithstanding private instructions from the owner to the employer, of which he had no knowledge, and the owner is liable for the amount of his wages. *Cox v. Albany Brewing Co.*, 56 Hun (N. Y.) 489.

5. **Agency Implied from Relation of Parties.**—*Williams v. McKinley*, 65 Fed. Rep. 4; *Roland v. Logan*, 18 Ala. 307; *Krebs v. O'Grady*, 23 Ala. 726, 58 Am. Dec. 312; *Gibson v. Snow Hardware Co.*, 94 Ala. 346; *Norton v. Bull*, 43 Mo. 113; *Hull v. Jones*, 69 Mo. 587; *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 145; *Kirchner v. Schmid*, 7 Misc. Rep. (N. Y. C. Pl.) 455; *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486.

6. A Roman Catholic pastor will not be presumed to have authority to convey real estate, title to which is in his bishop. *Leahey v. Williams*, 141 Mass. 345. See *Olcott v. Gabert*, 86 Tex. 121.

7. **Wife as Agent of Husband in Matters Concerning Household.**—2 *Kent Commentaries*

an authority to secure them as his agent arises from necessity.¹ As to other matters she may act as his agent the same as another, in which case she must be appointed.²

Husband as Agent of Wife.—The husband may be constituted the agent of the wife in the management, control, and disposal of her separate estate, but he is not such merely by virtue of the marital relation.³ It may, however, be shown to the jury as a circumstance, and may, with other facts shown, tend to prove agency.⁴

Other Relations.—So may any other near relationship.⁵

An Attorney who assumes to act for a party in court is presumed to be authorized, until the contrary is shown.⁶

A Partner is the general agent of his copartners in all matters within the scope of the partnership business,⁷ but he cannot bind them under seal by

(12th ed.) 146, 147; *Anderson v. Sanderson*, 2 Stark. 204, 3 E. C. L. 377; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362; *Pickering v. Pickering*, 6 N. H. 124.

This Presumption is Overcome by proof of the fact that credit was given to her individually. *Ehrich v. Bucki*, 7 Misc. Rep. (N. Y. C. Pl.) 118; *Baker v. Witten*, 1 Okla. 160.

1. **Wife's Authority by Necessity.**—*Johnston v. Sumner*, 3 H. & N. 261; *Lane v. Ironmonger*, 13 M. & W. 368; *Benjamin v. Dockham*, 134 Mass. 418.

2. **Wife as Agent of Husband in Other Matters.**—*Berwick v. Dusenbury*, 2 Daly (N. Y.) 107, 32 How. Pr. (N. Y.) 348; *Goodwin v. Kelly*, 42 Barb. (N. Y.) 194; *Beckwith v. Baxter*, 3 N. H. 67; *Chamberlain v. Davis*, 33 N. H. 121; *Sanborn v. Cole*, 63 Vt. 590; *Savage v. Davis*, 18 Wis. 608.

3. **Husband as Agent of Wife—Arkansas.**—*Hoffman v. McFadden*, 56 Ark. 217.

Colorado.—*Vescelius v. Martin*, 11 Colo. 391.

Indiana.—*Shafer v. Archbold*, 116 Ind. 29.

Iowa.—*Price v. Seydel*, 46 Iowa 696.

Massachusetts.—*Hunt v. Poole*, 139 Mass. 224.

Mississippi.—*Anderson v. Gregg*, 44 Miss. 170; *Crawford v. Redus*, 54 Miss. 700.

New Jersey.—*Tresch v. Wirtz*, 34 N. J. Eq. 124, 36 N. J. Eq. 356.

New York.—*Gates v. Williams*, 3 Misc. Rep. (N. Y. City Ct.) 376.

So in the Roman Law.—*Sohm's Institutes of Roman Law*, p. 370.

4. *Hunt v. Mercantile Ins. Co.*, 22 Fed. Rep. 503; *Barnett v. Gluting*, 3 Ind. App. 419; *Carroll v. O'Shea* (City Ct.), 19 N. Y. Supp. 374.

5. *Foster v. Fleishans*, 69 Mich. 543; *Abeel v. Seymour*, 6 Hun (N. Y.) 656; *Shimmel v. Erie R. Co.*, 5 Daly (N. Y.) 396; *Baxter v. West*, 5 Daly (N. Y.) 460. See *Ford v. Linehan*, 146 Mass. 283.

Brother.—In *Sheanon v. Pacific Mut. L. Ins. Co.*, 83 Wis. 507, the insured being helpless in a distant country, on account of injuries sustained, with no friend or relative at hand except his brother, and it being important to wind up the business relating to the insurance before he was removed to his home, it was held that the agency of the brother to act for him in the matter might be implied from the circumstances.

A sufficient presumption of agency for the application of the rule that notice to agent is notice to principal is not raised in a contract for the purchase of land by a son, merely from the fact that the father gave information and advice with reference to the purchase. *McNamara v. McNamara*, 62 Ga. 200.

A widow was not bound to sell, where the son of her late husband, who was also executor of his father's estate, represented that he was attorney in fact for his mother, and that title to the land owned by her was good. *Stewart v. Pickering*, 73 Iowa 652.

A son has no authority to act as the agent of his father in making a contract merely on account of the relationship. *Walsh v. Curley* (C. Pl.), 16 N. Y. Supp. 871.

Mere Relationship is not a ground upon which agency can be assumed. *Le Count v. Greenley* (Supreme Ct.), 6 N. Y. St. Rep. 91.

Father.—Where a son, being the owner of land, sent a prospective purchaser to his father with the statement that he would agree to any bargain they made, the acts of the father in making the sale were binding on the son. *Reeves v. Kelly*, 30 Mich. 132.

6. **Attorney.**—*Hunter v. Bryant*, 98 Cal. 247; *Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197.

Where a lawyer enters appearance for a defendant his authority will be presumed, and the presumption may be rebutted only by clear proof. *Kemmerer v. Markle*, 7 Kulp. (Pa.) 262, 3 Pa. Dist. Rep. 652, 14 Pa. Co. Ct. Rep. 493. See the title ATTORNEY AND CLIENT.

7. **Partners.**—*Lindley on Partnership* (Ewell's ed.) *236; *Hawken v. Bourne*, 8 M. & W. 703; *Wheeler v. Sage*, 1 Wall. (U. S.) 518; *Le Roy v. Johnson*, 2 Pet. (U. S.) 186; *Winship v. U. S. Bank*, 5 Pet. (U. S.) 529; *Kimbro v. Bullitt*, 22 How. (U. S.) 256; *Usher v. Wadingham*, 62 Conn. 412; *Pearson v. Post*, 2 Dakota 220; *Smith v. Collins*, 115 Mass. 388; *Wilkins v. Boyce*, 3 Watts (Pa.) 39; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390; *Whiteman v. American Cent. Ins. Co.*, 14 Lea (Tenn.) 327.

Where the power to execute a contract was given to a firm, and the member who signed the principal's name added his own name as agent, the principal was bound; he could have bound the principal by merely signing

virtue of the relation alone.¹ He may do so, however, with the assent of his copartners, or his act may become binding through their ratification or implied acquiescence, to prove which parol evidence is admissible.²

An Agent Appointed by a Partnership is not thereby made the agent of the individual members of the firm.³

Co-owners are not agents for each other.⁴

(2) *From Conduct—General Rule—Estoppel—Acquiescence.*—In a great proportion of cases agency arises, not from the use of express language nor from the existence of a well-defined relation, but from the general conduct of the parties.⁵ Where one person holds another out as his agent with certain authority

the principal's name. *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827.

One partner may appoint an agent to accept a composition in insolvency of debts due the firm. *Raymond v. M'Mackin*, 9 New Bruns. 524.

Mining Partnership.—One partner, except in a mining partnership, can employ an attorney to appear for the firm. The reason for the distinction is, that mining partnerships are not founded on the *delectus persona*, whereas others are. *Wheatley v. Tutt*, 4 Kan. 240; *Charles v. Eshleman*, 5 Colo. 107.

1. **Power of Partner to Bind Firm under Seal.**—*Tiedeman on Real Property*, § 805; *Story on Agency* (9th ed.), § 53; *Paley on Agency* (Lloyd, 3d ed.), *157; *Evans on Principal and Agent* (2d ed.), *22.

England.—*Harrison v. Jackson*, 7 T. R. 206; *Orr v. Chase*, 1 Meriv. 729.

United States.—*Columbia Bank v. Patterson*, 7 Cranch (U. S.) 299.

Connecticut.—*Swazey v. Union Mfg. Co.*, 42 Conn. 556.

Illinois.—*Darst v. Gale*, 83 Ill. 136.

Maine.—*Dresden School Dist. v. Ætna Ins. Co.*, 62 Me. 330; *Stanwood v. Laughlin*, 73 Me. 112.

Massachusetts.—*Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90.

New York.—*Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Wells v. Evans*, 20 Wend. (N. Y.) 257; *Peterson v. New York*, 17 N. Y. 449; *Dent v. North American Steamship Co.*, 49 N. Y. 390.

Ohio.—*McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731.

Pennsylvania.—*Schmertz v. Shreeve*, 62 Pa. St. 460, 1 Am. Rep. 439; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. St. 426.

South Carolina.—*Robinson v. Crowder*, 4 McCord (S. Car.) 519, 17 Am. Dec. 762.

See also the title PARTNERSHIP.

The Burden of Proving a Partner's Authority. in a suit for rent on a written lease executed by one partner in the name of the firm, is on the plaintiff, where the other partner denies under oath the execution of the lease. *Koch v. Endriss*, 97 Mich. 444.

2. **Partner Binding Firm under Seal—Assent or Ratification of Copartners—England.**—*Bruton v. Burton*, 1 Chit. Rep. 707, 18 E. C. L. 209.

Georgia.—*Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738.

Illinois.—*Peine v. Weber*, 47 Ill. 41.

Massachusetts.—*McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Cady v. Shep-*

herd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Van Deusen v. Blum*, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Holbrook v. Chamberlin*, 116 Mass. 161, 17 Am. Rep. 146.

New York.—*Gram v. Seton*, 1 Hall (N. Y.) 293; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

Pennsylvania.—*Bond v. Aitkin*, 6 W. & S. (Pa.) 165, 40 Am. Dec. 550; *Johns v. Battin*, 30 Pa. St. 84.

Washington.—*Darst v. Roth*, 4 Wash. (U. S.) 471.

Even before the partnership actually commenced, but while it is being negotiated. *Edmundson v. Thompson*, 2 F. & F. 564; *Gabriel v. Evill*, 9 M. & W. 297. But see *Greenslade v. Dower*, 7 B. & C. 635, 14 E. C. L. 107; *Dickinson v. Valpy*, 10 B. & C. 142, 21 E. C. L. 41; *Fisher v. Taylor*, 2 Hare 229, 230; *Heap v. Dobson*, 15 C. B. N. S. 460, 109 E. C. L. 460; *Smith v. Craven*, 1 C. & J. 500.

Contrary View.—It has been held in some cases that an authority under seal is necessary. *Turbeville v. Ryan*, 1 Humph. (Tenn.) 113, 34 Am. Dec. 622; *Tapley v. Butterfield*, 1 Met. (Mass.) 515, 35 Am. Dec. 374; *Napier v. Catron*, 2 Humph. (Tenn.) 534; *Steiglitz v. Egginton*, 1 Holt N. P. 141, 3 E. C. L. 63. See *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

But a partner can certainly bind the firm by a sealed instrument where the seal was affixed in the presence and at the request of his copartners. *Ball v. Dunsterville*, 4 T. R. 313; *Fichthorn v. Boyer*, 5 Watts (Pa.) 159, 30 Am. Dec. 300; *Fox v. Norton*, 9 Mich. 207.

3. *Johnston v. Brown*, 18 La. Ann. 330.

4. *Barton v. Williams*, 5 B. & Ald. 395, 7 E. C. L. 145.

5. **Agency Arising from General Conduct.**—*Story on Agency* (7th ed.), §§ 54, 55; *Wharton on Agency*, §§ 40-44; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Breed v. Central City First Nat. Bank*, 4 Colo. 506; *Hansell v. Levy*, 5 Houst. (Del.) 407; *Pittsburg, etc., R. Co. v. Berryman*, 11 Ind. App. 640, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 340; *Gilbraith v. Lineberger*, 69 N. Car. 145; *Geylin v. De Villeroi*, 2 Houst. (Del.) 311; *Ruffner v. Hewitt*, 7 W. Va. 585.

Where One Applied to an Insurance Company for insurance, and the company delivered to him policies of insurance, one of which had

he is liable for his acts¹ on the ground of estoppel,² whether he actually intends to be bound or not.³ So when one, with full knowledge, allows another to represent him as his agent and remains silent when occasion arises for him to speak, he may be held as principal.⁴

been procured from another company and contained a printed statement that the former company was the agent of the latter, the applicant is justified in crediting such statement, although it was in fact unauthorized by the company issuing the policy. *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524.

Son.—A son is the agent of his father, notwithstanding his testimony to the contrary, where he acts for the father in procuring a mortgage, undertakes the whole negotiation, decides upon the security, satisfies himself as to the title, attends to the execution of the papers, receives the money from his father and pays it over to the mortgagor, and the father accepts the benefits of the transaction. It is idle, under such circumstances, for the son to claim to have been the agent of the person giving the mortgage. *Mateson v. Blackmer*, 46 Mich. 393.

1. **Holding out One as Agent.**—*Livermore on Agency*, pp. 37-41; *Story on Agency* (7th ed.), §§ 56, 81; *Paley on Agency* (Lloyd, 3d ed.), pp. 161-175; 2 *Kent's Commentaries* (12th ed.), pp. 614, 615, 626, 627.

England.—*Brockelbank v. Sugrue*, 5 C. & P. 21, 24 E. C. L. 195; *Thompson v. Bell*, 10 Exch. 10.

United States.—*Bronson v. Chappell*, 12 Wall. (U. S.) 681.

Alabama.—*Tennessee River Transportation Co. v. Kavanaugh*, 101 Ala. 1, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 338, 339.

Arkansas.—*Leake v. Sutherland*, 25 Ark. 219.

Connecticut.—*Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37.

Illinois.—*St. Louis, etc., Packet Co. v. Parker*, 59 Ill. 23; *Thurber v. Anderson*, 88 Ill. 167; *Noble v. Nugent*, 89 Ill. 522; *Morris v. Preston*, 93 Ill. 215; *Union Mut. L. Ins. Co. v. Slee*, 110 Ill. 35.

Indiana.—*Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Croy v. Busenbark*, 72 Ind. 48.

Kansas.—*Atlantic, etc., R. Co. v. Reisner*, 18 Kan. 458.

Louisiana.—*Meyer v. King*, 29 La. Ann. 567.

Massachusetts.—*Com. v. Holmes*, 119 Mass. 195.

Michigan.—*Lyell v. Sanbourn*, 2 Mich. 109; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 386, 55 Am. Rep. 697.

Minnesota.—*Graves v. Horton*, 38 Minn. 66.

Missouri.—*Rice v. Groffman*, 56 Mo. 434; *Kiley v. Forsee*, 57 Mo. 390; *Whelan v. Reilly*, 61 Mo. 565; *Summerville v. Hannibal, etc., R. Co.*, 62 Mo. 391.

Nebraska.—*Starring v. Mason*, 4 Neb. 367.

New York.—*Gallup v. Lederer*, 3 Thomp. & C. (N. Y.) 710.

Pennsylvania.—*Kelsey v. Crawford County*

Nat. Bank, 69 Pa. St. 426; *Hill v. Nation Trust Co.*, 108 Pa. St. 1, 56 Am. Rep. 189.

Texas.—*McAlpin v. Cassidy*, 17 Tex. 449; *Elsner v. State*, 30 Tex. 524.

Vermont.—*Walsh v. Pierce*, 12 Vt. 130; *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634; *Fay v. Richmond*, 43 Vt. 25.

Virginia.—*Hooe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425.

Notwithstanding Private Instructions, such a one will have authority consistent with the usual course of business in which he acts as agent. *Doan v. Duncan*, 17 Ill. 272; *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Crain v. Jacksonville First Nat. Bank*, 114 Ill. 516.

2. **Estoppel.**—*Alabama.*—*Reynolds v. Collins*, 78 Ala. 94; *Burke v. Taylor*, 94 Ala. 530.

Colorado.—*Gauthier Decorating Co. v. Ham*, 3 Colo. App. 559.

Missouri.—*De Baun v. Atchison*, 14 Mo. 543; *Rice v. Groffmann*, 56 Mo. 434; *Cupples v. Whelan*, 61 Mo. 583; *Baker v. Kansas City, etc., R. Co.*, 91 Mo. 152; *Fanning v. Cobb*, 20 Mo. App. 577; *Hoppe v. Saylor*, 53 Mo. App. 4.

Pennsylvania.—*Hubbard v. Tenbrook*, 124 Pa. St. 291, 10 Am. St. Rep. 585.

Texas.—*Collins v. Cooper*, 65 Tex. 460.

3. **Intention Immaterial.**—*Johnson v. Christian*, 128 U. S. 374.

Where the owner of a slave, merely to frighten her, went with her to an auctioneer and requested him to sell her, and the auctioneer refused to make the sale but told them to call next day, and the slave came next day alone, stating that she came to be sold, it was held that the auctioneer was authorized to make the sale although the owner had no intention of selling. *Morgan v. Darragh*, 39 Tex. 171. See also *Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264. Compare *Davis v. Robb*, 2 Cranch (C. C.) 458.

4. **Story on Agency** (7th ed.), §§ 89-91; 1 *Story on Equity Jurisprudence* (12th ed.), §§ 385-392; *Wharton on Agency*, § 42; 2 *Kent's Commentaries* (12th ed.), pp. 614, 616.

Where one stands by and permits another to make a contract in his name without objection, he is bound thereby. *James v. Russell*, 92 N. Car. 194.

In general, one is estopped from denying the agency where from his conduct he has led another to believe that he has appointed some one to act as his agent, and, knowing that such other person is about to act in reliance upon that belief, does not interpose to undeceive such person. *Pole v. Leask*, 33 L. J. Ch. 155, 9 Jur. N. S. 829, 8 L. T. 605.

One Who Knowingly Allows Another to Collect for him is bound by payments made to that other. *Sax v. Drake*, 69 Iowa 760; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138; *Simon v. Brown*, 38 Mich. 552.

Son Signing Father's Name to Notes.—Where a son had been for years in the habit of sign-

Single Transaction.—While agency may be implied from a single transaction¹ it is more readily inferable from a course of dealing.²

ing his father's name to promissory notes made by himself as indorser, and the father knew the fact, and took no steps to prevent it, and gave no notice, the presumption was created that the son had authority to sign his father's name, and the father was liable. *Weaver v. Ogletree*, 39 Ga. 586.

Carrying on Business in Name of Another.—One is estopped from denying that another who conducts a business in the name of the former to avoid the creditors of the true owner is conducting the business as his agent, as against one who does not know that all the property belonged to the latter, although he is informed as to the purpose of the parties. *Goetz v. Goldbaum* (Cal., 1894), 37 Pac. Rep. 646.

The fact that one allows his name to stand over the door of another who sells goods of his manufacture and buys in his name is a circumstance which, taken with others, may be considered as tending to show agency. *Gilbraith v. Lineberger*, 69 N. Car. 145.

But it has been held that an agency is not implied so as to create a liability for the agent's debts, by permitting a debtor from whom a creditor has taken a store in satisfaction of a debt to take out a license in the creditor's name, in order to sell off a stock of liquors which remained in the building. *Ilff v. Stover*, 4 N. Mex. 54.

Where a railroad company allowed a person without objection to rent an office on its right of way, and display a sign styling it the office of the company, although he was in fact the agent of a foreign corporation of the same name, the company was held bound by the purchase of goods by him in its name. *Florida Midland, etc., R. Co. v. Varnedoe*, 81 Ga. 175.

Where one has knowledge that another in conducting a business represents himself as the agent of the former, and he acquiesces therein, the former will be liable for indebtedness incurred in such business with third parties dealing with the agent in good faith and relying upon such representation. *Garner v. A. Fisher Brewing Co.*, 6 Utah 332.

Knowledge of Representations.—It is essential, in order to create an agency by representation or estoppel, where a person held himself out to be and assumed to act as agent, that the principal shall have had full knowledge of such facts. *Middletown First Nat. Bank v. Council Bluffs City Water Works Co.*, 56 Hun (N. Y.) 412.

The Rule of Presuming an Agency where one has been suffered to be recognized as another's general agent in buying and selling in the principal's line of business was applied where the son of a grocer and saloon-keeper ordered a lot of cigars and ale in his father's name, but used the same himself. *Thurber v. Anderson*, 88 Ill. 167.

Where One Fails to Notify the Seller within a reasonable time, when he knows that another is ordering goods in his name without authority, he is estopped from denying the agency. *Cooper v. Mulder*, 74 Mich. 374.

See also *M'Cready v. Thorn*, 51 N. Y. 454; *Titus v. Cairo, etc., R. Co.*, 46 N. J. L. 393.

1. Agency Implied from Single Transaction.—Story on Agency (7th ed.), § 94; *Shoninger v. Peabody*, 57 Conn. 42, 14 Am. St. Rep. 88; *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 269. Compare *Graves v. Horton*, 38 Minn. 66.

But it was held, in an action against a married woman for seeds, fertilizers, etc., sold and delivered to her husband and used on her farm, on which both resided, that evidence that she had paid a bill for similar goods bought by him during the time covered by the transactions in question was incompetent on the issue as to whether or not he acted as her agent in carrying on the farm. *Lovell v. Williams*, 125 Mass. 439.

Limitation.—The law raises no inference, in the case of a special agency, limited to one transaction, that the agency continues or extends to other matters occurring years after. *Reed v. Baggott*, 5 Ill. App. 257. See also *Gregg v. Wooliscroft*, 52 Ill. App. 214; *Malburn v. Schreiner*, 49 Ill. 69.

2. Series of Transactions.—2 Kent's Commentaries (12th ed.) 613-615; Paley on Agency (Lloyd, 3d ed.) 198; Story on Agency (7th ed.), §§ 84, 95; *Dodsley v. Varley*, 4 P. & D. 448, 12 Ad. & El. 632, 40 E. C. L. 141, 5 Jur. 316; *Hazard v. Treadwell*, 1 Stra. 506; *Bryan v. Jackson*, 4 Conn. 291; *Brooke v. Barnes*, 1 Mackey (D. C.) 5; *Isbell v. Brinkman*, 70 Ind. 118; *Neibles v. Minneapolis, etc., R. Co.*, 37 Minn. 151; *Summerville v. Hannibal, etc., R. Co.*, 62 Mo. 391; *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197.

A third party is justified in dealing with one as the agent of another where the latter has intimated to him that the former was his agent, and it is known that such party had at or about that time transacted similar business with other persons as agent for the same principal; and any contract entered into within the scope of such supposed agency will bind the principal. *Thompson v. Clay*, 60 Mich. 627.

There is a Strong Presumption in favor of one who has acted for a long time as an agent, with the knowledge of the principal. *Smith v. White*, 5 Dana (Ky.) 376; *McDonnell v. Montgomery Branch Bank*, 20 Ala. 313; *Cobb v. Lunt*, 4 Me. 503; *Warren v. Ocean Ins. Co.*, 16 Me. 439, 33 Am. Dec. 674; *Valentine v. Packer*, 5 Pa. St. 333.

Indorsing Notes.—An agent who has been in the habit of indorsing notes with his principal's name, with the knowledge and assent of the principal, will be presumed to have that authority. *Weaver v. Ogletree*, 39 Ga. 586. See also *Friedlander v. Cornell*, 45 Tex. 585.

Payment of Assessments for the benefit of a society to the wife of the officer empowered to receive them is binding on the society when it has been common practice to pay to the wife in the course of business. *Anderson v. Supreme Council*, 135 N. Y. 107.

The Previous Course of Dealing by or through

Third Person must have Relied upon Agency.—A party seeking to hold one as principal must have believed in the existence of and relied upon the agency.¹

The Inference of the Existence of the Relation must have been one naturally drawn.²

The Authority will be Limited to acts within the scope of the agent's apparent duty.³

Limit of Principal's Responsibility.—The alleged principal is responsible, however, only for the appearance of authority which he allows to exist, not for that which the agent may assume.⁴

Circumstances Which Justify the Inference of Agency.—An agency may be implied, in accordance with the principles which have been stated, from the fact that one is put in possession of real property,⁵ given the custody of personal property,⁶

an agent is proper evidence for the jury, as tending to show the existence of an agency and its extent. *Doan v. Duncan*, 17 Ill. 272.

Husband Acting for Wife.—Evidence that a husband generally managed his wife's business affairs, doing business in the city where her property was located, while she lived in the country and gave the property no attention, looked after the rents and had sold portions of such property for her, is sufficient to establish the agency of the husband to employ a broker to sell the wife's real estate. *Barnett v. Gluting*, 3 Ind. App. 419.

Renewal of Agency.—A written contract creating a commercial agency for one year, at a fixed compensation for services, is tacitly renewed from year to year by having been expressly renewed for the second year, and continued for several successive years in conformity to the contract without express renewal. *Standard Oil Co. v. Gilbert*, 84 Ga. 714.

1. Good Faith Required of Third Party.—*Norton v. Richmond*, 93 Ill. 367; *Ladd v. Grand Isl.* (Vt., 1895), 31 Atl. Rep. 34; *Dugan v. Lyman* (N. J., 1892), 23 Atl. Rep. 657; *Bickford v. Menier*, 107 N. Y. 490; *Friedlander v. Hillcoat* (Tex., 1890), 14 S. W. Rep. 786. In this last case it was held that one who deals with another in possession of sheep, under a contract with the owner, by the terms of which he is to care for, manage, and control them at his own expense, with the exclusive right to sell the marketable product of such sheep, dividing the net proceeds equally, cannot charge the owner with liability as principal, when such dealer has full knowledge of the contract.

But in an action for the price of goods sold to an alleged agent, it has been held that where the plaintiff seeks to prove agency as an inference from certain facts, it is not necessary for him to show his knowledge of those facts at the time of the sale. *Doan v. Duncan*, 17 Ill. 272. See also *Thomas v. Moody*, 57 Cal. 215.

2. Plant v. McEwen, 4 Conn. 544.

Agency is Not Sufficiently Shown by evidence of the mere fact that the purchaser of standing timber was the president of a lumber company and gave the seller a draft of the company in part payment, in order to bind the company, where the authority is denied. *Wisconsin Marine, etc., Ins. Co. Bank v. Filer*, 83 Mich. 496.

A Debtor Who Pays One Not Possessing the Note or evidence of the debt assumes the risk

of the latter's authority to collect the money. *Wooding v. Bradley*, 76 Va. 614.

3. How the Agency Limited—United States.—*Owings v. Hull*, 9 Pet. (U. S.) 607; *Thurber v. Cecil Nat. Bank*, 52 Fed. Rep. 513; *Warren v. Tinsley*, 53 Fed. Rep. 689.

Colorado.—*Field v. Small*, 17 Colo. 386; *Sagers v. Nuckolls*, 3 Colo. App. 95; *Tootle v. Cook*, 4 Colo. App. 111.

Illinois.—*Mathews v. Hamilton*, 23 Ill. 470; *Marine Bank v. Ogden*, 29 Ill. 248; *Wider v. Branch*, 12 Ill. App. 358.

Michigan.—*Ruppe v. Edwards*, 52 Mich. 411.

Minnesota.—*Eckart v. Roehm*, 43 Minn. 271.

Pennsylvania.—*Dripps' Assignees*, 4 Pa. L. J. 563; *Carson v. Cockran*, 9 Phila. (Pa.) 21; *Beymer v. Hardy*, 20 Pittsb. L. J. (Pa.) 47.

4. Empire State Nail Co. v. Faulkner, 55 Fed. Rep. 819; *St. Louis, etc., R. Co. v. Bennett*, 53 Ark. 209, 22 Am. St. Rep. 187; *Gauthier Decorating Co. v. Ham*, 3 Colo. App. 559; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Middletown First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun (N. Y.) 412; *Edwards v. Dooley*, 120 N. Y. 540.

The appearance of the name of an individual on a heading as "General Western Manager" is not in itself sufficient to prove agency in any transaction in which such paper may be used. *Gaynor v. Pease Furnace Co.*, 51 Ill. App. 292.

A purchase of goods from and payment to one who had formerly been authorized by the owners to solicit orders, but never held out as authorized to sell, confer no right on the purchaser. *Abrahams v. Weiller*, 87 Ill. 179. See also *Merck v. American Freehold Land Mortg. Co.*, 79 Ga. 213.

5. Putting One in Possession of Realty.—*Johnson v. Johnson*, 80 Ga. 260; *Goss v. Helbing*, 77 Cal. 190. In this latter case it was held that when a pump is sold and delivered to one in charge of waterworks for use at the works, without anything being said as to his acting for others; he must be held to have acted for the owners of the property, so as to charge them with a lien therefor.

6. Giving One Custody of Personalty.—*Bynum v. Miller*, 89 N. Car. 393. Here it was held that the act of a mortgagee in accepting a mortgage deed on a stock of goods of another, and any other goods he might buy to replenish the stock, was equivalent to an assent that the mortgagor should continue the business as his agent.

given a note to collect,¹ put in charge of a business,² given money to invest or

Where A purchased the stock in trade of B at a sheriff's sale, and B continued the business as agent without disclosing his principal, a jury are warranted in presuming that A was his principal in it. *Hansell v. Levy*, 5 Houst. (Del.) 407. See also *Elgin First Nat. Bank v. Schween*, 127 Ill. 573.

But where goods are consigned to a party to be sold under an arrangement by which he is at liberty to sell them at any price and on any terms he pleases, paying a fixed price to the owner, such consignee is not an agent, but a vendee. *Gibney v. Curtis*, 61 Md. 192.

1. **Giving One a Note to Collect.**—Where the agent has the possession of a promissory note, it may be inferred that he has authority to receive payment of it; but the burden is on the debtor who makes payment to the agent, relying upon such inference, to show that the promissory note was in his possession when the payment was made. *Stiger v. Bent*, 111 Ill. 328; *Haines v. Pohlmann*, 25 N. J. Eq. 179; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Adams v. Humphreys*, 54 Ga. 496.

Where the owner of a promissory note delivers it indorsed in blank to another with authority to dispose of it, the proceeds to be equally divided between them, a release of the note subsequently executed by the owner to the payee is a defense to an action against him by the agent, he being a mere agent for collection. *Flanagan v. Brown*, 70 Cal. 254.

Bookkeeper Indorsing Drafts.—Where the bookkeeper of a concern, who had authority to indorse drafts for deposit, indorsed certain drafts and delivered them to the office boy for deposit, who received the money thereon and delivered it to the bookkeeper, who appropriated it, it was held that the payment was valid, and that the concern was bound by the indorsement of their bookkeeper as their agent. *Johnson v. Donnell*, 90 N. Y. 1. The same principle appears in *Doubleday v. Kress*, 60 Barb. (N. Y.) 181; *Guilford v. Stacer*, 53 Ga. 618.

Bank.—One is *quoad hoc* the servant of a bank that delivered to him certain notes with a request that he pass them for the benefit of the bank, or return them if he cannot do it, and who agrees to such terms. *Towson v. Havre-de-Grace Bank*, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9.

But the customer of a bank was held not to be the agent of it in procuring the usurious renewal of a note payable to himself and held by the bank as collateral for his note, the renewal note having been made at the maker's request and substituted as collateral for the original. *Rochester First Nat. Bank v. Bentley*, 27 Minn. 87.

The Mere Mailing of a Copy of an Account to a third person does not of itself constitute such person the agent for collection. *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232.

2. **Putting One in Charge of a Business.**—*Thomas v. Moody*, 57 Cal. 215; *White v. Leighton*, 15 Neb. 424.

An Insurance Company makes itself liable as principal by giving one all necessary blanks

and papers, responding to his acts, approving permits of removal given by him, and paying his rent. *Hardin v. Alexandria Ins. Co.*, 90 Va. 413.

Where it was shown that a salesman had authority to make a certain contract on behalf of a defendant concern, evidence of a letter written in response to a letter from the plaintiff, by such salesman, on the letter paper of such concern, which stated that a certain contract had been made with the salesman, and admitted the contract to be as stated by the plaintiff, was held to be sufficient to sustain a finding for the plaintiff. *Thomas v. Wells*, 140 Mass. 517.

The Request of a Purchaser of Land Sold for Taxes under the Iowa Code, § 894, to the foreman of a newspaper publishing the notice of sale to make affidavit, does not constitute him his agent. *Chambers v. Haddock*, 64 Iowa 556.

The Superintendent of a Mine has authority, by virtue of his position, to bind the owner for supplies furnished to the keeper of a boarding-house necessary to the working of the mine. *Heald v. Hendy*, 89 Cal. 632.

Husband Selling Wife's Property.—A wife who owns a herd of cattle is bound by sales made by a herder under authority from the husband, when it is shown that the husband had the entire management and control of such herd of cattle, and generally conducted the business and made sales of cattle as the owner. *Parker v. Freeman*, 11 Colo. 576.

Clerks, Servants, etc.—One employed in a broker's office apparently as a clerk or attaché, and doing business with the broker's customers, is an agent of the broker. *Timpson v. Allen*, 7 Misc. Rep. (N. Y. C. Pl.) 323, 27 N. Y. Supp. 915.

The dress of a railroad trainman indicates his character as such. *Hughes v. New York, etc., R. Co.*, 36 N. Y. Super. Ct. 222.

The master of a barge properly presumes one to be the agent of the wharf owner who directs him where to moor his barge and whom he sees in charge directing the moving of vessels, etc., and to whom, after the mooring, he is referred by the clerk of the owner as his representative, and the wharf owner is liable in damages if the barge sustains injury by reason of the unsafe condition of the mooring place. *Pennsylvania R. Co. v. Atha*, 22 Fed. Rep. 920.

The presence of a servant on a steamer is some evidence of his employment there. *Svenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 108.

One at work on a locomotive with his coat off is presumed to be an agent of the company. *McCoun v. New York Cent., etc., R. Co.*, 66 Barb. (N. Y.) 338.

A young man standing behind the counter of his father and dealing with his customers, may be considered as his clerk or agent, and his acts in the line of his duty are binding on his father. *Elsner v. State*, 30 Tex. 524.

Where one claiming to be the agent of the defendant habitually took care of the defendant's warehouse, and sold and delivered to

pay over to another,¹ given an account against another to secure,² or intrusted with a deed by another with authority to close a real-estate transaction.³ The acceptance by the creditor from the debtor's agent, of money due, does not make such agent the agent of the creditor;⁴ nor does a creditor render another his agent by sending for money left with such other by the debtor to pay the debt.⁵

By the Ratification of Past Acts, others of a similar nature may be held to be binding, on the ground of an implied authority.⁶ If, however, the nature of the act or the conduct of the alleged principal is not such as naturally to lead another to rely upon the agency, he is not responsible.⁷ Thus an appointment

customers the goods therein, evidence of such facts is competent to prove agency. *Kent v. Tyson*, 20 N. H. 121.

When a traveler goes to a hotel at night and finds a clerk in charge of the office, assigning rooms, etc., he properly assumes that such clerk has authority to take charge of money handed him by a guest for safe keeping, and the proprietor is liable. *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242.

Where a party contracted for cars to transport a herd of cattle, and in consideration of reduced rates signed a contract restricting the liability of the company, and delivered part of the herd, it was presumed that other persons who delivered the remainder of the herd acted as his agents, and had authority to sign a similar contract. *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136.

One who establishes a retail store in a place distant from the owner's residence, placing an agent or clerk in sole charge, which he visits about once a month, is presumed to hold out such clerk as authorized to sell goods at retail, and also to keep the stock replenished by purchases, according to the usual course of business. *White v. Leighton*, 15 Neb. 424; *Gilbraith v. Lineberger*, 69 N. Car. 145; *Darst v. Slevins*, 69 N. Car. 145. To much the same effect as the preceding are *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37; *Thurber v. Anderson*, 88 Ill. 167; *Watkins v. Vince*, 2 Stark. 368, 3 E. C. L. 448.

1. Giving One Money to Invest or to Pay to Another.—*Friesenhahn v. Bushnell*, 47 Minn. 443.

In *Albia First Nat. Bank v. Free*, 67 Iowa 11, it was held that where a debtor left money to pay a note with another and notified the creditor, who wrote for the money, which in the mean time had been stolen from the house of the person with whom it had been deposited, the loss should fall upon the debtor.

2. *Emerson v. Miller*, 27 Pa. St. 278.

An Agency to Collect a Debt is not to be inferred from the mere possession of a copy of an account. *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232.

3. *Pope v. Chafee*, 14 Rich. Eq. (S. Car.) 69.

4. *Fisher v. Schiller Lodge*, 50 Iowa 459.

5. *Albia First Nat. Bank v. Free*, 67 Iowa 11.

6. Effect of Ratification.—Story on Agency (7th ed.), § 55; 2 Kent's Commentaries (12th ed.) 615.

United States.—*Miller v. Moore*, 1 Cranch

(C. C.) 471. Compare *Washington Bank v. Peirson*, 2 Cranch (C. C.) 685.

Alabama.—*Fisher v. Campbell*, 9 Port. (Ala.) 210.

Delaware.—*Robinson v. Green*, 5 Harr. (Del.) 115.

Illinois.—*Rawson v. Curtiss*, 19 Ill. 456; *Abrahams v. Weiller*, 87 Ill. 179.

Indiana.—*Jewett v. Lawrenceburgh*, etc., R. Co., 10 Ind. 539.

Maine.—*Emerson v. Cogswell*, 16 Me. 77.

Massachusetts.—*Odiorne v. Maxcy*, 15 Mass.

39.

New Hampshire.—*Gillis v. Bailey*, 17 N. H. 22; *Ames v. Drew*, 31 N. H. 482.

New York.—*Auburn Bank v. Putnam*, 3 Keyes (N. Y.) 343; *Wood v. Auburn*, etc., R. Co., 8 N. Y. 160; *Edwards v. Schaffer*, 49 Barb. (N. Y.) 291; *Hammond v. Varian*, 54 N. Y. 398.

Pennsylvania.—*Brig Odorilla v. Baizley*, 128 Pa. St. 283.

Vermont.—*Walsh v. Pierce*, 12 Vt. 130.

Virginia.—*Downer v. Morrison*, 2 Gratt. (Va.) 237. See also *infra*, this title, *Ratification*.

Authority to do a certain act cannot be implied from the fact that another act of an entirely different character, done by the agent in the name of the principal, was assented to. *Humphrey v. Havens*, 12 Minn. 298. See *Green v. Hinkley*, 52 Iowa 633.

A Denial by an Alleged Principal when questioned as to the authority of one as to whom circumstances previous to the inquiry would have justified an inference of agency, operates to destroy the implication from the previous transactions. *Norton v. Richmond*, 93 Ill. 367.

7. *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81.

An Officer Who Receives a Writ of Attachment for service is not thereby constituted the agent of the plaintiff for receiving payment on the demand. *Wainright v. Webster*, 11 Vt. 576, 34 Am. Dec. 707.

An Attorney employed by one liable on a covenant of warranty to represent her in an ejectment suit brought by a tenant may be also the agent of the tenant, where it is shown that under his instructions the tenant settled the suit. *Freeman v. Brehm* (Ind. App., 1892), 30 N. E. Rep. 712 (Ind. App., 1892), 31 N. E. Rep. 545.

Where One was to Acquire an Interest in a Vessel when she should be built, it was held that the builder had no implied authority to

is not to be inferred from the mere delivery of a check to another, payable to the order of a third person, to be given to that person,¹ nor from a demand by a creditor for security and furnishing the debtor with a blank instrument to be signed.²

Making a Note Payable at a Certain Bank does not make the bank, except in a limited sense, an agent.³

Nor does the Delivery of a Subscription Paper make the one to whom it is given an agent to collect.⁴

Essentials of Ratification.—Where subsequent ratification is relied upon, it must have been with full knowledge of all the material facts on the part of the alleged principal;⁵ otherwise it is of no avail,⁶ even though the benefits of the transaction were accepted.⁷

Recognition of Agent's Acts.—Agency may be inferred from recognition of, or long acquiescence in, acts of the alleged agent.⁸

purchase an outfit on the other's credit. *De Wolf v. Tupper*, 24 Fed. Rep. 289.

One Who Serves a Warrant for Debt, issued by a justice, is not thereby made the agent of the plaintiff. *Munroe v. Stutts*, 9 Ired. (N. Car.) 49.

A Drayman is Not Constituted the Agent of one who accepts goods from him so as to be chargeable with other goods delivered to the drayman, but lost by the way. *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. Dec. 541.

The fact that one employed another to purchase lumber for repairs upon his house raises no presumption that he employed him the next year for the same purpose. *Green v. Hinkley*, 52 Iowa 633.

1. *Hunt v. Poole*, 139 Mass. 224.

2. *Campbell v. Murray*, 62 Ga. 86; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325.

3. *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58. Here it was held that where a note was made payable at a bank, and the payor made a deposit with instructions to apply it on the note, the bank was not the agent of the payor to the extent that the deposit of itself operated as payment.

4. *Antram v. Thorndell*, 74 Pa. St. 442.

5. **Ratification must have been with Full Knowledge.**—*Owings v. Hull*, 9 Pet. (U. S.) 607; *McClelland v. Whiteley*, 15 Fed. Rep. 322; *Field v. Small*, 17 Colo. 386; *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131; *Cadwell v. Meek*, 17 Ill. 220; *International Bank v. Ferris*, 118 Ill. 465; *Middletown First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun (N. Y.) 412. See *infra* this title, *Ratification*.

The party must know that he would not be bound without such ratification. *Pittsburgh, etc., R. Co. v. Gazzam*, 32 Pa. St. 340.

Consent Induced by Fraud is not binding. *McDonald v. Fithian*, 6 Ill. 269.

Ratification or Repudiation must be in Toto.—*Daniels v. Brodie*, 54 Ark. 216; *Shoninger v. Peabody*, 57 Conn. 42, 14 Am. St. Rep. 88.

Subsequent Ratification Equivalent to Original Authority.—When duly ratified, however, the act is treated throughout as though it had been originally authorized. *In re Insurance Co.'s Petition*, 22 Fed. Rep. 109; *Russ v. Telfener*, 57 Fed. Rep. 973; *Williams v. Butler*, 35 Ill. 544; *Connett v. Chicago*, 114 Ill.

233; *Ohio, etc., R. Co. v. Middleton*, 20 Ill. 629; *Booth v. Wiley*, 102 Ill. 84; *Evans v. Mengel*, 6 Watts (Pa.) 72; *McCulloch v. McKee*, 16 Pa. St. 289.

6. **Alleged Principal Not Having Knowledge of the Facts.**—*Cobb v. Hall*, 49 Iowa 366; *Abrahams v. Weiller*, 87 Ill. 179.

The fact that on different occasions a party has paid accounts in which are included articles that were purchased in his name but without his knowledge, is no proof of the authority of another to make purchases of such articles for him. *Tebbetts v. Moore*, 19 N. H. 369.

The fact that an agent has in one or more instances made notes and applied the proceeds in part to the payment of the debts of the principal, but without the latter's knowledge, creates no liability on the part of the principal for notes in the principal's name subsequently made by the agent. *Middletown First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun (N. Y.) 412.

But see *Milligan v. Davis*, 49 Iowa 126, which held that where one accepted the benefits of a proposition for a sale, he ratified the other's act as his agent.

7. **Accepting Benefits.**—*Niemeyer Lumber Co. v. Moore*, 55 Ark. 240; *Lindroth v. Litchfield*, 27 Fed. Rep. 894; *Markell v. Matthews*, 3 Colo. App. 49; *Fisher v. Stevens*, 16 Ill. 397; *Goodell v. Woodruff*, 20 Ill. 191; *Henderson v. Cummings*, 44 Ill. 325; *Grund v. Van Vleck*, 69 Ill. 478; *Booth v. Wiley*, 102 Ill. 84; *Baer v. Lichten*, 24 Ill. App. 311; *Milligan v. Davis*, 49 Iowa 126; *Kingsley v. Fitts*, 51 Vt. 414. See *infra*, this title, *Ratification*.

8. **Story on Agency** (7th ed.), § 210; *Paley on Agency* (Lloyd, 3d ed.) 33-36; *Woodhouse v. Meredith*, 1 Jac. & W. 224; *Morse v. Royal*, 12 Ves. Jr. 355; *Lowther v. Lowther*, 13 Ves. Jr. 103; *Sanderson v. Walker*, 13 Ves. Jr. 601; *Huntsville Belt Line, etc., R. Co. v. Corpening*, 97 Ala. 681; *Law v. Cross*, 1 Black (U. S.) 533; *Shinn v. Hicks*, 68 Tex. 277.

A power of attorney to convey land may be presumed from the recitals in a deed more than thirty years old, when coupled with long delays of the owners in asserting an adverse claim, notwithstanding the introduction in evidence of a power made to the same per-

4. Adoption of the Agent of Another.—While an adverse interest generally disqualifies one from acting as agent of the adverse party, and one individual cannot be the agent of two contracting parties,¹ there are certain exceptions to this rule.² Frequently one acts as agent up to a certain point for one person

son, for a different purpose, dated a few days after the execution of the deed. *Folts v. Ferguson* (Tex. Civ. App., 1894), 24 S. W. Rep. 657.

Long-continued Silence Coupled with Knowledge.—Long-continued silence, when knowledge is shown or presumed, may give rise to a presumption of ratification. *Long v. Thayer*, 150 U. S. 520; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 533; *De Land v. Dixon Nat. Bank*, 111 Ill. 323; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Buffalo Third Nat. Bank v. Butler Colliery Co.* (Supreme Ct.), 37 N. Y. St. Rep. 798; *Woodwell v. Brown*, 44 Pa. St. 121; *Winton v. Little*, 94 Pa. St. 64.

Mere Silence.—But while silence under certain circumstances may be shown as evidence of acquiescence, yet the mere fact of silence alone never constitutes acquiescence. *Dugan v. Lyman* (N. J., 1892), 23 Atl. Rep. 657; *Kersey Oil Co. v. Oil Creek, etc.*, R. Co., 34 Leg. Int. (Pa.) 362; *Saville v. Welch*, 58 Vt. 683.

In order to constitute acquiescence by silence alone, the delay must have been so long continued as to raise the presumption of some affirmative act. *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131.

1. General Rule in Case of Adverse Interests and Acting as Agent of Both Contracting Parties.—*Paley on Agency* (Lloyd, 3d ed.), pp. 10-12, 33-36; *Story on Agency* (7th ed.), §§ 210-212; 1 *Story on Equity Jurisprudence*, §§ 308, 328.

England.—*Taylor v. Salmon*, 4 Myl. & C. 139; *Glengal v. Barnard*, 1 Keen 769.

United States.—*Davis v. Patrick*, 122 U. S. 138; *Citizens' Ins. Co. v. Kountz Line*, 10 Fed. Rep. 768.

Alabama.—*Spratt v. Wilson*, 94 Ala. 608.

Iowa.—*McLean v. Ficke* (Iowa, 1895), 62 N. W. Rep. 753; *Fisher v. Schiller Lodge*, 50 Iowa 459.

New York.—*Kelly v. Lehigh Valley Coal Co.*, 8 Daly (N. Y.) 291; *Cooper v. Hong Kong, etc., Banking Corp.*, 13 Daly (N. Y.) 183.

Where a son having received from his mother five thousand dollars to pay to his uncle on a note, paid three thousand dollars, and was directed by the uncle to deliver the balance to a third party as a loan, and arrange the security, which he failed to do, and the money was lost, it was held that the loss was the uncle's, the son being his agent, and the mother should receive credit. *Williams v. Williams*, 11 Heisk. (Tenn.) 95.

Where Parties Sign an Application for a Loan, agreeing to pay all expenses, the person employed to negotiate the loan is the agent of the borrower. *Thomas v. Desney*, 57 Iowa 58.

One Who Buys Exchange for a Principal is the agent of that principal, and not of the seller of the exchange. *Horstmann v. Baltzer*, 38 Hun (N. Y.) 367.

A Direction by a Surety on a Note to the party's agent not to deliver it until time for investigation had elapsed, does not constitute such agent the agent of the surety. *Murray v. Kimball*, 10 Ind. App. 141.

One Who, Buying Goods from the Agent of a Seller, requests the agent to write a note and contract in his (the buyer's) book, which the agent does and signs it with his own name, does not constitute such agent his own agent. *Graham v. Musson*, 5 Bing. N. Cas. 603, 35 E. C. L. 243.

Where an Agent Acts as Such for Two Parties to a transaction, the transaction is not void *ab initio*, but voidable at the election of either party. *Wiley v. Stewart*, 122 Ill. 545; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 470.

2. Where One may be Agent of Both Parties to Contract.—*Benjamin on Sales* (ed. 1888), §§ 267-270; *Darrell v. Evans*, 6 H. & N. 660, 1 H. & C. 174, 30 L. J. Exch. 254, 31 L. J. Exch. 337; *Terry v. Birmingham Nat. Bank*, 99 Ala. 566; *Jensen v. Lewis Invest. Co.*, 39 Neb. 371; *Nolte v. Hulbert*, 37 Ohio St. 445; *Wheeler v. Alderman*, 34 S. Car. 533.

Where an Insurance Agent, upon application, agreed to give insurance to a certain amount on specified property, he to distribute the risk among several companies which he represented, it was held to be a valid contract of insurance with each company as soon as the policy was signed, although the policies were not delivered until after the property was destroyed by fire, since the agent acted for the insured in distributing the risks. *Michigan Pipe Co. v. Michigan F., etc., Ins. Co.*, 92 Mich. 482, 494.

To the same effect is *Hart v. Niagara F. Ins. Co.*, 9 Wash. St. 620.

But where an insurance agent delivered a policy to the insured, containing a provision that "the company will not be liable until the premium be actually paid at the home office," received the premium and failed to pay it over, it was held that he was the agent of the insured and not of the company, that the company was not bound, and the agent was liable to the insured for the loss. *Criswell v. Riley*, 5 Ind. App. 496.

The Agent of a Grantee is made the agent of the grantor where the grantor consents to an arrangement whereby the lands are sold to a third party with instructions to such agent to receive payments therefor and apply them to the indebtedness due the original grantor, and such grantor is bound by payments made to the agent. *Miller v. Wilson*, 126 Mo. 48.

Brokers.—A broker who is employed to sell produce and who effects a sale is agent of both parties. *Merrit v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286.

A broker may be regarded as the agent of purchasers, where the purchase of goods was made through him by means of telegrams and letters, and completed by bought and

and then becomes the agent of another, in the same transaction.¹ In general, the law requires strict proof of the appointment of one who, at the same time or just prior thereto, acted for another.²

5. Evidence—*a*. IN GENERAL—When Question for Court—When for Jury.—If the evidence adduced to support a claim of agency is undisputed, the question of whether it exists or not is one of law for the court.³ Whenever it is disputed, however, it is one of mixed law and fact for the consideration of the jury, aided by instructions from the court.⁴ The court is to decide

sold notes signed by other brokers who were employed by the purchasers. *Trent Valley Woollen Mfg. Co. v. Oelrichs*, 23 Can. Supreme Ct. 682.

A provision broker, having specific instructions as to the terms of sale, acts as agent for both the seller and purchaser where, after procuring a purchaser, he has the goods sent to his own order and indorses the bill of lading to the purchaser. *Ulmer v. Ryan*, 137 Pa. St. 309, 27 W. N. C. (Pa.) 26, 48 Leg. Int. (Pa.) 47.

1. *Freeman v. Brehm* (Ind. App., 1892), 30 N. E. Rep. 712; *Williams v. Williams*, 11 Heisk. (Tenn.) 95; *Lantry v. Sutton* (C. Pl.), 22 N. Y. St. Rep. 244; *Nolte v. Hulbert*, 37 Ohio St. 445.

Upon a sale of goods by the plaintiff's factor to the defendant, the factor drew up a note of sale in which he entered the name of the defendant as purchaser and delivered it to him, who requested an alteration to be made in it, which was done and he then accepted it; this was held to be evidence of the authority of the factor to write the name. *Darrell v. Evans*, 6 H. & N. 660, 1 H. & C. 174, 30 L. J. Exch. 254, 31 L. J. Exch. 337.

Where one, as agent for another, sold but did not transfer stock to a third person, promising to be accountable to the other for such dividends as he or his agent should receive before transfer, it was held that he thereby became the agent of the third party to receive such dividends. *Cropper v. Adams*, 8 Pick. (Mass.) 40.

Where the Cashier of a Bank is employed to purchase certain railroad bonds, he is the agent for the purchase of the bonds; but after the bonds have been deposited as a special deposit he ceases to be the agent of the purchaser and becomes the agent of the bank; and if he afterwards, to hide his embezzlement of the funds of the bank, takes the bonds from the special deposit and reports them as assets of the bank, the depositor may recover their value from the bank. *Monmouth First Nat. Bank v. Dunbar*, 118 Ill. 625.

2. Strict Proof Required.—*Murray v. Kimball*, 10 Ind. App. 141; *McLean v. Ficke* (Iowa, 1895), 62 N. W. Rep. 753; *Cropper v. Adams*, 8 Pick. (Mass.) 40; *Sullivan v. Ross*, 39 Mich. 511; *Hill v. Morris*, 15 Mo. App. 322; *New England Mortg. Security Co. v. Addison*, 15 Neb. 335; *Ulmer v. Ryan*, 137 Pa. St. 309, 27 W. N. C. (Pa.) 26, 48 Leg. Int. (Pa.) 47; *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909.

Where a contract between a coal company and a railroad company provided that the latter should transport the coal of the former

to a certain point and there deliver it on board boats in accordance with orders given by the coal company to the agent of the railroad company at that point, it was held that such agent was not the agent of the coal company so as to bind the latter by his acts and declarations in the delivery of the coal. *Kelly v. Lehigh Valley Coal Co.*, 8 Daly (N. Y.) 291.

A creditor by accepting money from the agent of a debtor does not thereby render such agent his agent; so that if at another time the agent should appropriate the money, the loss would be that of the creditor and not of the debtor. *Fisher v. Schiller Lodge*, 50 Iowa 459.

3. When Facts Undisputed—Agency Question for Court.—*Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728, which holds that, where the facts are undisputed, the question as to whether an agent has the requisite authority to bind his principal is one of law for the court; and that this is equally true whether such authority is sought to be sustained by a previous authorization or by a subsequent ratification.

4. When Facts Disputed—Agency Question for Jury—England.—*Durrell v. Evans*, 1 H. & C. 174, 31 L. J. Exch. 337; *Johnston v. Sumner*, 3 H. & N. 261.

United States.—*New England Mortg. Security Co. v. Gay*, 33 Fed. Rep. 636; *Sparrow v. Mutual Ben. L. Ins. Co.* (C. C. U. S., Mass. 1873, unreported).

Alabama.—*McClung v. Spotswood*, 19 Ala. 165; *McDonnell v. Montgomery Branch Bank*, 20 Ala. 313; *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606; *Central R., etc., Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353.

Arkansas.—*Vahlberg v. Keaton*, 51 Ark. 534, 14 Am. St. Rep. 73.

Georgia.—*Whitman v. Bolling*, 47 Ga. 125.

Illinois.—*Hankinson v. Lombard*, 25 Ill. 572, 79 Am. Dec. 348.

Indiana.—*Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

Maryland.—*Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661; *National Mechanics' Bank v. Baltimore Nat. Bank*, 36 Md. 5.

Massachusetts.—*Lovell v. Williams*, 125 Mass. 439; *Thomas v. Wells*, 140 Mass. 517.

Michigan.—*Haughton v. Maurer*, 55 Mich. 323; *Roberts v. Pepple*, 35 Mich. 367.

Missouri.—*Brooks v. Jameson*, 55 Mo. 505; *Rice v. Groffmann*, 56 Mo. 434; *Hull v. Jones*, 69 Mo. 587.

Nebraska.—*Nichols v. Hail*, 4 Neb. 210; *New England Mortg. Security Co. v. Addison*, 15 Neb. 335.

New Jersey.—*Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39.

whether or not there is any evidence of agency.¹

Evidence may be either Direct or Indirect.—It follows from the several ways in which agency may be created, that the evidence of appointment may be either direct or indirect.²

The Burden of Proof is upon the one affirming the relation,³ and the courts generally require the proof to be clear and specific.⁴

New York.—Engh *v.* Greenbaum, 4 Thomp. & C. (N. Y.) 426; Patridge *v.* Commercial F. Ins. Co., 17 Hun (N. Y.) 95; Howard *v.* Norton, 65 Barb. (N. Y.) 161.

Pennsylvania.—Lamb *v.* Irwin, 69 Pa. St. 436; Commercial Union Assur. Co. *v.* Elliott (Pa., 1888), 13 Atl. Rep. 970.

Texas.—Bradstreet Co. *v.* Gill, 72 Tex. 115, 13 Am. St. Rep. 768.

Hawaii.—Robinson *v.* Sresovich, 5 Hawaiian 618.

Commercial Agency.—Where a party's letters, coupled with testimony that he had made reports to a commercial agency of the status of merchants, would support a finding that he was an agent, if there was other evidence from which the jury might conclude that he was not such agent, the question of agency should be left to the jury. Bradstreet Co. *v.* Gill, 72 Tex. 115, 13 Am. St. Rep. 768.

Officer Serving Process upon Corporate Employee.—The fact that an officer made service upon a corporation by delivery to an individual who was supposed to be managing agent, is no evidence to show agency, and a return based upon such service is not conclusive. Boynton *v.* Keeseville Electric Light, etc., Co., 5 Misc. Rep. (Essex County Ct., N. Y.) 118.

Connecting Carriers.—Evidence tending to show that the roads of several connected railroad companies formed a "line," and had a common office in charge of a general agent, and where his chief clerk for the transportation of goods was found, is properly submitted to the jury on the question as to whether one assuming to act as general agent had authority to bind the companies. Barrett *v.* Indianapolis, etc., R. Co., 9 Mo. App. 225.

Insurance Company.—That a person who acted on behalf of an insurance company, and denied its liability, was of the same name as a person whom the company in a letter said it would send, is sufficient to go to the jury upon the question of agency. Roe *v.* Dwelling-house Ins. Co., 23 Pittsb. L. J. N. S. (Pa.) 3, 30 W. N. C. (Pa.) 281. See also Evans *v.* Rogers, 2 Nott & M. 3. Car.) 563.

1 McClung *v.* Spotswood, 19 Ala. 165; Coe *v.* Johnson, 6 Houst. (Del.) 9; National Mechanics' Bank *v.* Baltimore Nat. Bank, 36 Md. 5; Lamb *v.* Irwin, 69 Pa. St. 436.

2 Evidence of Appointment may be either Direct or Indirect.—*United States.*—Foster *v.* Swasey, 2 Woodb. & M. (U. S.) 217.

Georgia.—Florida Midland, etc., R. Co. *v.* Varndoe, 81 Ga. 175.

Indiana.—Fouch *v.* Wilson, 59 Ind. 93.

Iowa.—Milligan *v.* Davis, 49 Iowa 126; Kaufman *v.* Farley Mfg. Co., 78 Iowa 679, 16 Am. St. Rep. 462.

Missouri.—Franklin *v.* Globe Mut. L. Ins. Co., 52 Mo. 461; Hoppe *v.* Saylor, 53 Mo. App. 4; Hull *v.* Jones, 69 Mo. 587; Mitchum *v.* Dunlap, 98 Mo. 418.

New Hampshire.—Hatch *v.* Taylor, 10 N. H. 538.

New York.—Field *v.* Banker, 9 Bosw. (N. Y.) 467.

Pennsylvania.—Duncan *v.* Hartman, 143 Pa. St. 595, 24 Am. St. Rep. 570.

Wisconsin.—Hansen *v.* Flint, etc., R. Co., 73 Wis. 346, 9 Am. St. Rep. 791.

3. Burden of Proof upon Party Affirming the Relation.—*California.*—Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 123.

Michigan.—Busch *v.* Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563.

Missouri.—Alexander *v.* Rollins, 84 Mo. 657.

New York.—Oxford First Nat. Bank *v.* Turner (Supreme Ct.), 24 N. Y. Supp. 793.

Pennsylvania.—Beales *v.* Com., 11 S. & R. (Pa.) 299; Sylvius *v.* Kosek, 117 Pa. St. 67, 2 Am. St. Rep. 645.

Virginia.—Wooding *v.* Bradley, 76 Va. 614.

Wisconsin.—Kelly *v.* Strong, 68 Wis. 152.

One who seeks to enforce a contract alleged to have been made through an agent has the burden of proof where the agency is denied. McCarty *v.* Straus, 21 La. Ann. 592; Russ *v.* Telfener, 57 Fed. Rep. 973.

Where the principal in a suit brought to enforce a contract entered into in his name by a supposed agent, denies the authority of the agent, the burden of proof to establish the agent's authority is on the party who seeks to enforce the contract. McCarty *v.* Straus, 21 La. Ann. 592.

One who sues on a breach of contract of employment made through an agent must prove the agency. Mensing *v.* Birnbaum, 5 Misc. Rep. (N. Y. C. Pl.) 414.

One seeking to recover lands claimed by her under a contract of sale executed by an alleged agent has the burden, as against the defendants in actual possession, of proving the agency. Anderson *v.* Rasmussen (Wyoming, 1894), 36 Pac. Rep. 820. See also Waters *v.* Ritchie, 22 Wash. L. Rep. 361.

But in Forgery Proceedings the burden of proving the lack of authority of the accused to sign the name of another is on the state. Romans *v.* State, 51 Ohio St. 528.

4. Proof must be Clear and Specific.—Hodge *v.* Combs, 1 Black (U. S.) 192; Louisville, etc., R. Co. *v.* Gilmer, 89 Ala. 534; Taylor *v.* Merrill, 55 Ill. 52; Proudfoot *v.* Wightman, 78 Ill. 553; Methuen Co. *v.* Hayes, 33 Me. 169; Hood *v.* Adams, 128 Mass. 207; Stadlerman *v.* Fitzgerald, 14 Neb. 290; Chatzkelson *v.* California Steamship Co., 7 Misc. Rep. (N.

Merely Assuming to Act as Agent.—The mere fact that one has assumed to act as agent is not sufficient to show the relation,¹ unless his acts are so open and notorious that it is evident that they must have been known to the principal and assented to by him.²

Circumstances and Conduct of the Parties.—The circumstances and apparent relations of the parties, and their treatment of each other, may be shown in evidence.³

Competency of Principal and Agent as Witnesses.—Both the principal and agent are competent witnesses as to the existence or nonexistence of the relation;⁴ the admissions of the former being also competent evidence.⁵

Y. City Ct.) 240; *Barrett v. Franklin*, 14 R. I. 241.

Particularly where the agent relies upon implied or parol authority to charge real property. *Union Mut. L. Ins. Co. v. Masten*, 3 Fed. Rep. 881; *Challoner v. Bouck*, 56 Wis. 652.

1. **Merely Assuming to Act as Agent Not Sufficient.**—*Huntsville Belt Line, etc., R. Co. v. Corpening*, 97 Ala. 681; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Walsh v. St. Paul Trust Co.*, 39 Minn. 23; *Petrie v. Wright*, 6 Smed. & M. (Miss.) 647; *Whiting v. Lake*, 91 Pa. St. 349; *International, etc., R. Co. v. Prince*, 77 Tex. 560, 19 Am. St. Rep. 795.

The fact that a person assumed to act as the agent of another in receiving a payment of money does not prove his agency. *McDougald v. Dawson*, 30 Ala. 553; *Doonan v. Mitchell*, 26 Ga. 472; *Coburn v. Paine*, 36 Me. 105.

Declarations.—As to the declarations of an agent to prove agency, see the title **ADMISSIONS**, Vol. I, p. 674.

2. *Abbott's Trial Evidence*, p. 41; *Reynolds v. Collins*, 78 Ala. 94; *Minturn v. Burr*, 16 Cal. 107; *Proctor v. Tows*, 115 Ill. 138; *Indiana, etc., R. Co. v. Adamson*, 114 Ind. 282.

A Prima Facie Case of Agency is Made out by evidence that one acts openly for another under such circumstances as would imply a knowledge on the part of the other. *Barnett v. Gluting*, 3 Ind. App. 415.

Where a Person Acts Openly and Publicly as the agent of a corporation, and in such capacity employs a party to perform certain work, and the work when completed is appropriated and used by the corporation, the work being done with the knowledge of its agents, it is held that the agency and authority of such person so permitted to act must be presumed. *Rockford, etc., R. Co. v. Wilcox*, 66 Ill. 417; *Singer Mfg. Co. v. Holdford*, 86 Ill. 455, 29 Am. Rep. 43; *Franklin v. Globe Mut. L. Ins. Co.*, 52 Mo. 461; *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64.

Affixing Corporate Seal.—Where a corporation officer affixes the corporate seal it will be presumed that he was authorized to do so. *Flint v. Clinton Co.*, 12 N. H. 430.

3. **Circumstances and Apparent Relations and Conduct of the Parties may be Shown.**—*Brown v. Prude*, 97 Ala. 639; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Arthur v. Gard*, 3 Colo. App. 133; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 40 Barb. (N. Y.) 179, 84 Am. Dec. 298; *Forsyth v. Day*, 41 Me. 382; *Strimpfer v. Roberts*, 18 Pa. St. 283, 57 Am. Dec. 606; *North v. Metz*, 57 Mich. 612.

Illustrations.—Where there is a question whether one is principal or agent in a commercial transaction, evidence showing him to have been in possession of the property, and the commercial correspondence relating to it, is clearly admissible to prove the character in which he dealt with the property. *Turner v. Yates*, 16 How. (U. S.) 14.

Evidence that a landowner told a broker to sell property at a price named; that a year or two afterward the owner wrote the broker, naming a specified price for the property and offering a certain commission; that about a year later the broker telegraphed to the owner asking if he would take a less price, and the owner refused, whereupon the broker made a contract for that price, which the owner refused to carry out—is sufficient to justify a finding of authority of the broker to make the sale. *Holden v. Starks*, 159 Mass. 503.

And where it was sought to charge one as agent after a certain period, and the agent offered to prove that prior to that period another person had acted as agent, such evidence was held to be irrelevant. *Beasley v. Downey*, 10 Ired. (N. Car.) 284.

4. **Principal and Agent as Witnesses.**—*Collins v. Lester*, 16 Ga. 410; *Van Sickle v. Keith*, 88 Iowa 9; *Howe Mach. Co. v. Clark*, 15 Kan. 492; *Cowles v. Burns*, 28 Kan. 32; *French v. Wade*, 35 Kan. 393; *Methuen Co. v. Hayes*, 33 Me. 169; *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501; *Wilson v. Wyandance Springs Imp. Co.*, 4 Misc. Rep. (N. Y. C. Pl.) 605; *Tynan v. Dullnig* (Tex. Civ. App., 1894), 25 S. W. Rep. 465, 818; *O'Conner v. Hartford F. Ins. Co.*, 31 Wis. 160.

The agent will be permitted to testify as to his appointment. *Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197.

And is a competent witness to prove his authority to sign an instrument. *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724.

Also to prove contracts made by him for the principal, if he be not personally interested. *Cadwell v. Meek*, 17 Ill. 220.

An agent is a competent witness to prove his authority to sell real estate. *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *McGunnagle v. Thornton*, 10 S. & R. (Pa.) 251; *Miles v. Cook*, 1 Grant's Cas. (Pa.) 58.

5. **Admissions.**—*Phleger v. Ivins*, 5 Harr. (Del.) 118; *Haughton v. Maurer*, 55 Mich. 323; *Wild v. New York, etc., Silver Min. Co.*, 59 N. Y. 644.

Testimony of an agent that principal stated to a third party that he would leave the prop-

Evidence of General Reputation is not admissible to show agency.¹

An Adjudication of the Fact of Agency in a suit against the agent, to which the principal is not a party, does not estop the principal from contesting such fact in a suit against him.²

b. WHERE THE APPOINTMENT IS IN WRITING—Loss of Original Document.—If the appointment is in writing, or where a writing is by law necessary to the appointment, in a suit between principal and agent, parol testimony is only admissible as secondary evidence upon proof of the loss of the original document.³

As between Other Parties, however, agency, as a question of fact, may be proved by the acts, declarations, and conduct of the principal or agent, although the agent was appointed by power of attorney.⁴

If the Appointment is under Seal, better authorities hold that it may be proved by

erty in the hands of the agent for disposal, was held to be competent as tending to prove the agent's authority. *Wallace v. Nodine*, 57 Hun (N. Y.) 239, 32 N. Y. St. Rep. 657.

The statements and dealings of the principal in recognition of the agent's authority are relevant where such authority is the question at issue. *Haughton v. Maurer*, 55 Mich. 323.

Communications between principal and agent in which the latter's authority is expressly or impliedly admitted, or any other facts going to show recognition by the principal of authority, may establish agency where no better evidence is forthcoming. *Arthur v. Gard*, 3 Colo. App. 133.

Where one who claimed to be the president of a mining company employed another, and the question was whether the former had authority, an answer verified by him as president of the company which admitted that such person went into the employ of the company, was held to be *prima facie* evidence of sufficient authority. *Steel v. Solid Silver Gold, etc.*, Min. Co., 13 Nev. 486. See also *Norton v. Richmond*, 93 Ill. 367.

Admissions of the principal generally as to the agency of a person are not proof of the agency at a particular time. *Irvine v. Buckaloe*, 12 S. & R. (Pa.) 35. See the title ADMISSIONS.

1. Evidence of General Reputation.—*Saussy v. South Florida R. Co.*, 22 Fla. 327; *Graves v. Horton*, 38 Minn. 66; *Perkins v. Stebbins*, 29 Barb. (N. Y.) 523; *Clark v. Farmers' Woolen Mfg. Co.*, 15 Wend. (N. Y.) 256.

It has been held that general reputation may be shown in connection with other facts. *Abbott's Trial Evidence*, p. 41; *Litchfield Iron Co. v. Bennett*, 7 Cow. (N. Y.) 234.

Agency is a fact to which a witness having knowledge of its existence may testify; but mere general reputation is not such knowledge. *Central etc., Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353.

2 *Marks v. Sullivan*, 8 Utah 406. See also the title RES JUDICATA.

3. When Parol Evidence Admissible.—*Wharton on Agency*, §§ 44, 225; 2 Greenleaf on Evidence (14th ed.), § 63; *Nicholl v. American Ins. Co.*, 3 Woodb. & M. (U. S.) 529; *Elliott v. Stocks*, 67 Ala. 336; *McNeill v. Arnold*, 17 Ark. 155; *Neal v. Patten*, 40 Ga.

363; *Rawson v. Curtis*, 19 Ill. 456; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146, 33 Am. Dec. 460; *Downer v. Button*, 26 N. H. 338; *Nicholson v. Mifflin*, 2 Dall. (Pa.) 246, 2 Yeates (Pa.) 38; *Walsh v. Pierce*, 12 Vt. 130.

When, for want of proof of its due execution, a written power of attorney is rejected from the evidence on a trial, parol evidence of the agency to prove that for which it was offered is inadmissible. *Hovey v. Deane*, 13 Me. 31.

Parol Directions to Agent.—When parol directions to the agent are the best evidence to be obtained, they may be introduced to prove the authority conferred upon the agent. *Lunsford v. Smith*, 12 Gratt. (Va.) 554.

Parol directions from the principal to the agent are admissible to prove authority in the purchase of certain articles; and an unsigned writing purporting to have come from the principal, directed to the agent in these words, "Buy me the following articles" (enumerating them), is not such as defines or limits the authority of the agent. *Snow v. Warner*, 10 Met. (Mass.) 132, 43 Am. Dec. 417.

It is Competent in Order to Charge the Principal, to ascertain from evidence *dehors* a written contract made by an agent, who the real principal is. *New York, etc., Steamship Co. v. Harbison*, 16 Fed. Rep. 688.

4. When Fact of Agency Not Directly Involved.—*Reynolds v. Collins*, 78 Ala. 94; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15. Compare *Curtis v. Ingham*, 2 Vt. 287; *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39.

In order to relieve one from liability as a person acting for another without authority, where a bill of exchange purported to have been drawn under a special written authority, other evidence was allowed to establish the agent's authority. *Page v. Lathrop*, 20 Mo. 589.

The principal may also show by parol that an agent was acting for him in a contract made by the agent in his own name. *Barker v. Garvey*, 83 Ill. 184; *King v. Handy*, 2 Ill. App. 212.

But where the witness testified that he was such, and had the authority in his pocket, his oral testimony was properly excluded. *Lee v. Agricultural Ins. Co.*, 79 Iowa 379.

parol acknowledgment of the principal,¹ while others take the opposite view.²

V. DELEGATION—1. Delegation of Authority by Principal—*a*. GENERAL RULE.—Delegation, in the sense assigned to the term at common law, means the act of investing one or more persons with authority to do some act or acts. An authority or power is either original, or it is delegated. Where the authority is original, the general maxim of the common law applies that whatever a person may do of his own right, he may do by another.³

b. **EXCEPTIONS TO THE RULE—(1) *Personal Acts*.**—The rule stated above is subject to certain exceptions, and there are acts of so peculiarly personal a nature that their performance cannot be delegated. Thus, according to the ancient common law, the duty of rendering homage or fealty, or the lord's right of inflicting personal chastisement, with or without cause, upon his villain, could not be performed by an agent.⁴

More modern illustrations of this class of cases are, making a will, or contracting a marriage.⁵

(2) ***Illegal and Immoral Acts*.**—The relation of principal and agent does not appertain to transactions which are illegal, immoral, or opposed to public policy.⁶ Parties to such transactions are both liable as tortfeasors or crimi-

1. *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Weed Sewing Mach. Co. v. Kaulback*, 3 Thomp. & C. (N. Y.) 304. See also the title **EVIDENCE**.

2. *Greenleaf on Evidence* (15th ed.), § 96, and note. See also the title **EVIDENCE**.

3. *Evans on Agency* (Ewell's ed.) 35; *Com. Dig.*, tit. Attorney, C. 1; *Bac. Abridg.*, tit. Authority, A; *Story on Agency* (9th ed.), § 11. See also the provisions of the following codes: *California Civ. Code*, § 2304; *Dakota Code*, § 343; *Georgia Code*, § 2179; *Montana Civ. Code*, § 3080.

4. *Combes' Case*, 9 Coke 76a. Another instance noted in this case is as follows: "That where an infant of the age of fifteen years may make a feoffment, that he cannot do it by attorney, because a custom which enables a person disabled by the law ought to be pursued, and an infant can do nothing to pass anything out of him by attorney. *Vide* 11 H. IV., 33."

5. *Wharton on Agency*, § 21. See also *In re London, etc., Bank*, L. R. 6 Ch. 206; *Osgood v. Nelson*, L. R. 5 H. L. Cas. 636.

Certificates of Acknowledgment of Married Women.—The private examination of a married woman being designed for her protection from the influence of fear or coercion, is in its nature personal, and is therefore not a matter in which she may be represented by another, and, under statutes requiring such examination, acknowledgments made by married women through an attorney in fact have been held void. *Wambole v. Foote*, 2 Dakota 1; *Mott v. Smith*, 16 Cal. 534; *Dawson v. Shirley*, 6 Blackf. (Ind.) 531; *Sumner v. Conant*, 10 Vt. 9; *Holladay v. Daily*, 19 Wall. (U. S.) 606. See also *Hoban v. Campau*, 52 Mich. 346; *Halbert v. Hendrix* (Tex. Civ. App., 1894), 26 S. W. Rep. 911; *Halbert v. Bennett* (Tex. Civ. App., 1894), 26 S. W. Rep. 913. See also the title **ACKNOWLEDGMENTS**, Vol. I., p. 483.

6. *England*.—*Debenham v. Ox*, 1 Ves. 276; *Wymell v. Reed*, 5 T. R. 599.

United States.—*Mcguire v. Corwine*, 101 U. S. 108.

Connecticut.—*Nichols v. Ruggles*, 3 Day (Conn.) 145, 3 Am. Dec. 262; *Bollman v. Loomis*, 41 Conn. 581.

Illinois.—*Skeels v. Phillips*, 54 Ill. 309.

Indiana.—*Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362.

Kentucky.—*McGill v. Burnett*, 7 J. J. Marsh. (Ky.) 640.

Louisiana.—*Faurie v. Morin*, 4 Martin (La.) 39, 6 Am. Dec. 701.

Massachusetts.—*Parsons v. Trask*, 7 Gray (Mass.) 473, 66 Am. Dec. 502.

Michigan.—*Sturgis First Nat. Bank v. Watkins*, 21 Mich. 483; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369.

Missouri.—*Nash v. Murray Mfg. Co.*, 19 Mo. App. 1; *Maguire v. State Sav. Assoc.*, 62 Mo. 344; *Atlee v. Fink*, 75 Mo. 100.

New Hampshire.—*Bixby v. Moor*, 51 N. H. 402.

New York.—*Satterlee v. Jones*, 3 Duer (N. Y.) 102; *Tappan v. Brown*, 9 Wend. (N. Y.) 175; *Devlin v. Brady*, 32 Barb. (N. Y.) 518, affirmed in 36 N. Y. 531.

Pennsylvania.—*Badgley v. Beale*, 3 Watts (Pa.) 263; *Hatzfield v. Gulden*, 7 Watts (Pa.) 152; *Ormerod v. Dearman*, 100 Pa. St. 561, 45 Am. Rep. 391.

See also *Bartle v. Nutt*, 4 Pet. (U. S.) 184, and note; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258; *Watts v. Van Ness*, 1 Hill (N. Y.) 76; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *De Groot v. Van Duzer*, 20 Wend. (N. Y.) 390; *Morse v. Ryan*, 26 Wis. 356.

Lobbyist Agents.—So the relation of principal and agent does not subsist between two persons who contract to procure the passage of a legislative act by sinister means or by the use of personal influence with the members.

United States.—*Usher v. McBratney*, 3 Dill. (U. S.) 385; *Burke v. Child*, 21 Wall. (U. S.) 441; *Weed v. Black*, 2 McArthur (D. C.) 268, 29 Am. Rep. 618.

Alabama.—*Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659.

Indiana.—*Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746.

nals and all contracts thus entered into are null and void.¹

2. Delegation of Authority by Agent—*a*. GENERAL RULE: DELEGATUS NON POTEST DELEGARE.—In general, the power conferred upon an agent is based upon the special confidence or trust which the principal has in the agent's personal ability or integrity, and such power, in the absence of authority express or implied, cannot be redelegated by the agent so as to bind the principal.²

Kansas.—*Kansas Pac. R. Co. v. McCoy*, 8 Kan. 538; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213.

Kentucky.—*Wood v. McCann*, 6 Dana (Ky.) 366.

Louisiana.—*Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767.

Massachusetts.—*Frost v. Belmont*, 6 Allen (Mass.) 152; *Fuller v. Dame*, 18 Pick. (Mass.) 472.

New York.—*Davison v. Seymour*, 1 Bosw. (N. Y.) 88; *Gray v. Hook*, 4 N. Y. 449; *Harris v. Roof*, 10 Barb. (N. Y.) 489; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Monroe Bank v. State*, 26 Hun (N. Y.) 581; *Harris v. Simonson*, 28 Hun (N. Y.) 318; *Brown v. Brown*, 34 Barb. (N. Y.) 533, affirmed in 6 Alb. L. J. 167; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Cary v. Western Union Tel. Co.*, 47 Hun (N. Y.) 610; *McKee v. Cheney*, 52 How. Pr. (N. Y. Supreme Ct.) 144.

Oregon.—*Sweeney v. McLeod*, 15 Oregon 330.

Pennsylvania.—*Cutpinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519.

Vermont.—*Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677.

Wisconsin.—*Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

See also the title **ILLEGAL CONTRACTS**.

Government Contracts.—A contract of agency to procure contracts from the government by improper means is void, as it is opposed to public policy. *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Pease v. Walsh*, 49 How. Pr. (N. Y. Super. Ct.) 269. See also *Hutchen v. Gibson*, 1 Bush (Ky.) 270; *Beal v. Polhemus*, 67 Mich. 130.

See also the titles **PUBLIC POLICY**; **PUBLIC OFFICERS**; and **ILLEGAL CONTRACTS**.

Election Frauds.—So a contract of agency to improperly influence elections is void. *Keating v. Hyde*, 23 Mo. App. 555; *Nichols v. Mudgett*, 32 Vt. 546; *Stout v. Ennis*, 28 Kan. 706.

For a full discussion of this subject see the titles **ELECTIONS**; **BRIBERY**; and **ILLEGAL CONTRACTS**.

Marriage Brokers Contracts.—A contract of agency for promoting a marriage is void because opposed to public policy. *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325; *Johnson v. Hunt*, 81 Ky. 321; *Crawford v. Russell*, 62 Barb. (N. Y.) 92.

For a full discussion of this question see the title **MARRIAGE BROKAGE CONTRACTS**.

Stock Gambling.—A contract of agency to gamble in the price of stocks, securities, or commodities, is illegal. *Cunningham v. Augusta Nat. Bank*, 71 Ga. 400, 51 Am. Rep.

266; *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414.

For a full discussion of this subject see the titles **STOCKS**; **STOCK-BROKERS**; and **ILLEGAL CONTRACTS**.

Suppression or Procurement of Evidence.—Any contract to secure one's services for the suppression of evidence or the improper procurement of evidence is void. *Valentine v. Stewart*, 15 Cal. 387; *Hoyt v. Macon*, 2 Colo. 502; *Patterson v. Donner*, 48 Cal. 369.

For a full discussion of this subject see the title **ILLEGAL CONTRACTS**.

Contracts for Trading with Public Enemy.—Two parties, A and B, were engaged as partners in the cotton trade, one residing in the Federal lines of military occupation, and the other in the Confederate lines, during the Civil War, between whom all trade was interdicted. They engaged the services of one C. to haul it through the lines. The court held that C. could not recover compensation for his services, on the ground that he was employed to carry on illicit traffic expressly prohibited by law. *Williams v. Gay*, 21 La. Ann. 110; *Haney v. Manning*, 21 La. Ann. 166; *Irwin v. Levy*, 24 La. Ann. 302; *Rhodes v. Summerhill*, 4 Heisk. (Tenn.) 204.

For further discussion of this question see the titles **ALIEN**, and **ILLEGAL CONTRACTS**.

Lottery Tickets.—In *Rolfe v. Delmar*, 7 Robt. (N. Y.) 80, it was held that an employment to sell tickets in a foreign lottery was illegal under the *New York* statute, and hence no cause of action could arise out of it. See also *Davis v. Caldwell*, 2 Rob. (La.) 271.

See also the title **LOTTERIES**.

1. *Heugh v. Abergavenny*, 23 W. R. 40.

There can be no such thing as agency in the perpetration of crimes or misdemeanors, or indeed in the doing of any unlawful act; all persons actively participating are principals. *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414.

2. General Rule as to Delegation by Agent—*England*.—*Combes' Case*, 9 Coke 77; *Mason v. Joseph*, 1 Smith 406; *Ess v. Truscott*, 2 M. & W. 385; *Baker v. Cave*, 1 H. & N. 674.

***United States*.**—*Shankland v. Washington*, 5 Pet. (U. S.) 390; *Ex p. Winsor*, 3 Story (U. S.) 411; *Warner v. Martin*, 11 How. (U. S.) 209.

***Alabama*.**—*Waldman v. North British, etc., Ins. Co.*, 91 Ala. 170, 24 Am. St. Rep. 883; citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 368; *Harralson v. Stein*, 50 Ala. 347; *Mound City Mut. L. Ins. Co. v. Huth*, 49 Ala. 530; *Couthway v. Berghaus*, 25 Ala. 393; *Johnson v. Cunningham*, 1 Ala. 249.

***Arkansas*.**—*Weaver v. Carnall*, 35 Ark. 198, 37 Am. Rep. 22.

***California*.**—*McCarty v. Fremont*, 23 Cal.

b. RULE APPLIED TO VARIOUS CLASSES OF AGENTS—(1) *Public Officers*

197; Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Johnson v. Pacific Mail Steamship Co., 5 Cal. 408.

Colorado.—Vescelius v. Martin, 11 Colo. 391.
Illinois.—Ingraham v. Whitmore, 75 Ill. 24; Mason v. Wait, 5 Ill. 127.

Iowa.—Renwick v. Bancroft, 56 Iowa 527; Loomis v. Simpson, 13 Iowa 532; Ruthven v. American F. Ins. Co. (Iowa, 1894), 60 N. W. Rep. 663, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 368.

Kentucky.—Lynn v. Burgoyne, 13 B. Mon. (Ky.) 402.

Louisiana.—Mark v. Bowers, 8 Martin (La.) 50.

Maryland.—Wilson v. York, etc., R. Co., 11 Gill & J. (Md.) 74.

Massachusetts.—Appleton Bank v. McGilvray, 4 Gray (Mass.) 518, 64 Am. Dec. 92.

Mississippi.—Mayer v. McLure, 36 Miss. 390.

Missouri.—Brown v. Railway Pass. Assur. Co., 45 Mo. 221; Stone v. State, 12 Mo. 400; McClure v. Mississippi Valley Ins. Co., 4 Mo. App. 148; Paul v. Edwards, 1 Mo. 30.

Montana.—Underwood v. Birdsell, 6 Mont. 142.

Nebraska.—Furnas v. Frankman, 6 Neb. 429.

New Hampshire.—Wright v. Boynton, 37 N. H. 19, 72 Am. Dec. 319; Moor v. Wilson, 26 N. H. 332; Curry v. Rogers, 21 N. H. 253; Hanson v. Rowe, 26 N. H. 328; Gillis v. Bailey, 21 N. H. 149; Jaffrey v. Mont Vernon, 8 N. H. 436; Andover v. Grafton, 7 N. H. 304.

New Jersey.—Titus v. Cairo, etc., R. Co., 46 N. J. L. 418.

New York.—Daly v. Stetson (Super. Ct.), 10 N. Y. St. Rep. 453, 54 N. Y. Super. Ct. 202; Commercial Bank v. Norton, 1 Hill (N. Y.) 501; Grinnell v. Buchanan, 1 Daly (N. Y.) 538.

North Carolina.—Planters', etc., Nat. Bank v. Wilmington First Nat. Bank, 75 N. Car. 534.

Pennsylvania.—Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716; Mechanics' Bank v. Fisher, 1 Rawle (Pa.) 341.

South Carolina.—Entz v. Mills, 1 McMull. (S. Car.) 453.

Tennessee.—Merchants' Nat. Bank v. Trenholm, 12 Heisk. (Tenn.) 520; Campbell v. Reeves, 3 Head (Tenn.) 226.

Texas.—McCormick v. Bush, 38 Tex. 314; Smith v. Sublett, 28 Tex. 163; Tynan v. Dullnig (Tex. Civ. App., 1894), 25 S. W. Rep. 465.

West Virginia.—Smith v. Lowther, 35 W. Va. 309, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 368.

Wisconsin.—McKinnon v. Vollmar, 75 Wis. 82, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 368.

Authority to Make Promissory Notes.—An agent upon whom is conferred authority to give a note cannot delegate the authority. Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; Brewster v. Hobart, 15 Pick. (Mass.) 302; Blore v. Sutton, 3 Meriv. 237; Henderson v. Barnewall, 1 Y. & J. 387.

So One Authorized to Accept for Accommodation must himself determine the propriety of the act. Commercial Bank v. Norton, 1 Hill (N. Y.) 501.

A Verbal Authority to Sell Land cannot be delegated. Carroll v. Tucker (C. Pl.), 21 N. Y. Supp. 952; Tynan v. Dullnig (Tex. Civ. App., 1894), 25 S. W. Rep. 465, 818.

Nor can an Agent Having Power of Attorney to Sell Real Estate by a similar power delegate that authority to another. Bocock v. Pavey, 8 Ohio St. 270.

Authority to Sell Personalty.—The same rule applies to agents to sell personal property. Atlee v. Fink, 75 Mo. 100, 43 Am. Rep. 385.

And Bailees with power of sale have a non-delegable trust. Hunt v. Douglass, 22 Vt. 128; Barret v. Rhem, 6 Bush (Ky.) 467.

A Keeper of Goods Taken under Attachment, having authority from the sheriff, cannot turn the trust over to another. Connor v. Parker, 114 Mass. 331.

General Superintendent of Building.—In Crozier v. Reins, 4 Ill. App. 564, it was held that a general agent of the owner, having superintendence of a certain building, and clothed with judgment and discretion to employ an engineer, may not delegate this authority to another.

Civil Engineer.—In Wilson v. York, etc., R. Co., 11 Gill & J. (Md.) 74, a civil engineer was selected to make certain measurements, and he attempted to delegate his powers. The court said: "In his skill and integrity, or the person who might succeed him in the responsible station which he occupied, full and implicit confidence might have been reposed, which the plaintiff [his principal] at least might, for valid reasons, be unwilling to repose in a different and subordinate officer; and the execution of the trust by a different person was an assumption of power not warranted, we think, by the express terms of the contract."

California—Agent to Secure Tenant for Ranch.—The case of a person employed to secure a tenant for a ranch does not furnish one of the exceptions laid down in California Civ. Code, § 2349, to the general rule that delegated power may not be redelegated. Fairchild v. King, 102 Cal. 320.

Joint Power of Attorney.—Where a joint power of attorney is given to two or more persons one of them may not delegate to another authority to act for him in the execution of the power. Loeb v. Drakeford, 75 Ala. 454; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699.

Agent to Receive Money.—In Lewis v. Ingersoll, 1 Keyes (N. Y.) 347, it was held that the authority of an agent to receive money is most clearly a personal trust and confidence which cannot be delegated without certain and plain authority. See also Stephens v. Badcock, 3 B. & Ad. 354, 23 E. C. L. 93.

But in Grinnell v. Buchanan, 1 Daly (N. Y.) 538, where A agreed with B that if, within a certain time, the latter should make an arrangement for the tearing down of certain buildings, he would pay him a sum of money,

*in General*¹—Discretionary Powers.—The discretionary powers conferred upon public agents are in the nature of a trust, and unless authorized so to do the persons chosen for their execution cannot delegate them.² The duties, therefore, of judges,³ justices of the peace,⁴ sheriffs,⁵ and clerks of courts,⁶ in so far as they are judicial and official, cannot be delegated.

So Committees or agents authorized by statute to perform discretionary duties must personally execute the authority.⁷

which sum was to be paid as a bonus to the party taking down the buildings, and this arrangement was effected, it was held that the agency of B to receive and pay over the money was not one of personal trust and confidence, and might be delegated. See also *McEwen v. Mazyck*, 3 Rich. (S. Car.) 210; *Yates v. Freckleton*, Doug. 623; *Griffiths v. Williams*, 1 T. R. 710.

1. See the title PUBLIC OFFICERS.

2. Rule as to Delegation by Public Agents.—A *Commissary General* has been denied the right to perform his official duties by a deputy. *State v. Buffalo*, 2 Hill (N. Y.) 434.

Officers of a County elected to supervise an issue of bonds may not delegate their trust. *Jackson County v. Brush*, 77 Ill. 59.

Nor can a *County Commissioner* delegate the power to organize plantations. *State v. Shaw*, 64 Me. 263.

Nor can a *Board of Health*, having power to employ a physician, delegate it to a committee of persons not members of the board. *Young v. Blackhawk County*, 66 Iowa 460.

So a *Board of Charities* cannot by resolution authorize its clerk to commence and carry on all prosecutions of alleged bastardy in the name of the board. *People v. Davis*, 15 Hun (N. Y.) 209.

Board of Supervisors.—In *Maxwell v. Bay City Bridge Co.*, 41 Mich. 454, Cooley, J., said that the statutory authority conferred upon boards of supervisors to regulate the bridging of navigable streams is a trust that must be executed by themselves. In so far as such a board exercises governmental functions, as the imposition of a tax, it cannot delegate its powers. *People v. Rensselaer County*, 52 Hun (N. Y.) 447.

A *Tax List*, however, made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid. *Covington v. Rockingham*, 93 N. Car. 134.

Treasurer.—Where a statute prescribes certain duties to be performed by the treasurer, such duties cannot be discharged by another. *People v. Bank of North America*, 75 N. Y. 547.

A milk inspector cannot authorize another person, in his absence, to take samples of milk from wagons used for its conveyance. *Com. v. Smith*, 143 Mass. 169.

But see *Holland v. State*, 23 Fla. 123.

3. Judges.—*Smith v. Frisbie*, 7 Iowa 486; *Michales v. Hine*, 3 Greene (Iowa) 470; *Wright v. Boon*, 2 Greene (Iowa) 458; *Jacquemine v. State*, 48 Miss. 280; *Bradley Fertilizer Co. v. Taylor*, 112 N. Car. 141; *State v. Jefferson*, 66 N. Car. 309.

The judge cannot delegate to the clerk, to the stenographer, or to any one else the au-

thority to put a written instrument into a bill of exceptions. This is an important delegation of duty, inasmuch as it devolves upon the clerk the duty of determining what part of the record shall go into the bill, as well as the duty of determining what is actually evidence. *Seymour Woollen Factory Co. v. Brodhecker*, 130 Ind. 389.

Nor can a court delegate its judicial functions to its clerk, so that he may set aside a judgment upon the performance of a condition. *Strickland v. Cox*, 102 N. Car. 411.

The Signing of a Bill of Exceptions is so far a judicial act that the judge cannot perform it by an attorney or deputy. *Darling v. Gill, Wright (Ohio)* 73. See also *Pressley v. Lamb*, 105 Ind. 171. See the title JUDGE.

4. Justices of the Peace.—*Entick v. Carrington*, 19 How. St. Tr. 1063.

Writs.—A justice of the peace cannot delegate to his clerk authority to issue writs. *Borrodale v. Leek*, 9 Barb. (N. Y.) 611.

Nor can he leave blanks in writs and confer upon others power to fill them. *People v. Smith*, 20 Johns. (N. Y.) 63; *Kirkwood v. Smith*, 9 Lea (Tenn.) 228; *Ex p. Kellogg*, 6 Vt. 509.

But he may fill up blanks, it seems, or sign by another acting in his presence and under his direction. *Borrodale v. Leek*, 9 Barb. (N. Y.) 611; *People v. Smith*, 20 Johns. (N. Y.) 63; *Achorn v. Matthews*, 38 Me. 173; *Hanson v. Rowe*, 26 N. H. 329. But see *Chapman v. Limerick*, 56 Me. 391, and *Kidder v. Prescott*, 24 N. H. 263.

5. Sheriffs.—*Wilson v. Thorpe*, 6 M & W. 721; *Perkins v. Reed*, 14 Ala. 536; *McGuffie v. State*, 17 Ga. 508.

A Sheriff may Empower an Assistant to certify a copy of a warrant of attachment and make notice thereof, *Gibson v. National Park Bank*, 49 N. Y. Super Ct. 429; or to summon jurors, *McGuffie v. State*, 17 Ga. 508. See also *Allen v. Smith*, 12 N. J. L. 159. See the title SHERIFFS.

6. Clerks of Courts.—*Jackson v. Buchanan*, 89 N. Car. 74.

In the Absence of Statutory Authority a clerk of court cannot delegate to a deputy power to make probate of deeds. *Piland v. Taylor*, 113 N. Car. 1. See *Abrams v. Ervin*, 9 Iowa 87. See the title CLERKS OF COURTS.

7. Committees and Commissioners.—Power given pilot commissioners to examine pilots and grant or refuse licenses is incapable of delegation. *The California*, 1 Sawy. (U. S.) 596.

The same is true of the authority given a committee to make alterations in fish dams, *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; or to a committee to construct and repair canals, *Lyon v. Jerome*, 26 Wend. (N.

Agent Appointed by Court to Sell Property.—The same rule applies to one commissioned by a court to make sale of property. The person authorized to make the sale is invested with a discretion as to the time, place, and manner of sale, which cannot be delegated,¹ and the officer so appointed to sell must himself be present, and superintend and control the transaction.²

(2) **Officers and Agents of Municipal Corporations**³—**Rule Stated.**—The governing board, or other department or agent, of a municipal corporation, having powers calling for the exercise of discretion and judgment, cannot delegate the execution of such powers to other departments or persons.⁴

Hence, a **Common Council**, or other board, to which is intrusted the duty of making public improvements, as the construction, repairing, and grading of streets, or the construction and repairing of sewers, cannot delegate to the superintendent of streets, city engineer, or other person, its authority to determine what improvements are necessary.⁵ And where the city council or board of

Y.) 495, 37 Am. Dec. 271; *Hicks v. Dorn*, 42 N. Y. 50. See also *Wright v. Eldred*, 46 Hun (N. Y.) 12.

1. *Blossom v. Milwaukee, etc.*, R. Co., 3 Wall. (U. S.) 196.

2. *Chambers v. Jones*, 72 Ill. 275; *Meyer v. Patterson*, 28 N. J. Eq. 239; *Meyer v. Bishop*, 27 N. J. Eq. 141; *Noland v. Noland*, 12 Bush (Ky.) 426.

Where a master was taken sick and deputed his authority to sell to a competent agent, who attended and sold the land, the delegation was held improper and the sale invalid. *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154.

3. See, generally, the title MUNICIPAL CORPORATIONS.

4. **Delegation by Officers of Municipalities**—*United States*.—*Clark v. Washington*, 12 Wheat. (U. S.) 41.

California.—*Richardson v. Heydenfeldt*, 46 Cal. 68; *Oakland v. Carpentier*, 13 Cal. 540.

Indiana.—*Indianapolis v. Indianapolis Gas-Light, etc., Co.*, 66 Ind. 396; *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395.

Massachusetts.—*Coffin v. Nantucket*, 5 Cush. (Mass.) 269.

Michigan.—*Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

Missouri.—*St. Louis v. Russell*, 116 Mo. 248.

New Jersey.—*State v. Trenton*, 51 N. J. L. 498.

New York.—*Matter of Immigrant Industrial Sav. Bank*, 75 N. Y. 388.

Ohio.—*State v. Bell*, 34 Ohio St. 194.

Rhode Island.—*State v. Fiske*, 9 R. I. 94.

Tennessee.—*Whyte v. Nashville*, 2 Swan (Tenn.) 364.

Virginia.—*Beal v. Roanoke*, 90 Va. 77.

Wisconsin.—*Lauenstein v. Fond du Lac*, 28 Wis. 336.

See also *In re White*, 43 Minn. 250, 29 Am. & Eng. Corp. Cas. 514; *Bradley v. Rochester*, 54 Hun (N. Y.) 140.

Instances.—Legislative powers conferred upon a municipal corporation cannot be delegated. Such powers are in the nature of public trusts given the legislative assembly of the corporation for the public benefit, and cannot be vicariously exercised. *Matthews v. Alexandria*, 68 Mo. 118, 30 Am. Rep. 776.

Power conferred upon the common council to issue and sell bonds cannot be delegated.

State v. Hauser, 63 Ind. 155. The same is true of the power to regulate tolls, *Lord v. Oconto*, 47 Wis. 386; and of the power to grant licenses, *Brooklyn v. Breslin*, 57 N. Y. 594; *Darling v. St. Paul*, 19 Minn. 389. See also *In re White*, 43 Minn. 250, 29 Am. & Eng. Corp. Cas. 514.

Where the common council is authorized to regulate a calling or business—e.g., the sale of liquors—it cannot delegate its authority. *East St. Louis v. Wehrung*, 50 Ill. 28.

The mayor of Buffalo was not permitted to transfer the duty of approving ordinances to his clerk. *Lyth v. Buffalo*, 48 Hun (N. Y.) 175. And it was held not competent for the Board of Supervisors of San Francisco, by resolution, to delegate its proper functions to the clerk of the board. *Meuser v. Risdon*, 36 Cal. 239. A city engineer may not delegate his discretionary powers. *Sheehan v. Gleeson*, 46 Mo. 100.

But a common council may appoint a committee to procure the necessary furniture for its rooms. *Edwards v. Watertown*, 24 Hun (N. Y.) 426; *Kramrath v. Albany*, 53 Hun (N. Y.) 206. And agents of a town appointed to prosecute a suit, unless restricted, have the power of substitution or delegation so far as to appoint attorneys and employ counsel. *Buckland v. Conway*, 16 Mass. 396.

5. *California*.—*Stockton v. Creanor*, 45 Cal. 643; *Richardson v. Heydenfeldt*, 46 Cal. 68.

Illinois.—*Bryan v. Chicago*, 60 Ill. 507; *McDonnell v. Chicago*, 60 Ill. 350; *Wright v. Chicago*, 60 Ill. 312; *Foss v. Chicago*, 56 Ill. 354.

Kentucky.—*Zable v. Baptist Orphans' Home*, 92 Ky. 89, 13 Ky. L. Rep. 385; *Hydes v. Joyes*, 4 Bush (Ky.) 464, 96 Am. Dec. 311.

Massachusetts.—*Boylston Market Assoc. v. Boston*, 113 Mass. 528.

Missouri.—*Thomson v. Boonville*, 61 Mo. 282; *St. Louis v. Clemens*, 43 Mo. 395; *Rugles v. Collier*, 43 Mo. 355; *King Hill Brick Mfg. Co. v. Hamilton*, 51 Mo. App. 120; *St. Joseph v. Wilshire*, 47 Mo. App. 125.

New Jersey.—*State v. Paterson*, 34 N. J. L. 163.

New York.—*Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385.

Virginia.—*McCrowell v. Bristol*, 89 Va. 652.

aldermen and the mayor have a joint power, the mayor cannot delegate his power to the council or board, and *vice versa*.¹

The Selectmen of a Town are bound to exercise their personal discretion in discharging the duties of their office, and are not permitted to delegate their authority.²

(3) *Officers and Agents of Private Corporations*.—General Rule.—These officials are selected by the stockholders in order that the corporation may have the benefit of their wisdom and integrity; their discretionary duties, therefore, are personal and nondelegable.⁴

Calls—Dividends—Purchase of Stock—Appointment and Removal of Agents.—Thus power to make calls and assessments,⁵ to declare dividends,⁶ to purchase stock,⁷ and to appoint and remove agents⁸ is incapable of delegation.

The Same Rule Applies to Liquidators of a company, who cannot authorize one of their number to accept bills.⁹

Conveyance of Real Estate.—But a committee or agent may be appointed to convey real estate belonging to the corporation.¹⁰

(4) *Arbitrators*.¹¹—Rule Stated.—The general principle, *Delegatus non potest delegare*, is peculiarly applicable to arbitrators. They can neither delegate their trust to others,¹² nor leave a part of the matter in controversy to the

A city council cannot appoint a committee of its number to determine the location of street lights. *Gulf, etc., R. Co. v. Riordan* (Tex. Civ. App., 1893), 22 S. W. Rep. 519.

But see the case of *Hitchcock v. Galveston*, 96 U. S. 341, where it is held by a divided court that a city council, empowered "to establish, direct, construct, regulate, and keep in repair bridges, culverts, and sewers, sidewalks and cross-ways," after determining upon the materials and the manner in which the work should be done, might appoint another to make a contract according to the terms laid down by the council.

1. *Day v. Green*, 4 Cush. (Mass.) 433; *Thomson v. Boonville*, 61 Mo. 282.

2. *Jaffrey v. Mont Vernon*, 8 N. H. 436; *Andover v. Grafton*, 7 N. H. 298.

But there are cases in which one selectman may act and bind the town, with the assent of the others; and in some cases the assent of the others may be presumed. *Lee v. Deerfield*, 3 N. H. 290; *Windsor v. China*, 4 Me. 298.

3. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

4. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 226, 37 Am. Dec. 203; *Gillis v. Bailey*, 21 N. H. 150; *Tippets v. Walker*, 4 Mass. 596; *Davis v. Flagstaff Silver Min. Co.*, 2 Utah 74.

Allotment of Shares.—Directors cannot substitute others in their place to allot shares. *In re Leeds Banking Co.*, L. R. 1 Ch. 561.

Receiving Subscriptions.—In *Crocker v. Crane*, 21 Wend. (N. Y.) 211, it was held that commissioners to open books and receive subscriptions to stock must act personally. But in *Lohman v. New York, etc., R. Co.*, 2 Sandf. (N. Y.) 39, where the directors substituted others to receive subscriptions to the capital stock, the substitution was said to be valid. See also *Curtis v. Leavitt*, 15 N. Y. 190.

Vestrymen of a Church may empower a committee of three of their number to borrow

money and give notes therefor. *Johnson v. Smith*, 21 Conn. 632.

5. *Power to Make Calls and Assessments*.—*Exp. Winsor*, 3 Story (U. S.) 411; *Silver Hook Road v. Greene*, 12 R. I. 164; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341.

See *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545, where the court said the directors could "authorize the president to make such call on the stock subscribed as may be necessary for carrying on suits of the company, and do such other acts as, in his judgment, are for the interest of the company."

Sale of Shares.—In *York, etc., R. Co. v. Ritchie*, 40 Me. 425, the statute authorized, upon failure of the shareholders to pay assessments, a sale of the shares at auction, under an order from the board of directors to the treasurer. A sale made by the treasurer under the authority of a committee appointed by the directors was adjudged void, as the directors could not thus delegate their authority.

6. *Power to Declare Dividends*.—*Gratz v. Redd*, 4 B. Mon. (Ky.) 186.

7. *Power to Purchase Stock*.—*In re County Palatine Loan, etc., Co.*, L. R. 9 Ch. 691.

8. *Power to Appoint and Remove Agents*.—*Flagstaff Silver Min. Co. v. Patrick*, 2 Utah 306.

9. *In re London, etc., Bank*, L. R. 3 Ch. 651. But see *Shaw v. Stone*, 1 Cush. (Mass.) 228.

10. *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163, 35 Am. Dec. 395; *New Haven Sav. Bank v. Davis*, 8 Conn. 193.

11. See the title ARBITRATION AND AWARD.

12. *Haigh v. Haigh*, 31 L. J. Ch. 420, 8 Jur. N. S. 983; *Eastern Counties R. Co. v. Eastern Union R. Co.*, 3 De G., J. & S. 610; *Proctor v. Williams*, 8 C. B. N. S. 386, 98 E. C. L. 386; *Whitmore v. Smith*, 5 H. & N. 824; *Lingood v. Eade*, 2 Atk. 501; *Haven v. Winnisimmet*, 11 Allen (Mass.) 377, 87 Am. Dec. 723.

Award "Subject to the Opinion" of Another.—An arbitrator improperly delegates his

determination of others.¹ Nor can they elect others to act with them.²

Scientific and Technical Matters.—If, however, scientific or technical questions arise, they may properly consult persons of skill and experience, and may adopt the report of such persons to enable them to correctly decide the dispute.³ So when the duties of their office require the performance of ministerial or mechanical acts, as for example the taking of measurements or the examination of accounts, they may transfer the performance of such acts to others.⁴

(5) **Personal Representatives and Trustees**⁵—**General Rule.**—The office of personal representative and trustee is in a high degree personal, and must be executed according to the discretion of the persons authorized. This being the case, such delegates cannot appoint others to act for them.⁶

Joint Trustees.—And where two trustees or personal representatives have joint power, one cannot delegate his power to the other, so as to enable that other to act alone.⁷

Where there is No Element of Trust.—But where the power conferred has in it no element of trust and confidence it may be transferred.⁸

authority when he makes his award "subject to the opinion" of another. *Ellison v. Bray*, 9 L. T. 730.

Where Power is Given to Three Arbitrators, or any two of them, two of such arbitrators cannot transfer their power to the third. *Little v. Newton*, 2 M. & G. 351, 40 E. C. L. 407.

1. **Delegating Part of Matter Submitted.**—*Whitmore v. Smith*, 5 H. & N. 824; *Johnson v. Latham*, 1 L. M. & P. 348, 19 L. J. Q. B. 329; *Tomlin v. Fordwich*, 6 N. & M. 594, 5 Ad. & El. 147, 31 E. C. L. 304.

Instances.—An umpire directed that the parties should execute mutual releases, and that in case of dispute the form of release should be settled by another. The delegation was held to be void. *In re Goddard*, 1 L. M. & P. 25, 19 L. J. Q. B. 305. See *In re Tandy*, 9 D. P. C. 1044, 5 Jur. 726.

But if, after agreeing to be bound by the decision of another on a disputed point, the agreement is not regarded, their award will be good. *Haff v. Blossom*, 5 Bosw. (N. Y.) 559.

If the parties, pending a reference, by an agreement to which the arbitrator assents, stipulate that a certain part of an account in dispute shall be adjusted by a third person, whose finding shall be adopted by the arbitrator as conclusive evidence, and the arbitration is so conducted, there is no wrongful delegation of authority by the arbitrator. *Sharp v. Nowell*, 6 C. B. 253, 60 E. C. L. 253.

2. **Calling in Others to Act with Them.**—*Lingood v. Eade*, 2 Atk. 501; *In re Hare*, 8 Scott 267.

Illustrations.—A lay arbitrator cannot appoint an attorney-at-law to aid him throughout the arbitration and to be present for the purpose of regulating the conduct of the hearing. *Proctor v. Williams*, 8 C. B. N. S. 386, 98 E. C. L. 386.

Nor can an arbitrator employ the attorney of one of the parties to the reference to aid him in framing the award. *In re Underwood*, 11 C. B. N. S. 442, 103 E. C. L. 442, 31 L. J. C. P. 10, 5 L. T. 581, 10 W. R. 106.

He may draw the award, however, by the person who under the terms of the submission attended him as attorney. *Baker v. Cotterill*, 7 D. & L. 20, 18 L. J. Q. B. 345, 14 Jur. 1120.

Where two arbitrators were to sit, and in case of disagreement had power to call in a third person as umpire, it was held that upon disagreeing they could not call in such third person to act with them as an arbitrator. *Lyon v. Blossom*, 4 Duer (N. Y.) 319.

3. **Receiving Advice upon Scientific and Technical Questions.**—*Gray v. Wilson*, L. R. 1 C. P. 50, 35 L. J. C. P. 123, 14 W. R. 584; *Soulsby v. Hodgson*, 3 Burr. 1474; *Eads v. Williams*, 4 De G. M. & G. 674; *Whitmore v. Smith*, 7 H. & N. 509; *Anderson v. Wallace*, 3 Cl. & F. 26; *Caledonian R. Co. v. Lockhart*, 3 Macq. H. L. Cas. 808; *Emery v. Wase*, 8 Ves. Jr. 505.

4. **Ministerial Duties.**—*Thorp v. Cole*, 2 C. M. & R. 367; *Moore v. Barnett*, 17 Ind. 349. See also *Harvey v. Shelton*, 7 Beav. 455.

5. See the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; MORTGAGES; POWERS; RECEIVERS; TRUST DEEDS AND POWER OF SALE MORTGAGES; TRUSTS AND TRUSTEES.

6. *England.*—*Alexander v. Alexander*, 2 Ves. Sr. 643; *Atty.-Gen. v. Scott*, 1 Ves. 417; *Cole v. Wade*, 16 Ves. Jr. 27.

United States.—*Pearson v. Jamison*, 1 McLean (U. S.) 197.

California.—*Saunders v. Webber*, 39 Cal. 287.

Georgia.—*Neal v. Patten*, 47 Ga. 73.

New York.—*Hawley v. James*, 5 Paige (N. Y.) 318; *Suarez v. Pumpelly*, 2 Sandf. Ch. (N. Y.) 336; *Merrill v. Farmers' L. & T. Co.*, 24 Hun (N. Y.) 300; *Whitney v. Martine*, 6 Abb. N. Cas. (N. Y. Super. Ct.) 72.

Texas.—*McCormick v. Bush*, 38 Tex. 314.

Compare *Hutchins v. State Bank*, 12 Met. (Mass.) 421.

7. *Floyd v. Johnson*, 2 Litt. (Ky.) 109, 13 Am. Dec. 255; *Berger v. Duff*, 4 Johns Ch. (N. Y.) 369; *Williams v. Mattocks*, 3 Vt. 189.

8. *Crooke v. Kings County*, 97 N. Y. 421.

(6) *Attorneys at Law*.¹—It follows from the idea of personal confidence reposed in an attorney, retained to manage and argue a cause, that he must personally perform the duty, and may not transfer it to another without the express assent of his client.² But it would seem that the retainer of one member of a firm, unless otherwise stipulated, is a retainer of all, and in such case the duties may be performed by any of them.³

(7) *Factors and Brokers*.⁴—As a factor or broker is employed by reason of his superior knowledge and skill in his special business, he may not delegate his authority, unless expressly or impliedly authorized to employ subagents.⁵

c. QUALIFICATIONS OF GENERAL RULE—(1) *Ministerial, Executive, or Mechanical Duties*—General Rule.—When an agent is engaged to perform acts of a purely ministerial or mechanical character, or acts which do not call for the exercise of judgment, discretion, or skill, in respect to acts other than such as are ministerial, he may authorize another to perform them.⁶

Accommodation Acceptances.—Thus, an agent authorized to bind his principal by accommodation acceptances may direct another to write them, having himself first made up his mind as to the propriety of the act.⁷

1. See, generally, the title ATTORNEY AND CLIENT.

2. *Alabama*.—King v. Pope, 28 Ala. 601; Hitchcock v. M'Gehee, 7 Port. (Ala.) 556; Johnson v. Cunningham, 1 Ala. 249.

Arkansas.—Danley v. Crawl, 28 Ark. 95; Kellogg v. Norris, 10 Ark. 18.

Michigan.—Engle v. Chipman, 51 Mich. 524; Eggleston v. Boardman, 37 Mich. 14.

Mississippi.—Dickson v. Wright, 52 Miss. 588.

New York.—Buckley v. Buckley (Supreme Ct.), 18 N. Y. Supp. 607.

Texas.—Ratcliff v. Baird, 14 Tex. 43.

West Virginia.—Ellis v. Heptinstall, 8 W. Va. 388.

Compare Smith v. Lipscomb, 13 Tex. 533; Fenno v. English, 22 Ark. 170; Planters' Bank v. Massey, 2 Heisk. (Tenn.) 362.

3. Eggleston v. Boardman, 37 Mich. 14; Smith v. Hill, 13 Ark. 173.

4. See the titles COMMISSION MERCHANTS OR FACTORS; BROKERS; AUCTIONS AND AUCTIONEERS.

5. Cockran v. Irlam, 2 M. & S. 301; Solly v. Rathbone, 2 M. & S. 298; Catlin v. Bell, 4 Campb. 183; Henderson v. Barnewall, 1 Y. & J. 387; Jackson v. Clarke, 1 Y. & J. 216; Schmalzing v. Tomlinson, 6 Taunt. 147; Loomis v. Simpson, 13 Iowa 532; Mark v. Bowers, 8 Martin (La.) 50; Toland v. Murray, 18 Johns. (N. Y.) 24; Campbell v. Reeves, 3 Head (Tenn.) 226.

In Warner v. Martin, 11 How. (U. S.) 223, the court said: "The utmost relaxation of the rule, *Potestas delegata non potest delegari*, in respect to mercantile persons is, that a consignee or agent for the sale of merchandise may employ a broker for the purpose when such is the usual course of business. True-man v. Loder, 11 Ad. & El. 589, 39 E. C. L. 173. Or where the usual course of the management of the principal's concerns in the employment of a subagent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the agent himself. Blore v. Sutton, 3 Meriv. 237; Combes' Case, 4 Coke 77; * * *

Palliser v. Ord, Bunb. 166. Lord Eldon, in Coles v. Trecothick, 9 Ves. Jr. 236, repudiates the notion that if an auctioneer is authorized to sell, all his clerks are, during his absence, in consequence of any such usage in that business."

6. *England*.—Johnson v. Osenton, L. R. 4 Exch. 107; Burial Board v. Thompson, L. R. 6 C. P. 445; Baker v. Cave, 1 H. & N. 674; Parker v. Kett, 1 Ld. Raym. 658; Coles v. Trecothick, 9 Ves. Jr. 237.

United States.—Pearson v. Jamison, 1 McLean (U. S.) 197.

Alabama.—Drum v. Harrison, 83 Ala. 384.

Illinois.—Eldridge v. Holway, 18 Ill. 445.

Kentucky.—Page v. Hardin, 8 B. Mon. (Ky.) 662.

Maine.—Achorn v. Matthews, 38 Me. 173.

Maryland.—Williams v. Woods, 16 Md. 220.

Michigan.—Star Line v. Van Vliet, 43 Mich. 364.

New Hampshire.—Hanson v. Rowe, 26 N. H. 327.

New Jersey.—Titus v. Cairo, etc., R. Co., 46 N. J. L. 393.

New York.—Covell v. Hart, 14 Hun (N. Y.) 252; Grinnell v. Buchanan, 1 Daly (N. Y.) 538; People v. Smith, 20 Johns. (N. Y.) 63; Gibson v. National Park Bank, 98 N. Y. 87; People v. Bank of North America, 75 N. Y. 547.

Vermont.—Newell v. Smith, 49 Vt. 255.

Wisconsin.—Chase v. Ostrom, 50 Wis. 640.

7. Commercial Bank v. Norton, 1 Hill (N. Y.) 501. See also *Ex p.* Sutton, 2 Cox Ch. 84; Lord v. Hall, 2 C. & K. 698, 61 E. C. L. 698.

A General Freight Agent may authorize others to sign bills of lading in his name. Bennitt v. The Guiding Star, 53 Fed. Rep. 936. But in Pendall v. Rench, 4 McLean (U. S.) 260, the court held that an agency to make contracts for transportation was one of special trust and confidence, and could not be discharged by a substitute; and where the agent swore that he made the contracts for transportation, and adopted the signatures of his confidential clerk to the bills of lading, the court permitted the bills to go to

Bills of Exchange—Subscription Paper—Insurance.—The same principle is applicable in case of agents empowered to execute bills of exchange,¹ to sign subscription papers,² to sign insurance policies,³ to contract for risks, to deliver policies and renewals, to collect premiums and to give security therefor.⁴

Sales of Land.—And an agent authorized by the owners to sell lands may, having exercised his own discretion as to price and terms, after an examination of the property, delegate to his subagent authority to find a purchaser,⁵ or to point out the land to intending purchasers.⁶

Auctioneer.—An auctioneer may employ another person to use the hammer and make the outcry under his immediate direction and supervision, but he may not delegate his power to sell.⁷

(2) **Authority to Redelegate Implied**—(a) **Usage of Trade.**—Another exception to the general principle that an agent may not delegate his authority is found in those cases where he is allowed to do so by virtue of a lawful usage or custom.⁸

Merchandise Broker.—When, therefore, it is according to the course of trade for a merchandise broker to employ another to sell goods consigned to himself, the maxim *Delegatus non potest delegare* is relaxed to the extent of the usage.⁹ And such an agent may send goods consigned to him to another to be taken care of.¹⁰

A **Stockbroker** may act through a subagent where the purchase or sale is to be made in a distant city.¹¹

Banks.—Where the holder of a note payable at a distant point deposits it with a local bank for collection, he thereby assents to the course of banks to collect through the instrumentality of correspondents.¹²

Departure from Express Directions Not Justified.—But a custom or usage of trade will not justify the agent in departing from the express directions of his principal, or in changing the intrinsic character of the contract.¹³

(b) **Necessity—General Rule.**—It is a general principle that an agent's authority is

the jury, not as bills of lading, but as part of the deposition of the agent, showing the contract for the transportation. See also *Blore v. Sutton*, 3 Meriv. 237; *Henderson v. Barnewall*, 1 Y. & J. 387.

1. *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252.

2. *Norwich University v. Denny*, 47 Vt. 13.

3. *Grady v. American Cent. Ins. Co.*, 60 Mo. 120.

4. *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566. See also *Eclectic L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463.

5. *Renwick v. Bancroft*, 56 Iowa 527. But see *Bannard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443.

6. *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178.

7. *Com. v. Harnden*, 19 Pick. (Mass.) 482; *Poree v. Bonneval*, 6 La. Ann. 386. See, generally, the title AUCTIONS AND AUCTIONEERS.

8. *Combes' Case*, 9 Coke 75; *Blore v. Sutton*, 3 Meriv. 237; *Moon v. Whitney Union*, 3 Bing. N. Cas. 814, 32 E. C. L. 336; *Warner v. Martin*, 11 How. (U. S.) 220; *Wilson v. Smith*, 3 How. (U. S.) 763; *Harralson v. Stein*, 50 Ala. 347; *Mayer v. McLure*, 36 Miss. 390; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Northern Cent. R. Co. v. Bastian*, 15 Md. 494; *Newson v. Douglass*, 7

Har. & J. (Md.) 418, 16 Am. Dec. 317; *Lamson v. Sims*, 48 N. Y. Super. Ct. 281; *Planters', etc., Nat. Bank v. Wilmington First Nat. Bank*, 75 N. Car. 534; *Smith v. Sublett*, 28 Tex. 163. See *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296. See also the title USAGES AND CUSTOMS.

9. *Trueman v. Loder*, 11 Ad. & El. 589, 39 E. C. L. 178; *Warner v. Martin*, 11 How. (U. S.) 220; *Johnson v. Cunningham*, 1 Ala. 249; *Wallace v. Bradshaw*, 6 Dana (Ky.) 383; *Laussatt v. Lippincott*, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440; *Jackson v. Union Bank*, 6 Har. & J. (Md.) 146; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Bilsborrow v. James*, 25 Hun (N. Y.) 18; *Patterson v. Keys*, 1 Cin. Sup. Ct. Rep. 94; *Strong v. Stewart*, 9 Heisk. (Tenn.) 147; *Nugent v. Martin*, 1 Tex. App. Civ. Cas. § 1175. Compare *Grieff v. Cowguill*, 2 Disney (Ohio) 61.

10. *Ledoux v. Goza*, 4 La. Ann. 160.

11. *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Allen v. McConihe*, 124 N. Y. 342; *Booth v. Fielding*, 1 W. R. 245; *Gheen v. Johnson*, 90 Pa. St. 38. And see the title STOCKBROKERS.

12. See *infra*, this title, *Authority to Redelegate Implied—Necessity*. Also the title BANKS AND BANKING.

13. *Robinson v. Mollett*, L. R. 7 Eng. & Ir. App. 802, 44 L. J. C. P. 362; *Evans on Agency* (Ewell's ed.) *43. And see the title USAGES AND CUSTOMS.

construed to embrace all the means usual and necessary for its proper execution.¹ Accordingly, whenever the agent can show that the instructions of his principal could not have been properly executed without the employment of deputies, he will be warranted in delegating so much of his authority as the character of the agency demands.²

Banks.—Where a draft, payable at a distant place, is left with a bank for collection, it must be presumed that it is intended to be transmitted to a sub-agent at the place where it is payable, and not that the bank is to employ its own officers to proceed there for the purpose of obtaining payment.³ And a bank may place a note in the hands of a notary for demand and protest.⁴

Master of Vessel.—Where the master of a vessel carried merchandise to a distant port, with instructions to dispose of it to the best advantage, and was unable to find a purchaser, he was held to be justified in leaving it in the care of a responsible merchant, to be sold for the owner.⁵

Agent to Charter Ship.—An agent appointed to charter a ship may avail himself of the services of a ship broker.⁶

(c) **Nature of Agency.**—When, at the time of the appointment of an agent, the principal knows, or should know, that from the nature of the duties and powers of the agency it may be necessary for the agent to avail himself of the services of subagents, authority to that effect will be implied.⁷

3. Subagents⁸—*a. DEFINITION.*—When an agent employs a person as his agent, to assist him in transacting the affairs of his principal, the person so employed is called a subagent.⁹ The term is indifferently applied where a privity exists between such person and the principal, and where it does not exist.

b. RESPONSIBILITY OF PRINCIPAL FOR ACTS OF SUBAGENT—General Rule.—The principal is liable for the negligence of his agent's assistant whenever he has either expressly or impliedly authorized the employment of the assistant, and the assent of the principal to the employment of the assistant may be implied from slight circumstances.¹⁰

1. *Howard v. Baillie*, 2 H. Bl. 618; *Evans on Agency* (Ewell's ed.) *44. See *infra*, this title, *Nature and Extent of Authority*.

2. *Rossiter v. Trafalgar L. Assur. Assoc.*, 27 Beav. 377; *Quebec, etc., R. Co. v. Quinn*, 12 Moo. P. C. C. 233; *Johnson v. Cunningham*, 1 Ala. 249; *Fearn v. Mayers*, 53 Miss. 459; *Gillis v. Bailey*, 21 N. H. 150; *Wright v. Eldred*, 46 Hun (N. Y.) 12; *Planters', etc., Nat. Bank v. Wilmington First Nat. Bank*, 75 N. Car. 534; *M'Veagh v. Douglass*, 4 Phila. (Pa.) 69; *McCants v. Wells*, 4 S. Car. 381; *Saveland v. Green*, 40 Wis. 431; *Phelps v. Shrader*, 14 Am. L. Rev. 799.

3. *Washington Bank v. Triplett*, 1 Pet. (U. S.) 25; *Wilson v. Smith*, 3 How. (U. S.) 763; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Guelich v. National State Bank*, 56 Iowa 434, 41 Am. Rep. 110; *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87; *Jackson v. Union Bank*, 6 Har. & J. (Md.) 146; *Dorchester, etc., Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330, 34 Am. Dec. 59; *Planters', etc., Nat. Bank v. Wilmington First Nat. Bank*, 75 N. Car. 534. But see *Allen v. Merchants' Bank*, 15 Wend. (N. Y.) 482; and see, generally, the title **BANKS AND BANKING**.

4. *Britton v. Nicolls*, 104 U. S. 757; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.)

582; *Bowling v. Arthur*, 34 Miss. 41; *Smedes v. Utica Bank*, 20 Johns. (N. Y.) 372; *Utica Bank v. Smith*, 18 Johns. (N. Y.) 230; *Belle-mire v. U. S. Bank*, 4 Whart. (Pa.) 105, 33 Am. Dec. 46; *Bank v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94; *Stacy v. Dane County Bank*, 12 Wis. 629; *Baldwin v. Louisiana Bank*, 1 La. Ann. 13, 45 Am. Dec. 72; *Agricultural Bank v. Commercial Bank*, 7 Smed. & M. (Miss.) 592. See *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 83.

5. *Day v. Noble*, 2 Pick. (Mass.) 615, 13 Am. Dec. 463; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621. See also *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167.

6. *Saveland v. Green*, 40 Wis. 431.

See the title **CHARTER-PARTY**.

7. *Wilson v. Smith*, 3 How. (U. S.) 763; *Gunn v. Equitable Trust Co.*, 1 McCrary (U. S.) 61; *Johnson v. Cunningham*, 1 Ala. 249; *Krumm v. Jefferson F. Ins. Co.*, 40 Ohio St. 229; *Planters', etc., Nat. Bank v. Wilmington First Nat. Bank*, 75 N. Car. 534.

8. For full discussion of the question of effect of notice to subagent upon principal, see *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Principal to Third Parties*. For a full discussion of the question of revocation of authority of sub-agent, see *infra*, this title, *Termination*.

9. *Sweet's Law Dict.*

10. *Acts of Subagent Binding upon the Principal*.—*Coles v. Trecothick*, 9 Ves. Jr. 234;

Authority to Appoint Implied from Nature of Agency.—Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ subagents, and, when this is the case, the principal is bound by the acts of the subagent.¹

Agent of Independent Contractor.—The principal, however, is not responsible for the acts of an agent of an independent contractor.²

c. RESPONSIBILITY OF AGENT FOR ACTS OF SUBAGENT—General Rule.—Where an agent has authority to employ subagents, he will not be liable for their acts or omissions unless in their appointment he is guilty of fraud or gross negligence, or improperly co-operates in the acts or omissions.³

Bath v. Caton, 37 Mich. 199; *Haluptzok v. Great Northern R. Co.*, 55 Minn. 446; *Furnas v. Frankman*, 6 Neb. 429; *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Bates v. American Mortg. Co.*, 37 S. Car. 88. See also *American Underwriter's Assoc. v. George*, 97 Pa. St. 238; *Smith v. Wilson*, 1 Tex. Civ. App. 115; *Landon v. Proctor*, 39 Vt. 78; *O'Conner v. Arnold*, 53 Ind. 203; *Cronkite v. Wells*, 32 N. Y. 247; *Hilton v. Newman*, 6 Mo. App. 304.

Where an attorney is appointed with power of substitution, the substitute is the agent of the principal, provided the instructions of the principal are complied with in the appointment of the substitute. *Peries v. Aycinena*, 3 W. & S. (Pa.) 64; *Buckland v. Conway*, 16 Mass. 396. See also *Foster v. Preston*, 8 Cow. (N. Y.) 198.

1. Authority to Appoint Subagent Implied.—*Gum v. Equitable Trust Co.*, 1 McCrary (U. S.) 51; *Grace v. American Cent. Ins. Co.*, 16 Blatchf. (U. S.) 433; *California Bank v. Western Union Tel. Co.*, 52 Cal. 280. See also *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 64 Am. Dec. 92.

An Agent for the Sale of Land has a right to appoint a subagent to point out the land, and the acts of the subagent in pointing out the wrong land are binding on the principal, even though they were done by an employee of the subagent. *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178; *Renwick v. Bancroft*, 56 Iowa 527. See also *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Morgenstern v. Hill* (Buffalo Super. Ct.), 28 N. Y. Supp. 704, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 395.

Where a Broker is Employed to Dispose of a Note, and employs an agent to sell it for him, such agent becomes the subagent of the principal, and his fraudulent representations in negotiating the sale of the note are binding on the principal. *Elwell v. Chamberlain*, 2 Bosw. (N. Y.) 230. See also *Mayer v. McLure*, 36 Miss. 389.

Insurance Agents.—Although an insurance agent cannot delegate his authority to another, or sublet it, he may employ clerks and subagents, whose acts, if done in his name and recognized by him, either specially or according to his usual method of dealing with them, will be regarded as his acts, and, as such, binding on the principal. *Lingenfeiter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116.

2. Agents of Independent Contractors.—In *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, Mullett, J., said: "When a man is employed in doing a job or piece of work with his own means and his own men, and employs others to help him or to execute the work for him and under his control, he is the superior who is responsible for their conduct, no matter whom he is doing the work for. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondere superior* beyond the reason on which it is founded." See also *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432; *Cunningham v. International R. Co.*, 51 Tex. 503, 32 Am. Rep. 632; *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743; *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Linton v. Smith*, 8 Gray (Mass.) 147.

For a full discussion of this subject see the title MASTER AND SERVANT.

3. Liability of Agent.—*Stone v. Cartwright*, 6 T. R. 411; *Kentucky Bank v. Adams Express Co.*, 93 U. S. 174; *Loomis v. Simpson*, 13 Iowa 532; *Ledoux v. Goza*, 4 La. Ann. 160; *Joor v. Sullivan*, 5 La. Ann. 177; *Williamsburg City F. Ins. Co. v. Frothingham*, 122 Mass. 391; *Bath v. Caton*, 37 Mich. 199; *Hilton v. Newman*, 6 Mo. App. 304; *National Steamship Co. v. Sheahan*, 122 N. Y. 461; *Johnson v. Memphis*, 9 Lea (Tenn.) 125; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Brown v. Lent*, 20 Vt. 529. See also *Foster v. Preston*, 8 Cow. (N. Y.) 198; *Watson v. Muirhead*, 57 Pa. St. 161, 98 Am. Dec. 213.

For a discussion of the liability of banks as collecting agents see the title BANKS AND BANKING.

Employment of Commission Merchants.—Where it is customary for an agent to whom goods are consigned to employ a commission merchant to dispose of them, the agent will not be responsible for the failure of the commission merchant to account for the goods provided he uses reasonable care in the selection of the merchant. *Davis v. Languier*, 2 La. Ann. 326; *Bailey v. Baldwin*, 8 Martin N. S. (La.) 115; *Whitlock v. Hicks*, 75 Ill. 460; *Maxwell v. Evans*, 2 Bibb (Ky.) 399; *McCants v. Wells*, 4 S. Car. 381.

But where an agent mingles goods of his principal with those of others, and consigns them to another party to be disposed of, he will be liable upon the failure of the latter to account for the full value of the goods. *Williams v. White*, 70 Me. 138.

Appointment by Principal.—Nor will an agent be responsible for the defaults of subagents employed by the principal and placed under his control, unless the default is committed with his knowledge.¹

Necessity or Emergency.—The same rule will apply where the employment, although not so authorized, arises from unforeseen exigencies or emergencies, imposing upon the agent the necessity of employing subagents.²

No Authority to Appoint.—But where an agent has no authority, express or implied, to appoint a subagent, he will be responsible to his principal for the acts of a subagent appointed by him.³

Public Officers Not Liable.—It is a well-settled doctrine that public officers and agents are not responsible for the misfeasances, negligences, or omissions of

Employment of Broker.—Where it is customary for a commission merchant to employ a broker to make purchases for him, the commission merchant will not be liable for any damage which may result to his principal from the negligence of the broker, provided he employs a broker of experience and good reputation. *Darling v. Stanwood*, 14 Allen (Mass.) 504.

A consignee of goods is liable to the consignor for the value of the goods placed by him in the hands of a broker for sale, where the consignee takes the broker's note for the amount of the sales without the assent of the consignor. *Amory v. Hamilton*, 17 Mass. 103.

Masters of Ships—Exception to Rule.—An important exception to the rule that agents are not responsible for the misconduct of subagents is found in the case of masters of ships, and is founded upon the principles of maritime law. They are liable for the negligence and misfeasance of those employed under them, in navigating a vessel, whether such subagents are appointed by themselves or the owners of the vessel. *Story on Agency* (9th ed.), §§ 314-316; *Denison v. Seymour*, 9 Wend. (N. Y.) 9; *Sherlock v. Alling*, 93 U. S. 99. See also *Foot v. Wiswall*, 14 Johns. (N. Y.) 304; *Snell v. Rich*, 1 Johns. (N. Y.) 305; *Yates v. Brown*, 8 Pick. (Mass.) 23; *Nicholson v. Mounsey*, 15 East 384.

For a full discussion of this subject see the title **MASTERS OF SHIPS**.

1. Subagents Employed by Principal.—*Robinson v. Illinois Cent. R. Co.*, 30 Iowa 401; *Bath v. Caton*, 37 Mich. 199; *Louisville, etc., R. Co. v. Blair*, 4 Baxt. (Tenn.) 407; *Brown v. Lent*, 20 Vt. 529.

Where a university professor, in charge of a laboratory fund, had an assistant, appointed by the trustees of the university, and both were authorized to receive fees from the students, it was held that the professor was not responsible for a deficit in the funds collected by his assistant, but that the assistant was himself responsible. *Michigan University v. Rose*, 45 Mich. 284.

2. Authority for Appointment of Subagent Implied from Necessity.—*Story on Agency* (9th ed.), § 201; *Bromley v. Coxwell*, 2 B. & P. 438; *Goswill v. Dunkley*, 1 Stra. 680; *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87. See also *Catlin v. Bell*, 4 Campb. 183.

3. Agents—When Liable.—*St. Louis, etc.,*

R. Co. v. Smith, 48 Ark. 317; *Cleaves v. Stockwell*, 33 Me. 341; *Lindsay v. Singer Mfg. Co.*, 4 Mo. App. 570.

If an agent undertakes to do the work of his principal, and employs a subagent to assist him on his own account, he is answerable to the principal for the wrongdoing of the subagent, although the principal has knowledge of the fact of the employment of the subagent. *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443. See also *Campbell v. Reeves*, 3 Head (Tenn.) 226.

It was held in *Mark v. Bowers*, 4 Martin N. S. (La.) 95, that where goods are shipped to commission merchants, and, before they were disposed of, the firm dissolves, and turns over the goods to a third person for sale, without the order of the principal, the firm is responsible.

Where a principal gave to his agent a promissory note to be discounted, with instructions not to let it go out of his hands without receiving the proceeds, and the agent delivered the note to a third person, directing him to discount it and return the money to him, upon the appropriation by the subagent of the money received in discounting the note it was held that the agent was liable for the conversion of the note. *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184.

Where booksellers undertook to manage the sale of a library, prepare catalogues, employ auctioneers, etc., they were held responsible for the acts of such auctioneers, although one of them was appointed at the request of their principal for whom the library was being sold. *Cholmondeley v. Payne*, 8 C. & P. 482, 34 E. C. L. 490.

Employment of Attorney.—Where an attorney is employed to collect a claim, and he places the claim in the hands of another attorney, through whose negligence or misconduct the claim is lost, he is liable therefor to the principal in the absence of any agreement that such other attorney should be employed. *Stephens v. Badcock*, 3 B. & Ad. 354, 23 E. C. L. 93; *Simmons v. Rose*, 31 Beav. 1; *Cummins v. McLain*, 2 Ark. 402; *Pollard v. Rowland*, 2 Blackf. (Ind.) 22; *Abbott v. Smith*, 4 Ind. 452; *Wilkinson v. Griswold*, 12 Smed. & M. (Miss.) 669; *Riddle v. Poorman*, 3 P. & W. (Pa.) 224; *Krause v. Dorrance*, 10 Pa. St. 462, 51 Am. Dec. 496.

For a full discussion of this subject see the title **ATTORNEY AND CLIENT**.

duty of the subagents, servants, or other persons properly employed by and under them, in the discharge of their official duties.¹

d. RESPONSIBILITY OF SUBAGENT—(1) *To Principal*.—Where, by usage of trade, or otherwise, a subagent is employed with the express or implied consent of the principal, the subagent will be responsible directly to the principal, since a privity under such circumstances exists between them.²

(2) *To Agent*.—Where no privity exists between the subagent and the principal, the subagent is merely a subaltern of the primary agent, and as such is directly responsible to the latter.³

1. Public Officers, Nonliability of.—Story on Agency (9th ed.), § 319; *Lane v. Cotton*, 12 Mod. 472; *Sutton v. Clarke*, 6 Taunt. 29; *Central R., etc., Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Maxwell v. M'Ilvoy*, 2 Bibb (Ky.) 211; *Keenan v. Southworth*, 110 Mass. 474, 14 Am. Rep. 613; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Bolan v. Williamson*, 1 Brev. (S. Car.) 181; *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44; *Sawyer v. Corse*, 17 Gratt. (Va.) 230.

For a full discussion of this subject see the title PUBLIC OFFICERS.

2. Subagent—When Answerable to Principal.—Story on Agency, § 217a; *De Bussche v. Alt*, 8 Ch. Div. 286; *Wilson v. Smith*, 3 How. (U. S.) 763; *Dun v. City Nat. Bank*, 58 Fed. Rep. 174, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 394; *Guelich v. National State Bank*, 56 Iowa 434, 41 Am. Rep. 110; *Hoffman v. Parry*, 23 Mo. App. 20; *Campbell v. Reeves*, 3 Head (Tenn.) 226; *Commercial, etc., Bank v. Jones*, 18 Tex. 811; *Turner v. Turner*, 36 Tex. 41. See also *Merrick v. Bernard*, 1 Wash. (U. S.) 479.

Where an agent has the power of substitution, the same discretion may be vested in the subagent that is vested in the agent, and the subagent will not be liable to an action where he exercises due discretion and good faith. *Wicks v. Hatch*, 62 N. Y. 535.

Collection of Money by Subagent.—Whenever, by express agreement of the parties, a subagent is to be employed by an agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade or the nature of the transaction, the principal may treat the subagent as his agent, and, when the subagent has received the money, may recover in an action for money had and received. *Wilson v. Smith*, 3 How. (U. S.) 763; *Miller v. Farmers', etc., Bank*, 30 Md. 392; *Cecil Bank v. Farmers' Bank*, 22 Md. 148. See also *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

A subagent has no right to retain money belonging to the principal in order to satisfy a debt due from the original agent to himself. *Grant v. Seitsinger*, 2 P. & W. (Pa.) 525. See also *Bank of the Metropolis v. New England Bank*, 1 How. (U. S.) 234; *Cockran v. Irlam*, 2 M. & S. 301.

In *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291, the court held that a foreigner, upon whose vessel an insurance had been effected by a subagent, might recover the amount of the policy from him after the lien of the subagent had been satisfied.

The agent of a minor's guardian, who was

intrusted by the guardian with money belonging to the minor, was held to owe a duty to the guardian as agent, and to the minor as trustee, for the funds which came into his hands, and was held responsible to the latter for the collection of money, due the minor, in depreciated currency. *Turner v. Turner*, 36 Tex. 41.

Nonliability of Subagent—Want of Privity.—In *Robbins v. Fennell*, 11 Q. B. 248, 63 E. C. L. 248, it was held that where a claim was placed in the hands of an attorney in the country, and by him sent to an agent in London for collection, that the client could not recover money from the London agent, because there was no privity between them. The same doctrine was laid down in *Stephens v. Bacon*, 7 N. J. L. 1. See also *Stephens v. Badcock*, 3 B. & Ad. 354, 23 E. C. L. 93; *Cobb v. Becke*, 6 Q. B. 930, 51 E. C. L. 930; *Tickel v. Short*, 2 Ves. 239.

A, of Cincinnati, being entitled to receive £705 from B in England, arranged with C, a financial agent in Cincinnati, that he (A) should receive the money from him. A wrote to B directing him to pay the money to D, the London agent of C. C wrote to D directing him to receive the money, and to advise him of the receipt. B paid the money to D, who credited C (who owed him money) with it in his books and informed him that he had done so. In the mean time, C had gone into liquidation. In an action by A against D for the £705, it was held that there was no privity between A and D, D receiving the money as C's agent, and that consequently the action could not be maintained. *Crowther v. Ladenburg* (English Court of Appeals), 13 Cent. L. J. 26. See also *New Zealand, etc., Land Co. v. Watson*, 7 Q. B. Div. 374, reversing *New Zealand, etc., Co. v. Ruston*, 5 Q. B. Div. 474.

In *Bissell v. Roden*, 34 Mo. 63, 84 Am. Dec. 71, it is held that subcontractors, not contracting with the owner of the building, but with the person with whom the owner agrees for the construction, are not liable to the owner in an action for negligently and unskilfully doing their work by which the owner is injured, there being no privity between the parties, and that such an action should be brought against the principal who contracted.

3. Liability to Agent.—*Stephens v. Badcock*, 3 B. & Ad. 354, 23 E. C. L. 93; *Myler v. Fitzpatrick*, 6 Madd. 360; *Atty.-Gen. v. Chesterfield*, 18 Beav. 596; *Guelich v. National State Bank*, 56 Iowa 434, 41 Am. Rep. 110; *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569; *Pownall v. Bair*, 78 Pa. St. 403. See also *Robbins v. Fennell*, 11 Q. B. 248, 63 E. C. L. 248; *Cart-*

c. **RIGHTS OF SUBAGENT—(1) Against Principal—For Compensation.**—Whenever, by the usage of trade, or express or implied agreement of the parties, a subagent is to be employed, then a privity is created between the subagent and the principal, and the subagent is, under such circumstances, entitled to compensation from the principal, unless exclusive credit is given to his immediate employer.¹

Right of Subagent to Lien.—Wherever a privity exists between a subagent and the principal, the former will have a lien against the latter to the extent of the services performed and the advances and disbursements properly made by him on account of the subagency.² A subagent, however, has no general lien upon the property of the principal on account of any balance due to him from the primary agent, who employs him, when he knows or has reason to believe that the latter is acting for another person at the time of his subagency.³

wright v. Hateley, 1 Ves. Jr. 292; *Porter v. Peckham*, 44 Cal. 204; *Stephens v. Bacon*, 7 N. J. L. 1.

In general, subagents, acting *ex contractu*, are responsible only to the immediate agents who employed them, and not to the principal, and there is no privity between them. *Traf-ton v. U. S.*, 3 Story (U. S.) 646.

Attorneys.—An attorney confided a note to another attorney for collection, but failed to give instructions in regard to the ownership of the note. The second attorney collected the money and remitted it to the payee, whose name was indorsed on the note. The court held that this remittance (the payee not being the owner of the note) did not discharge the collecting attorney from liability to his immediate principal. *Lewis v. Peck*, 10 Ala. 142.

1. **Liability of Principal for Compensation.**—Story on Agency (9th ed.), § 387; *McConnell v. McCormick*, 12 Cal. 142; *Holmes v. Griffith*, 1 Colo. App. 423; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Cornelius v. Reiser* (C. Pl.), 18 N. Y. Supp. 114. See also *Terre Haute, etc., R. Co. v. Brown*, 107 Ind. 336; *Perry v. Jones*, 18 Kan. 552; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Covell v. Hart*, 14 Hun (N. Y.) 252.

But one employed by an agent without authority from the principal cannot recover from the principal upon the agreement of the agent. *Johnson v. Pacific Mail Steamship Co.*, 5 Cal. 407; *Atlee v. Fink*, 75 Mo. 100; *Hand v. Conger*, 71 Wis. 292. See also *Hibbard v. Peek*, 75 Wis. 619; *Bleecker v. Sutsop R. Co.*, 3 Wash. 79, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 351.

Insurance Companies.—Where a contract made by an agent of an insurance company for his principal, for the services of another party in the business of the principal, provided that as part compensation for such services the party so employed should receive a specified per cent. of the amount paid by the principal for the services of the agent so making the contract, it was held that the contract for such percentage was the contract of the principal, not of the agent, and that the former was therefore liable to the subagent for such compensation. *Ætna Ins. Co. v. Church*, 21 Ohio St. 492.

Where a general agent of a life-insurance company charged with the duty of appointing

subagents, made a contract obligating the company to pay the subagent a fixed sum per month, and signed the contract as the general agent of the company, it was held that the company and not the general agent was liable for the salary of such subagent. *Cotton States L. Ins. Co. v. Mallard*, 57 Ga. 64. Compare *U. S. Life Ins. Co. v. Hesseberg*, 27 Ohio St. 393.

See also *Beyers v. Hodge*, 1 Misc. Rep. (Buffalo Super. Ct.) 76, where it was held that a principal cannot be held to pay a specific sum to a subagent (contracted for by a general agent) unless the principal has ratified the contract.

In *Homan v. Brooklyn L. Ins. Co.*, 7 Mo. App. 22, it was held that where persons were employed by an agent the mere fact that the agent's principal knows that the person so employed is acting in the business committed by the principal to his agent and accepts such employment as beneficial, does not prove an agreement on the principal's part to pay for the services of the person so employed; and that in order to hold the principal liable for such payment the element of privity of contract between the principal and subagent should appear.

Officers and Agents Employing Surgical Aid.—The general rule is that the general manager or superintendent of a railway or other company has, as incidental to his employment, authority to bind the company to pay for surgical attention bestowed, at his request, on a servant of the company injured by an accident. *Walker v. Great Western R. Co.*, L. R. 2 Exch. 228; *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385; *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

For a full discussion of this subject see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

2. **Lien of Subagent.**—Story on Agency (9th ed.), § 388; *Maanss v. Henderson*, 1 East 335; *Snook v. Davidson*, 2 Campb. 218; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291. See also *Lanyon v. Blanchard*, 2 Campb. 597.

3. *Maanss v. Henderson*, 1 East 335; *Snook v. Davidson*, 2 Campb. 218; *Crown Point First Nat. Bank v. Richmond First Nat. Bank*, 76 Ind. 561; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Miller v. Farmers', etc., Bank*, 30 Md. 392; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327.

The assignee of a policy of insurance on

(2) *Against Agent*.—It is a general rule that where agents employ sub-agents in the business of the agency the latter are clothed with precisely the same rights in regard to their immediate employers as if they were the sole and real principals; and unless exclusive credit is given to the principal, the immediate agent will be liable to the subagent.¹

VI. NATURE AND EXTENT OF AUTHORITY—1. **Authority, General and Special**
—a. **DISTINCTION BETWEEN GENERAL AND SPECIAL AGENCIES**—**General Agent**.—A general agent is one who is authorized to do all acts connected with a particular trade, business, or employment.²

Special Agent.—A special agent is one who is authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done.³

goods, who becomes such by indorsement to him of the bill of lading of the goods by the consignor after he has directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person. *Man v. Shifner*, 2 East 523.

Agent Representing Himself as Principal.—It was held in *Westwood v. Bell*, 4 Campb. 349, that where A employed B to effect a policy of insurance for his benefit, and B, without A's knowledge, employed C to effect the policy, representing himself to C as the principal, C had a lien on the policy, as against A, for the general balance due to him from B, since he had no knowledge that B was not the real principal.

But see *Lanyon v. Blanchard*, 2 Campb. 597, where it was held that if an agent, employed to effect an insurance on goods, should represent himself as the owner of the goods to another person, whom he employed to effect the policy, the latter would not have a general lien on the policy for a balance due to him from the agent.

1. **Liability of Agent to Subagent for Compensation**.—*Farrell v. Campbell*, 3 Ben. (U. S.) 8; *Miles v. Mays*, 15 Colo. 133; *Wilkins v. Duncan*, 2 Litt. (Ky.) 168; *Clay v. Hopkins*, 3 A. K. Marsh. (Ky.) 485; *Cleaves v. Stockwell*, 33 Me. 341; *Taylor v. Nostrand*, 134 N. Y. 108.

Where a broker in one city is commissioned by his principal to buy pork in another, and effects the purchase through another broker, the second broker is the agent of the first broker, and has a right to look to him for his compensation. *Hill v. Morris*, 15 Mo. App. 322.

Where a contract is made with the leader of a band to furnish a given number of musicians at a fair, and afterwards payment is refused, the individual members of the band must look to the leader thereof for their pay. *Corbett v. Schumacker*, 83 Ill. 403.

Agents of Trustees.—Agents of trustees must look to them for compensation, and have no lien upon the trust estate for the value of

their services. *Worrall v. Harford*, 8 Ves. Jr. 4; *Jones v. Dawson*, 19 Ala. 672; *Fearn v. Mayers*, 53 Miss. 458. Compare *Coopwood v. Wallace*, 12 Ala. 790; *Noyes v. Blakeman*, 6 N. Y. 567.

2. **Story on Agency**, § 17; *Dearing v. Lightfoot*, 16 Ala. 28; *Witcher v. Brewer*, 49 Ala. 119; *Gregg v. Wooliscroft*, 52 Ill. App. 221; *Manning v. Gasharie*, 27 Ind. 411; *Bell v. Offutt*, 10 Bush (Ky.) 632; *Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358; *McAlpin v. Cassidy*, 17 Tex. 462.

A **General Agent** is one authorized to transact all his principal's business, or all his business of some particular kind. *Gibson v. Snow Hardware Co.*, 94 Ala. 346, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 348; *Lattomus v. Farmers' Mut. F. Ins. Co.*, 3 Houst. (Del.) 404; *Noble v. Nugent*, 89 Ill. 522; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Fatman v. Leet*, 41 Ind. 138; *Union Stockyard, etc., Co. v. Mallory, etc., Co.* (Ill., 1895), 41 N. E. Rep. 888, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 349; *Cruzan v. Smith*, 41 Ind. 288; *Toledo, etc., R. Co. v. Owen*, 43 Ind. 408; *Sawin v. Union, etc., Bldg. Assoc.* (Iowa, 1895), 64 N. W. Rep. 401, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 348; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390; *Walker v. Skipwith*, Meigs (Tenn.) 502, 33 Am. Dec. 161.

General Agent as to Particular Business.—The authority of an agent being limited to a particular business does not make it special. It may be as general in regard to that business as though its range were unlimited. *Crain v. Jacksonville First Nat. Bank*, 114 Ill. 516; *Cruzan v. Smith*, 41 Ind. 297; *Bell v. Offutt*, 10 Bush (Ky.) 632; *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Rountree v. Denson*, 59 Wis. 522.

Territorial Limitation of Authority.—An authority to an agent to buy an article in a certain locality and its vicinity, and to buy, generally, from whomsoever he may choose, not having in view a single transaction, but a number of separate transactions, constitutes a general agency. *Butler v. Maples*, 9 Wall. (U. S.) 766. See also *Cruzan v. Smith*, 41 Ind. 288; *Toledo, etc., R. Co. v. Owen*, 43 Ind. 405.

3. **United States**.—*Butler v. Maples*, 9 Wall. (U. S.) 766.

Distinction.—In short, the former imports not an unqualified authority, but an authority which is derived from a multitude of instances, whereas the latter is confined to an individual instance.¹

Principal Bound According to Extent of Apparent Authority.—In either case the principal is bound to the extent of the apparent authority he has conferred upon the agent, and not by the actual or express authority where that differs from the apparent authority;² and in either case, if the agent exceeds the authority conferred, his acts will not bind his principal.³

Alabama.—*Dearing v. Lightfoot*, 16 Ala. 28; *Golding v. Merchant*, 43 Ala. 705; *Witcher v. Brewer*, 49 Ala. 119; *Gibson v. Snow Hardware Co.*, 94 Ala. 346, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 348.

Arkansas.—*Keith v. Herschberg Optical Co.*, 48 Ark. 138.

Connecticut.—*Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Willard v. Buckingham*, 36 Conn. 395; *Ladd v. Franklin*, 37 Conn. 53.

Delaware.—*Lattomus v. Farmers' Mut. F. Ins. Co.*, 3 Houst. (Del.) 404.

Illinois.—*U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Baxter v. Lamont*, 60 Ill. 237; *Gregg v. Wooliscroft*, 52 Ill. App. 221; *Union Stockyard, etc., Co. v. Mallory, etc., Co.* (Ill., 1895), 41 N. E. Rep. 888, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 349.

Indiana.—*Fatman v. Leet*, 41 Ind. 138; *Cruzan v. Smith*, 41 Ind. 297; *Toledo, etc., R. Co. v. Owen*, 43 Ind. 408; *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424.

Iowa.—*Palmer v. Cheney*, 35 Iowa 281.

Kansas.—*Atlantic, etc., R. Co. v. Reisner*, 18 Kan. 458.

Louisiana.—*Crescent City Bank v. Hernandez*, 25 La. Ann. 43.

Massachusetts.—*Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

Mississippi.—*Goodlee v. Godley*, 13 Smed. & M. (Miss.) 233, 51 Am. Dec. 159; *Brown v. Johnson*, 12 Smed. & M. (Miss.) 398, 51 Am. Dec. 118.

New Hampshire.—*Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

New Jersey.—*Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.—*Beals v. Allen*, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

Pennsylvania.—*Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 503, 78 Am. Dec. 394; *Baring v. Peirce*, 5 W. & S. (Pa.) 548, 40 Am. Dec. 534.

Tennessee.—*Walker v. Skipwith, Meigs* (Tenn.) 507, 33 Am. Dec. 161.

Code Definitions.—An agent for a particular act or transaction is called a special agent. All others are general agents. *California Civ. Code*, § 2297; *Montana Civ. Code*, § 3092.

The Distinction between a General and a Special Agent is said to be this: The former is appointed to act in the affairs of his principal generally, and the latter to act concerning some particular object. *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

Where the authority conferred is for a special purpose and confined to a single act, it is a special agency. *Martin v. Farnsworth*, 49 N. Y. 555.

Character of Agency—Question of Law or Fact.

—The fact of agency and the scope of the agent's power are properly questions for the court, where the authority is created by writing; but where the authority is to be implied from the conduct of the parties, or the agency is to be proved by witnesses, the fact and scope of the agency are for the jury. *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390. See also, upon the latter point, *Nicoll v. American Ins. Co.*, 3 Woodb. & M. (U. S.) 529; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa 286; *Nicholson v. Golden*, 27 Mo. App. 155; *Glenn v. Savage*, 14 Oregon 576.

When the fact of agency has been established by uncontroverted testimony, the court may decide whether the agency is general or special, and charge the jury accordingly. *Witcher v. Brewer*, 49 Ala. 122. See also *infra*, this title, *Construction of Authority*.

Presumption.—The fact of agency being proved, the agency is to be presumed general. *Methuen Co. v. Hayes*, 33 Me. 169; *Trainer v. Morison*, 78 Me. 160. But see *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa 286.

1. Per Lord Ellenborough in *Whitehead v. Tuckett*, 15 East 408, *citing* *Fenn v. Harrison*, 3 T. R. 757. And see *Walker v. Skipwith, Meigs* (Tenn.) 502, 33 Am. Dec. 161.

The extent of the agent's authority, whether limited or unlimited, is to be distinguished from the nature of the agency, whether general or special. *Doan v. Duncan*, 17 Ill. 274.

The same agent may be special as to the nature of the acts to be performed, and general as to the manner of performing those acts. *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476.

2. See *infra*, this section, *When Principal is Bound—In General*.

3. *Hodge v. Combs*, 1 Black (U. S.) 192; *Nicklase v. Griffith*, 59 Ark. 641; *King v. Levy* (Miss., 1892), 13 So. Rep. 282; *Towle v. Leavitt*, 23 N. H. 374, 55 Am. Dec. 195; *King v. Kaiser*, 3 Misc. Rep. (N. Y. C. Pl.) 523; *Irvine v. Spring*, 35 How. Pr. (N. Y. Super. Ct.) 479; *Reaney v. Culbertson*, 21 Pa. St. 507; *Soule v. Dougherty*, 24 Vt. 92; *Hopkins v. Blane*, 1 Call (Va.) 361; *Blane v. Proudfoot*, 3 Call (Va.) 207, 2 Am. Dec. 546.

See *infra*, this section, *When Principal is Bound*.

Whether Principal Bound Determined by Same Principles whether Agent is General or Special.—"Whether the authority be general or limited, the servant cannot charge the master if he exceeds it. He is of course, more likely to transcend the bounds of a narrow

Universal Agents.—General are carefully distinguishable from universal agents—that is, from such as may be appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do.¹

b. THIRD PARTIES MUST ASCERTAIN AGENT'S AUTHORITY.—Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk.² They cannot rely upon the agent's assumption of authority,³ but are to be regarded as dealing with the power before them, and must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power.⁴

than of an extended power, but the principle in either case is the same. Within his commission he binds his master, beyond it he does not. Whilst, then, we must distinguish clearly between a general agent and a special agent, it is not because there is a diversity in the leading principle which determines the master's liability, but merely in order to adjust the actual measure of it." 1 Minor's Inst. 206.

In *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 632, Comstock, J., said: "There are in the books many loose expressions concerning the distinction between a general and special agency. The distinction itself is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. * * * Underlying the whole subject there is this fundamental proposition, that a principal is bound only by the authorized acts of his agent. This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established. But in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other."

1. Story on Agency, § 21.

Such an universal agency may potentially exist, but it must be of the very rarest occurrence. It will never be inferred from any general expressions, however broad; but the law will restrain them to the particular business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed. *Wood v. McCain*, 7 Ala. 803, 42 Am. Dec. 612; *Gielick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728. See also *Barr v. Schroeder*, 32 Cal. 609.

A general authority to do an indefinite number of acts of a particular kind by no means constitutes a universal agency. *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 149.

2. *Reid v. Rigby* (1894), 2 Q. B. 40; *Rust v. Eaton*, 24 Fed. Rep. 830; *Fisher v. Campbell*, 9 Port. (Ala.) 210; *Van Eppes v. Smith*, 21 Ala. 317; *Bohart v. Oberne*, 36 Kan. 284; *Chaffe v. Stubbs*, 37 La. Ann. 656; *Mussey v. Beecher*, 3 Cush. (Mass.) 511; *Chase v. Buhl Iron Works*, 55 Mich. 139; *Earp v. Richardson*, 81 N. Car. 5. See also *McNeill v. Easley*, 24 Ala. 455; and *infra*, this section, *When Principal is Bound—Special Agencies*.

Duty to Inquire as to Agent's Authority.—It is the duty of all having transactions with an agent in his representative character to inquire into the extent of his authority. *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 287, 19 Am. Dec. 92; *Tidrick v. Rice*, 13 Iowa 214.

One buying an overdue note from an agent is thereby put on inquiry about the extent of the agent's authority. *Earp v. Richardson*, 81 N. Car. 5. And receipting in a firm name, but in the form used by agents, puts the person making payment on inquiry as to the authority to take the payment. *Chase v. Buhl Iron Works*, 55 Mich. 139; *Jones v. Harris*, 10 Heisk. (Tenn.) 98.

Especially is This the Case with one dealing with an agent whose authority he knows to be special. *Michael v. Eley*, 61 Hun (N. Y.) 180; *Nester v. Craig*, 69 Hun (N. Y.) 543.

Principal Not Liable to One Neglecting Inquiry.—Carelessness of the principal in reposing confidence in his agent does not make him liable to a third party who, in dealing with such agent, fails to exercise the diligence usual with good business men under the circumstances. *Hurley v. Watson*, 68 Mich. 531. See also *Aldrich v. Londonderry*, 5 Vt. 441.

Agent with Authority in Case of Emergency.—A lender of money to an agent authorized to borrow for the purpose of carrying on business, including power to borrow on exceptional terms outside the ordinary course of business, in an emergency is not bound to inquire whether, in a particular case, the emergency has arisen. *Montaignac v. Shitta*, L. R. 15 App. Cas. 357.

3. *Rice v. Peninsular Club*, 52 Mich. 87. And see *Claffin v. Lenheim*, 5 Hun (N. Y.) 269; also the title ADMISSIONS.

4. *United States*.—*Pearce v. U. S.* (The Floyd Acceptances), 7 Wall. (U. S.) 666; *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. Rep. 347.

Alabama.—*Johnson v. Alabama Gas, etc., Mfg. Co.*, 90 Ala. 505.

Florida.—*Yates v. Yates*, 24 Fla. 64.

Illinois.—*Baxter v. Lamont*, 60 Ill. 237; *Abrahams v. Weiller*, 87 Ill. 179; *Boltz v. Huston*, 23 Ill. App. 579; *Garrels v. Morton*, 26 Ill. App. 433; *Schilling v. Rosenheim*, 30 Ill. App. 81.

Indiana.—*Cruzan v. Smith*, 41 Ind. 288.

Louisiana.—*Chaffe v. Stubbs*, 37 La. Ann. 656.

Power in Writing.—Where the authority is necessarily in writing, such person is presumed to know its scope, and if he neglects to call for the power and judge for himself, it is his own fault.¹

Public Officers.—These rules apply with equal force to public officers, and persons dealing with them are presumed to know their authority.²

c. WHEN PRINCIPAL IS BOUND—(1) In General—Acts Authorized Directly or by Implication.—A principal is bound by the acts of the agent, whether general or special, within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance.³

Mississippi.—Brown v. Johnson, 12 Smed. & M. (Miss.) 398, 51 Am. Dec. 118.

New Jersey.—National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Milne v. Kleb, 44 N. J. Eq. 378; Dowden v. Cryder, 55 N. J. L. 329.

Oregon.—Foster v. Virtue, 17 Oregon 607; Coulter v. Portland Trust Co., 20 Oregon 484.

Pennsylvania.—Baring v. Peirce, 5 W. & S. (Pa.) 548, 40 Am. Dec. 534; Weise's Appeal, 72 Pa. St. 351.

Vermont.—White v. Langdon, 30 Vt. 599; Stewart v. Woodward, 50 Vt. 78.

Virginia.—Stainback v. Read, 11 Gratt. (Va.) 286, 62 Am. Dec. 648; Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. (Va.) 119; Davis v. Gordon, 87 Va. 559, 15 Va. L. J. 241.

West Virginia.—Dyer v. Duffy, 39 W. Va. 148, 24 L. R. A. 339; Curry v. Hale, 15 W. Va. 867.

And see Herring v. Skaggs, 62 Ala. 185, 34 Am. Rep. 4; Cummins v. Beaumont, 68 Ala. 204; Burks v. Hubbard, 69 Ala. 379; Bohart v. Oberne, 36 Kan. 284; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Craighead v. Peterson, 72 N. Y. 283, 28 Am. Rep. 150; Rathbun v. Snow, 123 N. Y. 343.

Agents of Private Corporations.—This rule applies with equal force to parties dealing with agents of private corporations. Victoria Gold Min. Co. v. Fraser, 2 Colo. App. 14.

As to the authority of the officers of private corporations, and when they can bind their principals, see the title OFFICERS OF PRIVATE CORPORATIONS.

An Agent Appointed by a Writing which defines and limits his authority is subject to its terms, and acts done by him not within the scope of the authority cannot bind his principal. And a person who trades with such agent must examine for himself whether the agent is acting under written instructions, and the principal will not be bound because such person is ignorant of their existence. Snow v. Warner, 10 Met. (Mass.) 136, 43 Am. Dec. 417; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

One Dealing with Agent Bound by Limitations of Authority.—Where one deals with another acting under delegated authority, it is his own folly if he does not inform himself of the scope of the authority. Dozier v. Freeman, 47 Miss. 660. He must determine at his own risk whether the particular acts are within the authority. Davidson v. Porter, 57 Ill. 300; Claflin v. Continental Jersey Works, 85 Ga. 27. And he is bound to take notice of limitations not only upon its power, but also

as to the mode of contracting, Craycraft v. Selvage, 10 Bush (Ky.) 708; and the law will presume, in such case, that he knows the limits of the agent's power. Brown v. Johnson, 12 Smed. & M. (Miss.) 398, 51 Am. Dec. 118. So persons dealing with officers of a bank. Salem Bank v. Gloucester Bank, 17 Mass. 29, 9 Am. Dec. 111.

1. Sanford v. Handy, 23 Wend. (N. Y.) 267; Nixon v. Hyserott, 5 Johns. (N. Y.) 58.

Duty to Examine Authority.—One dealing with an agent is chargeable with knowledge of the legal effect of the authority, and must therefore inspect it, if in writing, or learn its language as best he can, if by parol. North River Bank v. Aymar, 3 Hill (N. Y.) 262.

Where Real Estate is the Subject of Sale the person purchasing of an agent must see that the power to convey is of equal dignity with the deed to be executed, Peabody v. Hoard, 46 Ill. 242; and that the agent is acting within the scope of his authority. Baxter v. Lamont, 60 Ill. 237; Bosseau v. O'Brien, 4 Biss. (U. S.) 395; and see Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

A Duly Recorded Power of Attorney to sell and convey real estate is notice to subsequent purchasers dealing with the agent in relation to the property, of the terms of the agency. Frink v. Roe, 70 Cal. 296.

From Public Records.—Where the extent of the power of an agent may be known by public records, as in the case of public officers, any restriction on his powers so created will be binding. Woodward v. Campbell, 39 Ark. 580; Sprague v. Cornish, 59 N. H. 161; Lewis v. Bourbon County, 12 Kan. 186; New York, etc., Steamship Co. v. Harbison, 16 Fed. Rep. 688.

2. An Agency Conferred by Statute and growing out of it must be ascertained from the statute, and persons dealing with an officer of the state are presumed to know his authority. State v. State Bank, 45 Mo. 528. See also Backman v. Charlestown, 42 N. H. 125; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535.

The Agent of a County to contract for repairs on county buildings has no power to bind the county to pay more in county warrants than the cash value of the labor and materials in United States currency; and parties contracting with such agent must take notice of the limits of his authority. Barton v. Swepston, 44 Ark. 437. See also Bowe v. U. S., 42 Fed. Rep. 761, and the title PUBLIC OFFICERS.

3. Edmunds v. Bushell, L. R. 1 Q. B. 97; Napier v. Poe, 12 Ga. 170; Broadway Sav.

Acts within Apparent Authority.—Beyond that, he is bound by the acts of the agent within the apparent authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing.¹

Bank v. Vorster, 30 La. Ann. 587; *Destrehan v. Louisiana Cypress Lumber Co.*, 45 La. Ann. 920; *Caswell v. Cross*, 120 Mass. 545; *White Lake Lumber Co. v. Stone*, 19 Neb. 402; *Webster v. Clark*, 30 N. H. 245; *Law v. Stokes*, 32 N. J. L. 249; *Knell v. U. S.*, etc., *Steam Ship Co.*, 33 N. Y. Super. Ct. 423; *Parker v. Saratoga County*, 106 N. Y. 392; *Meyer v. Harnden Express Co.*, 24 How. Pr. (N. Y. C. Pl.) 290; *Darst v. Slevins*, 2 Disney (Ohio) 473. See also *Humphreys v. Wilson*, 43 Miss. 328; *Hunneman v. Fire Dist. No. 1*, 37 Vt. 40.

All the acts of an agent within the scope of his authority will bind the principal. *Goodrich v. Hanson*, 33 Ill. 499; *Taylor v. Taylor*, 20 Ill. 650; *The Ship Portland v. Lewis*, 2 S. & R. (Pa.) 197. And see *infra*, this section, *Authority as Affected by Usage or Custom*; and *Powers Prima Facie Incident to Every Authority*.

Authority Determined by Nature of Act.—The scope of the authority is to be measured by the nature and necessities of the thing to be accomplished. *Geylin v. De Villeroi*, 2 Houst. (Del.) 311.

If sent to summon a certain physician, the agent may, in case of extraordinary emergency, summon another and bind his principal. *Bartlett v. Sparkman*, 95 Mo. 136.

Authority Necessarily Implied in Agent's Character.—Those dealing with an agent may rely on his having those powers, and those only, which necessarily, properly, and legitimately belong to the character in which he is held out by the principal. *Harrison v. Kansas City*, etc., R. Co., 50 Mo. App. 332.

1. *England*.—*Smith v. McGuire*, 3 H. & N. 554.

United States.—*Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264; *Union Mut. L. Ins. Co. v. Masten*, 3 Fed. Rep. 881; *Foster v. Cleveland*, etc., R. Co., 56 Fed. Rep. 434.

Alabama.—*Golding v. Merchant*, 43 Ala. 705.

Arkansas.—*Jacobson v. Poindexter*, 42 Ark. 97.

California.—*Davidson v. Dallas*, 8 Cal. 227.

Colorado.—*Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226.

Delaware.—*Lattomus v. Farmers' Mut. F. Ins. Co.*, 3 Houst. (Del.) 404; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 210.

Georgia.—*City Bank v. Kent*, 57 Ga. 283; *Blaisdell v. Bohr*, 77 Ga. 381; *Georgia Military Academy v. Estill*, 77 Ga. 409; *Florida Midland*, etc., R. Co. v. *Varnedo*, 81 Ga. 175.

Illinois.—*Rawson v. Curtiss*, 19 Ill. 456; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *St. Louis*, etc., *Packet Co. v. Parker*, 59 Ill. 23; *Thurber v. Anderson*, 88 Ill. 167; *Noble v. Nugent*, 89 Ill. 522; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67.

Indiana.—*Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Rathbone v. Sanders*, 9 Ind. 217; *Over v. Schiffing*, 102 Ind. 191; *Lake Shore*, etc., R. Co. v. *Foster*, 104 Ind. 293, 54 Am. Rep. 319; *Barnett v. Gluting*, 3 Ind. App. 419, *affirmed* on rehearing 3 Ind. App. 415; *Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind. App. 415; *Union Cent. L. Ins. Co. v. Huyck*, 5 Ind. App. 474.

Kansas.—*Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490.

Maine.—*Johnson v. Wingate*, 29 Me. 404.

Massachusetts.—*Dresser Mfg. Co. v. Waterston*, 3 Met. (Mass.) 9; *Markey v. Mutual Ben. L. Ins. Co.*, 103 Mass. 78; *Cutler v. Boyd*, 124 Mass. 181.

Michigan.—*Barry v. Boston Marine Ins. Co.*, 62 Mich. 424; *Verdine v. Olney*, 77 Mich. 310; *Austrian v. Springer*, 94 Mich. 343.

Minnesota.—*Tice v. Russell*, 43 Minn. 66.

Mississippi.—*Wilcox v. Routh*, 9 Smed. & M. (Miss.) 476; *Brown v. Johnson*, 12 Smed. & M. (Miss.) 398, 51 Am. Dec. 118; *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264.

Missouri.—*Johnson v. Hurley*, 115 Mo. 513; *Kinealy v. Burd*, 9 Mo. App. 359.

Nebraska.—*Oberne v. Burke*, 30 Neb. 581; *Lorton v. Russell*, 27 Neb. 372; *Levy v. Hastings First Nat. Bank*, 27 Neb. 557.

New Hampshire.—*Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

New York.—*Hoddard v. Mallory*, 52 Barb. (N. Y.) 87; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Dillaye v. Beer*, 3 Thomp. & C. (N. Y.) 218; *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351; *Kelly v. Fall Brook Coal Co.*, 4 Hun (N. Y.) 261; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Caffee v. Ottman*, 63 Hun (N. Y.) 502; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Farmers*, etc., *Bank v. Butchers*, etc., *Bank*, 16 N. Y. 125; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

Pennsylvania.—*Briggs v. Large*, 30 Pa. St. 291; *Baltimore*, etc., *Steamboat Co. v. Brown*, 54 Pa. St. 77; *Eilenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 464; *Hubbard v. Tenbrook*, 124 Pa. St. 291, 10 Am. St. Rep. 585, 23 W. N. C. (Pa.) 351; *Baring v. Peirce*, 5 W. & S. (Pa.) 548, 40 Am. Dec. 534.

South Dakota.—*Aldrich v. Wilmarth*, 3 S. Dak. 523.

Tennessee.—*Murphy v. Southern L. Ins. Co.*, 3 Baxt. (Tenn.) 449, 27 Am. Rep. 761.

Texas.—*Galveston*, etc., R. Co. v. *Neel* (Tex. Civ. App., 1894), 26 S. W. Rep. 788.

Vermont.—*Fay v. Richmond*, 43 Vt. 25; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Kingsley v. Fitts*, 51 Vt. 414; *Linsley v. Lovely*, 26 Vt. 123; *Winchell v. National Express Co.*, 64 Vt. 15.

Virginia.—*Mann v. King*, 6 Munf. (Va.) 428; *Gore v. Buzzard*, 4 Leigh (Va.) 231.

Theory upon Which the Principal is Held Liable.—For the acts of his agent within his express authority the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority which he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such case would be to enable him to commit a fraud upon innocent persons.¹

(2) **General Agencies—Authority Not Unlimited.**—The authority of a general agent is not unlimited, but must necessarily be restricted to the transactions and concerns within the scope of the business of the principal;² and if he ex-

Wisconsin.—Kountz v. Gates, 78 Wis. 415.

See also Keenan v. Missouri State Mut. Ins. Co., 12 Iowa 126; Morrison v. Taylor, 6 T. B. Mon. (Ky.) 85; Wells v. Welter, 15 Nev. 276; Smith v. Frank, 2 Robt. (N. Y.) 626; and *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties*.

It is essential in order to bind the principal that the contracts by one held out by him as his general agent shall be within the scope of the agent's authority as such. It is not enough that they be made with regard to the business of the agency. *Richmond v. Greeley*, 38 Iowa 666.

Apparent Authority Renders Principal Liable to Third Persons.—When one holds another out to the world as his agent, in determining the liability of the principal the question is not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified, from the acts of the principal, in believing was given to him. *Griggs v. Selden*, 58 Vt. 561; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Dodge v. McDonnell*, 14 Wis. 553.

Though an agent must act within the scope of his authority, yet when his acts affect innocent third parties the principal will be bound to the extent of the apparent authority conferred by him upon the agent. He is bound equally by the authority which he actually gives and by that which, by his own acts, he appears to give. *Webster v. Wray*, 17 Neb. 579; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224. And see *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78.

Where one deals with an agent, whether general or special, in ignorance of private instructions, the principal is bound if the act of the agent be within the apparent power which the principal holds him out to the world to possess. *Carmichael v. Buck*, 10 Rich. (S. Car.) 333, 70 Am. Dec. 226; *Howell v. Graff*, 25 Neb. 130; *Milne v. Kleb*, 44 N. J. Eq. 378; *Stovall v. Co.*, 84 Va. 246. See also *Routh v. Agricultural Bank*, 12 Smed. & M. (Miss.) 161.

If one holds out to the world another person as his agent to receive payments, it makes no difference what was the private or actual understanding and relation of the parties. *McAlpin v. Ziller*, 17 Tex. 508.

Apparent Powers and Acts Apparently within Powers Distinguished.—In *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 633, *Comstock, J.*, said: "The distinction is not always attended to between the apparent powers of an agent and his acts apparently but not really within the power. An agent's

apparent powers are those which are conferred by the terms of his appointment, notwithstanding secret instructions, or those with which he is clothed by the character in which he is held out to the world, although not strictly within his commission. Whatever is done under an authority thus manifested is actually within the authority as to third persons, and the principal is bound for that reason; but it is obvious that an agent may clothe his act with all the *indicia* of authority and yet the act itself may not be within the real or apparent power. The appearance of the power is one thing, and for that the principal is responsible; the appearance of the act is another, and for that, if false, I think the remedy is against the agent only. The fundamental proposition, I repeat, is that one man can be bound only by the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

Party Not Relying on Agent's Ostensible Authority.—If the party dealing with the agent does not rely upon his ostensible authority, the principal will not be bound by his unauthorized acts. *Tallmadge v. Lounsbury* (Super. Ct.), 21 N. Y. Supp. 908, 50 N. Y. St. Rep. 531.

Appearance of Authority Caused by Agent Only.—The principal is responsible only for the appearance of authority which is caused by himself, and not for an appearance of conformity to the authority caused only by the agent. *Edwards v. Dooley*, 120 N. Y. 540; *Leu v. Mayer*, 52 Kan. 419.

How Apparent Authority Determined.—The apparent authority of the agent is to be gathered from all the facts and circumstances in evidence, and is a question of fact for the jury. *Nicholson v. Golden*, 27 Mo. App. 132. See *supra*, this title, *Appointment—Evidence*; also *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Principal to Third Parties*. See also the title **ADMISSIONS**.

1. *Per Depue, J.*, in *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655.

2. *Pennsylvania, etc., Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; *Odiorne v. Maxcy*, 13 Mass. 181; *Fougue v. Burgess*, 71 Mo. 389; *Walker v. Skipwith, Meigs* (Tenn.) 502, 33 Am. Dec. 161.

Powers of General Agent are Restricted.—A general agency does not import an unqualified authority. *Whitehead v. Tuckett*, 15 East 408.

A general agency is a restricted service,

ceeds the authority, the principal is not bound.¹

and the agent cannot go outside the proper scope of the principal's business. *Stewart v. Woodward*, 90 Vt. 78. He is not a universal agent having the complete disposal of all the rights and property of his principal. *LaPoint v. Scott*, 36 Vt. 604. And in order to bind his principal the act must be within the line of his agency. *Brosnahan v. Philip Best Brewing Co.*, 26 Mo. App. 386.

Cannot per se Sell Property of Principal.—The appointment of a general and special agent to do and transact all manner of business does not necessarily authorize the agent to sell stock or other property of the principal. *Hodge v. Combs*, 1 Black (U. S.) 192.

Neither the president nor cashier of a bank has the power, by virtue of the office, to sell the safe of the bank for a debt of the bank. *Asher v. Sutton*, 31 Kan. 286.

The Conductor of a Passenger Train is not a general agent of the company with authority to waive the conditions of the contract set forth on a passenger's ticket. *Cloud v. St. Louis, etc., R. Co.*, 14 Mo. App. 136.

Station Agent Pledging Company's Credit for Wounded Brakeman.—The station agent of a railroad company is not authorized, by virtue of his position, to employ a hotel-keeper, at the expense of the company, to attend to one of its brakemen injured while working for the company; nor to furnish such employee with board and lodging while disabled. *Atlantic, etc., R. Co. v. Reisner*, 18 Kan. 458.

A Physician of a Railroad Company cannot bind the company for his patient's board: *St. Louis, etc., R. Co. v. Hoover*, 53 Ark. 377; *Mayberry v. Chicago, etc., R. Co.*, 75 Mo. 492; *Boyle v. Missouri Pac. R. Co.*, 13 Mo. App. 574. See also *Shriver v. Stevens*, 12 Pa. St. 258.

Cannot Pervert Funds.—A power to act for another, however general its terms or wide its scope, cannot be enlarged into a power to pervert funds coming into the agent's hands. *Williams v. Whiting*, 92 N. Car. 683.

Violating Law.—Nor, if capable of being executed in a lawful manner, is it ever to be extended by construction to acts prohibited by law, so as to render his innocent principal liable in a criminal action or prosecution. *Clark v. Metropolitan Bank*, 3 Duer (N. Y.) 241.

Forming Partnership.—An authority to act as an agent confers no authority to form a partnership in the name of the principal with a third person. *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319.

Accepting Service of Process.—A general agent, constituted under the *Louisiana Civil Code*, cannot accept service of process against the principal. *Leblanc v. Perroux*, 21 La. Ann. 26.

Power to Employ Counsel.—Nor is he authorized to employ counsel on the credit of his principal to prosecute a suit in favor of a servant of the principal, for a personal injury done to such servant while engaged in the principal's business. *Cochran v. Newton*, 5 Den. (N. Y.) 482.

May Purchase Goods for Debt.—A general agent specially directed to look after a certain claim and collect something on it, or to arrange it in some way, may purchase and sell a stock of goods in settlement thereof. *Knowles v. Street*, 87 Ala. 357.

1. *England.*—*Waters v. Brogden*, 1 Y. & J. 457.

Alabama.—*St. John v. Redmond*, 9 Port. (Ala.) 428; *Stanley v. Sheffield Land, etc., Co.*, 83 Ala. 260.

Colorado.—*Consolidated Gregory Co. v. Raber*, 1 Colo. 511.

Illinois.—*Abrahams v. Weiller*, 87 Ill. 179; *Pinkerton v. Gilbert*, 22 Ill. App. 568.

Iowa.—*Jones v. Turck*, 33 Iowa 246; *Wanless v. McCandless*, 38 Iowa 20; *Richmond v. Greeley*, 38 Iowa 666; *Taylor v. White*, 44 Iowa 295; *Beebe v. Equitable Mut. L., etc., Assoc.*, 76 Iowa 129.

Maine.—*Thomas v. Harding*, 8 Me. 417.

Mississippi.—*McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264.

Missouri.—*Fougue v. Burgess*, 71 Mo. 389.

Nevada.—*Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224; *Ellis v. Central Pac. R. Co.*, 5 Nev. 255; *Lonkey v. Succor Mill, etc., Co.*, 10 Nev. 17.

New Hampshire.—*Canaan v. Derush*, 47 N. H. 212.

New York.—*Booth v. Bierce*, 38 N. Y. 463, 98 Am. Dec. 73, reversing 40 Barb. 114; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404.

Wisconsin.—*Kelly v. Strong*, 68 Wis. 152.

And see *Mathews v. Gilliss*, 1 Iowa 242; *Hillyer v. Overman Silver Min. Co.*, 6 Nev. 51; *Taylor Mfg. Co. v. Brown* (Tex. App., 1889), 14 S. W. Rep. 1071; *Case v. Jewett*, 13 Wis. 498, 80 Am. Dec. 752.

Act must be within Power to Bind Principal.—It must be shown that the act was done during the agency, and was within the scope of the authority. *Hough v. Doyle*, 4 Rawle (Pa.) 291; *Taylor Mfg. Co. v. Brown* (Tex. App., 1889), 14 S. W. Rep. 1071.

The power must be limited to acts within the scope of the particular business to which it relates. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

The principle is a general one, that the conduct of an agent only binds his employer when he acts within the limits of the power granted to him, and with reference to the subject matter of the agency. *Hough v. Doyle*, 4 Rawle (Pa.) 291; *Taylor Mfg. Co. v. Brown* (Tex. App., 1889), 14 S. W. Rep. 1071; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Goodloe v. Godley*, 13 Smed. & M. (Miss.) 238, 51 Am. Dec. 159; *Fortner v. Parham*, 2 Smed. & M. (Miss.) 164; *Wilcox v. Routh*, 9 Smed. & M. (Miss.) 476; *Wilkins v. Commercial Bank*, 6 How. (Miss.) 220. See also *Fisher v. Abeel*, 44 How. Pr. (N. Y. Supreme Ct.) 432; *Lombard v. Winslow*, 1 Kerr (New Bruns.) 327. See also *supra*, this section, *When Principal is Bound—In General.*

Apparent Authority—Estoppel.—The act of an agent in excess of his authority never binds the principal, unless third persons,

Principal Bound if Such Agent Acts within General Authority.—But the principal is responsible for the acts of his general agent when acting within the general scope of his authority, and the public cannot be supposed cognizant of his private instructions.¹

having a right to believe that the agent was acting within his authority, would sustain loss if the act was not considered that of his principal. *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Nixon v. Brown*, 57 N. H. 39. See also *supra*, this title, *When Principal is Bound—in General*.

Illustrations—Principal Not Bound.—If an agent for the purchase of grain buys tobacco, the principal cannot be held responsible. *Hopkins v. Blane*, 1 Call (Va.) 361. And a release of a debt by a general agent to sell will not bind the principal. *Smith v. Perry*, 29 N. J. L. 74. See also *Clark v. Couser*, 29 N. H. 170.

It has been held under the *New Hampshire* statutes that selectmen cannot lawfully act as agents for the purchase of spirituous liquors, or appoint one of their number to be such agent, and cannot bind the town for the price of spirituous liquors so purchased. *Richards v. Columbia*, 55 N. H. 96.

The General Agent of a Corporation, clothed with a certain power by the charter, or the lawful act of the corporation, may use that power for an unauthorized or even a prohibited purpose in his dealings with an innocent third party, and yet render the corporation liable for his acts. Per Gregory, J., in *Madison, etc., R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457.

Principal Liable to Extent of Agent's Authority.—Where an agent authorized in writing to draw on his principal for \$75 raised the figures to \$175, and thereby induced an innocent third party to indorse a draft on the principal for \$150, which being protested for nonpayment was paid by the indorsee, it was held that the principal was liable to the latter for \$75. *Wilson v. Beardsley*, 20 Neb. 449.

1. *England*.—*Beaufort v. Neeld*, 12 Cl. & F. 248; *Whitehead v. Tuckett*, 15 East 407; *Runquist v. Ditchell*, 3 Esp. 64; *Fenn v. Harris*, 3 T. R. 757.

Alabama.—*Syndicate Ins. Co. v. Catchings* (Ala., 1894), 16 So. Rep. 46, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 350, 353.

Arkansas.—*Morton v. Scull*, 23 Ark. 289.

Connecticut.—*Willard v. Buckingham*, 36 Conn 395.

Georgia.—*Thompson v. Douglass*, 64 Ga. 57.

Illinois.—*Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67.

Indiana.—*Cruzan v. Smith*, 41 Ind. 298.

Iowa.—*Palmer v. Cheney*, 35 Iowa 281; *Brett v. Bassett*, 63 Iowa 340; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276. See also *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa 507, 96 Am. Dec. 65.

Kansas.—*New York L. Ins. Co. v. McGowan*, 19 Kan. 300.

Kentucky.—*Bell v. Offutt*, 10 Bush (Ky.) 632.

Louisiana.—*Forman v. Walker*, 4 La. Ann.

409; *Bergerot v. Farish*, 9 Rob. (La.) 346; *Arayo v. Currel*, 1 La. 536, 20 Am. Dec. 286.

Maine.—*Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354.

Massachusetts.—*Byrne v. Massasoit Packing Co.*, 137 Mass. 313; *Williams v. Mitchell*, 17 Mass. 98.

Michigan.—*Howry v. Eppinger*, 34 Mich. 29.

Mississippi.—*Wilcox v. Routh*, 9 Smed. & M. (Miss.) 476; *Planters' Bank v. Cameron*, 3 Smed. & M. (Miss.) 609.

Missouri.—*Sails v. Miller*, 98 Mo. 478; *Kinealy v. Burd*, 9 Mo. App. 359; *Stothard v. Aull*, 7 Mo. 318.

Nebraska.—*Furnas v. Frankman*, 6 Neb. 429.

New Hampshire.—*Myall v. Boston, etc., R. Co.*, 19 N. H. 122, 49 Am. Dec. 149; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Towle v. Leavitt*, 23 N. H. 374, 55 Am. Dec. 195.

New York.—*Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Kelly v. Fall Brook Coal Co.*, 4 Hun (N. Y.) 261; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219.

Ohio.—*Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647.

Pennsylvania.—*Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec. 602; *Hough v. Doyle*, 4 Rawle (Pa.) 291; *Adams Express Co. v. Schlessinger*, 75 Pa. St. 246; *Shelhamer v. Thomas*, 7 S. & R. (Pa.) 106; *Harrington v. Bronson*, 161 Pa. St. 296; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390.

South Carolina.—*Carmichael v. Buck*, 10 Rich. (S. Car.) 332, 70 Am. Dec. 226.

Texas.—*Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253.

Vermont.—*Walsh v. Pierce*, 12 Vt. 130; *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186.

Virginia.—*Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268, 18 Am. Rep. 681.

Wisconsin.—*Saveland v. Green*, 40 Wis. 431; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447, 54 Am. Rep. 634.

How Far Third Person must Inquire as to Agent's Authority.—His authority is only limited to the usual and ordinary means of accomplishing the business intrusted to him, and persons dealing with him are not bound to inquire into the particulars of his authority. *Williams v. Getty*, 31 Pa. St. 461, 72 Am. Dec. 757; *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *Roche v. Pennington*, 90 Wis. 107, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 354. See *supra*, this section, *Third Parties must Ascertain Agent's Authority*.

Mistake of Agent with Discretionary Powers.—If discretion is reposed in the agent the principal is bound, though he makes a mistake in

(3) *Special Agencies—Authority must be Strictly Pursued.*—Where the agency is a special and temporary one the authority must be strictly pursued, and the principal is not bound if the agent exceeds his authority.¹

judgment. *Merrimac Paper Co. v. Illinois Trust, etc.*, Bank, 129 Ill. 296, affirming 30 Ill. App. 268.

He may make an entry on lands for his principal. *Richards v. Folsom*, 11 Me. 70.

Illustrations—Principal Bound.—If an agent, authorized to make a certain contract, makes one differing in its precise terms, but of the same legal effect, or securing additional benefits to his principal, the latter will be bound thereby. *Simonds v. Clapp*, 16 N. H. 222.

A general agent intrusted by his principal with power to make and enter into contracts for the purchase of grain has power to modify or waive a contract made by him in respect thereto. *Anderson v. Coonley*, 21 Wend. (N. Y.) 279.

The principal cannot revoke a rescission of a contract made by his general agent and acquiesced in by the other party. *St. Paul Second Nat. Bank v. Larson*, 80 Wis. 469.

And a general agent to purchase may purchase on credit and bind his principal, notwithstanding instructions to purchase only for cash, if unknown to the party dealing with him. *Fatman v. Leet*, 41 Ind. 133.

Although by an agent's instructions he is directed to employ men by written agreements, parol engagements made by him will be binding upon the principal, if the employee be ignorant of the agent's instructions. *Rourke v. Story*, 4 E. D. Smith (N. Y.) 54.

1. *England.*—*East India Co. v. Hensley*, 1 Esp. 112; *Jordan v. Norton*, 4 M. & W. 155.

United States.—*Allen v. Ogden*, 1 Wash. (U. S.) 174.

Alabama.—*Cox v. Robinson*, 2 Stew. & P. (Ala.) 91; *Syndicate Ins. Co. v. Catchings* (Ala., 1894), 16 So. Rep. 46, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 352.

Connecticut.—*Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168.

Delaware.—*Jefferson v. Chase*, 1 Houst. (Del.) 219.

Illinois.—*Cooke v. School Com'rs*, 6 Ill. 537; *Williams v. Merritt*, 23 Ill. 573. See also *Ellington v. King*, 49 Ill. 449.

Indiana.—*Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Bagot v. State*, 33 Ind. 262; *Thomas v. Atkinson*, 38 Ind. 248; *Drover v. Evans*, 59 Ind. 454.

Iowa.—*Elder v. Stuart*, 85 Iowa 690; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa 286; *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa 466; *Davis v. Robinson*, 67 Iowa 355. See also *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa 507, 96 Am. Dec. 65.

Massachusetts.—*Snow v. Perry*, 9 Pick. (Mass.) 539; *Stollenwerck v. Thacher*, 115 Mass. 224.

Michigan.—*Saginaw, etc., R. Co. v. Chappell*, 56 Mich. 190.

Mississippi.—*King v. Levy* (Miss., 1892), 13 So. Rep. 282; *Fox v. Fisk*, 6 How. (Miss.) 328; *Planters' Bank v. Cameron*, 3 Smed. & M. (Miss.) 609; *Carter v. Taylor*, 6 Smed. & M. (Miss.) 367; *Brown v. Johnson*, 12 Smed.

& M. (Miss.) 398, 51 Am. Dec. 118. See also *Landsdale v. Shackleford*, Walk. (Miss.) 149.

New Hampshire.—*Hovey v. Brown*, 59 N. H. 114.

New York.—*Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Gibson v. Colt*, 7 Johns. (N. Y.) 390; *Skinner v. Dayton*, 5 Johns. Ch. (N. Y.) 351, 10 Am. Dec. 286; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Beals v. Allen*, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219. See also *Frankenstein v. Thomas*, 4 Daly (N. Y.) 256; *Gilbert v. Deshon*, 107 N. Y. 324; *Owen v. Sell*, 13 Misc. Rep. (N. Y. C. Pl.) 272, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 367.

Pennsylvania.—*Devinney v. Reynolds*, 1 W. & S. (Pa.) 328; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 503, 78 Am. Dec. 390; *Dripps' Assignees*, 6 Pa. L. J. 563; *Carson v. Cochran*, 9 Phila. (Pa.) 21.

South Carolina.—*Powell v. Buck*, 4 Strobb. (S. Car.) 427; *Hamburg Bank v. Johnson*, 3 Rich. (S. Car.) 42; *Lance v. Barrett*, 1 Hill (S. Car.) 204.

Tennessee.—*McClure v. Evertson*, 14 Lea (Tenn.) 495; *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71.

Texas.—*Darnell v. Lyon*, 85 Tex. 455; *Buzzard v. Jolly* (Tex., 1887), 6 S. W. Rep. 422.

Vermont.—*Huntington v. Wilder*, 6 Vt. 334; *Sprague v. Train*, 34 Vt. 150; *Hurlburt v. Kneeland*, 32 Vt. 316.

Virginia.—*Blane v. Proudfit*, 3 Call (Va.) 207, 2 Am. Dec. 546.

Washington.—*Bleecker v. Satsop R. Co.*, 3 Wash. 77.

Wisconsin.—*Dodge v. Hopkins*, 14 Wis. 636.

See also *Brown v. Billings*, 22 Vt. 9; *Sawyer v. Chicago, etc., R. Co.*, 22 Wis. 403, 99 Am. Dec. 49; *Prince v. Lewis*, 21 U. C. C. P. 63, 31 U. C. Q. B. 244.

Public Officer as Special Agent.—If a special agent whose authority is conferred by statute or orders of court, acting in the capacity of a public officer, with limited and well-defined powers, acts outside of the authority conferred, the principal will not be bound by his acts. *Dart v. Hercules*, 57 Ill. 449; *Keyes v. Westford*, 17 Pick. (Mass.) 273; *Nixon v. Hyserott*, 5 Johns. (N. Y.) 58.

Act in Disregard of Instructions.—A principal is not bound by the act of a special agent when done in disregard of his instructions, unless perhaps where the principal's own negligence has enabled the agent to perpetrate a fraud thereby. *Saginaw, etc., R. Co. v. Chappell*, 56 Mich. 190; *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540; *Brown v. Judge*, 42 Mich. 501; *Atlas Min. Co. v. Johnston*, 23 Mich. 36; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Hutchings v. Ladd*, 16 Mich. 493; *Atlas Min. Co. v. Johnston*, 23 Mich. 36; *Matter of Dripps*, 3 Pa. L. J. 87.

Inquiry as to the Extent of Authority.—And it is the duty of all parties dealing with an agent to inquire into the nature and extent of his authority, and deal with him accordingly.¹

d. AUTHORITY MODIFIED BY INSTRUCTIONS—(1) *General Agents*—**Instructions Not Known to Third Parties.**—Private instructions to a general agent circumscribing his power will not avail to shield the principal from liability to parties dealing with him in ignorance of the limitation.²

Act within Authority.—But while acting within the scope of his authority a special agent binds his principal as effectually as a general agent can do. *Morton v. Scull*, 23 Ark. 289.

Authority to Make Restricted Indorsement of Check.—Authority to a clerk to make restricted indorsements of checks drawn to the principal's order for deposit in a certain bank, confers no right to make a general indorsement thereof whereby the clerk receives the proceeds. *Schmidt v. Garfield Nat. Bank*, 64 Hun (N. Y.) 298.

A Local Freight Agent has no power to bind a railroad company by a contract for the transportation of freight to a point beyond the terminus of the company's road, unless such authority has been expressly conferred upon him by the company, or can be implied from his previous acts and conduct. *Grover, etc., Sewing Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672; *Turner v. St. Louis, etc., R. Co.*, 20 Mo. App. 632.

Emergency.—As to authority of special agent in case of emergency see *Williams v. Shackleford*, 16 Ala. 318.

1. *England.*—*Attwood v. Munnings*, 7 B. & C. 278, 14 E. C. L. 42.

United States.—*Schimmelpennich v. Bayard*, 1 Pet. (U. S.) 264.

Alabama.—*Syndicate Ins. Co. v. Catchings* (Ala., 1894), 16 So. Rep. 46, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 352.

Connecticut.—*Ladd v. Franklin*, 37 Conn. 53.

Indiana.—*Berry v. Anderson*, 22 Ind. 36; *Tomlinson v. Collett*, 3 Blackf. (Ind.) 436; *Reitz v. Martin*, 12 Ind. 306, 74 Am. Dec. 215; *Pursley v. Morrison*, 7 Ind. 358, 63 Am. Dec. 424.

Iowa.—*Roberts v. Rumley*, 58 Iowa 301; *Siebold v. Davis*, 67 Iowa 560.

Maryland.—*Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Equitable L. Assur. Soc. v. Poe*, 53 Md. 28.

Massachusetts.—*Bliss v. Clark*, 16 Gray (Mass.) 60; *Snow v. Perry*, 9 Pick. (Mass.) 542; *Murdock v. Mills*, 11 Met. (Mass.) 5.

New Hampshire.—*Hatch v. Taylor*, 10 N. H. 547; *Towle v. Leavitt*, 23 N. H. 373, 55 Am. Dec. 195.

New York.—*Stainer v. Tysen*, 3 Hill (N. Y.) 279; *Denning v. Smith*, 3 Johns. Ch. (N. Y.) 344.

North Carolina.—*Biggs v. Insurance Co.*, 88 N. Car. 141.

One dealing with an agent acting under a special authority is bound, at his peril, to know the extent of it. *Baxter v. Lamont*, 60 Ill. 237; *Cruzan v. Smith*, 41 Ind. 288; *Blackwell v. Ketcham*, 53 Ind. 184; *Bohart v. Oberne*, 36 Kan. 284; *Johnson v. Wingate*,

29 Me. 404; *Black v. Shreve*, 13 N. J. Eq. 455; *Martin v. Farnsworth*, 49 N. Y. 555.

The Depositary of an Escrow is a special and not a general agent, and the person dealing with him is bound to know the extent of his powers. The delivery of an escrow by the depositary to the grantee named therein, without a compliance with the conditions, is not a delivery with the assent of the grantor, and conveys no title. The authority of the depositary of an escrow is limited strictly to the conditions of the deposit, a compliance with which alone justifies its delivery. *Chicago, etc., Land Co. v. Peck*, 112 Ill. 408.

2. *England.*—*Whitehead v. Tuckett*, 15 East 400.

United States.—*Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Allen v. Ogden*, 1 Wash. (U. S.) 174; *Russ v. Telfener*, 57 Fed. Rep. 973.

Alabama.—*Fisher v. Campbell*, 9 Port. (Ala.) 210; *Cawthon v. Lusk*, 97 Ala. 674; *Syndicate Ins. Co. v. Catchings* (Ala., 1894), 16 So. Rep. 46, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 350; *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 350; *Shampton v. Brice*, 102 Ala. 655, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 350.

Colorado.—*Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569; *Higgins v. Armstrong*, 9 Colo. 38; *Hamill v. Ashley*, 11 Colo. 180.

Connecticut.—*Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517.

Illinois.—*Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166.

Indiana.—*Commercial Union Assur. Co. v. State*, 113 Ind. 331; *Robbins v. Magee*, 76 Ind. 381; *Manning v. Gasharie*, 27 Ind. 399.

Iowa.—*Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276.

Kansas.—*Banks v. Everest*, 35 Kan. 687.

Maine.—*Bryant v. Moore*, 26 Me. 87, 45 Am. Dec. 96.

Maryland.—*Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78.

Massachusetts.—*Lobdell v. Baker*, 1 Met. (Mass.) 202, 35 Am. Dec. 358.

Michigan.—*English v. Ayer*, 79 Mich. 516; *Allis v. Voigt*, 90 Mich. 125.

Missouri.—*New Albany Woolen Mills v. Meyers*, 43 Mo. App. 124; *Flint Walling Mfg. Co. v. Ball*, 43 Mo. App. 504; *Kinealy v. Burd*, 9 Mo. App. 359.

Nebraska.—*Furnas v. Frankman*, 6 Neb. 429; *Scales v. Paine*, 13 Neb. 521.

New Hampshire.—*Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Towle v. Leavitt*, 23 N. H. 374, 55 Am. Dec. 195.

New York.—*Johnson v. Jones*, 4 Barb. (N.

Instructions Known to Third Parties.—But if such persons are aware of the instructions the principal is not bound.¹

(2) **Special Agents — Instructions Contravening Apparent Authority.**—In special agencies, also, the principal cannot restrict his liability for acts of the agent within the apparent scope of his authority, by private instructions intended to be kept secret and not communicated to those with whom he may deal. Such instructions are not to be regarded as limitations upon the authority.²

Instructions Properly a Part of Authority.—But where the instructions are given at the same time with the commission, and are of a character which it would not be incongruous to make known, they will, as a rule, be part of the authority, and an agent's contract in violation of them will not bind his principal.³

Y.) 369; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Medbury v. New York, etc., R. Co.*, 26 Barb. (N. Y.) 564; *Engh v. Greenebaum*, 2 Hun (N. Y.) 136, *affirmed* in 64 N. Y. 642; *Cox v. Albany Brewing Co.*, 56 Hun (N. Y.) 489; *Gibson v. Colt*, 7 Johns. (N. Y.) 393.

Pennsylvania.—*Watts v. Devor*, 1 Grant's Cas. (Pa.) 267; *Grafius v. Land Co.*, 3 Phila. (Pa.) 447; *Williams v. Getty*, 31 Pa. St. 461, 72 Am. Dec. 757; *Jackson v. Emmens*, 119 Pa. St. 356.

Tennessee.—*Walker v. Skipwith*, Meigs (Tenn.) 502, 33 Am. Dec. 161.

Wisconsin.—*Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303.

See also *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655. But see *Shaw v. Williams*, 100 N. Car. 272.

And see *supra*, this section, *When Principal is Bound—General Agencies.*

Undisclosed Instructions.—If an agent disregards specific instructions, his acts are nevertheless binding upon his principal as regards third parties having no notice of such instructions. *Edwards v. Schaffer*, 49 Barb. (N. Y.) 291. See also *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192; *Crane v. Bedwell*, 25 Miss. 507.

The authority of an agent cannot be narrowed by private, undisclosed instructions, unless there is something in the nature of the business, or the circumstances of the case, to indicate that the agent is acting under special instructions or limited powers. *Markey v. Mutual Ben. L. Ins. Co.*, 103 Mass. 78; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. (Tenn.) 440, 27 Am. Rep. 761.

If a general agent for the purchase of wheat buys wheat to be paid for on demand, at the current price at the time of demand, his principal will be liable, though he may have instructed the agent to purchase only for cash and has paid him for the wheat, if the contract is made in good faith upon the credit of the principal, and in ignorance of the private instructions. *Cruzan v. Smith*, 41 Ind. 288. And see *Stapp v. Spurlin*, 32 Ind. 442.

Public Agents.—It has been held that the rule stated in regard to undisclosed instructions does not apply to public agents. *Parsel v. Barnes*, 25 Ark. 261.

Evidence of Instructions is admissible to prove the extent of the agency. *Bensberg v. Harris*, 46 Mo. App. 404.

1. Instructions of Which Third Parties are Aware.—*U. S. v. Williams*, Ware (U. S.) 175; *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360; *Longworth v. Conwell*, 2 Blackf. (Ind.) 469; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Barnard v. Wheeler*, 24 Me. 412; *Leathers v. Springfield*, 65 Mo. 507; *Stainer v. Tysen*, 3 Hill (N. Y.) 279.

2. Secret Instructions to Special Agents.—*Hatch v. Taylor*, 10 N. H. 538. *Parker, C. J.*, in delivering the opinion in this case, said: "No man is at liberty to send another into the market to buy or sell for him as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal, and then, when his agent has deviated from those instructions, to say that he was a special agent, that the instructions were limitations upon his authority, and that those with whom he dealt in the matter of his agency acted at their peril, because they were bound to inquire where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. If the principal deemed the bargain a good one, the secret orders would continue sealed; but if his opinion was otherwise, the injunction of secrecy would be removed and the transaction avoided, leaving the party to such remedy as he might enforce against the agent."

The principal is bound if the act of his special agent be within the scope of the authority which he holds him out to the world to possess, notwithstanding his private instructions. *Carmichael v. Buck*, 10 Rich. (S. Car.) 332, 70 Am. Dec. 226. And see *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78.

3. Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Lance v. Barrett*, 1 Hill (S. Car.) 204.

Where the owner of a horse sends a stranger to a fair with it for sale, with express directions not to warrant it, and he acts contrary to his orders, the owner would not be liable on the warranty. *Fenn v. Harrison*, 3 T. R. 757.

Secret Instructions Distinguished from Limitations of Authority.—"The practical difficulty is that, with special agents, the instructions often accompany the authority, being conveyed, it may be, in the same sentence, so that considerable embarrassment sometimes ensues in discriminating between instructions

e. AUTHORITY AS AFFECTED BY USAGE OR CUSTOM.—Parties in entering into contracts are presumed to have in view the established usages and customs of the particular trade or business with reference to which they are contracting.¹ Third persons in dealing with an agent have a right, therefore, to presume that he has been clothed with all the powers with which, according to the custom of that particular business, similar agents are clothed;² and the

and limitations of the power." 1 Minor's Inst. 208.

It is to be observed that a distinction is to be taken between the limited authority of a special agent, when appointed for specific acts, and private instructions given to such agent. Where the authority is limited in a *bona fide* manner, and the limitation is to be first disclosed by the agent, and is disclosed, either with or without inquiry, any departure from such authority or instructions will not bind the principal; but where the authority or instructions given are in the nature of private instructions, and so designed to be, they will not be binding upon the parties dealing with the agent. And if the instructions are of such a nature that they would not be communicated if an inquiry was made (even though it be the duty of the person dealing with the agent to make the inquiry), it is not necessary that it should be made, for it would not be communicated if made. Towle v. Leavitt, 23 N. H. 374, 55 Am. Dec. 195.

Effect of Subsequent Instruction.—A subsequent written instruction does not supersede or extinguish a prior parol instruction which it is evident the written instruction was not intended to interfere with or to displace. McLaughlin v. Wheeler, 1 S. Dak. 497.

1. See the title **USAGES AND CUSTOMS**, where the requisites of a valid usage and the necessity of knowledge thereof are fully treated; Milwaukee, etc., Invest. Co. v. Johnston, 35 Neb. 554.

Custom Unknown to Party and Not Recognized in the Place of Contract.—In an action for the breach of a written contract, made by an agent of the defendant in another state, for the sale of goods to the plaintiff, evidence of a custom among dealers in such goods in this commonwealth to accept or reject contracts made by their selling agents is inadmissible, in the absence of evidence that such a custom was known in the place where the contract was made, or that any notice of it was given to the plaintiff. Byrne v. Massasoit Packing Co., 137 Mass. 313.

2. Usage and Custom—England.—Jones v. Bowden, 4 Taunt. 847; Bayliffe v. Butterworth, 1 Exch. 425; Sutton v. Tatham, 10 Ad. & El. 27, 37 E. C. L. 25; Raitt v. Mitchell, 4 Campb. 146.

Alabama.—Cawthon v. Lusk, 97 Ala. 674.
California.—Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196.

Connecticut.—Willard v. Buckingham, 36 Conn. 395; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745.

Illinois.—Corbett v. Underwood, 83 Ill. 324, 25 Am. Rep. 392; Phillips v. Moir, 69 Ill. 156; Pardridge v. Bailey, 20 Ill. App. 351.

Maine.—Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169.

Maryland.—Kraft v. Fancher, 44 Md. 204; Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125.

Massachusetts.—Schnitzer v. Oriental Print Works, 114 Mass. 123; Day v. Holmes, 103 Mass. 306; Mixer v. Coburn, 11 Met. (Mass.) 559, 45 Am. Dec. 230; Winsor v. Dillaway, 4 Met. (Mass.) 221.

New Hampshire.—Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45.

New York.—M'Kinstry v. Pearsall, 3 Johns. (N. Y.) 319; Smith v. Tracy, 36 N. Y. 79.

Ohio.—Frank v. Jenkins, 22 Ohio St. 597.

Pennsylvania.—Sumner v. Stewart, 69 Pa. St. 321.

Tennessee.—Strong v. Stewart, 9 Heisk. (Tenn.) 137; Franklin v. Ezell, 1 Sneed (Tenn.) 497.

Texas.—Hollingsworth v. Holshausen, 25 Tex. 628.

The general rule is, as to all contracts, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual.

Alabama.—Alabama G. S. R. Co. v. Hill, 76 Ala. 303; Gaines v. McKinley, 1 Ala. 446; Skinner v. Gunn, 9 Port. (Ala.) 305.

Illinois.—Woodford v. McClenahan, 9 Ill. 85.

New York.—Sandford v. Handy, 23 Wend. (N. Y.) 260.

North Carolina.—Lane v. Dudley, 2 Murph. (N. Car.) 119, 5 Am. Dec. 523; Williamson v. Canaday, 3 Ired. (N. Car.) 349.

Vermont.—Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671.

Wisconsin.—Roche v. Pennington (Wis., 1895), 62 N. W. Rep. 946, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 354.

May Employ Means Justified by Usage.—It is well settled that an agent has authority to adopt the usual and ordinary means of accomplishing the business with which he is intrusted. Williams v. Getty, 31 Pa. St. 461, 72 Am. Dec. 757; Pickert v. Marston, 68 Wis. 465, 60 Am. Rep. 877.

And all the means justified by usage in such cases may be employed by him, unless such implied authority be expressly negated by the principal. Franklin v. Ezell, 1 Sneed (Tenn.) 497.

Powers Restricted by Usage of Trade.—And his powers may be restricted by a usage of the trade to which the transaction relates. Greely v. Bartlett, 1 Me. 179. See also Harris v. San Diego Flume Co., 87 Cal. 526.

Usage Binds Principal, Although Not Known to Him.—A person who employs another to act for him at a particular place or market, must be taken as intending that the business to be done will be done according to the cus-

usages of the business are properly admitted for the purpose of interpreting the powers given the agent.¹

2. Powers Prima Facie Incident to Every Authority.—The principle is elementary and uniform that a power given an agent in a transaction carries with it the authority to do whatever is usual² and necessary to carry into effect the principal power.³ And this applies as well to special as general agents,

tom and usage of that place or market, whether the principal in fact knew of the usage or custom, or not. *Bailey v. Bensley*, 87 Ill. 556.

Usage of Business Measures Authority.—The usage of the business in which the general agent is employed furnishes the rule by which his authority is measured. *Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 589, 59 Am. Dec. 163. See also *Quinn v. Carr*, 4 Hun (N. Y.) 259.

The Officers of a Bank are held out to the public as having authority to act according to the general usage, practice, and course of their business. And their acts within the scope of such usage, practice, and course of business will, in general, bind the bank in favor of third persons possessing no other knowledge. *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

Custom of Shipmasters to Insure.—Effect will be given to a custom of captains of steamboats at a large river port to insure their boats and give premium notes therefor, binding the owners of the boat. *Adams v. Pittsburgh Ins. Co.*, 95 Pa. St. 348, 40 Am. Rep. 662.

The Agent of an Insurance Company authorized to issue policies and to consummate the contract binds the principal by any act, agreement, representation, or waiver within the ordinary scope and limit of the insurance business which is not known by the assured to be outside the authority granted the agent. *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533. See the title **INSURANCE**.

1. *Phillips v. Moir*, 69 Ill. 155; *Clark v. Van Northwick*, 1 Pick. (Mass.) 343; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125. See also *Green v. Clay*, 10 Allen (Mass.) 90.

The extent of the authority can be resolved by the usages and general understanding of the community. *Topham v. Roche*, 2 Hill (S. Car.) 307, 27 Am. Dec. 387.

For evidence held not to be sufficient to warrant the court in presuming an established usage in the hardware business, see *Hibbard v. Peek*, 75 Wis. 619.

2. See *supra*, this title, *Authority, General and Special—Authority as Affected by Usage or Custom*.

3. *England*.—*Pole v. Leask*, 28 Beav. 562; *Heinrich v. Sutton*, L. R. 6 Ch. 220; *Howard v. Baillie*, 2 H. Bl. 618.

United States.—*Le Roy v. Beard*, 8 How. (U. S.) 451.

Alabama.—*Tennessee River Transp. Co. v. Kavanaugh* (Ala., 1893), 13 So. Rep. 283.

California.—*Goldtree v. Swinford*, 74 Cal. 586.

Colorado.—*Arthur v. Gard*, 3 Colo. App. 134.

Illinois.—*Meister v. Cleveland Dryer Co.*,

11 Ill. App. 227; *Springfield Engine, etc., Co. v. Green*, 25 Ill. App. 106.

Indiana.—*Shackman v. Little*, 87 Ind. 181.

Kansas.—*Bohart v. Oberne*, 36 Kan. 289.

Kentucky.—*Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92.

Louisiana.—*Farrar v. Duncan*, 29 La. Ann. 126.

Maine.—*Kidder v. Knox*, 48 Me. 551; *Stanwood v. Laughlin*, 73 Me. 112.

Massachusetts.—*Damon v. Granby*, 2 Pick. (Mass.) 345; *Simonds v. Heard*, 23 Pick. (Mass.) 120; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

Michigan.—*Busch v. Wilcox*, 82 Mich. 336, affirming 82 Mich. 315; *Michigan Slate Co. v. Iron Range, etc., R. Co.*, 101 Mich. 14.

Missouri.—*State v. Gates*, 67 Mo. 139; *Barns v. Hannibal*, 71 Mo. 449.

Nevada.—*Sacalaris v. Eureka, etc., R. Co.*, 18 Nev. 155, 51 Am. Rep. 737.

New Hampshire.—*Backman v. Charlestown*, 42 N. H. 125.

New York.—*Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Wicks v. Hatch*, 62 N. Y. 537.

North Carolina.—*Huntley v. Mathias*, 90 N. Car. 101, 47 Am. Rep. 516.

Pennsylvania.—*Peck v. Harriott*, 6 S. & R. (Pa.) 149, 9 Am. Dec. 415; *Williams v. Getty*, 31 Pa. St. 461, 72 Am. Dec. 757.

Tennessee.—*Strong v. Stewart*, 9 Heisk. (Tenn.) 137; *Franklin v. Ezell*, 1 Sneed (Tenn.) 497.

Texas.—*McAlpin v. Cassidy*, 17 Tex. 449; *Missouri Pac. R. Co. v. Simons*, 6 Tex. Civ. App. 621, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 340, 341.

West Virginia.—*Piercy v. Hendrick*, 2 W. Va. 458.

See *infra*, this section, *Construction and Scope of Certain Particular Authorities*. See also *supra*, this title, *Appointment*; also, for the implied powers of particular classes of agents, such as insurance agents, masters of vessels, officers of banks and corporations, etc., the titles **INSURANCE**; **MASTERS OF VESSELS**; **BANKS**; **CORPORATIONS**; **OFFICERS OF PRIVATE CORPORATIONS**; etc.

Limitation of the Doctrine.—The rule of the text does not apply where the inference of such powers is expressly excluded by the instrument creating the agency, or by the circumstances of the business to which the agency relates. *Collins v. Cooper*, 65 Tex. 460; *Byne v. Hatcher*, 75 Ga. 289.

Illustrations of Powers Necessarily Implied.—The employment of an agent to deliver all freights necessarily includes the authority to make terms in regard to the delivery. *Michigan Southern, etc., R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267.

A foreman intrusted with the general man-

unless the manner of doing the particular act is prescribed by the power.¹

3. Construction of Authority—*a*. WRITTEN AUTHORITIES—Question for Court.—Where the authority is created by power of attorney, or other writing, the instrument itself must, in general, be produced; and since the construction of writings belongs to the court and not to the jury, the fact and scope of the agency are, in such cases, questions of law to be decided by the court.²

agement of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of the business. *Richardson v. Cartwright*, 1 C. & K. 328, 47 E. C. L. 328.

An authority to pay an award and to do what is needful implies also authority to carry the award into effect by the execution of a release. *Dawson v. Lawley*, 4 Esp. 65.

The general agent in the management of an estate may bind his principal by the employment of an attorney to save property sold for taxes, and this although there was an understanding between the principal and agent that the latter was to be responsible for all attorneys' fees. *Farrar v. Duncan*, 29 La. Ann. 126.

And a power "to sue or otherwise collect all claims" implies authority to employ counsel. *Morgan v. Brown*, 12 La. Ann. 159.

Authority to collect a debt carries with it authority to sue for it and issue execution upon the judgment obtained. *Joyce v. Duplessis*, 15 La. Ann. 242, 77 Am. Dec. 185.

The power conferred upon a committee to investigate the affairs and accounts of a corporation implies everything necessary to execute it, such as employing an accountant and obtaining clerical assistance for him. *Star Line v. Van Vliet*, 43 Mich. 364.

If an agent is authorized to get immediate possession of a certain store-room, and his principal and he understand that a bonus will have to be paid for such possession, he is authorized to contract to pay such bonus. *Shackman v. Little*, 87 Ind. 181.

And where the manager of a railroad is authorized, in case of accident, to clear the road, he acts within the general scope of his authority in putting a lot of swine, let loose by an accident, into a farmer's yard. *Hawks v. Locke*, 139 Mass. 205.

An agent sent to hurry forward goods may bind his principal to pay a sum for which they are held under a claim of lien. *Robinson v. Springfield Iron Co.*, 39 Hun (N. Y.) 634. And see *Collins v. Cooper*, 65 Tex. 460.

Where goods are shipped to a consignee, and on account of an accident to a vessel carrying them it becomes necessary to execute a general average bond to the owners of the vessel, the consignee or agent has the right, and it is his duty, to execute the bond in order that he may carry out the instructions of his principal with regard to shipment and sale of the goods. *Hardee v. Hall*, 12 Bush (Ky.) 327.

A committee appointed by a town to sell land belonging to the town has implied authority to require a deposit to bind the sale. *Goodale v. Wheeler*, 11 N. H. 424.

A clause in a bank charter providing that

the funds of the company shall not in any case be liable for any contract or engagement whatever, unless the same shall be signed by the president and countersigned by the cashier, does not apply to such contracts or engagements as occur or are necessary to the ordinary business of a cashier or agent, such as drawing and indorsing bills of exchange, checks, and drafts. *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

The general power given a broker to negotiate the sale of a promissory note includes by implication the power to give such information relating thereto as would ordinarily be called for. *McBean v. Fox*, 1 Ill. App. 177.

Power Not Necessarily Involved.—But the authority given an agent for the management of property gives him no authority to borrow money even in a case of absolute necessity. *Hawtayne v. Bourne*, 7 M. & W. 595. See also *Sawyer v. Wayne* (Supreme Ct.), 6 N. Y. St. Rep. 745; *White v. Madison*, 26 N. Y. 117.

1. *United States*.—*Earnest v. Stoller*, 2 McCrary (U. S.) 380.

Indiana.—*Shackman v. Little*, 87 Ind. 181. *Kentucky*.—*Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92.

Louisiana.—*Farrar v. Duncan*, 29 La. Ann. 126.

Michigan.—*Star Line v. Van Vliet*, 43 Mich. 364.

Missouri.—*State v. Gates*, 67 Mo. 139.

New York.—*Sandford v. Handy*, 23 Wend. (N. Y.) 268; *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354.

Pennsylvania.—*Peck v. Harriott*, 6 S. & R. (Pa.) 146, 9 Am. Dec. 415.

Texas.—*Taylor v. Hudgins*, 42 Tex. 244.

Implied Powers of Special Agents.—Every agency carries with it, or includes in it, as incident, all the powers which are necessary or proper, or usual, as means to effectuate the purposes for which it was created, and in this respect there is no distinction whether the authority is general or special, express or implied. *McAlpin v. Cassidy*, 17 Tex. 449; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

A Special Agent to Obtain Subscriptions to a project of forming a joint-stock company to purchase lands may use the ordinary means of accomplishing the object of his appointment, such as representing the location and quality of the lands, and the like. *Sandford v. Handy*, 23 Wend. (N. Y.) 260.

2. *Claffin v. Continental Jersey Works*, 85 Ga. 27; *Millay v. Whitney*, 63 Me. 522; *Equitable L. Assur. Soc. v. Poe*, 53 Md. 28; *Pollock v. Cohen*, 32 Ohio St. 514; *Fisher v. Moyer* (Pa., 1886), 3 Cent. Rep. 583; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36

The Object of the Power.—In construing the power the court must have in view the design and object of the power and the means most usual and proper for carrying it into effect.¹

Subject to Strict Interpretation.—A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given.²

Pa. St. 498, 78 Am. Dec. 390; *McCreery v. Garvin*, 39 S. Car. 375, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 363; *Berry v. Harnage*, 39 Tex. 638. See *Berwick v. Horsfall*, 27 L. J. C. P. 193; *Dobbins v. Etowah Mfg., etc., Co.*, 75 Ga. 243.

A Letter by the Principal to His Agent, directing a sale of real estate, is sufficient authority for the agent to make a sale according to its terms; but if the authority be denied, the letter itself must be produced; or, if lost, its contents must be clearly proved. *Stadlerman v. Fitzgerald*, 14 Neb. 290.

1. *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; *Le Roy v. Beard*, 8 How. (U. S.) 468.

Intention of Parties.—In construing the power, the court must be governed by the intention of the parties. *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600.

"Undoubtedly it is a rule that a special power of attorney is to be strictly construed so as to sanction only such acts as are clearly within its terms; but it is also a rule of equal potency that the object of the parties is always to be kept in view, and, where the language used will permit, that construction should be adopted which will carry out instead of defeating the purpose of the appointment." *Per Field, J., in Holladay v. Daily*, 19 Wall. (U. S.) 606. See also *Spect v. Gregg*, 51 Cal. 198.

Evidence.—In order to arrive at the intention of the parties and to interpret the scope and meaning of the power, the court may receive evidence as to the relative positions of the parties, their obvious design as to the objects to be accomplished, and the nature of the business or transaction in which the principal was engaged, when the power of attorney relates to that. *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Maynard v. Mercer*, 10 Nev. 33.

Lex Loc.—Every authority given to an agent to transact business for his principal must, in the absence of any counter proof, be construed to be to transact it according to the laws of the place where it is to be done. *Owings v. Hull*, 9 Pet. (U. S.) 607.

2. *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395; *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Johnston v. Wright*, 6 Cal. 373; *Neal v. Patten*, 40 Ga. 363; *Clafin v. Continental Jersey Works*, 85 Ga. 27; *Chase v. Dana*, 44 Ill. 262; *Wood v. Goodridge*, 6 Cush. (Mass.) 123, 52 Am. Dec. 771; *Rice v. Tavernier*, 8 Minn. 248, 83 Am. Dec. 778; *Gilbert v. How*, 45 Minn. 121; *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313; *Mechanics' Bank v. Schauburg*, 38 Mo. 236; *Hubbard v. Elmer*, 7

Wend. (N. Y.) 446, 22 Am. Dec. 590; *Geiger v. Bolles*, 1 Thomp. & C. (N. Y.) 129. See also *Taylor v. Harlow*, 11 Barb. (N. Y.) 232.

An instrument creating an agency is subject to strict construction, and, like other contracts, must be read in the light of surrounding circumstances. *Bissell v. Terry*, 69 Ill. 184.

Not Subject to Liberal Interpretation.—Such instruments are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions, which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations. *Craighead v. Peterson*, 72 N. Y. 284, 28 Am. Rep. 150.

Construction must Not Defeat Intention.—But this rule does not require a construction that will defeat the intention of the parties, and where the intention fairly appears from the language used, it must control. *Hemstreet v. Burdick*, 90 Ill. 444.

Authority to Cite and Appear confers power to prosecute and defend suits brought by or against the principal. *Miller v. Marmiche*, 24 La. Ann. 30.

A Power of Attorney to Execute an Injunction Bond according to a certain order of the judge, which directs the condition to be according to law, does not authorize a bond to secure the damages that may be awarded on the dissolution of the injunction, where that is not required by the statute. *Dehart v. Wilson*, 6 T. B. Mon. (Ky.) 577.

An Agent to Confess Judgment cannot do so at a different time from that authorized in the power. *Rankin v. Eakin*, 3 Head (Tenn.) 229. But he may confess judgment with a stay of execution. *Calwells v. Shields*, 2 Rob. (Va.) 305.

A power of attorney authorizing an attorney "to negotiate any loan or loans of money, etc., or to contract any debt or debts, and to secure the same by executing" a mortgage on real estate, is sufficient to justify the agent in, and bind his principal by, receiving a draft instead of cash in payment of the money agreed to be loaned; the draft being paid at maturity, the securities given for payment of the loan are binding from their delivery. *Roelfson v. Atwater*, 1 Disney (Ohio) 346.

A general power of attorney is sufficient to authorize the agent to execute a general release in the name of his principal. *Quesnel v. Mussy*, 1 Dall. (Pa.) 449.

A power of attorney under seal authorizing an agent to sign his principal's name to

Restricted to Individual Business and Use of Principal.—A power of attorney, therefore, to act generally in the name and on behalf of the principal must, in the absence of anything showing a different intention, be construed as giving authority to act only in the separate individual business of the principal, and for his use.¹

General Words.—General words are to be construed with reference to the object to be accomplished; and where a power is given to do a particular act, followed by general words, such words are not to be extended beyond what is necessary for accomplishing the particular act for which the power is given.²

a contract, authorizes him to execute a contract under seal. *Wickham v. Knox*, 33 Pa. St. 71.

1. *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *Stainback v. Read*, 11 Gratt. (Va.) 286, 62 Am. Dec. 648; *Mechanics' Bank v. Schaumburg*, 38 Mo. 236.

The powers of the agent are limited to doing the acts authorized for the use and benefit of the principal only, as much as if it were so expressed. *Adams Express Co. v. Trego*, 35 Md. 48; *Hewes v. Doddridge*, 1 Rob. (Va.) 152.

A power of attorney authorizing an agent to issue notes in the name of the principal will be construed as extending only to notes issued in the business of the principal, or for his benefit. *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Camden Safe Deposit, etc., Co. v. Abbott*, 44 N. J. L. 257. Such an agent is not authorized to draw and indorse notes for the mere accommodation of third persons. *Wallace v. Mobile Branch Bank*, 1 Ala. 565.

See the title ACCOMMODATION PAPER.

2. *Esdaille v. LaNauze*, 1 Y. & C. 394; *Perry v. Holl*, 2 DeG. F. & J. 48; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Luke v. Griggs*, 4 Dakota 287; *Hazeltine v. Miller*, 44 Me. 177; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Lawrence v. Gebhard*, 41 Barb. (N. Y.) 575; *Craighead v. Peterson*, 72 N. Y. 283, 28 Am. Rep. 150; *Hewes v. Doddridge*, 1 Rob. (Va.) 152; *Gee v. Bolton*, 17 Wis. 604; *Rountree v. Denson*, 59 Wis. 522. And see *Withington v. Herring*, 5 Bing. 442, 15 E. C. L. 492; *Whelan v. McCreary*, 64 Ala. 319.

General Words are to be construed as giving general powers for carrying into effect the special purpose for which the power is given. *Attwood v. Munnings*, 7 B. & C. 278, 14 E. C. L. 42.

Powers of Attorney and All Special Powers are to be strictly construed, and general words therein are to be construed in reference to the particular terms which form the subject matter of the instrument in furtherance of, but in subordination to, the general power conferred. *Geiger v. Bolles*, 1 Thomp. & C. (N. Y.) 129. And see *Adams Express Co. v. Trego*, 35 Md. 47.

Illustrations—General Powers Construed with Reference to Subject Matter.—*A Power of Attorney to Collect Debts Due*, arising from certain notes secured by a mortgage, and to compromise, settle, and arrange them, either in law or otherwise, as to the attorney should seem fit, does not authorize him to forgive the debt or postpone or discharge the security, except

in fulfilment of some arrangement for its satisfaction. *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399.

To Transact All Business.—And an agent with a general authority to transact all the business of his principal, with certain books and accounts for professional services "for settlement," was held not authorized to transfer such books and accounts to a surety of his principal to indemnify him against the consequences of his suretyship. *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

A Power Authorizing the Collection of Debts and of personal property, and containing a clause that "upon the receipt of any such debt, dues, or issues of money, acquittances or other discharges for me, and in my name, to make, seal, execute deeds of conveyance, and deliver, and generally do all and every act or acts, thing or things, device or devices in the law, whatsoever needful and necessary to be done in and about the premises, for me, and in my name, to do, execute, and perform," does not authorize a sale of real estate, but only allows deeds of release for mortgages or to affect contracts previously made. *Berry v. Harnage*, 39 Tex. 638.

An Authority to Attend to the Business of the Principal Generally, or to act for him with reference to all his business, does not authorize a sale of real estate, or allow the agent to sell or otherwise dispose of the personality of his principal, unless as a means necessary and proper to conduct the business to which the agency applies. *Coquillard v. French*, 19 Ind. 274.

A power of attorney "to act in all my business as if I were personally present, and to stand good in law, on all my lands and other business," does not authorize the sale of land and the making of binding covenants in relation thereto. *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313.

And if one constitutes another his "general and special agent to do and transact all manner of business," it does not necessarily authorize him to sell stocks or other property of the principal. *Hodge v. Combs*, 1 Black (U. S.) 192.

To Collect Debts and Do All Acts Which the Principal could Personally Do.—A power of attorney to collect debts, execute deeds of lands, and accomplish a complete adjustment of all concerns of the principal in a particular place, and to do all other acts which the principal could do in person, does not authorize the giving of a note by the agent in the name of the principal; the larger power conferred by the general words must be construed with reference to the matters specially mentioned.

Parol Evidence.—Contemporaneous parol evidence is inadmissible to vary or enlarge a written authority,¹ but parol evidence may be admitted to show a further special agency to do a particular act,² or a subsequent enlargement of the original authority.³

Usage or Custom.—Nor can the nature and extent of a written authority be enlarged by parol evidence of a usage of other agents in like cases. It must be ascertained from the instrument itself.⁴ But such evidence may be admitted for the purpose of interpreting the powers actually given, or the manner of their execution.⁵

b. WHERE AUTHORITY IS AMBIGUOUS.—Where the authority is ambiguous and capable of two constructions, it should be construed according to the usual course of dealing in such matters.⁶ But if the agent has *bona fide* and in good faith adopted and acted upon one construction, it will bind the principal.⁷

Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62.

A Power to Receive All Salary and money, with all the principal's authority to recover, compound, and discharge, and give releases, does not authorize the agent to negotiate bills received in payment, or indorse them in his own name, and this though the power contained a clause authorizing him to transact all the business of the principal. Hogg v. Snaith, 1 Taunt. 347.

Duration of Power.—Where the operative part of a power of attorney contained no limitation on the duration of the power, but it was preceded by a recital that the principal was going abroad and was desirous of appointing agents to act for him during his absence, it was held that the recital controlled the generality of the operative part of the instrument and limited the exercise of the power to the period of the principal's absence. Danby v. Coutts, 29 Ch. Div. 500.

1. Hogg v. Snaith, 1 Taunt. 347; Claflin v. Continental Jersey Works, 85 Ga. 27; Ashley v. Bird, 1 Mo. 640, 14 Am. Dec. 213; State v. State Bank, 45 Mo. 528; Mechanics' Bank v. Schaumburg, 38 Mo. 228; Pollock v. Cohen, 32 Ohio St. 514; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

Parol Evidence to Interpret Powers.—But parol evidence, though inadmissible for the purpose of enlarging the authority or conferring other powers, may be admitted to interpret the powers conferred. Frink v. Roe, 70 Cal. 296.

The subject matter and general intention of the maker must first be shown by the writing, without the aid of extrinsic evidence, and then such evidence may be received to ascertain the particular subject in view at the time the writing was made, wherever its terms are equivocal or applicable indifferently to more than one subject. Gee v. Bolton, 17 Wis. 610.

2. Williams v. Cochran, 7 Rich. (S. Car.) 45.

3. Subsequent Enlargement of Power.—Where the parol evidence seeks to establish a subsequent enlargement of the original authority, or to give an authority for another object, or where the express power is ingrafted on an existing agency, affecting it only *sub modo* to a limited extent, the maxim

excluding parol evidence loses its force and application. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

Where an agent was authorized in writing to sell, or procure a purchaser for, land at sixteen hundred dollars, and execute a contract for such sale, it was held that it might be shown that he was afterwards orally authorized to accept six hundred dollars in cash and the balance on time secured by a mortgage. Magill v. Stoddard, 70 Wis. 75.

4. Reese v. Medlock, 27 Tex. 123, 84 Am. Dec. 611; Delafield v. Illinois, 26 Wend. (N. Y.) 192.

Evidence of a usage of the navy office to pay bills indorsed by the agent in his own name and negotiated by him under a special limited power cannot be received to enlarge the operation of the power. Hogg v. Snaith, 1 Taunt. 347.

5. Frink v. Roe, 70 Cal. 296.

In Reese v. Medlock, 27 Tex. 123, 84 Am. Dec. 611, it is said that there may be some qualifications and limitations to the general rule excluding parol evidence, especially in cases of general or implied agencies, where the usages of a particular trade or business or of a particular class of persons are properly admissible—not, indeed, for the purpose of enlarging the powers of the agents employed therein, but for the means of interpreting and understanding those powers which are actually given. And see *supra*, this section, *Authority as Affected by Usage or Custom*.

6. Pole v. Leask, 28 Beav. 574.

7. See Brown v. M'Gran, 14 Pet. (U. S.) 480; Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67; Mattocks v. Young, 66 Me. 459; Foster v. Rockwell, 104 Mass. 167; Mechanics' Bank v. Merchants' Bank, 6 Met. (Mass.) 13; Mann v. Laws, 117 Mass. 293; Johnson v. Jones, 4 Barb. (N. Y.) 369; Winne v. Niagara F. Ins. Co., 91 N. Y. 185; Bessent v. Harris, 63 N. Car. 542; Longmire v. Herndon, 72 N. Car. 629.

Principal Responsible for Ambiguities.—The principal should give his instructions in clear and unambiguous terms, and is himself responsible for any error arising from ambiguous instructions. Ireland v. Livingston, L. R. 5 H. L. 416. And see *infra*, this title, *Duties and Liabilities Inter Se—Of Agent to Principal—Fidelity to Instructions*.

c. IMPLIED AUTHORITIES.—The nature and extent of an implied authority are deemed to be limited to acts of a like nature with those from which it is implied,¹ and an implied agency is never construed to extend beyond the obvious purposes for which it is apparently created.² The

If a construction be in some doubt, the agent may do what seems, from the instrument, plausible and correct; and though it turn out in the end to be wrong as understood by the principal, the latter is still bound by the conduct of the agent. The persons dealing with an agent are required, like him, to look to the instrument to see the extent of the power, and if it be ambiguous, so as to mislead them, the injurious consequences should fall on the principal for not employing clearer terms. *LeRoy v. Beard*, 8 How. (U. S.) 468; *Very v. Levy*, 13 How. (U. S.) 345; *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151; *Courcier v. Ritter*, 4 Wash. (U. S.) 551; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 358.

1. *Odiorne v. Maxcy*, 13 Mass. 178; *Williams v. Getty*, 31 Pa. St. 464, 72 Am. Dec. 757. See also *Akers v. Kirke*, 91 Ga. 590; *Owing v. Myers*, 3 Bibb (Ky.) 278.

Ascertained by Course of Dealing.—It is to be ascertained by investigating the course of dealing pursued between the several parties to the transaction. *Pole v. Leask*, 28 Beav. 562.

Recognition of Similar Acts.—A single act of an assumed agent and a single recognition of his authority by the principal, if sufficiently unequivocal, positive, and comprehensive in their character, may be sufficient to prove the agency to do other similar acts. *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 269. But see *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *Billings First Nat. Bank v. Hall*, 8 Mont. 341.

A continuing agency is not to be presumed from the fact that one has occasionally been temporarily employed for special purposes. *Campbell v. Sherman*, 49 Mich. 534. And the law raises no inference that the agency continues or extends to other matters occurring years after. *Reed v. Baggott*, 5 Ill. App. 257.

In an action for the price of goods furnished on a forged order the plaintiff may show that the purchaser was the general agent of the defendant, who had frequently paid for goods purchased by the agent on his credit. *Williams v. Mitchell*, 17 Mass. 98.

Where a merchant's clerk makes sales, receives payment, and gives receipts in the name of his employer with the sanction of the latter, or the merchant in any manner holds him out to the community as his agent for those purposes, he is bound by the acts of such clerk in the same course of trade without his authority; but to apply this rule to a case where a purchasing clerk, having been employed in a single instance to make a sale, fifteen months afterwards made another, wholly unauthorized, is to carry the doctrine to an unwarranted extent, especially where the price asked and other circumstances are such as should have aroused the suspicions of ordinarily prudent persons. *Cupples v. Whelan*, 61 Mo. 583.

Authority Implied from Nature of Particular Act.—An implied authority may be deduced from the nature and circumstances of the particular act done by the principal. If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it will be intended that the commodity is sent thither for the purpose of sale; and where the article is sent in such a way and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser will be safe, although the agent may have acted wrongfully and against his orders or duty, if the purchaser had no notice of it. *Towle v. Leavitt*, 23 N. H. 373, 55 Am. Dec. 195; *Pickering v. Busk*, 15 East 38. See also *Lambert v. Carroll*, *Wright* (Ohio) 108.

Illustrations—Implied Powers.—Power to sign bills, notes, etc., and manage the principal's business, carries with it power to indorse notes. *Auldjo v. McDougall*, U. C. Q. B. 3 O. S. 199.

Power to collect money implies power to give a receipt. *Bedson v. Smith*, 10 Grant Ch. (Can.) 292.

Authority to execute a deed of trust carries with it by implication power to acknowledge it for registration. *Robinson v. Mauldin*, 11 Ala. 977.

An agent who makes an offer is also the agent to receive the response. *Ferguson v. Hemingway*, 38 Mich. 169.

2. *Story on Agency*, § 87.

Implied Authority Limited to Like Acts or Like Dealings.—If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of a like nature; if from the general habits of dealing between the parties, it is deemed to be limited to dealings of the same kind. *McAlpin v. Cassidy*, 17 Tex. 449.

The implied authority of an agent is limited by the usual course of dealing in the business in which he is employed. *Jones v. Warner*, 11 Conn. 40.

To the same effect see *Rankin v. New England Silver Min. Co.*, 4 Nev. 78. See also *Tidrick v. Rice*, 13 Iowa 214; *Waldworth County Bank v. Farmers' L. & T. Co.*, 14 Wis. 325.

As to how an agency may be created by implication, see *supra*, this title, *Appointment—Modes*.

Agent to Import cannot Sell.—An agent employed merely to import goods from a foreign country has no implied authority to sell them. *Dyer v. Pearson*, 3 B. & C. 38, 10 E. C. L. 13.

A Receiving and Forwarding Merchant, unless under some special contract, custom, or usage of trade, cannot forward cotton to a port without instructions from his principal, and direct its delivery to a commission merchant on arrival. *Love v. Davis*, 25 Ala. 335.

fact and scope of such an agency is for the jury.¹

4. Construction and Scope of Certain Particular Authorities—*a.* To SELL GENERALLY—(1) *Consideration must be in Money.*—All sales, whether of real or personal property, by an agent appointed generally to sell, must be for a consideration in money,² and such an agent cannot bind his principal by receiving payment in bonds, notes, or other paper.³

An Agent Intrusted with the Possession of the Property of Another, with his consent, and with the apparent ownership, does not thereby acquire authority to pledge it if it is not left with him for the purposes of sale, and such apparent ownership has not been permitted by the true owner with fraudulent intent. *Nickerson v. Darrow*, 5 Allen (Mass.) 419.

Power to Collect a Note does not authorize an agent to bind his principal by an expression of his opinion as to the correct reading of a doubtful word. *Van Vechten v. Smith*, 59 Iowa 173.

Authority to draw a bill of exchange is not of itself authority to receive notice of dishonor. *Hockaday v. Skeggs*, 2 Phila. (Pa.) 268.

Power of Attorney to Settle Certain Claims.—A power of attorney given to an agent to represent the principal's interest in the settlement of certain claims does not authorize the attorney to bind the principal for the debts of third persons. *Hart v. Dixon*, 5 Lea (Tenn.) 336. See also *Gouldy v. Metcalf*, 75 Tex. 455, 16 Am. St. Rep. 912.

To Exchange.—A power to change old issues of stock for new issues does not authorize the transfer of the property to a third person. *Quay v. Presidio*, etc., R. Co., 82 Cal. 1. Nor will authority to negotiate an exchange of lands authorize a binding contract to exchange or the receipt of a deed to be given the principal on exchange. *Swain v. Burnette*, 89 Cal. 564.

Authority to trade off a mule if the agent could get anything to suit him does not authorize him to exchange him for another, and bind the principal to pay a sum of money as the estimated difference in value. *McMillan v. Wooten*, 80 Ala. 263.

To Contract.—Authority to contract confers no authority to sue upon the contract, *Markham v. Burlington Ins. Co.*, 69 Iowa 515; nor to release any material benefit thereunder in order to avoid a lawsuit, there being no dispute as to the validity of the contract. *Kountz v. Gates*, 78 Wis. 415.

To Accept Performance.—And authority to accept performance of a contract gives no authority to add to the contract. *Carson v. Mitchell*, 41 Ill. App. 243.

Authority to Receive Money does not imply power to pay it out. *Knowlton v. School City of Logansport*, 75 Ind. 103.

To Protect Interest.—A power to "protect all the interest in and title to" certain land owned by the principal authorizes the agent to redeem the land from a purchaser at a tax sale. *Townshend v. Shaffer*, 30 W. Va. 176.

1. *Lovejoy v. Middlesex R. Co.*, 128 Mass. 480; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498, 78 Am. Dec. 390; *Seiple v. Irwin*, 30 Pa. St. 515; *Wilkins v.*

Commercial Bank, 6 How. (Miss.) 217. See also *Kaufman v. Farley Mfg. Co.*, 78 Iowa 679, 16 Am. St. Rep. 462; *Partridge v. Sterling*, 79 Mich. 302; *White v. King*, 87 Mich. 107.

The sufficiency of the evidence to establish the extent of the agent's powers is a question for the jury, under appropriate instructions from the court. *Golding v. Merchant*, 43 Ala. 705; *Jacobson v. Poindexter*, 42 Ark. 97.

For evidence held sufficient to justify finding of jury that agent had apparent authority to bind his principal, see *Ellinger v. Rawlings* (Ind. App., 1895), 40 N. E. Rep. 146; *Harris v. Nations*, 79 Tex. 409. For evidence held insufficient, see *Wood v. Chicago*, etc., R. Co. (Iowa, 1885), 24 N. W. Rep. 46.

2. *Falls v. Gaither*, 9 Port. (Ala.) 605; *Mott v. Smith*, 16 Cal. 557; *Mora v. Murphy*, 83 Cal. 12; *Taylor*, etc., *Organ Co. v. Starkey*, 59 N. H. 142; *Dowden v. Cryder*, 55 N. J. L. 329; *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555; *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831.

In Absence of Special Provision, Sale must be for Money.—An agent authorized to sell property must sell for money, unless otherwise specially instructed. *Brown v. Smith*, 67 N. Car. 245.

The same rule applies in the absence of special custom, whether or not the agent is a *del credere* agent. *Catterall v. Hindle*, L. R. 1 C. P. 186.

The very word "sale" implies a moneyed consideration. *Hampton v. Moorhead*, 62 Iowa 91.

Agent Given Discretion as to Terms.—But where the agent was authorized to sell "on such terms as to him shall seem meet," and it appeared that the principal owned a great deal of other property in the town, which was young, and the growth of which he was desirous of advancing, thus increasing the value of his remaining property, it was held that the agent might stipulate for the payment of a certain sum in money and the establishment of a lumber yard on the lot. *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539.

As to power to give credit, see *infra*, this section, *To Sell Real Estate; To Sell Personally.*

3. **Payment in Negotiable Paper.**—The agent cannot bind his principal by a sale of the property for bonds which are not circulating as money, *Brown v. Smith*, 67 N. Car. 245; nor by receiving payment in notes, *Buckwalter v. Craig*, 55 Mo. 71; or bills of exchange, *Sykes v. Giles*, 5 M. & W. 645.

Payment by check is not a payment in cash. *Hall v. Storrs*, 7 Wis. 253. And the agent is liable if loss results from accepting a check. *Harlan v. Ely*, 68 Cal. 522.

If authorized to receive a note he cannot

Agent cannot Give Away.—The agent, therefore, cannot give away the property or make a conveyance in consideration of love and affection in the principal for the grantee.¹

Nor Barter or Exchange.—Nor can the agent barter or exchange the property,² even in part.³

Nor Pledge or Dispose of the Property to be Sold in Payment of his Own Debts.—A valid exercise of the authority requires the transaction to be for the benefit of the principal, who is not bound by a pledge or transfer of the property by the agent as security for or in payment of his own debts,⁴ but may maintain trover against the creditor without a previous demand.⁵

assign it. *Wright v. Ray*, 3 Humph. (Tenn.) 68.

1. *Mott v. Smith*, 16 Cal. 557.

A Gift of the Property is not authorized, nor its transfer for any purpose, except in completion of a sale. *Dupont v. Wertheman*, 10 Cal. 354.

And the owner of land may treat as a nullity a conveyance made by the agent without consideration. *Randall v. Duff*, 79 Cal. 115, 3 L. R. A. 754; *Campbell v. Campbell*, 57 Wis. 288; *Meade v. Brothers*, 28 Wis. 639.

2. *Guerreiro v. Peile*, 3 B. & Ald. 616, 5 E. C. L. 399; *Morrill v. Cone*, 22 How. (U. S.) 75; *Sioux City Nursery, etc., Co. v. Magnus*, 1 Colo. App. 45; *Drury v. Barnes*, 29 Ill. App. 166; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Taylor, etc., Organ Co. v. Starkey*, 59 N. H. 142; *Hayes v. Colby*, 65 N. H. 192; *Brown v. Smith*, 67 N. Car. 245; *Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Rhine v. Blake*, 59 Tex. 240; *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771; *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265.

See also *Lumpkin v. Wilson*, 5 Heisk. (Tenn.) 555, where land was exchanged for a stock of merchandise; *Mann v. Robinson*, 19 W. Va. 57, 42 Am. Rep. 771, where the agent accepted cattle, horses, sheep, and notes of third parties.

Custom.—Nor can this rule be overturned by a custom of land agents to barter or exchange property placed in their hands for sale. *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

Exchanging Money.—He has no authority, after receiving payment in cash, to exchange the money with third parties for bills of a different denomination. *Kent v. Bornstein*, 12 Allen (Mass.) 342.

3. *Hampton v. Moorhead*, 62 Iowa 91, where the consideration was in part cash and the balance in a patent right.

Transaction Held Cash Sale.—Where A gave B a power of attorney to sell and convey land, B conveyed the land to C, and under an arrangement contemporaneously made, whereby D was to make a loan to C to enable him to pay for the land, took notes and a mortgage from C payable to himself (B), and immediately indorsed the notes and assigned the mortgage in his individual capacity to D, and received the money, it was held to be a sale for cash, and not a barter, nor sale on time. *Plummer v. Buck*, 16 Neb. 322.

Property of Agent and Principal Sold for Part Cash.—Where an agent sold his own goods and those of his principal in one sale, receiving part payment in goods, his principal was held bound, provided the money received amounted to the value of his goods. *Moore v. Thompson*, 32 Me. 497.

4. *England.*—*De Bouchout v. Goldsmid*, 5 Ves. Jr. 211.

United States.—*Warner v. Martin*, 11 How. (U. S.) 209.

Alabama.—*Ullman v. Myrick*, 93 Ala. 532; *Powell v. Henry*, 27 Ala. 612; *Voss v. Robertson*, 46 Ala. 483; *Burks v. Hubbard*, 69 Ala. 379; *Hill v. Helton*, 80 Ala. 528.

Arkansas.—*Smith v. James*, 53 Ark. 135.

California.—*Frink v. Roe*, 70 Cal. 296.

Maine.—*Rodick v. Coburn*, 68 Me. 170; *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220.

Maryland.—*Taliaferro v. Baltimore First Nat. Bank*, 71 Md. 200.

Michigan.—*Hurley v. Watson*, 68 Mich. 531.

Minnesota.—*Talboys v. Boston*, 46 Minn. 144.

Missouri.—*Greenwood v. Burns*, 50 Mo. 52; *Buckwalter v. Craig*, 55 Mo. 71; *Flanagan v. Alexander*, 50 Mo. 51.

Nebraska.—*Ryan v. Stowell*, 31 Neb. 121, 1 Neb. L. J. 597.

New Hampshire.—*Gould v. Blodgett*, 61 N. H. 115. And see *Rice v. Lyndeborough Glass Co.*, 60 N. H. 195; *Holton v. Smith*, 7 N. H. 446.

North Carolina.—*Williams v. Johnston*, 92 N. Car. 532, 53 Am. Rep. 428.

Texas.—*Belton Compress Co. v. Belton Brick Mfg. Co.*, 64 Tex. 337.

Vermont.—*Stewart v. Woodward*, 50 Vt. 78.

Wisconsin.—*Whitney v. State Bank*, 7 Wis. 620.

An agent for the sale of real property cannot convey it in trust for the payment of his own debts. *Frink v. Roe*, 70 Cal. 296. Nor can an agent for the sale of personal property pledge it for his own indebtedness, for goods sold to him for his own use. *Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265.

Note for Sewing-machine—Boarding Agent No Defense.—In a suit upon a note given for the purchase of a sewing-machine, bought of plaintiff's agent, it is no defense that the maker furnished board to the agent, in payment of the note, under an agreement to that effect made at the time of the sale. *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89.

5. *Rodick v. Coburn*, 68 Me. 170; *Gould v. Blodgett*, 61 N. H. 115.

Or the Debts of the Principal.—Nor does an authority to sell property authorize a transfer of it in payment of the debts of the owner.¹

(2) **Time of Sale.**—If the time within which the sale is to be made is specified in the power, it will, of course, govern;² but even though no time be limited, a sale several years afterwards and after the property has greatly increased in value will not be sustained.³

(3) **Power Exhausted by Sale.**—After once entering into a contract of sale, the powers of the agent are exhausted, and he cannot afterward cancel it and make another contract for the sale of the same property.⁴

b. TO SELL REAL ESTATE⁵—(1) **Sufficiency of Power.**—As has been stated, written powers are to be strictly construed, and will not be enlarged by general words beyond the particular act to be done.⁶

Replevin.—*Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220.

1. *Butts v. Newton*, 29 Wis. 632.

A salesman and confidential clerk in a retail store has no authority, in the ordinary and usual course of business, to sell by wholesale in payment of a debt owed by his employer, *Lee v. Tinges*, 7 Md. 215; *Hampton v. Matthews*, 14 Pa. St. 105; nor, in the absence of his employer, to deliver goods in payment of, or as security for, a note signed by his employer. *Nash v. Drew*, 5 Cush. (Mass.) 422.

2. *Clements v. Machebocuf*, 92 U. S. 418; *Thornton v. Boyden*, 31 Ill. 200; *Reed v. Baggott*, 5 Ill. App. 257.

Committee Authorized to Sell on Certain Day.—A committee authorized by a vote of the proprietors of a meeting-house to sell it on a day named have no authority to make the sale on any other day. *Bliss v. Clark*, 16 Gray (Mass.) 60.

Short Time.—Where a sale is authorized within "a short time," a sale within two weeks will be held a compliance with the power. *Smith v. Fairchild*, 7 Colo. 510.

Immediately.—Where an agent is authorized to sell at a certain price if he can find a purchaser "immediately," a sale one month afterwards is unauthorized, especially where the agent had written the principal that he could not sell for the price named, and requested permission to sell for considerably less, or, if the permission were not given, "to let the matter drop." *Matthews v. Sowle*, 12 Neb. 398.

3. **Sale after Several Years and Increase of Value.**—If an agent authorized to sell land at a given price, three years afterwards, when the value has greatly increased and is rapidly rising, sells at the price named and at a great sacrifice, without informing his principal of the rise in value, it is such a fraud upon the principal that a court of equity will refuse to enforce the conveyance. *Proudfoot v. Wightman*, 78 Ill. 553.

4. *Luke v. Griggs*, 4 Dakota 287; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154. And see *Stilwell v. New York Mut. L. Ins. Co.*, 72 N. Y. 385; *Fullerton v. McLaughlin*, 70 Hun (N. Y.) 568.

Agent to Sell cannot Rescind.—The rule that there is no presumption that an agent to sell has power to rescind the sale or materially modify its terms after it has become an executed contract is well settled. *Adrian v.*

Lane, 13 S. Car. 183; *Andrews v. Himrod*, 37 Ill. App. 124.

A traveling salesman for a commercial house will not, in the absence of proof, be presumed to have authority to rescind his contracts and take back goods furnished by the house for which he is agent, when they prove unsatisfactory to the customer. *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154.

Contra of General Agent.—But it has been held that a general agent selling a chattel may rescind the contract of sale with the consent of the purchaser, *Scott v. Wells*, 6 W. & S. (Pa.) 357, 40 Am. Dec. 568; and that the principal will be liable to refund the money paid. *Bloomer v. Denman*, 12 Ill. 240. And see *Palmer v. Roath*, 86 Mich. 602.

Releasing from Liability.—Nor can an agent to sell release the purchaser from liability and accept another in his stead. *Ludwig v. Gorsuch*, 154 Pa. St. 413.

May Correct Description.—When an agent to sell all the principal's lands in a certain parish sells part of them, and it is afterwards discovered that the portion intended had not been conveyed, he may remove the obstacle to a perfect sale and correct the description of the land by agreeing to a different location, so as to carry out the original intentions of the purchaser and himself. Until this be done the sale is not complete and his power not terminated. *Boykin v. Wright*, 11 La. Ann. 531.

5. For a detailed treatment of the requisites, sufficiency, and interpretation of powers of attorney, see the title **POWERS OF ATTORNEY**.

6. *Supra*, this section, **Construction of Authority—Written Authorities.** *Dupont v. Wertheman*, 10 Cal. 354, *Bissell v. Terry*, 69 Ill. 184; *Sweigart v. Frey*, 8 S. & R. (Pa.) 299.

A power to sell real estate will not be implied from a power to purchase. *Tod v. Benedict*, 15 Iowa 591.

Authority to Assign Certificate of Mortgage Sale.—But a power to "grant, bargain, sell, and convey any and all personal or real property" gives authority to sell and convey by assignment of the certificate of sale the interest or estate which a purchaser at a mortgage sale has in the premises prior to the expiration of the period of redemption. *Cooper v. Finke*, 38 Minn. 2.

Power to Redeem.—An agent with a power of attorney to sell land has authority to redeem it when sold as unseated for the pay-

Authority must be Clear.—An authority, therefore, to sell real estate must be clear and distinct and of such a character that a fair and candid person must see, without hesitation, that the authority is given.¹ Hence an authority given in general terms to manage real estate, make contracts, and do all things which concern the principal's interest in any way, gives no power to convey land,²

ment of taxes. *McCord v. Bergautz*, 7 Watts (Pa.) 487.

No Power to Create Equitable Estate.—Authority to take charge of and sell land does not authorize an agent to create an equitable estate therein. *Bohn v. Hatch* (Buffalo Super. Ct.) 39 N. Y. St. Rep. 404.

1. *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395; *Burlington, etc., R. Co. v. Sherwood*, 62 Iowa 309. And see *Treat v. De Celis*, 41 Cal. 202.

Naked Power, Prescribing Manner of Execution.

—Where one gives a naked power, prescribing in the instrument creating it the manner in which it is to be exercised, every requirement must be strictly complied with, or the power does not arise. And a power of attorney to sell certain real estate in "lots as surveyed by B," where the land was about to be surveyed as an addition to a town, gives the agent no authority to sell the entire tract for a certain sum or at a certain price per acre. *Rice v. Tavernier*, 8 Minn. 248, 83 Am. Dec. 778.

Subject Matter of Power Uncertain.—Under a power by a husband to his wife "to bargain, purchase, sell, grant, lease, and convey, to accept and receive all sums of money, to collect and pay, to sue and be sued, to give notes and receipts, and to accept the same of * * * all and every person or persons, and in my name to make, seal, and deliver, and acknowledge for me," she has no authority to convey real estate, inasmuch as the form of the instrument does not exclude the hypothesis that the subject matter of the power was to be something else than land. *Gee v. Bolton*, 17 Wis. 604, *distinguishing* *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600.

Authority to Negotiate Special Sale Insufficient.

—Nor will a power to sell be implied from the fact that in a particular instance the agent was authorized to negotiate a sale to one person on certain terms, the actual transfer to be made by the owner. *Graves v. Horton*, 38 Minn. 66. Nor does a mere special employment to effect a sale confer authority upon the agent to agree upon the terms of the sale. *Michael v. Eley*, 61 Hun (N. Y.) 180.

Authority to Sell Subject to Approval.—Where a real-estate broker wrote to the plaintiff's attorney in fact: "Do you have charge of the lands in this county belonging to the estate of S.? If so, are they for sale? If the title is all right we can possibly find a customer for the list this year; let us hear from you as to price, etc.," to which he received the reply: "I herewith inclose you a price-list of our land in your county; my mother is the widow of S., * * * and is the sole devisee * * * I am executor of my father and attorney in fact of my mother; the titles are all strictly clear and good," attached to which letter was: "Western land for sale, Winnebago county, Ohio," followed by a list of lands with the

prices, terms, and name of the party to whom application should be made—it was held that the correspondence did not, on its face, contain authority to sell the lands, but that at most it was an authority to sell subject to the approval of the widow of S., or that of her attorney in fact. *Stewart v. Pickering*, 73 Iowa 652.

Authority to Make Contract of Sale.—The owner of lots in Kansas City wrote from his home in another state to his agent, saying that he would leave the sale of the lots pretty much with the agent; that if any one was willing to buy on specified terms, he thought he was willing to have the agent make out a deed, and that he would perfect it; that if the agent thought better to wait, then to hold on; that the above price was only for the present; and it was held that the letter authorized the agent to make a contract for the present sale of the lots. *Smith v. Allen*, 86 Mo. 178.

To Sell "Claims and Effects."—A power of attorney to sell "claims and effects" cannot be construed to authorize a sale of land or real estate. *De Cordova v. Knowles*, 37 Tex. 19.

Power to Grant Discharges or the Execution and Delivery of Deeds.—A power authorizing the collection of debts and the granting of acquittances or other discharges, or the execution and delivery of deeds of conveyance, upon receipt of the claims, only allows deeds of release for mortgages, or to affect contracts previously made, and is insufficient to authorize a sale of real estate. *Berry v. Harnage*, 39 Tex. 638.

To Locate and Survey.—A power to locate and survey lands confers no power to sell. *Moore v. Lockett*, 2 Bibb (Ky.) 67, 4 Am. Dec. 683.

Advertisement Referring to Owner and Another.—An advertisement put up upon land, offering it for sale, and referring to the owner and another person, is not, in opposition to the denial of the owner of the agency of such third person, sufficient to imply in him power to make a sale of the land. *Mortimer v. Cornwell*, Hoffm. Ch. (N. Y.) 351.

2. Power to Superintend Real Estate, etc.—A power of attorney to S. "to superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient, hereby making the said S. my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power," contains no authority to convey real estate. *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Hunter v. Sacramento Valley Beet Sugar Co.*, 11 Fed. Rep. 15; *Lord v. Sherman*, 2 Cal. 498.

and neither will an authority to attend to all the business of the principal generally.¹

Power to Contract for Sale.—But though a power may be insufficient to authorize a conveyance of real estate, it may yet be sufficient to authorize a contract for the sale of it, specific performance of which will be enforced in equity.²

(2) *Certainty and Extent of Power.*—The power should be as certain as it is necessary for the deed to be which is to be executed by virtue of it.³

Though such a power will authorize the execution of a lease for a term exceeding one year. *Jones v. Marks*, 47 Cal. 242. And in *De Rutte v. Muldrow*, 16 Cal. 505, the court refused to extend the rule laid down in *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235, and hold the power sufficient to authorize a lease of real estate with the privilege of purchasing any part of it during the continuation of the lease.

An authority to represent the principal in all that concerns his interests in California, together with letters written afterward referring to the propriety of a sale of land, does not authorize the attorney to execute a contract for its sale. *Treat v. De Celis*, 41 Cal. 202.

Power to Recover, etc., Part of a Decedent's Estate.—A power of attorney to ask, demand, recover, or receive the maker's lawful part of a decedent's estate, giving and granting thereby to his said attorney his sole and full power and authority to make, pursue, and follow such legal course for the recovery, receiving, and obtaining the same, as he himself might or could do were he personally present, and upon the receipt thereof, acquittances, and other sufficient discharges for him in his name, to sign, seal, and deliver, does not authorize the conveyance of real estate. *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453.

A Power to Do Everything to Secure Title to a certain piece of property does not warrant a sale of and contract to sell any portion of it. *Blum v. Robertson*, 24 Cal. 127.

1. **Power to Attend to All the Principal's Business Insufficient.**—*Watson v. Hopkins*, 27 Tex. 637; *Coquillard v. French*, 19 Ind. 274. Even though the land was acquired in carrying on the business. *Smith v. Stephenson*, 45 Iowa 645.

A power of attorney "to act in all my business, in all concerns, as if I were present myself, and to stand good in law, in all my land and other business," gives no power to sell land. *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313.

2. **Power Authorizing Contract to Sell.**—Where A. wrote C., "I wish you to manage [my property] as you would with your own; if a good opportunity offers to sell everything I have, I would be glad to sell; it may be parties will come into S. who will be glad to purchase my gas stock and real estate," C. was held thereby authorized to contract for the sale of the real estate, but not to convey it; and a deed executed to a purchaser, though invalid as a conveyance, was held good as a contract for the sale of the property therein described. *Lyon v. Pollock*, 99 U. S. 668. And see *Jones v. Marks*, 47 Cal. 242; *De Rutte v. Muldrow*, 16 Cal. 505; *Jackson v. Badger*, 35 Minn. 52.

In *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92, the power, though insufficient to authorize a conveyance by the agent, was held to authorize him to bind his principal by a bond for title.

"I authorize you to sell * * * my house and lot; if you sell it, do not take less than one thousand four hundred dollars; if you rent it, get all you can in money, and no repairs;" written by the owner of land to his agent, is a sufficient authority to the agent to make a valid contract and sale for one thousand four hundred dollars, binding his principal to make a title to the purchaser, upon the payment of the purchase money. *Matherson v. Davis*, 2 Coldw. (Tenn.) 443.

A **Verbal Authority** is sufficient to authorize an agent to sell land; and a contract to sell land, made by an agent so authorized, may be valid to transfer the equitable title, although the writing which evidences the contract may not be under seal. *Ledbetter v. Walker*, 31 Ala. 175. See also *Brock v. Pearson*, 87 Cal. 581.

3. *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381; *Gage v. Gage*, 30 N. H. 420; *Gee v. Bolton*, 17 Wis. 612.

Illustrations of Descriptions of Property—All of the Principal's Land.—But an authority to sell all of the land belonging to the principal is good without a particular description of the property. *Roper v. McFadden*, 48 Cal. 346; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273.

Three Certain Lots in the Village of P.—A power of attorney to sell "three certain lots of land in the village of P. in said county of O. belonging to me," was held sufficiently precise to support sales from three tracts, two of forty acres each, and one of eighty, lying within an unincorporated settlement called the village of P., but all belonging to the person who gave the power, who could not repudiate this construction after taking the benefit of the sales. Any ambiguity which might arise from the previous platting of one of the tracts into smaller lots was said to be latent merely, and might be removed by parol evidence. *Vaughn v. Sheridan*, 50 Mich. 155.

Power Silent as to Subject Matter to be Conveyed.—And a power "to bargain, sell, grant, release, and convey," which was silent as to what the attorney was to sell or convey, was held sufficiently broad to authorize him to sell and convey whatever estate the grantor might then own. *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600. But in such a case it must appear with certainty that a power to convey land was intended. *Gee v. Bolton*, 17 Wis. 604.

After-acquired Land.—A power to sell real estate generally, authorizes a sale of after-acquired land.¹

(3) **Must be in Manner Authorized.**—The agent must sell in the manner prescribed by his power² and for the price limited.³

(4) **When may Receive Payment.**—An agent empowered under seal to sell and convey for cash may receive the purchase money, or so much thereof as is to be paid in hand at the time of the sale, or in payments to be made prior to the execution of the conveyance.⁴ But an agent empowered by parol to sell

Half a Lot of Land.—A power of attorney authorizing the sale of the half of a lot of land, without specifying which half, or whether the sale is to be one half in severalty or an undivided one half, empowers the agent to sell half of the lot in severalty, exercising his own discretion as to which half. *Aleman v. Daly*, 36 Cal. 90.

General Power by Two, Conveyance of Property of One.—A power of attorney to sell and convey real property, given by a husband and his wife, in general terms, without any provision against a sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney of the interest of the husband by a deed executed in his name alone. *Holladay v. Daily*, 19 Wall. (U. S.) 606. But a power to sell made by two jointly, without mention of the separate property or business of either, gives no authority to sell land owned solely by one and in which the other has no interest. *Gilbert v. How*, 45 Minn. 121.

Indefiniteness Cured by Deed.—Indefiniteness of the description of property in a power of attorney is cured by definiteness of description in the deed executed by virtue of the power. *Valentine v. Hawley*, 37 La. Ann. 303.

1. *Fay v. Winchester*, 4 Met. (Mass.) 513; *Bigelow v. Livingston*, 28 Minn. 57; *Berkey v. Judd*, 22 Minn. 287; *Benschoter v. Lalk*, 24 Neb. 251; *Benschoter v. Atkins*, 25 Neb. 645.

Power to Buy and Sell Authorizes Sale Only of Property Bought under Power.—Where the power given the attorney was "to buy and sell real estate, and in my name to receive and execute all necessary contracts and conveyances therefor; and further, to do all things necessary to the transaction of a general mercantile, trading, money-lending, and other lawful and proper business," it was held not to authorize him to sell and convey lands to which the principal acquired title before the execution of the power, but rather that it was the intention of the parties to authorize him to sell and convey such lands only as he should buy under the power. *Greve v. Coffin*, 14 Minn. 345, 100 Am. Dec. 229.

Conveyance of Land Mortgaged to Principal.—Where the authority to sell is limited to property owned by the principal at the time of the execution of the power, a deed subsequently made to land which the principal then owned, but in which his only interest at the time of the execution of the power was that of a mortgagee, does not convey a perfect title. *Turner v. McDonald*, 76 Cal. 177.

To Sell Land Not Previously Sold.—An agent empowered to sell and convey all of certain land not before sold and conveyed, may convey a parcel previously sold but not conveyed by the principal. *Mitchell v. Maupin*, 3 T. B. Mon. (Ky.) 188.

2. *Siebold v. Davis*, 67 Iowa 560.

A Sale on Different Terms from those authorized, though more favorable to the principal, does not bind him. *Dayton v. Buford*, 18 Minn. 126; *Thornton v. Boyden*, 31 Ill. 200.

Authority for Written Contract does Not Authorize Parol.—If authorized to enter into written contracts of sale, he cannot enter into a parol agreement to sell. *Baring v. Peirce*, 5 W. & S. (Pa.) 548, 40 Am. Dec. 534.

Directions as to Time of Payments.—An agent authorized to sell and make the payments payable in three years cannot make them payable "on or before" three years. *Jackson v. Badger*, 35 Minn. 52. Nor, when authorized to make them payable in one, two, and three years, can he make them payable "on or before" those dates. *Dana v. Turley*, 38 Minn. 106; *Monson v. Kill*, 144 Ill. 248, affirming 44 Ill. App. 306. But where authorized to make one half payable "on or before" one year, he may make it payable "in one year." *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827. And if authorized to sell for "about one half cash," he may sell and contract for the entire price to be paid in cash on delivery of the deed. *Witherell v. Murphy*, 147 Mass. 417. But see *Everman v. Herndon*, 71 Miss. 823. If authorized to sell for one half cash, he cannot bind the principal by a sale on ninety days' time. *Monson v. Kill*, 144 Ill. 248.

Power to Sell Whole—Sale of Part.—Where the agent disobeys positive instructions and undertakes to sell a portion of the property instead of the whole, specific performance will not be decreed against the principal. *Davis v. Gordon*, 87 Va. 559, 15 Va. L. J. 241.

3. An agent to sell for a specified sum cannot sell for less. *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *Holbrook v. McCarthy*, 61 Cal. 216.

4. *Peck v. Harriott*, 6 S. & R. (Pa.) 146, 9 Am. Dec. 415. See *Morrill v. Cone*, 22 How. (U. S.) 81; *Mann v. Robinson*, 19 W. Va. 55, 42 Am. Rep. 771; *Dyer v. Duffy*, 39 W. Va. 148; *Farquharson v. Williamson*, 1 Grant Ch. (Can.) 93.

Agent Empowered to Sell and Convey on Terms within His Discretion.—An agent empowered under seal to sell and convey upon such terms as to him seem meet may make the sale either for cash or on credit, and in either case receive the purchase money. *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539.

land—that is, to contract for its sale—or empowered under seal merely to contract for sale, has no power to receive the purchase money.¹

(5) *When may Sell on Credit.*—Whether or not the agent may sell on credit depends very largely upon the wording of his power.² Where it is silent upon the subject, the agent is authorized to sell upon such terms as are usual and customary;³ where he is expressly authorized to sell on credit, the credit must be reasonable.⁴

1. *Mann v. Robinson*, 19 W. Va. 55, 42 Am. Rep. 771; *Dyer v. Duffy*, 39 W. Va. 148. See *Minn v. Joliffe*, 1 Moo. & R. 327; *Ireland v. Thomson*, 4 C. B. 149, 56 E. C. L. 149; *Johnson v. Craig*, 21 Ark. 533; 1 Sugden on Vendors (8th Am. ed.) 70.

Authorities Contra Examined.—In *Yerby v. Grigsby*, 9 Leigh (Va.) 387, the head-note of the case states it to have been decided that an agent to contract for the sale of land has authority to receive so much of the purchase money as is paid in hand, and this head-note, although unsupported by the opinion or decree (see the comments of the court upon this case in *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771), has been made the basis of *obiter* statements of doctrine. Thus, in *Alexander v. Jones*, 64 Iowa 207, the same rule was laid down, *citing Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Johnson v. McGruder*, 15 Mo. 365; *Higgins v. Moore*, 6 Bosw. (N. Y.) 344; *Goodale v. Wheeler*, 11 N. H. 424; *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469; *Story on Agency*, § 58.

These authorities do not support the proposition announced. *Higgins v. Moore*, 6 Bosw. (N. Y.) 344, and *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469, are cases of agencies to sell personal property.

Johnson v. McGruder, 15 Mo. 365, was a case where the agent was authorized to sell the land and loan the purchase money, and the court, while expressly declaring that the general implied powers of an agent employed to make a contract for the sale of land were not involved in the case, held that the express power to loan clearly implied the power to receive the purchase money.

Goodale v. Wheeler, 11 N. H. 424, decided only that a committee appointed by a town meeting to sell at auction certain real estate belonging to the town, had authority to prescribe that a certain deposit should be made by the purchaser at the time of the sale, to be forfeited to the town if the purchaser should not complete the contract. The deposit was not in fact made.

Mr. Justice Story, in the passage cited from his work on Agency, states only the rule as regards agents to sell and convey, *citing Peck v. Harriott*, 6 S. & R. (Pa.) 146, 9 Am. Dec. 415.

Not only do the authorities cited in *Alexander v. Jones*, 64 Iowa 207, not support the rule announced, but the point decided in that case does not call for so broad a statement of principle. It there appeared that the conveyance was signed by the principal living at a distance and forwarded to the agent, to be by him delivered to the purchaser. The actual decision here might well proceed upon the grounds of the decision in *Johnson v. McGruder*, 15 Mo. 365, namely, that from the

powers expressly delegated, a power to receive the money was necessarily implied.

As is well pointed out by Green, J., in *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771, some of the seeming confusion in the cases upon this point is attributable to the ambiguity of the word "sell," a power to contract for sale, as well as a power to give a perfected conveyance, being loosely called a power to sell. See also, *infra*, this section, *Powers Implied*. It is also to be observed that in some of the cases general principles are announced without regard to the form of the power as under seal or simply by parol.

An Attorney Employed to Obtain Authority to Sell Realty is not, by force of such an employment, authorized to receive the purchase money offered for the estate sold. *Nolan v. Jackson*, 16 Ill. 272.

2. Where the agent was authorized to sell "on such terms as to him shall seem meet," he was held authorized to sell on credit. *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539. And see *Morrill v. Cone*, 22 How. (U. S.) 80; *Silverman v. Bullock*, 98 Ill. 11; *Etheridge v. Binney*, 9 Pick. (Mass.) 272; *Rundle v. Cutting*, 18 Colo. 337. See, as to a power of attorney held insufficient to authorize an agent to sell lands on credit, *Rodburn v. Swinney*, 16 Can. Supreme Ct. 297.

3. Where a power of attorney for the sale of land is general, containing no limitation upon the attorney and no directions whether the sale shall be for cash or on time, it is in the discretion of the attorney to make sales according to the usual custom in such matters, and a sale on credit made in good faith by such attorney will be upheld. *Silverman v. Bullock*, 98 Ill. 11.

It has, however, been stated by respectable text writers that unless there is some language in the power of attorney justifying the inference that other than cash sales were contemplated by the parties, a power to sell imports that the sale is to be for cash. *Devlin on Deeds*, § 370. See also *Dyer v. Duffy*, 39 W. Va. 148, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 360; *Riley v. Wheeler*, 44 Vt. 189.

It was held in *Henderson v. Beard*, 51 Ark. 483, that where an agent is simply authorized to sell land, he has no authority to sell it on credit, without retaining a lien by contract for the security of the purchase money, and his agreement to make such unauthorized sale, although in writing, will not bind his principal.

4. The discretion of the agent in such case is not unlimited, but, is subject to the condition that the credit must be reasonable and such as is usual and customary in sales of real estate in his vicinity. *Brown v. Central Land Co.*, 42 Cal. 257.

(6) *Authority Not Extended by Construction.*—The rule requiring powers of attorney to be strictly construed¹ prevents any extension of the power beyond what is legitimately necessary to carry the particular power into effect.² Hence a power of attorney to sell land does not authorize a mortgage by the agent.³ Nor can he dedicate a portion of it to the public for a highway or other use,⁴ nor make a partition of lands of which the principal is a tenant in common.⁵ Nor can an agent to rent or sell bind his principal by agreeing to a change of boundary.⁶ Nor, if specially authorized to sell at a fixed price, has he authority to give an option on it.⁷

(7) *Powers Implied — To Execute Conveyances—Power to Sell Authorizes Conveyance.*—As we have seen, every power carries with it authority to do whatever is necessary to carry into effect the principal power,⁸ and hence an agent empowered under seal to sell real estate is, unless his authority is otherwise limited, authorized to execute the proper instruments required by law to carry the sale into effect.⁹

1. See *supra*, this section, *Construction of Authority—Written Authorities.*

2. *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

Waste—License to Cut Timber.—An agent authorized to bargain and sell lands has no right, under such power, to grant a license to a proposed purchaser, previous to a conveyance, to enter and cut timber, although such license be given with a *bona fide* intent to effect a sale of the lands. *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590.

Agreement to Pay Taxes.—An agent to sell land for a specific sum has no power to bind his principal by a sale for a less sum and an agreement to pay taxes. *Holbrook v. McCarthy*, 61 Cal. 216.

3. *Haldenby v. Spofforth*, 1 Beav. 390; *Stroughill v. Anstey*, 1 De. G., M. & G. 635; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Morris v. Watson*, 15 Minn. 212; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9; *Bloomer v. Waldron*, 3 Hill (N. Y.) 367.

There can be no implication, from the principal authorizing a sale of his land, that he intends to allow the agent to charge him at his discretion with the responsibilities and duties of a mortgagor. *Jeffrey v. Hursh*, 49 Mich. 31.

A power of attorney authorizing the attorney, in the name of the principal, to buy and sell real property, and to execute and deliver deeds to transfer the same; to move and institute all necessary suits for the recovery and collection of his demands, and to assert and vindicate his rights, and to appear and defend in all suits against him; especially to carry on his saw-mill and buy and sell logs, timber, and lumber, and do all necessary things in and about the same; and, in general, to make such contracts, for the profitable improvement and use of such property and other means as he possessed, for the enlargement of his estate, does not authorize the attorney to mortgage the real estate of his principal, unless there is evidence that such power is necessary to the execution of the authority given. *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771. See also the title *POWERS*.

Nor Discharge or Foreclose Mortgage.—Nor can an agent to sell, discharge a mortgage. *Barger v. Miller*, 4 Wash. (U. S.) 280; nor

foreclose a mortgage taken to secure deferred payments. *Aultman v. Jones*, 1 Woolw. (U. S.) 99.

Some Old Cases affirm the doctrine that a power of sale includes the power to mortgage. *Mills v. Banks*, 3 P. Wms. 9; *Williams v. Woodward*, 2 Wend. (N. Y.) 492.

It has been held that if a mortgage is given under a general power to sell, as a part of the same transaction with the conveyance creating the power to sell, and for the purpose of securing the payment of the purchase money, it is valid. *Coutant v. Servoss*, 3 Barb. (N. Y.) 128.

4. *Gosselin v. Chicago*, 103 Ill. 623.

Unless such authority is expressly authorized or necessarily incident. *Wirt v. McEnery*, 21 Fed. Rep. 233.

But an agent authorized to purchase a town site and lay out a town has implied authority to lay out streets and dedicate them to the use of the public. *Barreau v. West*, 23 Wis. 416.

And so, it has been held, has an agent authorized to "lay out" the grounds of the principal in order to dispose of them. *State v. Atherton*, 16 N. H. 203.

5. *Borel v. Rollins*, 30 Cal. 408. See *Gosselin v. Chicago*, 103 Ill. 623; *M'Queen v. Farquhar*, 11 Ves. Jr. 467.

6. *Fore v. Campbell*, 82 Va. 808.

7. *Field v. Small*, 17 Colo. 386.

8. See *supra*, this section, *Powers Prima Facie Incident to Every Authority.*

Smith v. Tate, 82 Va. 657.

A power to sell and convey property implies a power to deliver possession. *Indiana Cent. Canal Co. v. State*, 53 Ind. 575.

Employment of Counsel.—The agent may employ counsel so far as may be necessary to prepare such instruments as he is authorized to execute, but he is not authorized to employ and advise with counsel relative to the principal's interests. *Harrett v. Garvey*, 36 N. Y. Super. Ct. 327.

9. *Hemstreet v. Burdick*, 90 Ill. 444; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Farnham v. Thompson*, 34 Minn. 315. And see *Yale v. Eames*, 1 Met. (Mass.) 486; *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163; *Plummer v. Buck*, 16 Neb. 322; *Benschoter v. Lalk*, 24 Neb. 251; *Delano v.*

Power Not under Seal.—Where the instrument is insufficient, for want of a seal, to enable the agent to convey, he may bind his principal by an executory contract to convey.¹

Jacoby, 96 Cal. 275, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 360.

Power to Convey Incident to Power to Sell.—Where the terms "sale" or "to sell" are used in the ordinary sense, and the general tenor and effect of the instrument is to confer a power to dispose of real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident. *Farnham v. Thompson*, 34 Minn. 335.

Meaning of "To Sell" Includes Completion by Conveyance.—In *Hemstreet v. Burdick*, 90 Ill. 449, Walker, J., in delivering the opinion of the court, said: "The whole question turns on the meaning that shall be given to the word 'sell.' Its popular meaning, we think, clearly embraces the power to contract to sell, and to convey or transfer the thing sold. To complete the sale, there must be a transfer of the title as well as the thing sold. When the term is applied to personal property, there is no doubt it embraces the delivery as well as the bargain for the sale—that it, in such cases, means the bargain for the sale, the receipt of the purchase money, and the delivery of possession, by which the sale is completed and the title vested in the purchaser. So, in regard to real estate, the word 'sell' in its popular sense implies the contract and its completion by conveyance."

Power to Sell and Convey—Conveyance without Sale.—A power to "sell and convey" land, which shows that it is for the purpose of transferring title to an association for certain purposes, authorizes a conveyance, although the agent does not sell. *Hull v. Glover*, 126 Ill. 122.

Powers Insufficient to Authorize Conveyance.—But a power of attorney may be so drawn as to authorize the attorney to negotiate for the sale of an estate, leaving it to the constituent afterwards to ratify it and to execute deeds. Should it appear, either from the restricted words used or from the tenor of the whole instrument, that such was the intent, it ought to be construed as conferring such a restricted power only. *Valentine v. Piper*, 22 Pick. (Mass.) 92, 33 Am. Dec. 715. And see *Dworak v. More*, 25 Neb. 735.

Though insufficient to authorize a conveyance by the agent, a power may yet authorize a bond, in the name of the principal, to make a sufficient title. *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92.

Power of Sale in Mortgage.—A power of sale in a mortgage authorizing the mortgagee to sell the premises upon default of payment, it is well settled, includes the power to execute a conveyance to the purchaser. *Fogarty v. Sawyer*, 17 Cal. 589.

Sale by Sheriff.—And the authority to sell lands, conferred by a writ in the hands of a sheriff, carries with it authority to execute all the instruments required by law to complete the sale. *People v. Boring*, 8 Cal., 406, 68 Am. Dec. 331.

Quitclaim Deed of Lands Not Owned.—A power to sell one's real estate authorizes a quitclaim deed of land which may not have been owned by the person giving the power. *Alexander v. Goodwin*, 20 Neb. 216.

Trust Deeds.—An authority to an attorney for and in the name of his principal to transact all business, to collect and receipt for all moneys, "and to sell and dispose of all property, real and personal, for such price and on such terms as he may choose, whenever he may think it advisable," authorizes the attorney to execute a deed to a trustee of all the property of the principal in trust to secure and pay off the debts of the latter. *Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135.

But a power to sell does not authorize the execution of a deed of trust with power of sale in the trustees. *Smith v. Morse*, 2 Cal. 524.

Deed with Preference.—Where an attorney who had power to convey land for the payment of debts had executed a deed in trust to secure certain specified creditors and to pay all the debts of the principal, inserting a provision excluding from the benefit of the instrument all creditors who should bring suits for their claims, it was held that the provisions of the instrument involving preference of certain creditors and forfeiture of certain claims were in excess of the authority conferred, although the deed was valid in other respects. *Gimell v. Adams*, 11 Humph. (Tenn.) 283.

Power to Sell Lands does Not Imply Power of Exchange.—A power of attorney from a married woman to her husband authorizing him to sell her lands does not authorize him to exchange such lands for others or to bind her to pay off incumbrances on the land received in exchange. *McMichael v. Wilkie*, 18 Ont. App. Rep. 464, *reversing* 19 Ont. Rep. 739.

Or to Grant License.—An agent authorized to bargain and sell lands has no right under such power to grant a license to the purchaser, previous to a conveyance, to enter and cut timber, although such license be given with a *bona fide* intent to effect the sale of the lands. *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590.

1. *Watson v. Sherman*, 34 Ill. 263; *Jackson v. Badger*, 35 Minn. 52; *Minor v. Wiloughby*, 3 Minn. 225; *Groff v. Ramsey*, 19 Minn. 44. See *McNeil v. Shirley*, 33 Cal. 202; *Force v. Dutcher*, 18 N. J. Eq. 401.

Where an agent whose authority is by parol has the power to sell real estate, he has the authority to sign an agreement in his principal's name and to bind him thereby. *Smith v. Allen*, 86 Mo. 178; *Haydock v. Stow*, 40 N. Y. 363. See also *Ledbetter v. Walker*, 31 Ala. 175; *Remington v. Palmer*, 62 N. Y. 31, *reversing* 1 Hun (N. Y.) 619.

Authority of Real Estate Agent.—A general authority to a real estate agent to sell real property is only an authority to find a pur-

Warranties and Representations.—A power without restrictions to sell and convey real estate gives authority to the agent to bind the principal by a covenant of general warranty inserted in the deed, where, under the circumstances, this is the common and usual mode of assurance.¹ But it has been held that an agent to sell land is not necessarily empowered to bind his principal by representations as to the quality or title of the land.²

c. TO SELL PERSONALTY—(1) *Must Act within Authority.*—An agent to sell personal property must act within his authority,³ and sell, in the absence

chaser, and not to conclude and execute a contract binding on his principal. *Ryon v. McGee*, 2 Mackey (D. C.) 17; *Hamilton v. Cutts*, 6 Mackey (D. C.) 208; *Armstrong v. Lowe*, 76 Cal. 616; *Morris v. Ruddy*, 20 N. J. Eq. 236. See also *Ryan v. Sing*, 7 Ont. Rep. 266; and the title **BROKERS**.

1. *LeRoy v. Beard*, 8 How. (U. S.) 451; *Taggart v. Stanbery*, 2 McLean (U. S.) 549; *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; *Bronson v. Coffin*, 118 Mass. 156; *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Backman v. Charlestown*, 42 N. H. 125; *Schultz v. Griffin*, 121 N. Y. 294, 18 Am. St. Rep. 825; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671; *California Civ. Code*, § 2324; *Taylor v. Gardiner*, 8 Manitoba 310.

Illustrations.—It was so held, where the power authorized a conveyance to be made in as full and ample a manner as the principal could execute. *Taggart v. Stanbery*, 2 McLean (U. S.) 543. And also where the agent was empowered to execute conveyances to transfer the title "as sufficiently in all respects, as we ourselves could do personally in the premises * * * on such terms, in all respects, as he may deem most eligible," especially where it was the usage of the country to insert such covenants. *LeRoy v. Beard*, 8 How. (U. S.) 466. And also where the agent was authorized "to do and perform all such acts and things for perfecting such sale or sales thereof, or any part thereof, as shall be requisite and necessary in that behalf." *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671.

Authorities Contra.—In *Nixon v. Hyserott*, 5 Johns. (N. Y.) 58, it was held that a special authority to convey implies no authority to convey with warranty or personal covenants, since the conveyance is perfectly good without either. This case was *disapproved* in several of the cases cited above in this note, and the Court of Appeals of New York, in *Schultz v. Griffin*, 121 N. Y. 294, 18 Am. St. Rep. 825, declared that it was opposed to the weight of authority, and after noting that the early *New York* cases holding that an agent to sell personal property has no power to warrant title, have been *overruled*, remarked that there seemed to be no distinction requiring a different construction of an agency for sale in the cases of real and personal property. The actual decision in this case, however, went off upon another point.

A decision similar to *Nixon v. Hyserott*, 5 Johns. (N. Y.) 58, has been made in *New Jersey*. *Howe v. Harrington*, 18 N. J. Eq. 495.

In *Bronson v. Coffin*, 118 Mass. 156, Morton, J., delivering the opinion of the court,

expressed a doubt whether a mere naked power to sell would give the attorney authority to bind the principal by any covenant, but the power construed in that case was considered to be broader than a mere power to sell.

Where land was conveyed by husband and wife, without covenants or warranty, to an agent, to be by him sold for the wife's benefit, the agent was held to have no power to make covenants binding on her, much less to engage in litigation, or buy in outstanding titles to extinguish liens, without her request. *Yazel v. Palmer*, 88 Ill. 597.

And where an agent authorized to sell land, subject to a lease, made a written contract of sale to the plaintiff, by which he assumed to bind his principal to convey the land "in fee simple, and with a perfect title free from all encumbrances," it was held that the contract was unauthorized, and not enforceable. *Thomas v. Joslin*, 30 Minn. 388.

2. Representations as to Quantity or Quality.—But an agent with a restricted power to sell land at a given price has no authority to bind his principal by any representations as to the quantity or quality of the land. *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331.

Representations as to Title.—Nor has he authority to make such representations in regard to title as will bind the principal. *Tondro v. Cushman*, 5 Wis. 279.

Representations as to Location.—But the principal is responsible for a false representation as to its location, if the purchaser has no opportunity of seeing the land, and also for a misrepresentation as to its cost. *Sandford v. Handy*, 23 Wend. (N. Y.) 260.

3. An Agency for Selling Logs after their arrival in the market does not show authority in respect to operating in the woods or driving logs. *Stratton v. Todd*, 82 Me. 149.

To Work and Develop Patents.—A sole agent for the United States for the purpose of working and developing the business of certain patents, with power to negotiate their sale on terms to be agreed upon, has no authority to make an absolute sale without the concurrence of the principal, although the sale is made upon the royalty specified to be reserved. *Johnson Railroad Signal Co. v. Union Switch, etc., Co.*, 51 Fed. Rep. 85.

Price.—An agent authorized to sell only at list price cannot bind his principal by an agreement to give a rebate of ten per cent. *Taylor Mfg. Co. v. Brown* (Tex. App., 1889), 14 S. W. Rep. 1071.

But a general salesman has been held to have implied authority to fix the prices and terms upon a sale. *Stirn v. Hoffman House*

of special instructions, in the usual manner.¹ Where, however, the manner of sale is specified in the agent's authority, the specifications must of course be followed.²

Powers Implied.—In sales of personalty, as in other transactions, an agent has implied authority to do whatever is usual and necessary in such transactions.³

May Sell by Sample.—It has been held that when unrestricted as to the manner of sale the agent may sell by sample.⁴

Sale for Future Delivery.—And a general agent for the sale of the entire product of a manufacturing corporation may contract for the sale of the future product of the corporation.⁵

May Sell on Approval.—The agent, if unrestricted, may sell on approval, with the privilege of returning if not satisfactory.⁶

Co., 8 Misc. Rep. (N. Y. C. Pl.) 246; *Flanders v. Putney*, 58 N. H. 358.

Authority to Sell does Not Imply Power to Execute Chattel Mortgage.—Where W. sold a colt to S., and S. subsequently, while the colt was still in W.'s possession, gave W. authority to sell the colt, and W., instead of selling the colt, mortgaged it in his own name to a third person, it was held that the mortgage was void. A power to sell does not authorize an agent to execute a chattel mortgage. *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259.

Sale of Less than Quantity Authorized.—A principal intrusting an agent with corporate stock for sale cannot object to his selling less than the whole number of shares, where the action is a positive benefit to him, and there was no direction to sell the whole or none. *Ulster County Sav. Inst. v. New York Fourth Nat. Bank* (Supreme Ct.), 8 N. Y. Supp. 162.

But a written contract to sell a team, wagon, and harness for three hundred and fifty dollars, does not authorize the sale of a part, nor does it justify sale of a part for advances, and sale of the balance under legal process for expenses. *Henry v. Buckner*, 13 Colo. 18.

Sale of Goods out of Stock.—An agent sent out to sell goods to be manufactured or which are in stock has no ostensible authority to sell goods of an old pattern which the principal has ceased to manufacture and does not carry in stock and which he can only manufacture at a loss. *McCord, etc., Furniture Co. v. Wollpert*, 89 Cal. 271.

1. An agent must sell in the usual manner, and cannot bind the principal by a sale at auction. *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

Goods of Different Principals Sold in Lump.—An agent of two unconnected and independent principals cannot bind them by the sale of the goods of both, differing in kind, in one lot, for a simple lump price, not susceptible of a ratable apportionment except by the mere arbitrary will of the agent. *Cameron v. Paxton*, 15 Can. Supreme Ct. 622.

Nor have commercial agents a right to sell merchandise of their principals as part of a lot with other goods, the principals having never agreed to be bound by any sales not made separately. *Coe v. Nash*, 28 Mich. 259.

Sale to Himself.—An agent having authority to sell may purchase from himself; and such purchase will be valid, except as against the

principal, who may set it aside within a reasonable time. *Eastern Bank v. Taylor*, 41 Ala. 93. See also *Walker v. Palmer*, 24 Ala. 358; and *infra*, this title, *Duties and Liabilities Inter Se*.

2. *Nester v. Craig*, 69 Hun (N. Y.) 543.

If instructed to sell publicly at auction, the principal will not be bound by private sale, *The G. H. Montague, 4 Blatchf. (U. S.) 461*; although the price received is greater than the price fixed for the sale at auction. See *Jaques v. Todd*, 3 Wend. (N. Y.) 91.

3. *McCormick Harvesting Mach. Co. v. Snell*, 23 Ill. App. 79; *Hayner v. Churchill*, 29 Mo. App. 676. See *supra*, this section, *Powers Prima Facie Incident to Every Authority*.

Illustrations.—An agent selling furnaces for a specific use, to be shipped in detached parts, has implied authority to contract for putting them together and putting them into the buildings in which they are to be used. *Boyn-ton Furnace Co. v. Clark*, 42 Minn. 335.

But an agent having possession of stock for sale has no implied authority to dispose of a previously declared dividend. *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. Rep. 347.

Cannot Advertise Business.—The agent of a brewery employed for the purpose of selling beer, collecting bills, and representing it before the excise board, has no authority to contract for the advertisement of the business. *Tarpy v. Bernheimer (C. Pl.)*, 16 N. Y. Supp. 870.

Cannot Pay Commissions to a Third Person.—An agent to sell has no implied power to bind his principal by an agreement to pay another commissions for making sales. *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385.

4. *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354.

5. *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427.

But an agent authorized to sell his principal's sherry when manufactured, is not authorized to sell it before it is manufactured. *Merriam v. De Turk*, 66 Cal. 549.

6. *Oster v. Mickley*, 35 Minn. 245; *Deering v. Thom*, 29 Minn. 120.

Sales on Approval.—An agent intrusted with harvesters to sell may give a reasonable opportunity to try the machine, and make a contract to take effect as a sale if it prove satisfactory. *McCormick v. Kelly*, 28 Minn. 135; *Murray v. Brooks*, 41 Iowa 45; *Boothby v.*

(2) *When can Sell on Credit.*—The agent cannot sell on credit unless specially authorized or unless such is the usage of trade;¹ and custom controls the period as well as the fact of the credit.²

(3) *May Give Exclusive Right to Sell.*—It has been held that it is within the apparent scope of the authority of a general agent to agree with the purchaser not to sell his principal's goods to any others in the same town.³

(4) *Guaranty to Maintain Price.*—The agent has no authority to guarantee a purchaser that his principal will not sell the same goods to others for a less price.⁴

(5) *Power to Warrant.*—The power of an agent employed to sell personal property, to bind his principal by warranties, depends upon various considerations, such as the character of the warranty, whether express or implied, the nature of the agency, whether general or special, the usages of trade, and the circumstances of the transaction itself, as being by sample or otherwise.⁵

(6) *Power to Receive Payment* ⁶—*General Rule.*—Where the principal has clothed the agent with the *indicia* of authority to receive payment, as by entrusting him with the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent at the time of the sale.⁷ But when

Scales, 27 Wis. 626; The Monte Allegre, 9 Wheat. (U. S.) 616.

Where one having general authority to solicit orders for plaster busts, but no authority to guarantee satisfaction, took an order with the understanding that the party ordering would not be obliged to accept it if not satisfied, and the bust was refused as unsatisfactory, it was held that the general authority of the agent would seem to be sufficient to enter into such a contract; still, if the authority was not sufficient, the result would be that there was no special contract; and as the defendant had not accepted the bust, there was no sale. *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446.

May Waive Return or Notice.—Authority to sell threshing-machines on trial, to be returned if not satisfactory, empowers the agent to waive such return. *Pitsinowsky v. Beardsley*, 37 Iowa 9; *Gaar v. Rose*, 3 Ind. App. 269; *Warder v. Robertson*, 75 Iowa 585; *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa 607. And he may also waive a condition requiring notice to be given of the failure of the machine. *Acker v. Kimmie*, 37 Kan. 276; *Heilman Mach. Works v. Dollarhide*, 32 Mo. App. 178.

And Give Further Time for Trial.—And give further reasonable time to fix up the machine and test it, and make it work satisfactorily. *Bannon v. Aultman*, 80 Wis. 307.

But see *Bragg v. Bamberger*, 23 Ind. 198, where it was held that when a contract of warranty of a machine provides that, if it does not correspond with the warranty, it shall be returned to the vendor or his agent at a specified place, and states that no agent is authorized to make any representations or warranty beyond the terms of the contract, an agent has no authority to release the vendee from the performance of the agreement to return the machine as provided in the contract, upon its failure to correspond with the terms of the contract.

1. *Burks v. Hubbard*, 69 Ala. 379; *Falls v. Gaither*, 9 Port. (Ala.) 605; *Payne v. Potter*, 9 Iowa 549; *Graul v. Strutzel*, 53 Iowa 715, 36 Am. Rep. 250; *School Dist. No. 6 v. Etna*

Ins. Co., 62 Me. 330. See *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 92; *Taylor, etc., Organ Co. v. Starkey*, 59 N. H. 142; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45.

As to authority of commission merchants and factors to sell on credit, see the title COMMISSION MERCHANTS OR FACTORS.

Credit Authorized by Custom.—As a general rule, an agent for sale must sell for cash, unless he has an express authority to sell upon credit; but such authority may be implied where, from the general usage of the trade in which he is employed, it is a custom to sell on credit. *Illinois v. Delafield*, 8 Paige (N. Y.) 527; on appeal, *Delafield v. Illinois*, 26 Wend. 192. See *White v. Fuller*, 67 Barb. (N. Y.) 267; *Cowan v. Adams*, 10 Me. 374, 25 Am. Dec. 242.

He may sell according to the course of trade of the place where the sale is made; and where it is shown to authorize sales upon credit, he is not responsible for any loss. *May v. Mitchell*, 5 Humph. (Tenn.) 365.

Request to Put Property in Safe Hands.—A request, in a letter, to put certain accompanying lottery tickets into such hands as he shall think safe will not authorize a sale by him on credit. *Brown v. Bull*, 3 Mass. 211.

2. *Payne v. Potter*, 9 Iowa 549; *Graul v. Strutzel*, 53 Iowa 715, 36 Am. Rep. 250.

Credit must be Reasonable.—Authority to sell "upon credit" means a reasonable credit, which reasonableness is a question to be determined by the evidence. *Brown v. Central Land Co.*, 42 Cal. 257.

3. Such an agreement is not contrary to public policy. *Keith v. Herschberg Optical Co.*, 48 Ark. 138; *Watkins v. Morley*, 19 Am. Law Rev. 962; *Texas Law Rev.*, Sept. 22, 1885.

4. Nor is such authority to be derived from a letter from the principal stating that he proposes to "place" his goods at a certain price. *Anderson v. Bruner*, 112 Mass. 14.

5. For a full discussion of this question see the title WARRANTY.

6. See also the title PAYMENT.

7. *Meyer v. Stone*, 46 Ark. 210, 55 Am.

the agent has not the possession of the goods, and no other *indicia* of authority, and is only authorized to sell, the purchaser pays the agent at his peril, and it devolves upon him to show that the agent was authorized to receive payment.¹

Sales on Credit.—An agent selling on credit has no implied authority to subsequently collect the price,² unless the principal has held him out to third persons as having authority to receive payments.³

Rep. 577; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469; *Cross v. Haskins*, 13 Vt. 536. And see *Taylor v. Nussbaum*, 2 Duer (N. Y.) 302; *Seiple v. Irwin*, 30 Pa. St. 515.

The Authority to Sell Personal Property for Cash would carry with it generally the power to receive the purchase money. *Mann v. Robinson*, 19 W. Va. 55, 42 Am. Rep. 771; *Hackney v. Jones*, 3 Humph. (Tenn.) 612.

Power to Buy and Sell does Not Imply Power to Borrow on Principal's Credit.—Where an agent was employed for buying goods for the principal, and selling them at the principal's store, and written articles of agreement were drawn up, stipulating that the principal would furnish the capital, or authorize the agent to obtain credit on the principal's name, for the purchase of goods, to an amount not exceeding four thousand dollars; that all purchases should be in the name of the principal, and should not exceed, in cash down and on credit, the sum specified, unless by the express consent of the principal,—it was held that the agent was not authorized by said agreement to borrow money on the credit of the principal. *Spooner v. Thompson*, 48 Vt. 259.

Sale and Delivery by Agent.—Where the person contracting for the sale has the property in his possession and delivers it, he is clothed with the *indicia* of authority to receive payment, especially where the owner is unknown. He is then clothed with apparent authority, and that, as to third persons, is the real authority. *Higgins v. Moore*, 34 N. Y. 417; *Rice v. Groffmann*, 56 Mo. 434; *Lumley v. Corbett*, 18 Cal. 494; *Capel v. Thornton*, 3 C. & P. 352, 14 E. C. L. 343; *Pickering v. Busk*, 15 East 38.

Brokers and Commission Merchants.—As to the authority of brokers to receive payment, see the title *BROKERS*; of factors, see the title *COMMISSION MERCHANTS OR FACTORS*.

Authority to Sell and Collect Implies Authority to Deduct from Price.—An agent having a discretionary power to sell goods and collect the price has implied authority to make any deduction from the original price that could have been made by his principal. *Taylor v. Nussbaum*, 2 Duer (N. Y.) 302.

1. *Greenhood v. Keator*, 9 Ill. App. 183; *Kane v. Barstow*, 42 Kan. 465, 16 Am. St. Rep. 490; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Chambers v. Short*, 79 Mo. 204; *Higgins v. Moore*, 34 N. Y. 417; *Crosby v. Hill*, 39 Ohio St. 100.

As to the powers of traveling salesmen and soliciting agents, see *infra*, this section.

Power to Make Contracts does Not Include Power to Collect.—The power of an agent to

make contracts for his principal does not necessarily include the power to collect moneys due thereon. *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740. See *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577.

Where goods ordered through an agent are sent direct to the purchaser accompanied by a bill, the latter is not authorized to pay the agent, in the absence of some other evidence of his authority to collect. *Kornemann v. Monaghan*, 24 Mich. 36.

Authority Proved by Course of Dealing.—But the authority of the agent to receive payment may be proved by the habit and course of dealing of the principal. *Brooks v. Jameson*, 55 Mo. 505; *Rice v. Groffmann*, 56 Mo. 434.

2. *Clark v. Smith*, 88 Ill. 298; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655; *Seiple v. Irwin*, 30 Pa. St. 513.

Agent Receiving Securities—when Authority to Collect Terminates.—Where an agent to sell receives securities for the purchase money and transmits them to his principal, his authority to receive payment on the securities ceases with his possession. *Strachan v. Muxlow*, 24 Wis. 21; *Draper v. Rice*, 56 Iowa 114, 41 Am. Rep. 88.

3. **Doctrine of "Holding out" Applies.**—Authority to receive payment may be shown by proof either that the agent was expressly authorized to receive and discharge debts, or that he was held out by the principal to the public or to the purchaser as having such authority. *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655. And see *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Estey v. Snyder*, 76 Wis. 624.

Where an agent selling a machine for a company is permitted to transact business in behalf of the company with the knowledge of its controlling representatives, in such a manner that he is held out as an agent with general powers, the purchaser will be protected in subsequent payments made to him. *Howe Mach. Co. v. Ballweg*, 89 Ill. 318; *Sumner v. Saunders*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505. And see *Kasson v. Noltner*, 43 Wis. 646.

Where an agent for the sale of safes sold a new one, taking an old one in part payment, and the principal accepted the old safe, and sent the new one to the purchaser without any notice to him that the agent had transcended his authority, the purchaser was held to have reason for supposing that the agent was authorized to receive payment; and that a payment to him was good as against the principal, if made without notice that he had no such authority. *Harris v. Simmerman*, 81 Ill. 413.

Sales over the Counter.—Where payments are made over the counter of the principal's store to a shopman accustomed to receive money there for his employer, authority to receive payment will be implied in favor of innocent persons.¹ But if a shopman authorized to receive money over the counter only, receives money elsewhere than in the shop, the payment is not good.²

Traveling Salesmen and Soliciting Agents.—Independent of a controlling usage to the contrary, a traveling salesman or agent merely to solicit orders for goods has no implied authority to receive payment therefor.³

Effect of Notice on Bill for Goods.—Where a notice is printed upon the bill sent the purchaser for the goods, that agents are not authorized to receive payment, the purchaser will be presumed to have seen it, and not to have done so is the grossest negligence,⁴ though some cases draw a distinction as to the prominence given to the notice, the size of the type in which it is printed, etc.⁵

But where a traveling agent took from a customer an order for goods, which he forwarded to his principals, who thereupon wrote the agent expressing an unwillingness to fill the order until a former account was settled, and adding that "they should like to draw upon him therefor," and the customer, upon seeing the letter, gave the agent his acceptance at three months, blank as to the name of the drawer, it was held that the payment of such acceptance at maturity to a third person who had become the holder was no defense to an action by the principals, although it was proved that on a previous occasion a similar bill drawn by the agent and accepted by the customer had been received by the plaintiffs as payment. *Hogarth v. Wherley*, L. R. 10 C. P. 630, 14 Moak 474.

1. *Kaye v. Brett*, 5 Exch. 269. See *Butler v. Dorman*, 68 Mo. 302, 30 Am. Rep. 795; *Law v. Stokes*, 32 N. J. L. 250, 90 Am. Dec. 655.

In such case the principal, by his own act, gives to the agent an apparent authority to receive such payment. *Law v. Stokes*, 32 N. J. L. 252, 90 Am. Dec. 655. And see *Hirshfeld v. Waldron*, 54 Mich. 651; *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216.

2. *Kaye v. Brett*, 5 Exch. 269.

3. *Clark v. Smith*, 88 Ill. 298; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Abrahams v. Weiller*, 87 Ill. 179; *Clough v. Whitcomb*, 105 Mass. 482; *Kornemann v. Monaghan*, 24 Mich. 36; *Janney v. Boyd*, 30 Minn. 319; *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745.

Sale by Sample.—An agent selling by sample has no authority to receive payment. *Simon v. Johnson* (Ala., 1893), 101 Ala. 368, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 355; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795.

Order Given to Agent is Not Sale.—An order solicited by or given to an agent does not constitute a sale, either absolute or conditional, but is a mere proposal to be accepted or not, as the principal may see fit. *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740. See also *Deane v. Everett*, 90 Iowa 242.

Where an agent is merely employed to solicit orders, the orders being sent to the office of the principal, subject to his approval, this fact alone sufficiently shows that

the agent has no authority to make collections, and a payment to him is no defense to an action by the principal to recover the purchase money. *Greenhood v. Keator*, 9 Ill. App. 183.

The employment of a canvassing agent for the sale of books by subscription confers no authority to receive payment for books sold but not delivered by him, nor in his possession. *Chambers v. Short*, 79 Mo. 204.

Usage.—But where such is the general and known usage, and has been recognized by the principal, such agent may receive payment. *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577.

Contra.—There are a few cases laying down a doctrine at variance with the statements in the text, and holding payments to traveling salesmen to be valid. *Trainer v. Morison*, 78 Me. 160; *Scott v. Hopkins* (Supreme Ct.), 2 N. Y. St. Rep. 324; *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469; *Collins v. Newton*, 7 Baxt. (Tenn.) 269; *Putnam v. French*, 53 Vt. 403, 38 Am. Rep. 682. See *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45. See also *Haughton v. Maurer*, 55 Mich. 323.

Perhaps these cases are to be regarded as variations from the general rule due to the peculiar circumstances of the cases adjudicated and to the recognition of usage.

4. **Notice on Bills for Merchandise.**—In *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655, it is said that "not to have seen the directions in the billhead was the grossest negligence, and to permit a party to defend under the protection of his own carelessness would be to offer a premium for negligence and open the door to fraud, especially so when the party is himself bound to see to it that the person with whom he transacts business as an agent has the authority which he assumes."

The words "Agents not authorized to collect," stamped in large, legible print on the face of a bill sent to a purchaser of goods, will be presumed to have been observed by him, and whether he saw them or not is notice to him not to pay to an agent. *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740.

5. In *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682, the words "Payable at office" were written on the bill rendered when the last invoice was sent, which the purchaser failed

(7) *Powers of Traveling Salesmen—To Hire Horses.*—An agent to travel about the country and sell goods has implied authority to hire horses when necessary to carry out the object of his agency.¹

Hotel Bills.—But he cannot bind his principal for hotel bills.²

To Sell Samples.—Nor has a traveling salesman authority to sell the samples furnished him to be exhibited while soliciting orders.³

d. *TO MORTGAGE*⁴—*Power to Insert Usual Provisions Implied.*—A power to the agent to mortgage goods is a power to insert in the mortgage the provisions which are usual in such instruments.⁵

to see, and it was held, in view of the obscure manner in which they were written on the billhead and the circumstances under which, and the purposes for which, in other respects, the bill was sent, and the terms of the contract as to when and where and to whom payment was to be made, that the purchaser was not guilty of such negligence in not seeing them as to be chargeable with notice which he did not in fact have.

A much stronger case is *Trainer v. Morison*, 78 Me. 160, where there were printed across the top of a bill, in red ink, the words, "All bills must be paid by check to our order or in current funds at our office." The purchaser did not see the notice, and it was held that, taking into consideration the care ordinarily exercised by prudent men, he was not at fault in not doing so. The court said it was "not so prominent upon the bill as to become a distinctive feature of it—one that would be likely to attract attention in the hurry of business, and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have enclosed the bill in a letter of advice calling the attention of the defendants to the fact that he was unwilling to intrust collections to his agent." And see *Kinsman v. Kershaw*, 119 Mass. 140, where it was held that in the absence of evidence that the defendant saw the words, "All moneys to be paid to the treasurer, and bills to be receipted by him," printed in fine type upon the billhead, there was evidence of payment to go to the jury.

1. *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827; *Huntley v. Mathias*, 90 N. Car. 101, 47 Am. Rep. 516, where the principal was held responsible for an injury to a horse hired by his traveling salesman. But see *Howe Mach. Co. v. Ashley*, 60 Ala. 496.

2. *Sampson v. Singer Mfg. Co.*, 5 S. Car. 465, where it is said that "a contract binding the principal cannot be presumed from the mere fact that an agent has obtained lodging at a hotel while prosecuting the business of his principal, and while having in charge property belonging to such principal. The authority that the law presumes from the fact of an agency is measured by the direct objects contemplated by such agency, on the principle that one having power to perform an act and imposing its performance on another as a duty, or conferring it as a right, must be deemed, where requisite, to have communicated power so to act commensurate with the duty or rights imposed or conferred. Supplies afforded for the personal use of an agent are not among the objects presumed

to be included in the agency, but if related to it at all, are merely collateral to it." And in *Covington v. Newberger*, 99 N. Car. 523, it was held that a drummer, a transient patron at a hotel, could not bind his principal for board furnished him from time to time through an extended period, it being the custom for transient patrons to pay cash.

Board of Horse.—Nor can an agent bind his principal for the board of a horse furnished him for use in the transaction of his business. *Grover, etc., Sewing Mach. Co. v. Polhemus*, 34 Mich. 247; *Sampson v. Singer Mfg. Co.*, 5 S. Car. 465.

3. *Savage v. Pelton*, 1 Colo. App. 148; *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745.

4. See the title MORTGAGES.

5. *Interest Clause.*—Where such a provision is not usual in mortgages, an agent has no power to insert in a mortgage that it shall become due at the option of the holder upon default of the payment of interest. *Jesup v. City Bank*, 14 Wis. 331.

Power of Sale.—A power to mortgage real estate authorizes a mortgage with power of sale in a jurisdiction where such a provision is ordinarily and usually inserted in mortgages. *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 7 Johns. Ch. (N. Y.) 25, 14 Am. Dec. 458.

Attorney's Fees.—The insertion of a provision for the payment of attorney's fees in a mortgage has been held not authorized by usage nor implied in a general authority to mortgage as granted to an agent. *Pacific Rolling Mill Co. v. Dayton, etc., R. Co.*, 7 Sawy. (U. S.) 61.

Agent Mortgaging for Third Person.—A general power to mortgage the property of the principal will not sustain a mortgage for the benefit of the agent or of a third person. *Nippel v. Hammond*, 4 Colo. 211; *Wolfley v. Rising*, 8 Kan. 297; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375.

Second Mortgage.—An authority to mortgage does not imply a power to give a second mortgage. *Skaggs v. Murchison*, 63 Tex. 348.

An Absolute Sale by an agent authorized only to execute a mortgage does not bind the principal unless ratified by him. *Coppage v. Barnett*, 34 Miss. 621.

Execution of Mortgage Note.—In *Kansas* it has been held that a power to mortgage does not include the power to execute a note in the name of the principal for the amount of the mortgage debt, inasmuch as the principal cannot be presumed to have intended to give the agent authority to bind him personally,

When Authority to Mortgage Not Implied.—Authority to mortgage will not be implied from a power to manage and take care of the property of the principal, unless such an authority is shown to be necessary for the execution of the authority given,¹ nor will it be implied from a power to sell.²

To Cancel Mortgage.—A power to cancel a mortgage must be strictly pursued.³

To Redeem from Mortgage.—Authority to redeem from a mortgage empowers the agent to pay any expenses necessarily incurred in enforcing the security.⁴

c. TO LEASE.—While an authority to execute a lease under seal must, of course, be given under seal,⁵ yet an agent appointed by parol may execute a written lease not under seal,⁶ or bind his principal by an executory contract to lease.⁷

Power to Lease Implied.—The power to lease, like any other power, may be implied from the general authority granted to an agent and the recognition of his acts by his principal.⁸

but must be presumed to have authorized him merely to procure money on the security of the land only. *Mylius v. Copes*, 23 Kan. 617.

In *Texas*, where an agent with power to mortgage, hypothecate, and create a lien upon all his principal's lands, borrowed a sum of money, for which he executed a note and secured it by a deed of trust, and the principal, upon suit being brought against him upon the note and to foreclose the mortgage, pleaded *non est factum* as to the note only, it was held that the note was properly admitted in evidence, inasmuch as it was authorized by the power, and the note and mortgage constituted but one transaction and cause of action, and the mortgage and its covenants would alone have enabled the plaintiff to maintain a suit and obtain judgment for his debt with a decree of foreclosure. *Taylor v. Hudgins*, 42 Tex. 244.

1. General Power does Not Authorize Mortgage.—*Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. A power of attorney authorizing an agent, in the name and for the benefit and use of his principal, to buy and sell real and personal property, and to execute and deliver deeds to transfer the same; to move and institute all necessary suits for the recovery and collection of his demands, and to assert and vindicate his rights, and to appear and defend in all suits against him; especially to carry on a sawmill, and buy and sell logs, timber, and lumber; and to do the necessary things in and about the same, and generally to make such contracts for the profitable improvement and use of such property and other means as he possessed, for the enlargement of his estate, does not authorize the agent to mortgage the real estate of his principal, unless such power is necessary to the execution of the authority given. *Wood v. Goodrich*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771. See also *State Bank v. Morley*, 19 Wis. 62.

2. Jeffrey v. Hursh, 49 Mich. 31; *Morris v. Watson*, 15 Minn. 212. See also *Stevens v. Cunningham*, 3 Allen (Mass.) 491.

See *supra*, this section, *To Sell Real Estate—Authority Not Extended by Construction*; also the title **POWERS**.

3. A Power to Cancel a Mortgage and the

notes secured thereby, and to take new notes and a new mortgage, does not authorize the cancellation without taking the renewals. *Foster v. Paine*, 56 Iowa 622.

Unauthorized Cancellation or Extension.—Such a cancellation is void as against a subsequent mortgagee who is charged by the record with notice of the terms and conditions on which the cancellation is authorized.

The agent cannot surrender the mortgage without payment or other consideration, *Harrison v. Burlingame*, 48 Hun (N. Y.) 212; nor extend the time of payment, *Powell v. Henry*, 96 Ala. 412.

Power of Foreclosure Not Implied.—A power to foreclose is not implied from a power to take a mortgage for deferred payments. *Aultman v. Jones*, 1 Woolw. (U. S.) 99.

4. Shutes v. Woodard, 57 Mich. 213.

5. See supra, this title, *Appointment*.

Authority to Lease Includes Authority to Contract for Lease.—An agent authorized to lease may bind his principal by an agreement to lease, and this without regard to the question whether the agent intended that the lease should be for his own benefit or that of his principal. *Taylor v. Salmon*, 4 Myl. & C. 138.

Undisclosed Principal.—A person put in possession of real estate by an agent of the owner without knowing who is the owner or for whom the agent acts, is a tenant of the owner. *Charter Oak L. Ins. Co. v. Cummings*, 13 Mo. App. 76.

As to lease by agent on his own behalf see *Ridgley v. De Bough*, 83 Iowa 100.

6. Lake v. Campbell, 18 Ill. 109.

7. See Lawrence v. Taylor, 5 Hill (N. Y.) 107; *Yerby v. Grigsby*, 9 Leigh (Va.) 387. See also the title **FRAUDS, STATUTE OF**.

8. Authority to Lease Implied.—Under a power of attorney authorizing the agent to sell, assign, transfer, trade, and dispose of the principal's lands, either for cash or in exchange for other property, and providing that the agency was to continue for ten months, and that the agent was to receive for his services one half of all he might make out of the property over a certain price, it was held that the agent had such a power, coupled with an interest, as gave him authority to rent lands which he had taken in exchange, at least until such time as he and his principal should

Agent to Lease—Scope of Powers.—An agent to lease cannot bind his principal by representations as to title,¹ nor by a surrender of the lease,² nor by stipulations having reference to the agent's own property.³

Lease for Unauthorized Period.—A lease for a period longer than is authorized by the agent's power has been held good *pro tanto* to the extent of the power.⁴

close their accounts. *Hitchens v. Ricketts*, 17 Ind. 625.

Where a general agent for the management of real estate for the owner executed a lease under seal and received some of the rent, though he had no written authority, and the principal then brought an action for subsequent instalments of the rent, it was held that a surrender of the lease to the agent and his acceptance thereof was a bar to the action, notwithstanding the agent's want of written authority to make the lease or accept the surrender. *Amory v. Kannofsky*, 117 Mass. 351, 19 Am. Rep. 416.

Authority to Renew Lease.—A school society owning a building called the academy, voted in 1824 that the control of such building should thenceforth be vested solely in a committee with power to lease it at their discretion to any person for the purpose of keeping a school. The committee leased the premises for five years, and after the expiration of that time by the authority of the same vote executed another lease to the same tenant for the term of five years from that time. It was held that the committee had authority under the vote of 1824 to make a second lease. *Emerson v. Goodwin*, 9 Conn. 423.

The Powers of the General Agent of the Owner of a Railroad are such as will warrant him in executing a lease of property to be used as a ticket-office for the road. *Ecker v. Chicago*, etc., R. Co., 8 Mo. App. 223.

Evidence—Similar Acts.—Where the evidence as to the authority of an agent authorized to receive lands in exchange for certain lands of his principal was conflicting as to the right of the agent to rent the lands so received, it is competent to prove that the agent had acted for his principal in renting other lands taken by him in exchange under the power of attorney. *Hitchens v. Ricketts*, 17 Ind. 625. See *Gillis v. Bailey*, 17 N. H. 18.

Extent of Implied Authority Tested by Purpose of Lease.—The general agent of a corporation in charge of lands cannot, in virtue of his general authority to manage the affairs of the corporation, make a lease for the purpose of trying title to land upon which he has entered for condition broken under a vote of the corporation especially authorizing him to enter, but containing no provision empowering him to lease. The fact that he has been accustomed to lease land for the corporation for the purpose of obtaining rent, without objection to his acts, is not evidence of authority to make such a lease, because the power to make leases for rents being derived from the exercise thereof with the approbation of the principal is limited to the description of cases in which it has been exercised. *Gillis v. Bailey*, 17 N. H. 18.

Authority Not Implied.—A mere power to collect rent does not imply authority to make a new lease or change an existing one. In-

dianapolis Mfg., etc., Union v. Cleveland, etc., R. Co., 45 Ind. 281; *Weil v. Zodiag*, 34 La. Ann. 982; *Davidson v. Blumor*, 7 Daly (N. Y.) 205; *Tryon v. Davis*, 8 Wash. 106.

Authority to lease will not be inferred from the fact that the agent has given his own receipt for rent due or that he has previously rented the same property. *Weil v. Zodiag*, 34 La. Ann. 982.

Burden of Proof.—The person seeking to establish a lease from an agent must establish the agent's authority to lease for the term for which the property was rented to him. *Weil v. Zodiag*, 34 La. Ann. 982.

Contra—Authority must be Express.—In *Howard v. Carpenter*, 11 Md. 281, it is said that an attorney either at law or in fact has no authority either to make a lease or to ratify or confirm an imperfect one, or to perfect an inchoate agreement for the lease of property of his principal or client, unless authority for such purpose is expressly given. An examination of the facts of that case will show that the court did not have in mind, and did not intend to deny, the existence of such a power as necessarily incident to powers expressly granted.

1. *Tondro v. Cushman*, 5 Wis. 279.

2. Authority to create, convey, or assign a lease for a term of years does not authorize a surrender of it. *Ramsay v. Wilkie* (C. Pl.), 13 N. Y. Supp. 554.

3. **Agent Leasing His Own Lands with Those of Principal.**—A general agent to lease lands cannot, by leasing his own land with that of his principal, make his principal, without his knowledge or assent, a joint lessor of the agent's lands, so as to render the principal jointly liable with him upon the stipulations in the lease in reference to the agent's property as well as the principal's. *LaPoint v. Scott*, 36 Vt. 604.

An agent authorized to lease lands cannot bind the principal by his attempt to subject the rents to a lien for agricultural supplies advanced to the tenant. *Loftin v. Crossland*, 94 N. Car. 76.

Implied Powers of Agents to Take a Lease.—Authority to an agent to lease a house does not authorize him to covenant to repair or to rebuild. *Halbut v. Forrest City*, 34 Ark. 246.

Where A appointed B to take a lease for him to a tract of land lying in another state, and B accordingly took the lease, but the lessor, not being willing to trust A, required B to give his own note for the rent, which he did, and he afterwards paid it, it was held that this was an undertaking by B within the scope of his general authority, and that A was bound to reimburse him. *Irions v. Cook*, 11 Ired. (N. Car.) 203.

4. *Alexander v. Alexander*, 2 Ves. 644. But see *Roe v. Prideaux*, 10 East 158, where a distinction was taken between a general

f. TO PURCHASE—(1) *Must Observe Authority*.—An agent to purchase, in order to bind his principal, must observe his authority,¹ both as to the quantity² and the kind³ of goods purchased, and if instructed to purchase from a particular party he cannot bind his principal by a purchase from some one else.⁴

(2) *To Purchase on Credit—Not Implied*.—A mere agency to purchase does not imply authority to pledge the credit of the principal.⁵

power not specifying the kind of lease but adding a restriction to limit the extent of the lease, and a power particularizing the species of lease to be granted.

Agent for Life Tenant Granting Term.—The owner of a reversion acting as agent of the tenant for life demised the premises for a term of years by a letter signed by himself as agent, and the lessee knew that he was acting as such agent. It was held that the estate of the lessee ended with the death of the tenant for life, though the term of years had not expired. *Page v. Wight*, 14 Allen (Mass.) 182.

Oral Authority to Act during Principal's Absence.—Where an agent orally authorized by the landowner to take charge of the land while he was gone and make it pay the best he could gave a lease for three years, it was held that the lease was terminable by the landowner on his return. *Antoni v. Belknap*, 102 Mass. 193.

1. *McAttee v. Perrine*, 48 Ill. App. 548.

Cannot Transfer Title of Property Purchased.—The agent cannot transfer the goods purchased to secure the debts of parties with whom he has become connected, and the title remains in the principal in spite of such an attempted transfer on the part of an agent who has no real nor apparent authority to sell. *Edwards v. Dooley*, 120 N. Y. 540. See *Fraser v. M'Pherson*, 3 Desaus. Eq. (S. Car.) 393.

Cannot Purchase Jointly for Separate Principals.—An agent severally authorized by two corporations to make purchases for them has no authority to bind them jointly. *Pacific Cable Construction Co. v. McNott*, 2 Wash. 216.

Purchase at Higher Price.—An agent authorized to purchase one sixteenth part of a ship at forty dollars a ton does not bind his principal by purchasing two sixteenths at forty-four dollars per ton, one sixteenth being on his own account, unless subsequently ratified. *Starbird v. Curtis*, 43 Me. 352.

Agent to Complete Purchase.—An agent authorized to complete a purchase of land and receive the deed has no authority to add anything to the consideration named in the contract or attach any new condition to the delivery of the deed. *Deering v. Starr*, 118 N. Y. 665.

Authority of Station Agent.—A station agent has no authority to bind his company for the payment for timber. *Butler v. Michigan Cent. R. Co.*, 60 Mich. 83.

Parol Authority to Purchase will support a written contract. *Welch v. Hoover*, 5 Cranch (C. C.) 444.

2. **An Agent Commissioned to Purchase a Certain Specific Amount** is a special agent, and can no more purchase a smaller than a larger

quantity of what he is commissioned to purchase. There may be cases where the purchase of a smaller quantity than that ordered would be deemed valid as an execution of the authority *pro tanto*, but such cases can only arise where an express or an implied discretion was committed to the agent in the exercise of his authority. *Olyphant v. McNair*, 41 Barb. (N. Y.) 446.

Clerk Making out Order for Goods.—The act of a clerk, authorized by his employer, in filling up blanks in a printed order for the purchase of goods is binding on the employer, and the latter cannot defend a suit brought against him for the price of the goods, upon the ground that the clerk made a mistake and ordered more than he wanted, especially where there was nothing to show the plaintiff that the blanks were not filled and the order signed by the defendant in person. *Shrimpton v. Brice* (Ala., 1894), 15 So. Rep. 452, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 350.

3. *Hopkins v. Blane*, 1 Call (Va.) 361. See also *Butterworth v. Shannon*, 11 Ont. App. Rep. 86.

But of course the principal may be bound by the acts of the agent within his ostensible authority. *Hill v. Miller*, 76 N. Y. 32.

4. A letter of attorney authorizing an agent to purchase a certain steamship from B., and draw bills on the principal for such amounts and payable at such times as shall be agreed upon between them, does not authorize the purchase of the boat from other parties. *Peckham v. Lyon*, 4 McLean (U. S.) 45.

5. *Berry v. Barnes*, 23 Ark. 411; *Indiana Bank v. Bugbee*, 3 Keyes (N. Y.) 461. And see *Eckart v. Roehm*, 43 Minn. 271; *Martin v. Peters*, 4 Robt. (N. Y.) 434.

General Agent.—Where the agent is a general agent, it has been held that a limitation upon his authority to purchase on credit will not affect a vendor having no knowledge of such limitation. *Liddell v. Sahline*, 55 Ark. 627.

And it has been held that an authority to buy and sell, given in the most general terms, will, in the absence of any restriction, authorize the agent to buy for cash or on credit, as he may deem best, and to sell in the same way. *Fradley v. Hyland*, 37 Fed. Rep. 49.

A Clerk Employed in the General Conduct of a Store, under the supervision of a merchant, cannot purchase goods on credit. *Doan v. Duncan*, 18 Ill. 96.

A Purchase by a Principal, Personally and on His Own Credit, of goods selected by his agent is no authority for subsequent sales to the agent alone on the principal's credit. *Town v. Hendee*, 27 Vt. 258.

Guaranty.—Authority to purchase and ship

Where Furnished with Funds.—And where the agent is furnished with funds with which to make purchases, he cannot bind his principal by a purchase on credit, unless such is the custom of trade,¹ or the principal, with knowledge of the facts, ratifies the transaction.²

Where No Funds Furnished.—But where no funds are advanced to the agent to enable him to purchase for cash, he has implied authority to make the purchase on the principal's credit.³

(3) **Implied Powers.**—An agent to purchase has, if unrestricted, implied authority to do whatever is necessary and usual in the performance of such contracts.⁴ He may give directions for the delivery of the commodity.⁵

Agent to Purchase on Credit.—And, if authorized to purchase on credit, such an agent may acknowledge the indebtedness in his principal's name,⁶ and make

specified commodities, and make cash advances thereon, is no authority to guarantee, in the name of the principal, an obligation to pay the vendors for cattle sold on time. *Oberne v. Burke*, 30 Neb. 581, 1 Neb. L. J. 238.

1. *Parsons v. Armor*, 3 Pet. (U. S.) 413; *Wheeler v. McGuire*, 86 Ala. 398; *Boston Iron Co. v. Hale*, 8 N. H. 363; *Fraser v. M'Pherson*, 3 Desaus. Eq. (S. Car.) 393; *Stoddard v. McIlwain*, 7 Rich. (S. Car.) 525; *Greenville First Nat. Bank v. Pennington*, 75 Tex. 272; *Komorowski v. Krumdick*, 56 Wis. 23. And see *Sprague v. Gillett*, 9 Met. (Mass.) 91; *Patton v. Brittain*, 10 Ired. (N. Car.) 8.

Illustrations.—Where a country merchant ships to his correspondent in town such produce and other articles as he has to sell, and the merchant in town supplies him with such articles of merchandise as he deals in, and fills out his orders by procuring from other merchants, on credit, such articles as he does not deal in, charging them to the country merchant, the latter is not liable to the seller of any articles thus procured if he has funds in the hands of the city merchant and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognized such act. *Jaques v. Todd*, 3 Wend. (N. Y.) 83.

But where the agent is furnished with money with which to pay for property procured, there is no such limitation on his authority to buy on credit, as to require him to pay the instant, or on the same day, for property purchased without any understanding or agreement that credit is to be given therefor. *Adams v. Boies*, 24 Iowa 96.

An agent furnished with funds to build a house cannot build on credit. *Proctor v. Tows*, 115 Ill. 138.

Evidence of Funds Admissible.—It is error, in an action to charge a principal with goods purchased by his agent, to exclude evidence to show that the agent was at all times in funds sufficient to pay for the goods. *Taft v. Baker*, 100 Mass. 68.

Agent cannot Mortgage.—An agent to purchase cannot give a mortgage on the property purchased to secure the purchase money. *Fraser v. M'Pherson*, 3 Desaus. Eq. (S. Car.) 393.

2. *Komorowski v. Krumdick*, 56 Wis. 23; *Jaques v. Todd*, 3 Wend. (N. Y.) 83. And see *Paine v. Tillinghast*, 52 Conn. 532.

3. *Sprague v. Gillett*, 9 Met. (Mass.) 91.

Agent Purchasing in His Own Name.—Where an agent authorized to purchase supplies for the use of his principal, and instructed to purchase only for cash, purchases in his own name upon credit from one who supposes him to be buying for himself only, the principal, having settled with the agent, supposing him to have purchased for cash or upon his personal credit, cannot be held liable to the seller for the price of the supplies. *Fradley v. Hyland*, 37 Fed. Rep. 49.

Agent Authorized to Barter.—A, the manager of a country store, was authorized by B, the proprietor of the store, to take butter only in exchange for goods. A was also the agent of another party, to buy butter for cash. A bought butter of the plaintiff, to be delivered at the store, agreeing to pay cash therefor. He did not profess to act for B in buying the butter, nor did B ever receive any benefit therefrom. It was held that B was not liable for the purchase so made, although the plaintiff supposed that the purchase was made for him. *Cochran v. Richardson*, 33 Vt. 169.

Payment by Principal to Agent.—Where a purchase was made through an agent who represented to the vendor that it was necessary to send a receipted bill in order to get the money from the principal, and the vendor accordingly gave the agent a receipted bill which he presented to his principal, who, having no knowledge of the circumstances, paid the amount to him, and the money so received by the agent was never paid to the vendor, it was held that the vendor was entitled to recover the amount of the bill from the principal. *Willard v. Buckingham*, 36 Conn. 395. But see *Adams v. Humphreys*, 54 Ga. 496.

4. The power to purchase implies the power to pay or to agree to pay. *Johnson v. East Carolina, etc., R. Co.*, 116 N. Car. 926.

5. *Owen v. Brockschmidt*, 54 Mo. 285.

May Determine Details of Contract.—The agent to purchase may determine the details of the contract, and agree that the title shall remain in the vendor until the goods are paid for. *Wishard v. McNeill*, 85 Iowa 474.

Modification of Contract.—A general agent for the purchase of goods may modify a contract of purchase. *Spaulding Lumber Co. v. Stout*, 86 Wis. 89. See also *Anderson v. Coonley*, 21 Wend. (N. Y.) 279; *Standard Oil Co. v. Triumph Ins. Co.*, 3 Hun (N. Y.) 591, affirmed 64 N. Y. 85.

6. *Stothard v. Aull*, 7 Mo. 318. And see

the necessary representations as to the solvency of the principal.¹

Execution of Negotiable Notes.—But he cannot bind the principal by the execution of negotiable notes for the goods purchased, unless it is indispensable to the execution of the power.²

g. TO MANAGE BUSINESS OR PROPERTY—Power Coextensive with Business.—A general agent for the management of the business of the principal has an authority coextensive in scope with the business. He must necessarily possess and exercise the same power and authority that his principal could, if present,³

Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

Illustration.—Where a principal instructed an agent to purchase a lot of pelts, to be paid for in cotton goods, and failed to furnish the goods or any other means of payment, it was held that the agent might give a promissory note for the price thereof, in which it was stipulated that the pelts were to be paid for in cotton goods, on demand, and indorse his personal guarantee of payment, upon which he could make his principal liable for reimbursement if compelled to pay himself. *Morris v. Bowen*, 52 N. H. 416.

An authority to draw checks on a bank in payment of the agent's purchases does not authorize the borrowing of money on the responsibility of the principal. *Mordhurst v. Boies*, 24 Iowa 99.

May Assume Mortgage.—An agent having a general authority to purchase real estate may, as part of the purchase price, assume the payment of mortgages upon the property. *Schley v. Fryer*, 100 N. Y. 71. But see *Bucklen v. Hasterlik*, 51 Ill. App. 132.

Making Advances to Vendors.—An authority to an agent to purchase hides, wool, furs, and tallow, and to pay for the same with the funds furnished by the principal, does not authorize him to advance the moneys of his principal to his customers, nor to sell the particular accounts that he received in satisfaction of the unauthorized advances, much less to guarantee the payment of such accounts. *Bohart v. Oberne*, 36 Kan. 284.

1. Such authority is necessarily incident to the power to purchase on credit. *Hunter v. Hudson River Iron, etc., Co.*, 20 Barb. (N. Y.) 493.

Cannot Guarantee his Own Debts in Principal's Name.—The fact that one acts as agent for another, in writing letters, collecting money, etc., does not thereby authorize him to give a written guarantee in the name of his principal for goods purchased by himself. *Stevenson v. Hoy*, 43 Pa. St. 191.

2. *Temple v. Pomroy*, 4 Gray (Mass.) 128; *Paige v. Stone*, 10 Met. (Mass.) 168, 43 Am. Dec. 420.

Special Agent.—As a general rule, a special agent to make purchases has no authority to bind his principal by a negotiable promissory note or bill of exchange. *Taber v. Cannon*, 8 Met. (Mass.) 456. See also *Wider v. Branch*, 12 Ill. App. 358.

Clerk Having General Management of Business.

—A principal clerk, having the general management of a store, and accustomed to give due-bills in the name of his employers with their knowledge and consent, who buys goods in the usual course of business, has authority,

upon such purchase, to take up due-bills given for former purchases, and give a note therefor, in the name of his employers, including therein the amount of his last purchase. *Chidsey v. Porter*, 21 Pa. St. 390.

3. *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Bice v. Hover*, 2 Colo. App. 172; *Cummings v. Sargent*, 9 Met. (Mass.) 172; *Shipman v. Byles*, 65 Mich. 690; *Badger Lumber Co. v. Ballentine*, 54 Mo. App. 172; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77; *Bailey v. Rawley*, 1 Swan (Tenn.) 295; *Shepherd v. Milwaukee Gas Light Co.*, 11 Wis. 234. And see *Starr v. Gregory Consol. Min. Co.*, 6 Mont. 485; *Adamson v. Wiggins*, 45 Minn. 448; *Giles v. Ebsworth*, 10 Md. 333.

Power of Agent Determined from Character of Business.—It is not only proper but necessary, in order to ascertain the extent of the powers of such an agent, to consider the character of the business, the manner in which it is usual to carry on such a business, and, where the agency has continued for a long time, the manner in which the particular business has been conducted. *Collins v. Cooper*, 65 Tex. 460. See *Roche v. Pennington* (Wis., 1895), 62 N. W. Rep. 946, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 354.

Release and Waiver of Contract Rights.—He may release, vary, or waive a contract when his authority has not been withdrawn. *Burley v. Hitt*, 54 Mo. App. 272.

Compromise Disputed Claims.—An agent to manage a business may pay a disputed claim though probably not enforceable by suit, but resting only on moral obligation. *Bergenthal v. Fiebrantz*, 48 Wis. 435.

Repairing, Rebuilding.—An agent to manage property can make such repairs as are necessary to preserve and protect the property from ordinary wear and tear, but he has no authority to rebuild improvements destroyed by fire or make other permanent improvements. *Beckman v. Wilson*, 61 Cal. 335.

Sue and Defend.—An agent empowered to manage a business may sue for the collection of debts. *German F. Ins. Co. v. Grunert*, 112 Ill. 68; and employ an attorney to defend suits. *Mason v. Taylor*, 38 Minn. 32. And see *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216. But a managing agent has no power to employ an attorney to bring suit for personal injuries to employees of the principal. *Cochran v. Newton*, 5 Den. (N. Y.) 482.

An agent to manage property cannot sue in his own name to recover possession thereof. *McHenry v. Painter*, 58 Iowa 365. But he may bring a suit to restrain a trespass, and may execute an injunction bond in his prin-

and may conduct the business in the same way as the latter is in the habit of doing when at home.¹ But his authority is limited, as is that of any other

principal's name. *State v. Banks*, 48 Md. 513. He has no authority to confess a general judgment for his principal where an attachment is issued against the property, the owner being a nonresident. *Howell v. Gordon*, 40 Ga. 302. Nor can he employ counsel in a case concerning property of another person. *Perry v. Jones*, 18 Kan. 552. Nor has an agent, when left in charge of a store during the absence of his principal, with instructions to do the best he can, authority to sell the entire stock, valued at upwards of ten thousand dollars, to a single creditor of his principal to satisfy a debt of less than seven thousand dollars. *Berry v. Hart*, 1 Colo. 246.

Make Proof of Loss.—And in case of loss by fire, he may make proof of loss, and sue upon the policy. *German F. Ins. Co. v. Grunert*, 112 Ill. 68.

Keep up Stock.—He may bind his principal by purchase of goods to keep up the stock, and secret instructions to buy and sell only for cash will not relieve the latter from liability. *Watteau v. Fenwick* (1893), 1 Q. B. 346; *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Schmidt v. Sandel*, 30 La. Ann. 353; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Hubbard v. Tenbrook*, 124 Pa. St. 291, 23 W. N. C. 351, 10 Am. St. Rep. 585.

Has Insurable Interest.—A managing agent has an insurable interest where he is liable to account for the property. *Kline v. Queen Ins. Co.*, 7 Hun (N. Y.) 267.

Surgical Aid.—The manager of a manufacturing company may employ surgical aid for an injured employee. *Swazey v. Union Mfg. Co.*, 42 Conn. 556. But only in case of the necessity for the immediate services of a surgeon. *Chaplin v. Freeland*, 7 Ind. App. 676. He cannot incur funeral expenses of one who did not die in its service or on its premises. *Kipp v. East River Electric Light Co. (C. Pl.)*, 19 N. Y. Supp. 387.

1. Paying Board of Principal's Employees.—Where it is shown that the principal was responsible for the board of his employees, paying it and deducting it from their wages, his foreman left in the general control and management of his business may employ laborers and make the principal responsible for their board in the same way as the latter has been in the habit of doing when at home. *Burley v. Kitchell*, 20 N. J. L. 305.

One in Charge of Waterworks and having the management thereof has authority to bind his principal by the purchase of a pump for use in the waterworks. *Goss v. Helbing*, 77 Cal. 190.

An Agent to Manage a Hotel may bind his principal by a purchase of necessary supplies for the hotel, *Beecher v. Venn*, 35 Mich. 466; *Oliver v. Shoemaker*, 35 Mich. 466; and for liquors, wines, and sugar for use at the bar, *Cummings v. Sargent*, 9 Met. (Mass.) 172. But such authority extends no further than the purchase of such supplies as are reasonably adapted to, or customarily used in, a business of the kind. *Wallis Tobacco Co.*

v. Jackson, 99 Ala. 460. And he cannot bind his principal for the safe keeping and return of carriages furnished guests of the hotel by a livery-stable keeper. *State v. Mullin*, 46 N. J. L. 448, 50 Am. Rep. 442. Nor by entering into a contract with an electric-light company to remove the old lighting apparatus and fixtures and replace them with new. *Fisk v. Greeley Electric Light Co.*, 3 Colo. App. 319.

A General Agent and Manager of a Mining Company is presumably authorized to sell its personal property, since purchases and sales of personality for use about mining premises must be of frequent occurrence, and would presumably be under the control of the general manager. *Scudder v. Anderson*, 54 Mich. 122.

He may purchase on credit the supplies and materials necessary for the usual working of the mine. *Stuart v. Adams*, 89 Cal. 367; and may bind the owner for supplies furnished the keeper of a boarding-house necessary to the working of the mine. *Heald v. Hendy*, 89 Cal. 632.

The manager of the milling establishment of a mining corporation has no implied authority to bind the company by the purchase of machinery, for instance mills. *Victoria Gold Min. Co. v. Fraser*, 2 Colo. App. 14.

To Manage Plantation.—An agent to manage a plantation cannot contract an account on the credit of his principal, *Meyer v. Baldwin*, 52 Miss. 263; nor bind him for the purchase of goods for the laborers on the farm, *Carter v. Burnham*, 31 Ark. 212. Nor is he authorized to execute a note in the name of his principal, *Scarborough v. Reynolds*, 12 Ala. 252; nor bind him for medical services rendered on the plantation, *Malone v. Robinson* (Miss., 1893), 12 So. Rep. 709. And where a creditor attached certain lands and the grass growing thereon, in a suit upon a note it was held that the agent of the debtor for the management of the farm had no authority to give the attaching creditor leave to cut and gather the grass, and sell it on execution in such suit. *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

A manager of a plantation cannot dispose of the crops, but the principal must notify the purchaser as soon as he is informed of the fact, that he repudiates the act of the agent. *Ball v. Bender*, 22 La. Ann. 493.

A power of attorney sufficiently comprehensive to authorize the agent to manage a plantation and disburse the proceeds of the crops, will justify the factor who sells the crops to pay out their proceeds to the orders of the agent. *Sentell v. Kennedy*, 29 La. Ann. 679.

Overseer.—An overseer of a plantation carried on by slave labor may procure the necessary supplies for the slaves, the owner being absent and having made no provision for their maintenance. *Fisher v. Campbell*, 9 Port. (Ala.) 210. And see *Garratt v. Trabue*, 82 Ala. 227.

agent, to the management and transaction of the business under his control, and he cannot bind his principal by the performance of any act beyond the apparent and ostensible scope of his authority.¹

Cannot Dispose of Business.—An agent to manage a business cannot sell or dispose of it.²

Nor Mortgage.—Nor mortgage the property used in carrying it on.³

1. Illustrations of Acts beyond Authority.—

Where it appeared that the amount of sales in plaintiff's business did not exceed fifty thousand dollars a year, it was held that an agent having general charge of the business could not bind the principal by entering into contracts for advertising the business in foreign countries at an expense of over one hundred and thirty thousand dollars a year. *Holloway v. Stephens*, 2 Thomp. & C. (N. Y.) 562.

The fact that an attorney-at-law has loaned money for his principal on mortgage security, and has foreclosed the mortgage and purchased the realty in his principal's name, and the principal has refused to pay his fees until he shall realize them out of a sale of the property, gives him no authority to bind his principal by a contract to sell the same. *Scully v. Book*, 3 Wash. 182.

An agent having authority under a general power of attorney to manage the personal property of his principal is not authorized to go security for third persons, or to indorse notes in matters foreign to the subject matter of his agency so as to bind his principal. *Poirier v. Jobin*, 12 Revue Légale, 64 Super. Ct. (Quebec, 1881).

Where the owners of a tannery appointed an agent to act for them in all matters of business relating thereto, it was held that the agent had no authority to bind his principals as receipters to an officer, for horses and other property used in the tannery, which had been attached as the property of a third person, since receipting for goods attached was not a matter relating to the tannery nor to the attending business. *Weston v. Alley*, 49 Me. 94.

Not Deny Principal's Title.—An agent cannot deny his principal's title, and therefore where creditors of the principal claimed that the principal obtained credit and bought goods of them, making false representations, and they demanded of an agent empowered to carry on the principal's business a return of the goods thus procured, the agent exceeded his authority by admitting upon their *ex parte* statement his principal's fraud, and by rescinding the sales and restoring the goods to the creditors. *Clafin v. Continental Jersey Works*, 85 Ga. 27.

2. *Vescelius v. Martin*, 11 Colo. 391; *Henson v. Keet*, etc., *Mercantile Co.*, 48 Mo. App. 214.

Nor can an agent to purchase hides, to superintend their manufacture into leather, and generally to manage the tanning business, sell hides purchased for use at the tannery. *Holbrook v. Oberne*, 56 Iowa 324. See *Smith v. Stephenson*, 45 Iowa 645.

Cannot Surrender Stock in Trade.—Where a power of attorney expressly states the object of the delegation of authority to be a continuation of the business of the principal

during his absence, the agent cannot, under the guise of making payments to creditors whose demands have not yet matured, surrender a large part of the stock in trade, inasmuch as such a surrender would be foreign to the object of the power, against the interests of the business, and in excess of the agent's authority. *Clafin v. Continental Jersey Works*, 85 Ga. 27. See also *Conner v. Littlefield*, 79 Tex. 76.

Manager of Corporation may Sell to Pay Debts.—The manager of a foreign corporation, who is its sole representative and the person through whom another has become its creditor, has *prima facie* authority to sell the property of the corporation to pay such debt. *Carey-Hallidy Lumber Co. v. Cain*, 70 Miss. 628.

Agent to Manage Property—Disposing of Property.—An agent to manage property cannot dispose of it. *Smith v. Stephenson*, 45 Iowa 645.

An agent appointed to "take care of personal property and to give notice of any lien upon it," has no authority to make an agreement with a third person to purchase the property of his principal, at a sale to which it is exposed, to satisfy rent under a distress warrant. *Brisbane v. Adams*, 3 N. Y. 129.

Assigning Cause of Action.—Nor can he assign a cause of action for trespass. *Geiger v. Bolles*, 1 Thomp. & C. (N. Y.) 129.

Cannot Lease.—Authority to manage a farm for the use and benefit of the agent does not authorize a lease. *Ward v. Thrustin*, 40 Ohio St. 347.

Authority to Exchange Real Estate is Not Authority to Purchase.—A power of attorney to "exchange and convey" a certain lot for other real estate does not authorize the attorney to purchase land to be paid for in part by an assignment of the principal's interest in said lot (under a contract of sale) and the remainder and greater part in money. *Long v. Fuller*, 21 Wis. 121.

Nor has an agent authorized to "manage" lands for a year *prima facie* authority to lease them for fifteen years, with a right to quarry and sell stone therefrom. *Duncan v. Hartman*, 143 Pa. St. 595, 48 Phila. Leg. Int. 441, 24 Am. St. Rep. 570.

Timber Contract.—The fact that an agent had charge of lands, with power to negotiate sales of timber, does not show that he had power to bind the principal to perform a timber contract for the plaintiff with a third party. *Gilchrist v. Pearson*, 70 Miss. 351.

3. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

But the general agent, having the entire superintendence and management of the business of a lumber company, the members of which live abroad, has authority in good

Nor Engage in a Different Business.—Nor can he engage his principal in new and different enterprises.¹

Cannot Borrow.—Such an agent has no authority to borrow money for his principal,² unless it is absolutely indispensable to the execution of the duties delegated,³ and *a fortiori* he cannot bind him for the debt of a third party.⁴

Nor Execute Notes.—Nor has he authority to bind his principal by the execution or indorsement of negotiable paper.⁵

h. TO RECEIVE PAYMENT.—(1) *From What Authority will be Implied—Presentation of Bill.*—The mere presentation of a bill by an employee of the vendor of goods does not *per se* warrant the debtor therein in making payment to such agent.⁶

faith to make a transfer of lumber in trust to pay off the servants in the employ of the company. *Taylor v. Labeaume*, 17 Mo. 338.

1. *Campbell v. Hastings*, 29 Ark. 512.

An authority given to an agent to carry on mills for the owner, to permit parties to cut timber on his land and to collect the stumpage therefor, and to claim indemnity from trespassers, does not imply an authority in the agent to embark his principal in lumbering operations by which he would be obligated to pay large sums of money. *Hazeltine v. Miller*, 44 Me. 177.

A Power to Close up a Business does not authorize a reinvestment of the funds. *Stoddart's Case*, 4 Ct. of Cl. 511.

2. *Perkins v. Boothby*, 71 Me. 94; *Bickford v. Menier*, 107 N. Y. 490. See *Stanley v. Sheffield Land, etc., Co.*, 83 Ala. 260; *Tucker v. Woolsey*, 64 Barb. (N. Y.) 142.

A Power of Attorney to Wind up the Business of a nonresident principal does not authorize the agent to borrow money on his account. *Smith v. McGregor*, 96 N. Car. 101.

No Authority to Borrow Money Generally can be implied from the fact that an agent has the management of his principal's store, keeps its accounts, and is authorized to make checks on a special bank account, and overdraw it if necessary in order to pay for goods. *Heath v. Paul*, 81 Wis. 532.

Principal Accepting Benefits.—Where the agent borrows money and applies it to the payment and discharge of the legal liabilities of his principal, who knowingly retains the benefit of such payment, the principal will be liable therefor to the lender in an action for money had and received. *Perkins v. Boothby*, 71 Me. 91.

3. *Bickford v. Menier*, 107 N. Y. 490.

Evidence Showing Authority to Borrow.—Evidence that a person was the financial agent and confidential clerk of another, and had on various occasions, with his assent, in his behalf accepted drafts, and drawn orders upon others, which he afterwards allowed in account, is evidence from which, without any proof of direct authority, a jury may infer a general authority to borrow money to meet the exigencies of the principal's business, even at a usurious rate of interest, and to bind him by a check given therefor. *Kelley v. Lindsey*, 7 Gray (Mass.) 287. See also *Consolidated Nat. Bank v. Pacific Coast Steamship Co.*, 95 Cal. 1.

4. Cannot Bind Principal as Surety.—*Ruppe v. Edwards*, 52 Mich. 411; *New York Iron Mine*

v. Negaunee First Nat. Bank, 39 Mich. 644; *Clayton v. Martin*, 31 Ark. 217; *Meyer v. Baldwin*, 52 Miss. 263; *Doan v. Duncan*, 18 Ill. 96.

5. *Smith v. Gibson*, 6 Blackf. (Ind.) 369; *Perkins v. Boothby*, 71 Me. 91; *New York Iron Mine v. Negaunee First Nat. Bank*, 39 Mich. 644; *Fairly v. Nash*, 70 Miss. 193; *Terry v. Fargo*, 10 Johns. (N. Y.) 114; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Holtsinger v. National Corn Exch. Bank*, 1 Sweeny (N. Y.) 64; *Witz v. Gray*, 116 N. Car. 48; *Hamburg Bank v. Johnson*, 3 Rich. (S. Car.) 42. But see *Odiorne v. Maxcy*, 13 Mass. 178; *White v. Westport Cotton Mfg. Co.*, 1 Pick. (Mass.) 215, 11 Am. Dec. 168; *Tappan v. Bailey*, 4 Met. (Mass.) 529.

The rule stated in the text holds even though the issue of paper is necessary to avoid the suspension of work of great importance. *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 619.

But an agent having authority to transact all the business of his principal, transfer notes, etc., may assign and transfer negotiable paper belonging to the principal. *Bailey v. Rawley*, 1 Swan (Tenn.) 295.

Accommodation Paper.—Nor can he bind his principal by making accommodation paper, even though in connection with the business it be shown that he is authorized to make notes in the name of his principal. *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728.

6. This is true although the bill is in the merchant's handwriting, and upon one of his billheads. *Hirshfield v. Waldron*, 54 Mich. 649. And see *Willard v. Buckingham*, 36 Conn. 395.

And the sending of a copy of an account through the post-office to a third party does not, of itself, constitute the latter an agent for the collection of the claim. *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232. But see *Adams v. Humphreys*, 54 Ga. 496.

Question for Jury.—The authority of an agent to collect need not be express, but may be implied; and where a bill for goods previously sold by him for the house he represents, together with a bill for goods sold directly by the house to the same customer, is sent to the agent and both bills are presented by him to the customer, who pays both, whether under all the circumstances the sending of the bill to the agent implies authority for him to collect the money is a question of fact for the jury. The fact that the bills bore on their face in small letters the words "Bills

Making the Contract.—No authority to receive payment under a contract is to be implied from the fact that the agent was employed to make or negotiate it.¹

The Receipt of Interest.—Nor will authority to receive payment of the principal of a debt be implied from a power to receive the interest.²

Possession of Securities.—But a debtor is authorized to infer that an agent employed to negotiate a loan is empowered to receive payment of both principal and interest, from his having possession of the securities.³ But this inference is founded upon possession of the securities, and ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor relying upon such inference to show that the securities were in the possession of the agent on each occasion when payments were made,⁴ though it is not necessary that he should have actually seen them.⁵ The mere possession of an

payable at this office only," which the debtor did not notice or know of at the time of payment, does not necessarily negative the authority. *Luckie v. Johnston*, 89 Ga. 321.

Bill of Lading.—Authority to ship cotton and forward the bills of lading to the consignees does not imply authority to receive advances from the consignee. *Hill v. Helton*, 80 Ala. 528.

1. *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Thompson v. Elliott*, 73 Ill. 221; *Smith v. Hall*, 19 Ill. App. 17; *Austin v. Thorp*, 30 Iowa 376; *Greenhood v. Keator*, 9 Ill. App. 183; *Tew v. Labiche*, 4 La. Ann. 526. And see *infra*, this section, *Possession of Securities*; *supra*, this section, *To Sell Personality—Power to Receive Payment*.

An agent authorized to make a rental contract has no authority to collect the rent falling due thereunder. *Heflin v. Campbell*, 5 Tex. Civ. App. 106.

2. *Brewster v. Carnes*, 103 N. Y. 556; *Harrison v. Burlingame* (Supreme Ct.), 17 N. Y. St. Rep. 909; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157. See also *Crane v. Evans* (Supreme Ct.), 1 N. Y. St. Rep. 216.

3. *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 612; *Crane v. Gruenewald*, 120 N. Y. 274; *Megary v. Funtis*, 5 Sandf. (N. Y.) 376; *Cleveland v. Ashwood*, Freem. 249; *Merritt v. Cole*, 9 Hun (N. Y.) 98.

Possession of Bond and Mortgage.—He is authorized to infer that the agent is empowered to receive both principal and interest from his having possession of the bond and mortgage given to secure the loan, or from possession of the bond alone. *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325, *criticising* *Spencer v. Wilson*, 4 Munf. (Va.) 130; *Haines v. Pohlmann*, 25 N. J. Eq. 179.

If an agent be intrusted with the custody of a bond, he may receive the interest; and though he fails, yet the mortgagee shall bear the loss. And so it is also, in such cases, if he receives the principal and delivers up the bond. After being intrusted with the security itself, it shall be presumed he is intrusted with power over it, and with the power to receive the principal and interest. If intrusted with the mortgage deed but not the bond, he has only authority to receive the interest, but not the principal; because a giving up the deed is not sufficient to restore the estate, but there must be a reconveyance, whereas the giving up a bond is, in law, an

extinguishment of the debt. *Whitlock v. Waltham*, 1 Salk. 157. See *Crane v. Evans* (Supreme Ct.), 1 N. Y. St. Rep. 216.

Where the assignee of a mortgage allows it to remain in the hands of the mortgagee, payments to him by the mortgagor, without notice of the assignment, are valid. *Van Keuren v. Corkins*, 4 Hun (N. Y.) 129.

Possession of Bank-book.—Proof that a depositor in a savings bank left her bank-book with her mother, for the purpose of enabling the latter to draw out money upon special orders, from time to time, and that moneys were at different times deposited and withdrawn by the latter for the former, is not sufficient to authorize a jury to infer an agency on the part of the latter to receive payment of other money due to the former. *Butman v. Bacon*, 8 Allen (Mass.) 25.

4. *England.*—*Henn v. Conisby*, 1 Ch. Ca. 93; *Degg v. Osbastan*, 1 Eq. Ca. Ab. 145; *Wostenholm v. Davies*, 2 Freem. 289; *Whitlock v. Waltham*, 1 Salk. 157; *Roberts v. Matthews*, 1 Vern. 150; *Curtis v. Drought*, 1 Moll. 487.

Georgia.—*Guilford v. Stacer*, 53 Ga. 618.

Illinois.—*Viskocil v. Doktor*, 27 Ill. App. 232; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296.

Iowa.—*Tappan v. Morseman*, 18 Iowa 499; *Security Co. v. Graybeal*, 85 Iowa 543; *U. S. Bank v. Burson*, 90 Iowa 191.

Missouri.—*Whelan v. Reilly*, 61 Mo. 565.

New Jersey.—*Haines v. Pohlmann*, 25 N. J. Eq. 179.

New York.—*Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Smith v. Kidd*, 68 N. Y. 137, 23 Am. Rep. 157. And see *Brown v. Blydenburgh*, 7 N. Y. 141.

Withdrawal of Securities.—It is not incumbent upon a creditor to show notice to the debtor of the withdrawal of the papers from the possession of the attorney. *Brewster v. Carnes*, 103 N. Y. 556.

And it has been held that if the agent has parted with the possession of the securities, though wrongfully, any payment to him will not bind the principal, although the latter supposes the agent to be still in possession of them. *Crane v. Gruenewald*, 120 N. Y. 274. Compare *Shane v. Palmer*, 43 Kan. 481, and *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138.

5. **Payment without Inspection of Securities.**—*Crane v. Gruenewald*, 120 N. Y. 274.

unindorsed note, however, gives the agent no implied authority to receive payment of either principal or interest.¹

(2) *Payment must be in Money.*—An agent to collect or receive payment can receive nothing but money in satisfaction of the claim.²

Notes, Drafts, Checks, etc.—Hence he cannot bind his principal by accepting from the debtor in discharge of the debt a note, bond, draft, or check,³ nor by

In *Hatfield v. Reynolds*, 34 Barb. (N. Y.) 612, the court said: "This presents the question whether, in such cases, the authority to receive payments is implied from the possession of the securities, or from their production and exhibition to the debtor, at the time of the payment. * * * I do not perceive that if the defendant had taken the precaution to call for the production of the papers whenever he made a payment, he would have strengthened this implication. The authority is implied from the possession of the papers and the continued receipt of money upon them, which are facts, and not from the exhibition of the papers by the agent, which is only the evidence of the facts. * * * To have called for the bond and mortgage, under the circumstances of this case, would have been a very prudent and proper precaution, but it would have been only a precaution. It would have enabled the defendant to verify the authority of Purdy, but it would have been no more than verifying it. By neglecting to do so, the defendant took the risk of making a payment, after Purdy's authority had ceased by his ceasing to have possession of the securities."

1. *Doubleday v. Kreiss*, 50 N. Y. 410, 10 Am. Rep. 502; *Wardrop v. Dunlop*, 1 Hun (N. Y.) 325, *affirmed* in 59 N. Y. 634. And see *Dixon v. Haslett*, 2 Treadw. Const. (S. Car.) 615. But see *Padfield v. Green*, 85 Ill. 529.

2. *Note Payable to Bearer.*—Possession of a note payable to bearer is presumptive evidence of authority to receive payment, but not of authority to make any arrangement for the benefit of the owner. *Woodbury v. Larned*, 5 Minn. 339.

See the title **BILLS AND NOTES.**

Authority to Calculate the Amount Due on Notes.—Authority in an agent to keep the books of his principal and figure the interest on notes does not show authority to collect and settle such notes and accounts. *Reynolds v. Ferree*, 86 Ill. 570.

3. *Ward v. Smith*, 7 Wall. (U. S.) 447; *McCormick v. Walter A. Wood Mowing, etc., Mach. Co.*, 72 Ind. 518; *Carver v. Carver*, 53 Ind. 241; *Graydon v. Patterson*, 13 Iowa 256, 81 Am. Dec. 432; *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *Hurley v. Watson*, 68 Mich. 531; *Pitkin v. Harris*, 69 Mich. 133; *Fellows v. Northrup*, 39 N. Y. 122; *Tankersley v. Anderson*, 4 Desaus. Eq. (S. Car.) 44; *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132; *Rodgers v. Bass*, 46 Tex. 506; *Robson v. Watts*, 11 Tex. 764; *Harper v. Harvey*, 4 W. Va. 539. See also *Hutson v. Mitchell*, 14 S. & R. (Pa.) 307; *Frazer v. Gore* Dist. Mut. F. Ins. Co., 2 Ont. Rep. 416.

Money Only.—An agent who has authority to receive payments only, cannot bind his principal by any arrangement short of an actual collection of the money. *Powell v. Henry*,

27 Ala. 612; *Taylor v. Robinson*, 14 Cal. 396; *Earnhart v. Robertson*, 10 Ind. 8; *Corning v. Strong*, 1 Ind. 329; *Kirk v. Hiatt*, 2 Ind. 322; *McCulloch v. McKee*, 16 Pa. St. 289.

He can receive nothing but money in discharge of a debt, unless expressly authorized to do so. *Mathews v. Hamilton*, 23 Ill. 470; *McCarver v. Nealey*, 1 Greene (Iowa) 360.

But the payment is good in so far as made in cash. *Rhine v. Blake*, 59 Tex. 240; *Scott v. Irving*, 1 B. & Ad. 605, 20 E. C. L. 453.

Currency of a Particular Kind.—An agent to collect a debt payable in a particular sort of currency has no power to receive payment in any other kind of currency; and if loss ensues he will be liable, even where the currency he receives is the only currency circulating at the time and place of collection. *Mangum v. Ball*, 43 Miss. 288.

Confederate and Bank Notes.—As to the power of the agent to receive payment in Confederate currency or bank notes, see the titles **MONEY; PAYMENT.**

3. *Ward v. Evans*, 2 Ld. Raym. 928; *Sykes v. Giles*, 5 M. & W. 645; *Powell v. Henry*, 27 Ala. 612; *Mathews v. Hamilton*, 23 Ill. 470; *Corning v. Strong*, 1 Ind. 329; *Runyon v. Snell*, 116 Ind. 164, 9 Am. St. Rep. 839; *McCarver v. Nealey*, 1 Greene (Iowa) 360; *Wilcox, etc., Organ Co. v. Lasley*, 40 Kan. 521; *Downer v. Carpenter*, 1 Hun (N. Y.) 591; *Kenny v. Hazeltine*, 6 Humph. (Tenn.) 62; *Cooney v. Wade*, 4 Humph. (Tenn.) 444, 40 Am. Dec. 657; *Rodgers v. Bass*, 46 Tex. 505; *Wiley v. Mahood*, 10 W. Va. 206; *Crane v. Boltenhouse*, 2 Kerr (New Bruns.) 581.

Notes Not Payment unless Discharged.—An agent cannot cancel notes placed in his hands for collection upon the receipt of new notes of the debtor. *Miller v. Edmonston*, 8 Blackf. (Ind.) 291. Nor can he take the note of a third party in payment of the claim. *Langdon v. Potter*, 13 Mass. 319; *Scully v. Dodge*, 40 Kan. 395.

It does not constitute payment unless the notes are actually collected by the agent. *Spence v. Rose*, 28 W. Va. 333.

Bonds.—An agent to collect cannot take the bond of the debtor or of a third party. *Kent v. Ricards*, 3 Md. Ch. 392; *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780. Though it has been held that when the bond is paid the debtor will be discharged. *Smith v. Lamberts*, 7 Gratt. (Va.) 138.

Drafts.—*Drain v. Doggett*, 41 Iowa 682; *Goldsborough v. Turner*, 67 N. Car. 403. Though it has been held good if afterwards paid. *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

Checks.—*Harlan v. Ely*, 68 Cal. 522; *Hall v. Storrs*, 7 Wis. 253; *Broughton v. Silloway*, 114 Mass. 71, 19 Am. Rep. 312.

If, however, payment is made by check,

accepting payment in merchandise or other property.¹

Certificates of Deposit.—But where the agent is a bank of deposit, it may receive its own certificates of deposit as money.²

Cannot Compound Debt.—The agent cannot bind his principal by a composition or release of the claim,³ or commute it for a debt due from himself.⁴

Cannot Substitute Note Payable to Agent.—Nor can the agent substitute himself as creditor by taking a note payable to himself in settlement of a claim.⁵

Nor Exchange the Security.—Nor can he exchange or assign the security for the debt which he is empowered to collect.⁶

and the check is duly honored, that is payment in cash. *Bridges v. Garrett*, L. R. 5 C. P. 454.

1. *Mudgett v. Day*, 12 Cal. 139; *Reynolds v. Ferree*, 86 Ill. 570; *Kirk v. Hiatt*, 2 Ind. 322; *Aultman v. Lee*, 43 Iowa 404; *Martin v. U. S.*, 2 T. B. Mon. (Ky.) 89, 15 Am. Dec. 129; *Kendall v. Wade*, 5 La. Ann. 157; *Rhine v. Blake*, 59 Tex. 240; *Wright v. Daily*, 26 Tex. 730; *Rodgers v. Bass*, 46 Tex. 505.

Agent Taking Property for His Own Use.—Especially is this true where the property is taken by the agent for his own use, as where he agreed to take timber delivered at his sawmill. *Williams v. Johnston*, 92 N. Car. 532, 53 Am. Rep. 428. But see *Clark v. Shields*, 3 Hawks (N. Car.) 461.

Purchase of Debtor's Property.—Nor can he purchase the property of the debtor to secure the claim. *Taylor v. Robinson*, 14 Cal. 396.

2. *British, etc., Mortg. Co. v. Tibballs*, 63 Iowa 468.

And where an agent received a certificate of deposit which was duly paid upon presentation, it was held a good payment. *Poorman v. Woodward*, 21 How. (U. S.) 266.

3. *Parrot v. Wells*, 2 Vern. 127; *Penn v. Brown*, 2 Freem. 214; *Roberts v. Matthews*, 1 Vern. 150, note; *Swinfen v. Swinfen*, 24 Beav. 549; *McHany v. Schenk*, 88 Ill. 367; *Nolan v. Jackson*, 16 Ill. 272; *Padfield v. Green*, 85 Ill. 529; *Baird v. Randall*, 58 Mich. 175; *Eaton v. Knowles*, 61 Mich. 625; *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205; *Sier v. Bache*, 7 Misc. Rep. (N. Y. C. Pl.) 105; *McAlpin v. Cassidy*, 17 Tex. 463; *Tompkins Machinery, etc., Co. v. Peter*, 84 Tex. 627. See also *Holker v. Parker*, 7 Cranch (U. S.) 436; *Fellows v. Northrup*, 39 N. Y. 117; *Heffernan v. Adams*, 7 Watts (Pa.) 117; and title ATTORNEY AND CLIENT.

No Authority to Release.—Authority to collect by no means implies authority to release the claim without payment. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *De Mets v. Dagron*, 53 N. Y. 635; *Herring v. Hottendorf*, 74 N. Car. 588; *Deacon v. Greenfield*, 141 Pa. St. 467, 27 W. N. C. 565. See also *Hutchings v. Clark*, 22 Cal. 228.

An attorney employed to collect a debt has not authority to compromise it, extend time for payment, or take new securities in exchange, yet the debtor may be protected in a settlement made in good faith with such attorney. *Mallory v. Mariner*, 15 Wis. 172.

An agent to receive personal property cannot dispense with delivery. *Boyet v. Braswell*, 72 N. Car. 260.

4. *Kingston v. Kincaid*, 1 Wash. (U. S.) 454; *Cost v. Genette*, 1 Port. (Ala.) 212; *Craig v. Ely*, 5 Stew. & P. (Ala.) 354; *Gullett v. Lewis*, 3 Stew. (Ala.) 23; *McCarver v. Nealey*, 1 Greene (Iowa) 360; *Hurley v. Watson*, 68 Mich. 531; *Greenwood v. Burns*, 50 Mo. 52; *Merchants' Mut. Ins. Co. v. Excelsior Ins. Co.*, 4 Mo. App. 578; *Chambers v. Miller*, 7 Watts (Pa.) 63; *McAlpin v. Cassidy*, 17 Tex. 467; *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Wiley v. Mahood*, 10 W. Va. 206.

Cannot Set off for Debt Due Himself.—"There is no doubt that where an agent is authorized to receive money for his principal he cannot allow it by way of set-off in accounts between the payer and himself; he must receive it in money." Per Cockburn, C.J., in *Bridges v. Garrett*, L. R. 5 C. P. 454. And this though specially authorized to compromise and accept personal property in satisfaction of the claim. *McCormick v. Keith*, 8 Neb. 142. He cannot substitute himself as debtor. *Aultman v. Lee*, 43 Iowa 404.

Where an underwriter settled a loss with an insurance broker employed to collect it, by setting off in part account against it a debt due him from the broker for premiums, it was held, upon the bankruptcy of the broker and his failure to pay the amount of the policy to the insured, that the underwriter was not entitled to treat the set-off as payment to the assured, who was not bound by a usage of such method of adjustment between insurance brokers and underwriters which was not shown to be known to him. *Scott v. Irving*, 1 B. & Ad. 605, 20 E. C. L. 453.

In *Todd v. Reid*, 4 B. & Ald. 210, 6 E. C. L. 455, such a custom was held to be illegal.

Commuting Debt.—An agent to receive payment cannot commute the debt for another thing. *Padfield v. Green*, 85 Ill. 529.

And one dealing with him is bound to know that he has no such authority. *Hurley v. Watson*, 68 Mich. 531.

5. *Corning v. Strong*, 1 Ind. 329; *Robinson v. Anderson*, 106 Ind. 152; *McCormick v. Walter A. Wood Mowing, etc., Mach. Co.*, 72 Ind. 518; *O'Connor v. Arnold*, 53 Ind. 203; *McCulloch v. McKee*, 16 Pa. St. 289.

6. *McHany v. Schenk*, 88 Ill. 357; *Hakes v. Myrick*, 69 Iowa 189; *Ames v. Drew*, 31 N. H. 475. See also *Malloye v. Coubrough*, 96 Cal. 649; *Richardson v. Bunker*, 7 Phila. (Pa.) 241.

An agent to collect a note cannot sell, barter, or exchange it for drafts, bills of exchange, or other property. *Smith v. Johnson*, 71 Mo. 382; *Rodgers v. Bass*, 46 Tex. 505.

(3) *Time of Payment*.—The agent cannot extend the time of payment,¹ nor receive the payment of an obligation before it is due.²

(4) *Powers Implied—May Employ Counsel and Sue*.—Authority to collect implies authority to use all the ordinary means of collecting, and among these are the employment of counsel³ and the institution of suits.⁴

Cannot Pledge Note Taken in Payment.—Nor, if authorized to take a negotiable note in payment, can the agent pledge the same for a debt of his own. *Jones v. Farley*, 6 Me. 226.

1. **Cannot Extend Time.**—*Chappel v. Raymond*, 20 La. Ann. 277; *Hutchings v. Munger*, 41 N. Y. 155; *Ritch v. Smith*, 82 N. Y. 627; *Mallory v. Mariner*, 15 Wis. 172. And see *Gerrish v. Maher*, 70 Ill. 470; *Lawrence v. Johnson*, 64 Ill. 351; *Lockhart v. Wyatt*, 10 Ala. 231, 44 Am. Dec. 481.

Consideration for Extension.—Even if the agent is authorized to make the extension, there must be some consideration to support it. If the debt is overdue, payment of a part is no consideration for a promise to give further time for the payment of the balance. *Hutchings v. Munger*, 41 N. Y. 155.

When Extension Authorized.—But where the owner authorized an agent to procure additional security for a real-estate mortgage, leaving it to his judgment to make the best arrangement he could for that purpose, it was held that the agent was authorized to make an agreement for a reasonable extension of the time of payment. *Kane v. Cortesy*, 100 N. Y. 132.

And an agent having money in his hands with undisputed power to loan, manage, and collect as he shall deem best, has been held to have power to extend the time of payment. *Hurd v. Marple*, 2 Ill. App. 402.

Place of Payment.—An agent to receive payments under a contract to be made by him may, in the absence of instructions, provide in the contract that they shall be made at a reasonable and proper place or bank convenient to him. *McLaughlin v. Wheeler*, 1 S. Dak. 497.

2. **Cannot Receive Payment before Due.**—*Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Doubleday v. Kreiss*, 50 N. Y. 410, 10 Am. Ry. Rep. 502; *Schermerhorn v. Farley*, 58 Hun (N. Y.) 66; *Parnther v. Gaitskell*, 13 East 432. See also *Holland v. Van Beil*, 89 Ga. 223.

Effect of Usage.—If there be a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, extending the ordinary reach of the authority, that may well be held to give full validity to the act. *Thompson v. Elliott*, 73 Ill. 221; *Smith v. Hall*, 19 Ill. App. 17.

In *Bliss v. Cutter*, 19 Barb. (N. Y.) 9, it appeared that the plaintiffs were payees and the defendants drawees of a bill of exchange drawn by one B., and held by the P. bank as collecting agents for the plaintiffs, who had discounted the bill for B. In order to secure the plaintiffs for their liability incurred upon the bill of exchange, B. attached thereto a bill of lading for a shipment of flour of which he was consignor, which bill was marked, "Held subject to the order of cashier

P. bank." The defendants accepted the bill of exchange upon its presentation to them, and retained the bill of lading attached thereto, and they subsequently, but before the maturity of the bill of exchange, as commission merchants for B., sold the shipment of flour, but were unable to make delivery without an order from the cashier of the P. bank, in accordance with the indorsement upon the bill of lading. The cashier held the flour as security for the plaintiffs for their liability upon the bill of exchange, and agreed to give the order only upon payment to the bank by the defendants of the present value of the bill of exchange; the defendants made the payment and obtained the order, but before the date of the maturity of the bill of exchange the bank failed. It was held that the loss must fall on the plaintiffs, and that commercial usage authorized a payment to the bank under the circumstances before the maturity of the bill of exchange.

In *Campbell v. Hassell*, 1 Stark. 233, 2 E. C. L. 94, it was held that payment would not be good if it varied from the original terms of the contract, and that evidence of a custom to that effect was inadmissible.

3. *Ryan v. Tudor*, 31 Kan. 366. See *Merrick v. Wagner*, 44 Ill. 266.

Authority to Collect Broader than Authority to Receive Payment.—It should be noted that the implied authority of an agent to collect is broader and more comprehensive than the authority of an agent to receive payment merely; and the authority of an agent of the latter class would seem not to extend *per se* to the bringing of suit. See *Ryan v. Tudor*, 31 Kan. 366.

Authority to Receive Shares of Estate, Authorizes Suit for Partition.—Power to receive the shares of the heirs at law in a certain estate, and perform acts requisite, with full power of substitution, authorizes the employment of counsel to bring an action of partition of lands belonging to such estate, and an action to recover the shares. *Woerman v. Baas* (Supreme Ct.), 12 N. Y. Supp. 59.

4. **Authority to Collect Implies Authority to Sue.**—Authority to collect a debt carries with it authority to sue, issue execution, and direct seizure of property. *Weile's Case*, 7 Ct. of Cl. 535; *Joyce v. Duplessis*, 15 La. Ann. 242, 77 Am. Dec. 185; *Moore v. Hall*, 48 Mich. 145; *Bush v. Miller*, 13 Barb. (N. Y.) 481; *Scott v. Elmendorf*, 12 Johns. (N. Y.) 317; *Hirshfield v. Landman*, 3 E. D. Smith (N. Y.) 208; *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216.

A general authority to collect implies authority to appear as attorney. *M'Minn v. Richtmyer*, 3 Hill (N. Y.) 236.

Power to Demand Indemnity from Foreign Government.—A power of attorney to demand pecuniary indemnification from a foreign government, with power to do every necessary act, empowers the agent to prosecute the

When in His Own Name.—If the claim is a negotiable instrument, payable to bearer or indorsed in blank, the agent may sue in his own name.¹

May Give Acquittance.—Upon receipt of the money the agent may give an acquittance therefor² or surrender the security.³

And Receive Declarations.—And may receive declarations accompanying the payment.⁴

Part Payment.—Authority to receive the whole of a debt embraces power to receive a part.⁵

No Authority to Indorse.—An agent authorized to accept checks and negotiable paper in payment of debts has no implied authority to indorse the paper, such indorsement not being a necessary incident to the collection.⁶

Nor Transfer Claim.—Nor can the agent sell or transfer the claim.⁷

claim before a commission. *Weile's Case*, 7 Ct. of Cl. 535.

Attachment.—Power to sue for a debt carries with it power to make the suit effective by attachment, *DePoret v. Gusman*, 30 La. Ann. 930; *Fenn v. Harrison*, 4 T. R. 177; to do which he may sign the necessary bond, *Merrick v. Wagner*, 44 Ill. 266; *Trowbridge v. Weir*, 6 La. Ann. 706; *Alexander v. Burns*, 6 La. Ann. 704.

Indemnity.—He has implied authority to indemnify an officer in making a levy. *Clark v. Randall*, 9 Wis. 135, 76 Am. Dec. 252; *Schoregge v. Gordon*, 29 Minn. 367.

1. *Nisbet v. Lawson*, 1 Ga. 275; *Brigham v. Gurney*, 1 Mich. 349; *Boyd v. Corbitt*, 37 Mich. 52; *Hazewell v. Coursen*, 45 N. Y. Super. Ct. 22.

An Indorsement in Blank gives authority to the agent not only to receive and receipt for the money, but to bring a suit in his own name on the instrument. *Orr v. Lacy*, 4 McLean (U. S.) 244.

Death Not Revocation.—The indorsement for such purpose passes the legal title in trust, and the authority to collect is not revoked by the death of the owner. *Moore v. Hall*, 48 Mich. 143.

Assignment—Note Unindorsed.—But the agent cannot assign the judgment or sue in his own name on an unindorsed note. *Padfield v. Green*, 85 Ill. 529.

2. *Orr v. Lacy*, 4 McLean (U. S.) 244; *Scammon v. Wells*, 84 Cal. 311; *Gentry v. Connecticut Mut. L. Ins. Co.*, 15 Mo. App. 215.

Acquittance.—But he can only give an acquittance upon receipt of the sum due. *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399. See *supra*, this section, *Payment must be in Money*.

To Release without Payment, Authority must be Express.—The authority of an agent to discharge a person from execution, without satisfaction of the debt, must be clearly proved and strictly pursued. *Crary v. Turner*, 6 Johns. (N. Y.) 51.

He cannot release notes and accounts held for collection unless authorized by the principal. *Randon v. Toby*, 11 How. (U. S.) 493.

Receipt from General Agent Prima Facie Good.—A receipt in full from a general agent to receive money will be binding until avoided by proof. *Patterson v. Ackerson*, 2 Edw. Ch. (N. Y.) 427.

3. **Surrender of Securities.**—*Padfield v. Green*, 85 Ill. 529; *Feldman v. Beier*, 78 N. Y. 293.

But he cannot surrender the securities without payment. *Harrison v. Burlingame* (Supreme Ct.), 17 N. Y. St. Rep. 905.

Agent to Receive Legacies cannot Relieve Executor from Liability.—Nor will authority to receive legacies coming from a certain estate authorize the agent to acquiesce in the turning over of the funds and management of the estate by one executor to his coexecutor so as to relieve such executor from liability for the mismanagement of the coexecutor. *In re Osborn's Estate*, 87 Cal. 1.

4. **Receiving Declarations.**—He may receive such declarations as necessarily accompany the payment and direct its application. *Davis v. Amy*, 2 Grant's Cas. (Pa.) 412.

An agent to present a claim may receive notice of its acceptance or rejection. *Peters v. Stewart*, 2 Misc. Rep. (N. Y. C. Pl.) 357, reversing 1 Misc. Rep. (N. Y. City Ct.) 8.

5. *Pickett v. Bates*, 3 La. Ann. 627; *Whelan v. Reilly*, 61 Mo. 565; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325.

6. *Hogg v. Snaith*, 1 Taunt. 347; *Millard v. National Bank of the Republic*, 3 McArthur (D. C.) 54; *Ames v. Drew*, 31 N. H. 475; *Holtsinger v. National Corn Exch. Bank*, 6 Abb. Pr. N. S. (N. Y. Super. Ct.) 292; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *McClure v. Ewartson*, 14 Lea (Tenn.) 495. And see *Thomson v. Bank of British North America*, 82 N. Y. 1.

Authority Given a Collector to Receive Checks in lieu of cash, in payment of bills held for collection, confers no authority to indorse and collect the checks; when he receives checks payable to his principal, his duty as collector ceases, and his next duty is to account to his principal for the proceeds of his collections, and turn over the checks to him, to be disposed of as he may judge proper. *Graham v. U. S. Savings Inst.*, 46 Mo. 186; *Jackson v. McMinnville Nat. Bank*, 92 Tenn. 154.

Nor does power to receive a note in payment of an account imply power to dispose of it. *Hays v. Lynn*, 7 Watts (Pa.) 524.

Indorsement for Debtor.—An agent for the collection of a note is not authorized to indorse a security for the debtor, to enable him to raise the money. *Hines v. Butler*, 3 Ired. Eq. (N. Car.) 307.

7. *Texada v. Beaman*, 6 La. 85, 25 Am.

i. TO SETTLE.—An agent with full power to settle has implied authority to do what is necessary to secure a settlement,¹ and may allow credits,² and receive personal property.³

Limitations of Powers.—But he can only bind his principal by a settlement of the matters referred to him,⁴ and cannot submit matters in dispute to arbitration,⁵ or assign the claims.⁶

Dec. 204; *Quigley v. Mexico Southern Bank*, 80 Mo. 289, 50 Am. Rep. 503; *Smith v. Johnson*, 71 Mo. 382; *Stonington Sav. Bank v. Davis*, 14 N. J. Eq. 286; *Garrigue v. Loescher*, 3 Bosw. (N. Y.) 578; *Rodgers v. Bass*, 46 Tex. 505.

No Power to Sell or Transfer Securities.—An agent holding a note for collection has no power to sell it. *Smith v. Johnson*, 71 Mo. 382; *Goodfellow v. Landis*, 36 Mo. 168. The possession of the note raises no presumption that he is authorized to assign it, and the burden is upon the party claiming under an assignment to show that it was authorized by the principal. *Hardesty v. Newby*, 28 Mo. 567, 75 Am. Dec. 137.

And power to collect debts and demands, as well as to sign the principal's name in all business transactions, confers no authority to transfer shares of stock belonging to the principal. *Camden F. Ins. Assoc. v. Jones*, 53 N. J. L. 189.

1. But he must regularly pursue his authority. *Nickles v. Wells*, 2 Utah 167.

Possession of Unadjusted Vouchers.—An agent to whom unadjusted vouchers for services rendered a railroad company are sent, with authority to make the best settlement he can, is authorized to determine the amount due and collect and receive the money. *New York, etc., R. Co. v. Bates*, 68 Md. 184.

A Telegraph Operator cannot settle claims against the company. *Western Union Tel. Co. v. Rains*, 63 Tex. 27.

Power to Sell.—An agent in charge of a plantation for his principal, under a power of attorney to act in all cases as the principal might do, with subsequent verbal instructions, when about to break up the plantation and remove the family to another state, "to settle up or discharge all demands against the family before he (the agent) left, and acting under the power of attorney to do all that might be necessary," is not authorized to sell the slaves of his principal. *Dearing v. Lightfoot*, 16 Ala. 28.

Cannot Pledge Property of Principal.—Where a debtor leaving the state on account of pecuniary embarrassments gave verbal directions to an individual to assist in settling up his affairs, it was held that such individual was not thereby authorized to pledge the debtor's property as security for a debt. *Swett v. Brown*, 5 Pick. (Mass.) 178.

Authority to Pay Money to Secure Settlement Authorizes Note.—An agent authorized to pay one thousand dollars to secure the settlement of an attachment suit is authorized to raise the money by the execution of a note and make his principal liable to the indorsers. *Tanner v. Hastings*, 2 Ill. App. 283.

Indorsing Note Received in Settlement.—The agent cannot accept a note in settlement and indorse it so as to make his principal liable

thereon. *Essick v. Buckwalter* (Pa., 1889), 16 Atl. Rep. 849, 20 Pittsb. L. J. N. S. 26.

Distribution among Principals of Money Received.—The agent cannot distribute the money received in settlement amongst his principals according to his own judgment. *Hawkins v. Avery*, 32 Barb. (N. Y.) 551.

2. *Anderson v. Coonley*, 21 Wend. (N. Y.) 279.

3. *Oliver v. Sterling*, 20 Ohio St. 391.

Cannot Receive More than Discharges Debt.—But not to purchase more of the debtor's property than is necessary to cancel the debt, when by so doing he creates a debt against the principal. *Pollock v. Cohen*, 32 Ohio St. 514.

Authority to Take Possession of Land in Principal's Name.—A general power authorizing the agent "to finish all the principal's unsettled business" authorizes the agent to take possession of lands to which the principal has claim, in the name of the principal. *Chiles v. Stephens*, 3 A. K. Marsh. (Ky.) 340.

4. **Powers Limited to Claims to be Settled.**—An attorney having in charge certain notes for collection and settlement cannot, without his client's consent, include in the settlement other notes not in his hands. *Melcher v. Exchange Bank*, 85 Mo. 362.

An agent to adjust a particular loss cannot adjust another loss. *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422.

Authority to collect certain notes, "compromise, settle, and arrange them," etc., does not authorize any compromise except such as is consistent with and in furtherance of the collection of the debt. *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399.

A special authority from the owner to look up property mislaid or lost by a common carrier does not imply any authority to settle for the damages resulting from the carrier's neglect. *Congar v. Galena, etc., R. Co.*, 17 Wis. 477.

5. **Reference to Arbitration.**—Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; *Huber v. Zimmerman*, 21 Ala. 488, 56 Am. Dec. 255; *McPherson v. Cox*, 86 N. Y. 472, reversing 21 Hun (N. Y.) 493; *O'Regan v. Quebec, etc., Steamship Co.*, 19 New Bruns. 528. And see *Trout v. Emmons*, 29 Ill. 433, 81 Am. Dec. 326.

An authority to an agent, stated thus: "If you can honorably and fairly settle with R. for me out of court, do so; if not, let the court and jury settle," does not authorize a reference to arbitrators; nor will authority to exercise a reasonable discretion or submit to a reasonable sacrifice confer such power. *Scarborough v. Reynolds*, 12 Ala. 252. But see *Goodson v. Brooke*, 4 Campb. 163, where an authority to settle an insurance policy was held to include power to refer to arbitration.

6. **Assignment of Securities.**—An agent to

Must be Benefit to Principal.—And the settlement must enure to the benefit of the principal,¹ and not be entirely without consideration.²

j. TO DRAW AND INDORSE NEGOTIABLE INSTRUMENTS³—(1) *Express or Implied Power.*—The power of an agent to draw and indorse negotiable instruments must, as a general rule, be expressly conferred.⁴ Yet in some cases it is necessarily implied from the duties to be performed.⁵

When Implied.—Where the execution or indorsement of negotiable paper is necessary and customary in the transaction of the business, authority in the agent may be implied.⁶

whom are left the books and accounts of his principal "for settlement" is not authorized to assign them to a surety of his principal to indemnify the surety against the consequences of his suretyship. *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

An agent to whom overdue bonds are sent to do the best he can in settlement cannot sell them. *Hannon v. Houston*, 18 Kan. 561.

1. Must Enure to Benefit of Principal.—The settlement must not be one which enures entirely to the benefit of the agent, *Williams v. Johnston*, 94 N. Car. 633; who cannot extinguish the claim by setting off his own debt against it. *McCormick v. Keith*, 8 Neb. 142.

2. Consideration.—The agent cannot give a discharge without receiving any consideration. *Patterson v. Moore*, 34 Pa. St. 69. And see *Baird v. Randall*, 58 Mich. 175. But see *Middlebury College v. Loomis*, 1 Vt. 189, where it was held that if the agent has full power to settle according to his best judgment, he may discharge without payment.

In *Scales v. Mount*, 93 Ala. 82, it was held that authority to "settle and collect" a claim did not authorize a compromise for less than the full amount.

To Release Liens.—Authority to sign releases of liens where the cash is paid gives no implied authority to sign them without payment. *Corr v. Greenfield*, 134 Pa. St. 503.

3. Paper Delivered in Blank.—As to the liability of the principal on paper executed in blank and delivered to the agent to be filled up according to instructions, see the titles ALTERATION OF INSTRUMENTS; BILLS AND NOTES.

Sealed Instrument.—Where an agent with parol authority to fill up a blank signed by his principal converts the blank into a sealed instrument, the principal is not bound thereby. *Arrington v. Burton*, 19 Ala. 114.

Parol authority is insufficient to authorize an agent to bind his principal by affixing, in his absence, his name and seal to a bond. *Gordon v. Bulkeley*, 14 S. & R. (Pa.) 331.

4. Chicago Electric Light Renting Co. v. Hutchinson, 25 Ill. App. 476; *Avery v. Lauve*, 1 La. Ann. 457; *Nugent v. Hickey*, 2 La. Ann. 358; *Duconge v. Forgay*, 15 La. Ann. 37; *Folger v. Peterkin*, 39 La. Ann. 815; *Torrey v. Dustin Monument Assoc.*, 5 Allen (Mass.) 327; *Paige v. Stone*, 10 Met. (Mass.) 160, 43 Am. Dec. 420; *Webber v. Williams College*, 23 Pick. (Mass.) 302; *Savage v. Rix*, 9 N. H. 263; *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Eaton v. Berlin*, 49 N. H. 219; *Terry v. Fargo*, 10 Johns. (N. Y.) 114; *Lawrence v.*

Gebhard, 41 Barb. (N. Y.) 575; *Park v. Leshner*, 16 Alb. L. J. 151. And see *Whiting v. Western Stage Co.*, 20 Iowa 554; *Englehart v. Peoria Plow Co.*, 21 Neb. 41; *Palmer v. Yarrington*, 1 Ohio St. 253; *Bryce v. Massey*, 35 S. Car. 127.

Authority to indorse notes need not be under seal. *Washington Bank v. Peirson*, 2 Cranch (C. C.) 685.

The power must be express and special, and an agent cannot bind his principal on a note given under a general power of attorney. *Robertson v. Levy*, 19 La. Ann. 327; *Hills v. Upton*, 24 La. Ann. 427.

Parol Evidence is admissible to show the authority of an indorser's agent to indorse. *Miller v. Moore*, 1 Cranch (C. C.) 471. See, as to the interpretation of a power of attorney to draw or indorse negotiable instruments, *Washington Bank v. Peirson*, 2 Cranch (C. C.) 685; *Bank of the Metropolis v. Moore*, 5 Cranch (C. C.) 518; *Knapp v. McBride*, 7 Ala. 19.

5. Paige v. Stone, 10 Met. (Mass.) 160, 43 Am. Dec. 420; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62. And see *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Miller v. House*, 67 Iowa 737; *Beaman v. Whitney*, 20 Me. 413.

6. Allin v. Williams, 97 Cal. 403; *Turner v. Keller*, 66 N. Y. 66.

Illustrations of Implied Power.—The general agent of a company may give its note for purchases necessary to carry on the business. *Odiorne v. Maxcy*, 13 Mass. 182; *White v. Westport Cotton Mfg. Co.*, 1 Pick. (Mass.) 215, 11 Am. Dec. 168.

Power to discount a bill carries with it power to indorse it. *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

And an authority to sell a negotiable note carries with it power to indorse it "without recourse in the name of the principal." *Yale v. Eames*, 1 Met. (Mass.) 436.

An agent, authorized to transact a particular affair, may execute a note jointly with others who have a common interest in the subject matter, to pay the necessary expenses for the accomplishment of a common end. *Layet v. Gano*, 17 Ohio 466.

An agent employed in the manufacture of carriages has no such implied authority, *Paige v. Stone*, 10 Met. (Mass.) 160, 43 Am. Dec. 420; nor has one authorized "to accomplish a complete adjustment" of all the principal's concerns, *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; nor one employed to manage a grocery and provision store, *Smith v. Gibson*, 6 Blackf. (Ind.) 369;

(2) *Subject to Strict Interpretation.*—An authority to make or indorse negotiable paper is subject to strict interpretation,¹ and must be strictly pursued,²

Perkins v. Boothby, 71 Me. 91; nor one employed as clerk for a merchant, *Terry v. Fargo*, 10 Johns. (N. Y.) 114; *Kerns v. Piper*, 4 Watts (Pa.) 222; *Heathfield v. Van Allen*, 7 U. C. C. P. 346; or to manage a farm, *Davidson v. Stanley*, 2 M. & G. 721, 40 E. C. L. 594. Such authority will not be implied from a power to borrow money and issue bonds. *School Directors v. Sippy*, 54 Ill. 287.

An agent to superintend the sale of merchandise and authorized to receive payment in articles of produce has no authority to execute a note payable in such merchandise at a future day and thus bind his principal by his acknowledgment of "value received." *Denison v. Tyson*, 17 Vt. 549.

Nor will general authority to transact business and to receive and discharge debts confer the power of making notes, or accepting or indorsing bills, so as to charge the principal. *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 619.

But authority to transact all the business of the principal confers power to sign and transfer negotiable paper. *Bailey v. Rawley*, 1 Swan (Tenn.) 295. See also *Auldjo v. McDougall*, 3 U. C. Q. B. (O. S.) 199.

Power to Advance Money for a corporation will not authorize signing a note for them. *Webber v. Williams College*, 23 Pick. (Mass.) 302.

1. *Attwood v. Munnings*, 7 B. & C. 278, 14 E. C. L. 42; *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Deer Lodge Bank v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Batty v. Carswell*, 2 Johns. (N. Y.) 48; *Sims v. U. S. Trust Co.*, 103 N. Y. 472; *Sewanee Min. Co. v. McCall*, 3 Head (Tenn.) 619. And see *Lazarus v. Shearer*, 2 Ala. 718; *Crutcher v. Kentucky Bank*, 4 Litt. (Ky.) 436; *White v. Westport Cotton Mfg. Co.*, 1 Pick. (Mass.) 215, 11 Am. Dec. 168; *Hamburg Bank v. Johnson*, 3 Rich. (S. Car.) 42.

Illustrations of Interpretation of Authorities.—The agent to execute commercial paper cannot bind his principal by the execution of an instrument which is not a commercial note. *Trenton First Nat. Bank v. Gay*, 63 Mo. 33.

An agent authorized to draw and indorse checks for and in the name of his principal is not authorized to overdraw his bank account, *Union Bank v. Mott*, 39 Barb. (N. Y.) 180; *Breed v. Central City First Nat. Bank*, 4 Colo. 481; nor to borrow money. *Mordhurst v. Boies*, 24 Iowa 99.

But authority to bind a corporation by giving a "company note" has been held to authorize a bill of exchange on a person who had no funds. *Tripp v. Swanzy Paper Co.*, 13 Pick. (Mass.) 291.

And power to sign and acknowledge bonds includes power to sign the bonds of a county officer in the name of the principal. *Jernegan v. Gray*, 14 Lea (Tenn.) 536.

Authority given an agent to draw a bill of

exchange in his own name does not authorize him to draw in the name of his principal. *Deer Lodge Bank v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458.

Parol authority to sign a note does not empower an agent to make a note under seal containing a warrant to confess judgment and waiving exemption and inquisition laws. *Payne v. Robinson*, 1 Pa. Dist. Rep. 638, 11 Pa. Co. Ct. Rep. 544.

An agent authorized by his principal to indorse drafts for collection, and deposit on account of a particular business, or to indorse any draft drawn in favor of his principal in connection with that business, but who is not an unlimited agent, has no authority to indorse a draft not connected with such business, without the knowledge of his principal; and where the proceeds do not come to the hands of his principal, but pass to another party, the principal cannot be held responsible for such proceeds. *Chouteau v. Filley*, 50 Mo. 174.

Notice of Dishonor.—It cannot be intended, because one is authorized to indorse notes, that he is also an agent for the purpose of receiving notices of their dishonor. *Planters', etc., Bank v. King*, 9 Ala. 279.

No Authority to Renew.—Nor does authority to execute notes for discount at a certain bank for a certain amount authorize their renewal. *Ward v. Kentucky Bank*, 7 T. B. Mon. (Ky.) 93.

Or Indorse.—Nor does authority to draw a bill of exchange authorize an indorsement. *Robinson v. Yarrow*, 7 Taunt. 455, 2 E. C. L. 455.

Or Pay.—Authority to execute a note does not include authority to pay it when due. *Luning v. Wise*, 64 Cal. 410.

2. *Hortons v. Townes*, 6 Leigh (Va.) 47.

Authority Strictly Pursued.—Authority to indorse and discount a note for one purpose cannot be extended to another. *Callender v. Golsan*, 27 La. Ann. 311.

If authorized to draw a bill in the name of the principal, he cannot draw one in the joint names of himself and principal, *Stainback v. Read*, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; or of his principal and others, *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

If a joint power is given to two, it must be jointly exercised. *Union Bank v. Beirne*, 1 Gratt. (Va.) 226. And authority to indorse for several jointly, does not authorize a several and successive indorsement. *U. S. Bank v. Beirne*, 1 Gratt. (Va.) 234, 42 Am. Dec. 551.

An authority to accept a draft to be drawn for a particular use does not authorize the agent to accept a draft drawn for another purpose. *Nixon v. Palmer*, 8 N. Y. 398.

If authorized to put the principal's name upon the back of a note as indorser, the agent cannot bind him as a joint maker. *Cuyler v. Merrifield*, 5 Hun (N. Y.) 559.

Authority to sign as surety does not in-

and the agent cannot bind his principal by the execution or indorsement of paper differing in amount¹ or time from that authorized.²

(3) *Must be for Benefit of Principal.*—The power will be construed as extending only to paper executed or indorsed in the business of the principal and for his benefit.³

k. *TO SHIP.*—Authority to ship carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability.⁴

l. *TO EMPLOY.*—Authority to employ will, in the absence of restrictive words, include authority to make a complete contract definite as to the amount of compensation, terms of employment, etc.⁵

clude authority to sign as maker. *Farming-ton Sav. Bank v. Buzzell*, 61 N. H. 612.

1. *Amount of Instrument must be Pursuant to Authority.*—*King v. Sparks*, 77 Ga. 285, where an agent authorized to sign a note for five hundred dollars, signed one for eleven hundred dollars.

The principal cannot be bound by a note for a greater sum than he authorized, and the payee will be charged with knowledge of the extent of the agent's authority. *Blackwell v. Ketcham*, 53 Ind. 184.

If authorized to accept a bill for a certain sum to be used for a certain purpose, the principal is not bound by the acceptance of a bill for a less sum to be used for a different purpose. *Nixon v. Palmer*, 8 N. Y. 398.

2. *Provisions as to Date of Maturity.*—If authorized to execute a note payable in six months, the agent cannot bind the principal by a note payable in sixty days. *Batty v. Carswell*, 2 Johns. (N. Y.) 48. And if authorized to draw a bill at four months, he cannot bind him by a bill antedated so as to become payable in less than four months. *Tate v. Evans*, 7 Mo. 419.

Authority to draw bills of exchange payable on time or at sight does not include authority to draw postdated bills. *New York Iron Mine v. Citizens' Bank*, 44 Mich. 344.

If the difference in time is immaterial, the authority may not be restricted to the exact time. *Adams v. Flanagan*, 36 Vt. 400.

A power to renew notes payable at sixty or ninety days includes a power to renew a note at eighty-eight days. *State Bank v. Herbert*, 4 McCord (S. Car.) 89.

3. *Citizens' Sav. Bank v. Hart*, 32 La. Ann. 22; *Humphrey v. Havens*, 12 Minn. 298; *Camden Safe Deposit, etc., Co. v. Abbott*, 44 N. J. L. 257; *Stainer v. Tysen*, 3 Hill (N. Y.) 279; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Suckley v. Tunno*, 1 Brev. (S. Car.) 257; *Holden v. Durant*, 29 Vt. 184; *Stainback v. Virginia Bank*, 11 Gratt. (Va.) 269. And see *Odiorne v. Maxcy*, 13 Mass. 178; *German Nat. Bank v. Studley*, 1 Mo. App. 260.

Accommodation Paper.—Although an agent is authorized to execute notes in the transaction of his principal's business, he has not authority to make accommodation paper. *Wallace v. Mobile Branch Bank*, 1 Ala. 565; *Bird v. Daggett*, 97 Mass. 494; *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728. See the title ACCOMMODATION PAPER, Vol. I., p. 349.

Joint Transaction.—Nor has he authority to

use the name of the principal in joint transactions with other persons and for their benefit. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

Bill for His Own Benefit.—Nor has such an agent authority to draw a bill for his own benefit. *Stainback v. Read*, 11 Gratt. (Va.) 281, 62 Am. Dec. 648.

4. *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400; *Lewis v. Great Western R. Co.*, 5 H. & N. 867; *Illinois Cent. R. Co. v. Jonte*, 13 Ill. App. 424; *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258; *Jennings v. Grand Trunk R. Co.*, 52 Hun (N. Y.) 227; *Root v. New York, etc., R. Co.*, 76 Hun (N. Y.) 23; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13. And see the title BILLS OF LADING.

Implied Powers.—The authority must be construed to include all necessary and usual means of carrying it into effect. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183. The agent may agree that the carrier shall have the benefit of any insurance that may have been effected. *Missouri Pac. R. Co. v. International Marine Ins. Co.*, 84 Tex. 149.

To Pledge Bill of Lading.—But a merchant's clerk to do outdoor work, negotiate purchases and charter-parties, and present bills of lading for signature on shipping property, has no authority to pledge such bills of lading or receive advances thereon. *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 68.

To Procure Cargo.—An agent for the charterers of a vessel to procure a cargo in a foreign port has no authority to modify or cancel the charter-party of his principal. *Ye Seng Co. v. Corbitt*, 7 Sawy. (U. S.) 368.

5. *Alabama G. S. R. Co. v. Hill*, 76 Ala. 303; *Farrington v. Hayes*, 65 Vt. 153. But see *Beyers v. Hodge*, 1 Misc. Rep. (Buffalo Super. Ct.) 76.

The Time for Which the Agent may Employ will depend upon the character of the business. If it is such a business as it is apparent would last but six months, a contract for a year would doubtless not be binding upon the principal, since it would be apparent that such a contract is not necessary to the accomplishment of the object. So, if the business is such as would apparently last for months, an employment for one or more months would seem to be covered by the agent's authority, and will be binding. *Williams v. Getty*, 31 Pa. St. 461, 72 Am. Dec. 575.

An authority to hire a farm laborer will authorize a contract for two months, for such

m. TO BORROW OR LEND.—A general power to borrow includes power to give ordinary securities for the loan.¹ And a general power to lend will authorize an extension of the time of payment,² but not the receipt of usury.³

VII. MANNER OF EXECUTION OF AUTHORITY—1. General Rule.—The functions of an agent being to represent and act for his principal, he should so execute his authority as to accomplish the same result as would have been effected had the principal himself acted in person; and this result should be a contract mutually binding on his principal and the party with whom he contracts, and not binding on himself.⁴ To accomplish this the agent must act in person,⁵ and within the authority conferred upon him.⁶ Presuming that he has done this, it remains to consider the formal execution of his contracts in behalf of his principal.

2. Formal Execution—*a.* GENERAL RULE.—The intent of the parties, as legally evidenced by the terms of the contract itself, is always the governing consideration in determining who is bound by the contract; hence a contract by an agent should be in the name of his principal, so as to show beyond question that it is the principal who contracts, and not the agent.⁷ The

is not an unusual hiring. *Decker v. Hassel*, 26 How. Pr. (N. Y. Supreme Ct.) 528.

Where a party purchased a fruit store and authorized an agent to employ a clerk at eleven dollars a week, nothing being said as to the time, it was held that a hiring for six months exceeded the agent's authority. *Pasco v. Smith*, 49 Conn. 576.

Duties of Employee.—An authority to employ does not include the power to allow an employee to engage in other business antagonistic to the interest of the principal. *Adams Express Co. v. Trego*, 35 Md. 47.

When Authority Not Implied.—An authority to collect the rents of a building gives no authority to employ an engineer to take charge of the engine in such building. *Crozier v. Reins*, 4 Ill. App. 564.

Unauthorized Payment.—Where an agent is authorized to employ a lawyer and pay him in money, and pays part of his fee in money and the residue in land belonging to the principal, the agreement does not bind the principal to convey the land. *Ross v. Daviess*, 4 J. J. Marsh. (Ky.) 383.

A Note in the Name of the Principal given by a duly authorized agent to the person employed by him is evidence of the fact and the amount of the principal's indebtedness. *Chorpenning v. Royce*, 58 Pa. St. 474.

1. *Hatch v. Coddington*, 95 U. S. 48; *Posner v. Bayless*, 59 Md. 56. And see *Burnet v. Boyd*, 60 Miss. 627.

A general agent for buying and selling cannot, without special authority, resort to extraordinary and expensive means to raise money for his principal. *Shaw v. Stone*, 1 Cush. (Mass.) 228.

Cannot Raise Money for Himself.—But the delivery of a deed running to a third person, to an agent to raise money for the grantor, does not clothe him with apparent authority to deliver it to such person as security for a loan or advance to himself, the purpose of which is known to the grantee. *Hubback v. Ross*, 96 Cal. 426.

2. *Hurd v. Marple*, 2 Ill. App. 402.

When Authority to Loan on Usury Presumed.—In *Rogers v. Buckingham*, 33 Conn. 81, it

was said that authority to make a usurious loan will not be presumed where the agency is special and limited to a single transaction, though it may be presumed where the agency is general and embraces the business of making, managing, and collecting the loans of a moneyed man; but it is a presumption of fact which may be rebutted.

And in *Stevens v. Meers*, 11 Ill. App. 138, it was held that where a general agent to make loans exacts usury, the principal is presumed to have known and authorized it. See the title *USURY*.

3. *Gokey v. Knapp*, 44 Iowa 32; *Dryfus v. Burnes*, 53 Fed. Rep. 410.

Principal Not Responsible for Usury of Agent.

—If the principal has no knowledge that a higher rate of interest is charged than that allowed by law, and does not receive any of the excess, he is not responsible for the usury. *Boylston v. Bain*, 90 Ill. 283. And hence he is not responsible where the agent, without his authority or knowledge, charges a bonus for himself in addition to the legal rate of interest. *New England Mortg. Security Co. v. Gay*, 33 Fed. Rep. 636; *Bell v. Day*, 32 N. Y. 165; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137.

Where the loan is made under an arrangement between the lender and the agent that the latter is to charge the borrower a bonus for his services, the contract will be usurious. *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69. See also *Lewis v. Willoughby*, 43 Minn. 307.

4. *Story on Agency*, § 146; *Evans on Agency* 166.

5. See *supra*, this title, *Delegation—Delegation of Authority by Agent*.

6. See *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Agent to Third Parties—Of Principal to Third Parties*.

7. *Alabama*.—*McTyer v. Steele*, 26 Ala. 487.

California.—*Sayre v. Nichols*, 5 Cal. 487; *Jones v. Post*, 6 Cal. 102.

Georgia.—*Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

modifications and exceptions to this rule, when applied to different classes of contracts, will appear under subsequent subsections.

b. INSTRUMENTS UNDER SEAL—(1) *Application of the General Rule.*—The general rule stated above is most strictly applied to sealed instruments. It is essential to their proper execution that they be in the name of the principal and under his seal, and purport to be his deed.¹

Indiana.—Warrick County *v.* Butterworth, 17 Ind. 129.

Iowa.—Tryon *v.* Oxley, 3 Greene (Iowa) 293.

Kentucky.—Nichols *v.* Davis, 1 Bibb (Ky.) 492.

Massachusetts.—Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150; Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347.

Michigan.—Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

New York.—Guyon *v.* Lewis, 7 Wend. (N. Y.) 28; Spencer *v.* Field, 10 Wend. (N. Y.) 88; Evans *v.* Wells, 22 Wend. (N. Y.) 324; Walker *v.* Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334.

South Carolina.—Fash *v.* Ross, 2 Hill (S. Car.) 294.

Vermont.—Hodges *v.* Green, 28 Vt. 358.

1. *Must be in Name of Principal, under His Seal, and Purport to be His Deed—England.*—Schack *v.* Anthony, 1 M. & S. 573; Bacon *v.* Dubarry, 1 Salk. 70; Parker *v.* Kett, 1 Salk. 95; Frontin *v.* Small, 1 Stra. 705; Cayhill *v.* Fitzgerald, 1 Wils. 28; Wilks *v.* Back, 2 East 142; Gardner *v.* Lachlan, 4 Myl. & C. 129; Berkeley *v.* Hardy, 5 B. & C. 355, 11 E. C. L. 251; White *v.* Cuyler, 6 T. R. 176; Combes' Case, 9 Coke 76.

United States.—Clarke *v.* Courtney, 5 Pet. (U. S.) 319.

Alabama.—Skinner *v.* Gunn, 9 Port. (Ala.) 305; Carter *v.* Doe, 21 Ala. 72; Hall *v.* Cockrell, 28 Ala. 507.

California.—McDonald *v.* Bear River, etc., Water Co., 13 Cal. 220; Echols *v.* Cheney, 28 Cal. 159; Morrison *v.* Bowman, 29 Cal. 337; Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 652, 91 Am. Dec. 602.

Connecticut.—Reed *v.* Latham, 40 Conn. 52.

Georgia.—Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

Illinois.—Mears *v.* Morrison, 1 Ill. 223; Home Library Assoc. *v.* Witherow, 50 Ill. App. 117.

Indiana.—Crum *v.* Boyd, 9 Ind. 289; Potts *v.* Henderson, 2 Ind. 327; Warrick County *v.* Butterworth, 17 Ind. 129; Prather *v.* Ross, 17 Ind. 495; M'Clure *v.* Bennett, 1 Blackf. (Ind.) 189, 12 Am. Dec. 223; Deming *v.* Bullitt, 1 Blackf. (Ind.) 241; Pitman *v.* Kintner, 5 Blackf. (Ind.) 250, 33 Am. Dec. 469; Mears *v.* Graham, 8 Blackf. (Ind.) 144.

Kentucky.—Taul *v.* Winn, 5 J. J. Marsh. (Ky.) 442.

Louisiana.—Daniels *v.* Burnham, 2 La. 243; Lynch *v.* Postlethwaite, 7 Martin (La.) 293.

Maryland.—Harper *v.* Hampton, 1 Har. & J. (Md.) 622; Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360.

Massachusetts.—Damon *v.* Granby, 2 Pick. (Mass.) 345; Brinley *v.* Mann, 2 Cush. (Mass.)

337, 48 Am. Dec. 669; Copeland *v.* Mercantile Ins. Co., 6 Pick. (Mass.) 198; Abbey *v.* Chase, 6 Cush. (Mass.) 54; Mussey *v.* Scott, 7 Cush. (Mass.) 216, 54 Am. Dec. 719; Huntington *v.* Knox, 7 Cush. (Mass.) 374; Elwell *v.* Shaw, 16 Mass. 42, 8 Am. Dec. 126; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240.

Michigan.—Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

Mississippi.—Grubbs *v.* Wiley, 9 Smed. & M. (Miss.) 29; Holmes *v.* Carman, 1 Freem. Ch. (Miss.) 408.

Missouri.—Einstein *v.* Holt, 52 Mo. 340; Martin *v.* Almond, 25 Mo. 313.

New Hampshire.—Underhill *v.* Gibson, 2 N. H. 352, 9 Am. Dec. 82; Cofran *v.* Cockran, 5 N. H. 458.

New Jersey.—Sheldon *v.* Dunlap, 16 N. J. L. 245; Borchering *v.* Katz, 37 N. J. Eq. 150.

New York.—Dean *v.* Roesler, 1 Hilt. (N. Y.) 420; Platt *v.* Cathell, 3 Den. (N. Y.) 604; Townsend *v.* Hubbard, 4 Hill (N. Y.) 351; Stanton *v.* Camp, 4 Barb. (N. Y.) 274; Stone *v.* Wood, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; Guyon *v.* Lewis, 7 Wend. (N. Y.) 28; Minard *v.* Mead, 7 Wend. (N. Y.) 68; Spencer *v.* Field, 10 Wend. (N. Y.) 88; Evans *v.* Wells, 22 Wend. (N. Y.) 324; Townsend *v.* Corning, 23 Wend. (N. Y.) 435; Schaefer *v.* Henkel, 75 N. Y. 378.

North Carolina.—Oliver *v.* Dix, 1 Dev. & B. Eq. (N. Car.) 158; Delius *v.* Cawthorn, 2 Dev. (N. Car.) 90; Locke *v.* Alexander, 2 Hawks (N. Car.) 155, 11 Am. Dec. 750, 1 Hawks (N. Car.) 412; Bryson *v.* Lucas, 84 N. Car. 680, 37 Am. Rep. 634; Whitehead *v.* Reddick, 12 Ired. (N. Car.) 95; Scott *v.* McAlpin, Term (N. Car.) 155, 7 Am. Dec. 703.

Pennsylvania.—Bellus *v.* Hays, 5 S. & R. (Pa.) 427, 9 Am. Dec. 385; Hefferman *v.* Addams, 7 Watts (Pa.) 121; Samuel *v.* Scott, 13 Phila. (Pa.) 64.

South Carolina.—Webster *v.* Brown, 2 S. Car. 428; Varnum *v.* Evans, 2 McMull. (S. Car.) 409.

Texas.—Traynham *v.* Jackson, 15 Tex. 170, 65 Am. Dec. 152.

Vermont.—Roberts *v.* Button, 14 Vt. 195.

Virginia.—Martin *v.* Flowers, 8 Leigh (Va.) 158; Stinchcomb *v.* Marsh, 15 Gratt. (Va.) 202.

General Rule—Intention.—In Hunter *v.* Miller, 6 B. Mon. (Ky.) 612, the rule is stated thus: "The attorney should act in the name of his principal, and not in his own name merely. There is no inflexible rule as to the mode in which this is to be done; and when both names are to be used both in the caption or body and signature of the instrument, it is a question of intention and construction, whether the act is done, or the engagement made, in the name of the principal or of the agent. The terms of the covenant itself are commonly decisive as to intention. The

"Principal by Agent"—"Agent for Principal."—When these circumstances concur it is immaterial in what form the signature is, whether "Principal by Agent"

description in the caption and the mode of signature are referred to, either as aids in discovering the intention, or as determining whether the form of the instrument corresponds with this intention, so as that it may be carried out. If, in view of all its parts, the instrument can be regarded as the deed or covenant of the party intended to be bound, it must, on principle, be so regarded. There is, we believe, no difference of opinion with regard to the propriety of these positions, though there doubtless may be in their application."

Illustrations.—In *Carter v. Doe*, 21 Ala. 72, a deed began: "This indenture, made and entered into between Joshua Kennedy and S. H. Garrow, both of Mobile city," etc., "of the first part, and Daniel Duval of the county and territory aforesaid, of the other part, witnesseth:" Following this was the recital of a power of attorney. The granting clause purported to be by Joshua Kennedy, by his attorney, S. H. Garrow. The deed proceeded in the name of Joshua Kennedy alone, and concluded: "In witness whereof the parties have hereunto set their hands and seals. * * * S. H. Garrow [seal], attorney in fact for J. Kennedy." The court recognized the rule laid down in the text, and construed the deed to be sufficiently executed to bind the principal. See also *Crutcher v. Memphis*, etc., R. Co., 38 Ala. 579.

In *Kansas City v. Hannibal*, etc., R. Co., 77 Mo. 180, there was offered in evidence a deed in the following form: "Know all men by these presents that the West Kansas Land Company, by Solomon Houck, president, and Theodore S. Case, secretary, has granted," etc. "In witness whereof we hereunto subscribe our names and affix our seals." Following the attestation clause were four seals, opposite the first of which there appeared no signature. The remaining seals were affixed to the signatures of the president and secretary above named, and the W. K. Land Co. The acknowledgment was in effect that S. Houck, president, and Theodore S. Case, secretary, acknowledged that they executed and delivered the deed as their voluntary act and deed. It was held that it was the deed of the corporation.

In *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70, there was in evidence a deed of the following form: "A. W. M., agent for the M. M. Co., being empowered by a vote of said company, in pursuance of said power, * * * do give, grant, etc. And I do hereby covenant for and in behalf of said M. M. Co. * * * that * * * said M. M. Co. is well seised * * * and I do also bind said M. M. Co. to warrant," etc. This deed was conditioned to be void on payment of sundry notes then due and payable by the M. M. Co., and concluded: "In witness whereof, I have hereto, for and in behalf of said M. M. Co., set my hand and seal. * * * A. W. M. [L. s.], agent for the M. M. Co." It was held that the instrument was well executed as the deed of the company.

In *Butterfield v. Beall*, 3 Ind. 203, Beall filed a bill in chancery, from which it appeared that there was executed to him a deed in form as follows: "This indenture, made * * * between J. C. W., * * * attorney in fact for A. B. and R. B., * * * parties of the first part, and J. B., * * * of the second part, witnesseth, that the said J. C. W., party of the first part, * * * hath granted," etc. "In witness whereof the said J. C. W., attorney, hath hereunto set their hands and seals. * * * A. B. [seal], * * * R. B. [seal]. * * * By J. C. W. [seal], their attorney in fact." It was held that the parties were bound by it. The court said that the deed, "though very inartificially drawn, we have determined, not, however, without a good deal of hesitation, should be held operative to the extent of the power that had been legally conveyed to him. * * * It was Wright's intention to act under the power granted him; and justice will be promoted and litigation, perhaps, saved by holding the deed operative."

In *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, 18 Am. Rep. 631, an action of covenant was brought on a lease in which "Edward F. Lawrence, president of the Northwestern Distilling Company," appeared as party of the second part. Throughout, the parties were mentioned as of the first or second part, and the pronoun "he" was everywhere used in referring to the party of the second part. The instrument concluded: "In testimony whereof the said parties have hereunto set their hands and seals," and was signed "Northwestern Distilling Co. [seal], by Edward Lawrence, president." It was held that the lease was well executed and binding on the company, and not on Lawrence personally. See also *Shanks v. Lancaster*, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

Most Approved Form of Execution.—The most usual and approved form of executing a deed by attorney is by his writing the name of the principal and adding, "by A B, his attorney;" or, "by his attorney, A B." But this is not the only form of execution which will make the deed the act of the principal. *Wilburn v. Larkin*, 3 Blackf. (Ind.) 55; *Patterson v. Henry*, 4 J. J. Marsh. (Ky.) 127; *Mussey v. Scott*, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; *Farmers', etc., Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457; *Berkey v. Judd*, 22 Minn. 287; *Spencer v. Field*, 10 Wend. (N. Y.) 88.

One Seal Sufficient for Several Principals.—Where an attorney executes an instrument under seal for several parties, one seal will be sufficient for a valid execution as to all, if it appears that the intention of each was to adopt the seal as his own. *Ball v. Dunster-ville*, 4 T. R. 313; *M'Dill v. M'Dill*, 1 Dall. (U. S.) 63; *Bohannons v. Lewis*, 3 T. B. Mon. (Ky.) 376; *Stabler v. Cowman*, 7 Gill & J. (Md.) 284; *Yarborough v. Monday*, 2 Dev. (N. Car.) 493.

Rule in Equity.—An agreement under seal made by an attorney for his principal, though inoperative at law for want of formal execu-

or "Agent for Principal;"¹ indeed it is not necessary that the agent's name appear at all,² especially where the instrument recites the fact that it is executed by an agent,³ or where it is executed in the presence and by the direction of the principal.⁴

Statutes.—A less vigorous application prevails in some states, owing to statutory modifications.⁵

(2) *Imperfect Execution*—(a) *Agent Bound*—*Agent Using Apt Words to Charge Himself.*—An agent who executes a sealed instrument in his own name, using apt words to charge himself, fails to bind his principal, and is personally liable on the contract,⁶ though he adds to his name descriptive words indicating that he

tion in the name of the principal, is binding in equity if the attorney had authority. *Love v. Sierra Nevada Lake Water, etc., Co.*, 32 Cal. 652, 91 Am. Dec. 602; *Johnson v. Johnson*, 1 Dana (Ky.) 364; *McNaughten v. Part-ridge*, 11 Ohio 223, 38 Am. Dec. 731; *Giddens v. Byers*, 12 Tex. 75; *Daughtry v. Knolle*, 44 Tex. 450; *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152.

And likewise a deed executed by an agent, though defective and inoperative to convey the property, will be enforced as an agreement to convey in equity. *Salmon v. Hoffman*, 2 Cal. 138; 56 Am. Dec. 322; *Gerdes v. Moody*, 41 Cal. 335; *Colsten v. Chaudet*, 4 Bush (Ky.) 675; *Welsh v. Usher*, 2 Hill Eq. (S. Car.) 167, 29 Am. Dec. 63.

1. *England.*—*Wilks v. Back*, 2 East 142.

Alabama.—*Stringfellow v. Mariott*, 1 Ala. 573.

Indiana.—*Wilburn v. Larkin*, 3 Blackf. (Ind.) 55.

Kentucky.—*Webb v. Burke*, 5 B. Mon. (Ky.) 51; *Hunter v. Miller*, 6 B. Mon. (Ky.) 612.

Massachusetts.—*Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Mussey v. Scott*, 7 Cush. (Mass.) 215, 54 Am. Dec. 719; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367.

Missouri.—*Martin v. Almond*, 25 Mo. 313; *Shuetze v. Bailey*, 40 Mo. 69.

New Hampshire.—*Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176.

New Jersey.—*Sheldon v. Dunlap*, 16 N. J. L. 245.

New York.—*Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Galusha v. Hitchcock*, 29 Barb. (N. Y.) 193.

North Carolina.—*Oliver v. Dix*, 1 Dev. & B. Eq. (N. Car.) 158; *Redmond v. Coffin*, 2 Dev. Eq. (N. Car.) 437; *Locke v. Alexander*, 2 Hawks (N. Car.) 155, 11 Am. Dec. 750, 1 Hawks (N. Car.) 412; *Bryson v. Lucas*, 84 N. Car. 680, 37 Am. Rep. 634.

South Carolina.—*Varnum v. Evans*, 2 McMull. (S. Car.) 409.

Vermont.—*Roberts v. Button*, 14 Vt. 195.

Virginia.—*Jones v. Carter*, 4 Hen. & M. (Va.) 184.

Illustrations.—In *Varnum v. Evans*, 2 McMull. (S. Car.) 409, a deed in the form following was held well executed as the deed of the principal: "By virtue of the authority vested in me as aforesaid, in the name and in behalf of the said V., F. & Co., I accept the provisions in the said assignment made in this behalf, and do further release, etc." The release was signed "John Winslow [L. s.], agent for Varnum, Fuller & Co."

An agreement under seal purporting to be between "W. B. W., for and on behalf of the A. S. L. Co. of the one part, and A. B. of the other part," in which "the party of the first part" and "the party of the second part" respectively agree to perform certain acts, and concluding, "In witness whereof, W. B. W., for and on behalf of the party of the first part, being the A. S. L. Co.," etc., "set their hands and affixed their seals; * * * W. B. W., for and on behalf of the A. S. L. Co. [seal]." —is the deed of the A. S. L. Co. and not of W. B. W. personally. *Whitehead v. Reddick*, 12 Ired. (N. Car.) 95.

2. *Wilks v. Back*, 2 East 142; *Forsyth v. Day*, 41 Me. 382; *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827. See dictum to the contrary in *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; and also Cal. Civ. Code, § 1095.

3. *Berkey v. Judd*, 22 Minn. 287; *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328.

4. *Ball v. Dunsterville*, 4 T. R. 313; *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Kidder v. Prescott*, 24 N. H. 263; *Hanson v. Rowe*, 26 N. H. 329; *Opinion of Justices*, 44 N. H. 633. See also *Lovejoy v. Richardson*, 68 Me. 386; *Cushman v. Wooster*, 45 N. H. 410; *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 193.

5. See *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Purinton v. Security L. Ins., etc.*, Co., 72 Me. 22; *Simpson v. Garland*, 72 Me. 40, 39 Am. Rep. 297; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Rendell v. Hariman*, 75 Me. 497, 46 Am. Rep. 421; *Nobleboro v. Clark*, 68 Me. 87; *Warner v. Mower*, 11 Vt. 385; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Bryan v. Stump*, 8 Gratt. (Va.) 241, 56 Am. Dec. 139; *Stinchcomb v. Marsh*, 15 Gratt. (Va.) 202.

Arkansas.—In *Arkansas* private seals have been abolished by statute, and there is no longer any distinction between instruments under seal and not under seal, so that a lease executed by an agent in his own name will be treated as the contract of the principal, if the intention to bind the principal is apparent. *Gibbs v. Dickson*, 33 Ark. 107.

Alabama.—In *Alabama* the courts hold that the statute dispensing with a seal in conveyances of land has not changed the common-law rule as to execution of such instruments by agents. *Jones v. Morris*, 61 Ala. 518.

6. *England.*—*Paul v. Birch*, 2 Atk. 621.

Kentucky.—*Banks v. Sharp*, 6 J. J. Marsh. (Ky.) 180.

Massachusetts.—*Abbey v. Chase*, 6 Cush.

is the agent of a named principal; and the rule is applicable whether such description occurs in the body of the instrument,¹ in the signature,² or in both.³

(Mass.) 54; *Tileston v. Newell*, 13 Mass. 406.

New York.—*Bogart v. DeBussy*, 6 Johns. (N. Y.) 94; *Guyon v. Lewis*, 7 Wend. (N. Y.) 28; *Lincoln v. Crandell*, 21 Wend. (N. Y.) 101; *Evans v. Wells*, 22 Wend. (N. Y.) 324; *Simpson v. New York, etc., R. Co.*, 51 N. Y. Super. Ct. 419; *Willis v. Bellamy*, 52 N. Y. Super. Ct. 373; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Kiersted v. Orange, etc., R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199.

North Carolina.—*Locke v. Alexander*, 2 Hawks (N. Car.) 155, 17 Am. Dec. 750.

Wisconsin.—*Stowell v. Eldred*, 39 Wis. 614.

Personal Covenant of Agent Followed by Repugnant Proviso.—In *Furnivall v. Coombes*, 5 M. & G. 736, 44 E. C. L. 384, four persons covenanted in such a manner as to bind themselves personally. The covenant was followed by the proviso "that nothing in these presents contained shall extend to, or be deemed, adjudged, construed, or taken to extend to, any personal covenant of or obligation upon * * * several * * * parties thereto of the third part, or in any wise personally affect them, any or either of them * * * or their executors, administrators, goods, effects, or estates, in their present capacity; but shall be and is intended to be binding and obligatory upon churchwardens and overseers of the poor of the parish of," etc., "and their successors for the time being as such churchwardens and overseers of the poor, but no further, or otherwise." It was held that the covenant was a personal covenant, and that the proviso, being repugnant thereto, was void.

Exception—Seal Surplusage.—In *Stowell v. Eldred*, 39 Wis. 614, an agreement under seal, executed by an agent in his own name without disclosing his principal, but which was in fact made on behalf of the principal, was held to be the agreement of the principal. The court said: "So many exceptions to the last rule have been made in modern times by the courts, that the rule seems to operate at the present time within quite narrow limits. One of these exceptions, sanctioned by reason and authority, is, that if the instrument would be valid without a seal, then, although executed under seal, it is to be treated as written evidence of a simple contract, and the seal adds nothing to it;" citing the opinion of Senator Verplanck in *Evans v. Wells*, 22 Wend. (N. Y.) 341. See also *Kirschbon v. Bonzel*, 67 Wis. 178; *Steele v. McElroy*, 1 Sneed (Tenn.) 341.

But see *Schaefer v. Henkel*, 75 N. Y. 378, where the court, in considering a similar contract, said: "It is therefore settled law, that in order to take a case out of the general rule, where the contract is one which is valid without a seal, and the seal is therefore of no account, it must appear that the contract was really made on behalf of the principal, from the instrument, and that the party derived benefit from and accepted and con-

firmed it by acts on his part." To the same effect see *Simpson v. New York, etc., R. Co.*, 51 N. Y. Super. Ct. 419; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617.

1. *England*.—*Appleton v. Binks*, 5 East 148.

United States.—*Duvall v. Craig*, 2 Wheat. (U. S.) 45.

Alabama.—*Hall v. Cockrell*, 28 Ala. 507.

Illinois.—*Stobir v. Dills*, 62 Ill. 432.

Massachusetts.—*Tucker v. Bass*, 5 Mass. 164; *Fowler v. Shearer*, 7 Mass. 14; *Kimball v. Tucker*, 10 Mass. 192; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126.

New Jersey.—*Sheldon v. Dunlap*, 16 N. J. L. 245; *Dayton v. Warne*, 43 N. J. L. 659.

New York.—*Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *White v. Skinner*, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; *Kiersted v. Orange, etc., R. Co.*, 69 N. Y. 343, 25 Am. Rep. 199.

Pennsylvania.—*Frazer v. Shelley*, 6 Phila. (Pa.) 429; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 127; *Quigley v. De Haas*, 82 Pa. St. 267; *Meyer v. Barker*, 6 Binn. (Pa.) 234.

Tennessee.—*Steele v. McElroy*, 1 Sneed (Tenn.) 341.

2. *Alabama*.—*Skinner v. Gunn*, 9 Port. (Ala.) 305, overruling *Martin v. Dortch*, 1 Stew. (Ala.) 479; *Carter v. Chandrou*, 21 Ala. 72; *Dawson v. Cotton*, 26 Ala. 591.

Kentucky.—*Parks v. S. & L. Turnpike Road Co.*, 4 J. J. Marsh. (Ky.) 456.

Massachusetts.—*Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Tileston v. Newell*, 13 Mass. 406.

North Carolina.—*Bryson v. Lucas*, 84 N. Car. 680, 37 Am. Rep. 634.

Ohio.—*Potts v. Rider*, 3 Ohio 71, 17 Am. Dec. 581.

Pennsylvania.—*Seyfert v. Bean*, 83 Pa. St. 450.

3. *United States*.—*Lutz v. Linthicum*, 8 Pet. (U. S.) 165.

Illinois.—*Home Library Assoc. v. Withers*, 50 Ill. App. 117; *Sperry v. Fanning*, 80 Ill. 371.

Indiana.—*M'Clure v. Bennett*, 1 Blackf. (Ind.) 189, 12 Am. Dec. 223; *Prather v. Ross*, 17 Ind. 495.

Kentucky.—*Banks v. Sharp*, 6 J. J. Marsh. (Ky.) 180.

Massachusetts.—*Fullam v. West Brookfield*, 9 Allen (Mass.) 1; *Seaver v. Coburn*, 10 Cush. (Mass.) 324.

Minnesota.—*Rollins v. Phelps*, 5 Minn. 463.

New York.—*Platt v. Cathell*, 3 Den. (N. Y.) 604; *Peck v. Gardner*, 9 Hun (N. Y.) 704; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Schaefer v. Henkel*, 75 N. Y. 378; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280.

North Carolina.—*Godley v. Taylor*, 3 Dev. (N. Car.) 178.

That Agent and Not Principal is Bound a Mere Presumption—In *Abrams v. Musgrove*, 12 Pa.

Likewise, a Mere Recital of Authority in the instrument will not relieve the agent of the liability which he has incurred by contracting in his own name.¹

(b) **Agent Not Bound.**—It does not necessarily follow that a contract made by an authorized agent, which does not bind the principal, becomes the agent's contract and makes him liable if it is not performed. This depends upon the legal effect of the terms of the contract; and if there are no apt words to charge the agent he cannot be held liable, though by reason of defective execution he has failed to give a right of action against his principal on the contract.²

St. 292, a judgment bond in form, "I, Jacob Johnson, guardian of Gabriel Abrams, * * * am held and firmly bound," etc., and signed "Jacob Johnson, guardian" [seal], was held not to render Johnson personally liable, it appearing in the evidence that the instrument was signed in the presence and by the direction of Abrams, who was himself stricken with palsy and unable to rise from his bed. The court said: "Every presumption of law must give way to facts. The general rule, to be sure, is, that a deed signed by an agent and sealed with his own seal, is his deed; but there are exceptions. The law raises a presumption that he intended to bind himself. For if it is not his deed, it is the deed of nobody. But if, from the nature and terms of the instrument, it appears that the party is an agent and that he means to bind his principal, and to act for him and not on his own account, the law will give the paper that intendment to carry out the actual meaning of the parties, however inartificial the language may be. And there is no difference on this point whether the instrument be a deed or an unsealed contract."

In *Potts v. Lazarus*, 2 Law Repos. (N. Car.) 83, a charter-party entered into by the defendant, describing himself in every part of the instrument, and signing and sealing as agent of another, was held to be the contract of his principal. The court cited two decisions as establishing the rule governing the case—*Unwin v. Wolseley*, 1 T. R. 674, and *Hodgson v. Dexter*, 1 Cranch (U. S.) 345. But it is to be noted that in both of these cases the instruments were executed by public agents, and a different rule recognized as applying to agents of individuals; and this fact is commented upon and the authority of this case questioned in *Godley v. Taylor*, 3 Dev. (N. Car.) 178.

1. *Cobb v. Arnold*, 8 Met. (Mass.) 398.

2. *Alabama*.—*Hall v. Cockrell*, 28 Ala. 507.
Connecticut.—*Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429.

Delaware.—*McCauley v. Jenney*, 5 Houst. (Del.) 32.

Illinois.—*Hancock v. Yunker*, 83 Ill. 208.

Indiana.—*Freise v. Crary*, 29 Ind. 524.

Maine.—*Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25.

Massachusetts.—*Abbey v. Chase*, 6 Cush. (Mass.) 54; *Ellis v. Pulsifer*, 4 Allen (Mass.) 165.

New York.—*Stanton v. Camp*, 4 Barb. (N. Y.) 274.

Contract in Principal's Name.—Where the contract is in terms in the name of the prin-

cipal by his agent, but is signed by the agent in his own name, with his seal attached, neither principal nor agent is liable on the contract itself as a sealed instrument.

Illinois.—*Neufeld v. Beidler*, 37 Ill. App. 34.

Massachusetts.—*Abbey v. Chase*, 6 Cush. (Mass.) 54; *Sherman v. Fitch*, 98 Mass. 59; *Blanchard v. Blackstone*, 102 Mass. 343; *Terry v. Brightman*, 132 Mass. 318; *Cook v. Gray*, 133 Mass. 106.

New York.—*Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

North Carolina.—*Taylor v. School Committee No. 17*, 5 Jones (N. Car.) 98; *Osborne v. High Shoals Min., etc., Co.*, 5 Jones (N. Car.) 177.

Pennsylvania.—*Bellas v. Hays*, 5 S. & R. (Pa.) 427, 9 Am. Dec. 385; *Hopkins v. Meahaffy*, 11 S. & R. (Pa.) 126.

Restrictive Words.—Where an executor made a conveyance of his testator's land in his capacity as executor, "and not otherwise," it was held that he was not liable personally on the covenants, though they did not bind his testator's estate. *Thayer v. Wendell*, 1 Gall. (U. S.) 37.

Where an agent contracting for the principals agreed for the relinquishment of a title which he professed not to hold, but recited to be in his principals, and which he stipulated that his principals should release upon the payment of a certain sum, the contract was held not to be binding on the agent personally, though on its face it purported to be between F. M. of the one part and W. H., agent for T., and was signed "W. H. for [seal] T." *Hunter v. Miller*, 6 B. Mon. (Ky.) 612.

Principal, a Corporation, Liable in Assumpsit.—

Where the authorized agent of a corporation attaches his own seal to a contract instead of the corporate seal, the corporation may be held liable in assumpsit or other form of action. *McCauley v. Jenney*, 5 Houst. (Del.) 32; *Sherman v. Fitch*, 98 Mass. 59; *Blanchard v. Blackstone*, 102 Mass. 343; *Cook v. Gray*, 133 Mass. 106; *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.) 285; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Sherman v. New York Cent. R. Co.*, 22 Barb. (N. Y.) 240; *Haight v. Sahler*, 30 Barb. (N. Y.) 218; *Taylor v. School Committee No. 17*, 5 Jones (N. Car.) 98; *Osborne v. High Shoals Min., etc., Co.*, 5 Jones (N. Car.) 177.

And in *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131, the rule was extended to

(c) **Conveyances of Estates.**—There is no distinction to be made between the execution of conveyances and other sealed instruments, by agents, so far as the formalities, which are required in order that the principal may be bound, are concerned.¹ But, owing to the very nature of the contract, a conveyance of the principal's estate in lands, by the agent, improperly executed, can pass no title, and the deed to that extent is void.² However, if the deed contains personal covenants in the name of the agent, he will be individually liable thereon.³

include an indenture in which the defendants were severally described as president, vice-president, etc., "being a board of managers of" a named society. The lease was to the defendants "and their successors in office," and was under their individual signatures and seals. It was held that the defendants were not personally liable, and that the corporation, though not liable in a technical action of covenant, by reason of the absence of a corporate seal, might be held liable in an action of assumpsit for use and occupation.

In *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193, Platt, J., in delivering the opinion of the court, said: "It is important here to remark the difference between a corporation and an individual person, acting by an agent. In the one case there is a corporate seal, which is the only organ by which the body politic can covenant. The seals of these defendants are not, in any sense, the seals of the corporation, but the seal of an agent for an individual person, as his principal, is, in law, the seal of his principal; and therefore it is that the form of action against the principal, in the one case (that of a corporation) is not determined by the form in which the agent contracts, while in the other case (that of an individual) the action against the principal must correspond with the form by which the agent contracts, whether by seal or by simple contract." See also *Damon v. Granby*, 2 Pick. (Mass.) 345.

Assignment of Corporation Pursuant to Vote of Directors.—In *Sargent v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743, an insolvent corporation by a vote of its directors authorized the treasurer to assign all of the property to a creditor of the corporation. The assignment was made and executed in the name of the treasurer and under his seal. The assignment was held to be well executed. Shaw, C. J., in delivering the opinion of the court, said: "If a deed were necessary, in this case, to pass the property, there would be great weight in this objection [to the execution of the assignment]; but the vote of the directors was in effect an agreement of transfer when accepted by the plaintiff, and the effect of the assignment of the treasurer, who had the care and control of all the property, was little more than to hand the property over, pursuant to the vote."

Unauthorized Seal.—Where an agent without authority under seal enters into a contract for his principal, affixing a seal, the seal may be rejected and the contract, if it is not such as to require a sealed instrument, may be treated as a simple contract. *Tapley*

v. Butterfield, 1 Met. (Mass.) 515, 35 Am. Dec. 374; *Van Deusen v. Blum*, 18 Pick. (Mass.) 229; *Thomas v. Joslin*, 30 Minn. 388; *Henry County v. Gates*, 26 Mo. 315; *Human v. Cuniffe*, 32 Mo. 316; *Einstein v. Holt*, 52 Mo. 340; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Sherman v. New York Cent. R. Co.*, 22 Barb. (N. Y.) 240; *Ruffin v. Mebane*, 6 Ired. Eq. (N. Car.) 507; *Baum v. Dubois*, 43 Pa. St. 260; *Jones v. Horner*, 60 Pa. St. 214; *Schmertz v. Shreeve*, 62 Pa. St. 457, 1 Am. Rep. 439.

1. See *supra*, this section, *Instruments under Seal—Application of General Rule*.

2. *England.*—*Wilks v. Back*, 2 East 142; *Frontin v. Small*, 1 Stra. 705; *Appleton v. Binks*, 5 East 148; *White v. Cuyler*, 6 T. R. 176.

United States.—*Thayer v. Wendell*, 1 Gall. (U. S.) 37; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165.

Alabama.—*Jones v. Morris*, 61 Ala. 518.

California.—*Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297; *Echols v. Cheney*, 28 Cal. 157.

Kentucky.—*Casey v. Lucas*, 2 Bush (Ky.) 57.

Louisiana.—*Fetter v. Field*, 1 La. Ann. 80.

Massachusetts.—*Brinley v. Mann*, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Fowler v. Shearer*, 7 Mass. 18; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126.

Mississippi.—*Holmes v. Carman*, 1 Freem. Ch. (Miss.) 408.

New York.—*Spencer v. Field*, 10 Wend. (N. Y.) 87; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Bogart v. De Bussy*, 6 Johns. (N. Y.) 94.

North Carolina.—*Locke v. Alexander*, 2 Hawks (N. Car.) 155, 11 Am. Dec. 750; *Scott v. McAlpin*, Term (N. Car.) 155, 7 Am. Dec. 703.

Virginia.—*Martin v. Flowers*, 8 Leigh (Va.) 158.

Conveyance to Agent.—So a conveyance to "A, B. and C, trustees of the Associate Presbyterian Congregation of Newark," vests the title to the estate conveyed in A, B, and C individually, and not in the corporation. *Den v. Hay*, 21 N. J. L. 174. See also *Fox v. Frith*, 10 M. & W. 131; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *Brown v. Combs*, 29 N. J. L. 36.

3. *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Locke v. Alexander*, 2 Hawks (N. Car.) 155, 11 Am. Dec. 750. And see *Northcote v. Underhill*, 1 Salk. 199; *Rus-*

c. **NEGOTIABLE INSTRUMENTS**—(1) *Application of General Rule*.—A less strict application of the general rule governing the execution of authority by agents is required in regard to bills and notes than in regard to sealed instruments.¹ But in order to exempt the agent from liability, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent.² If he expresses this, the principal is bound and the agent is not.³

sell *v.* Stokes, 1 H. Bl. 562; Webb *v.* Russell, 3 T. R. 393; Stokes *v.* Russell, 3 T. R. 678.

Illustration.—In North *v.* Henneberry, 44 Wis. 306, there was offered in evidence a deed which purported to be by "Edward Henneberry, attorney in fact, and by virtue of a power of attorney, etc., of the first part," and which concluded: "In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year first above written. This deed is made by virtue of said power of attorney." The deed was originally signed "Edward Henneberry, [L. s.]." The execution was afterwards altered so as to read as follows: "William Powers [L. s.], B. his attorney in fact, Edward Henneberry [L. s.]." The acknowledgment was to the effect that the above-named Edward Henneberry acknowledged that he executed the foregoing instrument. It was held that the deed was the deed of Henneberry, and that he was bound by the covenant therein contained, and that after-acquired title to the land conveyed enured to the benefit of his grantee. As to the alteration, it was held that its effect was to change the whole character of the deed. By the alteration the deed, which was a deed of Henneberry personally, became the deed of his principal.

1. Means *v.* Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; Rice *v.* Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; Smith *v.* Alexander, 31 Mo. 193; Dow *v.* Moore, 47 N. H. 419.

2. Leadbitter *v.* Farrow, 5 M. & S. 345; Lazarus *v.* Shearer, 2 Ala. 718; Powers *v.* Briggs, 79 Ill. 493, 22 Am. Rep. 175; Fulton *v.* Loughlin, 118 Ind. 286; Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139; Morell *v.* Codding, 4 Allen (Mass.) 403; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150; Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; Bingham *v.* Stewart, 13 Minn. 106; Fowler *v.* Atkinson, 6 Minn. 578; Savage *v.* Rix, 9 N. H. 263; Casco Nat. Bank *v.* Clark (Supreme Ct.), 46 N. Y. St. Rep. 162; Moss *v.* Livingston, 4 N. Y. 208; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; Barker *v.* Mechanic F. Ins. Co., 3 Wend. (N. Y.) 94; DeWitt *v.* Walton, 9 N. Y. 571; Anderton *v.* Shoup, 17 Ohio St. 126.

But see *infra*, this section, *Admissibility of Parol Evidence—Negotiable Instruments*.

3. Alexander *v.* Sizer, L. R. 4 Exch. 102; Lindus *v.* Melrose, 3 H. & N. 177; Rawlings *v.* Robson, 70 Ga. 595; Means *v.* Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; Simpson *v.* Garland, 72 Me. 40, 39 Am. Rep. 297; Laffin, etc., Powder Co. *v.* Sinsheimer, 48 Md. 415, 30 Am. Rep. 472; Rice *v.* Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; Gillig *v.* Lake

Bigler Road Co., 2 Nev. 214; Dow *v.* Moore, 47 N. H. 419; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; Cape Fear Bank *v.* Wright, 3 Jones (N. Car.) 376.

Illustrations of Negotiable Paper Held Binding on Principal.—Notes in the following forms have been held binding on the principal:

Note in form, "The pastor and deacons of the F. F. Baptist Church, in behalf of said church, promise to pay," and signed "S. D. Y., Agent for the F. F. Baptist Church." Jeffs *v.* York, 4 Cush. (Mass.) 371, 50 Am. Dec. 791.

A note in form, "We promise to pay," and signed "A B for himself and C D," binds both. Olcott *v.* Little, 9 N. H. 259, 32 Am. Dec. 357.

A note in the ordinary form, "I promise to pay," and signed "Pro W. G. J., S. C." Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160. See Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

A note reciting that "The trustees of the Third Unitarian Church of Chicago, as such trustees, promise to pay," and signed by the trustees, with the addition under each signature of the words "As trustee of the Third Unitarian Church of Chicago." Little *v.* Bailey, 87 Ill. 239. And see Blanchard *v.* Kaull, 44 Cal. 440.

Upon a promissory note in part as follows: "I, as treasurer of the Congregational Society or my successors in office, promise to pay," and signed "S. R., treasurer," it was held that the society was liable. Barlow *v.* Congregational Soc., 8 Allen (Mass.) 460.

A note in form, "The Howard County Agricultural Association, who execute this note by her directors, * * * do promise to pay," and signed by one person describing himself as "secretary," together with others describing themselves as "directors Howard County Agricultural Association," binds the association, and not the signers individually. Armstrong *v.* Kirkpatrick, 79 Ind. 527.

A bill in the following form binds the company: "By order of the board of trustees, the treasurer of the White, etc., Co. will pay," etc.; signed, "S. C., president; C. Y., secretary." Hasey *v.* White Pigeon Beet Sugar Co., 1 Dougl. (Mich.) 193.

Corporation Signature Followed by That of Officer.—A note in form, "We promise to pay," and signed "Massachusetts Steam Heating Co., L. L. Fuller, treasurer," is the note of the corporation. Draper *v.* Massachusetts Steam Heating Co., 5 Allen (Mass.) 338. And see Turner *v.* Potter, 56 Iowa 251; Castle *v.* Belfast Foundry Co., 72 Me. 167; Atkins *v.* Brown, 59 Me. 90; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Walker *v.* State Bank, 9 N. Y. 582.

A note in form, "We, the trustees of the

Descriptive Persons.—But a mere description of the general relation which the person signing the paper holds to another, without indicating that the particular signature is made in the execution of the agency, is not sufficient to charge the principal or to exempt the agent from personal liability.¹

First, etc., Society, promise to pay," and signed, "Trustees of the First, etc., Society," followed by the individual names of the trustees, binds the trustees in their corporate capacity, and not personally. *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39.

In *Falk v. Moebs*, 127 U. S. 597, a promissory note signed, "Peninsula Cigar Company; G. M., secretary and treasurer," payable to the order of "G. M., secretary and treasurer," and indorsed "G. M., secretary and treasurer," was held to be made, payable to, and indorsed by the corporation.

But the decisions are not in complete accord. Thus in *M'Bean v. Morrison*, 1 A. K. Marsh. (Ky.) 545, where a note beginning, "I promise," and signed, "for the M. H. & F. S. Co., W. McB., president," was held to be the individual note of McB.

And in *Heffner v. Brownell*, 70 Iowa 591, a promissory note in form, "We promise to pay, etc.," was signed "Independence Manuf. Co.," and directly underneath, "A., president." The court held that there was nothing to show that A. was president of the company, and he, as well as the company, was bound.

Consideration Moving to Principal.—Where it appears from the face of a negotiable instrument that the consideration moved to the principal, the principal alone will be bound. Thus a note "to be paid out of the township funds," signed "A., trustee of J. township," is the contract of the township, and not of A. personally. *Wallis v. Johnson School Tp.*, 75 Ind. 368.

In *Taylor v. Williams*, 17 B. Mon. (Ky.) 489, a bill drawn by "George W. Williams, G. W. P.," and attested by "L. Hord, G. S.," on "Thomas B. Posey, treasurer grand division of Kentucky," concluded: "In full of copies of * * * New Era ordered to be sent General D. G. W. Patriarchs," etc. It was held that the draft was drawn by the corporation, and that Williams was not personally liable thereon. See also *McHenry v. Duffield*, 7 Blackf. (Ind.) 41; *Dow v. Moore*, 47 N. H. 419; *Horton v. Garrison*, 23 Barb. (N. Y.) 176; *Haskell v. Cornish*, 13 Cal. 45; *Lindus v. Melrose*, 2 H. & N. 293; *Carson v. Lucas*, 13 B. Mon. (Ky.) 213; *Richmond, etc., R. Co. v. Snead*, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

And in *Mann v. Chandler*, 9 Mass. 335, notes in form, "I, the subscriber, treasurer of the D. T. Corporation, promise, etc.," and signed "G. L. C., treasurer of the D. T. Corporation," were held to bind the corporation, and not the treasurer personally. The case was before the court on an agreed statement of facts, from which it appeared that the corporation was indebted to the plaintiff to the amount of the notes at the time they were given, and that they were given for that debt.

Contra.—But in *Anderson v. Pearce*, 36

Ark. 293, 38 Am. Rep. 39, a note given "for work done on Hazel Valley School-house," and signed by two persons with the word "committee" following their names, was held to be the individual note of the signers. And see *Bingham v. Kimball*, 17 Ind. 396.

1. *Alabama*.—*Lazarus v. Shearer*, 2 Ala. 718. *California*.—*Chamberlain v. Pacific Wool Growing Co.*, 54 Cal. 103.

Illinois.—*Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

Indiana.—*Hayes v. Brubaker*, 65 Ind. 27; *Williams v. Lafayette Second Nat. Bank*, 83 Ind. 237.

Kentucky.—*Burbank v. Posey*, 7 Bush (Ky.) 372.

Maine.—*Fogg v. Virgin*, 19 Me. 352, 36 Am. Dec. 757; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *Ross v. Brown*, 74 Me. 352.

Massachusetts.—*Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

Nevada.—*Gillig v. Lake Bigler Road Co.*, 2 Nev. 214.

New York.—*DeWitt v. Walton*, 9 N. Y. 571.

South Carolina.—*Fash v. Ross*, 2 Hill (S. Car.) 294.

See *infra*, this section, *Admissibility of Parol Evidence—Negotiable Instruments*.

Signature Followed by Official Designation—

Maker.—A note in form "I promise to pay," and signed "J. S., trustee S. Railroad," is the individual note of the signer. *Fiske v. Eldridge*, 12 Gray (Mass.) 474. See also *McClure v. Livermore*, 78 Me. 390; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Sheridan v. Carpenter*, 61 Me. 83; *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94; *Exchange Bank v. Lewis County*, 28 W. Va. 273; *Rupert v. Madden*, 1 Chand. (Wis.) 146; *Gaff v. Theis*, 33 Ind. 307; *Hobbs v. Cowden*, 20 Ind. 310.

And so where a note was in form "We promise to pay," and signed "A., Treas. St. S., etc., Fund," it was held that A. was the maker and individually liable. *Sumwalt v. Ridgely*, 20 Md. 114. But see *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146, where it was held that the agent was not personally liable on a note signed in the form "A., agent for B." See also *Rawlings v. Robson*, 70 Ga. 595; *Wheelock v. Winslow*, 15 Iowa 464; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

In *Early v. Wilkinson*, 9 Gratt. (Va.) 68, an action was brought by the payer against the maker of a note in form, "I promise to pay, etc., (signed) Robert Early [for Sam'l Early]." It was held that the signature without the brackets would have rendered it doubtful whom the parties intended to bind, but that the addition of the brackets was sufficient to remove all doubt, and disclose an intention on the face of the instrument to bind Robert Early.

(2) *Signature in Agent's Name.*—Whatever the authority the signer of a negotiable note may have to bind another, if he signs merely his own name either as maker, drawer, or acceptor he will be personally liable if there are apt words in the instrument to charge him,¹ even though he appears in the body

In *Scott v. Baker*, 3 W. Va. 285, a note in form, "We promise to pay," and signed, "W. S., pres't B. A. Co.; W. H., treasurer," was held to be the individual note of the signers.

Joint Note.—Where several persons signed a note in the usual form, "We promise to pay," describing themselves as "trustees of the G. Lodge, etc.," they were held to be personally liable as makers. *McClellan v. Robe*, 93 Ind. 298. See also *Coburn v. Omega Lodge*, 71 Iowa 581; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197.

And in *Mears v. Graham*, 8 Blackf. (Ind.) 144, a note in part, "We, the trustees of the M. E. Church, promise to pay," and signed by several persons with the addition of the words, "Trustees M. E. Church," was held to be the individual obligation of the persons signing. See also *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

But in *Farmers', etc., Sav. Bank v. Colby*, 64 Cal. 352, a note in form, "We promise to pay," and signed by two persons describing themselves as "Pres't Pac., etc., Co.," and "Sec. pro tem.," was held to be the note of the company.

Joint and Several Note.—In *Savage v. Rix*, 9 N. H. 263, a note in form, "We jointly and severally promise to pay, in official capacity," and signed by several persons with the addition, "Whitfield Road Committee," was held to bind the signers individually.

In *Whitney v. Sudduth*, 4 Metc. (Ky.) 296, a note in form: "We, or either of us, directors of the T. Company, promise," and signed by one person describing himself as "president," and four others in their own names without addition, was held to bind the signers personally. See also *Bradlee v. Boston Glass Manufactory*, 16 Pick. (Mass.) 347; *Titus v. Kyle*, 10 Ohio St. 444; *Trask v. Roberts*, 1 B. Mon. (Ky.) 201; *Healey v. Story*, 3 Exch. 3; *Bottomley v. Fisher*, 1 H. & C. 211.

But in *Harvey v. Irvine*, 11 Iowa 82, a note in form, "We, or either of us, promise to pay in behalf of the School District No. 6, etc.," and signed by three persons, describing themselves as president, secretary, and treasurer, respectively, was held to be the note of the school district.

And in *Rice v. Gove*, 22 Pick. (Mass.) 158, 33 Am. Dec. 724, a note beginning "We jointly and severally promise to pay," and signed "P. & J. for G.," was construed to be the note of G.

Acceptor.—A bill of exchange drawn on "J. R. L., Pres't Rosendale Man'f'g Co.," and accepted in the same form, is the individual acceptance of "J. R. L." *Moss v. Livingston*, 4 N. Y. 209. See also *Tousey v. Taw*, 19 Ind. 212.

In *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, a bill of exchange drawn by the "K. & O. Coal Co." on

"J. A. R., agent," and accepted in form "J. A. R., agent K. & O. C. Co.," was held to bind "J. A. R." personally as acceptor.

Note, for Premium on Insurance, Reciting Number of Policy.—Where a note, given for premiums on insurance, and reciting the number of the policy, was in form, "We promise to pay," and signed by three persons describing themselves as president, secretary, and director, respectively, it was held that the signers were individually liable as makers, and that the fact that the policy recited in the note was issued to the school district of which they were officers was not sufficient to alter the legal effect of the note. *American Ins. Co. v. Stratton*, 59 Iowa 696. See also *Haverhill Mut. F. Ins. Co. v. Newhall*, 1 Allen (Mass.) 130.

Rule in Connecticut.—The *Connecticut* courts have adopted a rule less exacting in its requirements than that stated in the text.

In *Johnson v. Smith*, 21 Conn. 627, a note in the usual form, signed by three persons, to whose signatures were annexed the words, "Vestrymen of the Episcopal Society," was held to be the note of the society, and not binding on the signers individually.

In *Shelton v. Darling*, 2 Conn. 435, a bill of exchange drawn on N. D., agent of a commission company, and accepted "N. D., agent of the C. C.," was held to be the acceptance of the company, and not binding on N. D. personally.

In *Hovey v. Magill*, 2 Conn. 680, a note in form, "I promise to pay," etc., was signed "A., agent for M. M. Co." It was held that A. was not personally liable, parol evidence being admitted to show that he had been in the constant habit of so signing notes for the company with their knowledge.

1. *England.*—*Leadbitter v. Farrow*, 5 M. & S. 345.

Georgia.—*Rawlings v. Robson*, 70 Ga. 595; *Graham v. Campbell*, 56 Ga. 258.

Kentucky.—*Scott v. Messick*, 4 T. B. Mon. (Ky.) 535; *Caphart v. Dodd*, 3 Bush (Ky.) 584, 96 Am. Dec. 258.

Louisiana.—*Cooley v. Esteban*, 26 La. Ann. 515.

Maine.—*Hancock v. Fairfield*, 30 Me. 299.

Maryland.—*Condon v. Pearce*, 43 Md. 83.

Massachusetts.—*Bedford Commercial Ins. Co. v. Covell*, 8 Met. (Mass.) 442; *Bass v. O'Brien*, 12 Gray (Mass.) 477.

New York.—*Rochester Bank v. Monteath*, 1 Den. (N. Y.) 402, 43 Am. Dec. 681; *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Joynson v. Richard*, 44 N. Y. Super. Ct. 16; *Crocker v. Colwell*, 46 N. Y. 213; *Phelps v. Borland*, 30 Hun (N. Y.) 362; *Genesee Bank v. Patchin Bank*, 19 N. Y. 312.

Ohio.—*Titus v. Kyle*, 10 Ohio St. 444.

Direction to "Charge to Account."—Where an agent draws a bill of exchange in his own name without stating that he acts as agent, the direction to charge the amount of the

of the instrument as acting as agent, or for and on behalf of another.¹ An apparent exception arises where the principal has adopted the agent's name as his own; the principal will then be bound by such contracts.² But the liability exists only where it is affirmatively and satisfactorily proved that the name or signature thus used is one which has been assumed and sanctioned as indicative of his contracts, and has been with his knowledge and consent adopted as a substitute for his own name and signature.³

account to another is not sufficient to exempt him from personal liability. *Mayhew v. Prince*, 11 Mass. 54; *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *Snow v. Goodrich*, 14 Me. 235; *Goupy v. Harden*, 7 Taunt. 159; *Leadbitter v. Farrow*, 5 M. & S. 345. *Compare Maher v. Overton*, 9 La. 115.

But where in addition to this the relation of agency is disclosed, as by the addition of the word "agent" to the signature, the principal alone is liable. *Tripp v. Swanzy Paper Mfg. Co.*, 13 Pick. (Mass.) 291; *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229; *Witte v. Derby Fishing Co.*, 2 Conn. 260.

1. *England*.—*Mare v. Charles*, 5 El. & Bl. 978, 85 E. C. L. 978.

Georgia.—*Cleaveland v. Stewart*, 3 Ga. 233.

Illinois.—*Hypes v. Griffin*, 89 Ill. 136; 31 Am. Rep. 71.

Iowa.—*Bayliss v. Pearson*, 15 Iowa 279.

Kentucky.—*McKenney v. Edwards*, 88 Ky. 272; *Pack v. White*, 78 Ky. 243.

Massachusetts.—*Morell v. Coddington*, 4 Allen (Mass.) 403; *Packard v. Nye*, 2 Met. (Mass.) 47; *Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390; *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460.

New York.—*Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94.

Vermont.—*Pomeroy v. Slade*, 16 Vt. 220.

Illustration.—In *Thomas v. Bishop*, 2 Stra. 955, a bill of exchange drawn on Mr. H. B., cashier of the York Buildings Company, at their house in W., by the York Buildings Company, and accepted by writing "accepted per H. B.," was held to bind H. B. personally, and not the company. The court said: "A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. Now, here is nothing in writing to bind the company, nor can any action be maintained against them upon the bill; for the addition of cashier to the defendant's name is only to denote the person with more certainty, and the York Buildings house is only to inform the order where the drawee is to be found; and the direction whose account to place it is for the use of the drawee only." See also *Lallerstedt v. Griffin*, 29 Ga. 708.

In an action by the indorsee of a bill of exchange drawn on "the agent and owners of the barque Endeavor" and accepted by the agent in his own name, it was held that the agent alone was liable as acceptor. *Taber v. Cannon*, 8 Met. (Mass.) 456.

Intention—Principal Only Bound.—In *Aggs v. Nicholson*, 1 H. & N. 165, a note in part, "We, two of the directors of the Ark, etc., Assurance Society, by and on behalf of the

said society, do hereby promise to pay," and signed by two persons by their fixing their own signatures merely, was held to be the note of the society, and not binding on the makers personally.

And in *Baker v. Chables*, 4 Greene (Iowa) 428, an action was brought on a note in part, "We, the undersigned directors of School District No. 4, Montpelier township, promise," etc., which was signed by three persons without addition to their signatures, and it was held that the signers were not personally liable. The court said: "The rule is well settled that if the name of the principal and the relation of agency be stated in the writing, and the agent is authorized to make the contract or obligation, the principal alone is bound unless the intention is clearly expressed to bind the agent personally. * * * It is true, as claimed by counsel, that in deciding whether a party contracts personally or as agent the presumption is in favor of the former. It is obvious that a party should be personally bound unless his agency is disclosed. But it is equally true, in deciding whether an apparent agent intends to bind himself or his principal, the presumption is that he intended to bind his principal, because the agent should not be personally bound unless that intention is expressed in the contract." See also *Lyon v. Adamson*, 7 Iowa 509; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502.

Statutory Modification—Maine.—In *Maine*, where the body of the instrument purports to be in behalf of the principal, he will be bound though the agent sign in his own name; but a mere description, such as "We, the trustees of W. Co., promise," is not sufficient to render the principal liable. The common-law rule is modified by statute in *Maine*. *Simpson v. Garland*, 72 Me. 40, 39 Am. Rep. 297; *Fogg v. Virgin*, 19 Me. 352, 36 Am. Dec. 757. See also *Sheridan v. Carpenter*, 61 Me. 83.

2. *England*.—*South Carolina Bank v. Case*, 8 B. & C. 427, 15 E. C. L. 256.

Connecticut.—*Phelps v. Livingston*, 2 Root (Conn.) 495; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225.

Massachusetts.—*Brown v. Parker*, 7 Allen (Mass.) 337; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59.

New Hampshire.—*Chandler v. Coe*, 54 N. H. 561.

New York.—*Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *DeWitt v. Walton*, 9 N. Y. 571; *Crocker v. Colwell*, 46 N. Y. 212; *Rochester Bank v. Monteath*, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

West Virginia.—*Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 135.

3. *Massachusetts*.—*Brown v. Parker*, 7 Allen

(3) *Signature in Principal's Name.*—As a matter of convenience in preserving testimony, it may be well that the names of all parties who are in any way connected with a written instrument should appear upon the instrument itself.¹ It is not essential, however, to the valid execution of a bill or note by an agent, that the agent's name appear; he may sign the principal's name only.²

(4) *Undisclosed Principal.*—Where an agent executes a negotiable instrument in his own name throughout, disclosing neither the principal nor the relation of agency otherwise than by the addition of the word "agent" or some similar designation, the agent alone is liable on the contract.³

(Mass.) 337; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396.

West Virginia.—*Devendorf v. West Virginia Oil, etc., Co.*, 17 W. Va. 135.

This is but an application of the general rule that a person may become a party to a contract by any mark or designation he chooses to adopt, provided it be used as a substitute for his name and he intends to be bound by it. *DeWitt v. Walton*, 9 N. Y. 571; *Brown v. Butcher, etc., Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; *Rogers v. Coit*, 6 Hill (N. Y.) 322; *Alabama Coal Min. Co. v. Brainard*, 35 Ala. 476. See also the title NAMES.

Not Necessary that Principal's Name Appear in Signature.—Where the instrument purports in its body to be the obligation of the principal, it is not essential that his name appear in the signature. A note reading "The President and Directors of the Woodstock Glass Co. promise to pay," etc., and signed "W. Hicks, President," binds the company, and not Hicks individually. *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550. See also *Lander v. Castro*, 43 Cal. 497; *Farmers', etc., Bank v. Colby*, 64 Cal. 354; *Bean v. Pioneer Min. Co.*, 66 Cal. 455, 56 Am. Rep. 106; *Shaver v. Ocean Min. Co.*, 21 Cal. 46; *Hall v. Crandall*, 29 Cal. 568, 89 Am. Dec. 64; *Yowell v. Dodd*, 3 Bush (Ky.) 581, 96 Am. Dec. 256; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13, 3 Am. Dec. 171; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Whitney v. Stow*, 111 Mass. 368; *McGreary v. Chandler*, 58 Me. 537; *Moor v. Wilson*, 26 N. H. 332; *Shotwell v. M'Kown*, 5 N. J. L. 955.

Unincorporated Association Principal.—Where a note purported in its body to be the promise of an unincorporated association by the associate name adopted in the by-laws, and was signed by a person describing himself as "treasurer," it was held that the members of the association were liable on the note. *Walker v. Wait*, 50 Vt. 668. And see *McGreary v. Chandler*, 58 Me. 537.

1. *Forsyth v. Day*, 41 Me. 382.

2. *England.*—*Watkins v. Vince*, 2 Stark. 368, 3 E. C. L. 448.

Illinois.—*Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Walter v. School Trustees*, 12 Ill. 63.

Maine.—*Forsyth v. Day*, 41 Me. 382.

Massachusetts.—*Brigham v. Peters*, 1 Gray (Mass.) 139.

Minnesota.—*Rock Island First Nat. Bank v. Loyhed*, 28 Minn. 396.

Missouri.—*Trenton First Nat. Bank v. Gay*, 63 Mo. 33; *Cravens v. Gillilan*, 63 Mo. 28.

New Hampshire.—*Morse v. Green*, 13 N. H. 32, 38 Am. Dec. 471; *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Kidder v. Prescott*, 24 N. H. 263; *Hanson v. Rowe*, 26 N. H. 329; *Cushman v. Wooster*, 45 N. H. 410.

New York.—*Canandaigua First Nat. Bank v. Whitney*, 4 Lans. (N. Y.) 40; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558.

See also *Courteen v. Touse*, 1 Campb. 43; *Weed v. Carpenter*, 4 Wend. (N. Y.) 219; *Brigham v. Peters*, 1 Gray (Mass.) 139.

3. *England.*—*Bottomley v. Fisher*, 1 H. & C. 211; *Price v. Taylor*, 5 H. & N. 540; *Schmalz v. Avery*, 16 Q. B. 655.

United States.—*Armstrong v. Brolaski*, 46 Fed. Rep. 903.

Arkansas.—*Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39.

California.—*Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *Zeigler v. Wells*, 28 Cal. 263; *Hobson v. Hassett*, 76 Cal. 203.

Georgia.—*Graham v. Campbell*, 56 Ga. 258; *Bedell v. Scarlett*, 75 Ga. 56.

Illinois.—*Bickford v. Chicago First Nat. Bank*, 42 Ill. 238; *School Trustees v. Rautenberg*, 85 Ill. 219.

Indiana.—*Crum v. Boyd*, 9 Ind. 289.

Iowa.—*Thurston v. Mauro*, 1 Greene (Iowa) 231; *Tryon v. Oxley*, 3 Greene (Iowa) 292; *American Ins. Co. v. Stratton*, 59 Iowa 696; *Wing v. Glick*, 56 Iowa 473, 41 Am. Rep. 118.

Kentucky.—*Trask v. Roberts*, 1 B. Mon. (Ky.) 201; *Whitney v. Sudduth*, 4 Metc. (Ky.) 297.

Massachusetts.—*Bartlett v. Hawley*, 120 Mass. 92; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Fuller v. Hooper*, 3 Gray (Mass.) 341.

New Hampshire.—*Savage v. Rix*, 9 N. H. 263.

New Mexico.—*Luna v. Mohr*, 3 N. Mex. 56.

New York.—*Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Snelling v. Howard*, 7 Robt. (N. Y.) 400; *Bolles v. Walton*, 2 E. D. Smith (N. Y.) 164.

Ohio.—*Anderton v. Shoup*, 17 Ohio St. 126; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Bank v. Cook*, 38 Ohio St. 442.

Pennsylvania.—*Tassey v. Church*, 4 W. & S. (Pa.) 346, 39 Am. Dec. 65.

See *infra*, this section, *Admissibility of Parol Evidence—Negotiable Instruments—Action between the Original Parties.*

(5) *Principal Impliedly Disclosed*—Name Printed on the Instrument.—Where the principal's name appears, printed in the margin or head of a bill or note executed by an agent, the former is sufficiently designated to put a prudent man upon inquiry and to take the case out of the rule in regard to an undisclosed principal.¹

Corporate Seal.—And a corporate seal bearing the name of the corporation has a like effect when attached to a negotiable instrument.²

(6) *Agent as Payee and Indorser*.—The general principles governing the execution of negotiable instruments by an agent as maker, drawer, or acceptor are alike applicable where the agent is payee or indorser. So if in a note or bill there are added to the name of the payee words denoting agency or official character, such words are deemed merely descriptive, and the note or bill is payable to the payee thus described personally,³ and when so in-

Agent Liable after the Determination of the Agency.—A note in form "I promise to pay," and signed by a person with the word "agent" after his name, binds the agent personally though the agency is determined before the note becomes due. *Hall v. Bradbury*, 40 Conn. 32.

Express Exclusion of Liability.—A promissory note in part, "We, as trustees, but not individually, promise to pay," and signed by three persons with the word trustees after their names, does not bind them personally. The court declared it unnecessary under the circumstances to determine whether or not the principals were liable on the instrument. *Shoe, etc., Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49. And see *Leach v. Blow*, 8 Smed. & M. (Miss.) 221.

1. *Name of Principal Printed on Margin, etc.*—In *Fuller v. Hooper*, 3 Gray (Mass.) 334, a draft concluding, "Place to the account of Pompton Iron Works, W. Burke, agent," and having "Pompton Iron Works" printed on the margin, was held to be a draft of the Pompton Iron Works. And see *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360.

But in *Casco Nat. Bank v. Clark*, 139 N. Y. 307, a note signed by the president and the secretary of a corporation to whose signatures were added their respective titles, was held to bind the signers personally, although the name of the corporation was printed on the margin of the paper. And see *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314.

In *Chipman v. Foster*, 119 Mass. 189, a bill of exchange headed "New England Agency of the Pennsylvania Fire Insurance Co.," and having printed on the margin, "Foster and Cole, general agents of the New England States," appeared on its face to be drawn by Foster and Cole without addition to their signatures; it further appeared from the instrument that it was drawn on the Pennsylvania Fire Insurance Co. in payment of a claim against them. It was held that the company were liable on the bill, and not Foster and Cole.

In *Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750, a bill of exchange was headed, "Office of the T. L. Manufacturing Company." The draft concluded, "Charge the same to the account of this company," and was signed "I. R. J., agent." It was held to be a draft of the company. See also

Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; *Hitchcock v. Buchanan*, 105 U. S. 416; *Waugh v. Suter*, 3 Ill. App. 271.

In *Lacy v. Dubuque Lumber Co.*, 43 Iowa 510, a note headed "Office of Dubuque Lumber Company" and in form "I promise to pay" was signed "W. H. Moore, P. D. L. Co." It was held to be the note of the company, and not binding on Moore personally.

A bill of exchange headed "Lake Bigler Road Co.," drawn by "Butler Ives, superintendent," on "J. E. Garrett, secretary," and accepted "J. E. Garrett, secretary L. B. R. Co.," is accepted by the company. *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214. And see *Fitch v. Lawton*, 6 How. (Miss.) 371; *Van Leuvan v. Kingston First Nat. Bank*, 6 Lans. (N. Y.) 378; *Schaefer v. Bidwell*, 9 Nev. 209.

2. In *Scanlan v. Keith*, 102 Ill. 640, 40 Am. Rep. 624, a note in form "we promise to pay" was signed by a person describing himself as the "Pres't Chicago, etc., Co.," and bore the corporate seal of the company, attested by the secretary. It was held to be the note of the corporation. See also *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330; *Miller v. Roach*, 150 Mass. 140; *Guthrie v. Imbrie*, 12 Oregon 182, 53 Am. Rep. 331. *Contra*, *Dutton v. Marsh*, L. R. 6 Q. B. 361.

3. *Alabama*.—*Castleberry v. Fennel*, 4 Ala. 642.

California.—*Ord v. McKee*, 5 Cal. 515.

Illinois.—*Chadsey v. McCreary*, 27 Ill. 253.

Massachusetts.—*Shaw v. Stone*, 1 Cush. (Mass.) 228; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225.

Missouri.—*Toledo Agricultural Works v. Heisser*, 51 Mo. 128.

Contra.—In an action on a note payable to "C. W. S., treasurer of the I. M. B. Co.," and indorsed in the same manner, the court held that the note was payable to the company, and not to Smith personally. *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29.

In *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539, a note payable to "L. M., president of the M., etc., Ins. Co.," was indorsed "M., etc., Ins. Co., by L. M., president." It was held that the insurance company was sufficiently designated as payee. The court said: "It cannot be denied that, if the note was intended to be payable to the order of L. Monson as an

dorsed he is liable personally on the indorsement.¹

individual, and not as president of the company, acting officially, the insertion of such descriptive words was wholly nugatory. Under the circumstances of this case, we cannot doubt that it was the intention of the parties to the note to make it payable to the order of L. Monson as president of the insurance company, and so, by its very terms, the said Monson is distinctly recognized as having official authority to indorse it. Such must have been the mutual understanding of the parties." See also *Trustees of Ministerial, etc., Fund v. Parks*, 10 Me. 441.

Rule in Equity—Notice.—In *Holmes v. Carman*, 1 Freem. Ch. (Miss.) 408, it was held that a note payable to "Carman, agent of Floyd," had enough on its face to excite inquiry, and that whatever is sufficient to put a party upon inquiry amounts in equity to notice.

1. *Bartlett v. Hawley*, 120 Mass. 92; *Towne v. Rice*, 122 Mass. 67.

Decisions Holding a Contrary Doctrine to that laid down in the text are found. Thus in *Bowne v. Douglass*, 38 Barb. (N. Y.) 312, it was held that where a note was payable to C. D., assignee, and was indorsed "C. D., assignee," C. D. was not personally liable as indorser. The court said that where a note is payable to any one in such qualified manner and he indorses it in the same way, the rule as to *descriptio personæ* does not hold, but the indorsement is to be considered a qualified indorsement for the purpose of passing the title.

In *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665, a bill of exchange payable to Scott Cray, agent, and so indorsed, was held to bind the principal. And see *Lockwood v. Coley*, 22 Fed. Rep. 192.

In *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550, the court held (Savage, C. J., *dissenting*) that the owner of a note may dispose of it on what terms he pleases, and that a note payable to Israel Horsefield, and indorsed "Israel Horsefield, agent," relieved the payee from personal liability, since he had elected to indorse in the character of agent. In *Daniel on Negotiable Instruments*, § 302, the author refers to this case as "peculiar," and says: "The case has been quoted as holding that such an indorsement is equivalent to an indorsement without recourse, and it has been so construed by the courts; but we think that it only determines that under the peculiar circumstances it had that effect."

In *Babcock v. Beman*, 11 N. Y. 200, the court cited and followed the above decision in an action on a note payable to "R. Beman, treasurer," and so indorsed. See also *University Bank v. Hamilton*, 78 Ga. 312.

In *Hicks v. Hinde*, 9 Barb. (N. Y.) 528, the principle in *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550, was applied to the drawer of a bill of exchange, "Jehu Hinde, agent," was held to be restrictive, and not binding personally on Hinde.

Note Payable to A, Agent.—In *Davidson v. Dallas*, 8 Cal. 227, an action was brought on two notes, one payable to McPherson,

son, agent, or order, and the other to McPherson, agent of A. G. Dallas, or order. The court held that it was clear upon the face of the notes that the consideration upon which they were given came from McPherson in his capacity of agent and did not move from him in his personal right, and the error of McPherson in making a note payable to him as agent without disclosing the name of his principal he had the right to cure by indorsement.

Statutory Rule—Georgia.—In the *University Bank v. Hamilton*, 78 Ga. 312, a note payable to H., president, was indorsed "H., President Princeton Factory." It was held that H. incurred no personal liability on the indorsement. The case was governed by Ga. Code, § 2211, by which it is enacted that "where the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances of each case." The court said: "This declaration on its face shows that the agency was known. There is no allegation that the credit was expressly given to Hamilton individually, and therefore by this statute he is not responsible upon this contract." The court then proceeded to consider the question regardless of the statute, and came to the conclusion that H. could limit his liability by indorsing on any terms he saw fit, and that by indorsing the note "President Princeton Factory" he limited his liability to his official character.

Indorsement Sufficient to Transfer Title.—In a note payable to C. B. M., agent, and indorsed "G. Agricultural Works, C. B. M., agent," the indorsement is that of "C. B. M., agent." The rest of the indorsement may be rejected as surplusage, leaving the name of the payee, which is sufficient to transfer the property in the note, whether he was acting as agent of the Granite Agricultural Works or any other party beneficially interested in the transaction. *Farmington Sav. Bank v. Fall*, 71 Me. 49. See also *Mann v. Springfield Second Nat. Bank*, 34 Kan. 746.

In *Russell v. Folsom*, 72 Me. 436, an indorsement, "A, Treas.," on a note payable to a corporation by its corporate name, was held sufficient to pass the title to the note. And see *Road, etc., Com'rs v. Shorter*, 50 Ga. 489; *Chase v. Hathorn*, 61 Me. 505; *Scott v. Johnson*, 5 Bosw. (N. Y.) 213; *Merchants' Bank v. McColl*, 6 Bosw. (N. Y.) 473; *Clark v. Titcomb*, 42 Barb. (N. Y.) 123.

Where one carries on business on his own account, in the name of a company which has been incorporated but not organized, and receives in such business a promissory note payable to the order of the corporation, he may transfer title to the note by indorsing it in his own name. *Bryant v. Eastman*, 7 Cush. (Mass.) 111.

The indorsement "A & Co." on a note payable to A is sufficient to pass title to the note. *Finch v. DeForest*, 16 Conn. 445.

Indorsement without Recourse.—In *McIn-*

Bank Officers.—The same strictness is not required, however, in the execution of commercial paper by bank officers. A note or bill payable to the cashier of a bank in his official capacity sufficiently shows that the bank is the payee though the name of the bank does not appear;¹ and when similarly indorsed the bank will be bound thereby, and not the cashier personally.²

tire v. Preston, 10 Ill. 48, 48 Am. Dec. 321, a note payable to an insurance company was indorsed "Without recourse, Joel Scott, Sec'y," and it was held that the indorsement was sufficient to pass the legal interest in the note. After establishing the necessary authority in the corporation and Scott, the court said: "This point of the case is, then, presented in the same light as if the record contained proof that Joel Scott made the indorsement upon the note as the secretary and under the direction of the Ocean Insurance Company. If he did, there can be little difficulty in determining that the indorsement was sufficient to carry the legal title to the note, and authorize the holder thereof to fill it up so as to show said assignment to have been made for and on behalf of said company. There can be no mistaking the intention of the parties in this case. The words 'without recourse' show that Scott intended to indorse the note, and not to guarantee the payment thereof; and the letters 'Sec'y' annexed to his name are sufficient to indicate that he did not suppose he was acting for himself alone. * * * We are therefore of the opinion that the indorsement in this case was sufficient to pass the legal interest in the note, when properly filled up, which the plaintiff had the right to do upon the trial."

1. *Nave v. Lebanon First Nat. Bank*, 87 Ind. 204; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Water-vliet Bank v. White*, 1 Den. (N. Y.) 608; *Wright v. Boyd*, 3 Barb. (N. Y.) 523.

2. *United States*.—*Baldwin v. Newbury Bank*, 1 Wall. (U. S.) 234; *Lafayette Bank v. Illinois State Bank*, 4 McLean (U. S.) 208.

Connecticut.—*Stamford Bank v. Ferris*, 17 Conn. 268.

Georgia.—*Collins v. Johnson*, 16 Ga. 458.

Indiana.—*State Bank v. Wheeler*, 21 Ind. 90.

Maine.—*Burnham v. Webster*, 19 Me. 232; *Farrar v. Gilman*, 19 Me. 440, 36 Am. Dec. 766.

Massachusetts.—*Northampton Bank v. Pepoon*, 11 Mass. 288; *Hartford Bank v. Barry*, 17 Mass. 94; *Folger v. Chase*, 18 Pick. (Mass.) 63.

New York.—*Genesee Bank v. Patchin Bank*, 19 N. Y. 312; *State Bank v. Muskingum Branch Bank*, 29 N. Y. 619; *Robb v. Ross County Bank*, 41 Barb. (N. Y.) 586.

Wisconsin.—*Aiken v. Marine Bank*, 16 Wis. 679; *Houghton v. Elkhorn First Nat. Bank*, 26 Wis. 663; *Kennedy v. Knight*, 21 Wis. 345, 94 Am. Dec. 543.

Bank as Drawer or Acceptor.—In *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, it was said: "To this rule usage has established an apparent exception in the instances where a bill is drawn or

accepted by the cashier of a bank. But it is rather apparent than real, since the custom by which a cashier represents his bank in such matters, by simply signing his own name, is so general, that the practice has reduced the custom to the certainty of a law."

In *Farmers', etc., Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457, a bill of exchange drawn on A. B., cashier F. & M. Bank, and accepted by writing across the face of the bill, "Accepted, A. B., cashier," was held to bind the bank as acceptor, and not A. B.

In *Safford v. Wyckoff*, 4 Hill (N. Y.) 442, reversing 1 Hill (N. Y.) 11, a negotiable bill of exchange in the ordinary form, signed by the cashier only of a banking association, was held binding on the association in favor of a *bona fide* indorsee.

Construction of Statute Regulating Manner of Signing.—The statutory provision wherein notes and bills issued by a bank and put in circulation as money are required to be signed by the president or vice-president and cashier, does not apply to negotiable notes and bills executed in the ordinary course of business. *Rockwell v. Elkhorn Bank*, 13 Wis. 635; *Safford v. Wyckoff*, 4 Hill (N. Y.) 442. *Contra*, *Smith v. Strong*, 2 Hill (N. Y.) 244.

Construction of Charter.—A provision in a bank charter requiring that "all bills, bonds, notes, and every other contract or engagement" entered into by the bank, shall be signed by the president or vice-president and countersigned by the cashier, does not apply to a check signed by the cashier alone or to contracts which the law implies. *Mechanics' Bank v. Columbia Bank*, 5 Wheat. (U. S.) 326; *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Bank as Maker.—In *Rockwell v. Elkhorn Bank*, 13 Wis. 653, a note in form "Elkhorn Bank promises to pay," and signed "D. D. S., cashier," was held to bind the bank.

Notice of Protest.—Where a note indorsed by a bank was protested, notice of protest stating that "the holder looks to you for payment," and addressed to "J. S. H., Pres't," was held sufficient to charge the bank. *Aiken v. Marine Bank*, 16 Wis. 679.

Insurance Company.—The rule has been extended so as to include insurance companies. Thus, a note payable to such a company, and indorsed "W. Earl, Secretary," was held to be sufficient to bind the insurance company as indorser. *Nicholas v. Oliver*, 36 N. H. 218; *Ohio State Bank v. Fox*, 3 Blatchf. (U. S.) 431.

Illinois—Wide Scope of Rule.—In *Illinois*, the rule as generally applied to banks is applied to other corporations, the principle as declared in the leading cases being that "where a party signs his name as cashier or agent for a banking, railroad, or other cor-

d. SIMPLE CONTRACTS OTHER THAN NEGOTIABLE INSTRUMENTS—(1) General Rule—Intention Controlling.—Contracts not under seal, other than negotiable instruments, require but little observance of mere form. The intention of the parties is the prevailing consideration in the construction of this class of contracts;¹ and the rule is well established that, if the nature

poration, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness, in its ordinary business, if it appears, or is made to appear, it is the obligation of the corporation, and the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence." *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71.

1. *England.*—*Green v. Kopke*, 18 C. B. 549, 86 E. C. L. 549.

United States.—*Whitney v. Wyman*, 101 U. S. 302; *Post v. Pearson*, 108 U. S. 418.

Alabama.—*Roney v. Winter*, 37 Ala. 278.

California.—*McDonald v. Bear River, etc.*, Water, etc., Co., 13 Cal. 235.

Connecticut.—*Hovey v. Magill*, 2 Conn. 682; *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429.

Indiana.—*Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680.

Maine.—*Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Dyer v. Burnham*, 25 Me. 9; *Rogers v. March*, 33 Me. 106; *Winship v. Smith*, 61 Me. 122.

Massachusetts.—*Bray v. Kettell*, 1 Allen (Mass.) 80; *Lyon v. Williams*, 5 Gray (Mass.) 557; *New England Marine Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56; *Blanchard v. Blackstone*, 102 Mass. 343; *Cutler v. Ashland*, 121 Mass. 588.

Michigan.—*Detroit v. Jackson*, 1 Dougl. (Mich.) 106.

Minnesota.—*Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502.

Missouri.—*Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505.

New York.—*Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188; *Spencer v. Field*, 10 Wend. (N. Y.) 87; *Pentz v. Stanton*, 10 Wend. (N. Y.) 275, 25 Am. Dec. 558; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Evans v. Wells*, 22 Wend. (N. Y.) 324.

North Carolina.—*Fowle v. Kerchner*, 87 N. Car. 49.

Texas.—*Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152.

Vermont.—*Roberts v. Button*, 14 Vt. 195.

Illustration.—In *Gilmore v. Pope*, 5 Mass. 491, the cause came before the court on a statement of facts agreed, from which it appeared that the plaintiff was the authorized agent of a corporation to whose stock the defendant had subscribed and at the same time given a written promise to the plaintiff, without designating him as agent, to pay all assessments of the corporation. It was held that the plaintiff could not maintain an action in his own name for unpaid assessments, but

that the promise would support an action by the corporation.

Corporation Principal.—In *Gottfried v. Miller*, 104 U. S. 521, the court by Mr. Justice Woods said: "The rule as laid down by the authorities is that the agent should, in the body of the contract, name the corporation as the contracting party, and sign as its agent or officer."

Statute of Frauds.—The signature of a memorandum, which is a sufficient compliance with the provisions of the statute of frauds, may be made by an agent, though he write his own name instead of that of his principal, if it is his intention that the latter should be bound by it. *Kemey v. Proctor*, 3 Ves. & B. 57; *White v. Proctor*, 4 Taunt. 209; *Coles v. Trecothick*, 9 Ves. Jr. 234; *Williams v. Bacon*, 2 Gray (Mass.) 387; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Conaway v. Sweeney*, 24 W. Va. 643. See the title *FRAUDS, STATUTE OF*.

Foreign Principal.—While the rule stated in the text is in general true, an apparent exception has arisen in cases of an agent contracting for a foreign principal. There is no presumption of law that the agent is liable personally, but where the contract on its face fails to clearly disclose the intent of the parties it will be presumed that credit was given to the agent.

England.—*Lennard v. Robinson*, 5 El. & Bl. 130, 85 E. C. L. 130; *Mahony v. Kekule*, 14 C. B. 396, 78 E. C. L. 396; *Green v. Kopke*, 18 C. B. 558, 86 E. C. L. 558; *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335; *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Paterson v. Gandasequi*, 15 East 62.

Louisiana.—*New Castle Mfg. Co. v. Red River R. Co.*, 1 Rob. (La.) 145, 36 Am. Dec. 686.

Maine.—*Rogers v. March*, 33 Me. 106.

New York.—*Hochster v. Baruch*, 5 Daly (N. Y.) 440.

In *De Bebian v. Gola*, 64 Md. 262, an action was brought on an instrument in the following form: "Royal Consular Agency of Italy. Received from Charles Gola, for the use of this vice-consulate of Italy, etc.—E. De Merolla." There appeared on the instrument a seal marked "Royal Consular Agency of Italy, Baltimore." It was held that the maker of the note was individually liable thereon. The court said: "The theory that these notes or receipts are obligations resting upon the 'vice-consulate of Italy, at Baltimore,' and to be assumed and paid by De Merolla's successors in office, or, to put the matter plainly, that the Italian government—for that is what such a theory would mean—would issue bonds or pay for all money borrowed by a vice-consul, does not deserve any serious consideration." *Ritchie, J., dissented* on the ground that the maker of the note was a public officer.

and circumstances of the transaction show that the intention was to bind the principal and not the agent, effect will be given to such intention,¹ though the agent signs in his own name merely.²

(2) *Execution in Principal's Name.*—Where a contract throughout is in the name of the principal, it is not essential to its proper execution that the name of the agent, or the fact that it was executed by an agent, appear at all, though done by the hand of the agent; the latter may sign his principal's name merely.³

c. ADMISSIBILITY OF PAROL EVIDENCE.—(1) *Instruments under Seal.*—**Parol Evidence Not Admissible to Discharge Agent or Charge Principal.**—When an agent, contracting under seal, executes his authority in such a manner as to bind himself personally, according to the rules previously laid down for the execution of such contracts, parol evidence is not admissible to discharge the agent from liability,⁴ or charge the principal on the contract.⁵ Nor is such evidence admissible to enable one not a party to a sealed instrument to maintain an action thereon.⁶

For a full discussion of this subject see *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Agent to Third Parties.*

1. *England.*—*Bowen v. Morris*, 2 Taunt. 374; *Price v. Taylor*, 5 H. & N. 540.

Alabama.—*Stringfellow v. Mariott*, 1 Ala. 573.

Connecticut.—*Hewitt v. Wheeler*, 22 Conn. 557.

Iowa.—*Armstrong v. Borland*, 35 Iowa 537; *Harkins v. Edwards*, 1 Iowa 426; *Wheelock v. Winslow*, 15 Iowa 464.

Kentucky.—*M'Calla v. Rigg*, 3 A. K. Marsh. (Ky.) 259; *Carson v. Lucas*, 13 B. Mon. (Ky.) 213.

Massachusetts.—*Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561, 66 Am. Dec. 384; *Page v. Wight*, 14 Allen (Mass.) 182; *Cutler v. Ashland*, 121 Mass. 588; *Goodenough v. Thayer*, 132 Mass. 152; *Cook v. Gray*, 133 Mass. 106.

Michigan.—*Knickerbocker v. Wilcox*, 83 Mich. 200.

Minnesota.—*Deering v. Thom*, 29 Minn. 120.

Missouri.—*McGee v. Larramore*, 50 Mo. 425.

New York.—*Hill v. Miller*, 76 N. Y. 32; *Stanton v. Camp*, 4 Barb. (N. Y.) 274.

North Carolina.—*McCall v. Clayton*, Busb. (N. Car.) 422.

Pennsylvania.—*Lancaster v. Knickerbocker Ice Co.*, 153 Pa. St. 427, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 392.

Virginia.—*Walker v. Christian*, 21 Gratt. (Va.) 293.

Illustration.—An order to deliver goods addressed to "Union Stove Co.," having written across its face, "Accepted, J. F. Wood, Treas.," is the contract of the company. *Rogers v. Union Stove Co.*, 134 Mass. 31.

Body of Instrument Controls.—In *Revolving Scraper Co. v. Tuttle*, 61 Iowa 423, 47 Am. Rep. 816, it was held that the language in the body of an instrument controls its legal effect, and if that imports a personal obligation it will be held to be such, notwithstanding the signers may have appended to their names some official designation.

2. *United States.*—*Whitney v. Wyman*, 101 J. S. 392.

Alabama.—*Jones v. Morris*, 61 Ala. 518.

California.—*Haskell v. Cornish*, 13 Cal. 45; *McDonald v. Bear River, etc.*, Water, etc., Co., 13 Cal. 220; *Love v. Sierra Nevada Lake Water, etc.*, Co., 32 Cal. 654, 91 Am. Dec. 602.

Maryland.—*Key v. Parnham*, 6 Har. & J. (Md.) 418; *McClernan v. Hall*, 33 Md. 293.

Massachusetts.—*Lamson, etc.*, Mfg. Co. v. Russell, 112 Mass. 387.

New Hampshire.—*Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82.

New York.—*Stanton v. Camp*, 4 Barb. (N. Y.) 274.

North Carolina.—*Fowle v. Kerchner*, 87 N. Car. 49.

Ohio.—*Wheeler v. Knaggs*, 8 Ohio 169.

Repugnant Addition to Signature.—An agent having a power of attorney from his principal to sell stock executed the following assignment: "I, A, by my attorney C, sell and transfer to B, etc.," signed "C, attorney for B." It was held that it was sufficient for C to sign the contract without any addition of the character in which he acted, the same having been distinctly averred in the instrument, and that the words "attorney for B" must be rejected, being repugnant to the whole instrument, and appearing to be a mere act of inadvertence. *Bend v. Susquehanna Bridge, etc.*, Co., 6 Har. & J. (Md.) 128, 14 Am. Dec. 261.

Agent Alone Bound.—In *Chouteau v. Paul*, 3 Mo. 260, an agreement not under seal purporting to be by B. P., who styled himself the agent of C, and was signed by B. P., was held to be the agreement of B. P. and not of C. But see *Warrick County v. Butterworth*, 17 Ind. 129.

3. *Human v. Cuniffe*, 32 Mo. 316. And see *supra*, this section, *Negotiable Instruments—Signature in Principal's Name.*

4. *Platt v. Cathell*, 3 Den. (N. Y.) 604; *Lincoln v. Crandell*, 21 Wend. (N. Y.) 101; *Delius v. Cawthorn*, 2 Dev. (N. Car.) 90.

5. *Beckham v. Drake*, 9 M. & W. 79; *Nobleboro v. Clark*, 68 Me. 87; *Willis v. Bellamy*, 52 N. Y. Super. Ct. 373; *Delius v. Cawthorn*, 2 Dev. (N. Car.) 90. But see the opinion of Senator Verplanck in *Evans v. Wells*, 22 Wend. (N. Y.) 324.

6. *Beckham v. Drake*, 9 M. & W. 79; *Spencer v. Field*, 10 Wend. (N. Y.) 88.

Instrument Ambiguous.—But where the instrument on its face is ambiguous, parol evidence has been held admissible to determine the intent of the parties.¹

(2) **Negotiable Instruments**—(a) **Action between the Original Parties**—When Parol Evidence Admissible.—Where the names of both principal and agent appear on a negotiable instrument in such a manner as to render it doubtful to whom credit is given, parol evidence is admissible between the original parties to the instrument and others affected with notice, to remove the doubt.²

1. **Intention Shown where Instrument Ambiguous.**—In *Shuetze v. Bailey*, 40 Mo. 69, an agreement under seal purporting to be between "Kenneth Mackenzie, agent for V. S. Stevenson, of the first part, and George Bailey, of the second part," concluded: "In witness whereof said parties of the first and second parts have hereto set their hands and seals, etc. K. Mackenzie [L. s.], agent for V. S. Stevenson. Geo. Bailey [L. s.]" It was held that the instrument was ambiguous and parol evidence was admissible to show the intent of the parties. And see *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131.

2. **United States.**—*Dessau v. Bours*, 1 McAll. (U. S.) 20; *Baldwin v. Newbury Bank*, 1 Wall. (U. S.) 234.

Alabama.—*McWhorter v. Lewis*, 4 Ala. 198.

California.—*Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106.

Colorado.—*Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68, *overruling Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278, 9 Am. Rep. 156.

Connecticut.—*Hovey v. Magill*, 2 Conn. 680.

Georgia.—*Cleaveland v. Stewart*, 3 Ga. 283.

Illinois.—*LaSalle Nat. Bank v. Tolu Rock, etc., Co.*, 14 Ill. App. 141.

Kentucky.—*Webb v. Burke*, 5 B. Mon. (Ky.) 51; *Owings v. Grubbs*, 6 J. J. Marsh. (Ky.) 32.

Maine.—*Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421.

Maryland.—*Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139; *Laffin, etc., Power Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472.

Massachusetts.—*Shattuck v. Eastman*, 12 Allen (Mass.) 369.

Michigan.—*Keidan v. Winegar*, 95 Mich. 430, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 390, 391.

Minnesota.—*Bingham v. Stewart*, 13 Minn. 106.

Mississippi.—*Martin v. Smith*, 65 Miss. 1; *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229; *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432.

Missouri.—*Turner v. Thomas*, 10 Mo. App. 338; *Shuetze v. Bailey*, 40 Mo. 69; *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316; *McClellan v. Reynolds*, 49 Mo. 312; *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Klostermann v. Loos*, 58 Mo. 290.

Montana.—*Gerber v. Stuart*, 1 Mont. 172.

Nevada.—*Gillig v. Lake Bigler Road Co.*, 2 Nev. 214.

New York.—*Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94; *Babcock v. Beman*, 11 N. Y. 200; *White v. Skinner*, 13

Johns. (N. Y.) 307, 7 Am. Dec. 381; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Utica Bank v. Magher*, 18 Johns. (N. Y.) 342; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Genesee Bank v. Patchin Bank*, 19 N. Y. 312; *Newman v. Greeff*, 101 N. Y. 663.

Virginia.—*Early v. Wilkinson*, 9 Gratt. (Va.) 68; *Richmond, etc., R. Co. v. Snead*, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

Instrument Indicating Agency—Parol Evidence Admissible.—In *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366, there was appended to a bill in equity a note of the following form: "I promise to pay S. H. P., etc. (the same for expenses paid by him for board and education of S. B. previous to her marriage)." The note was signed by the husband of S. B., with the addition to his name of the words "acting trustee." It was held that the note, in the absence of extrinsic evidence, would *prima facie* impose a personal liability upon the husband; yet the fact that his name was subscribed to it with the description of acting trustee would entitle him or its owner to show by parol evidence the consideration, intention, and purpose of the note and the true character of the transaction, and, these being thus proved, the court of chancery would not allow the sense and equity of the transaction to be controlled by the mere form of the note. And see *Kenyon v. Williams*, 19 Ind. 44.

In an action between the original parties to a note in the usual form, signed by the trustees of a church society, describing themselves as such, parol evidence was admitted to show that the note was given for a debt of the society, and that the signers were its authorized agents to make the note, and to correct an error in the name of the society. *Brockway v. Allen*, 17 Wend. (N. Y.) 40.

In an action between the original parties to a note in form "I promise to pay," and signed by the defendant with the addition to his name "Treas'r Ohio & Miss. R. R. Co.," parol evidence was held admissible to discharge the defendant. *Smith v. Alexander*, 31 Mo. 193. See also *Lazarus v. Shearer*, 2 Ala. 718; *Drake v. Flewellen*, 33 Ala. 106.

In *Wetumpka, etc., R. Co. v. Bingham*, 5 Ala. 657, parol evidence was held admissible in an action by the payee against the drawer of a bill headed "Wetumpka & Coosa Rail Road, President's Office," and signed by a person describing himself as "Pres't."

In *Mechanics' Bank v. Columbia Bank*, 5 Wheat. (U. S.) 326, the action was between the original parties on a check having printed on its margin "Mechanics' Bank, Alexandria," and drawn by "William Paton, Jr.," on the "cashier of the Bank of Colum-

Instrument Not Indicating Principal.—But where neither the name of the principal nor any other circumstance appears on the face of the instrument to connect it with him, extrinsic evidence is not admissible to show any other intent than that expressed in the instrument to bind the agent, though the word "agent" is added to the signature.¹

Parol Evidence Not Admissible to Discharge Agent.—Nor is such evidence admissible to discharge an agent who signs his own name merely to a negotiable instru-

bia," payable to the order of "P. H. Minor." Extrinsic evidence was admitted to show that the drawer of the check was cashier of the Mechanics' Bank, and that the check was drawn by the bank and not Paton personally.

See *supra*, this section, *Negotiable Instruments—Signature in Agent's Name.*

Parol Evidence to Show by Whom Consideration was Received.—In *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, the court laid down the rule as stated in the text, and said further: "Even if it could be said that there were no indications suggestive of agency on the face of the note, * * * evidence was admissible tending to prove that the consideration * * * was received by the Pioneer Company [the principal] and the credit extended to the company alone."

Parol Evidence Inadmissible—Illustrations.—In *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421, the action was between the original parties on a note beginning, "We promise to pay," and signed "A. and C., President and Directors of the P. & S. C. Co." It was held that A. and C. were personally liable, and that there was no ambiguity in the note to let in extrinsic evidence. And see *McClure v. Livermore*, 78 Me. 390.

A note in form, "We promise to pay," and signed by several persons, with the words "Trustees of the First * * * Church" added, binds the signers personally, and extrinsic evidence is not admissible to show a different intent. *Hayes v. Brubaker*, 65 Ind. 27; *Williams v. Lafayette Second Nat. Bank*, 83 Ind. 237; *Hills v. Bannister*, 8 Cow. (N. Y.) 31.

In *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409, parol evidence was held inadmissible in an action between the original parties to a note in form, "I promise to pay. Jno. T. Hull, Treas. St. Paul's Parish." It was also held that the statutory modification of the common-law rule as to the execution of contracts by agents does not change the rule as to admissibility of parol evidence.

1. *United States.*—*Dessau v. Bours*, 1 McAll. (U. S.) 20.

California.—*Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529.

Georgia.—*Bedell v. Scarlett*, 75 Ga. 56.

Illinois.—*Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624.

Indiana.—*Kenyon v. Williams*, 19 Ind. 45; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226.

Iowa.—*Thurston v. Mauro*, 1 Greene (Iowa) 231; *Wing v. Glick*, 56 Iowa 473, 41 Am. Rep. 118.

Maine.—*Hancock v. Fairfield*, 30 Me. 299.

Massachusetts.—*Slawson v. Loring*, 5 Allen (Mass.) 340, 81 Am. Dec. 750; *Brown v. Par-*

ker, 7 Allen (Mass.) 337; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Bedford Commercial Ins. Co. v. Covell*, 8 Met. (Mass.) 442; *Bass v. O'Brien*, 12 Gray (Mass.) 477; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Bartlett v. Hawley*, 120 Mass. 92.

Nebraska.—*Webster v. Wray*, 19 Neb. 558, 56 Am. Rep. 752.

New Mexico.—*Luna v. Mohr*, 3 N. Mex. 56.

New York.—*Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558.

Ohio.—*Anderton v. Shoup*, 17 Ohio St. 126; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Bank v. Cook*, 38 Ohio St. 442.

Parties Affected with Notice—Parol Evidence Admissible.—In *Metcalfe v. Williams*, 104 U. S. 93, a bill in equity was filed to set aside a judgment at law, rendered on a check signed by two persons, one describing himself as "V. Pres't" and the other as "Sec'y." It appeared that the person claiming the beneficial interest, for whose benefit the action was brought, was a fellow agent, with the signers, of the company on whose account the check was drawn, and it was held that under such circumstances he could not pretend to be ignorant of the character of the instrument. Extrinsic evidence was admitted to show that the check was given by the company though this was not disclosed on its face.

In *Roberts v. Austin*, 5 Whart. (Pa.) 313, an action was brought by the payee against the drawer of a bill of exchange, signed by the latter in his own name merely. Parol evidence was admitted to show that the drawer was agent of the drawee and had given the bill in the business of the latter, and that the payee knew the facts when he received the bill. And see *Miles v. O'Hara*, 1 S. & R. (Pa.) 32.

Contra.—But see *Hicks v. Hinde*, 9 Barb. (N. Y.) 528, where a draft in favor of the plaintiff was signed, "John Hinde, Agent," and extrinsic evidence was admitted to discharge Hinde from liability.

And in *Moore v. McClure*, 8 Hun (N. Y.) 557, parol evidence was held admissible to charge the principal on a note similarly signed. The court, by Talcott, J., said: "The fact that the name of the principal does not appear on the face of the note is not, under the modern decisions in this state, at all conclusive. If it was intended to be given in the business of the principal, was in fact so given, and with due authority, it is binding on the principal, and all this is matter of evidence."

See also *Merchants' Bank v. Central Bank*, 1 Ga. 429, 44 Am. Dec. 665.

ment, though he describes himself in the body of the instrument as agent of another.¹

(b) *Action by Bona Fide Holder.*—One who takes negotiable paper contracts with the parties appearing on its face, and parol evidence is not admissible to add a principal not so appearing.²

When Parol Evidence Admitted.—But extrinsic evidence has been admitted where there was sufficient on the face of the instrument to reasonably suggest the intention to contract as agent and not as principal,³ or to show that the name in which the contract was made was the name adopted by the party sought to be charged, for the purpose of making such contracts.⁴

(3) *Other Simple Contracts.*—Parol evidence is admissible to show the intent of the parties to a non-negotiable simple contract, when there is anything

1. *Magee v. Atkinson*, 2 M. & W. 440; *Nash v. Towne*, 5 Wall. (U. S.) 689; *Mann v. Smyser*, 76 Ill. 365; *Hypes v. Griffin*, 89 Ill. 135, 31 Am. Rep. 71; *Williams v. Lafayette Second Nat. Bank*, 83 Ind. 237; *Morell v. Codding*, 4 Allen (Mass.) 403; *Newcomb v. Clark*, 1 Den. (N. Y.) 226; *Phelps v. Borland*, 30 Hun (N. Y.) 362; *Babbett v. Young*, 51 N. Y. 238; *Titus v. Kyle*, 10 Ohio St. 444.

When Not Admissible to Charge Agent.—Likewise, such evidence is not admissible to charge an agent personally who has contracted in the name of his principal. *Lieb-scher v. Kraus*, 74 Wis. 387, 17 Am. St. Rep. 171; *Delius v. Cawthorn*, 2 Dev. (N. Car.) 90; *McClerman v. Hall*, 33 Md. 293.

But see *Milligan v. Lyle*, 24 La. Ann. 144, where a bill of exchange concluding, "charge the same to B.'s account," was signed "A.," and extrinsic evidence was admitted to show that it was not A.'s intention to bind himself personally.

Note by Corporation, Signature by Agents Personally.—A note in form, "We, the trustees of C. H. College, promise to pay," and signed by several persons in their own names merely, is *prima facie* the note of the makers, but parol evidence is admissible to show intention to bind the corporation. *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152. See also *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502.

2. *United States.*—*Cragin v. Lovell*, 109 U. S. 194.

Colorado.—*Heaton v. Myers*, 4 Colo. 62.

Connecticut.—*Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225.

Iowa.—*Thurston v. Mauro*, 1 Greene (Iowa) 231.

Massachusetts.—*Bank of British North America v. Hooper*, 5 Gray (Mass.) 567, 66 Am. Dec. 390; *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460; *Taber v. Cannon*, 8 Met. (Mass.) 456; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396.

Nebraska.—*Webster v. Wray*, 19 Neb. 558, 56 Am. Rep. 754.

New York.—*DeWitt v. Walton*, 9 N. Y. 571.

Ohio.—*Anderton v. Shoup*, 17 Ohio St. 125; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829.

Vermont.—*Arnold v. Sprague*, 34 Vt. 409.

But see *Green v. Skeel*, 2 Hun (N. Y.) 486, where parol evidence was admitted in an action by the indorser of a note signed by

the defendant with the addition of the word "agent" to his name.

In *Condon v. Pearce*, 43 Md. 83, an action was brought by an indorsee of a note payable to the Cecil Fire Brick Co., and indorsed, "M. B., Treas'r. H. C." It was held that parol evidence was inadmissible to show that H. C. indorsed as president of the company and thereby relieved him of personal liability as indorser.

Action between Principal and Agent.—In *Kimmell v. Bittner*, 62 Pa. St. 203, the action was by the indorsee of a bill against his indorser. Parol evidence was admitted to show that the defendant was the plaintiff's attorney and in collecting money for his principal took bills payable to himself and indorsed them to his principal. It was further shown that this manner of conducting the business was expressly ratified by the principal. It was held that the attorney indorsed the bill merely for the purpose of transferring title and was not liable as indorser. And see *Sharp v. Emmet*, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190. *Compare Heubach v. Rother*, 2 Duer (N. Y.) 227.

3. *Intention to Contract as Agent.*—In *Paige v. Stone*, 10 Met. (Mass.) 160, an action was brought by the indorsee of a note in form "I promise to pay," and signed "A, for the assignees." The court held that the meaning of the words "for the assignees" was a question for the jury, extrinsic evidence being admitted to show who were meant.

In *Kean v. Davis*, 21 N. J. L. 683, a bill of exchange payable to "E. & S. R. R. Co." and signed "J. K., Pres't E. & S. R. R. Co.," was held to be ambiguous, and parol evidence was admitted to show the intent of the parties in an action by a *bona fide* holder.

In *Hood v. Hallenbeck*, 7 Hun (N. Y.) 362, parol evidence was held admissible in an action by an indorsee on a note bearing a corporate seal and signed by the trustees of the corporation with the addition of their official designation. See also *May v. Hewitt*, 33 Ala. 161; *Stearns v. Allen*, 25 Hun (N. Y.) 558; *Lee v. Methodist Episcopal Church*, 52 Barb. (N. Y.) 116.

4. *Barlow v. Congregational Soc.*, 8 Allen (Mass.) 460; *Société des Mines d'Argent v. Mackintosh*, 5 Utah 568. And see *supra*, this section, *Negotiable Instruments—Signature in Agent's Name.*

on the face of the instrument to render it doubtful to whom credit was given.¹ Such evidence is also admissible to charge an undisclosed principal,² or enable him to bring an action,³ but not to discharge the agent who has contracted in his own name.⁴

1. *United States*.—*U. S. v. Parmele*, 1 Paine (U. S.) 252; *Lockwood v. Coley*, 22 Fed. Rep. 192.

Colorado.—*Rhone v. Powell*, 20 Colo. 41.

Georgia.—*Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Maine.—*Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521.

Massachusetts.—*Arfridson v. Ladd*, 12 Mass. 173.

Missouri.—*Ziegler v. Fallon*, 28 Mo. App. 295; *Blakely v. Bennecke*, 1 Mo. 193; *Ferris v. Thaw*, 72 Mo. 446.

Nevada.—*Gillig v. Lake Bigler Road Co.*, 2 Nev. 214.

New York.—*Becker v. Lamont*, 13 How. Pr. (N. Y. Supreme Ct.) 23.

Vermont.—*Roberts v. Button*, 14 Vt. 195.

Virginia.—*Walker v. Christian*, 21 Gratt. (Va.) 291.

In *Richmond, etc., R. Co. v. Snead*, 19 Gratt. (Va.) 354, 100 Am. Dec. 670, parol evidence was held admissible to show the intent of the parties in a contract to pay for "labor performed on cottage lot of the railroad company," signed by an agent in his own name merely.

Agent Prima Facie Liable—Burden of Proof.—In *Pratt v. Beaupre*, 13 Minn. 187, a contract beginning, "We, Temple & Beaupre," and signed by T. & B. with the addition to their signatures of the words "Agents Steamer Flora," was held to be *prima facie* the personal contract of the signers, with the burden of proof on the party seeking to change the *prima facie* character. And see *Peterson v. Homan*, 44 Minn. 166, 20 Am. St. Rep. 564.

2. *England*.—*Beckham v. Drake*, 9 M. & W. 79; *Irvine v. Watson*, 5 Q. B. Div. 414.

United States.—*Lockwood v. Coley*, 22 Fed. Rep. 192; *Nash v. Towne*, 5 Wall. (U. S.) 689.

Alabama.—*McTyer v. Steele*, 26 Ala. 487.

Connecticut.—*Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174.

Georgia.—*Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Illinois.—*Porter v. Day*, 44 Ill. App. 256.

Iowa.—*Bryan v. Brazil*, 52 Iowa 350.

Massachusetts.—*Brown v. Parker*, 7 Allen (Mass.) 337; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Hunter v. Giddings*, 97 Mass. 42, 93 Am. Dec. 54; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314.

Minnesota.—*Bacon v. Rupert*, 39 Minn. 512.

Missouri.—*Ferris v. Thaw*, 72 Mo. 446; *Mantz v. Maguire*, 52 Mo. App. 136.

New Hampshire.—*Chandler v. Coe*, 54 N. H. 561.

New Jersey.—*Borcherling v. Katz*, 37 N. J. Eq. 150.

New York.—*Coleman v. Elmira First Nat.*

Bank, 53 N. Y. 388; *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615; *Nicoll v. Burke*, 78 N. Y. 580; *Kayton v. Barnett*, 116 N. Y. 625.

North Carolina.—*Neaves v. North State Min. Co.*, 90 N. Car. 412.

Ohio.—*Anderton v. Shoup*, 17 Ohio St. 126; *Wilson v. Bailey*, 1 Handy (Ohio) 177.

Pennsylvania.—*Hubbard v. Tenbrook*, 124 Pa. St. 291, 10 Am. St. Rep. 585.

South Carolina.—*Bacon v. Sondley*, 3 Strobb. (S. Car.) 542, 51 Am. Dec. 646.

Texas.—*Texas Land, etc., Co. v. Carroll*, 63 Tex. 48.

Vermont.—*Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324.

Washington.—*Brewster v. Baxter*, 2 Wash. Ter. 135.

Action between Principal and Agent.—When an agent contracts in his own name, disclosing no principal, parol evidence is admissible to charge the principal in an action between principal and agent. *Whitlock v. Hicks*, 75 Ill. 460.

See *supra*, this section, *Admissibility of Parol Evidence—Negotiable Instruments*.

But see *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214, where it was held that parol evidence is not admissible either to discharge a party to a written contract, or to add to it another not appearing on the face of the contract.

In *Davison v. Davenport Gas-light, etc., Co.*, 24 Iowa 419, it was held that where one contracts without disclosing either the principal or the fact of agency, parol evidence is not admissible to charge another as principal, in an action on the contract; but if the alleged principal in fact received the benefit of such contract, he may be held liable in a suit in equity founded upon the special facts of the case. See also *Rowell v. Oleson*, 32 Minn. 288.

3. *England*.—*Sims v. Bond*, 5 B. & Ad. 389, 27 E. C. L. 97; *Higgins v. Senior*, 8 M. & W. 834.

United States.—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Pacific Guano Co. v. Holleman*, 12 Fed. Rep. 61.

California.—*Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618.

Massachusetts.—*Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *National L. Ins. Co. v. Allen*, 116 Mass. 398.

New Hampshire.—*Elkins v. Boston, etc., R. Co.*, 19 N. H. 337, 51 Am. Dec. 184.

New York.—*Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Beebe v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; *Nicoll v. Burke*, 78 N. Y. 580.

Vermont.—*U. S. National Bank v. Burton*, 58 Vt. 426; *Rutland, etc., R. Co. v. Cole*, 24 Vt. 33.

4. *England*.—*Higgins v. Senior*, 8 M. & W. 834.

United States.—*Lockwood v. Coley*, 22 Fed. Rep. 192.

Georgia.—*Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

*f. PUBLIC OFFICERS*¹.—Presumed to have Contracted on Principal's Credit.—For evident reasons, founded on public policy, the contracts of public agents and officers have been put on a different footing from the contracts of agents of individuals. In the former case the credit is presumed to have been given to the principal; and contracts of such agents, when within the scope of the authority delegated, are not binding on the agent, although executed in a manner which would have made him personally liable had he been acting for an individual.²

Negotiable Instruments—Contracts under Seal—The rule is not confined in its application to simple contracts, but includes as well negotiable instruments³ and

Missouri.—Mantz v. Maguire, 52 Mo. App. 136.

New Hampshire.—Chandler v. Coe, 54 N. H. 561.

New York.—Chappell v. Dann, 21 Barb. (N. Y.) 17; Auburn City Bank v. Leonard, 40 Barb. (N. Y.) 119; Babbett v. Young, 51 N. Y. 238.

Ohio.—Wilson v. Bailey, 1 Handy (Ohio) 177.

1. See the title PUBLIC OFFICERS.

2. *England*.—Macbeath v. Haldimand, 1 T. R. 172; Rice v. Chute, 1 East 579.

United States.—Hodgson v. Dexter, 1 Cranch (U. S.) 345; Parks v. Ross, 11 How. (U. S.) 374; Garland v. Davis, 4 How. (U. S.) 149; Stone v. Mason, 2 Cranch (C. C.) 431.

Connecticut.—Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Adams v. Whittlesey, 3 Conn. 560; Perry v. Hyde, 10 Conn. 329.

Indiana.—Sparta School Township v. Mendall, 138 Ind. 188, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 386.

Massachusetts.—Brown v. Austin, 1 Mass. 208, 2 Am. Dec. 11; Freeman v. Otis, 9 Mass. 272, 6 Am. Dec. 66; Whiting v. Dewey, 15 Pick. (Mass.) 428; Dawes v. Jackson, 9 Mass. 490.

Minnesota.—Balcombe v. Northup, 9 Minn. 172; Sanborne v. Neal, 4 Minn. 126, 77 Am. Dec. 502.

Missouri.—Lapsley v. McKinstry, 38 Mo. 245.

New Hampshire.—Underhill v. Gibson, 2 N. H. 352, 9 Am. Dec. 82.

New Jersey.—Stewart v. Johnson, 1 N. J. L. 31.

New York.—Walker v. Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Olney v. Wickes, 18 Johns. (N. Y.) 126; Belknap v. Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621; Osborne v. Kerr, 12 Wend. (N. Y.) 180; Henderson v. Brown, 1 Cai. (N. Y.) 92, 2 Am. Dec. 164; Hall v. Lauderdale, 46 N. Y. 70; Fox v. Drake, 8 Cow. (N. Y.) 191.

North Carolina.—Hite v. Goodman, 1 Dev. & B. Eq. (N. Car.) 364; Stanly v. Hawkins, Mart. Dec. (N. Car.) 55.

Pennsylvania.—Cook v. Irvine, 5 S. & R. (Pa.) 492, 9 Am. Dec. 397.

Tennessee.—Amison v. Ewing, 2 Coldw. (Tenn.) 366.

Virginia.—Tutt v. Lewis, 3 Call (Va.) 233.

Public Agents.—Likewise, the contracts of a public agent, though made in his name, enure to the benefit of his principal and should be sued on in the name of the principal. Hodg-

son v. Dexter, 1 Cranch (U. S.) 345; Balcombe v. Northup, 9 Minn. 172; U. S. v. Blount, 2 Law Repos. (N. Car.) 84.

But see Swift v. Hopkins, 13 Johns. (N. Y.) 313, where in an action on a parol contract it was held that unless the contractor shows distinctly that in making the contract he expressly or ostensibly acted as a public agent, it must be deemed a private contract.

See also Sheffield v. Watson, 3 Cai. (N. Y.) 69, where a government agent, known to be such, contracted for things for the use of the government in his own name, without reference to his official character, and it was held that the agent was liable personally on the contract.

Officers of a Town.—In Brown v. Bradlee, 156 Mass. 28, where the officers of a town offered, in writing, a reward for evidence leading to the arrest and conviction of a criminal, and signed the same, adding to their signatures the words "Selectmen of Milton," it was said that it has been doubted how far there is a difference between agents and officers of a town and agents of individuals. The court held that the persons signing the offer of reward were personally liable, conceding, however, that the conclusion was probably strengthened by the fact that the officers had exceeded their authority.

In Crawshaw v. Roxbury, 7 Gray (Mass.) 374, and Janvrin v. Exeter, 48 N. H. 83, 2 Am. Rep. 185, where the facts were almost identical with the facts in the preceding case, it was held that the officers of the towns were not personally liable.

3. *United States*.—Jones v. LeTombe, 3 Dall. (U. S.) 384.

Indiana.—Perrin v. Lyman, 32 Ind. 16; Wallis v. Johnson School Tp., 75 Ind. 368.

Iowa.—Harvey v. Irvine, 11 Iowa 82; Armstrong v. Borland, 35 Iowa 537.

Maine.—Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45.

New York.—Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

Public Agent Payee.—A note payable to "A, land agent of Maine," is in legal contemplation payable to the state, and an action on it should be brought in the name of the state. State v. Boies, 11 Me. 474; Irish v. Webster, 5 Me. 171.

Rule Governing Private Agents Applied.—There is some conflict among the cases as to the application of the rule stated in the text. Where the rule above has not been followed it will be found that it was not referred to, the courts citing and following decisions in

contracts executed under the seal of the agent.¹

Waiver of Official Immunity.—Such agents may waive their official immunity, however, and in express terms assume a personal liability.²

g. JOINT AGENTS—Private Agency.—When authority to perform an act of a private nature is conferred on two or more agents, the principal is bound only when the execution is by all.³

Contrary Intention.—But when the intention to confer a several authority is manifest, execution by one is sufficient.⁴

Public Agency.—In the execution of authority of a public nature, as a general

cases of private agency. The conflict has been confined to promissory notes executed by such public officers as the treasurer of the town, officers of a school board, etc.

School Trustees.—*School Trustees v. Rautenberg*, 88 Ill. 219.

Road Committee.—*Savage v. Rix*, 9 N. H. 263.

Town Treasurer.—*Ross v. Brown*, 74 Me. 352.

County Treasurer.—*Exchange Bank v. Lewis County*, 28 W. Va. 273. In this case the court, without referring to the rule as to public officers, said that the note in question was not sufficient in form, but it appeared that the county had not authority to execute the instrument.

1. *England.*—*Unwin v. Wolseley*, 1 T. R. 674.

United States.—*Hodgson v. Dexter*, 1 Cranch (C. C.) 109, 1 Cranch (U. S.) 345.

Georgia.—*Ghent v. Adams*, 2 Ga. 214.

Kentucky.—*Murray v. Carothers*, 1 Metc. (Ky.) 71; *Kentucky Bank v. Sanders*, 3 A. K. Marsh. (Ky.) 185, 13 Am. Dec. 149.

Maine.—*Stinchfield v. Little*, 1 Me. 231, 10 Am. Dec. 65.

Massachusetts.—*Dawes v. Jackson*, 9 Mass. 490.

Missouri.—*McClenticks v. Bryant*, 1 Mo. 598, 14 Am. Dec. 310.

New Jersey.—*Knight v. Clark*, 48 N. J. L. 22, 57 Am. Dec. 534.

North Carolina.—*U. S. v. Blount*, 2 Law Repos. (N. Car.) 84.

Pennsylvania.—*Heidelberg School Dist. v. Horst*, 62 Pa. St. 301.

Conveyance of Town Property.—In *New Hampshire* a deed purporting to convey property of a town executed in the individual names of a duly authorized committee, was held to be well executed and pass the title to the land. The decision was based on the mischief which would ensue from holding otherwise, it having been the custom in *New Hampshire* for thirty years to convey in this manner property belonging to towns. *Cofran v. Cockran*, 5 N. H. 458.

See *supra*, this section, *Instruments under Seal—Conveyances of Estates*.

2. *Connecticut.*—*Sterling v. Peet*, 14 Conn. 245.

Kentucky.—*Murray v. Carothers*, 1 Metc. (Ky.) 71; *Kentucky Bank v. Sanders*, 3 A. K. Marsh. (Ky.) 185, 13 Am. Dec. 149.

Massachusetts.—*Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66.

Missouri.—*Lapsley v. McKinstry*, 38 Mo. 245.

New York.—*Fox v. Drake*, 8 Cow. (N. Y.) 191; *Gill v. Brown*, 12 Johns. (N. Y.) 385; *Nichols v. Moody*, 22 Barb. (N. Y.) 611.

3. *Alabama.*—*Loeb v. Drakeford*, 75 Ala. 464.

Arkansas.—*Pulaski County v. Lincoln*, 9 Ark. 320.

Connecticut.—*Johnson v. Smith*, 21 Conn. 627.

Illinois.—*Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 185.

Maine.—*Purinton v. Security L. Ins., etc.*, Co., 72 Me. 22.

Maryland.—*White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699.

Massachusetts.—*Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *First Parish v. Cole*, 3 Pick. (Mass.) 232; *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84.

Michigan.—*Scott v. Young Men's Soc.*, 1 Dougl. (Mich.) 119.

Minnesota.—*Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827; *Rollins v. Phelps*, 5 Minn. 463.

New Hampshire.—*Jewett v. Alton*, 7 N. H. 253; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 226, 37 Am. Dec. 203; *Andover v. Grafton*, 7 N. H. 304.

New York.—*Salisbury v. Brisbane*, 61 N. Y. 617.

Pennsylvania.—*Case of Turnpike Road, etc.*, 5 Binn. (Pa.) 481; *Allegheny County v. Lecky*, 6 S. & R. (Pa.) 166.

Vermont.—*Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 217.

Virginia.—*Union Bank v. Beirne*, 1 Gratt. (Va.) 226.

Wisconsin.—*Soens v. Racine*, 10 Wis. 271.

Authority Conferred on a Partnership.—The rule has no application where the authority is given to a partnership as such. Each partner may execute, and the act of one is the act of the firm in strict pursuance of the power. *Gordon v. Buchanan*, 5 Verg. (Tenn.) 71; *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827; *Kennebec Co. v. Augusta Ins., etc., Co.*, 6 Gray (Mass.) 204; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *Purinton v. Security L. Ins., etc., Co.*, 72 Me. 22; *Beck v. Martin*, 2 McMull. (S. Car.) 260. See the title PARTNERSHIP.

4. *Guthrie v. Armstrong*, 5 B. & Ald. 628, 7 E. C. L. 215; *Heard v. March*, 12 Cush. (Mass.) 580; *French v. Price*, 24 Pick. (Mass.) 13; *Hawley v. Keeler*, 53 N. Y. 116; *Case of Turnpike Road, etc.*, 5 Binn. (Pa.) 481; *Soens v. Racine*, 10 Wis. 271.

rule, a majority may act,¹ provided all have notice and an opportunity to act.²

VIII. DUTIES AND LIABILITIES INTER SE.—1. Of Agent to Principal—*a*. FIDELITY TO INSTRUCTIONS—(1) *General Rule*—(a) *In Case of Remunerated Agent*.—It is the duty of the agent to follow faithfully the directions of his principal,³ and for any failure or refusal in this respect he may not only be dismissed from his agency,⁴ but also held liable to his principal for any loss or damage resulting.⁵

1, *England*.—Atty.-Gen. *v.* Davy, 2 Atk. 212; *Rex v. Beeston*, 3 T. R. 592; *Grindley v. Barker*, 1 B. & P. 229; *Withnell v. Gartham*, 6 T. R. 388.

United States.—*Cooley v. O'Connor*, 12 Wall. (U. S.) 391.

Alabama.—*Caldwell v. Harrison*, 11 Ala. 755.

Arkansas.—*Holland v. Davies*, 36 Ark. 446; *Crain v. State*, 45 Ark. 452.

Connecticut.—*Johnson v. Smith*, 21 Conn. 627.

Massachusetts.—*Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84; *Haven v. Lowell*, 5 Met. (Mass.) 35; *Reynolds v. New Salem*, 6 Met. (Mass.) 340; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Weymouth, etc., Fire Dist. v. Norfolk County*, 108 Mass. 142; *Worcester v. Railroad Com'rs*, 113 Mass. 161.

Minnesota.—*Rollins v. Phelps*, 5 Minn. 463.

New Hampshire.—*Andover v. Grafton*, 7 N. H. 304; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 226, 37 Am. Dec. 203.

New York.—*Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; *Ex p. Rogers*, 7 Cow. (N. Y.) 526.

North Carolina.—*Austin v. Helms*, 65 N. Car. 560.

Pennsylvania.—*Case of Turnpike Road, etc.*, 5 Binn. (Pa.) 481; *Allegheny County v. Lecky*, 6 S. & R. (Pa.) 166.

South Carolina.—*Geter v. Tobacco Inspection Com'rs*, 1 Bay (S. Car.) 354, 1 Am. Dec. 621; *State v. Delisseline*, 1 McCord (S. Car.) 60.

Vermont.—*Hill v. Sunderland*, 7 Vt. 215; *North Bennington First Nat. Bank v. Mount Taber*, 52 Vt. 87, 36 Am. Rep. 734.

Wisconsin.—*Soens v. Racine*, 10 Wis. 271; *Walker v. Rogan*, 1 Wis. 597; *Beaver Dam v. Frings*, 17 Wis. 400.

2. *Scott v. Young Men's Soc.*, 1 Dougl. (Mich.) 119; *Charles v. Hoboken*, 27 N. J. L. 205; *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 324; *Case of Turnpike Road, etc.*, 5 Binn. (Pa.) 481; *McCready v. Guardians of Poor*, 9 S. & R. (Pa.) 94, 11 Am. Dec. 667. See the title PUBLIC OFFICERS.

3. **Agent must Faithfully Follow Directions.**—*Loeb v. Hellman*, 45 N. Y. Super. Ct. 336; *Williams v. Littlefield*, 12 Wend. (N. Y.) 362; *Scott v. Rogers*, 31 N. Y. 676; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Le Guen v. Gouverneur*, 1 Johns. Cas. (N. Y.) 437, note, 1 Am. Dec. 121; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Mobile Bank v. Huggins*, 3 Ala. 206; *Holbrook v. McCarthy*, 61 Cal. 216; *Thomas v. Joslin*, 30 Minn. 388; *Raht v. Union Consol. Min. Co.*, 5 Lea (Tenn.) 1.

It is a well-established rule of law that an

agent is bound to execute the orders of his principal whenever for a valuable consideration he has undertaken to perform them, whether reasonable or not, unless prevented by some unavoidable accident without default on his part, or unless the instructions required him to do an illegal or immoral act. *Rechtscherd v. Accommodation Bank*, 47 Mo. 181; *Switzer v. Connett*, 11 Mo. 88. The directions constitute a part of the authority, and operate as a limitation upon it. *Johnson v. New York Cent. R. Co.*, 31 Barb. (N. Y.) 196. And he is generally bound to obey such instructions exactly if they are imperative and not discretionary. *Wilson v. Wilson*, 26 Pa. St. 393.

A violation of positive instructions is gross negligence, rendering the agent liable for such loss or damage as may result from it, and in such case every doubtful circumstance is construed against him. *Adams v. Robinson*, 65 Ala. 586.

He has no discretion to question the prudence of his instructions, provided they are explicit and intelligible and he is furnished with the necessary means. *Coker v. Ropes*, 125 Mass. 577.

Where a principal writes his agent referring him to another letter written to a third person for his government, the two letters together are to be taken as his letter of instructions; and if the principal refers the agent to the third person for advice, the agent is bound to apply to him for instructions and await a reasonable time for their receipt. *Mactier v. Wirgman*, 4 Har. & J. (Md.) 579.

4. *Ford v. Danks*, 16 La. Ann. 119; *Newman v. Reagan*, 65 Ga. 512. And see *infra*, this title, *Termination*.

5. **Liability of Agent for Disobedience of Instructions.**—*Sawyer v. Mayhew*, 51 Me. 398; *Amory v. Hamilton*, 17 Mass. 103; *Thompson v. Stewart*, 3 Conn. 172, 8 Am. Dec. 168; *Austill v. Crawford*, 7 Ala. 335; *Short v. Skipwith*, 1 Brock. (U. S.) 103; *Hasselmann v. Carroll*, 102 Ind. 153. And see *Heinemann v. Heard*, 50 N. Y. 27; *Milwaukee County v. Hackett*, 21 Wis. 613.

If an agent, through mistake or design, disobeys his instructions, he is undoubtedly responsible for any loss resulting. *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36.

It is his first duty to adhere faithfully to his instructions in all cases to which they can be properly applied, and if he neglects, exceeds, or violates them, he is responsible for all losses which are the natural consequence of his acts. *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327; *Ward v. Warfield*, 3 La. Ann. 468.

Illustrations.—Thus, if he sells to irresponsible parties when instructed to sell only to those of undoubted solvency,¹ or if, instructed to remit in a certain manner or in a certain medium, he remits in a different manner or medium,² or where instructed to sell for cash or for a certain price he sells on credit³ or for a less price,⁴ or where he fails to effect insurance as instruct-

He disregards specific instructions at his peril, and will be liable for any loss resulting from having adopted his own course, though he may have used reasonable diligence. *Butts v. Phelps*, 79 Mo. 302.

Agent to Procure Discount of Note.—An agent intrusted with a promissory note to be discounted, with instructions not to permit it to leave his hands without receiving the proceeds, is liable for a conversion of the note where he delivers it to a third party who promises to get and return the money on it, but who appropriates it to his own use. *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184, 53 How. Pr. (N. Y.) 152.

If, when Directed to Forward a Claim to a certain person for collection, he forwards it to another, the agent is liable for any loss resulting thereby. *Butts v. Phelps*, 79 Mo. 302.

An Agent Shipping Goods in a manner prohibited by his principal is liable as an insurer. *Wilts v. Morrell*, 66 Barb. (N. Y.) 511.

And a Common Carrier Disobeying the shipper's instructions as to forwarding goods is liable for their loss. *Johnson v. New York Cent. R. Co.*, 33 N. Y. 610, 88 Am. Dec. 416.

An Agent to Invest in certain securities is liable for any loss resulting from his failure to invest. *Short v. Skipwith*, 1 Brock. (U. S.) 103.

Agent to Buy Goods.—And if an agent purchases goods of a quality inferior to the kind authorized, the principal may repudiate the transaction. *Safford v. Kinsley*, 40 Vt. 506.

And see *Fahy v. Fargo* (Supreme Ct.), 17 N. Y. Supp. 344, 61 Hun (N. Y.) 623, where the agent failed to return a draft promptly upon non-payment, as directed; *Howatt v. Davis*, 5 Munf. (Va.) 34, 7 Am. Dec. 681, where the agent delivered goods to an insolvent buyer, notwithstanding orders to stop them while in transit; *Pape v. Westacott*, 42 W. R. 131, where an agent, instructed not to turn over to a tenant a license to assign the lease until the latter had paid all arrears of rent, surrendered it on receiving a check in payment of the arrears, which was afterwards dishonored.

Where an Agent Transferred Negotiable Securities contrary to instructions, and converted the money to his own use, he was held liable only to the extent of the consideration received by him. *Wolfe v. Brouwer*, 5 Robt. (N. Y.) 601.

1. Selling to Irresponsible Party Contrary to Instructions.—Where the agent is instructed to take nothing but "undoubted paper," or "first-class collectible paper," in payment, and he makes no effort to ascertain the solvency of the parties, or takes paper which he knows to be worthless, he may be charged with any loss or held liable as a guarantor. *Osborne v. Rider*, 62 Wis. 235; *Robinson Mach. Works v. Vorse*, 52 Iowa 207; *Clark v.*

Roberts, 26 Mich. 506. But see *Plano Mfg. Co. v. Buxton*, 36 Minn. 203.

2. Violating Instructions in Reference to Manner of Remitting.—*Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Kerr v. Cotton*, 23 Tex. 411.

An agent instructed to remit by express, who remits by check, is liable for the loss if the drawers afterwards become insolvent before payment. *Walker v. Walker*, 5 Heisk. (Tenn.) 425. And where one was instructed to remit by mail in notes of fifty and one hundred dollars, and he sent notes of the denominations of five, ten, and twenty dollars, thus increasing the size of the package, which was lost, he was held liable. *Wilson v. Wilson*, 26 Pa. St. 393. If, being instructed to remit by draft, an agent remits by letter, he is liable for the loss. *Foster v. Preston*, 8 Cow. (N. Y.) 198.

It is a sufficient compliance with general instructions to remit the proceeds of a sale, if the agent remit by a bill of exchange without indorsing or guaranteeing it, provided such is the usage at the agent's place of business and the agent uses proper diligence and discretion in the purchase of the bill; and this being shown by the agent, the burden of proof is on the principal to show that he should have indorsed or guaranteed the bill. *Potter v. Morland*, 3 Cush. (Mass.) 384.

In the Absence of Instructions the agent is bound to use only due care in remitting to his principal, and there is no rule of law that the post-office established by the government for the purpose of carrying letters is a less safe or appropriate means of forwarding money than a private carrier or banker. *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58.

3. Violating Instructions to Sell for Cash.—*Clark v. Roberts*, 26 Mich. 506; *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 517, 9 Am. Dec. 720.

A factor receiving wheat with instructions to sell for cash is liable for all losses which may result to his principal from a sale on credit. *Hall v. Storrs*, 7 Wis. 253. In this case a check was taken payable the next day after the sale. But see *Clark v. Van Northwick*, 1 Pick. (Mass.) 343, as to the effect of custom upon such an instruction.

If the custom is to sell for cash or sight drafts, and the agent takes a check payable in ten days, he is liable if the check is not paid. *Harlan v. Ely*, 68 Cal. 522.

4. Violating Instructions to Sell for Certain Price.—*Steele v. Ellmaker*, 11 S. & R. (Pa.) 86; *Wolfe v. Luyster*, 1 Hall (N. Y.) 146.

A factor making advances upon goods consigned to him for sale with a limit as to the price, cannot sell below such price to recover advances, without timely notice to his principal to return the same. *Blot v. Boiceau*, 1 Sandf. (N. Y.) 111. And see *Henry v. Buckner*, 13 Colo. 18.

ed,¹ he is liable for the loss resulting from his violation of instructions.

Intention.—The fact that the agent intended to promote the principal's interest will not exonerate him.²

Presumption.—But the law presumes that an agent obeyed his instructions, and if the contrary is alleged it must be proved.³

Adoption by Principal.—And the principal, by failing to seasonably object, or by adopting the acts of the agent, may discharge the latter from liability.⁴

(b) **In Case of Unremunerated Agent.**—Where the agency is gratuitous and the agent has never entered upon the performance of the service, he cannot be held liable for damage resulting from his nonfeasance, there being no consideration to support the promise.⁵ The inception of the performance is essential to the agent's liability; accordingly, if the agent once enters upon the execution of the business and any loss results from his neglect or failure to carry out his instructions, he may be held responsible.⁶

And the fact that agents have made advances on goods which they had been instructed to sell according to their judgment of the market, "unless otherwise advised," will not justify their refusal to sell immediately upon being ordered to do so, unless the sale is directed on terms which will prejudice them. *Howland v. Davis*, 40 Mich. 546. And see *Monks v. Bruce* (City Ct.), 3 N. Y. Supp. 419.

1. **Failure to Insure as Instructed.**—*Shoenfeld v. Fleisher*, 73 Ill. 404; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132; *Park v. Hamond*, 4 Campb. 344.

The agent is bound to follow the instructions of his principal and effect a valid insurance, and if he does not obtain a valid policy which might be enforced at law, he is responsible to the principal for the actual loss sustained. *Sawyer v. Mayhew*, 51 Me. 398; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

Failure of Insurance Agent to Cancel Policy.—An agent of an insurance company failing to cancel a policy as instructed is liable to the company for the amount paid upon the policy in case of loss. *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513. And the agent is not relieved from liability by showing that he instructed the broker who placed the policy with him to have it cancelled. *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290.

2. **Rechtscherd v. Accommodation Bank**, 47 Mo. 181; *Hardeman v. Ford*, 12 Ga. 205; *Ward v. Warfield*, 3 La. Ann. 468; *Ledoux v. Goza*, 4 La. Ann. 160; *Lowe v. Bell*, 6 La. Ann. 28; *Merritt v. Wright*, 19 La. Ann. 91; *Holmes v. Misroon*, 3 Brev. (S. Car.) 209; *Coker v. Ropes*, 125 Mass. 577.

If the instructions be free from ambiguity, and are positive and unqualified, they must be rigidly obeyed, if it be practicable; and no motive connected with the interest of the principal, however honestly entertained or wisely adopted, can excuse a breach of them. *Courcier v. Ritter*, 4 Wash. (U. S.) 549.

3. *Bangs v. Hornick*, 30 Fed. Rep. 97. And see *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Irwin v. Williar*, 110 U. S. 499.

4. *Etna Ins. Co. v. Sabine*, 6 McLean (U. S.) 393; *Richmond Mfg. Co. v. Starks*, 4 Mason (U. S.) 296; *Ward v. Warfield*, 3 La.

Ann. 468; *Barrett v. Zacharie*, 5 La. Ann. 253; *Flower v. Downs*, 6 La. Ann. 538; *Oliver v. Johnson*, 24 La. Ann. 460; *Lewin v. Dille*, 17 Mo. 64; *Menkens v. Watson*, 27 Mo. 163; *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337; *Darling v. Albert* (C. Pl.), 17 N. Y. Supp. 358; *Pickett v. Pearsons*, 17 Vt. 470. See also *infra*, this title, *Ratification*.

5. *Morrison v. Orr*, 3 Ala. 49.

By the common law a mandatory, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is responsible only when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance but not for a nonfeasance, even though special damages are averred. *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Smedes v. Utica Bank*, 20 Johns. (N. Y.) 372. If the promise is made without consideration, it is mere *nudum pactum*, and no action can be maintained upon it. *Benden v. Manning*, 2 N. H. 289. And see *Elsee v. Gatward*, 5 T. R. 143; *Balfe v. West*, 13 C. B. 466, 76 E. C. L. 466. See also *Ferguson v. Porter*, 3 Fla. 27.

Agent to Collect, Taking Note to Himself.—An agent having undertaken gratuitously to collect an indebtedness took a note to himself for the amount due. It was held that this extinguished the original indebtedness, and he was held liable to his principal for the amount of the indebtedness. *Opie v. Serrill*, 6 W. & S. (Pa.) 264.

6. *McGee v. Bast*, 6 J. J. Marsh. (Ky.) 453.

Responsibility after Entering upon Performance.—Though no man can compel another to render him acts of friendship or service of any kind whatsoever, gratuitously or with a view to compensation, yet if the person applied to consents to render the service and undertakes the business, he is bound to act in conformity to the terms on which the request is made; and if he does not comply with his instructions, he is liable for the loss occasioned thereby, although the service was gratuitously rendered. Relinquishment of his commission of the agency does not release him from the effects of negligence. *Walker v. Smith*, 1 Wash. (U. S.) 152.

Thus, one voluntarily undertaking, without consideration, to invest money for another, and disregarding positive instructions as to the specific character of the security to be

(2) *Qualifications and Exceptions*—(a) *Circumstantial Variance*.—A substantial compliance with the terms of the authority, however, is all that can be required, and where this has been done a circumstantial variance from the instructions is immaterial.¹

(b) *Illegal or Immoral Acts*.—An agent is not justified by the instructions of his principal in doing an illegal or immoral act,² and will not be held liable for a refusal to obey such instructions.³

(c) *In Case of Necessity or Emergency—Rule Stated*.—Where a deviation from instructions is due to necessity or an unforeseen emergency which is not itself due to the agent's default, the agent using his best judgment to carry out the objects of the agency will not be held responsible although it should subsequently develop that another course would have been preferable.⁴ Acts done in a *bona fide* effort to save perishing property come within this rule.⁵

taken, is liable if the investment should fail. *Williams v. Higgins*, 30 Md. 404; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470.

By undertaking the commission he becomes an agent, whether he could have been compelled to assume the agency or not, and is then bound to carry out his instructions unless waived or countermanded. *Spencer v. Towles*, 18 Mich. 9.

1. *Parkhill v. Imlay*, 15 Wend. (N. Y.) 431; *Parker v. Kett*, 1 Salk. 95; *Cornwall v. Wilson*, 1 Ves. 510. And see *Wood v. Cooper*, 2 Heisk. (Tenn.) 441.

But it must be shown affirmatively that the deviation in no manner contributed to the loss. *Wilson v. Wilson*, 26 Pa. St. 393. And in such case every doubtful circumstance will be construed against the agent. *Adams v. Robinson*, 65 Ala. 586.

2. The agent is not chargeable for a breach of orders if his compliance would have been a fraud on others. *Goodhue v. McClarty*, 3 La. Ann. 58.

The command of the principal to commit trespass or other unlawful act is no justification to the agent. *Brown v. Howard*, 14 Johns. (N. Y.) 119. And the rule *respondet superior* does not apply where an agent elects to obey an illegal order. *Elmore v. Brooks*, 6 Heisk. (Tenn.) 45. And see *Davis v. Barger*, 57 Ind. 54.

3. *Rechtscherd v. Accommodation Bank*, 47 Mo. 181; *Switzer v. Connett*, 11 Mo. 88; *Wilson v. Wilson*, 26 Pa. St. 394.

Agent's Authority to Do Illegal Act—Liability Therefor.—The principal cannot delegate to his agent authority to do an illegal act; but, having given such authority, he cannot take advantage of his own wrong, and hold the agent liable for the consequences of such illegal act. This principle, however, cannot be invoked by a third person, who was employed by the agent to assist in the illegal act, and was liable to the principal for the act. *Morton v. Bradley*, 30 Ala. 683.

4. *Deviation from Instructions in Case of Emergency.*—*Judson v. Sturges*, 5 Day (Conn.) 556; *Drummond v. Wood*, 2 Cai. (N. Y.) 310; *Liotard v. Graves*, 3 Cai. (N. Y.) 226; *Harter v. Blanchard*, 64 Barb. (N. Y.) 617; *Wilson v. Wilson*, 26 Pa. St. 394; *Nixon v. Bogin*, 26 S. Car. 611; *Gould v. Rich*, 7 Met. (Mass.) 538; *Williams v. Shackelford*, 16 Ala. 318; *Wolff v. Horncastle*, 1 B. & P. 323.

In cases of necessity or great urgency it is only necessary that the agent should act *bona fide* and with reasonable discretion. *Forrestier v. Bordman*, 1 Story (U. S.) 43. And a deviation from orders is excused by an event not contemplated at the time the orders were given. *Dusar v. Perit*, 4 Binn. (Pa.) 361.

Especially is this the case when not only the principal's interests are endangered, but also the interests of the agent. *Brown v. M'Gran*, 14 Pet. (U. S.) 480; *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Stall v. Meek*, 70 Pa. St. 181; *Milbank v. Dennistoun*, 21 N. Y. 391; *Frothingham v. Everton*, 12 N. H. 239.

A Factor has Implied Authority, in case of unforeseen circumstances of necessity or great urgency, to act for his principal irrespective of instructions or the ordinary usages of trade in adjusting contracts and claims, and disposing of property; and if he has acted in good faith, with a sound discretion under the circumstances as they appeared to him at the time, he will not be held liable for the consequences, although his course should subsequently turn out disadvantageous to his principal. *Greenleaf v. Moody*, 13 Allen (Mass.) 363.

An Agent Instructed to Get a Certain Physician is justified, upon being unable to procure him, in employing another instead. *Bartlett v. Sparkman*, 95 Mo. 136, 6 Am. St. Rep. 35.

An Agent Instructed to Invest Certain Moneys coming into his hands in Missouri bonds is justified, upon the large advance of such bonds in price, in asking additional instructions of his principal as to whether he shall invest at the advanced price, and, upon receiving no reply, in retaining the money in his hands for further instructions. *Bernard v. Maury*, 20 Gratt. (Va.) 434.

A Factor having Made Advances may sell after notice, upon failure to repay, though for a less sum than the price limited. *Frothingham v. Everton*, 12 N. H. 239.

The Master of a Vessel instructed to sell certain goods upon reaching the port of destination, is justified, upon being unable to find a purchaser, in leaving them with an agent. *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174.

5. *Jervis v. Hoyt*, 2 Hun (N. Y.) 637; *Greenleaf v. Moody*, 13 Allen (Mass.) 363; *Goodwillie v. McCarthy*, 45 Ill. 186.

Limit of Rule.—While, as above stated, under extraordinary circumstances, an agent may be justified in assuming extraordinary powers, yet it does not follow as a corollary that, under such circumstances, an agent may assume any or all extraordinary powers, and by his acts bind his principal.¹

(d) **Uncertainty and Ambiguity in Instructions.**—When the directions to the agent are clear and well defined, it is his duty to follow them faithfully, provided this may be lawfully done.² On the other hand, where the instructions are obscure or ambiguous, an agent using his honest and diligent discretion in the interpretation of them will not be held responsible if he makes a mistake.³

(3) **Effect of Established Usage or Custom.**—Although an agent is, in the absence of instructions, bound to follow the established usage or mode of dealing, yet no custom or usage will authorize a departure from positive instructions; the instructions of the principal make the law by which the agent is to be governed.⁴

(4) **Departure from Instructions—Nature of Liability.**—Where the agent is

1. *Foster v. Smith*, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604. In this case the defendants were employed to deliver a cargo of wheat, and when near their destination their boat and most of the wheat sank in three feet of water. It was held that though they were authorized to employ hands and prevent a total loss of the wheat, they had no power to sell it.

2. See *supra*, this title, *Nature and Extent of Authority*.

3. **Instructions Uncertain and Obscure.**—*Bes-sent v. Harris*, 63 N. Car. 542; *Pickett v. Pearsons*, 17 Vt. 470; *Courcier v. Ritter*, 4 Wash. (U. S.) 549. And see *Commerce Nat. Bank v. Merchants' Nat. Bank*, 91 U. S. 92.

The courts will hold an agent to a strict account in relation to the instructions he receives, provided they are expressed in plain terms and free from ambiguity. *Lorraine v. Cartwright*, 3 Wash. (U. S.) 151.

But he is bound by the instructions only as he understood them, unless there is fraud or some fault on his part in not comprehending them. *Pickett v. Pearsons*, 17 Vt. 470.

Where the instructions are susceptible of two meanings, that meaning which the agent in good faith attaches to them and acts upon is to be adopted, and if loss thereby occurs the principal, and not the agent, must bear it. It is immaterial whether or not the principal had reason to believe that the agent understood the instructions as he intended them. *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa 67.

Where the instructions are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound, although upon a more refined and critical examination the court might be of the opinion that a different construction would be more correct. *Very v. Levy*, 13 How. (U. S.) 345; *LeRoy v. Beard*, 8 How. (U. S.) 451; *DeTastett v. Crousillat*, 2 Wash. (U. S.) 132. They are to be construed as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed them. He is not bound to take the opinion of a lawyer

concerning the meaning of a word not technical, and apparently employed in a popular sense. *Very v. Levy*, 13 How. (U. S.) 345; *Withington v. Herring*, 5 Bing. 442, 15 E. C. L. 492.

4. **Usage.**—A custom cannot overcome an express contract nor defeat an express limitation upon the authority of an agent, nor be received in evidence to change the obvious meaning of the words occurring in instruments of writing. *Wanless v. McCandless*, 38 Iowa 20.

A factor instructed to sell only for cash is not authorized by the custom of the market in which he deals to sell for credit. *Barksdale v. Brown*, 1 Nott & M. (S. Car.) 517, 9 Am. Dec. 720; *Wanless v. McCandless*, 38 Iowa 20; *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467.

And evidence to show that a sale for credit is according to the usage of the market will be properly rejected. *Leland v. Douglass*, 1 Wend. (N. Y.) 490; *Catlin v. Smith*, 24 Vt. 85. But see *Clark v. Van Northwick*, 1 Pick. (Mass.) 343, where it was held no breach of orders in a factor, instructed to sell for cash, to sell and deliver the goods to a person of good credit and send his bill the next day, such sale being according to the usage of the market.

In *Hall v. Storrs*, 7 Wis. 253, the court doubted exceedingly the soundness and correctness of a rule permitting a usage or custom in any particular business or trade to qualify or vary the instructions to an agent, and allow him to show that, by the understanding of merchants, a sale on credit was no violation of an order to sell for cash; and held that even if such custom might be shown, the evidence of it should be of the most clear and satisfactory kind.

In *Parsons v. Martin*, 11 Gray (Mass.) 115, it was held that an agent, acting under a written authority contained in a letter, was bound to regard the instructions given him in every particular, and that no usage or custom could affect the legal rights of the parties, nor, if fully proved, would the law sustain or tolerate it. See *Osborne v. Rider*, 62 Wis. 235. And see *supra*, this title, *Nature and Extent of Authority*.

guilty of a mere breach of duty, as where he is instructed to sell for a certain price and sells for less, the proper remedy of the principal is an action for damages;¹ but where there is an entire departure from his authority on the part of the agent, as where he parts with the property in an unauthorized manner or when not authorized to do so, he may be held liable as for a conversion.²

b. REASONABLE SKILL AND DILIGENCE—(1) Agency for Reward—(a) Rule and Its Extent.—Where an agent receives a remuneration for his services, he is understood to contract for reasonable skill and ordinary diligence; that is, that he is possessed of the skill ordinarily possessed and employed by persons of common capacity engaged in the same trade, business, or employment, and that he will exercise that degree of diligence which persons of common prudence are accustomed to use about their own business affairs; and he is consequently liable for any injury to his principal occasioned by his want of ordinary skill or by his ordinary negligence.³ This rule applies to all classes

1. *McDermid v. Cotton*, 2 Ill. App. 297; *Mangum v. Ball*, 43 Miss. 288; *Sargent v. Blunt*, 16 Johns. (N. Y.) 74; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 304; *Spencer v. Blackman*, 9 Wend. (N. Y.) 167; *Dufresne v. Hutchinson*, 3 Taunt. 117. See also *Nichols v. Wadsworth*, 40 Minn. 547; *McMillan v. Arthur*, 98 N. Y. 167, *affirming* 48 N. Y. Super. Ct. 424, 6 N. Y. Wkly. Dig. 432; *Guy v. Oakley*, 13 Johns. (N. Y.) 332; *Allen v. Brown*, 51 Barb. (N. Y.) 86, 44 N. Y. 228.

Measure of Damages.—Where, by the terms of an agreement between an agent and his principal, the former is authorized to sell goods for a certain price, and he sells for a less amount, the principal may recover from the agent the entire amount named in the agreement. *Reynolds v. Rogers*, 63 Mo. 17. See also *Sheffield v. Linn*, 62 Mich. 151.

"Where one person furnishes money to another to discharge an incumbrance from the land of the person furnishing the money, and the person undertaking to discharge the incumbrance neglects to do it, and the land is lost to the owner by reason of the incumbrance, the measure of damages may be the money furnished, with interest, or the value of the land lost, according to the circumstances. If the landowner has knowledge of his agent's failure in time to redeem the land himself, his damages will be the money furnished, with interest. But if the landowner justly relies upon his agent, to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, then the agent will be liable for the value of the land at the time it is lost." *Adams, J.*, in *Blood v. Wilkins*, 43 Iowa 565.

2. *Mechem on Agency*, § 477; *Farrand v. Hurlburt*, 7 Minn. 477.

Where the Agent Wholly Departs from His Authority in disposing of the goods, he makes the property his own, and may be treated as a tortfeasor. There must be some act on the part of the agent. A mere omission of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must be an entire departure from his authority before an action

for the conversion of the goods can be maintained. *McMorris v. Simpson*, 21 Wend. (N. Y.) 610.

Thus, where cotton was delivered to an agent to be held in store for an advance in price and then sold at Memphis, and the agent, without the principal's knowledge or consent, shipped it to Liverpool, he was held liable for the conversion of the cotton. *Galbreath v. Epperson* (Tenn., 1886), 1 S. W. Rep. 157.

And where the owner of goods on board a vessel directed the captain not to land them on the wharf, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, the captain was held liable in an action of trover. *Syeds v. Hay*, 4 T. R. 260.

Investing Contrary to Instructions.—If an agent, who has received money from his principal to be invested, invests the same after notice from his principal not to invest, the agent makes the investment on his own responsibility, and is liable to the principal. *Richardson v. Futrell*, 42 Miss. 525.

A factor instructed to sell at a specified price on a certain day or ship to M., is liable as for a conversion if he sells on the next day. *Scott v. Rogers*, 31 N. Y. 676, 4 Abb. App. Dec. (N. Y.) 157.

Depreciation of Funds in Agent's Possession.—Where funds in an agent's possession commence to depreciate, it is not his duty to return or offer to return the same to the principal, where the principal has the same facilities as the agent for knowing of the depreciation of the funds. *Richardson v. Futrell*, 42 Miss. 525.

3. Rule as to Skill and Negligence of Remunerated Agent—Alabama.—*Morrison v. Orr*, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; *Steiner v. Clisby*, 103 Ala. 181, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 371.

Connecticut.—*Redfield v. Davis*, 6 Conn. 439.

Georgia.—*Wright v. Central R., etc., Co.*, 16 Ga. 38; *Brown v. Clayton*, 12 Ga. 564.

Illinois.—*Darlington v. Fredenhagen*, 18 Ill. App. 273; *Phillips v. Moir*, 69 Ill. 155; *Deshler v. Beers*, 32 Ill. 368.

Indiana.—*Hall v. Junction R. Co.*, 15 Ind. 362.

Iowa.—*Sioux City, etc., R. Co. v. Walker*, 49 Iowa 273; *Bartle v. Phelps*, 39 Iowa 498; *Montgomery County v. American Emigrant Co.*, 47 Iowa 91.

Kentucky.—*Myles v. Myles*, 6 Bush (Ky.) 237; *Respass v. Morton*, Hard. (Ky.) 234.

Louisiana.—*Nichols v. Hanse*, 2 La. 382; *Hill v. White*, 11 La. Ann. 170; *Kinney v. Crane*, 17 La. 417; *Clark v. Norwood*, 19 La. Ann. 116.

Maryland.—*Gaither v. Myrick*, 9 Md. 118, 66 Am. Dec. 316.

Massachusetts.—*Savage v. Birkhead*, 20 Pick. (Mass.) 167.

Minnesota.—*Lake City Flouring Mill Co. v. McVean*, 32 Minn. 301.

Mississippi.—*Richardson v. Futrell*, 42 Miss. 525.

New York.—*Heinemann v. Heard*, 50 N. Y. 27; *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 174; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645.

South Carolina.—*Bellinger v. Gervais*, 1 Desaus. (S. Car.) 174; *Dickson v. Screven*, 23 S. Car. 212.

Texas.—*Williams v. O'Daniels*, 35 Tex. 542.

Washington.—*Crawford v. Cockran*, 2 Wash. Ter. 117.

And see *Story on Agency*, § 183; *Richardson v. Taylor*, 136 Mass. 143; *Kountz v. Gates*, 78 Wis. 415.

An agent is responsible, not only for his unfaithfulness, but also for his fault or neglect. *Imboden v. Richardson*, 15 La. Ann. 534.

Where the plaintiff by agreement allowed the defendant to control her business in his own name as her trustee and agent, he was held liable, in an action on account, for losses occasioned by his neglect of her interests, although a former agreement between them provided that he should not be accountable for his manner of conducting the business or for errors of judgment. *Geisse v. Franklin*, 56 Conn. 83.

The Agent is Not Liable for Such Accidental Losses as may occur in the course of his employment, and which could not be prevented by the exercise of reasonable skill and diligence. *Lake City Flouring Mill Co. v. McVean*, 32 Minn. 301; *Page v. Wells*, 37 Mich. 415; *Fick v. Runnels*, 48 Mich. 302; *Bannon v. Warfield*, 42 Md. 22; *James v. Borgeois*, 4 Baxt. (Tenn.) 345; *Weakley v. Pearce*, 5 Heisk. (Tenn.) 401; *Hale v. Wall*, 22 Gratt. (Va.) 424; or for property stolen, *Furber v. Barnes*, 32 Minn. 105.

Mistake in Doubtful Matter of Law.—Nor is he responsible for damages caused by his mistake in a doubtful matter of law. *Mechanics' Bank v. Merchants' Bank*, 6 Met. (Mass.) 13; *Howe v. Dewing*, 2 Gray (Mass.) 476; *Hicks v. Minturn*, 19 Wend. (N. Y.) 550; *Watson v. Rickard*, 25 Kan. 662; *Rice v. Melendy*, 41 Iowa 395. It is requiring too much to oblige him to determine at his peril difficult questions of law not adjudicated in his state, and customs not judicially recognized. *Barrett v. Zacharie*, 5 La. Ann. 253.

Conveyancers.—Conveyancers are held to the same rule of liability for errors of judgment as are lawyers and physicians, and where,

relying on the opinion of legal counsel that a ground rent was free of incumbrances, a conveyancer so represented it to his principal, he was held not liable for negligence. *Watson v. Muirhead*, 57 Pa. St. 161, 98 Am. Dec. 213.

An agent employed to examine the titles of lands offered as security for a loan is liable for damages for negligently representing it as good when it is not. *Pennoyer v. Willis*, 26 Oregon 1. See the title **ABSTRACT OF TITLE**, Vol. I., p. 220.

Agent to Look after Goods at Custom-house.

—An agent to attend to entries of goods at the custom-house, and instructed to appeal from certain illegal assessments of duties and employ counsel, is liable for damages if he allows the time to elapse within which suit can be brought to recover the illegal duties without entering suit. *Bowerman v. Rogers*, 125 U. S. 585.

Agent to Procure Corporation's Acceptance.—

And an agent to procure a corporation's acceptance of a draft is liable for the amount of the draft if he takes the acceptance of the secretary of the corporation, knowing that he is not authorized to bind the corporation. *Kirkeys v. Crandall*, 90 Tenn. 532.

An Agent under Contract to Keep a Highway in Repair is liable to the town for any damages it is compelled to pay to one sustaining an injury by reason of his neglect. *Wilson v. Greensboro*, 54 Vt. 533.

An Agent to Rent Lands and Collect the Rents is liable to his principal for neglect only where he has, or with reasonable diligence could have, collected rent, or rented the lands to some one who could or would have paid rent therefor. *Burpe v. Van Eman*, 11 Minn. 327.

Agent Acting on Principal's Advice.—If an agent, by advice of his principal, takes paper in payment of a sale, instead of cash, he is not liable for a failure to collect it unless he is guilty of negligence, bad faith, or dishonesty. *Fick v. Runnels*, 48 Mich. 302.

Agent Buying through Third Person—Advance Price.—Authority to an agent to purchase a certain mare for his principal at a limited price will not justify the agent in sending a third person to buy it, and then buying it of him at an advance, though within the prescribed limit. *Armstrong v. Elliott*, 29 Mich. 485.

Where an Agent Bought for Remittance, without instructions, a bill at forty-five days after date, on drawees at a place distant from their customer's residence, and drawn by a house of inferior and doubtful credit from whom he occasionally obtained accommodation, he was held responsible for the loss. *Rourk v. Pegram*, 10 La. Ann. 394.

Deposits.—If the agent deposits the money of his principal in a solvent house, subject to the draft of his principal, he is not liable for the subsequent failure of the house. *Hammon v. Cottle*, 6 S. & R. (Pa.) 290.

Death of Agent.—In case of the death of the agent, his estate will be liable to his principal for losses occasioned by his negligence or lack of skill. *Robinson Mach. Works v. Vorse*, 52 Iowa 207.

of agents, including agents to effect insurance,¹ physicians and surgeons,² attorneys,³ bankers and brokers,⁴ commission merchants, and factors.⁵

Agents to Loan or Invest.—An agent making investments, or loaning the money of his principal, must see to it that the security is sufficient, and use due diligence in collecting the debt when it falls due.⁶

Waiver.—The principal may, by his laches, relieve the agent from liability for his negligence or wrongful act. *Reed v. Ritchey*, 2 La. Ann. 797; *Ingraham v. Barber*, 72 Ga. 158.

1. Insurance Agents.—An insurance broker or agent undertaking to effect insurance for his principal is liable for negligence in failing to procure a policy in the proper form, *Park v. Hamond*, 4 Campb. 344; or to effect a valid insurance, *Sawyer v. Mayhew*, 51 Me. 398. But he is not liable for the solvency of the company if he insures in one generally considered safe, using due care in the selection of the company. *Gettins v. Scudder*, 71 Ill. 86. See the title **INSURANCE BROKERS**; and *infra*, this section, *Duty as to Insurance*.

2. Physicians and Surgeons.—The rule applies to physicians and surgeons, who are liable to patients for unskillful treatment. *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *Fowler v. Sergeant*, 1 Grant's Cas. (Pa.) 355; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Patten v. Wiggins*, 51 Me. 594, 81 Am. Dec. 593; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Grannis v. Branden*, 5 Day (Conn.) 260, 5 Am. Dec. 143; *Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 333; *Wood v. Clapp*, 4 Sneed (Tenn.) 65. And see the title **PHYSICIANS AND SURGEONS**.

3. Attorneys.—Attorneys are within the rule. *Varnum v. Martin*, 15 Pick. (Mass.) 440; *Crooker v. Hutchinson*, 1 Vt. 73; *Evans v. Watrous*, 2 Port. (Ala.) 205; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Stimpson v. Sprague*, 6 Me. 470; *Wilson v. Russ*, 20 Me. 421; *Holmes v. Peck*, 1 R. I. 242; *Stevens v. Walker*, 55 Ill. 151. And see the title **ATTORNEY AND CLIENT**.

And the negligence of the attorney may be shown in an action for his fees. *Gleason v. Clark*, 9 Cow. (N. Y.) 57.

4. Bankers and Brokers.—*Gheen v. Johnson*, 90 Pa. St. 38; *Trinidad First Nat. Bank v. Denver First Nat. Bank*, 4 Dill. (U. S.) 290; *Milwaukee Nat. Bank v. City Bank*, 103 U. S. 668. And see the titles **BANKS AND BANKING**; **BROKERS**.

In making a collection a bank is liable for negligence in accepting a depreciated currency. *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *Webster v. Whitworth*, 49 Ala. 201.

And the failure of a bank to promptly present a draft for payment renders it liable for the loss. *Meadville First Nat. Bank v. New York Fourth Nat. Bank*, 77 N. Y. 320.

But it is not liable for negligence in sending a collection to a correspondent bank if the same is generally considered sound, and it has no reason to be suspicious. *Fay v. Strawn*, 32 Ill. 295.

5. Factors and Commission Merchants.—*Babcock v. Orbison*, 25 Ind. 75; *Phillips v. Moir*,

69 Ill. 155. And see the title **COMMISSION MERCHANTS OR FACTORS**.

A factor failing, through negligence, to collect cotton due his principal, is liable for the value of the cotton with interest. *Dickson v. Screven*, 23 S. Car. 212.

6. Agent to Loan and Invest—Insufficient Securities.—An agent to lend money is liable for negligence in taking insufficient security, as by lending on real estate already heavily mortgaged. *Whitney v. Martine*, 88 N. Y. 535; *Owensboro Bank v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Murrah v. Brichta* (Tex., 1888), 9 S. W. Rep. 185; *Bannon v. Warfield*, 42 Md. 22; *McFarland v. McClees* (Pa., 1886), 5 Atl. Rep. 50; *Bronnenburg v. Rinker*, 2 Ind. App. 391.

Especially where instructed to lend on unencumbered real estate. But his liability does not exceed the amount of the prior mortgage. *Welsh v. Brown*, 8 Ind. App. 421.

But the agent does not guarantee the security. *Kennedy v. McCain*, 146 Pa. St. 63.

An agent to invest money on mortgage cannot invest it in a second mortgage without the express consent of his principal. *Whitney v. Martine*, 6 Abb. N. Cas. (N. Y. Super. Ct.) 72. But he will not be held personally liable because he has done so, in the absence of proof that loss has ensued, or will probably ensue. *Porter v. Woodruff*, 36 N. J. Eq. 174.

If, by neglect and want of diligence, he fails to collect money of his principal loaned by him, he is liable for the loss. *Rochester v. Levering*, 104 Ind. 562. See *Dickson v. Screven*, 23 S. Car. 212.

Where an agent loaned money to a person who was insolvent, and who had forged his deed to the land on which the loan was made, and the loan turned out to be a total loss to the principal, it was held that the agent, having made diligent inquiries as to the borrower's character, and heard nothing but good reports, and acted in good faith, was not liable for the loss. *Texas Loan Agency v. Swayne* (Tex. Civ. App., 1894), 27 S. W. Rep. 183.

And an agent intrusted with money to be invested, in his discretion, in speculations in stocks and securities, is not liable for the loss if he has acted in good faith. *Stewart v. Parnell*, 147 Pa. St. 523, 29 W. N. C. (Pa.) 537.

An agent agreeing to take the money of his principal and loan it to good parties must loan it in fact, and cannot use it himself and pay the principal with the note of a third party, based on a different consideration, without advising him of the fact. *Scott v. Turley*, 9 Lea (Tenn.) 631.

The Principal Has the Burden of Proof that the agent was negligent, in an action against him for negligently taking forged notes as se-

Agents to Collect.—And one whose duty or business it is to collect money will be liable for any loss occasioned by his want of diligence in pressing the claim.¹

curity for a loan. *Rand v. Johns* (Tex. App., 1891), 15 S. W. Rep. 200.

Unauthorized Receipt of Goods by Agent.—The agent is not liable to his principal for the value of goods delivered to him in payment of a loan, and so received, without authority, where the principal repudiates the debtor's claim of payment, and still holds him for the debt. *Perkins v. Hershey*, 77 Mich. 504.

1. **In Making Collections** an agent is bound to use ordinary care and diligence in pressing the claim and remitting the proceeds, and if through his carelessness the debt is lost, he will be held liable. *Kingston v. Kincaid*, 1 Wash. (U. S.) 457; *Mechanics Bank v. Merchants Bank*, 6 Met. (Mass.) 26; *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; *Walker v. State Bank*, 9 N. Y. 582; *Wiley v. Logan*, 95 N. Car. 358; *Reed v. Northup*, 50 Mich. 442; *Diamond Mill Co. v. Groesbeek Nat. Bank* (Tex. Civ. App., 1894), 29 S. W. Rep. 169, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 371.

But he is bound only to use due diligence to collect the debt. *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Stancill v. Gilmore*, 6 La. Ann. 763; *Evans v. Hatcher*, 10 La. Ann. 98; *Buckingham v. Payne*, 36 Barb. (N. Y.) 81. Compare *Pickett v. Pearsons*, 17 Vt. 470.

An agent receiving a note for collection must show that he has used the proper degree of care and industry in obtaining payment. *Police Jury v. Hebert*, 2 La. Ann. 149; *Livaudais v. Denis*, 4 La. Ann. 300; *Stancill v. Gilmore*, 6 La. Ann. 763; *Bush v. Guion*, 6 La. Ann. 797.

Agent Putting Bonds with Attorney for Collection.—Where one receives bonds for collection, and puts them into the hands of a lawyer to collect, he is not responsible any further than he receives moneys from the lawyer. *Hawkins v. Minor*, 5 Call (Va.) 118. But see also *Prentice v. Buxton*, 3 B. Mon. (Ky.) 35; *Harrold v. Gillespie*, 7 Humph. (Tenn.) 57.

Agent Giving Notice to Principal.—It is the duty of an agent receiving a note for collection to present it at the time and place fixed for payment, or if no place is designated, to use due diligence to make demand; if payment is refused, he should give immediate notice to his principal, that the latter may take the measures necessary for his security. *Mobile Bank v. Huggins*, 3 Ala. 206.

Agent to Collect and Holder of Bill of Exchange Distinguished.—An agent to collect a bill or note does not bear the same relation to his principal that the holder of a bill of exchange does to the drawer and indorser, and the same negligence or omission which will deprive the holder of all recourse against the drawer or indorser will not subject the agent to liability to his principal. *Hamilton v. Cunningham*, 2 Brock. (U. S.) 350.

The Principal must show that the Money could

have been Collected by use of such diligence as was incumbent upon the agent from the nature of his undertaking. *Sandefur v. Mattingley*, 16 Ark. 237.

Agent Need Not Do Vain Thing.—An omission to do that which if done would have been fruitless and unavailing cannot be properly denominated negligence. *Folsom v. Mussey*, 10 Me. 297.

Presenting Bill for Acceptance.—But an agent receiving a bill for collection, payable a certain day and date, is held to a strict vigilance in making presentation for acceptance. *Allen v. Suydam*, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555.

A Justice Receipting for a Note for collection, in his official capacity, does not thereby become a collecting agent, and is not bound to cause a suit to be instituted in another precinct. *White v. Goffe*, 24 Tex. 658.

Sickness of Agent—Acting Bona Fide.—Where through sickness, and the bill being mislaid, an agent was delayed three days in forwarding it to the place of payment for collection, he was held not guilty of such gross negligence as to render him responsible; nor was he rendered liable by the fact that the firm to which the bill was forwarded failed immediately thereafter, the firm being in good credit at the time, and the principal being aware that it was to be forwarded to such firm. *Ford v. Stewart*, 4 B. Mon. (Ky.) 326.

Satisfaction of Mortgage for Less than is Due.—An agent raising a mortgage, which he is authorized to collect, for a less sum than is actually due thereon, is liable to his principal for the deficiency. *Kempker v. Roblyer*, 29 Iowa 274.

An Agent Holding Claims of Different Persons against the same party, to each of whom he is under the same obligations, is bound to apply money received generally without any appropriation by the debtor, upon each claim *pro rata*. *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263. And see the titles ATTORNEY AND CLIENT; BANKS AND BANKING; MERCANTILE AGENCIES; where the liability of those agents in making collections is fully treated.

Medium of Payment.—The agent, in the absence of instructions to the contrary, is authorized to receive in payment of such debts whatever kind of money is generally received by prudent business men for similar purposes. *Baird v. Hall*, 67 N. Car. 230; *Atkin v. Mooney*, Phil. (N. Car.) 31. And where an agent accepted Confederate treasury notes, without showing any necessity therefor or effort to dispose of them to the best advantage, he was compelled to bear the loss. *Webster v. Whitworth*, 49 Ala. 201; *Shuford v. Ramsour*, 63 N. Car. 622.

And if he accepts the bills of a bank, the solvency of which he does not know, taking at the same time the guaranty of the debtor, with surety, that they are good, he is not guilty of such negligence as to make himself

Agents to Sell.—An agent intrusted with property for sale is bound to use reasonable diligence in making a sale for a fair price,¹ and if through his negligence a portion of the purchase price is lost, he will be responsible.²

responsible for a resulting loss. *Pickett v. Pearsons*, 17 Vt. 470.

1. Duties of Agent for Sale of Property.—*Chase v. Blaisdell*, 4 Minn. 90.

If, owing to his neglect, the sale is not consummated, he is liable. *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284.

An Agent Neglecting to Sell when directed to do so is liable to his principal for the loss sustained by reason of his failure. *Pulsifer v. Shepard*, 36 Ill. 513.

Notice of Depreciation before Selling.—Where a consignment is made without any restriction, and the consignees are authorized to "deal with it as their own," the consignor is not entitled to notice of its depreciated value before sale. *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566.

A Factor Selling at an Under Price is liable for the fair value of the goods. *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

All that can be required of the agent is that he act fairly and use his best judgment; and where an agent received cotton upon which he made an advance and agreed to ship to New Orleans or New York, and have it sold for the best price it would bring, the agent to have the entire control of it, and he shipped to New York, where it sold for less than it would have brought in New Orleans, it was held that he was not responsible for the loss. *Betts v. Planters', etc., Bank*, 3 Stew. (Ala.) 18.

And where an agent in Memphis, expecting the city to be occupied by Federal troops, sold a lot of sugar and molasses belonging to his principal, taking payment in Confederate money, and being unable to transmit the money to his principal and finding it depreciating in value, invested it in tobacco and sheeting, which he afterwards sold, he was held responsible only for the net proceeds of the final sale. *James v. Borgeois*, 4 Baxt. (Tenn.) 345.

Where the Cashier of a Bank was employed to sell certain shares therein at a fixed price, but before completion of the sales the sale was enjoined and the bank proved insolvent, he could not be held responsible for the supposed value of the stock, no neglect being shown on his part in forwarding the sale. *Washburn v. Blake*, 47 Me. 316.

Where an Agent Selling His Principal's Logs permits the purchaser to scale them instead of the official scaler, he commits a breach of duty, making him liable if the measurement is incorrect. *Crawford v. Cockran*, 2 Wash. Ter. 117.

Orders from Principal Not to Deliver.—If having sold goods he is ordered by his principal, while they are yet in transit, not to deliver them, as the latter doubts the solvency of the purchaser, he is liable to his principal if he, notwithstanding, delivers them without taking security and the purchaser proves insolvent. *Howatt v. Davis*, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

In an Action by a Factor to Recover a General Balance, his negligence in selling his principal's goods can be given in evidence in mitigation of damages, and to bar all charges for commissions and all charges for interest, storage, etc., caused by his negligence. *Dodge v. Tileston*, 12 Pick. (Mass.) 328.

Must Preserve Property.—The agent is bound to use ordinary diligence to preserve the property while in his hands, and if through his neglect a loss or damage results to it, he is responsible. *Chenoweth v. Dickinson*, 8 B. Mon. (Ky.) 156. And see *Dickey v. Grant*, 6 Cow. (N. Y.) 310.

Return of Goods.—If he allowed the purchaser to return unsatisfactory goods, he cannot be charged by his principal with a share of their value after the latter has caused the agent to send them back to him and has kept them. *Filer v. Jenks*, 38 Mich. 585.

2. United States.—*Evans v. Lawton*, 34 Fed. Rep. 233; *Scanlan v. Hodges*, 52 Fed. Rep. 354, 3 C. C. A. 113, 10 U. S. App. 352.

California.—*Harlan v. Ely*, 68 Cal. 522.

Georgia.—*Loveless v. Fowler*, 79 Ga. 134, 11 Am. St. Rep. 407; *Augusta Nat. Bank v. Goodyear*, 90 Ga. 711.

Illinois.—*Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274.

Indiana.—*U. S. Mortgage Co. v. Henderson*, 111 Ind. 24; *Babcock v. Orbison*, 25 Ind. 75.

Iowa.—*Robinson Mach. Works v. Vorse*, 52 Iowa 207.

Kansas.—*Frick v. Larned*, 50 Kan. 776.

Maine.—*School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330; *Greely v. Bartlett*, 1 Me. 172; *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522.

Massachusetts.—*Hemenway v. Hemenway*, 5 Pick. (Mass.) 389.

Michigan.—*Birdsell Mfg. Co. v. Brown*, 96 Mich. 213; *Fick v. Runnels*, 48 Mich. 302.

Minnesota.—*Plano Mfg. Co. v. Buxton*, 36 Minn. 203; *Nichols v. Wadsworth*, 40 Minn. 547.

New York.—*Doty v. Case, etc., Thresher Co.*, 50 Hun (N. Y.) 595.

Pennsylvania.—*Browne v. Arrott*, 6 W. & S. (Pa.) 402; *Harvey v. Turner*, 4 Rawle (Pa.) 223.

South Carolina.—*Tate v. Marco*, 27 S. Car. 493.

Vermont.—*Thompson v. Babcock*, *Brayt. (Vt.)* 24.

Virginia.—*Piedmont Guano, etc., Co. v. Morris*, 86 Va. 941.

Wisconsin.—*Osborne v. Rider*, 62 Wis. 235.

As to the right of the agent to sell on credit, see *supra*, this title, *Nature and Extent of Authority*. As to his right to accept payment in depreciated currency, see *supra*, this title, *Nature and Extent of Authority*. Also the title MONEY. As to the method of remitting the proceeds of the sale, see the title PAYMENT.

Diligence for the Jury.—Whether or not due care and reasonable diligence have been used is for the jury.¹

Errors of Judgment.—But no greater diligence is required of an agent than his principal, under similar circumstances, would have exercised,² and he is not liable for errors of judgment in matters left to his discretion.³

Illegal Acts.—Nor is he liable for the damage resulting from the negligent performance of illegal acts.⁴

Measure of Damages.—The agent is liable only for the actual loss resulting from his negligence.⁵

(b) **Duty as to Insurance.**—In the absence of instructions, or a usage of trade or habit of dealing between the parties, the agent is not bound to insure the property of his principal;⁶ but if he has received instructions to insure, or has been in the habit of effecting insurance in the previous dealings between them, or it is the usual custom in the course of such transactions, he will be liable himself as an insurer for any loss arising from his failure to insure.⁷

1. *Heinemann v. Heard*, 50 N. Y. 27; *Milwaukee Nat. Bank v. City Bank*, 103 U. S. 668.

2. *Blight v. Askley*, 1 Pet. (C. C.) 15.

3. *Milbank v. Dennistoun*, 21 N. Y. 391; *Page v. Wells*, 37 Mich. 415; *M'Laughlin v. Simpson*, 3 Stew. & P. (Ala.) 85; *Long v. Poole*, 68 N. Car. 479.

Where an agent had demands aggregating nine thousand dollars placed in his hands "to settle on the best terms in his power," and, the result of a suit pending for them being doubtful, he took the notes of the defendants for five thousand six hundred dollars, for which he took salt at a high rate, from the sale of which but two thousand seven hundred dollars was realized, it was held that, having acted with good faith and sound discretion, he could not be made accountable for more than the net proceeds. *Steele v. Taylor*, 4 Dana (Ky.) 445.

4. *Baynard v. Harrity*, 1 Houst. (Del.) 200.

5. *Bell v. Cunningham*, 3 Pet. (U. S.) 69; *Mobile Bank v. Huggins*, 3 Ala. 206; *Ainsworth v. Partillo*, 13 Ala. 460; *Walsh v. Frank*, 19 Ark. 270; *Andrews v. Pardee*, 5 Day (Conn.) 29; *Ashley v. Root*, 4 Allen (Mass.) 504. And see the title DAMAGES.

No more can be recovered as damages than will fully indemnify the principal. *Ryder v. Thayer*, 3 La. Ann. 149.

6. *Shoenfeld v. Fleisher*, 73 Ill. 404; *Schaeffer v. Kirk*, 49 Ill. 251; *Brisban v. Boyd*, 4 Paige (N. Y.) 17; *Lee v. Adsit*, 37 N. Y. 78.

A special agent is bound by his special instructions, unless the mercantile law or custom has established additional duties, and in the absence of instructions or of a usage of trade to do so, is not bound to insure. *Shirtliff v. Whitfield*, 2 Brev. (S. Car.) 71, 3 Am. Dec. 701.

But an agent may become an insurer by representing to his principal that there is no risk. He is bound to keep his principal informed of all material occurrences. *Brown v. Arrott*, 1 Miles (Pa.) 137.

7. *Shirtliff v. Whitfield*, 2 Brev. (S. Car.) 71, 3 Am. Dec. 701; *Kingston v. Wilson*, 4 Wash. (U. S.) 315; *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Smith v. Lascelles*, 2 T. R. 187.

But it is otherwise where the insurance

would have been of no avail if effected. *Alsop v. Coit*, 12 Mass. 40. And see *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 84. Also *supra*, this section, *Fidelity to Instructions—General Rule*.

In *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195, the special agent of the owner of a steamboat for the purpose of attending to the business of the boat, collecting the money earned, and doing everything necessary to the interest of the owner, had been in the habit of keeping the boat insured, but had inadvertently allowed the policy to run out. Upon the boat being destroyed he was held liable to his principal for the loss. And see *Berthoud v. Gordon*, 6 La. 579.

But where the contract with the principal does not require the agent to keep the property insured, but only to insure it for a reasonable period, the agent will not be liable for the loss of such property destroyed by fire after a long period has elapsed and the policies have run out. *Milburn Wagon Co. v. Evans*, 30 Minn. 89.

A Simple Request to Insure where No Funds are Provided, or there has been no previous dealing between the parties, or no goods on consignment from which the agent might reimburse himself, will not of itself devolve upon him the duty to insure or render him liable for failure to do so. But a promise or undertaking to insure is implied where the course of dealing has been such that the agent has been used to effect insurance, or where he has funds or effects on hand, or even where the bill of lading from which he derives his authority contains an order to insure, or where the general usage is to insure. *Vickery v. Lanier*, 1 Metc. (Ky.) 133.

If the Agent has been in the Habit of Effecting Insurance, he must give notice to his principal of his intention to discontinue it, and he is responsible for any loss consequent upon his failure to insure before giving notice to the principal. *Area v. Milliken*, 35 La. Ann. 1150; *Berthoud v. Gordon*, 6 La. 579; *Smith v. Lascelles*, 2 T. R. 187; *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132.

Must Notify Principal of Failure to Obtain Insurance.—And if, having undertaken to effect insurance according to special instructions, he fails to obtain it, he should at once notify

or from his imperfect execution of insurance.¹

(c) **Duty to Advise Principal of Matters Material to His Interest.**—It is the duty of the agent to keep the principal regularly informed of his transactions, and the state of the interest intrusted to him, and he is liable in damages to the principal for any loss sustained through his dereliction in this particular.²

his principal, *Callander v. Oelrichs*, 5 Bing. N. Cas. 58, 35 E. C. L. 29; and will be liable in damages if he does not, *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132. But not if he notifies him at once. *Williams v. Rost*, 13 La. Ann. 327.

Factor Insuring for His Own Security—Waiver.—But if the custom of insuring is shown to have in view merely the security of a factor making advances on consignments, the factor may, if he chooses, waive it. *Kingston v. Wilson*, 4 Wash. (U. S.) 315.

Insuring with Company in Bad Credit.—If the agent procures insurance from underwriters notoriously in bad credit or insolvent, and loss results, it falls upon him. *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195.

Agent Unable to Effect Insurance.—Where the owner of a vessel in a foreign port directed his correspondent in Boston to procure insurance upon the vessel, and the agent, not able to effect it in that town or in the towns in the vicinity, extended his endeavors to the city of New York, limiting the premium to a rate at which it could not be obtained, it was held that the agent was not liable for not having procured the insurance. *Sanches v. Davenport*, 6 Mass. 258.

Agent Rendering Account for Higher Rate than Actually Paid.—Where the plaintiff's factors effected insurance on their stock of tobacco and other merchandise in four different companies, the policies running for various periods and at different rates, the rate being equal to about one eighth of one per cent a month, and in their accounts rendered of the sales of the tobacco charged one fourth of one per cent a month for insurance, it was held that they were not to be considered the plaintiff's agents in the insurance they had effected, but as being themselves insurers at the rate of one fourth of one per cent a month, and as having reinsured at the best terms they could obtain in the different companies in their city. *Miller v. Tate*, 12 La. Ann. 160. 1. *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132.

The agent is liable for any loss occasioned by a peril he should have insured against. *Strong v. High*, 2 Rob. (La.) 103, 38 Am. Dec. 195.

Failure to Procure Full Insurance.—If there is no difficulty in procuring full insurance, and such is the general practice in the matter embraced, the agent is liable for not procuring a contract for a full indemnity. *Beardsley v. Davis*, 52 Barb. (N. Y.) 159.

Failure to Incorporate Stipulations in Policy.—Where insurance brokers were ordered to effect a policy "at and from Teneriffe to London," they were held liable for not inserting in the policy the liberty "to touch and stay at any or all of the Canary Islands," that being usually inserted in policies from Teneriffe. *Mallough v. Barber*, 4 Campb. 150.

Measure of Damages.—In Case of an Entire Failure to Insure, the measure of damages is the full amount of the policy the agent should have procured, less the premium. *Storer v. Eaton*, 50 Me. 219, 79 Am. Dec. 611.

And in Case of Only Partial Insurance, the value of the property destroyed, less the amount received under the policy. *Beardsley v. Davis*, 52 Barb. (N. Y.) 159.

Insurance Imperfectly Made.—In *De Tastett v. Crousillat*, 2 Wash. (U. S.) 132, it is said that when the insurance has been imperfectly made and not altogether neglected, it may be questioned whether the agent is liable for more than the damages equal to the chance of indemnity which would have been afforded by the exact execution of the order.

Where the owner of a vessel instructed his agent to procure a policy of insurance, stating that he valued the vessel at four thousand dollars, three fourths of which sum he wished to be insured, and the agent neglected to insure according to the instructions, he was held answerable as in the case of a valued policy, although the letter contained no precise order to have the policy valued. *Miner v. Tagert*, 3 Binn. (Pa.) 204.

2. It is the duty of the agent to give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security, and if he fails to do so, it is a dereliction of duty for which he is chargeable. *Norris v. Tayloe*, 49 Ill. 17; *Edmonstone v. Hartshorn*, 19 N. Y. 9; *Devall v. Burbridge*, 4 W. & S. (Pa.) 305; *Brown v. Arrott*, 6 W. & S. (Pa.) 402; *Clark v. Wheeling Bank*, 17 Pa. St. 322; *Rogers v. Bradford*, 1 Pin. (Wis.) 418; *Moore v. Thompson*, 9 Phila. (Pa.) 164. See also *Duff v. Duff*, 71 Cal. 513. The general rule is that the measure of damages is to be proportioned to the actual loss sustained by the principal. *Arrott v. Brown*, 6 Whart. (Pa.) 9.

Attachment Proceedings.—The agent should give notice of an attachment levied on the principal's property. *Moore v. Thompson*, 9 Phila. (Pa.) 164.

Inability to Insure.—And if he undertakes to effect insurance according to special instructions, he should notify his principal in case of failure. *Callander v. Oelrichs*, 5 Bing. N. Cas. 58, 35 E. C. L. 29; *Williams v. Rost*, 13 La. Ann. 327. And see *supra*, this section, *Duty as to Insurance*.

Nonpayment of Note Taken for Goods Sold.—An agent selling goods and taking a note in payment should notify the principal in case the note is not paid at maturity. *Harvey v. Turner*, 4 Rawle (Pa.) 223.

An Agent for the Investment and Transmission of Money has been held liable for every default of a subagent occurring during a period in which he kept his principal in ignorance of the destination of a draft purchased by him on account of the principal. *Clark v. Wheeling Bank*, 17 Pa. St. 322.

(2) *Gratuitous Agency*—(a) *Ordinary Agencies*.—In ordinary agencies not necessarily implying a peculiar knowledge or skill in the agent, one undertaking to perform services for another without reward is held to a degree of responsibility greatly inferior to that of a hired agent, and is only liable for gross neglect¹ or wilful and malicious fraud,² but not for nonfeasance.³ The question of negligence is one of fact, to be passed upon by the jury.⁴

(b) *Agencies Implying Peculiar Knowledge or Skill*.—One holding himself out as possessing a peculiar knowledge or skill in any profession, business, or vocation is held to the same degree of care and the same liability as an agent for reward, whether he in fact receives a remuneration or not.⁵

Agent must Communicate Facts Affecting Value of Land to be Sold by Him.—It is the duty of an agent authorized to sell land for a certain sum, upon learning of a fact in the condition of the land increasing its value, and of which the principal was ignorant when he named the price, to inform the principal of the fact; and a sale by him on the basis of the sum fixed without so informing the principal is a fraud. *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808.

1. *Ordinary Agencies not Implying Peculiar Knowledge or Skill*.—It is well settled that a mandatory or a bailee without hire is liable only for gross neglect. *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; *Lampley v. Scott*, 24 Miss. 528; *Moore v. Gholson*, 34 Miss. 372; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Haynie v. Waring*, 29 Ala. 263; *Stanton v. Bell*, 2 Hawks (N. Car.) 145, 11 Am. Dec. 744; *Nixon v. Bogin*, 26 S. Car. 611; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452; *Anthony v. Smith*, 9 Humph. (Tenn.) 508; *Lyon v. Tams*, 11 Ark. 189; *Story on Bailments*, § 137. And see *Pate v. McClure*, 4 Rand. (Va.) 164; *Turton v. Dufief*, 6 Wall. (U. S.) 420; and the title **BAILMENTS**.

An agent without reward is responsible only for the most ordinary care. *Persch v. Quiggle*, 57 Pa. St. 247.

In *Herrick v. Hodges*, 13 Cal. 431, however, it is held that where one undertakes a gratuitous agency he is bound to good faith and ordinary diligence in executing what he pretends to do.

The fact that it is a friendly agency, undertaken without any expectation of commissions for services, is no excuse for the want of reasonable care in conducting it. *Dodge v. Perkins*, 9 Pick. (Mass.) 393.

Where the issue is raised as to whether or not he was an agent for reward, an instruction which ignores the distinction between the responsibilities of the two classes is fatally erroneous. *Stewart v. Butts*, 45 Ill. App. 512.

An Agent, without Remuneration, to Invest or Lend the money of another is liable only for gross neglect. *Sodowsky v. M'Faland*, 3 Dana (Ky.) 204; *Grant v. Ludlow*, 8 Ohio St. 1.

A Leading Case upon the Subject is *Shiells v. Blackburne*, 1 H. Bl. 158, where a general merchant voluntarily and without reward undertook to enter a parcel of goods for B at the custom-house for exportation, along with a parcel of his own of the same sort, and made the entry under a wrong denomination, whereby both parcels were seized; and

it was held that, having taken the same care of the goods of B as of his own, and having received no reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, he was not liable to an action for the loss.

Gross Neglect—How Determined.—What constitutes such gross neglect in an agent acting without reward as will render him liable in damages to his principal, is a question of fact to be determined by reference to the subject matter and objects of the agency, the known character, qualifications, and relations of the parties, and all the circumstances of the case. *Grant v. Ludlow*, 8 Ohio St. 11.

He is guilty of gross neglect if he omits that reasonable care of property committed to his charge which persons in like situations exercise, or which he is accustomed to exercise in like cases. Gross negligence is to be construed with reference to the nature of the goods which are delivered to the agent, and if money is delivered, it is to be kept with more care than common property. *Tracy v. Wood*, 3 Mason (U. S.) 132.

Where money was deposited with a gratuitous bailee, residing in Utah, to be remitted to a party in St. Louis, and the general method of remitting moneys, there being no bankers, was for several persons to unite together and purchase the drafts of United States officers upon the department at Washington, and the agent put the money with his own, others uniting with him, and took the draft of the United States marshal upon the Treasury Department, it was held that if he acted in good faith and with ordinary care, in the manner usual in transmitting moneys in such cases, he would not be held liable upon payment of the draft being refused. *Eddy v. Livingston*, 35 Mo. 487, 88 Am. Dec. 122.

2. *Stanton v. Bell*, 2 Hawks (N. Car.) 146, 11 Am. Dec. 744; *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41.

3. *Morrison v. Orr*, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; *Thorne v. Deas*, 4 Johns. (N. Y.) 84. And see *supra*, this section, *Fidelity to Instructions—In Case of Unremunerated Agent*.

4. *Skelley v. Kahn*, 17 Ill. 170; *Grant v. Ludlow*, 8 Ohio St. 11.

5. If a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. *Shiells v. Blackburne*, 1 H. Bl. 162; *Stanton v. Bell*, 2 Hawks (N. Car.) 145, 11 Am. Dec. 744.

In *Wilson v. Brett*, 11 M. & W. 113, Rolfe,

c. **GOOD FAITH AND LOYALTY**—(1) *Necessity and Extent of Rule*.—The paramount and vital principle of all agencies is good faith, for without it the relation of principal and agent could not well exist. So sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed.¹ An agent, therefore, will not be allowed to put himself in a position antagonistic to his principal,² or speculate in the subject of the agency;³ and any gift, release, or conveyance obtained by the agent from his principal is subjected to the most rigid scrutiny.⁴

B. said: "A gratuitous bailee is only bound to exercise such skill as he possesses. * * * If a person more skilled knows that to be dangerous which another, not so skilled as he, does not, surely that makes a difference in the liability."

Physicians.—The profession of medicine or surgery is one implying skill, and a physician is liable for the improper treatment of a patient, although he undertakes to treat him without charge. *McNeve v. Lowe*, 40 Ill. 209; *Shiells v. Blackburne*, 1 H. Bl. 158.

But if he does not profess to be a physician nor to practice as such, and is merely asked his advice as a friend or neighbor, he does not incur any responsibility. *McNeve v. Lowe*, 40 Ill. 209. See also *Ritchey v. West*, 23 Ill. 385.

Although the Managers of a Bank are Unpaid, they are held liable for the want of ordinary care and diligence in the management of the affairs of the institution. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775. And a bank is liable for negligence in making collections, although no charge is made for the same. *Durnford v. Patterson*, 7 Martin (La.) 460, 12 Am. Dec. 514.

Attorneys.—But an attorney is not liable to an action for negligence for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed, there being no relation of attorney and client between him and the party asking the question. *Fish v. Kelly*, 17 C. B. N. S. 194, 112 E. C. L. 194.

1. *Lamb v. Evans*, 2 Rep. 189, 1 Ch. 218; *Michoud v. Girod*, 4 How. (U. S.) 554; *Boswell v. Cunningham*, 32 Fla. 277, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 378 *et seq.* *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; *Brooke v. Berry*, 2 Gill (Md.) 100; *Stone v. Daggett*, 73 Ill. 367; *Merryman v. David*, 31 Ill. 404; *Dennis v. McCagg*, 32 Ill. 429; *Fairman v. Bavin*, 29 Ill. 75; *Young v. Hughes*, 32 N. J. Eq. 372; *Persch v. Quiggle*, 57 Pa. St. 247; *Firestone v. Firestone*, 49 Ala. 128; *Columbus Co. v. Hurford*, 1 Neb. 146; *People v. Overysse Tp.*, 11 Mich. 222; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775; *Moore v. Moore*, 5 N. Y. 256.

Agent Investing in Corporation in Which He is Interested.—An agent investing his principal's money in a corporation, which is largely in debt, and of which he is a member, without first informing him of the facts, is guilty of fraud, though there be no actual wrongful intent; and the principal may, in the absence of ratification, recover such sum from the agent. *Sterling v. Smith*, 97 Cal. 343.

Fraud.—An agent fraudulently inducing his principal to exchange land for other land of

less value than represented is liable for the damages sustained. *Palmer v. Pirson* (Buffalo Super. Ct.), 24 N. Y. Supp. 333.

2. *Hughes v. Washington*, 72 Ill. 84; *Cotton v. Holliday*, 59 Ill. 176; *Flint, etc., R. Co. v. Dewey*, 14 Mich. 477. And see *infra*, this section, *Uniting Opposite Characters of Buyer and Seller*, and *Acquiring Adverse Interests*.

An agent cannot be permitted to assume duties and trusts incompatible with his agency, nor to exercise such agency validly after he has acquired an interest adverse to his principal. *Knabe v. Ternot*, 16 La. Ann. 13. He cannot act for his principal in the same transaction in two inconsistent capacities. *Pittsburgh, etc., Iron Co. v. Kirkpatrick*, 92 Mich. 252. But in *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754, it is said that "it must appear, however, that the rule has been violated, and we are not to indulge presumptions upon the subject for the purpose of depriving a party of the fruits of his engagements."

3. *Hughes v. Washington*, 72 Ill. 84; *Krutz v. Fisher*, 8 Kan. 90.

An agent to collect a security receiving property in payment, with the intention of applying it to his own use, and concealing the fact from his principal, is guilty of a conversion. *Ward v. Forrest*, 20 How. Pr. (N. Y. Supreme Ct.) 465.

If instructed to insure, he will not be allowed to take the risk upon himself, and if he does he cannot recover the premiums. In case of loss, he will be compelled to indemnify his principal on the ground of having failed to insure, and not as insurer. *Keane v. Branden*, 12 La. Ann. 20.

4. *Brooke v. Berry*, 2 Gill (Md.) 83; *Kerby v. Kerby*, 57 Md. 345; *Gould v. Gould*, 36 Barb. (N. Y.) 270.

An agent receiving a gift from his principal will be held to prove that his principal acted with full knowledge of the facts and with due deliberation, and under the advice of others than the grantee. *Uhlich v. Muhlke*, 61 Ill. 499; *Neilson v. Bowman*, 29 Gratt. (Va.) 732; *Rubidoex v. Parks*, 48 Cal. 215.

A conveyance obtained by an agent from his principal will be vacated for fraud or concealment in obtaining it; or for the incompetency of the principal to manage his own business on account of his feebleness of intellect; or for inadequacy of consideration so great as to render the transaction unjust, unequal, and unconscientious. *Brooke v. Berry*, 2 Gill (Md.) 83. See *infra*, this title, *Uniting Opposite Characters of Buyer and Seller*; and the titles ATTORNEY AND CLIENT; GIFTS; UNDUE INFLUENCE.

(2) *Making Profit out of Agency.*—It follows from the above rule that an agent will not be allowed to make a profit out of the agency or deal in the business thereof for his own benefit, but must give the principal the benefit of any advantage he may obtain.¹ Any profits made out of the purchase or sale of property for his principal belong to the latter;² as where the agent sells for a higher price,³ or purchases for a less price,⁴ than that limited by the principal.

1. *Agent may Not Deal in the Agency for His Own Benefit.*—*England.*—Imperial Mercantile Credit Assoc. v. Coleman, L. R. 6 H. L. 189.

United States.—Yates v. Arden, 5 Cranch (C. C.) 526; Northern Pac. R. Co. v. Kindred, 14 Fed. Rep. 77.

Alabama.—Whelan v. McCreary, 64 Ala. 319.

Arkansas.—Leake v. Sutherland, 25 Ark. 219; Rhea v. Puryear, 26 Ark. 344.

California.—Wiard v. Brown, 59 Cal. 194.

Illinois.—Merryman v. David, 31 Ill. 404; Cottom v. Holliday, 59 Ill. 176; Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442; Montgomery County v. Robinson, 85 Ill. 174; New Era Gas Fuel Appliance Co. v. Shannon, 44 Ill. App. 477.

Indiana.—Lafferty v. Jelley, 22 Ind. 471.

Iowa.—Stoner v. Weiser, 24 Iowa 434. See also Briggs v. Hartman, 10 Iowa 63.

Louisiana.—Denson v. Stewart, 15 La. Ann. 456.

Mississippi.—Gillenwaters v. Miller, 49 Miss. 150; Murphey v. Sloan, 24 Miss. 658.

Missouri.—Bent v. Priest, 86 Mo. 475.

Nebraska.—Buck v. Reed, 27 Neb. 67.

New Jersey.—Dodd v. Wakeman, 26 N. J. Eq. 484; Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Porter v. Woodruff, 36 N. J. Eq. 174; Thalman v. Canon, 24 N. J. Eq. 127.

New York.—Wilson v. Wilson, 4 Abb. App. Dec. (N. Y.) 621; Dutton v. Willner, 52 N. Y. 312; Price v. Keyes, 62 N. Y. 378; Bain v. Brown, 7 Lans. (N. Y.) 506; Wilson v. Wilson, 4 Keyes (N. Y.) 413, 4 Abb. Dec. (N. Y.) 621; Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 304; Morrison v. Ogdensburgh, etc., R. Co., 52 Barb. (N. Y.) 173; Minnesota Cent. R. Co. v. Morgan, 52 Barb. (N. Y.) 217. See also McMillan v. Arthur, 98 N. Y. 167, *affirming* 48 N. Y. Super. Ct. 424, 6 N. Y. Wkly Dig. 432.

Ohio.—Etna Ins. Co. v. Church, 21 Ohio St. 492.

Pennsylvania.—Reeside v. Reeside, 6 Phila. (Pa.) 507; Norris' Appeal, 71 Pa. St. 106; Coursin's Appeal, 79 Pa. St. 220.

Tennessee.—Moinett v. Days, 1 Baxt. (Tenn.) 431.

Texas.—Borden v. Houston, 2 Tex. 594; Bell v. Maximos, 85 Tex. 140, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 379.

Vermont.—Judevine v. Hardwick, 49 Vt. 180.

Wisconsin.—Collins v. Case, 23 Wis. 230.

Renewing Insurance Policy.—Where an agent instructed to surrender an insurance policy on the life of his principal and secure a return of the premium notes renewed the policy for his own benefit, it was held to enure to the benefit of the principal, and upon his death the agent was held liable to account

for the amount of the policy. Dutton v. Willner, 52 N. Y. 312.

Compromising Debt.—An agent who pays off a debt of his principal for a less sum than is owing is accountable for any residue in his hands given for the purpose. Hitchcock v. Watson, 18 Ill. 289.

Taking up Notes.—Mortgage.—Where an agent, who in the course of his dealings with his principal had frequently made advances to him, took up some outstanding notes of his principal, he was held not entitled to the benefit of a mortgage securing these and other notes, because they must be considered as having been paid at maturity by the maker. Turnbull v. Thomas, 1 Hughes (U. S.) 172.

Contract of Carriage.—The captain of a steamboat cannot make a contract for carriage on his own account, and the owners may call for an assignment of such contract. Roorbach v. Dale, 6 Johns. Ch. (N. Y.) 469.

2. Warren v. Burt, 58 Fed. Rep. 101, 7 C. A. 105; Rising Sun Nat. Bank v. Seward, 106 Ind. 264; McDermid v. Cotton, 2 Ill. App. 297.

And see Lister v. Stubbs, 45 Ch. Div. 1, where a purchasing agent accepted commissions from houses with which he placed orders.

An agent employed to purchase hay, who turns it over to other parties after a rise in the market, for the purpose of getting larger commissions, is liable for any loss sustained. Rundell v. Kalbfus, 125 Pa. St. 123.

If an agent to purchase, purchases on his own account, the profits belong to the principal. Ackenburgh v. McCool, 36 Ind. 473. And see *infra*, this section, *Agent to Purchase, Purchasing for Himself.*

3. *Selling for Higher Price than That Named.*—Merryman v. David, 31 Ill. 404; Kerfoot v. Hyman, 52 Ill. 512; Bain v. Brown, 56 N. Y. 285; Blanchard v. Jones, 101 Ind. 542; Love v. Hoss, 62 Ind. 255; Greenfield Sav. Bank v. Simons, 133 Mass. 415; Schoellkopf v. Leonard, 8 Colo. 159; Kramer v. Winslow, 130 Pa. St. 484, 25 W. N. C. 257; Kramer v. Winslow, 154 Pa. St. 637.

Where a broker sold stock for his principal and remitted a smaller amount than he had actually received for it, although the principal, under the impression that the smaller amount was the highest market price, had consented to sell for that amount, it was held that he could recover from the broker the price actually received by him. Cutter v. Demmon, 111 Mass. 474.

4. *Purchasing for Price Less than That Named by Principal.*—*United States.*—Northern Pac. R. Co. v. Kindred, 3 McCrary (U. S.) 627.

Agent Employing Principal's Property in His Own Business.—So, also, if the agent uses the property of his principal in his business, he is liable for the value of the use.¹

Gratuities.—The principal, however, is not entitled to mere gratuities received by the agent.²

Trustees.—These principles apply equally to trustees.³

(3) **Acting for Both Parties—Rule Stated.**—When an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is voidable in equity upon the application of either party, or the circumstance is available as a defense in an action at law upon the contract,⁴

California.—Ritchey v. McMichael (Cal., 1893), 35 Pac. Rep. 151.

Illinois.—Ely v. Hanford, 65 Ill. 267.

Indiana.—Rising Sun Nat. Bank v. Seward, 106 Ind. 264.

Iowa.—Keyes v. Bradley, 73 Iowa 589;

Anderson v. Weiser, 24 Iowa 428; Rorebeck v. Van Eaton (Iowa, 1894), 57 N. W. Rep. 694.

Maine.—Bunker v. Miles, 30 Me. 431, 50 Am. Dec. 632.

Minnesota.—Crump v. Ingersoll, 44 Minn. 84.

Missouri.—Kanada v. North, 14 Mo. 615.

New York.—Manville v. Lawton (Supreme Ct.), 19 N. Y. Supp. 587; Duryea v. Vosburgh, 138 N. Y. 621; Moore v. Moore, 5 N. Y. 256; Wilson v. Wilson, 4 Abb. App. Dec. (N. Y.) 621.

1. Stebbins v. Waterhouse, 58 Conn. 370.

2. *Ætna Ins. Co. v. Church*, 21 Ohio St. 492.

3. Where a trustee speculates with trust funds, the profits will belong to the *cestui que trust*. Norris' Appeal, 71 Pa. St. 106; Bond v. Lockwood, 33 Ill. 212; America Bank v. Pollock, 4 Edw. Ch. (N. Y.) 215; Pugh v. Pugh, 9 Ind. 132; Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152; Bent v. Priest, 86 Mo. 476; Taylor v. Plumer, 3 M. & S. 562. See also the title TRUSTS AND TRUSTEES.

4. **General Rule—Agent may Not Act for Both Parties.**—*England.*—Panama, etc., Tel. Co. v. India Rubber, etc., Tel. Works Co., L. R. 10 Ch. 515.

Illinois.—Bensley v. Moon, 7 Ill. App. 415; Fish v. Leser, 69 Ill. 394.

Iowa.—Seymour v. Shea, 62 Iowa 706.

Kentucky.—Lloyd v. Colston, 5 Bush (Ky.) 587.

Louisiana.—Draughon v. Quillen, 23 La. Ann. 237.

Maryland.—Schwartz v. Yearly, 31 Md. 278.

Michigan.—Moore v. Mandelbaum, 8 Mich. 433; Englemann v. Rense, 61 Mich. 395.

Minnesota.—Crump v. Ingersoll, 44 Minn. 84, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 372.

Missouri.—Mercantile Mut. Ins. Co. v. Hope Ins. Co., 8 Mo. App. 408; Robinson v. Jarvis, 25 Mo. App. 421.

New Jersey.—Young v. Hughes, 32 N. J. Eq. 372.

New York.—New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85, reversing 20 Barb. (N. Y.) 468; Neuendorff v. World Mut. L. Ins. Co., 69 N. Y. 389; Cumberland Coal, etc., Co. v. Sherman, 30 Barb. (N. Y.), 553.

North Carolina.—Sumner v. Charlotte, etc., R. Co., 78 N. Car. 289.

Tennessee.—Tennessee Bank v. Moore, 3. Sneed (Tenn.) 544.

Texas.—Armstrong v. O'Brien, 83 Tex. 635; Centennial Mut. L. Assoc. v. Parham, 80 Tex. 518.

Wisconsin.—Walworth County Bank v. Farmers' L. & T. Co., 16 Wis. 629.

Executing Mortgage.—One standing in the position of agent for both parties cannot execute a mortgage as attorney of one for the benefit of the other. Greenwood v. Spring, 54 Barb. (N. Y.) 375.

Agent Liable to Principal in Damages.—Where a person voluntarily becomes an unpaid agent of another to negotiate a sale of stock, and thus receives a certain sum from the purchaser as a reward for acting in his behalf and procuring a sale for less than the purchaser was willing to pay, the agent becomes liable to the owner for the loss sustained by this breach of confidence. Hunsaker v. Sturges, 29 Cal. 142.

May Not Shield Himself by Repudiation.—If one accepts the position of agent for the buyer without disclosing the fact that he is agent for the seller, he cannot afterwards repudiate such position, and shield himself from liability to the buyer on the ground that he was agent for the seller. Having assumed the relation of agent for the buyer, he must be held to a strict performance of the duties and to all the liabilities the relation imposes. But the buyer may, in a proper case, repudiate the acts of the agent upon the ground that he was the agent of the seller and did not disclose the fact. Cotton v. Holliday, 59 Ill. 176.

Dealing in Land Warrants.—Certain parties having established a claim to a land bounty, employed an agent to do the best he could with the warrant, and wrote him that a far better price than seventy-five cents an acre was expected, but as it had been left to him he must act for them. The sale was afterwards effected through the agent at seventy-five cents per acre, and a conveyance made to the purchaser. It afterwards transpired that the purchaser had authorized the same agent to purchase warrants, and agreed to allow him one half of any profit that might be made, after refunding the purchase money and interest; that the agent had informed the purchaser that the warrant was offered at seventy-five cents per acre, but that the purchaser did not know whose warrant was the subject of sale until after the purchase

and the agent is not entitled to a commission for his services.¹

Limitation—Where Interests Not Conflicting.—But one may act as agent for both parties where their interests do not conflict, and where loyalty to one is not a breach of duty to the other.²

Limitation—Where Principals Consent.—And where the principals have knowledge of the fact that the agent is acting in a dual capacity, and with such knowledge assent to his so acting, the disability will be considered as waived.³

had been completed. Upon a bill being filed against the agent and the purchaser, it was held that the agent should not have been concerned in the purchase, and the court decreed against him for so much of the profit resulting therefrom as he had received. *Segar v. Edwards*, 11 Leigh (Va.) 220.

Property Sold at Public Auction.—But in *Scott v. Mann*, 36 Tex. 157, it was held that where the agent sells property at public outcry, and in the manner usual at trust or judicial sales, there is no legal principle prohibiting him from bidding it off for a third party. See the title AUCTIONS AND AUCTIONEERS.

Corporate Directors.—A contract between two corporations made through their respective boards of directors is not voidable from the mere circumstance that a minority of the board of one corporation are also directors of the other company. *U. S. Rolling Stock Co. v. Atlantic, etc., R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380.

In Cases of Doubt the courts will always assume that only one principal is responsible for the acts of the agent. So where an express company receives goods directed to the special care of its agent at a specified place, it will be assumed that the shipper intended to make such agent his own agent for receiving the goods; and the express company is discharged from responsibility in delivering the goods to such agent. *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330, 2 Am. Rep. 577.

Brokers.—As to when a broker may be agent for both parties, see the title BROKERS.

1. *Connecticut.*—*Bollman v. Loomis*, 41 Conn. 581.

Illinois.—*Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Boyd v. Dullaghan*, 33 Ill. App. 266.

Kentucky.—*Lloyd v. Colston*, 5 Bush (Ky.) 587; *Mullen v. Keetzleb*, 7 Bush (Ky.) 253.

Maryland.—*Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

Massachusetts.—*Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Holcomb v. Weaver*, 136 Mass. 265; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459.

Missouri.—*Collins v. Fowler*, 8 Mo. App. 588; *Atlee v. Fink*, 75 Mo. 100.

New York.—*Watkins v. Cousall*, 1 E. D. Smith (N. Y.) 65; *Dunlop v. Richards*, 2 E. D. Smith (N. Y.) 181; *Vanderpoel v. Kearns*, 2 E. D. Smith (N. Y.) 170; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245; *Siegel v. Gould*, 7 Lans. (N. Y.) 177; *Bennett v. Kidder*, 5 Daly (N. Y.) 512; *Levy v. Loeb*, 85 N. Y. 365.

Ohio.—*Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

Pennsylvania.—*Everhart v. Searle*, 71 Pa. St. 256.

Rhode Island.—*Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458.

Tennessee.—*Moinett v. Days*, 1 Baxt. (Tenn.) 431.

Wisconsin.—*Meyer v. Hanchett*, 39 Wis. 419, 43 Wis. 246; *Barry v. Schmidt*, 57 Wis. 172; *Orton v. Scofield*, 61 Wis. 382.

And see *infra*, this section, *Of Principal to Agent—Remuneration for Services Rendered.*

2. The maxim that "no man shall serve two masters" does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other. *Nolte v. Hulbert*, 37 Ohio St. 445.

An Agent Merely for the Care and Custody of Property may act as agent for an insurance company in issuing a policy of insurance on the property. The two capacities are not necessarily inconsistent. *Northrup v. Germania F. Ins. Co.*, 48 Wis. 420, 33 Am. Rep. 815.

Compromising Debt.—In making a contract for the composition of a debt the same man cannot be the agent for both parties; but when the composition is agreed upon with the creditor by the agent of the debtor, he can be the agent of the creditor for another and distinct purpose—as to receive the money. *Henckley v. Arey*, 27 Me. 362.

3. **Consent of Principals.**—*Alexander v. North-Western Christian University*, 57 Ind. 476; *Colwell v. Keystone Iron Co.*, 36 Mich. 51; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Helmer v. Krolick*, 36 Mich. 371.

The law will not allow a person to assume a double agency, or hold the inconsistent and repugnant relations which it imposes, without the full consent of both parties freely given. *Meyer v. Hanchett*, 43 Wis. 246; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458.

Attorneys.—This rule does not prohibit an attorney at law, into whose hands a debt has been placed for collection, from acting as the attorney in fact of the debtor to confess judgment on the debt, the debtor being advised of the extent of the attorney's agency for the creditor, and executing the power to avoid costs of suit. *Wassell v. Reardon*, 11 Ark. 705, 54 Am. Dec. 245. See the title ATTORNEY AND CLIENT.

A person who voluntarily employs the agent of another, knowing the fact of such existing agency, is estopped from pleading the rule that the same person cannot be the

and he may recover commissions from either party.¹

(4) *Letting Contract to Himself*.—Agents authorized to let a contract for a public work, or other matter, cannot let it to themselves; and if they do, it will be held void.²

(5) *Uniting Opposite Characters of Buyer and Seller*—(a) *Statement of Rule*.—It is well settled that an agent cannot unite in his own person the opposite characters of buyer and seller; that is, an agent to purchase cannot purchase from himself, and an agent to sell cannot be himself the purchaser without the full, free, and intelligent consent of his employer.³ The rule is very general in its application, embracing not only agencies of a private character, but also those public in their nature.⁴

agent of two principals having conflicting interests. *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330, 2 Am. Rep. 577.

Good Faith Required.—When a professional land agent acts as agent for both the seller and the buyer, and that is known to them, the law exacts the most perfect good faith, honesty, and fairness on his part, and will not adjudge the specific performance of a contract thus made unless it has been entered into with perfect fairness and without misapprehension or misrepresentation. *Morgan v. Hardy*, 16 Neb. 427.

1. *Dunlop v. Richards*, 2 E. D. Smith (N. Y.) 181; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245; *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528, followed in *Capener v. Hogan*, 40 Ohio St. 203; *Alexander v. North-Western Christian University*, 57 Ind. 466; *Robinson v. Jarvis*, 25 Mo. App. 421.

If a principal, in authorizing an agent to make a purchase, also authorizes him to contract with the seller for a commission sufficient to pay him for his services, and the seller, knowing his relation to the purchaser, contracts to pay him a commission, he cannot afterwards avoid paying it on the ground that the contract was void, as being in violation of the good faith which an agent owes his principal. *Leekins v. Nordyke, etc., Co.*, 66 Iowa 471.

Where the general business agent of another is also the agent of an insurance company, and in the latter capacity writes insurance upon the property of his principal, but with such knowledge on the part of the company as would make the policies valid, or at most merely voidable, he is entitled to be reimbursed for the premiums paid by him. *Rochester v. Levering*, 104 Ind. 562. See *infra*, this section, *Of Principal to Agent—Remuneration for Services Rendered*.

2. Thus where certain parties were authorized to represent a township in letting a contract for the improvement of a harbor, with power in regard to the plan of the work, the materials to be used, the time and mode of completion, security for performance, etc., and a portion of their number, though less than a majority, united with others in taking the contract, it was held void. *People v. Overysel Tp.*, 11 Mich. 222. The agent cannot take a contract to which he is secretly a party. *Green v. Knoch*, 92 Mich. 26.

And it is immaterial that the contract is let

to third parties and afterwards assigned to those having charge of the letting. *Flint, etc., R. Co. v. Dewey*, 14 Mich. 477.

3. *General Rule—Agent may Not be Both Buyer and Seller—England*.—*Bentley v. Craven*, 18 Beav. 75.

United States.—*Robertson v. Chapman*, 152 U. S. 673; *Michoud v. Girod*, 4 How. (U. S.) 503.

Alabama.—*McKinley v. Irvine*, 13 Ala. 681; *Walker v. Palmer*, 24 Ala. 358.

California.—*Wilbur v. Lynde*, 49 Cal. 290.

Colorado.—*Finnerty v. Fritz*, 5 Colo. 174.

Connecticut.—*Banks v. Judah*, 8 Conn. 145; *Church v. Sterling*, 16 Conn. 388.

Illinois.—*Casey v. Casey*, 14 Ill. 112.

Indiana.—*Sturdevant v. Pike*, 1 Ind. 277.

Maine.—*Matthews v. Light*, 32 Me. 305.

Massachusetts.—*Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198.

Michigan.—*Ingerson v. Starkweather, Walk. (Mich.)* 346; *Moore v. Mandlebaum*, 8 Mich. 433.

New Hampshire.—*Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316.

New York.—*Cumberland Coal, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Moore v. Moore*, 5 N. Y. 256.

North Carolina.—*Deep River Gold Min. Co. v. Fox*, 4 Ired. Eq. (N. Car.) 61.

South Carolina.—*Butler v. Haskell*, 4 Desaus. (S. Car.) 651.

Tennessee.—*Tynes v. Grimstead*, 1 Tenn. Ch. 508.

Texas.—*Shannon v. Marmaduke*, 14 Tex. 217.

Virginia.—*Segar v. Edwards*, 11 Leigh (Va.) 220.

4. *Ten Eyck v. Craig*, 62 N. Y. 420; *Wager v. Reid*, 3 Thomp. & C. (N. Y.) 335; *Ames v. Port Huron Log Driving, etc., Co.*, 11 Mich. 139, 83 Am. Dec. 731; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Torrey v. Orleans Bank*, 9 Paige (N. Y.) 663; *Rankin v. Porter*, 7 Watts (Pa.) 387. See also the titles ATTORNEY AND CLIENT; AUCTIONS AND AUCTIONEERS; BANKRUPTCY; EXECUTORS AND ADMINISTRATORS; GUARDIANS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PUBLIC OFFICERS; SHERIFFS; TRUSTS AND TRUSTEES; and other classes of agents under their specific titles.

Various Statements of the Rule with Reasons Therefor.—Whoever undertakes to act for another in any matter shall not, in the same matter, act for himself; and this without regard to the fact whether he has or has not

Rights of Third Parties.—This principle, however, does not render the transaction absolutely void, but voidable only. It is an abuse of authority which may be taken advantage of by any one whose interest is affected, but strangers to the property cannot call it in question.¹

Not Necessary to Show Actual Fraud.—It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him; he may repudiate or affirm the contract irrespective of any proof of actual fraud.²

Party must Offer to Make Return.—But if he repudiates it, he must offer to return whatever he has received thereunder.³

Custom.—Evidence of usage is not admissible to convert an agent employed to buy for his principal into a principal to sell to him, except where the employer knows and assents to the dealing on the footing of such custom.⁴

made a profit by the act. *Tynes v. Grimstead*, 1 Tenn. Ch. 508. Express contracts thus made are contrary to public policy. *Wilbur v. Lynde*, 49 Cal. 290.

The rule that a person cannot, either directly or indirectly, be both vendor and purchaser in the same transaction, is as old as the principles of equity. *Downes v. Grazebrook*, 3 Meriv. 200; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Schenck v. Dart*, 22 N. Y. 422; *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88; *Fox v. Mackreth*, 2 Bro. C. C. 400, 2 Cox Ch. 320, 1 White & T. Lead. Cas. in Eq. (3d Am. ed.) *92.

The characters of seller and buyer are so entirely incompatible that they can never be united in the same person. *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23. For when the agent has a duty to discharge, his own interest must not come in conflict with the duty he owes his principal. *Mollett v. Robinson*, L. R. 5 C. P. 646; *Tewksbury v. Spruance*, 75 Ill. 188.

He cannot deal for his own advantage with his principals, or become the seller or buyer to or of them, on account of his confidential relation, and his being bound to disclose to them every fact, circumstance, and advantage in relation to the purchase which may come to his knowledge. *McDonald v. Fithian*, 6 Ill. 269; *Meeker v. York*, 13 La. Ann. 18; *Bruce v. Davenport*, 36 Barb. (N. Y.) 349.

The law does not presume that such transactions will always be impressed with fraud; but they furnish an inducement to fraud and afford opportunities to persons who should always act with the most conscientious and scrupulous good faith, to abuse their trust. A total disability is therefore enjoined to take away all temptation. *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304.

The object of the principle is to elevate the agent to a position where he cannot be tempted to betray his trust. *Porter v. Woodruff*, 36 N. J. Eq. 174.

It is the legal duty of a commission merchant or broker to sell and buy for, and not to or from, his principal. *Butcher's Sons v. Krauth*, 14 Bush (Ky.) 713.

Limitation.—But this rule applies only to agents who are relied upon for counsel and direction, and where the employment is rather a trust than a service, or both, and not

to those who are employed merely as instruments in the performance of an appointed service; and hence an agent employed about another matter may purchase from an agent of the same principal, employed to sell. *Spalding v. Mattingly* (Ky., 1886), 1 S. W. Rep. 488.

1. *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258; *Eastern Bank v. Taylor*, 41 Ala. 93; *McKinley v. Irvine*, 13 Ala. 681.

2. **Not Necessary to Show Actual Imposition or Fraud.**—*New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 91; *Porter v. Woodruff*, 36 N. J. Eq. 174.

The transaction will be set aside by a court of equity without inquiry as to its fairness. *Sturdevant v. Pike*, 1 Ind. 277.

"If such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence, the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party." Per *Christiancy, J.*, in *People v. Overysse* Tp., 11 Mich. 228.

But see the opinion in *Burke v. Bours* (Cal., 1891), 26 Pac. Rep. 102, which certainly seems contrary to all the authorities, though the sale was sustained on the ground of ratification.

3. *Disbrow v. Secor*, 58 Conn. 35.

4. Thus a merchant gave orders to a tallow broker in London to buy certain quantities of tallow for him, and the broker did not buy the specified quantities from any person, though he sent bought notes in the usual form, "Bought of A on your account;" but both before and after the order bought from various persons, in his own name, larger quantities of tallow, proposing to allot to his principal the quantities he had desired bought. Upon the principal's refusal to accept the tallow, the broker sold it and brought an action for the difference, and it was held that though the evidence showed such a mode of dealing to be the usage in the London tallow market, the action was not maintainable against the principal, who did not appear to have had knowledge of its

(b) **Agent to Purchase, Purchasing from Himself.**—An agent to purchase cannot buy his own property for his principal unless the latter with a full knowledge of all the facts assents to the transaction;¹ and it is immaterial that the agent's intention is honest, that he can do better for his principal by selling him his own property than by going into the open market and buying. The rule is inflexible.²

(c) **Agent to Sell, Purchasing for Himself.**—An agent employed to sell cannot himself be the purchaser, unless the relations with his principal have been dissolved,³

existence. *Robinson v. Mollett*, L. R. 7 H. L. 802. And see *Butcher v. Krauth*, 14 Bush (Ky.) 713; also the title *USAGE AND CUSTOM*.

1. *England.*—*Kimber v. Barber*, L. R. 8 Ch. 56.

United States.—*Bischoffsheim v. Baltzer*, 20 Fed. Rep. 890; *Sunderland v. Kilbourn*, 3 Mackey (D. C.) 506.

Alabama.—*Spratt v. Wilson*, 94 Ala. 608, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 372, 375.

California.—*Davidson v. Dallas*, 8 Cal. 245.

Connecticut.—*Disbrow v. Secor*, 58 Conn. 35.

Illinois.—*Ely v. Hanford*, 65 Ill. 267; *Tewksbury v. Spruance*, 75 Ill. 187.

Louisiana.—*Beal v. McKiernan*, 6 La. 107.

Maryland.—*Keighler v. Savage Mfg. Co.*, 12 Md. 386, 71 Am. Dec. 600.

Minnesota.—*Friesenhahn v. Bushnell*, 47 Minn. 443.

New York.—*Willink v. Vanderveer*, 1 Barb. (N. Y.) 599; *Marvin v. Buchanan*, 62 Barb. (N. Y.) 468; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 268; *Miller v. Curtiss* (Super. Ct.), 39 N. Y. St. Rep. 383; *Conkey v. Bond*, 36 N. Y. 427, affirming 34 Barb. (N. Y.) 276; *Taussig v. Hart*, 58 N. Y. 425; *King v. Mackellar*, 109 N. Y. 215.

The principal upon ascertaining the facts may repudiate the transaction, and it makes no difference that he was not injured. *Friesenhahn v. Bushnell*, 47 Minn. 443.

Stock Broker.—An agent under a general authority to purchase stock cannot impose his own stock on the principal without his assent. *Conkey v. Bond*, 36 N. Y. 427, affirming 34 Barb. (N. Y.) 276; *Taussig v. Hart*, 58 N. Y. 425.

A stock broker who has purchased stock for his customer is bound to keep on hand, or under his control, ready for delivery to the customer upon his paying the amount due, either the particular shares purchased or an equal amount of other shares of the same kind, whether the relation of pledgor and pledgee exists between the parties, or the broker holds the stock under a special contract; and whenever he sells, failing to keep on hand a sufficient amount of stock to meet his obligation, the customer may ratify and claim the benefit of a sale or may claim the value of the stock on the day of sale. A subsequent acquisition of a sufficient amount of the stock to replace that which he held does not relieve the broker. *Taussig v. Hart*, 58 N. Y. 425.

And where a stock broker, employed to purchase canal shares, bought them from C., the ostensible owner, who afterwards turned

out to be a mere trustee for the broker, after the lapse of several years, the court, without entering into the question of the fairness of the price, held the transaction void on grounds of public policy, and set it aside with costs. *Gillett v. Peppercorne*, 3 Beav. 78.

Commission Merchant.—A commission merchant, employed to go into the market and buy a given quantity of wheat for cash, is not authorized to turn over to his principal wheat held by him, even if he charges no more than the market price. His interests must not come in conflict with his duty. *Tewksbury v. Spruance*, 75 Ill. 187.

Partners.—Where one of several partners was employed to purchase goods for his firm, and, unknown to his copartners, purchased goods of his own at the market price, making a considerable profit thereby, he was held accountable to the firm for the profit thus made. *Bentley v. Craven*, 18 Beav. 75.

2. *Taussig v. Hart*, 58 N. Y. 425.

3. *McDonald v. Lord*, 2 Robt. (N. Y.) 7, 26 How. Pr. (N. Y.) 404; *Euneau v. Rieger*, 105 Mo. 659; *Prigden v. Adkins*, 25 Tex. 388; *Armstrong v. O'Brien*, 83 Tex. 635; *Satterthwaite v. Loomis*, 81 Tex. 64; *Moseley v. Buck*, 3 Munf. (Va.) 232, 5 Am. Dec. 508; *Rockford Watch Co. v. Manifold*, 36 Neb. 801; *Jansen v. Williams*, 36 Neb. 869.

The most open, ingenuous, and disinterested dealing is required of a confidential agent while he consents to act as such; and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt of his position in this respect is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so familiar or so accordant with common honesty. *Bartholemew v. Leech*, 7 Watts (Pa.) 472; *Colbert v. Shepherd*, 89 Va. 401. And see *Bowman v. Officer*, 53 Iowa 640.

An agent to sell real estate contracted to sell it for seventeen thousand dollars, and so advised his principal. The day after, other parties offered to purchase the property, and he executed a contract with them in his own name as vendor for twenty-six thousand dollars. He procured an assignment of the first contract, and had his principal deed to the second parties, on the representation that the first party had assigned to them, not disclosing to his principal the price to be paid under the second contract, and his principal was held entitled to the benefit of the second sale. *Bain v. Brown*, 56 N. Y. 285.

Buying from the Purchaser Subsequently.—After the agent has fully discharged the trust and sold the property in good faith, having

or there is a deliberate agreement between them to that effect.¹

no interest in the same at the time, he may afterwards acquire title from the purchaser. *Walker v. Carrington*, 74 Ill. 446.

Presumption.—But when an agent is found, recently after his sale to have acquired a beneficial interest in the property under the purchaser, a strong presumption of indirection and attempted evasion arises, which he is required to remove by good and convincing evidence. *McGar v. Adams*, 65 Ala. 106; *Bucher v. Bucher*, 86 Ill. 377; *Walker v. Derby*, 5 Biss. (U. S.) 134; *First Nat. Bank v. Bissell*, 2 McCrary (U. S.) 73.

A Mere Formal Surrender of the Agency is not sufficient to give the agent a right to purchase. *Fountain Coal Co. v. Phelps*, 95 Ind. 271.

Notice of Surrender of Agency—Burden of Proof.—Where the agent attempts to sever his relations with his principal by notice, the burden is upon him to show that the notice was received by the principal. *Fountain Coal Co. v. Phelps*, 95 Ind. 271.

Option Contract.—Where a written option to real-estate brokers, for a given time, to sell land for a specified price, leaves it doubtful whether the option is to buy as well as to sell, the law will not infer that the agent could himself become the purchaser. *Colbert v. Shepherd*, 89 Va. 401.

1. *United States.*—*Cleveland Ins. Co. v. Reed*, 1 Biss. (U. S.) 180; *Jeffries v. Wiester*, 2 Sawy. (U. S.) 135; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

Arkansas.—*Rogers v. Lockett*, 28 Ark. 290; *White v. Ward*, 26 Ark. 445.

Connecticut.—*Banks v. Judah*, 8 Conn. 145.

Georgia.—*Kellam v. Doe*, 31 Ga. 544.

Illinois.—*Kerfoot v. Hyman*, 52 Ill. 512; *Eldridge v. Walker*, 60 Ill. 230; *Hughes v. Washington*, 72 Ill. 84; *Francis v. Kerker*, 85 Ill. 190.

Indiana.—*Sturdevant v. Pike*, 1 Ind. 277.

Iowa.—*Ingle v. Hartman*, 37 Iowa 274.

Louisiana.—*Florance v. Adams*, 2 Rob. (La.) 556, 38 Am. Dec. 226; *Robertson v. Western M. & F. Ins. Co.*, 19 La. 227, 36 Am. Dec. 673.

Maryland.—*Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

Massachusetts.—*Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198.

Michigan.—*McKay v. Williams*, 67 Mich. 547; *McNutt v. Dix*, 83 Mich. 328; *Ames v. Port Huron Log Driving, etc., Co.*, 11 Mich. 139, 83 Am. Dec. 731; *People v. Overysse* Tp., 11 Mich. 222.

Missouri.—*Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304.

New Hampshire.—*Martin v. Moulton*, 8 N. H. 504; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316.

New York.—*Cumberland Coal, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Bain v. Brown*, 56 N. Y. 285.

Oregon.—*Savage v. Savage*, 12 Oregon 459.

Tennessee.—*Tynes v. Grimstead*, 1 Tenn. Ch. 508.

Texas.—*Shannon v. Marmaduke*, 14 Tex. 217; *Scott v. Mann*, 36 Tex. 157.

Virginia.—*Moseley v. Buck*, 3 Munf. (Va.) 232, 5 Am. Dec. 508.

Wisconsin.—*Bank of the North West v. Taylor*, 16 Wis. 609; *Stewart v. Mather*, 32 Wis. 344; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433.

And see *infra*, this section, *Dealing Directly with Principal*.

It is a settled principle of equity that a person who is placed in a situation of trust or confidence, in reference to the subject of sale, cannot be the purchaser of the property on his own account. *Torrey v. Orleans Bank*, 9 Paige (N. Y.) 649. And equity will scrutinize every such transaction. *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433.

The two interests which an agent has, to sell property and to become the purchaser thereof, are so incompatible, that the law does not allow them to be united in the same person. *Parker v. Vose*, 45 Me. 60. Nor will an inquiry be permitted into the fairness or unfairness of the transaction. *Mills v. Goodsell*, 5 Conn. 479, 13 Am. Dec. 90; *Banks v. Judah*, 8 Conn. 157.

Agent Selling to Near Relative.—But the fact that the purchaser is a brother-in-law of the agent does not imply that confidence which precludes him from becoming a purchaser. *Walker v. Carrington*, 74 Ill. 446.

Agent for Control of Property Buying at Mortgage Sale.—An agent having control of real estate, renting it out, collecting the rents, paying taxes and insurance, and having power to sell, cannot himself become the purchaser of the property at a sale under a mortgage, and hold it against his principal; especially where, by private agreement with the mortgagee, he induces the latter not to bid against him. *Adams v. Sayre*, 70 Ala. 318.

Specific Performance of a contract to sell will not be enforced where the agent to sell is interested in the purchase. *Green v. Knoch* (Mich., 1892), 52 N. W. Rep. 80.

Agent Using Name of Wife in the Transaction.

—An agent for the sale of land wrote that he had found a purchaser for one hundred dollars, and advised his principal to accept it, and transmitted a conveyance, in favor of his wife, to the principal for his execution, which he represented was a means of ultimately transferring the title to the purchaser. The principal executed the deed, and the agent remitted the one hundred dollars. The purchaser refused to take the land, and about fifteen months afterwards, it having greatly increased in value, the agent, without informing his principal of the refusal of the purchaser or of the increase in value, placed the deed to his wife on record and sold the property at a large advance; it was held that he was guilty of a breach of duty in not informing his principal of the facts, and that the latter was entitled to recover the profits made out of the transaction. *Smitz v. Leopold*, 51 Minn. 455. And see *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97, where a sale to the wife was set aside.

Agent's Clerk.—And this rule has been applied to a clerk of the agent employed or concerned in the affairs of the principal relating to the property.¹

Purchase through Third Party.—An agent will not be allowed to accomplish by the intervention of another what the law prohibits him from doing directly; and a purchase made for him by a third party is equally as objectionable as one made by himself.²

Character of Sale Immaterial.—It is immaterial that the sale is made at public auction and for full value,³ or that the agent is empowered to sell for a stipu-

Exemplary Damages.—In *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, where the agent by false and fraudulent representations sold goods of his principal to himself, so as to realize from a rise in value, he was held liable for exemplary damages.

Ground for Discharge.—Where the agent of a mercantile firm for the sale of goods sells to another firm in which he himself is interested his employers will be justified in dismissing him before the expiration of the term for which he has been employed. *Reimers v. Ridner*, 2 Robt. (N. Y.) 11.

1. Employees of Agent within the Rule.—*Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Lingke v. Wilkinson*, 57 N. Y. 445; *Cheeseman v. Sturges*, 9 Bosw. (N. Y.) 246; *Levy v. Brush*, 8 Abb. Pr. N. S. (N. Y. Super. Ct.) 418; *Newcomb v. Brooks*, 16 W. Va. 32.

In *Hobday v. Peters*, 28 Beav. 349, the rule was held applicable to an attorney's clerk.

In *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192, it was said that the clerk, of course, had access to the correspondence of the firm, was well acquainted with the principal's urgency to sell, his motives for so doing, and all the facts and circumstances connected with the property known to the agents, and as clerk to the agent he owed the same duty to the principal as the agent.

Neither is the solicitor to a commissioner of bankruptcy allowed to purchase at the commissioner's sale. *Ex p. Bennett*, 10 Ves. Jr. 381.

2. Agent Purchasing through Third Person.—*Parker v. Vose*, 45 Me. 54; *McKay v. Williams*, 67 Mich. 547, 11 Am. St. Rep. 597; *Ingerson v. Starkweather, Walk.* (Mich.) 346; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258; *Jones v. Hoyt*, 23 Conn. 165; *Fisher v. Budlong*, 10 R. I. 525; *Eldridge v. Walker*, 60 Ill. 230.

He cannot purchase either directly or indirectly. *Robbins v. Butler*, 24 Ill. 387.

Where an agent to sell enters into a contract with one desiring to buy, that he will introduce him to the vendor and promote the sale if he will subsequently sell him part of the property at an agreed price, such contract is invalid and cannot be enforced. *Smith v. Townsend*, 109 Mass. 500; *Hughes v. Washington*, 72 Ill. 84.

And in *Moore v. Moore*, 21 How. Pr. (N. Y. Ct. App.) 211, it was held that an agent who procured property sold under foreclosure by him, to be bought in for him by a friend, at an inadequate price, was not entitled to interest on the sum as an advance.

Partner of Agent.—Where the owner of certain real estate gives authority to an agent to sell the same, and such agent, without the

knowledge or consent of his principal, enters into a contract with a person who is his partner in the purchase and sale of such property, to sell the property to him, the contract will not be specifically enforced as against the owner of the land. *Fry v. Platt*, 32 Kan. 62; *Francis v. Kerker*, 85 Ill. 190. See *Reimers v. Ridner*, 2 Robt. (N. Y.) 11.

Agent Selling to Himself and Another Jointly.—And where the agent sells to himself and another jointly, although the contract purports to be entirely between the owner and the ostensible purchaser, it will not be sustained. *Hughes v. Washington*, 72 Ill. 84.

Inadequacy of Price—Reconveyance to Agent Unexplained.—An agent for the sale of land sold it for fifty cents an acre, and more than two years afterwards the purchaser conveyed it to the agent. The principal then sued the agent for the land, and proved by a witness that he had heard him say that he was only authorized to sell when he could get three dollars per acre, and it was held, in the absence of any explanation or contradiction of the testimony, that the plaintiff was entitled to recover. *Shannon v. Marmaduke*, 14 Tex. 217.

Qualification of Rule—Good Faith.—But where the agent, in good faith and without any design to obtain the property for himself, sells it to a purchaser, reports the sale to his principal, giving the terms and conditions thereof, and, after the ratification of the sale by the principal, purchases the land from the party to whom it has been sold, and receives a conveyance from him, no fraud having been perpetrated against his principal, the sale will be sustained. *Bookwalter v. Lansing*, 23 Neb. 291. And see, to the same effect, *Robertson v. Chapman*, 152 U. S. 673.

3. Sales by Public Auction.—A purchase by the selling agent, although made at auction, for full value and by perfectly fair means, will be set aside upon application of the principal if made promptly. *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, 45 Am. Dec. 310; *Brothers v. Brothers*, 7 Ired. Eq. (N. Car.) 150; *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285; *Mason v. Martin*, 4 Md. 124; *Martin v. Wyncoop*, 12 Ind. 266, 74 Am. Dec. 209; *Newcomb v. Brooks*, 16 W. Va. 32; *Ingerson v. Starkweather, Walk.* (Mich.) 346.

Where a shipmaster, finding no representative of the owner of certain goods shipped on board his vessel, at the port of delivery, had them sold at public auction to pay freight and charges, according to a provision in the bill of lading, giving notice by advertisement in the newspapers, and had them bid in for his own benefit by a third party, the sale was held to be void. *Jones v. Hoyt*, 23 Conn. 165.

lated price; the rule is the same.¹ And there is no distinction between a private and a judicial sale where it is controlled by the agent and the officer acts under his instructions.²

Purchasers from Agent.—Purchasers from the agent with knowledge of the facts stand in no better position than the agent himself, and hold as trustees for the principal.³

Sale Not Void.—As has been seen, however, the sale is not void, but only voidable at the option of the parties in interest.⁴

Principal must Do Equity.—And the principal, seeking to set aside the sale, will be required to do equity.⁵

(d) **Adoption of Transaction by Principal—Express.**—The principal may, if he so desires, ratify such sale or purchase by the agent;⁶ but the ratification, to be binding upon him, must be made with a full knowledge of all the facts.⁷

Implied.—The ratification may be implied as well as expressed; and if, after the evidence touching the transaction comes to the knowledge of the principal, he fails to avoid it within a reasonable time, he will be held to have ratified it.⁸

1. **Stipulation as to Price Immaterial.**—*Meryman v. David*, 31 Ill. 404; *Ruckmann v. Bergholz*, 37 N. J. L. 437; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

And where he sells to himself for the minimum price fixed by the principal he will be liable for the difference between market value and value paid by himself. *Greenfield Sav. Bank v. Simons*, 133 Mass. 415.

2. **Judicial Sales.**—*Moore v. Moore*, 5 N. Y. 256, affirming 4 Sandf. Ch. (N. Y.) 37.

But it has been held that when he sells at public outcry, and in the manner usual at trust or judicial sales, he may bid the property off for a third party. *Scott v. Mann*, 36 Tex. 157.

3. **Situation of Purchasers from Agent.**—*Louisville Bank v. Gray*, 84 Ky. 565.

Where an agent to sell, after purchasing the property, organizes a company in which he becomes a director and large shareholder, and transfers and conveys the land and assigns the contract relating to it to such company, the latter will be charged with notice of the facts and circumstances attending the purchase by the agent, and will stand in no better position than the agent. *Cumberland Coal, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 553.

4. *Supra*, this section, **Uniting Opposite Characters of Buyer and Seller.**

Louisville Bank v. Gray, 84 Ky. 565.

The principal may elect to be bound or not by the sale. *Mealor v. Kimble*, 2 Murph. (N. Car.) 272; *Gaines v. Acre*, Minor (Ala.) 141.

5. **Duty of Principal upon Repudiation.**—*Adams v. Sayre*, 76 Ala. 509; *Eastern Bank v. Taylor*, 41 Ala. 93; *Bassett v. Brown*, 105 Mass. 551; *Wadsworth v. Gay*, 118 Mass. 44; *Uhlich v. Muhlke*, 61 Ill. 499; *Leach v. Fowler*, 22 Ark. 143; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

A principal, seeking to set aside his agent's purchase at a mortgage sale of the property, will be required, at least, to refund the purchase money paid, with interest, moneys expended in repairs and permanent improvements, taxes, and other lawful charges, with

interest thereon; while the agent will be required to account for rents and profits, or, if in possession, for use and occupation, as of the value of the property when he took possession, not estimating the increased value by reason of his improvements. The agent having become the purchaser at a mortgage sale, and claiming to hold possession in his own right, he is not entitled, as against his principal seeking to set aside the sale and to redeem, to compensation for his management of the property during such possession, nor for attorney's fees and costs incurred in ejecting a defaulting tenant. *Adams v. Sayre*, 76 Ala. 509.

6. *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Eastern Bank v. Taylor*, 41 Ala. 100; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 203; *Sturdevant v. Pike*, 1 Ind. 277.

7. *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 203; *Dunbar v. Tredennick*, 2 B. & B. 304; *Smith v. Cologan*, 2 T. R. 189, note; *Fenn v. Harrison*, 3 T. R. 757.

But the principal cannot acquiesce in the purchase of his property by his agent until he knows that such purchase has been made, and the onus of showing such knowledge is upon the agent. *Fountain Coal Co. v. Phelps*, 95 Ind. 271.

8. **Principal must Disapprove within Reasonable Time.**—*Eastern Bank v. Taylor*, 41 Ala. 100.

And where the principal has adopted and approved the transaction and acquiesced in it, he is concluded from questioning it. *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

The receipt of the purchase money is not necessarily a ratification. *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 203.

Illustrations.—Where an agent sold corn of his principal to his own firm, and gave the principal a statement thereof, and no objection was made for two years, and the parties had a settlement of accounts in which no allusion was made to the transaction, the principal was held to have thereby ratified the sale. *Francis v. Kerker*, 85 Ill. 190.

Where an agent to sell made a deed to himself, the grantor intending it only as a means of carrying into effect a supposed sale to a

(e) **Dealing Directly with the Principal—Rule Stated.**—The agent may deal directly with the principal, however, and buy from or sell to him, where the latter acts with full knowledge and there is no concealment or deception on the part of the agent.¹

Must Make Full Disclosure.—But the agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the sale.²

third person, and also fraudulently misrepresented the value of the consideration, and the principal, within two or three months, learned the facts which entitled him to avoid the sale on the first ground, and, within a year afterwards, those which entitled him to avoid it on the second ground, and neglected for more than two years and a half from the time of the conveyance to take any steps to avoid it, and meanwhile sold or otherwise disposed of many of the stocks given in payment for the land, exchanging a considerable portion of them for other stocks after he had a full knowledge of both grounds of avoidance, he was held to have ratified the transaction. *Bassett v. Brown*, 105 Mass. 551.

In *Burke v. Bours* (Cal., 1891), 26 Pac. Rep. 102, the agent purchased the property without the knowledge of the principal, paying a fair price therefor, and sent his check in payment, and the court seemed to think that the acceptance of the check was a notice that the purchaser was the agent, and that by not objecting he ratified the sale.

1. **When Agent may Deal Directly with Principal.**—*Rochester v. Levering*, 104 Ind. 562; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Fisher's Appeal*, 34 Pa. St. 29; *Uhlich v. Muhlke*, 61 Ill. 499; *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516; *Ingle v. Hartman*, 37 Iowa 274; *Burke v. Bours*, 98 Cal. 171; *Stewart v. Mather*, 32 Wis. 344; *Dobson v. Racey*, 8 N. Y. 216. And see *Jenkins v. Einstein*, 3 Biss. (U. S.) 128.

It must be with full knowledge and acquiescence on the part of the seller. *Stewart v. Mather*, 32 Wis. 344; *Jansen v. Williams*, 36 Neb. 869.

Where one, while occupying the relation of general confidential business agent of another, is requested by the latter to find a purchaser at a fixed price for certain land, but being unable to do so proposes to buy the property himself at that price, at the same time communicating to his principal all the facts within his knowledge about the land and its value, misrepresenting or concealing nothing, and a sale is accordingly made to him, the price paid being at the time a fair one, such sale is valid. *Rochester v. Levering*, 104 Ind. 562.

Inadequate Price—Presumption.—Where the agent himself buys, with knowledge of the principal, and it appears that the price paid was grossly inadequate, a court of equity will conclusively presume undue influence and imposition, and will set aside the sale. *Ferguson v. Dent*, 24 Fed. Rep. 412.

2. **Duty as to Disclosure.**—*Dunne v. English*, L. R. 18 Eq. 524; *Ormond v. Hutchinson*, 16 Ves. Jr. 107; *Ingle v. Hartman*, 37 Iowa 274; *Stoner v. Weiser*, 24 Iowa 434; *Brown v. Post*,

1 Hun (N. Y.) 303; *Persch v. Quiggle*, 57 Pa. St. 247; *Thompson v. Hallet*, 26 Me. 141; *Bell v. Bell*, 3 W. Va. 183; *Lane v. Black*, 21 W. Va. 617. See also *Newcomb v. Brooks*, 16 W. Va. 62.

He is bound to disclose to his principal the exact nature of his interest, and all material facts connected therewith. *Audenreid v. Walker*, 11 Phila. (Pa.) 183.

An agent cannot make a valid purchase from his principal without fully and fairly disclosing all the propositions he has received, and all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the sale. *Moore v. Mandlebaum*, 8 Mich. 435.

He must acquire it openly and on a full and frank disclosure of every fact likely to influence the principal's conduct. *Porter v. Woodruff*, 36 N. J. Eq. 174.

If an agent to sell conceals from his principal information he has obtained as to the price at which the property can be sold, and purchases it himself, selling it afterwards for a much larger sum, he will be required to account to the principal for the sum obtained over and above the amount received by the latter. *Bell v. Bell*, 3 W. Va. 183; *Stoner v. Weiser*, 24 Iowa 434; *Moore v. Mandlebaum*, 8 Mich. 433.

Or he may be ordered to reconvey upon the repayment of the purchase money. *Moseley v. Buck*, 3 Munf. (Va.) 232, 5 Am. Dec. 508; *Savage v. Savage*, 12 Oregon 459.

Where an Agent to Sell a Note and Mortgage was offered four thousand eight hundred dollars therefor, and afterwards purchased the same of his principal for four thousand five hundred dollars without disclosing the offer, it was held that he failed to acquire complete title, and was bound to account to his principal for whatever sum he realized out of the sale. *Mason v. Bauman*, 62 Ill. 76.

Where an Agent to Sell a Patent Right for a certain territory purchased the right to the entire territory upon a representation that he could not sell for a better price, concealing the fact that he had already contracted to sell two counties for the same sum given for the entire territory, and afterwards sold other counties for various sums, it was held that the sale would be annulled and the territory unsold reconveyed. *Jeffries v. Wiester*, 2 Sawy. (U. S.) 135.

If A and B own a mine and authorize C to sell it for them, or bring them a purchaser at a fixed price, with the understanding that C is to have all he can get above that price, C may make the best bargain he can with any one; he may purchase it himself, and is under no obligation to disclose to A and B anything that he may have discovered con-

Presumption of Invalidity.—And where the transaction is seasonably challenged, a presumption of invalidity arises, and the burden is upon the agent of making it affirmatively appear that he dealt fairly, and in the strictest good faith imparted to his principal all the information possessed by him concerning the property.¹

Commissions.—An agent to sell becoming himself the purchaser, loses his right to a commission on the sale.²

(6) **Agent to Purchase, Purchasing for Himself.**—An agent to purchase will not be allowed, without the intelligent assent of the principal, to purchase for himself and hold the property in his own name,³ unless he has openly and notoriously discharged himself from his agency;⁴ and a purchase in his own name will be regarded as made on behalf of his principal, for whom he will be considered as trustee.⁵

cerning the mine after such arrangement is made. *Synnott v. Shaughnessy*, 2 Idaho 111.

1. **Burden upon Agent to Show Fairness of Transaction.**—*Rochester v. Levering*, 104 Ind. 562; *Teakle v. Bailey*, 2 Brock. (U. S.) 43; *Neely v. Anderson*, 2 Strobb. Eq. (S. Car.) 262.

The agent is required not only to state to the principal that he has an interest in the purchase, but must disclose all facts concerning it; and under such circumstances the burden of proof for perfect fairness is upon the agent, and in the absence of such proof courts of equity will treat the case as one of constructive fraud. *Brock v. Barnes*, 40 Barb. (N. Y.) 521; *Brown v. Post*, 1 Hun (N. Y.) 303; *Nesbit v. Lockman*, 34 N. Y. 167; *Comstock v. Ames*, 1 Abb. App. Dec. (N. Y.) 411; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *Rubidoex v. Parks*, 48 Cal. 215; *Dunne v. English*, L. R. 18 Eq. 524; *Selsey v. Rhoades*, 2 Sim. & S. 49.

It rests upon the agent to prove that the contract is in every respect equal, fair, and equitable. *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

2. Unless it was understood between the agent and the principal, at the time of the sale, that he should be entitled to a commission. *Stewart v. Mather*, 32 Wis. 344.

3. *New Orleans Exch., etc., Co. v. Yorke*, 4 La. Ann. 138; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Torrey v. Orleans Bank*, 9 Paige (N. Y.) 649; *Moore v. Moore*, 5 N. Y. 256, *affirming* 4 Sandf. Ch. (N. Y.) 37; *Sweet v. Jaycocks*, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; *Cram v. Mitchell*, 1 Sandf. Ch. (N. Y.) 251; *Matthews v. Light*, 32 Me. 305; *Reed v. Warner*, 5 Paige (N. Y.) 650; *Walker v. Hill*, 21 N. J. Eq. 191.

But where one is buying at a tax sale for himself and also acting in some purchases for another, it will be presumed that purchases made in his own name, and upon which he takes the certificates, are not made for his principal, but for himself. *Smith v. Stephenson*, 45 Iowa 645.

And where a firm on the verge of failure employed an agent to purchase forty-two of their notes, furnishing him with the money for that purpose, and while so engaged he also purchased eighty-two other notes of the same firm with his own money, and on his own account, at a large discount, it was held

that such other purchase was not a violation of his agency, and that he could claim the full amount of the debts represented by the eighty-two notes. *Low v. Graydon*, 50 Barb. (N. Y.) 414.

But if, at the time a purchase is made outside the actual purview of his agency, the agent assumes to act for his principal and purchases for his benefit, the transaction as against the agent will enure to the benefit of the principal. *Watson v. Union Iron, etc., Co.*, 15 Ill. App. 509.

4. **When Agent may Act on His Own Account.**—*Baker v. Whiting*, 3 Sumn. (U. S.) 475; *McMahon v. McGraw*, 26 Wis. 614.

Inability to Buy for Price Named by Principal—Buying for Himself at Higher Price.—A real-estate agent under contract to purchase for another certain real estate for a stated sum may, on failure to purchase, buy for himself at a greater price. *Pearsall v. Hirsh* (Super. Ct.), 39 N. Y. St. Rep. 258.

He may Repudiate the Agency and act for himself, using his own funds. *First Nat. Bank v. Bissell*, 2 McCrary (U. S.) 73.

5. 2 Warvelle on Vendors, p. 585.

England.—*Lees v. Nuttall*, 2 Myl. & K. 819.

United States.—*Dodge v. Briggs*, 27 Fed. Rep. 160; *Ringo v. Binns*, 10 Pet. (U. S.) 269; *Baker v. Whiting*, 3 Sumn. (U. S.) 475.

Alabama.—*Firestone v. Firestone*, 49 Ala. 128; *McKinley v. Irvine*, 13 Ala. 681.

Arkansas.—*Rhea v. Puryear*, 26 Ark. 344; *White v. Ward*, 26 Ark. 445; *McMurry v. Mobley*, 39 Ark. 309.

California.—*Wells v. Robinson*, 13 Cal. 133.

Connecticut.—*Church v. Sterling*, 16 Conn. 388.

Florida.—*Boswell v. Cunningham*, 32 Fla. 277, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 378 *et seq.*

Georgia.—*Chastain v. Smith*, 30 Ga. 96.

Illinois.—*Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723. See also *Stewart v. Duffy*, 116 Ill. 47; *Dennis v. McCagg*, 32 Ill. 429.

Indiana.—*Ackenburgh v. McCool*, 36 Ind. 473; *Rising Sun Nat. Bank v. Seward*, 106 Ind. 264.

Iowa.—*Bryant v. Hendricks*, 5 Iowa 256.

Kansas.—*Fisher v. Krutz*, 9 Kan. 501.

Maine.—*Pillsbury v. Pillsbury*, 17 Me. 107, *Brown v. Dwelley*, 45 Me. 52.

Minnesota.—*Kraemer v. Deustermann*, 37 Minn. 469.

Statute of Frauds.—Where the agency is to purchase real estate, the principal may not, according to the leading authorities, show by parol that the purchase was made for his benefit or on his account, unless the purchase money was advanced by himself.¹ On the other hand, some very respectable authorities

Mississippi.—Gillenwaters v. Miller, 49 Miss. 150; Fairly v. Fairly, 38 Miss. 280.

New Jersey.—Von Hurter v. Spengeman, 17 N. J. Eq. 185; Bostleman v. Bostleman, 24 N. J. Eq. 103.

New York.—Boyd v. M'Lean, 1 Johns. Ch. (N. Y.) 582; Sandford v. Norris, 4 Abb. App. Dec. (N. Y.) 144.

North Carolina.—Hargrave v. King, 5 Ired. Eq. (N. Car.) 430.

Ohio.—Williams v. Van Tuyl, 2 Ohio St. 336; Gashe v. Young, 51 Ohio St. 376.

Pennsylvania.—Eshleman v. Lewis, 49 Pa. St. 410; Nixon's Appeal, 63 Pa. St. 279; Wolford v. Herrington, 74 Pa. St. 311, 15 Am. Rep. 548. See also McAninch v. Bates, 4 Brews. (Pa.) 72.

South Carolina.—Hutchinson v. Hutchinson, 4 Desaus. (S. Car.) 77.

Texas.—Barziza v. Story, 39 Tex. 354.

Buying Judgment against Principal.—But this principle cannot prevent an agent from purchasing a judgment against his principal, though to the detriment of the creditors of the latter. New Orleans Exch., etc., Co. v. Yorke, 4 La. Ann. 138.

And the Agent is Bound to Convey to the Principal upon his complying with the terms of the contract. Wellford v. Chancellor, 5 Gratt. (Va.) 39.

Agent Misapplying Funds—Buying with Funds Obtained from Other Sources.—It is immaterial that the agent used the money furnished him for his own purposes and purchased the property with money derived from other sources. Edwards v. Dooley, 120 N. Y. 540.

Agent to Locate Lands.—If an agent locate land for himself which he ought to locate for his principal, he is, in equity, a trustee for his principal. Massie v. Watts, 6 Cranch (U. S.) 148.

Estoppel on Part of Principal.—Where a principal, unable to repay his agent for expenditures made in acquiring title to real estate for the purpose of protecting his interests therein, received a payment from the agent and gave him a receipt in full of all demands for the purpose of settling the whole transaction, it was held that his silence for twelve years without offering to return the money precluded him from asserting any claim to the property on the theory that the agent continued to hold in trust for him. Curtis v. Newton, 58 Fed. Rep. 495.

And where an agent authorized to purchase the half interest in a mining claim for fifteen hundred dollars purchased the whole for four thousand dollars, taking title in his own name, and offered to sell a half interest to his principal for two thousand dollars, it was held that he had exceeded his authority, and his action was not binding without ratification, but that upon the unreasonable delay of his principal to accept his proposition he might repudiate the agency and hold the mine as

his own. Wenham v. Switzer, 51 Fed. Rep. 351.

Purchase at Tax Sale.—Where one acting as agent of the owner purchases a tax certificate for land sold at a tax sale, and afterwards receives the tax deed in his own name, he will be held a trustee for the owner and compelled to account for net rents and profits received, and the deed will be cancelled on payment of his outlay. Collins v. Rainey, 42 Ark. 531; Continental L. Ins. Co. v. Perry, 65 Iowa 709; Woodman v. Davis, 32 Kan. 344; Krutz v. Fisher, 8 Kan. 90; Fisher v. Krutz, 9 Kan. 501; McMahon v. McGraw, 26 Wis. 614; O'Connor v. Irvine, 74 Cal. 435.

But he must be actually employed to buy. Ascertaining the amount of taxes due upon a certain piece of land by request of the owner does not make one an agent so as to charge him with fraud in buying the same for himself for less than half value. Collar v. Ford, 45 Iowa 331.

Proceeds Impressed with Similar Trust.—If the land has been sold by the agent, the proceeds in his hands will be impressed with a similar trust. Kraemer v. Deustermann, 37 Minn. 469.

Rule Applies to Leases.—The rule applies as well to leases as to outright purchases. Burrell v. Bull, 3 Sandf. Ch. (N. Y.) 15; Hargrave v. King, 5 Ired. Eq. (N. Car.) 430.

1. Agent to Purchase Lands—When Trust Provable by Parol.—2 Story Eq. Jur., § 1201a; 2 Sugd. Ven. (14th ed.), p. 438; Bish. Eq. (3d ed.), § 80.

England.—Bartlett v. Pickersgill, 1 Eden 515, 4 East 577, note.

Alabama.—Andrews v. Jones, 10 Ala. 460.

California.—Green v. Clark, 31 Cal. 592.

District of Columbia.—Balloch v. Hooper, 6 Mackey (D. C.) 421.

Illinois.—Walter v. Klock, 55 Ill. 362; Perry v. McHenry, 13 Ill. 227.

Indiana.—Irwin v. Ivers, 7 Ind. 308, 63 Am. Dec. 420.

Iowa.—Burden v. Sheridan, 36 Iowa 125, 14 Am. Rep. 505.

Maryland.—Dorsey v. Clarke, 4 Har. & J. (Md.) 551.

Massachusetts.—Barnard v. Jewett, 97 Mass. 87; Fickett v. Durham, 109 Mass. 419; Parsons v. Phelan, 134 Mass. 109; Collins v. Sullivan, 135 Mass. 461.

Missouri.—Allen v. Richard, 83 Mo. 55.

New Jersey.—Wallace v. Brown, 10 N. J. Eq. 308.

New York.—Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Levy v. Brush, 45 N. Y. 589, reversing 8 Abb. Pr. N. S. (N. Y.) 418.

Ohio.—Watson v. Erb, 33 Ohio St. 35.

Pennsylvania.—Jackman v. Ringland, 4 W. & S. (Pa.) 149.

Vermont.—Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521.

Mr. Bispham says: "A resulting trust of this kind must arise, if at all, from the pay-

hold that although the agent purchases the property entirely with his own funds, his taking a conveyance in his own name is such a fraud upon his principal as will create a resulting trust in favor of the latter which may be shown by parol.¹ And certainly where the principal has some present interest in the land, this seems to be undoubtedly the law.² Where the agent agrees to advance the money it will be considered a loan, and the trust may be shown by parol.³

ment of the purchase money at the time of the conveyance. If an express agreement is relied upon, it necessarily excludes the idea of any trust arising purely by implication of law. Such a trust will, therefore, be an express trust, and will fall directly within the statute of frauds." Prin. of Eq. (3d ed.), § 80.

Part of Purchase Money Advanced by Principal.

—Where a part only of the purchase money is advanced by the principal, the land will be charged only *pro tanto* with the money advanced. *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Fickett v. Durham*, 109 Mass. 419. But see *Firestone v. Firestone*, 49 Ala. 128.

Principal Furnishing Funds after the Purchase.

—And the payment or advance of money after the purchase has been completed will not raise a resulting trust. *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Walter's Appeal*, 70 Pa. St. 392.

Promise by Principal to Pay.—Neither a promise to pay nor after payment of the purchase money is sufficient. *Longdon v. Clouse* (Pa., 1885), 1 Atl. Rep. 600.

1. When Principal Supplies No Part of Purchase Price.—*Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145; *Rottman v. Wasson*, 5 Kan. 552; *Chastain v. Smith*, 30 Ga. 96; *Firestone v. Firestone*, 49 Ala. 128; *Wellford v. Chancellor*, 5 Gratt. (Va.) 39. And see *Hidden v. Jordan*, 21 Cal. 92; *Snyder v. Wolford*, 33 Minn. 175, 53 Am. Rep. 22; *Follansbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691; *Hutchinson v. Hutchinson*, 4 Desaus. (S. Car.) 77.

In *Heard v. Pilley*, L. R. 4 Ch. 553, *Gifford, L. J.*, in commenting upon *Bartlett v. Pickersgill*, 4 East 577, note, the principal case cited by Story and Sugden in support of their position, said: "It seems to be inconsistent with all the authorities of this court, which proceed on the view that it will not allow the statute of frauds to be made an instrument of fraud."

And in *Jenkins v. Eldredge*, 3 Story (U. S.) 290, *Story, J.*, said: "It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust even when the agency itself may be, nay must be, proved only by parol. *Bartlett v. Pickersgill*, 1 Eden 515, 4 East 577, note; *Leman v. Whitley*, 4 Russ. 423, are, I admit, against this doctrine—not wholly, but to a limited extent, for the latter case excludes a case of fraud. But then *Lees v. Nuttall*, 1 Russ. & M. 53, expressly decides that if an agent employed to purchase an estate purchase for himself and on his own account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by parol, and the purchase was from a third person. *Carter v. Palmer*,

11 Bli. N. S. 397, goes the full length of the same proposition."

Instances.—In *Cave v. Mackenzie*, 46 L. J. Ch. 564, 37 L. T. 218, it was held that a contract for the purchase of land made by an agent in his own name vests the equitable title in the principal, and may be established by him against the agent and persons claiming under him, although the agent is appointed merely by parol.

In *Wellford v. Chancellor*, 5 Gratt. (Va.) 39, no portion of the purchase was advanced by the principal, but a trust was decreed and the agent ordered to reconvey. And in *Chastain v. Smith*, 30 Ga. 96, the plaintiff advanced no portion of the purchase money, though he did contribute his professional services.

In *Firestone v. Firestone*, 49 Ala. 128, the agent used the money of his principal, together with money of his own, in purchasing in his own name, and a trust was decreed for the entire tract.

2. Where Principal Has Present Interest in the Lands.—*Cameron v. Lewis*, 56 Miss. 76; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Rose v. Bates*, 12 Mo. 30; *Kennedy v. Keating*, 34 Mo. 25; *Lincoln v. Wright*, 4 De G. & J. 16; 2 *Warvelle on Vendors* 787.

Illustrations.—Thus, where one whose lands are about to be sold under a judicial sale verbally agrees with another for the latter to bid them off for him at the sale, and the agent takes the title in his own name, the trust may be shown by parol. *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Peebles v. Reading*, 8 S. & R. (Pa.) 484; *Soggins v. Heard*, 31 Miss. 426.

The same is true where one of several lessees agrees to get a renewal of the lease and takes it in his own name. *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 15.

Or where an agent agrees to buy up an incumbrance to perfect his principal's title, and takes a conveyance in his own name. *Barziza v. Story*, 39 Tex. 354.

In *Sandford v. Norris*, 4 Abb. App. Dec. (N. Y.) 144, the agent agreed with the principal to attend an auction sale of the premises on which the latter lived, made by the assignees for benefit of creditors of the principal's husband, and to purchase in his own name for the principal, and convey to the latter on being repaid his bid, and he was not allowed to invoke the statute of frauds to defeat the claim to enforce the trust arising.

But see *Jackman v. Ringland*, 4 W. & S. (Pa.) 149, where it was held that the fact that the property belonged to the plaintiff at the time of sale made no difference. And to the same effect *Fox v. Heffner*, 1 W. & S. (Pa.) 372; *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685.

3. Agreement by Agent to Advance the

When Ejectment Lies.—In states where ejectment is an equitable action, the land may be recovered in ejectment wherever equity would decree a conveyance.¹

(7) **Acquiring Adverse Interests.**—Nor will an agent be allowed to make use of his position, and information thereby obtained, to acquire an interest adverse to his principal, and any interest so obtained will be decreed to be held in trust for the principal.² Thus an agent employed to manage property cannot acquire a title thereto by purchase at a sale for taxes³ or sheriff's

Money.—*Kendall v. Mann*, 11 Allen (Mass.) 15; *Davis v. Wetherell*, 11 Allen (Mass.) 19; *Sandfoss v. Jones*, 35 Cal. 481; *Hellman v. Messmer*, 75 Cal. 166; *Soggins v. Heard*, 31 Miss. 426; *Page v. Page*, 8 N. H. 187.

1. *Peebles v. Reading*, 8 S. & R. (Pa.) 484; *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145. And see *O'Connor v. Irvine*, 74 Cal. 435.

2. *Larey v. Baker*, 86 Ga. 468, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 375. *Lockhart v. Rollins*, 2 Idaho 503; *Blount v. Robeson*, 3 Jones Eq. (N. Car.) 73; *Comings v. Stuart*, 22 Me. 110; *McClendon v. Bradford*, 42 La. Ann. 160. See also *Clarke v. Kelsey*, 41 Neb. 766.

Agent to Settle with Creditors.—An agent employed to settle with creditors cannot obtain any benefit by purchasing a debt which the principal is liable to discharge. *Noyes v. Landon*, 59 Vt. 569; *Reed v. Warner*, 5 Paige (N. Y.) 650.

It is his duty, upon behalf of his employer, to settle the debt upon the best terms he can obtain. *Reed v. Norris*, 2 Myl. & C. 374.

And an executor or administrator cannot buy in any of the debts of the deceased for his own benefit. *Ex p. Lacey*, 6 Ves. Jr. 625. And see the title EXECUTORS AND ADMINISTRATORS.

Attorney of Mortgagor Buying the Property.—An attorney employed by the mortgagor in a foreclosure suit cannot buy in the mortgaged property. *Davis v. Smith*, 43 Vt. 269; *Case v. Carroll*, 35 N. Y. 385.

Agent for General Control of Property Buying at Mortgage Sale.—Nor can an agent having charge of the property, renting it out, collecting the rents, paying the taxes and insurance, and having power to sell, become a purchaser at the mortgage sale, especially where by private agreement with the mortgagee he induces the latter not to bid against him. *Adams v. Sayre*, 70 Ala. 318.

Agent Discovering Defect in Principal's Title.—If an agent discovers a defect in the title of his principal to land, he cannot misuse his information to acquire title for himself; and if he does so, he will be considered as a trustee holding for his principal. *Ringo v. Binns*, 10 Pet. (U. S.) 269; *Cragin v. Powell*, 128 U. S. 691; *Hardenbergh v. Bacon*, 33 Cal. 356; *Rogers v. Lockett*, 28 Ark. 290. And see *Case v. Carroll*, 35 N. Y. 385.

An Agent for an Administrator for the settlement of an estate cannot purchase a judgment against the estate for his own benefit, and upon such purchase can only retain the amount actually paid by him *James v. McKernon*, 6 Johns. (N. Y.) 543.

Other Illustrations.—Where a party contracted with an agent to give him two hundred

dollars if he would furnish him with numbers and information of certain specified lands which he desired to enter, and the agent, after furnishing the information, went to the office and entered the land in his own name, and afterwards claimed it as his own property, it was held that the land so acquired must be held in trust for the benefit of the principal. *Winn v. Dillon*, 27 Miss. 494.

But a sale sustained by a verdict will not be annulled simply because the vendee was formerly the vendor's counsel. *White v. Slaughter*, 5 La. Ann. 136.

An agent or attorney buying property under a judgment of his principal becomes a trustee if he paid with the money of his principal or purchased for less than his claim. But the principal is not obliged to take the land or consider the purchaser as his trustee, but may elect to treat him as a debtor and claim the money instead of the property. *Eshleman v. Lewis*, 49 Pa. St. 410.

An agent may purchase a lien upon the property of his principal and enforce it for the purpose of securing the repayment of the purchase money. *Spring Garden v. Blight*, 1 Phila. (Pa.) 553.

A bank officer may buy in, for his own benefit, a pledge held by the bank; and if he pays enough for it to satisfy the debt to the bank he will not be held as a trustee for the residue. *Smith v. Lansing*, 22 N. Y. 520.

3. **Agent Purchasing Principal's Land at Tax Sale.**—A party having charge of lands and charged with the payment of the taxes cannot acquire a tax title to his principal's land, either by purchasing the land himself at tax sale or by the assignment to him of a certificate of purchase obtained by another; nor can he, by assigning his certificates, confer upon his assignee any greater rights than he himself has. *Ellsworth v. Cordrey*, 63 Iowa 675; *Bowman v. Officer*, 53 Iowa 640; *Franks v. Morris*, 9 W. Va. 664; *Barton v. Moss*, 32 Ill. 50; *Matthews v. Light*, 32 Me. 305; *Huzard v. Trego*, 35 Pa. St. 9; *Bartholemew v. Leech*, 7 Watts (Pa.) 472; *In re Brown's Estate*, 2 Pa. St. 463; *Nailor v. Nailor* (D. C., 1886), 3 Cent. Rep. 777; *Curtis v. Ciska*, 7 Biss. (U. S.) 260; *Krutz v. Fisher*, 8 Kan. 90; *Fisher v. Krutz*, 9 Kan. 501; *Murdoch v. Milner*, 84 Mo. 96; *Collins v. Rainey*, 42 Ark. 531. See also *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Schedda v. Sawyer*, 4 McLean (U. S.) 181; *Morris v. Joseph*, 1 W. Va. 256, 91 Am. Dec. 386; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304. And see *Gonzalia v. Bartelsman*, 143 Ill. 634. where an agent employed to procure the foreclosure of his principal's mortgage, and rent and pay taxes on the mortgaged property, was held incapable of acquiring title at a tax sale.

sale,¹ nor can an attorney buy in an adverse title to land about which he has been consulted;² and a lease obtained by an agent or clerk, of the premises occupied by his employer, will enure to the latter.³

d. KEEPING AND RENDERING ACCOUNTS—(1) *General Principles.*—The agent is bound to account to his principal for all goods, money, and securities coming into his hands during the course of the agency,⁴ and all the

The rule applies so much the more where the agent has funds in his hands with which to pay the taxes, and, in breach of his trust, neglects to pay them and bids the land in at the sale. *Woodman v. Davis*, 32 Kan. 344; *Barton v. Moss*, 32 Ill. 50; *Fox v. Zimmermann*, 77 Wis. 414.

Failure of Principal to Furnish Funds to Pay Taxes.—The rule is not changed by the fact that the principal has failed to furnish money with which to pay the taxes. There must be an unambiguous relinquishment of the agency before the agent can acquire an interest in the subject of it adverse to the principal. *Bowman v. Officer*, 53 Iowa 640; *Continental L. Ins. Co. v. Perry*, 65 Iowa 709; *Page v. Webb* (Ky., 1888), 7 S. W. Rep. 308; *McIlvain v. Porter* (Ky., 1888), 7 S. W. Rep. 309; *McMahon v. McGraw*, 26 Wis. 614.

Neglect of Principal to Reimburse Agent.—Nor will he be allowed to hold under the tax deed on account of the negligence of the principal in reimbursing him unless he has made a full and fair statement of the account between them and the amount necessary to reimburse him. *Continental L. Ins. Co. v. Perry*, 65 Iowa 709.

He will be held a trustee for the owner, and liable for the rents and profits. *Collins v. Rainey*, 42 Ark. 531.

1. Sheriff's Sale.—*Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Fisher v. Krutz*, 9 Kan. 501; *Bowman v. Officer*, 53 Iowa 640; *Rogers v. Lockett*, 28 Ark. 290. But see *Craig v. Craig*, 6 J. J. Marsh. (Ky.) 171.

But where an agent purchased the property of his principal at a sheriff's sale, and the circuit chancellor refused to set the purchase aside, but ordered the agent to account for the "true value of the property," it was held that this meant the true value at the time of the sale, and that, the plaintiff having acquiesced in the decree and acted under it, his appeal, after an adverse report from the commissioner on the question of value, would be refused. *Rawls v. Wall*, 5 Rich. Eq. (S. Car.) 143.

2. Attorneys.—When an attorney at law buys in a title outstanding or adverse to land as to which he has been consulted or employed, he buys for his client, if the client elects to take it. *Smith v. Brotherline*, 62 Pa. St. 461. And he cannot avoid the effect of the rule by having the conveyance made to his wife or brother-in-law. *Cameron v. Lewis*, 56 Miss. 76.

And where a barrister had filled the situation of confidential and advising counsel to a party for several years, and there acquired an intimate knowledge of his estates and liabilities, he was held incapable, even after the relationship had ceased for some time, of purchasing outstanding securities affecting his client's estates, especially as the validity of

those very securities had been impeached, and such impeachment was known to the counsel, he having been repeatedly consulted by his client in reference to a compromise respecting them. *Carter v. Palmer*, 1 D. & W. 722. See the title ATTORNEY AND CLIENT.

3. Lease of Premises Occupied by Principal.—Where a confidential agent of the lessee of a theatre, who from his position was well acquainted with the profits of his principal in the use of the building, and who knew some months before the old lease expired that the principal was desirous of renewing, offered privately to lease the theatre of the owner at a larger rental, and denied to his principal that he was competing with him for the lease, but in fact did procure a lease to himself, he was held to hold the same as a trustee for his principal. *Davis v. Hamlin*, 108 Ill. 39.

And where the clerk to a warehouseman, whose lease was about to expire and who was negotiating for a renewal at a reduced rent, having access to the principal's books and papers, and a knowledge of his business, applied to the lessor and obtained a lease of the premises for himself and another, who had notice of the facts, it was held that, pending an action to compel a transfer of the lease, an injunction should have been granted restraining them from proceeding to recover the premises. *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242.

4. General Rule as to Accounting—England.—*Topham v. Braddick*, 1 Taunt. 572.

California.—*Wooster v. Nevills*, 73 Cal. 58.
Connecticut.—*Pettibone v. Pettibone*, 4 Day (Conn.) 178. See also *Avery v. Kinsman*, Kirby (Conn.) 354.

Georgia.—*Sibley v. Ober*, 87 Ga. 55.

Illinois.—*Bedell v. Janney*, 9 Ill. 193. See also *Cagwin v. Ball*, 2 Ill. App. 70; *Fred W. Wolf Co. v. Salem*, 33 Ill. App. 614; *Illinois Linen Co. v. Hough*, 91 Ill. 63.

Indiana.—*Earnhart v. Robertson*, 10 Ind. 8; *Heddens v. Younglove*, 46 Ind. 212.

Iowa.—*Haas v. Damon*, 9 Iowa 589.

Maine.—*Sanford v. Lancaster*, 81 Me. 434.

Massachusetts.—*Shaw v. Stone*, 1 Cush. (Mass.) 228; *Hapgood v. Batcheller*, 4 Met. (Mass.) 573; *Hemenway v. Hemenway*, 5 Pick. (Mass.) 389; *Torrey v. Bryant*, 16 Pick. (Mass.) 528; *Monitor Mut. F. Ins. Co. v. Young*, 111 Mass. 537.

New Hampshire.—*Eaton v. Welton*, 32 N. H. 352. See also *Morse v. Woods*, 5 N. H. 297.

New York.—*Hancock v. Gomez*, 58 Barb. (N. Y.) 490; *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *Prisco v. Hug*, 58 N. Y. Super Ct. 140; *Brown v. Brown*, 40 Hun (N. Y.) 418. See also *Crosbie v. Leary*, 6 Bosw. (N. Y.) 312.

Pennsylvania.—*Johnston v. Thumm* (Pa., 1887), 7 Atl. Rep. 739.

profits arising from his dealings therein.¹

South Carolina.—Robson v. Sanders, 25 S. Car. 116; Rowand v. Fraser, 1 Rich. (S. Car.) 325.

South Dakota.—Hormann v. Sherin (S. Dak., 1894), 60 N. W. Rep. 145.

Texas.—Taul v. Edmondson, 37 Tex. 556.

Vermont.—Rowell v. Fuller, 59 Vt. 688; Tupper v. Rider, 61 Vt. 69; Rich v. Austin, 40 Vt. 416; Gallup v. Merrill, 40 Vt. 137.

Virginia.—McVeigh v. Old Dominion Bank, 26 Gratt. (Va.) 188.

West Virginia.—Ruffner v. Hewitt, 7 W. Va. 585.

Nature of Action against Agent.—Assumpsit is ordinarily the proper form of action for money had and received by an agent. But the rule is different when the agent is to disburse the money instead of handing it over to his principal; for under these circumstances his duty is not to pay over, but to account, and no debt will arise unless there is a surplus. Gallagher v. Gallagher, 6 Phila. (Pa.) 528. See also Reeside v. Reeside, 49 Pa. St. 322.

Where, however, an agent receives money for a particular purpose and refuses to so apply it or to account for it, or misappropriates it, or applies it after the authority is countermanded, an action for money had and received will lie. Millingar v. Hartupee, 53 Pa. St. 362.

Factor.—The law will raise a contract on the part of a factor to whom goods have been consigned for sale, to account for such as are sold, to pay over the proceeds, and to redeliver the residue unsold. Topham v. Brad-dick, 1 Taunt. 572.

Agent Collecting Money on Specialties.—But an agent collecting money for his principal on specialties is only liable to the latter as a simple contract debtor. Mason v. Man, 3 Desaus. (S. Car.) 116.

A Failure to Pay after Demand is equivalent to a refusal. Hays v. Smith, 4 Ired. (N. Car.) 254.

Effect of Agent Rendering Himself Liable to Third Parties.—The fact that the agent has rendered himself liable to third parties does not release him from liability to his principal. McNair v. Burns, 9 Watts (Pa.) 130.

Burden on Agent to Show Payment by Him to Principal.—Where one receives money as the agent of another, the burden is on him, in an action to account therefor, to show that he repaid it to his principal, or otherwise disposed of it by the latter's direction. Young v. Powell, 87 Mo. 128. There is no presumption, when the collection of money is shown, that the agent has paid it, or accounted to his principal. Carder v. Primm, 52 Mo. App. 102.

Certificate of Membership in Board of Trade Furnished by Principal.—Agent must Account for.—A principal furnished his agent with a certificate of membership of a board of trade to enable him to conduct the principal's business advantageously. The agent on the dissolution of the agency refused to transfer the certificate to his principal, and equity compelled him to assign the certificate in blank and deliver the same to the principal

Weaver v. Fisher, 110 Ill. 146. See Western R. Co. v. Bayne, 75 N. Y. 1.

Limitation of Rule.—But where the demand for property remaining unsold is coupled with a demand for other property, and compliance with it might be construed as an admission of the latter claim, which the agent disputes, he is justified in refusing. Esterly Harvesting Mach. Co. v. Veeder, 29 Neb. 664.

Unauthorized Transactions as Defense.—In a suit by the principal an agent cannot set up in defense transactions unauthorized and not within the scope of his employment. Earnhart v. Robertson, 10 Ind. 8.

Set-off.—Nor can an agent to receive and pay over money set off a debt previously due him by the principal. Shearman v. Morrison, 149 Pa. St. 386.

In an Action for Damages for the refusal by an agent to deliver certain bonds, of which there were no sales, and consequently no market value, evidence was held admissible to show what they were considered worth as collateral security, and also to show that they were payable in gold, the legal-tender act not excluding such evidence from the jury. Simpkins v. Low, 49 Barb. (N. Y.) 382.

Time of Accounting.—The agent must account at the time fixed by the stipulations of his agency, or upon demand by his principal. Leake v. Sutherland, 25 Ark. 219.

Agents to Collect money are bound to immediate payment. Merchants Bank v. Rawls, 21 Ga. 289; Lyle v. Murray, 4 Sandf. (N. Y.) 590.

Where money is collected by an agent upon a note for persons who are themselves agents he may discharge himself, either by paying it over to those from whom he received the claim, or to the true owner. Wallace v. Peck, 12 Ala. 768.

Joint Agents are jointly bound for joint acts and money jointly received. Olinde v. Saizan, 10 La. Ann. 153.

Effect of Accepting Account.—It has been held that a principal, by accepting the final account of his factor without objection, discharges him from all further liability to account for sales made on credit, the proceeds of which have not been collected. Rion v. Gilly, 6 Martin (La.) 417, 12 Am. Dec. 483. And where an agent for making payments reports in full to his principal, the latter must object within a reasonable time, to any payments, or his silence will be treated as a ratification. Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67. It is *prima facie* evidence of an admission that the statement is correct. McCord v. Manson, 17 Ill. App. 118.

But where an agent settled with his principal for a balance due to him, by conveying land of less value than such balance without informing him of its value, of which he was ignorant, the fact that the agent afterwards accounted to him for the rents of the property for several years was held not to preclude the principal from disaffirming the transaction. Boyd v. Jacobs, 6 Tex. Civ. App. 442.

See the titles ACCOUNTS, Vol. I., p. 433; ADMISSIONS, Vol. I., p. 670.

1. See *supra*, this section, *Making Profit out of Agency*.

Legality of Transaction Immaterial.—And this though the transaction, as between the principal and the third party, be illegal and incapable of enforcement.¹

Failure to Account—Form of Action.—For a conversion of property in his hands for which he fails to account and pay he may be held liable either for a breach of contract or a conversion;² and if the goods are still in his possession and he refuses to turn them over, the principal may, upon tendering his commissions and charges, maintain an action of replevin.³

Accountable Only to Principal.—But the agent is liable to account only to his principal.⁴

Where a person is employed as an agent in the conduct of the financial part of the business of his principal, the relation is a fiduciary one in its character; and if the agent appropriates the property of his principal to his own use, or makes any profit to himself by virtue of his position, he must account therefor as for a trust. *Weaver v. Fisher*, 110 Ill. 146.

But it seems that an agent following his instructions and acting within his authority cannot make himself a trustee *in invitum* or a trustee *de son tort*. *Houston v. Farris*, 93 Ala. 587.

1. *Tenant v. Elliott*, 1 B. & P. 3; *Bousfield v. Wilson*, 16 M. & W. 185; *Kiewert v. Rindskopf*, 46 Wis. 481, 32 Am. Rep. 731; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Reed v. Dougan*, 54 Ind. 306; *Daniels v. Barney*, 22 Ind. 207; *Vischer v. Yates*, 11 Johns. (N. Y.) 23; *Hammond v. Christie*, 5 Robt. (N. Y.) 160; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Snell v. Pells*, 113 Ill. 145; *Evans v. Trenton*, 24 N. J. L. 764; *Norton v. Blinn*, 39 Ohio St. 145; *Gilliam v. Brown*, 43 Miss. 641; *Baldwin v. Potter*, 46 Vt. 402.

Bank.—A bank receiving a note for collection cannot refuse to return it or its proceeds to the depositor on the ground that it was given to defraud creditors of a third party, unless the bank itself is one of the creditors. *Leadville First Nat. Bank v. Leppel*, 9 Colo. 594.

Partners.—A partner cannot plead illegality of the business to avoid an accounting. *Brooks v. Martin*, 2 Wall. (U. S.) 70.

Municipal Bonds.—In an action by a corporation against an agent for the sale of bonds it is not necessary for the plaintiffs to show, as a condition precedent to their right to recover, that the issue of the bonds was duly authorized. *Auburn v. Draper*, 23 Barb. (N. Y.) 425.

Illegal Taxes.—And a tax collector receiving taxes illegally levied or collected cannot refuse to turn them over to the state on that ground. *Placer County v. Astin*, 8 Cal. 303; *Clark v. Moody*, 17 Mass. 145; *Galbraith v. Gaines*, 10 Lea (Tenn.) 568; *Chandler v. State*, 1 Lea (Tenn.) 296; *Hammond v. Christie*, 5 Robt. (N. Y.) 160.

Usurious Interest.—And it is immaterial that the money coming into the agent's hands is composed of usurious interest and not collectible by the principal himself. *Chinn v. Chinn*, 22 La. Ann. 599; *Sternburg v. Callanan*, 14 Iowa 251; *Dillman v. Hastings*, 144 U. S. 136.

Agents to Make Wagers.—An agent to make

bets for his principal cannot refuse to pay over the winnings on the ground that the debts were wagering contracts. *Bridger v. Savage*, 15 Q. B. Div. 363, *overruling Beyer v. Adams*, 26 L. J. Ch. 841.

2. *Coit v. Stewart*, 50 N. Y. 17; *Greentree v. Rosenstock*, 61 N. Y. 583; *Conaughty v. Nichols*, 42 N. Y. 83; *Ridder v. Whitlock*, 12 How. Pr. (N. Y. Supreme Ct.) 208; *Michigan Carbon Works v. Schad* (Supreme Ct.), 1 N. Y. Supp. 490; *Coleman v. Pearce*, 26 Minn. 123.

The agent may be sued in assumpsit for money had and received. *Seidel v. Peschkaw*, 27 N. J. L. 427; *Strickland v. Burns*, 14 Ala. 511; *Peyton v. Howell*, 1 Blackf. (Ind.) 244; *English v. Devarro*, 5 Blackf. (Ind.) 588. See also *Carriger v. Whittington*, 26 Mo. 311; *Floyd v. Day*, 3 Mass. 403.

Any application of moneys collected by an agent, other than as directed, is a conversion. *Wells v. Collins*, 74 Wis. 341. But where an agent sold goods, taking a draft in payment, which he discounted and failed to account for the proceeds, it was held that the action should have been upon the contract, since the agent's possession of the draft was rightful, and in parting with it and obtaining the money upon it he was pursuing the line of his duty. *Walter v. Bennett*, 16 N. Y. 251.

If the principal elects to proceed for a breach of contract, he may interpose it as a counterclaim in an action brought against him by the agent upon contract. *Coit v. Stewart*, 50 N. Y. 17; *Challiss v. Wylie*, 35 Kan. 506.

As to the choice between trover and assumpsit, see the title TROVER.

3. *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403.

4. *Atty.-Gen. v. Chesterfield*, 18 Beav. 596; *Lake Eric, etc., R. Co. v. Eckler*, 13 Ind. 67; *Toland v. Murray*, 18 Johns. (N. Y.) 24; *Tripler v. Olcott*, 3 Johns. Ch. (N. Y.) 473.

The cases of public officers are not necessarily an exception to this rule, although, under particular circumstances, an exception may arise. *Trafton v. U. S.*, 3 Story (U. S.) 646.

Agent of Several Principals.—And where several parties appoint a common agent for a common purpose, no one of them has a right to compel the agent to render a separate account to himself. There should be but one proceeding, to which all persons in interest should be made parties. *Louisiana Board of Trustees, etc., v. Dupuy*, 31 La. Ann. 305.

Where a Pledgee Receives Property with the

Must Keep Regular Accounts.—It is incumbent upon the agent to keep regular accounts of all his transactions and dealings in the subject matter of the agency, together with the necessary vouchers,¹ and whenever reasonably requested, to make and present to his principal a full and complete statement of his dealings and the state of the accounts between them.²

(2) *Commingling Principal's Property with His Own.*—It will be readily seen that, in order to secure a prompt and correct accounting, the agent must keep the property and effects of his principal unmixed with his own or with the property of others,³ and if he allows them to become so intermingled as afterwards to be indistinguishable the whole will belong to his principal.⁴

understanding that he shall dispose of it through a factor and credit the debtor with the amount of sales, and accordingly commits it to a factor from whom he takes a receipt, he is the proper party to call the factor to account. *Bigelow v. Walker*, 24 Vt. 149, 58 Am. Dec. 156.

Death of Principal.—Upon the death of the principal the agent is liable to account to his personal representative. *Clegg v. Baumberger*, 110 Ind. 536; *Simmons v. Simmons*, 33 Gratt. (Va.) 451.

Or a bill for an accounting may be filed by his heirs. *Ellas v. Lockwood*, 1 Clarke Ch. (N. Y.) 311.

1. *Clarke v. Tipping*, 9 Beav. 284.

It is his duty to keep books in which shall be correctly entered the transactions on account of his principal; and the latter is entitled to a correct copy of the entries, including all memoranda connected therewith. *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

His Failure in This Respect authorizes unfavorable inferences, and subjects him, when called on for an account, to a heavy burden of suspicion as well as of proof. *Peterson v. Poignard*, 8 B. Mon. (Ky.) 309.

When Agent Not Confined to His Books to Prove Transactions.—But unless his books purport to contain all the charges and payments to and for his principal, he will not be restricted from proving them in any other way. *Lever v. Lever*, 2 Hill Eq. (S. Car.) 158.

Interference of Principal in Management of Property.—In *Robbins v. Robbins* (N. J., 1885), 3 Atl. Rep. 264, Bird, V.C., said: "It is true it is the duty of an agent to account strictly; but if the principal has himself, by his interference, created or so contributed to such confusion as to render an absolutely satisfactory accounting impossible, the agent ought not to be held to the most rigid rule."

Reopening Accounts.—Fraudulent accounts between a principal and a factor will be opened from the beginning, and the relief under such circumstances will not be limited to a right to surcharge and falsify. *Clarke v. Tipping*, 9 Beav. 284. See the title ACCOUNTS, Vol. I., p. 463.

Agent's Books Showing a Credit.—And an agent will be bound by a credit given in his books and the notice thereof to the principal. *Higginson v. Fabre*, 3 Desaus. (S. Car.) 89.

2. *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Boston Carpet Co. v. Journeay*, 36 N. Y. 384; *Clark v. Moody*, 17 Mass. 148; *Hartshorne v. Thomas*, 43 N. J. Eq. 419. And see *Penney v. Kaldenberg*, 56 N. Y. Super. Ct. 178.

It is the duty of an agent to render an account to his principal in due season after the sale of property. *Haas v. Damon*, 9 Iowa 591.

If the agent fails to furnish a full account of his transactions, the principal may file a bill in equity for an accounting. *Dunwidie v. Kerley*, 6 J. J. Marsh. (Ky.) 501; *Zetelle v. Myers*, 19 Gratt. (Va.) 62; *Halsted v. Rabb*, 8 Port. (Ala.) 63; *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24.

But the failure of a general agent to render monthly accounts as required by his contract has been held not to defeat his right to recover salary. *Sampson v. Somerset Iron Works Co.*, 6 Gray (Mass.) 120. See *infra*, this section, *Of Principal to Agent—Remuneration for Services Rendered*.

3. *Clarke v. Tipping*, 9 Beav. 284; *Greene v. Haskell*, 5 R. L. 447; *Commercial, etc., Bank v. Jones*, 18 Tex. 811. See also *Cock v. Van Etten*, 12 Minn. 522.

Depositing Money.—In *Commercial, etc., Bank v. Jones*, 18 Tex. 811, it was held where an agent receives money for his principal, if he deposits it in a bank, it is his duty to deposit it either in the name of his principal or in his own name as agent of his principal, opening a new account for that purpose, even if he already has one in his own name.

4. *Yates v. Arden*, 5 Cranch (C. C.) 526; *Safford v. Gallup*, 53 Vt. 292; *Story on Agency*, § 205. And see *Jewett v. Dringer*, 30 N. J. Eq. 291; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62. Also the title CONFUSION OF GOODS.

The whole must, both in law and in equity, be taken to be the property of the principal until the agent puts it under such circumstances that it may be distinguished as satisfactorily as it might have been before the mixture. *Lupton v. White*, 15 Ves. Jr. 432. And see *Chedworth v. Edwards*, 8 Ves. Jr. 46.

If an agent mingles funds of his principal with those of his own, he must disclose the amount belonging to himself, or his principal will take the whole. *Atkinson v. Ward*, 47 Ark. 533.

If one having charge of the property of another so confounds it with his own that it cannot be distinguished, he must bear all the inconveniences of the confusion. If he cannot distinguish and separate his own, he must lose it. *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62.

If one mixes trust funds with his own, the whole will be treated as trust property, except in so far as he may be able to distinguish what is his. *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54.

Any loss resulting to the intermingled mass will fall upon the agent.¹

Bank Deposits.—Whenever it becomes the duty of an agent to deposit in a bank his principal's funds, he can escape liability by the failure of the bank only by opening the account in his principal's name, or by so distinguishing the funds on the books of the bank as to indicate clearly that they are the property of the principal.² If he deposits such funds in his own name, mixing them with his own funds, he will not, in case of loss, be permitted to throw such loss on his principal.³ And this rule has been applied even though the agent had no other funds in the bank at the time.⁴

And where an agent, having blended his own and his principal's demands in one account, received a general remittance, he was held bound to apply it ratably. *Barrett v. Lewis*, 2 Pick. (Mass.) 123.

1. *Pinckney v. Dunn*, 2 S. Car. 314; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123.

Depreciation in Value.—The agent is liable for any depreciation in value of the intermingled fund. *Mason v. Whitthorne*, 2 Coldw. (Tenn.) 242.

A Chicago bank received from a New York bank a note for collection, which it collected in a depreciated currency and used in its own business. When called upon to remit, the currency had further depreciated forty per cent, and the bank in New York was held entitled to the value of the currency as collected. *Marine Bank v. Fulton County Bank*, 2 Wall. (U. S.) 252.

An agent has no right to mix the funds of his principal with his own and then hold his principal liable for the depreciation of moneys in his hands. *Webster v. Pierce*, 35 Ill. 158.

Loss by Theft.—Where an agent mixed the money and funds of his principal with moneys and funds belonging to himself and a third person, and a portion of the money so mixed was subsequently stolen, but it was impossible to determine to whom the stolen money actually belonged, it was held that the loss must fall upon the agent as a penalty for not keeping his principal's money separate from his own and that of others. *Massachusetts L. Ins. Co. v. Carpenter*, 2 Sweeny (N. Y.) 734. And see *Fidelity Invest. Co. v. Carico*, 1 Colo. App. 292.

The burden is on the agent in such a case to show that the identical money was stolen which belonged to his principal. *Bartlett v. Hamilton*, 46 Me. 435.

Failure of Factor to Whom Agent Consigned Goods of Several Principals.—Where an agent to sell hay consigned his whole cargo, comprising that of the plaintiff and several lots of other owners, to commission merchants, who from time to time sold portions of it and made remittances on account of sales of the cargo, but who failed before the whole was disposed of, it was held that the agent should have consigned the plaintiff's hay separately and required separate accounts of its sale, and that he was responsible for the loss resulting from the failure. *Williams v. White*, 70 Me. 138.

2. **How Principal's Funds should be Deposited.**—*Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61; *Norwood v. Harness*, 98 Ind. 134,

49 Am. Rep. 739; *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753; *Hammon v. Cottle*, 6 S. & R. (Pa.) 290.

In *Robinson v. Ward*, 2 C. & P. 60, 12 E. C. L. 29, *Abbott, C.J.*, in speaking of the method by which the agent might escape liability, said: "The defendant should have paid this money into a banker's hands by opening a new account in his own name 'for the credit of Robinson's estate,' and so to earmark the money as belonging to that estate; then it would have been kept separate."

By mingling it with his own money and depositing the whole in the bank in his own name and to his own individual and private account, he treats the money as his own, and from that moment it ceases to be at the risk of the principal, and is at the risk of the agent. *Mason v. Whitthorne*, 2 Coldw. (Tenn.) 245.

Where a factor kept the funds arising from his business separate from his individual funds, by depositing to a "separate brokerage account" the drafts received for goods sold, the fact that the drafts included his commissions on such sales is not a mingling of his own with the trust funds. *Richardson v. St. Louis Nat. Bank*, 10 Mo. App. 246.

3. *Fletcher v. Walker*, 3 Madd. 73; *Wren v. Kirton*, 11 Ves. Jr. 377; *Macdonnell v. Harding*, 7 Sim. 178; *Cartmell v. Allard*, 7 Bush (Ky.) 482; *Norris v. Hero*, 22 La. Ann. 605; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; *Webster v. Pierce*, 35 Ill. 158; *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739; *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753.

Such disposition will be treated as a conversion of the funds, and devolve on him any loss which may be sustained by the banker's insolvency. *Cartmell v. Allard*, 7 Bush (Ky.) 482.

In *School Dist. v. Greenfield First Nat. Bank*, 102 Mass. 174, it was held that in the absence of any notice that the deposit was not the private property of the agent the bank might apply it as such.

4. *Sargeant v. Downey*, 49 Wis. 524. But see, *contra*, *Hale v. Wall*, 22 Gratt. (Va.) 424.

In *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61, an attorney deposited money collected for his client, in his own name although not in his private account, without anything to indicate its trust character, and he was held responsible for a loss occurring by reason of the failure of the bank, notwithstanding the transmission of the money to the client was arrested by garnishee process

(3) *Disputing Principal's Title.*—An agent may not deny the title of his principal to the subject matter of the agency;¹ but he is at all times at liberty to show that the principal has parted with his interest in the property subsequent to the delivery to him,² or that he has been divested of possession by a title superior to that of the principal.³

(4) *Demand by Principal for Accounting—General Rule.*—The general rule is that the principal must make a demand of the agent before he can recover money or goods received by the latter in the course and by virtue of the agency.⁴

against the attorney before he had an opportunity to transmit it, and the deposit thus became prolonged until the bank suspended.

And in *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708, the liability was carried still further, and an administrator held responsible for the loss of funds deposited in his individual name, although he had no other funds in the bank and informed its officers at the time of making the deposit that the fund was held by him in trust.

1. *May Not Deny Principal's Title.*—*Von Hurter v. Spengeman*, 17 N. J. Eq. 185; *Hungerford v. Moore*, 65 Ala. 232; *Hancock v. Gomez*, 58 Barb. (N. Y.) 490, 50 N. Y. 668; *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Cowing v. Greene*, 45 Barb. (N. Y.) 585; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 605.

An agent undertaking the sale of property for his principal is estopped, in an action brought by the principal to recover the avails of the sale, from denying the validity of the title by which his principal held the property at the time of the sale. *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398.

It is no defense in an action by the principal for money collected by the agent, for the latter to show that it belonged to third parties. *Witman v. Felton*, 28 Mo. 601; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Roberts v. Burton*, 14 Vt. 195; *Day v. Southwell*, 3 Wis. 657.

2. *Marvin v. Ellwood*, 11 Paige (N. Y.) 365.

3. *May Show that He has been Divested of Possession by Title Paramount.*—*Bliven v. Hudson River R. Co.*, 36 N. Y. 406; *Van Winkle v. U. S. Mail Steamship Co.*, 37 Barb. (N. Y.) 122; *Doty v. Hawkins*, 6 N. H. 247, 25 Am. Dec. 459; *Robertson v. Woodward*, 3 Rich. (S. Car.) 251.

In *Western Transp. Co. v. Barber*, 56 N. Y. 544. Grover, J., said: "The right of a bailee to set up title in a third person as against the claim of his bailor has been much considered. It is said that neither a wharfinger nor warehouseman can deny the right of the person from or for whom he receives the property; that they are the agents of the persons from whom they receive the property and cannot dispute their title. This general rule is sustained by numerous cases, a citation of which is unnecessary. It applies in all cases where the bailee seeks to avail himself of the title of a third person for the purpose of keeping the property himself from the bailor, and to all cases where the bailee has not yielded to a paramount title in another. The question in this case is whether it applies in

case he has done so. It does not apply where the property has been taken from the bailee by due process of law; nor where the bailor has obtained possession feloniously, or by force or fraud. * * * I think the best-considered cases hold that the right of a third person to which the bailee has yielded, by delivering the property, may be interposed in all cases as a defense to an action brought by the bailor subsequently for the property. When the owner comes and demands his property he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title."

Warehouseman.—If a warehouseman receives goods and the bailor has no title to the goods, and they are taken from the custody of the warehouseman by the authority of the law as the property of a third person, the warehouseman may show this in defense of an action brought against him by the bailor for the goods. *Burton v. Wilkinson*, 18 Vt. 186.

4. *England.*—*Topham v. Braddick*, 1 Taunt. 572.

Alabama.—*Sally v. Capps*, 1 Ala. 121; *Hammett v. Brown*, 60 Ala. 498.

Arkansas.—*Taylor v. Spears*, 6 Ark. 381; *Denton v. Embury*, 10 Ark. 228; *Martin v. Webb*, 5 Ark. 73; *Warner v. Bridges*, 6 Ark. 385.

California.—*In re Holdforth*, 1 Cal. 438.

Illinois.—*Bedell v. Janney*, 9 Ill. 193.

Indiana.—*Judah v. Dyott*, 3 Blackf. (Ind.) 324, 25 Am. Dec. 112; *Armstrong v. Smith*, 3 Blackf. (Ind.) 251; *Philips v. Wills*, 2 Ind. 325; *Nutzenholster v. State*, 37 Ind. 457; *Peyton v. Bowell*, 1 Blackf. (Ind.) 244; *Pierse v. Thornton*, 44 Ind. 235; *English v. Devarro*, 5 Blackf. (Ind.) 588; *Heddens v. Younglove*, 46 Ind. 212; *Hamilton v. Elkins*, 46 Ind. 213; *Dodds v. Vannoy*, 61 Ind. 89; *State v. Sims*, 76 Ind. 328; *Jones v. Gregg*, 17 Ind. 84; *Claypool v. Gish*, 108 Ind. 424.

Iowa.—*Haas v. Damon*, 9 Iowa 591; *Alexander v. Jones*, 64 Iowa 207.

Kentucky.—*Roberts v. Armstrong*, 1 Bush (Ky.) 263, 89 Am. Dec. 624.

Massachusetts.—*Clark v. Moody*, 17 Mass. 145.

Missouri.—*Burton v. Collin*, 3 Mo. 315; *Benton v. Craig*, 2 Mo. 198; *Cockrill v. Kirkpatrick*, 9 Mo. 697.

New Hampshire.—*Hutchins v. Gilman*, 9 N. H. 359.

New York.—*Albany City F. Ins. Co. v. Devendorf*, 43 Barb. (N. Y.) 444; *Williams v.*

Limitations of Rule.—Where, however, the agent has been guilty of a breach of duty, as where he fails to render an account of sales or to notify the principal of the collection of moneys within a reasonable time,¹ or has converted the property to his own use,² there is no necessity for demand before suit.

Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; Ferris v. Paris, 10 Johns. (N. Y.) 285; Baird v. Walker, 12 Barb. (N. Y.) 298; Rathbun v. Ingals, 7 Wend. (N. Y.) 320; Cooley v. Betts, 24 Wend. (N. Y.) 203; Halden v. Crafts, 4 E.D. Smith (N. Y.) 490; Taylor v. Bates, 5 Cow. (N. Y.) 376; Lillie v. Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360.

North Carolina.—Waring v. Richardson, 11 Ired. (N. Car.) 77; Hyman v. Gray, 4 Jones (N. Car.) 155; Moore v. Hyman, 12 Ired. (N. Car.) 38; Potter v. Sturges, 1 Dev. (N. Car.) 79.

Pennsylvania.—Krause v. Dorrance, 10 Pa. St. 462, 51 Am. Dec. 496.

Vermont.—Hall v. Peck, 10 Vt. 474.

Compare Leake v. Sutherland, 25 Ark. 219; Coffin v. Coffin, 7 Me. 298, explaining Staples v. Staples, 4 Me. 532.

When Demand is Necessary to Recovery, It must be Proved.—In an action against an agent for not accounting a demand is necessary. It must be proved on the trial. Bushnell v. McCauley, 7 Cal. 421.

Awaiting Directions as to Manner of Remitting.—A factor or assignee apprising his principal of the sale of goods consigned to him may await directions as to the manner of remitting the net proceeds, and is not liable to an action until a default on his part in remitting or paying the proceeds according to the order of his principal. Ferris v. Paris, 10 Johns. (N. Y.) 285.

An action will not lie against a factor or agent to whom goods are sent to be sold at auction without a demand of the proceeds, or instructions to remit before suit brought. Cooley v. Betts, 24 Wend. (N. Y.) 203; Cummins v. McLain, 2 Ark. 402; Sevier v. Holliday, 2 Ark. 512; Palmer v. Ashley, 3 Ark. 75.

Agreement to Pay over Money when Collected.—Where the agent agrees beforehand to pay over the money when collected, demand is dispensed with. Mardis v. Shackelford, 4 Ala. 493.

Authority to Demand must be Questioned when Demand Made.—Where a demand is made, the party has a right to require reasonable evidence of authority of the individual to make it; but if no exception is taken at the time it will be too late to raise it on the trial, as the authority should always be questioned at the time the demand is made. Baxter v. McKinlay, 16 Cal. 76. See also Connah v. Hale, 23 Wend. (N. Y.) 462; Payne v. Smith, 12 N. H. 34.

Sufficiency of Demand.—The proof of a demand and refusal is not restricted to any particular form of words; but any declaration of the agent to the principal, or any act which shows a denial of his right, puts him in the wrong, and gives to the principal a right of action. Moore v. Hyman, 12 Ired. (N. Car.) 38.

Where, by the terms of a written contract, one P. constituted T. his agent to loan money

and take securities for the payment of the same, and expressly provided that the authority could be revoked at the request of P. in writing, it was held that a demand for the securities in writing, signed by a party claiming to be an attorney of P., without an order in writing or proof of his authority, was not sufficient to authorize P. to maintain an action for the face value of the securities. Tingley v. Parshall, 11 Neb. 443.

But a demand on a member of a firm acting as agents for the sale of goods, for the goods or a settlement, is sufficient. Baird v. Walker, 12 Barb. (N. Y.) 298.

1. *Arkansas.*—Denton v. Embury, 10 Ark. 228.

Illinois.—Paris v. Hunter, 10 Ill. App. 230; Chapman v. Burt, 77 Ill. 337; Bedell v. Janney, 9 Ill. 193.

Iowa.—Haas v. Damon, 9 Iowa 591.

Maine.—Chapman v. Shaw, 5 Me. 59.

Massachusetts.—Hill v. Hunt, 9 Gray (Mass.) 66; Wait v. Gibbs, 7 Pick. (Mass.) 146.

Missouri.—McMahan v. Franklin, 38 Mo. 548.

New York.—Lillie v. Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360; Cooley v. Betts, 24 Wend. (N. Y.) 203.

Pennsylvania.—Drexel v. Raimond, 23 Pa. St. 21; Harvey v. Turner, 4 Rawle (Pa.) 223; Brown v. Arrott, 1 Miles (Pa.) 139; Witherup v. Hill, 9 S. & R. (Pa.) 11.

Texas.—Mitchell v. McLemore, 9 Tex. 151.

When Principal Learns of the Collection, but Not from Agent.—Yet even where the agent fails to notify the principal of the collection of money, if the latter actually has notice of such collection, he must make the demand within a reasonable time; Jett v. Hempstead, 25 Ark. 462.

If he neglects to make demand in such a case, he puts in motion the statute of limitations; and if he could, with reasonable diligence, have known of the collection, the statute begins to run after the lapse of a reasonable time after demand. Whitehead v. Wells, 29 Ark. 108.

2. *Chapman v. Burt*, 77 Ill. 337; *Terrell v. Butterfield*, 92 Ind. 1; *Bunger v. Roddy*, 70 Ind. 26.

Where an agent exchanges property, intrusted to him to sell on commission, for other property, he is liable to the owner for the value thereof, and the owner may maintain an action therefor without showing a demand for a return of the property or for an account. Haas v. Damon, 9 Iowa 589; Cutter v. Fanning, 2 Iowa 580.

The circumstance that an agent acting in the business of his principal takes notes payable to himself in discharge of the sum due to his principal, is not by itself such evidence of a conversion as will dispense with proof of a demand of the money collected on the note before suit brought. Kidd v. King, 5 Ala. 84.

Where money has been received by the

And it is held that the agent is in duty bound to account to his principal in a reasonable time without any demand, in cases where a demand would be impracticable or highly inconvenient.¹ Thus it has been said: "If a merchant who sends his goods to a foreign country to be sold can have no right to call for his money, the proceeds of his goods, until he has sent abroad to make a demand, the risk of loss from the failure of factors would be considerably increased, and the disposition to trust them proportionably impaired."² Further, where the agency is denied or repudiated by the agent, the principal may institute suit without demand.³

(5) *Interest—General Rule.*—An agent is under no liability for interest where he has been guilty of no default and has been ready to settle with his principal when called upon for that purpose.⁴

Retention of Property for His Indemnity.—An agent, entitled to retain the property for his indemnity, although he disposes of it without authority, is not charge-

agent a demand or a misapplication of the money is necessary before an action can be brought, and the statute of limitations begins to run only from the time of such demand. *Waring v. Richardson*, 11 Ired. (N. Car.) 77. See also *Potter v. Sturges*, 1 Dev. (N. Car.) 79; *White v. Miller*, 3 Dev. & B. (N. Car.) 55; *Wills v. Sugg*, 3 Ired. (N. Car.) 96.

An agent who receives notes to be deposited with an attorney for collection, but collects the money himself, is not entitled to insist on a demand before suit against him. *Brazier v. Fortune*, 10 Ala. 516.

Nor is demand necessary where the ground of action is the agent's breach of duty, by which less money came to his hands for the principal than otherwise would have come. *Dever v. Branch*, 18 Tex. 615.

1. *Eaton v. Welton*, 32 N. H. 352; *Clark v. Moody*, 17 Mass. 149; *Dodge v. Perkins*, 9 Pick. (Mass.) 387.

A steward is bound to account periodically, though not called on. *Ormond v. Hutchinson*, 13 Ves. Jr. 53.

2. *Clark v. Moody*, 17 Mass. 148, per Parker, C.J.

After a lapse of a reasonable time from the receipt of goods by factors abroad and a neglect to account for them in any way, the fair presumption is that the goods have been sold and the money received for them, and an action for money had and received may be maintained. *Eaton v. Welton*, 32 N. H. 352.

But in *New York* it is held that the factor of a foreign principal is not liable in an action for the proceeds of a sale made by him on account of his principal on commission, until demand made by the principal or instructions to remit. *Halden v. Crafts*, 4 E. D. Smith (N. Y.) 495; *Cooley v. Betts*, 24 Wend. (N. Y.) 206; *Ferris v. Paris*, 10 Johns. (N. Y.) 285. And *Topham v. Braddick*, 1 Taunt. 572, was a case of foreign agency, and demand was held necessary.

3. *King v. Foscue*, 91 N. Car. 116; *Waddell v. Swann*, 91 N. Car. 108; *Tillotson v. McCrillis*, 11 Vt. 477.

A demand is required to enable the agent to pay over the money without incurring the costs of a suit, and therefore is not necessary where the agency is denied, or where claims are set up exceeding the amount collected, or where the agent's liability is disputed in the answer. *Wiley v. Logan*, 95 N. Car. 358.

Denial of Liability will Excuse Demand.—The general rule requiring a demand does not apply where the agent denies his liability, or otherwise shows that a demand would have been fruitless. *Hammett v. Brown*, 60 Ala. 498.

4. *Williams v. Baxter*, 3 McLean (U. S.) 471; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Miller v. Clark*, 5 Lans. (N. Y.) 388; *Mason v. Roosevelt*, 5 Johns. Ch. (N. Y.) 534; *Rowland v. Martindale*, 1 Bailey Eq. (S. Car.) 226; *Gordon v. Zacherie*, 15 La. Ann. 17; *Wheeler v. Haskins*, 41 Me. 432; *Hyman v. Gray*, 4 Jones (N. Car.) 155; *Board of Justices v. Fennimore*, 1 N. J. L. 281.

He will, however, be liable from the time he becomes a defaulter by delaying to pay over. *Millaudon v. Lesseps*, 17 La. Ann. 246.

An agent improperly withholding the money of his principal is liable for the ordinary interest of the country where it ought to be paid. *Anderson v. State*, 2 Ga. 373; *People v. Gasherie*, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; *Harrison v. Long*, 4 Desaus. (S. Car.) 110; *Story on Agency*, § 215.

In *Crawford v. Welling*, 1 Dall. (Pa.) 349, note, it was held that a factor or agent who does not with due diligence remit the money of his principal, is chargeable with interest.

An agent having collected money for his principal, which is subsequently attached and condemned in his hands by process of garnishment, is not liable for interest while the money remained in his hands, unless a demand is first made. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484, citing *Kimbrow v. Waller*, 21 Ala. 376; *Sally v. Capps*, 1 Ala. 121; *Barton v. Peck*, 1 Stew. & P. (Ala.) 486; *M'Broom v. Governor*, 6 Port. (Ala.) 32. And see *Lever v. Lever*, 2 Hill Eq. (S. Car.) 158.

An agent receiving money for his principal in the transaction of his business is not liable for interest thereon before a demand is made, unless he receives special instructions to remit as fast as collected or is in default in neglecting to render his accounts. *Hauxhurst v. Hovey*, 26 Vt. 544.

Account Stated.—Where there has been an account stated between the parties, interest should be calculated from that time, as fixing the true amount of the indebtedness. *Trippe v. Wynne*, 76 Ga. 200. See the title ACCOUNTS—ACCOUNTS STATED, Vol. I., p. 457.

able with interest on the avails of that property during the continuance of his lien.¹

Neglect to Notify Principal of Collection.—On the other hand, if the agent receives moneys and wilfully suffers his principal for a long time to remain in ignorance that the debtor has paid, it is but equitable that the agent should be charged with interest, as in this case there is a clear default and breach of duty.²

Neglect or Refusal to Pay after Demand.—Where a demand has been made for an accounting, the agent's unreasonable and unjust neglect and refusal to account will render him liable for interest.³

Neglect to Pay when No Demand Necessary.—And interest is to be allowed where the law makes it the duty of the agent to account without a previous demand on the part of his principal.⁴

Misapplication.—The same is true where the agent, having agreed or been instructed to invest the funds, or apply them in some other designated way, retains and employs them for his own purposes.⁵

When Agent Receives Interest.—And of course the agent must account for the interest that he receives for the use of such funds.⁶

(6) *Accounting in Equity.*—Wherever a fiduciary relation exists between the principal and agent, the latter may be called upon to account in equity.⁷ But

1. *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168.

2. *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Clark v. Moody*, 17 Mass. 149; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Bedell v. Janney*, 9 Ill. 193; *Nisbet v. Lawson*, 1 Ga. 275.

Where an agent retains money in his hands for fifteen years, furnishing no account of the manner in which it has been employed, he will be treated as if he had actually used the fund, and charged with interest as a matter of right. *Comegys v. State*, 10 Gill & J. (Md.) 175.

3. *Hill v. Williams*, 6 Jones Eq. (N. Car.) 242.

He will be charged with interest from the time of demand. *Nisbet v. Lawson*, 1 Ga. 275; *Black v. Goodman*, 1 Bailey (S. Car.) 201; *Hackleman v. Moat*, 4 Blackf. (Ind.) 164; *Gordon v. Zacherie*, 15 La. Ann. 17; *Wheeler v. Haskins*, 41 Me. 432; *Neal v. Freeman*, 85 N. Car. 441; *Porter v. Grimsley*, 98 N. Car. 550.

It has been said that there is no principle upon which he can be charged with interest further back than the time of demand. *Hyman v. Gray*, 4 Jones (N. Car.) 155.

4. *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

5. *Short v. Skipwith*, 1 Brock. (U. S.) 103; *Nisbet v. Lawson*, 1 Ga. 275; *Stern v. People*, 102 Ill. 557; *Rochester v. Levering*, 104 Ind. 562; *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264; *Taylor v. Knox*, 5 Dana (Ky.) 466; *Gordon v. Zacherie*, 15 La. Ann. 17; *Gridley v. Conner*, 2 La. Ann. 87; *Hill v. Hunt*, 9 Gray (Mass.) 66; *Schisler v. Null*, 91 Mich. 321; *Kerr v. Laird*, 27 Miss. 544; *People v. Gasherie*, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; *Tuers v. Tuers*, 100 N. Y. 196; *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Harrison v. Long*, 4 Desaus. (S. Car.) 110; *Blodgett v. Converse*, 60 Vt. 410.

6. *Bassett v. Kinney*, 24 Conn. 267, 63 Am. Dec. 161.

Interest-bearing Securities.—An agent will be presumed to have received the interest upon the interest-bearing securities in his possession belonging to his principal, and the burden is upon him to prove that he did not receive it. *Blodgett v. Converse*, 60 Vt. 410.

7. *Evans on Agency*, p. 342; *Makepeace v. Rogers*, 4 De G. J. & S. 649, affirming 11 Jur. N. S. 215; *McIntyre v. McClenaghan*, 12 S. Car. 185; *Thornton v. Thornton*, 31 Gratt. (Va.) 212.

In *Makepeace v. Rogers*, 11 Jur. N. S. 215, *Stuart, V.C.*, said: "I conceive that wherever the relation between the person who seeks an account, and the person against whom he seeks it, partakes of a fiduciary character, a trust is reposed by the plaintiff in the defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman. The fiduciary character of the employment imposes upon the person employed the duty of keeping accounts and of preserving vouchers; and according to the old law, which I trust will continue to be the law of this court, a bill for an account in equity may be filed and sustained." In this case it was held that a landowner might maintain a bill for an account against his agent.

In *Moxon v. Bright*, L. R. 4 Ch. 294, *Hatherley, L.C.*, said there were numerous cases showing that where the relation of principal and agent had imposed a trust upon the agent, the court would entertain a bill for an account; and the only difficulty was in determining what constituted this species of trust. It was not every agent who held a fiduciary position as between himself and his principal. *Foley v. Hill*, 1 Ph. 399, 2 H. L. Cas. 28, showed that though a banker was the agent of the customer for many purposes, they were not such as would constitute a trust. Nor did the mere circumstance that

the mere relation of principal and agent will not entitle the principal to come into equity where the accounting can be fairly had at law.¹ Where the account has become so complicated that a court of law would be incompetent to examine it with all necessary accuracy, there is ground for equitable interference.² This branch of the subject will receive a detailed treatment elsewhere under titles given in the note.³

2. Of Principal to Agent—*a*. REMUNERATION FOR SERVICES RENDERED—

(1) *How the Right may be Derived*—(a) *Special Agreement*.—If the agent's employment be by special agreement, his right to compensation will be determined by the terms of the agreement exclusively.⁴

the principal wanted discovery empower the court to give him assistance in the way of relief. The case of *Smith v. Leveau*, 2 De G. J. & S. 1, showed that though you might be entitled to discovery, which you could get either in equity or at law, that did not entitle you to relief, for all depended upon the character of the agency. As between master and servant such an agency did not exist, and a court of equity ought not to entertain a suit in such a case.

1. *Taylor v. Tompkins*, 2 Heisk. (Tenn.) 92; *Crothers v. Lee*, 29 Ala. 337; *Knotts v. Tarver*, 8 Ala. 743; *Powers v. Cray*, 7 Ga. 206. And see *Matthews v. Wilson*, 27 Mo. 155; *Padwick v. Stanley*, 9 Hare 627; *Shepherd v. Brown*, 4 Giff. 456; *Garr v. Redman*, 6 Cal. 574; *Webb v. Fuller*, 77 Me. 568.

In an agency involving a single transaction, such as a single consignment, or the delivery of money to be laid out in the purchase of a particular thing or to be paid over to a third person, a suit at law would be maintainable, and if a ground for equitable jurisdiction is not laid by reason of a discovery being wanted, it is perhaps the better opinion that such a case would be cognizable alone at law. *Halsted v. Rabb*, 8 Port. (Ala.) 65; *Porter v. Spencer*, 2 Johns. Ch. (N. Y.) 171; *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24. And see *Paulding v. Lee*, 20 Ala. 753.

A bill for an account by a principal against his agent is not necessary where the transaction to which it relates is a single transaction and untainted by fraud. *Navulshaw v. Brownrigg*, 2 De G. M. & G. 441.

2. *Halsted v. Rabb*, 8 Port. (Ala.) 65; *Knotts v. Tarver*, 8 Ala. 743; *Dunwiddie v. Kerley*, 6 J. J. Marsh. (Ky.) 501.

In *Taylor v. Tompkins*, 2 Heisk. (Tenn.) 89, a bill in equity was held to lie for an account of goods sold on commission if complicated, or if there was embarrassment in making proof, although the items were all on one side.

Where there is no complexity or difficulty in the account, a bill for an account against an attorney charging him with negligence and a failure to pay is without equity, nor can it be maintained on the ground of discovery alone unless it alleges that the complainant cannot prove the facts without the defendant's answer. *Crothers v. Lee*, 29 Ala. 337. See 1 Story Eq. Jur., §§ 462, 463. And see the title ACCOUNTS AND ACCOUNTING, 1 ENCYC. OF PL. AND PR. 93-96, where this subject is treated at length.

When once in a court of equity, the court

will allow all matters relating to the account and the transactions of the agent to be adjudicated in the same suit. *Clark v. Lee*, 21 Iowa 274.

3. See the title EQUITY in this work, and the title ACCOUNTS AND ACCOUNTING, 1 ENCYC. OF PL. AND PR. 95; also the title PRINCIPAL AND AGENT in the latter work.

4. *England*.—*Bower v. Jones*, 8 Bing. 65, 21 E. C. L. 224; *Tribe v. Taylor*, 1 C. P. Div. 505; *Fullwood v. Akerman*, 11 C. B. N. S. 737, 103 E. C. L. 737; *Bray v. Chandler*, 18 C. B. 718, 86 E. C. L. 718; *Bull v. Price*, 7 Bing. 237, 20 E. C. L. 115; *Warde v. Stuart*, 1 C. B. N. S. 88, 87 E. C. L. 88.

United States.—*Steinbach v. Montpelier Carriage Co.*, 37 Fed. Rep. 760.

California.—*Wiley v. California Hosiery Co.* (Cal., 1893), 32 Pac. Rep. 522; *Crane v. McCormick*, 92 Cal. 179; *Fiske v. Soule*, 87 Cal. 313; *Gilbert v. Judson*, 85 Cal. 105; *Maze v. Gordon*, 96 Cal. 61; *Dobinson v. McDonald*, 92 Cal. 33; *Neilson v. Lee*, 60 Cal. 555; *Masten v. Griffing*, 33 Cal. 111. See also *Mattingly v. Roach*, 84 Cal. 207.

Georgia.—*Irvy v. Lawshe*, 62 Ga. 216.

Illinois.—*Hoyt v. Shipherd*, 70 Ill. 309.

Iowa.—*Williams Harvester Co. v. Pope*, 69 Iowa 523. See also *Dubois v. Dubois*, 54 Iowa 216.

Kansas.—*Robinson v. Kindley*, 36 Kan. 157.

Louisiana.—*Lalande v. Breaux*, 5 La. Ann. 505.

Massachusetts.—*Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Pearson v. Mason*, 120 Mass. 53.

Minnesota.—*Plano Mfg. Co. v. Buxton*, 36 Minn. 203; *Turnbull v. Northwestern Terra Cotta Co.*, 46 Minn. 513. See also *Kelly v. Erie Tel., etc., Co.*, 34 Minn. 321.

Missouri.—*Woods v. Stephens*, 46 Mo. 555.

Nebraska.—*Singer Mfg. Co. v. Doggett*, 16 Neb. 609.

New Jersey.—*Hinds v. Henry*, 36 N. J. L. 328.

New York.—*Condict v. Cowdrey* (Super. Ct.), 19 N. Y. Supp. 699; *Taylor v. Enoch Morgan's Sons Co.*, 124 N. Y. 184, 48 Hun (N. Y.) 483; *Wight v. Wood*, 85 N. Y. 402; *Jacobs v. Kolff*, 2 Hilt. (N. Y.) 133; *O'Sullivan v. Roberts*, 42 N. Y. Super. Ct. 282; *Warren v. Rendrock Powder Co.* (Supreme Ct.), 9 N. Y. Supp. 842.

Texas.—*Sypert v. McCowen*, 28 Tex. 635; *Heidenheimer v. Walthew*, 2 Tex. Civ. App. 501.

See also *McDonald v. Ortman*, 88 Mich. 645.

Where Remuneration is Made to Depend upon Contingency.—An agent may by special agreement with his principal so contract as to make his compensation dependent on a contingency.¹ Under such contract he will be entitled to compensation on showing that the contingency has happened,² or that performance was prevented through some fault of the other party.³

(b) **When Promise to Pay Implied—Prior Request.**—Where one performs services for another at the latter's request, the law, in the absence of an express contract, will imply a promise to pay what the services are reasonably worth, unless it can be inferred from the circumstances that they were to be rendered without compensation.⁴

Implied from Circumstances—Service Performed with Knowledge of Party Benefited.—Moreover, an assumpsit to compensate may be implied from the beneficial nature of the consideration and the circumstances of the transaction,⁵ as where a party,

1. **Compensation Depending upon Contingency**—*England.*—*Roberts v. Jackson*, 2 Stark. 225, 3 E. C. L. 387; *Alder v. Boyle*, 4 C. B. 635, 56 E. C. L. 635; *Bull v. Price*, 7 Bing. 237, 20 E. C. L. 115; *Moffatt v. Laurie*, 15 C. B. 583, 80 E. C. L. 583.

California.—*McPhail v. Buell*, 87 Cal. 115.

Maryland.—*Jones v. Adler*, 34 Md. 440.

Massachusetts.—*Zerrahn v. Ditson*, 117 Mass. 553.

Missouri.—*Beauchamp v. Higgins*, 20 Mo. App. 514.

New Jersey.—*Hinds v. Henry*, 36 N. J. L. 328.

New York.—*Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Robinson v. New York Ins. Co.*, 2 Cai. (N. Y.) 357. See *Stanton v. Embrey*, 93 U. S. 557.

Illustrations.—The general agent of the managers of a musical festival wrote a letter to the plaintiff promising, as security for the payment of services to be rendered by the plaintiff, to guarantee a certain sum for his services, provided that the proceeds of the festival resulted in that amount being placed to the agent's credit, and stipulating that neither the executive committee nor any person connected with the festival, except the agent, should be responsible for the fulfillment of the contract, and that, should the festival result in a loss, the plaintiff should have no claim against the agent or anybody else connected therewith. The plaintiff, by letter, accepted this proposition. It was held that the plaintiff could not maintain an action against the managers to recover a reasonable compensation for his services after the festival resulted in a loss. *Zerrahn v. Ditson*, 117 Mass. 553.

Under a contract by the terms of which the plaintiff was to receive a commission for the sale of such lots as the defendant desired to sell in a certain tract, the prices and items to be agreed upon thereafter, which commission was to be his compensation for services rendered in surveying and laying the lots out ready for the market, the plaintiff is not entitled to recover for his services rendered in connection with the laying out of the lots if the defendant complied with the terms of the contract upon his part in fixing prices upon all the surveyed lots he desired to sell and plaintiff failed to sell any such lots, on the sale of which his compensation depended. *Gilbert v. Judson*, 85 Cal. 105.

2. *Moffatt v. Laurie*, 15 C. B. 583, 80 E. C. L. 583; *Spear v. Gardner*, 16 La. Ann. 383; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Hinds v. Henry*, 36 N. J. L. 328; *Franklin v. Robinson*, 1 Johns. Ch. (N. Y.) 157; *Warren v. Rendrock Powder Co. (Supreme Ct.)*, 9 N. Y. Supp. 842.

3. *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Hinds v. Henry*, 36 N. J. L. 328.

4. *Martin v. Roberts*, 36 Fed. Rep. 217; *Van Arman v. Byington*, 38 Ill. 443; *Mangum v. Ball*, 43 Miss. 288, 5 Am. Rep. 488; *Dougherty v. Whitehead*, 31 Mo. 255; *Lewis v. Trickey*, 20 Barb. (N. Y.) 387; *Harrison v. Long*, 4 Desaus. (S. Car.) 110; *Roberts v. Swift*, 1 Yeates (Pa.) 209, 1 Am. Dec. 295. See also *Weeks v. Holmes*, 12 Cush. (Mass.) 215; *Waterman v. Gibson*, 5 La. Ann. 672.

In Regular Course of One's Business.—In *Martin v. Roberts*, 36 Fed. Rep. 217, *Simon-ton, J.*, said that "all persons engaged in commerce called upon to do services in the due course of business are *ex necessitate* entitled to compensation as growing out of and inseparably connected with the contract of their employment."

Private Agent.—In *South Carolina* it has been held that a private agent is not entitled to commissions unless they are stipulated for in the contract creating the agency. *Poag v. Poag*, 1 Hill Eq. (S. Car.) 285; *Lever v. Lever*, 2 Hill Eq. (S. Car.) 158.

5. *Hatch v. Purcell*, 21 N. H. 544; *Livingston v. Rogers*, 1 Cai. (N. Y.) 583; *Hicks v. Burhans*, 10 Johns. (N. Y.) 243; *Hewett v. Bronson*, 5 Daly (N. Y.) 1.

Mandate.—In *Louisiana* it has been held that a mandate is gratuitous unless there has been a contrary stipulation. *Rice's Succession*, 14 La. Ann. 317; *Moreau v. Dumagene*, 20 La. Ann. 230; *Wilson v. Wilson*, 16 La. Ann. 155; *Wells v. Hawley*, 24 La. Ann. 271.

But the better doctrine seems to be that it is of the nature, but not of the essence, of a mandate that it be gratuitous, and an agent need not establish an express agreement that he should have a pecuniary remuneration for his services, but the courts may infer such an agreement from the nature of the employment and the relation of the parties. *Krekeler's Succession*, 44 La. Ann. 726; *Waterman v. Gibson*, 5 La. Ann. 672; *Wood v. McCranie*, 21 La. Ann. 557.

knowing that services are being performed for his benefit and on his account by another party, makes no objection, but permits him to continue performing the services.¹

It is for the Jury to determine whether a promise of recompense can be inferred or not.²

When Promise Not Implied—Gratuitous Services—General Rule.—No promise will arise by implication where the service is spontaneous or unrequested, or where the circumstances, such as the nature of the service and the relations of the parties, account for the transaction on some ground more probable than that of a promise of remuneration.³

Yet the Plaintiff must Show Some Specific Act performed in the capacity of mandatary before any implied contract for compensation can be established. *Wood v. McCranie*, 21 La. Ann. 557.

1. *England*.—*Phillips v. Jones*, 1 Ad. & El. 333, 28 E. C. L. 100; *Peacock v. Peacock*, 2 Campb. 45.

Alabama.—*Wood v. Brewer*, 66 Ala. 570.

Iowa.—*Scully v. Scully*, 28 Iowa 548; *McCrary v. Ruddick*, 33 Iowa 521; *Shelton v. Johnson*, 40 Iowa 84.

Kansas.—*Muscott v. Stubbs*, 24 Kan. 520; *Jones v. School Dist.* No. 47, 8 Kan. 362.

Maine.—*Weston v. Davis*, 24 Me. 374.

Missouri.—*Bartlett v. Sparkman*, 95 Mo. 136, 6 Am. St. Rep. 35.

Pennsylvania.—*Neal v. Gilmore*, 79 Pa. St. 422.

Wisconsin.—*Garrey v. Stadler*, 67 Wis. 512, 58 Am. Rep. 877.

Illustrations.—It has been held that a consulting surgeon who, at the request of the attending surgeon, rendered services to a patient with his consent, may recover from the patient, upon an implied promise, the value of such services, notwithstanding an agreement between the patient and the attending surgeon that the latter should pay for such services, if the consulting surgeon did not expressly or impliedly assent to such agreement. *Garrey v. Stadler*, 67 Wis. 512, 58 Am. Rep. 877. See also *Shelton v. Johnson*, 40 Iowa 84.

Where a codefendant in a suit, being an attorney, specially contracted with his codefendants in the action for a stipulated sum to defend the suit in behalf of himself and his codefendants, he to employ and pay assistant counsel, it was held that assistant counsel who were called into the case by said attorney, and who performed valuable services in the defense of the case, with the knowledge of the other defendants and without any knowledge on their part of the special contract existing between said attorney and his codefendant, were, in an action against all the defendants, entitled to recover compensation for the services rendered by them in defense of the suit. *McCrary v. Ruddick*, 33 Iowa 521. See also *Weston v. Davis*, 24 Me. 374.

But it has been held that a contract will not be implied from the mere fact that work is done which is beneficial to the party sought to be charged. If the circumstances show that the work done was primarily and directly for the benefit of the parties doing it, or under an express contract with a party equally interested with the one sought to be

charged, and also that the latter has, to the knowledge of the party claiming the implied contract, made an express contract with another to do such work, and that the two have worked together in performing the labor, the jury may be justified in finding the party liable only upon the express contract. *Muscott v. Stubbs*, 24 Kan. 520.

Where Employer Assists Employee.—In *Lange v. Kaiser*, 34 Mich. 318, it was held that where one has employed another to manufacture articles at an agreed price out of materials to be furnished by the former, the fact that he himself, without request, assists in the manufacture with the knowledge and assent of the other party will not raise an implied promise on the part of the other party to pay for such services.

Where a Party Benefited Suffers Work to Proceed—Evidence of Request.—It has been held that where beneficial services have been performed by one person for another, who has recognized them and suffered them to proceed, a promise to pay for them may be implied, the law in that case considering the circumstances as evidence from which a request may be presumed. *James v. Bixby*, 11 Mass. 34; *Hatch v. Purcell*, 21 N. H. 544; *Low v. Connecticut River, etc., R. Co.*, 46 N. H. 284; *Livingston v. Rogers*, 1 Cal. (N. Y.) 588; *Hicks v. Burhans*, 10 Johns. (N. Y.) 243; *Hewett v. Bronson*, 5 Daly (N. Y.) 1.

In *Westgate v. Munroe*, 100 Mass. 227, Hoar, J., in giving the opinion of the court, said: "In *James v. Bixby*, 11 Mass. 37, cited for the plaintiffs, it is said by the court that 'when a ship is repaired under the eye of the owner, there is an implied promise on his part to pay for the work, as there is against the owner of a house that he will pay for repairs done upon it, the law in such cases presuming a request if the owner suffers the work to proceed.' There was no occasion for absolute accuracy in the statement of the rule which the court used as an illustration, but it would have been more accurate to say that the law considers it 'as evidence from which a request may be presumed.'"

2. *Hatch v. Purcell*, 21 N. H. 544; *Oatfield v. Waring*, 14 Johns. (N. Y.) 188.

3. *England*.—*Reason v. Wirdnam*, 1 C. & P. 434, 11 E. C. L. 442; *Smart v. Guardians of Poor*, 36 Eng. L. & Eq. 496.

Alabama.—*Morrow v. Allison*, 39 Ala. 70.

California.—*Dopman v. Hoberlin*, 5 Cal. 413.

Illinois.—*Reed v. Baggott*, 5 Ill. App. 257.

Service Rendered in Expectation of Legacy.—Thus, where a person renders services to another, relying solely upon his generosity and expecting to be compensated by a legacy or devise, he cannot, when disappointed in such expectation, maintain an action for the value of his services.¹

Louisiana.—*White v. Jones*, 14 La. Ann. 692; *Ploton's Succession*, 36 La. Ann. 211.

Maryland.—*Bantz v. Bantz*, 52 Md. 693.

Massachusetts.—*Cook v. Welch*, 9 Allen (Mass.) 350; *Palmer v. Haverhill*, 98 Mass. 487.

Michigan.—*St. Jude's Church v. Van Denberg*, 31 Mich. 287; *Lange v. Kaiser*, 34 Mich. 317; *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396; *Coe v. Wager*, 42 Mich. 49; *Scott v. Maier*, 56 Mich. 554.

New Hampshire.—*Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329.

New Jersey.—*Hinds v. Henry*, 36 N. J. L. 328.

New York.—*Livingston v. Ackeston*, 5 Cow. (N. Y.) 531; *Mason v. Roosevelt*, 5 Johns. Ch. (N. Y.) 534; *Griffin v. Potter*, 14 Wend. (N. Y.) 209; *Goodwin v. O'Brien* (Supreme Ct.), 6 N. Y. Supp. 239.

North Carolina.—*Hill v. Williams*, 6 Jones Eq. (N. Car.) 242.

Ohio.—*Cincinnati, etc., R. Co. v. Lee*, 37 Ohio St. 479.

Pennsylvania.—*Hartman's Appeal*, 3 Grant's Cas. (Pa.) 271; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Earp v. Cummins*, 54 Pa. St. 394, 93 Am. Dec. 718.

South Carolina.—*Higginson v. Fabre*, 3 Desaus. (S. Car.) 89.

See also *Ewarth v. Nier*, 11 Neb. 441; *Hay v. Walker*, 65 Mo. 17.

In *Pew v. Gloucester First Nat. Bank*, 130 Mass. 395, *Morton, J.*, in delivering the opinion of the court, said: "The mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and ought to understand that compensation was to be paid for them."

In *St. Jude's Church v. Van Denberg*, 31 Mich. 287, it was held that the allowance of a claim for services as sexton, of one who at the time was a vestryman, and part of the time a senior warden and treasurer of the society, where the evidence clearly showed that the performance of the duty was voluntary, and that it was supposed on both sides

that his service was something he was spontaneously giving from a desire to promote a cause he had at heart, and not in any extent to get money, was erroneous.

Necessity of the Service.—There are some *obiter* expressions to the effect that an implied obligation to pay for services rendered by one party to another without the knowledge of the latter, arises if it was an act of necessity for which he was legally bound to provide, or where it may be assumed that if he had known of the exigency he would have required such a service to be performed, with the understanding that he was to pay for it. *Hewett v. Bronson*, 5 Daly (N. Y.) 1. See *Dunbar v. Williams*, 10 Johns. (N. Y.) 249.

Where Claim to Compensation is an Afterthought.—Where, at the time an agent took charge of certain property, it was not contemplated by either party that he should receive compensation for his services, and nothing arose by which the relations between the parties were changed, and the owners were not informed of any intent to charge for such services until shortly before the termination of the agency, it was held that the agent was not entitled to recover. *Goodwin v. O'Brien* (Supreme Ct.), 6 N. Y. Supp. 239. See also *Higginson v. Fabre*, 3 Desaus. (S. Car.) 89; *James v. O'Driscoll*, 2 Bay (S. Car.) 101, 1 Am. Dec. 632.

Whether Gratuitous Service will Support Subsequent Promise to Pay.—In *Allen v. Bryson*, 67 Iowa 591, 56 Am. Rep. 358, it was held that where one person renders services for another gratuitously, and with no expectation of being paid therefor, no obligation is incurred by the recipient which will support a subsequent promise to pay for the same.

But in *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329, it was held that a prisoner who, after his discharge, promised a person who had voluntarily and without solicitation performed services in procuring his discharge that he would work for him in payment of those services, and thereupon began and continued to labor for him to that amount, could not recover for such labor.

1. Services Performed in Expectation of Legacy.—*Osborn v. Governors*, 2 Stra. 728; *Le Sage v. Coussmaker*, 1 Esp. 187; *Little v. Dawson*, 4 Dall. (U. S.) 111; *Lee v. Lee*, 6 Gill & J. (Md.) 316; *Davison v. Davison*, 13 N. J. Eq. 246; *Grandin v. Reading*, 10 N. J. Eq. 370; *Martin v. Wright*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468; *Eaton v. Benton*, 2 Hill (N. Y.) 576; *Walker's Estate*, 3 Rawle (Pa.) 243; *Hartman's Appeal*, 3 Grant's Cas. (Pa.) 271.

If, however, there was an understanding between the parties that the one rendering the services was to be remunerated by will, and the will makes no provision, then the action lies. *Davison v. Davison*, 13 N. J. Eq. 246; *Jacobson v. La Grange*, 3 Johns. (N. Y.) 199; *Reynolds v. Robinson*, 82 N. Y. 103, 37 Am. Rep.

Service Performed in Hope of Future Employment.—Similarly, no compensation is due an unsuccessful bidder for his time and trouble in making proposals, the inducement to make such bids being the hope that they will be accepted and a profitable contract thereby obtained.¹

Where Agent is Member of Principal's Family.—Where it is shown that the person rendering the service is a member of the family of the person served, and is receiving support therein,² especially where the relation of parent and child exists,³ a presumption of law arises that such service is gratuitous.

555; *Bonesteel v. Van Etten*, 20 Hun (N. Y.) 468; *Martin v. Wright*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468; *Eaton v. Benton*, 2 Hill (N. Y.) 576; *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Robinson v. Raynor*, 28 N. Y. 494; *Snyder v. Castor*, 4 Yeates (Pa.) 353.

1. *Palmer v. Haverhill*, 98 Mass. 487; *Scott v. Maier*, 56 Mich. 554.

2. *Illinois*.—*Neeley v. Rich*, 7 Ill. App. 116; *Miller v. Miller*, 16 Ill. 296; *Brush v. Blanchard*, 18 Ill. 46; *Guffin v. Morrison First Nat. Bank*, 74 Ill. 259; *Faloon v. McIntyre*, 118 Ill. 292.

Indiana.—*Hays v. McConnell*, 42 Ind. 285. *Iowa*.—*Scully v. Scully*, 28 Iowa 548; *Smith v. Johnson*, 45 Iowa 308; *Wilson v. Wilson*, 52 Iowa 44; *Keegan v. Malone*, 62 Iowa 208. *Kansas*.—*Ayres v. Hull*, 5 Kan. 419.

Michigan.—*Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497; *Coe v. Wager*, 42 Mich. 49; *Allen v. Allen*, 60 Mich. 635.

Missouri.—*Morris v. Barnes*, 35 Mo. 412.

New Hampshire.—*Hall v. Hall*, 44 N. H. 293.

New Jersey.—*Brown v. Ramsay*, 29 N. J. L. 120; *Udike v. Titus*, 13 N. J. Eq. 151.

New York.—*Gallaher v. Vought*, 8 Hun (N. Y.) 87; *Carpenter v. Weller*, 15 Hun (N. Y.) 134; *Dye v. Kerr*, 15 Barb. (N. Y.) 444; *Bowen v. Bowen*, 2 Bradf. (N. Y.) 336; *Green v. Roberts*, 47 Barb. (N. Y.) 521.

Pennsylvania.—*Duffey v. Duffey*, 44 Pa. St. 399; *Neal v. Gilmore*, 79 Pa. St. 421; *Defrance v. Austin*, 9 Pa. St. 309; *Houck v. Houck*, 99 Pa. St. 552; *Swires v. Parsons*, 5 W. & S. (Pa.) 357; *Curry v. Curry*, 114 Pa. St. 367.

Tennessee.—*Taylor v. Taylor*, 1 Lea (Tenn.) 83.

Vermont.—*Andrus v. Foster*, 17 Vt. 556.

Wisconsin.—*Kaye v. Crawford*, 22 Wis. 320; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559.

Compare *Richards v. Humphreys*, 15 Pick. (Mass.) 133.

Where the Relation of Uncle and Niece Exists.

—A girl upon the death of her mother was turned away from home by her father, at the age of fourteen, and at the suggestion of her aunt and her grandmother she went to live with her uncle and aunt, with whom she remained until she was twenty-five years of age, when, being engaged to be married, she privately left and was afterwards married, and she brought suit against the uncle for work and labor. There being no express contract for compensation, and it appearing that she had been kindly treated and provided for in a better manner than she would have been if she had merely received her wages, it was held that she was not entitled to recover

for her services. *Hays v. McConnell*, 42 Ind. 285; *Morris v. Barnes*, 35 Mo. 412.

Where the Relation of Brother and Sister Exists.—The plaintiff and her husband lived for twenty-three years with and in the house of the deceased, her brother, a farmer. She assisted in the ordinary work of the house and in milking the cows and in the dairy, she and her husband and children all living together in her brother's house as one family. An action was brought by her after her brother's death to recover from his administrators the value of her services thus rendered during the previous six years. It was held that, as no promise or agreement of the brother to compensate her for her services was shown, she could not recover. *Carpenter v. Weller*, 15 Hun (N. Y.) 134. See also *Ayres v. Hull*, 5 Kan. 419; *Neeley v. Rich*, 7 Ill. App. 116; *Taylor v. Taylor*, 1 Lea (Tenn.) 83; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559; *Scully v. Scully*, 28 Iowa 548; *O'Connor v. Beckwith*, 41 Mich. 657.

Where the Party Serving and the Party Served are Cousins.—It has been held that the relationship of cousins is not such as of itself to rebut the presumption of an implied contract arising from services rendered and accepted, but it must be shown that the parties lived together as members of the same family. *Gallaher v. Vought*, 8 Hun (N. Y.) 87; *Neal v. Gilmore*, 79 Pa. St. 421.

Where the Relationship of Granddaughter Exists.—In *Hauser v. Sain*, 74 N. Car. 552, it was held that the relationship of granddaughter was not alone sufficient to rebut the presumed obligation to pay for services rendered in the grandfather's family.

3. **Where the Relation of Parent and Child Exists.**—Where a child, after attaining his majority, continues a member of his father's family, rendering services for him and receiving his support and maintenance from him as before without any understanding between them that he shall be paid, the law will not allow him to recover for such services. *Cohen v. Cohen*, 2 Mackey (D. C.) 227; *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311; *Guffin v. Morrison First Nat. Bank*, 74 Ill. 259; *Miller v. Miller*, 16 Ill. 296; *Wilson v. Wilson*, 52 Iowa 44; *Lovet v. Price*, *Wright (Ohio)* 89; *Houck v. Houck*, 99 Pa. St. 552; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Candor's Appeal*, 5 W. & S. (Pa.) 513; *Andrus v. Foster*, 17 Vt. 556; *Putnam v. Town*, 34 Vt. 429; *Kaye v. Crawford*, 22 Wis. 320; *Byrnes v. Clark*, 57 Wis. 13; *Allen v. Allen*, 60 Mich. 635; *Green v. Roberts*, 47 Barb. (N. Y.) 521. *Compare* *Richards v. Humphreys*, 15 Pick. (Mass.) 133.

Where the Person Served Stands in Loco Parentis.

To Overcome This Presumption there must be clear, direct, and positive proof that the relation between the parties was not merely one of family, but was that of debtor and creditor, or principal and agent.¹

Proof of Agreement to Compensate.—In order that this relation may be established, an express agreement to that effect must be shown,² or such facts and circumstances must be proved as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor.³

ties to the Party Serving.—And the same rule applies to cases where the person from whom the compensation for services is claimed takes a child into his family to live with him until he becomes of age, and the child continues after that time to reside in his family, he standing *in loci parentis* to the child. *Andrus v. Foster*, 17 Vt. 556; *Thorp v. Batemen*, 37 Mich. 68, 26 Am. Rep. 497; *Smith v. Johnson*, 45 Iowa 308; *Windland v. Deeds*, 44 Iowa 98; *Medsker v. Richardson*, 72 Ind. 323; *Ryan v. Lynch*, 9 Mo. App. 18; *Lantz v. Frey*, 14 Pa. St. 201.

Thus a stepfather will not be held liable for the services of a minor stepson who lives in the family as a member of it, where the relationship of parent and child exists, unless a promise to pay for the services can be shown. *Brush v. Blanchard*, 18 Ill. 46. See also *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301.

In *Curry v. Curry*, 114 Pa. St. 371, Trunky, J., in giving the opinion of the court said: "When the parties are parent and child, or members of the same family, the relationship excludes the implication of a promise. In all cases, except that of parent and child, there must be evidence beyond the relationship that the creation of no debt was intended."

1. *Candor's Appeal*, 5 W. & S. (Pa.) 513; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559. See *Green v. Roberts*, 47 Barb. (N. Y.) 521.

It is for the jury to determine whether such services are gratuitous. *Guild v. Guild*, 15 Pick. (Mass.) 130; *Coe v. Wager*, 42 Mich. 49.

2. *United States*.—*Cohen v. Cohen*, 2 Mackey (D. C.) 227.

Illinois.—*Brush v. Blanchard*, 18 Ill. 46; *Faloon v. McIntyre*, 118 Ill. 292; *Miller v. Miller*, 16 Ill. 296; *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311; *Neeley v. Rich*, 7 Ill. App. 116.

Indiana.—*Medsker v. Richardson*, 72 Ind. 323.

Iowa.—*Smith v. Johnson*, 45 Iowa 308; *Wilson v. Wilson*, 52 Iowa 44; *Keegan v. Malone*, 62 Iowa 208; *Scully v. Scully*, 28 Iowa 548.

Kansas.—*Ayres v. Hull*, 5 Kan. 419.

Michigan.—*Allen v. Allen*, 60 Mich. 635.

New Hampshire.—*Hall v. Hall*, 44 N. H. 293.

New York.—*Gallaher v. Vought*, 8 Hun (N. Y.) 87; *Carpenter v. Weller*, 15 Hun (N. Y.) 134; *Green v. Roberts*, 47 Barb. (N. Y.) 521.

Ohio.—*Lovet v. Price*, *Wright* (Ohio) 89.

Pennsylvania.—*Hertzog v. Hertzog*, 29 Pa. St. 465; *Bosh v. Bosh*, 9 Pa. St. 260.

Vermont.—*Putnam v. Town*, 34 Vt. 429.

Wisconsin.—*Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559; *Byrnes v. Clark*, 57 Wis. 13.

Illustrations.—Where the mother of the plaintiff's wife, being aged and infirm, requested the plaintiff to take her to his home and care for her, which he did, boarding and nursing her until her death, she being helpless and unable to perform any service during all the time, and it was shown that she expressed a desire to pay plaintiff for her care, it was held that she did not become a member of his family, and that he was entitled to recover from her estate the value of the services rendered by him and his family. *Wence v. Wykoff*, 52 Iowa 644.

In *Ulrich v. Ulrich*, 136 N. Y. 120, it was held that a parent may make a valid contract with a child to pay for services rendered after majority, and there is no presumption of law arising from the relationship against the existence of such a contract.

In *Hall v. Hall*, 44 N. H. 293, it was held that a father may, by agreement with his minor child, relinquish to the child the right he has to his services and earnings, and after such an agreement the father may contract to employ and pay his child for his services, and he will be bound like a stranger.

Where the Son does Not Live as a Member of the Father's Family.—In *Parker v. Parker*, 33 Ala. 459, it was held that whatever may be the claims of filial duty and affection as between an aged and infirm father and his grown son, there is no principle of law which requires the son while separate and apart from his father to perform services for the latter without compensation when the father is in comfortable circumstances; consequently, to support the son's claim to compensation for such services, proof of an express contract is not necessary.

3. *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311; *Miller v. Miller*, 16 Ill. 296; *Scully v. Scully*, 28 Iowa 548; *Keegan v. Malone*, 62 Iowa 208; *O'Connor v. Beckwith*, 41 Mich. 657; *Hall v. Hall*, 44 N. H. 293; *Green v. Roberts*, 47 Barb. (N. Y.) 521; *Lovet v. Price*, *Wright* (Ohio) 89; *Andrus v. Foster*, 17 Vt. 556; *Fitch v. Peckham*, 16 Vt. 150; *Putnam v. Town*, 34 Vt. 429; *Byrnes v. Clark*, 57 Wis. 13; *Fisher v. Fisher*, 5 Wis. 472. See also *Hays v. McConnell*, 42 Ind. 285. Compare *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559; *Ailen v. Allen*, 60 Mich. 635; *Faloon v. McIntyre*, 118 Ill. 292.

In *Fisher v. Fisher*, 5 Wis. 472, *Cole, J.*, in giving the opinion of the court said: "The plaintiff might have shown to the satisfaction of any jury that by the course of dealing between him and the defendant, as, for instance

(c) **Where Unauthorized Acts are Ratified.**—If a person acts as an agent without authority and his acts are ratified, he is entitled to compensation just as though he had been duly authorized.¹

(2) **When the Right may be Deemed to have Attached**—(a) **General Rule.**—It is a general rule that an agent will be entitled to remuneration when he has completely² and faithfully³ performed the services for which he was employed, and this whether his services have been profitable or otherwise to the principal.⁴

(b) **Where Service has Not been Faithfully Performed—Negligence—Gross Negligence.**—Where an agent has been guilty of such gross negligence in the transaction of his principal's business as to render his services worthless, he can recover no compensation whatever.⁵

Slight Negligence.—Slight negligence, however, if the principal has derived some benefit from the services rendered, will not work a forfeiture of the agent's entire compensation, but will go merely to reduce the amount of his demand.⁶

Failure to Keep and Render Accounts Properly.—Thus, an agent may be guilty of such gross negligence in keeping and rendering to the principal accounts relating to the business of his agency as to deprive him of all compensation;⁷ but where

that they kept books of account, or had had settlements, or acts of this kind, that the relation of debtor and creditor subsisted between them, and that it was not intended or expected that these services should be rendered gratuitously."

In *Morton v. Rainey*, 82 Ill. 215, 25 Am. Rep. 311, it was held that where a minor of eleven years of age was taken into the family of his uncle and remained there until he was of age, receiving his board, clothing, and medical attendance from the uncle, and after he became of age continued to reside with his uncle, but furnished his own clothes and paid his own medical bills, these facts were sufficient to establish an implied contract on the part of the uncle to pay him what his services were reasonably worth.

1. *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24; *Wilson v. Dame*, 58 N. H. 392; *Kentucky Bank v. Combs*, 7 Pa. St. 543.

2. *Hyams v. Miller*, 71 Ga. 608; *Thomas v. Lincoln*, 71 Ind. 41; *Hoyt v. Shipherd*, 70 Ill. 309; *Gottschalk v. Jennings*, 1 La. Ann. 5, 45 Am. Dec. 70; *Harkness v. Briscoe*, 47 Mo. App. 196; *Coffin v. Coke*, 3 Hun (N. Y.) 396; *Winchester v. Slatter*, 2 Heisk. (Tenn.) 65; *Burns v. Hill*, 2 Tex. App. Civ. Cas., § 523.

3. *Harvey v. Cook*, 24 Ill. App. 134; *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412; *Zurn v. Noedel*, 113 Pa. St. 336; *Winchester v. Slatter*, 2 Heisk. (Tenn.) 65; *Warner v. Cuckow*, 90 Wis. 291.

4. *Lockwood v. Levick*, 8 C. B. N. S. 603, 98 E. C. L. 603. See also *Glenn v. Davidson*, 37 Md. 365.

5. **Gross Negligence.**—*Farnsworth v. Garrard*, 1 Campb. 38; *Bracey v. Carter*, 12 Ad. & El. 373, 40 E. C. L. 74; *Money Penny v. Hartland*, 1 C. & P. 352, 11 E. C. L. 414; *Denew v. Daverell*, 3 Campb. 451; *Fisher v. Dynes*, 62 Ind. 348; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Nugent v. Martin*, 1 Tex. App. Civ. Cas., § 1173.

Surveyor.—In *Money Penny v. Hartland*, 1 C. & P. 352, 11 E. C. L. 414, it was held that if a surveyor makes an estimate which turns

out to be incorrect to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for that work.

Attorney.—In *Bracey v. Carter*, 12 Ad. & El. 373, 40 E. C. L. 74, it was held that if an attorney conducting a suit commits an act of negligence by which all the previous steps become useless in the result, he cannot recover for any part of the business done. See the title ATTORNEY AND CLIENT.

6. **Slight Negligence—Principal Deriving Some Benefit.**—*Farnsworth v. Garrard*, 1 Campb. 38; *Mobile, etc., R. Co. v. Clanton*, 59 Ala. 392, 31 Am. Rep. 15; *Lee v. Clements*, 48 Ga. 128; *Rochester v. Levering*, 104 Ind. 562; *Steeple v. Newton*, 7 Oregon 110, 33 Am. Rep. 705; *Kelly v. Bradford*, 33 Vt. 35.

7. **Negligence in the Matter of Accounts.**—*White v. Lincoln*, 8 Ves. Jr. 363; *Smith v. Crews*, 2 Mo. App. 269; *Motley v. Motley*, 7 Ired. Eq. (N. Car.) 211; *Ridgeway v. Ludlam*, 7 N. J. Eq. 123; *Nugent v. Martin*, 1 Tex. App. Civ. Cas., § 1173.

In *Ridgeway v. Ludlam*, 7 N. J. Eq. 123, it was held that if the agent for the performance of certain services, for which a salary or yearly sum is to be allowed him, neglects to keep an account of moneys received by him in his agency, and several annual accounts are settled between him and his principal, in which considerable amounts of money previously received by him are omitted to be credited to the principal, and the omission is not supplied until the principal, in consequence of information received from others, makes inquiry of the agent in reference thereto, the salary or yearly sum for the years in which such omission occurred shall be disallowed.

Where the Agent's Duty of Rendering an Account is Separable from the Other Duties of His Agency.—Under a written contract to perform for a fixed quarterly salary all duties of general agent of a manufacturing corporation, one of which, specified in the contract,

his failure to perform these duties does not amount to gross negligence, it will have the effect simply to reduce the agent's compensation to the extent of whatever loss the principal may have suffered thereby.¹

Fraud. It is well settled that where an agent has committed a fraud on his principal in the transaction of his agency he can receive no compensation,² and if the principal, in ignorance of the fraud, pays the compensation the amount so paid may be recovered.³

Where the Agent's and the Principal's Interests are Adverse.—Thus, where it appears that an agent, without the principal's knowledge, makes use of his agency to acquire or promote interests which are directly inimical to those of his principal, he will not be allowed to recover compensation for his services.⁴

was to render monthly accounts of the funds in his hands, distinct and separable from the other duties of the agency, a failure to render it would not defeat his right to recover his salary while he remained their agent. *Sampson v. Somerset Iron Works Co.*, 6 Gray (Mass.) 120. *Merrick, J.*, in giving the opinion of the court in this case, said: "The agreement of the plaintiff to render a monthly account of the funds of the company had no necessary connection with the other duties he was bound to perform in his behalf. It was, no doubt, considered a very useful and important part of the special services he was to render to his employers, the neglect of which might have afforded them just cause of complaint; but it was distinct and separable from many other things to be done by him in his capacity as agent, and, therefore, cannot be regarded as a condition precedent. It was a stipulation only, upon the breach of which he was liable for damages for whatever injury was, in any way, caused to the defendant."

1. *Jones v. Hoyt*, 25 Conn. 374; *Lee v. Clements*, 48 Ga. 128; *Walker v. Norton*, 29 Vt. 226; *Gallup v. Merrill*, 40 Vt. 137. See also *Clark v. Moody*, 17 Mass. 145; *Sampson v. Somerset Iron Works Co.*, 6 Gray (Mass.) 120.

2. **Compensation Forfeited on Account of Fraud.**—*Wadsworth v. Adams*, 138 U. S. 380; *The Taranto*, 1 Sprague (U. S.) 170; *Blair v. Shaeffer*, 33 Fed. Rep. 219; *Prescott v. White*, 18 Ill. App. 322; *Porter v. Silvers*, 35 Ind. 295; *Cleveland, etc., R. Co. v. Pattison*, 15 Ind. 70; *Vennum v. Gregory*, 21 Iowa 326; *Harkness v. Briscoe*, 47 Mo. App. 196; *Jansen v. Williams*, 36 Neb. 869; *Martin v. Bliss*, 57 Hun (N. Y.) 157; *Palmer v. Pirson*, 4 Misc. Rep. (Buffalo Super. Ct.) 455; *Sea v. Carpenter*, 16 Ohio 412; *Millingar v. Hartuppee*, 53 Pa. St. 362.

Evidence of Precise Extent of Injury to Principal Unnecessary to Show Forfeiture.—In *Prescott v. White*, 18 Ill. App. 322, it was held that the right of a principal to insist that his agent has forfeited his right to compensation by reason of fraud cannot be dependent upon the principal's ability to show, by facts and figures, the precise extent of the injury to him on account of such misconduct. See also *Harkness v. Briscoe*, 47 Mo. App. 196.

3. *McGar v. Adams*, 65 Ala. 106; *Palmer v. Pirson*, 4 Misc. Rep. (Buffalo Super. Ct.) 455.

4. *Salomons v. Pender*, 3 H. & C. 639;

Hoffin v. Moss, 67 Fed. Rep. 440; *McGar v. Adams*, 65 Ala. 106; *Larey v. Baker*, 86 Ga. 468, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 397; *Hobson v. Peake*, 44 La. Ann. 383, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 397; *Jansen v. Williams*, 36 Neb. 869; *Murray v. Beard*, 102 N. Y. 505.

Illustrations.—Thus an agent employed to sell property cannot himself become the purchaser at his own sale, and if he does so without the knowledge or consent of his principal a commission cannot be collected by him for his services. *McGar v. Adams*, 65 Ala. 106; *Jansen v. Williams*, 36 Neb. 869.

An agent employed to sell land sold it to a company in which he was interested as a shareholder and director; it was held that he was entitled to no commission in respect of the sale. *Salomons v. Pender*, 3 H. & C. 639.

The defendant, a manufacturer of medicines, made an agreement with the plaintiff by which he authorized him to make contracts with newspapers for the insertion of defendant's advertisements, and agreed to pay therefor by accepting orders for his medicines from the publishers of the newspapers at a price considerably below the market price, but sufficient to yield a profit, and also agreed to pay plaintiff \$2.75 for his services in procuring each such advertising contract. The plaintiff sued the defendant for the agreed commission for procuring a large number of such advertising contracts, and defendant set up in the answer that the contract between him and the plaintiff had been procured by the plaintiff's representations that the sole consideration to be given to the publishers of the papers would be the sale of the medicines at the reduced price, whereby defendant would not only make a profit, but would cause his medicines to be put on sale at the places where they were advertised; that such representations were false, and plaintiff in fact never attempted to make advertising contracts on such terms, but inserted the advertisements in papers in which he already controlled space, and that no orders for medicines had in fact been received by the defendant. It was held that the agent, by seeking to advance his own interests at the expense of his principal's, could not recover compensation for his services. *Hoffin v. Moss*, 67 Fed. Rep. 440.

Where by his own admissions it appeared that an agent to buy certain property for a

Misappropriation of Goods and Funds.—An agent is not entitled to compensation if he fails to deliver the goods which he has been employed to purchase, and appropriates them to his own use;¹ or if, when intrusted with goods to be sold, he appropriates the proceeds of the sale,² or otherwise improperly retains the funds of his principal.³

(c) **Where Service has Not been Completely Performed**—*aa. WHERE AGENCY IS REVOKED BY PRINCIPAL*—(*aa*) *Agency Revocable at the Pleasure of Principal.*—Where an agency, terminable at the will of the principal, has been revoked by him without any fault on the part of the agent, it is the usual rule, unless otherwise stipulated,⁴ that the agent shall receive a reasonable compensation for his services rendered before the termination of his authority;⁵ but he will not be allowed, in addition to this, what he would have received as compensation had he been permitted to continue in the agency.⁶

(*bb*) *Agent Discharged for Cause.*—**Remuneration for Services Already Rendered.**—The authorities are not agreed as to the right of the agent to receive compensation for his services already rendered where he has been discharged for good cause. In *England*, and some of the states in this country, it is held, on the principle of entirety of contract, that the agent forfeits all compensation;⁷ but in other

party charged and received from him many thousand dollars more than he paid for the property, it was held that the agent had forfeited all right to compensation. *Blair v. Shaeffer*, 33 Fed. Rep. 218. See *Martin v. Bliss*, 57 Hun (N. Y.) 157.

In *Adams Express Co. v. Trego*, 35 Md. 47, it was held that if a person employed by the year as an assistant superintendent of an express company, at a stated salary payable monthly, engages in another business in competition with, and calculated seriously to injure that of, the express company, and being notified by the company that he must discontinue said business, refuses so to do, and is discharged at the expiration of six months, and paid for his services at the stipulated price up to the time of his discharge, he cannot recover the balance of the year's salary.

If the Employer, However, Knows of the Agent's Interest, he cannot escape from a contract to remunerate him. *Wright v. Welch*, 3 MacArthur (D. C.) 479. See also *Jansen v. Williams*, 36 Neb. 870.

1. *Myers v. Walker*, 31 Ill. 354; *Millingar v. Hartuppee*, 53 Pa. St. 362.

2. *Brannan v. Strauss*, 75 Ill. 234; *Segar v. Parrish*, 20 Gratt. (Va.) 672.

3. *Sumner v. Reicheniker*, 9 Kan. 320.

4. Where there is a Contract that no compensation whatever shall be received if the agent's authority is revoked before the completion of the services, he cannot recover on a *quantum meruit*. *Spear v. Gardner*, 16 La. Ann. 383; *Hotchkiss v. Greta Ginnery, etc.*, Co., 36 La. Ann. 517.

5. *U. S. v. Jarvis*, Dav. (U. S.) 274; *Chambers v. Seay*, 73 Ala. 372; *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347.

6. *Orr v. Ward*, 73 Ill. 318; *State L. Ins. Co. v. Williams*, 91 N. Car. 69; *Jacobs v. Warfield*, 23 La. Ann. 395; *Kirk v. Hartman*, 63 Pa. St. 97; *Coffin v. Landis*, 46 Pa. St. 426; *Tyler v. Ames*, 6 Lans. (N. Y.) 280; *Morrison v. Ogdensburgh, etc.*, R. Co., 52 Barb. (N. Y.) 173.

By the terms of a contract between the

plaintiff and the defendant, the plaintiff, in consideration of a certain sum for the year 1873, and of another sum for the year 1874, to be paid in semi-monthly or monthly instalments, agreed to devote his whole time and attention solely to the business of the defendant under the contract. The plaintiff entered the service of the defendant, and continued in it up to June, 1873, when the defendant suspended business. It was held, in a suit by the plaintiff for damages on account of being thrown out of employment, that there was no undertaking on the part of the defendant to continue the plaintiff in his employment for any definite length of time, and that the plaintiff could not recover. *Orr v. Ward*, 73 Ill. 318.

7. *Ridgway v. Hungerford Market Co.*, 3 Ad. & El. 171, 30 E. C. L. 59; *Atkin v. Acton*, 4 C. & P. 208, 19 E. C. L. 346; *Callo v. Brouncker*, 4 C. & P. 518, 19 E. C. L. 504; *Turner v. Robinsons*, 6 C. & P. 15, 25 E. C. L. 257; *Spain v. Arnott*, 2 Stark. 256, 3 E. C. L. 400; *Sumner v. Reicheniker*, 9 Kan. 320; *Posey v. Garth*, 7 Mo. 95, 37 Am. Dec. 183; *Waters v. Davies*, 55 N. Y. Super. Ct. 39. See also *Champion v. Hartshorne*, 9 Conn. 574.

Thus in *Turner v. Robinsons*, 6 C. & P. 15, 25 E. C. L. 257, it was held that if a yearly servant be dismissed by his master before the year expires, for such misconduct as will justify his dismissal, the servant is not entitled to any wages for the time during which he served.

Credit of Wages on Ledger—Waiver of Forfeiture.—In an action by an agent against his principals for wages for services rendered under a contract terminated by them, evidence that on terminating it they credited him on their ledger for the full amount of his stipulated wages up to that time is competent to prove that they waived any claim to a forfeiture thereof, although the entry on the ledger was made without his knowledge. *Bell v. Smith*, 99 Mass. 617. See also *McGrath v. Bell*, 33 N. Y. Super. Ct. 195.

states a different rule prevails, and the agent may recover as compensation what the services are reasonably worth to the principal.¹

Remuneration which might have been Earned.—It is well settled, however, that where the agent is discharged for bad conduct, he will not be entitled to compensation for services which, but for the discharge, he might have rendered.²

(cc) *Agent Wrongfully Discharged—Remedies Growing out of the Wrongful Act.*—An agent wrongfully discharged has but two remedies growing out of the wrongful act.

Action on a Quantum Meruit.—First, he may rescind the contract, in which case he may sue immediately on a *quantum meruit* for services actually rendered.³

Action for Damages for Breach of Contract.—Secondly, he may treat the contract of employment as continuing, though broken by the principal, and may recover damages for the breach.⁴

When Cause of Action Arises.—The agent's cause of action arises as soon as the injury is done, and he may sue immediately,⁵ or he may wait until the expiration of his term of service.⁶

1. *Robinson v. Sanders*, 24 Miss. 391; *Massey v. Taylor*, 5 Coldw. (Tenn.) 447, 98 Am. Dec. 429; *Congregation of Children of Israel v. Peres*, 2 Coldw. (Tenn.) 620; *Eaken v. Harrison*, 4 McCord (S. Car.) 249; *Lawrence v. Gullifer*, 38 Me. 532. See also *Du Quoin Star Coal Min. Co. v. Thorwell*, 3 Ill. App. 394; *Kessee v. Mayfield*, 14 La. Ann. 90.

A contract of employment was as follows: "In consideration of Mr. F. F. Waters having agreed to give his undivided time and services in our business as we may direct, we agree to pay him a salary, etc., for a term of two years, etc." The services of Waters were in traveling over the country and selling his employers' goods. Shortly before January 12th they directed him to go to St. Paul with samples, and to take a room and sell in and from it. He refused to go unless his employers agreed to pay him, besides his salary, up to eight dollars a day for his expenses of traveling. In an action by Waters against his employers it was held that the service demanded was within the contract, and that it having been the custom to pay the salary the 1st and 15th of each month, and the plaintiff having been rightfully discharged on the 12th of the month, for refusing to follow directions, he was not entitled to any pay for his services from the 1st of the month. *Waters v. Davies*, 55 N. Y. Super. Ct. 39.

2. *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244; *Du Quoin Star Coal Min. Co. v. Thorwell*, 3 Ill. App. 394; *Kessee v. Mayfield*, 14 La. Ann. 90.

3. **Quantum Meruit.**—*Britt v. Hays*, 21 Ga. 157; *Rogers v. Parham*, 8 Ga. 190; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Brinkley v. Swicegood*, 65 N. Car. 626; *Booge v. Pacific R. Co.*, 33 Mo. 215, 82 Am. Dec. 160; *Derby v. Johnson*, 21 Vt. 17; *Moody v. Leverich*, 4 Daly (N. Y.) 401.

4. **Damages for Breach of Contract—England.**—*Goodman v. Pocock*, 15 Q. B. 576, 69 E. C. L. 576.

Alabama.—*Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8.

Arkansas.—*Gardenhire v. Smith*, 39 Ark. 28c.

Colorado.—*Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569.

Georgia.—*Britt v. Hays*, 21 Ga. 157; *Rogers v. Parham*, 8 Ga. 190.

Illinois.—*Williams v. Chicago Coal Co.*, 60 Ill. 149.

Indiana.—*Richardson v. Eagle Mach. Works*, 78 Ind. 422, 41 Am. Rep. 584.

Kentucky.—*Chamberlin v. McCalister*, 6 Dana (Ky.) 352.

Maine.—*Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638.

Minnesota.—*Horn v. Western Land Assoc.*, 22 Minn. 233.

Missouri.—*Pooge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160; *Stone v. Vimont*, 7 Mo. App. 277; *Ream v. Watkins*, 27 Mo. 516, 72 Am. Dec. 283; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534.

New York.—*Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Moody v. Leverich*, 4 Daly (N. Y.) 401.

North Carolina.—*Brinkley v. Swicegood*, 65 N. Car. 626; *Hendrickson v. Anderson*, 5 Jones (N. Car.) 246.

Ohio.—*James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821.

Vermont.—*Derby v. Johnson*, 21 Vt. 17.

Virginia.—*Willoughby v. Thomas*, 24 Gratt. (Va.) 521.

5. **When Agent's Right of Action Accrues.**—*Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569; *Britt v. Hays*, 21 Ga. 157; *Sutherland v. Wyer*, 67 Me. 64; *Booge v. Pacific R. Co.*, 33 Mo. 215, 82 Am. Dec. 160; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Brinkley v. Swicegood*, 65 N. Car. 626; *Gordon v. Brewster*, 7 Wis. 355.

Where, three days after the discharge and before the expiration of his term of employment, the plaintiff commenced his action to recover damages for the defendant's breach of contract, it was held that the action was not premature. *Sutherland v. Wyer*, 67 Me. 64.

6. *Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569; *Sutherland v. Wyer*, 67 Me. 64; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Gordon v. Brewster*, 7 Wis. 355.

Where the Principal Rejects the Services of the Agent before the Time for Performance Arrives, the agent has an election either to bring an immediate action, or to wait until the appointed day arrives and then to be in readiness to render his services.¹

Measure of Damages.—In an action for a breach of contract for the performance of services, whether brought before or after the end of the term, the amount of compensation stipulated in the contract for the entire term will be adopted as the *prima facie* measure of damages; but the damages may be diminished if the proof shows that the agent has sustained an actual loss less than the contract price.² The damages, however, will not be allowed to exceed

1. *Hochster v. De la Tour*, 2 El. & Bl. 678, 75 E. C. L. 678; *Danube, etc., R., etc., Co. v. Xenos*, 13 C. B. N. S. 825, 106 E. C. L. 825; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Howard v. Daly*, 61 N. Y. 378, 19 Am. Rep. 285.

2. *United States*.—*Leatherberry v. Odell*, 7 Fed. Rep. 641.

California.—*Utter v. Chapman*, 38 Cal. 659. *Colorado*.—*Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569.

Connecticut.—*Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520.

Georgia.—*Ansley v. Jordan*, 61 Ga. 482; *Putney v. Swift*, 54 Ga. 266.

Indiana.—*Richardson v. Eagle Mach. Works Co.*, 78 Ind. 422, 41 Am. Rep. 584.

Kentucky.—*Chamberlin v. McCalister*, 6 Dana (Ky.) 352; *Whitaker v. Sandifer*, 1 Duv. (Ky.) 262.

Maryland.—*Jaffray v. King*, 34 Md. 217; *Cumberland, etc., R. Co. v. Slack*, 45 Md. 180.

Minnesota.—*Horn v. Western Land Assoc.*, 22 Minn. 233.

Mississippi.—*Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381.

Missouri.—*Ream v. Watkins*, 27 Mo. 516, 72 Am. Dec. 283; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534.

New York.—*Heim v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

Pennsylvania.—*King v. Steiren*, 44 Pa. St. 99, 84 Am. Dec. 419.

Tennessee.—*Jones v. Jones*, 2 Swan (Tenn.) 605.

Virginia.—*Willoughby v. Thomas*, 24 Gratt. (Va.) 521.

Wisconsin.—*Gordon v. Brewster*, 7 Wis. 355.

Where Suit is Brought before the Expiration of the Term of Service.—The plaintiff contracted with the defendants to act in their theatrical company for thirty-six weeks. At the close of the nineteenth week the defendants discharged him without fault on his part. He commenced an action for breach of the contract during the next week. It was held that the plaintiff was entitled to recover as damages for the remainder of the term at the stipulated rate, less what he actually earned, or might have earned, by the exercise of reasonable diligence. *Sutherland v. Wyer*, 67 Me. 64.

But in *Gordon v. Brewster*, 7 Wis. 355, it was held that where A entered into a contract to hire B to superintend his lumbering business, etc., for five years at a salary of two thousand dollars per year, and discharged

him at the end of the year, and B brought his action for breach of the contract, the rule of damages was the rate of the salary from the time of the breach up to the time of the trial, less the amount B might have earned in the meantime.

Where Suit is Commenced after the Expiration of the Term of Service, it is undisputed that *prima facie* the plaintiff is damaged to the extent of the amount stipulated to be paid. *Sutherland v. Wyer*, 67 Me. 64; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Gordon v. Brewster*, 7 Wis. 355. See also cases cited at the beginning of this note.

Suit before Expiration of Term of Service—Trial after Expiration Thereof.—Where, upon breach of a contract of employment for a wrongful discharge of the employee, the action is brought by him before the expiration of the term of service, but is not brought to trial until after the expiration thereof, it has been held that the plaintiff is entitled to recover the same damages as he would have been entitled to had the action been commenced after the expiration of the term; that is, the difference between the compensation fixed by the contract for the service and what the plaintiff has received, together with what he was able to earn after his discharge. *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319.

Amount Already Paid to be Deducted.—In *Cumberland, etc., R. Co. v. Slack*, 45 Md. 162, it was held that the measure of damages which the agent is entitled to by reason of his discharge is fixed by the contract of employment, and is a stipulated salary for the year less the amount which has been paid him and less the amount of the money of the principal which he might have actually received and not accounted for. See *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319.

Amount of Damages—A Question for the Jury.—In *Ream v. Watkins*, 27 Mo. 518, 72 Am. Dec. 283, *Richardson, J.*, delivering the opinion of the court, said: "The measure of damages, in an action for a wrongful discharge brought before the expiration of the term, is not necessarily the contract price for the whole term, because a plaintiff, after he is dismissed, may sue and recover a judgment, and then obtain employment elsewhere, and receive for the residue of the term as much or more than by the broken contract he would have been entitled to if he had served his time out. The damages must depend on the kind of service to be performed and the wages to be paid, and allowance should be made for the time that would probably be lost before similar employment

the amount to which the agent would have been entitled had the contract been fulfilled.¹

Other Employment in Reduction of Damages.—The agent upon his discharge is bound to use reasonable efforts to secure employment elsewhere. If he secures employment, or by reasonable diligence might have done so, the amount of compensation received,² or that might have been received, must be deducted from the amount of damages occasioned by the breach of the contract.³

Employment must be of the Same General Nature.—This principle, however, extends only to the offer or opportunity of employment of the same general nature as that from which he has been dismissed,⁴ and to be carried on in the same locality.⁵

could be obtained. In some pursuits it may be almost certain that the dismissal of a person at a particular season will throw him entirely out of employment for the residue of the year, whilst in other pursuits similar employment could readily be obtained elsewhere on the same or better terms; and, therefore, the amount of damages is a question for the jury under all the circumstances of the case."

1. *Utter v. Chapman*, 38 Cal. 659; *Meade v. Rutledge*, 11 Tex. 44.

2. **Wages Earned in Other Employment.**—*Leatherberry v. Odell*, 7 Fed. Rep. 641; *Fain v. Goodwin*, 35 Ark. 109; *Utter v. Chapman*, 38 Cal. 659; *Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Sutherland v. Wyer*, 67 Me. 64; *Williams v. Anderson*, 9 Minn. 50; *Horn v. Western Land Assoc.*, 22 Minn. 233; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Heim v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Kirk v. Hartman*, 63 Pa. St. 97; *Jones v. Jones*, 2 Swan (Tenn.) 605; *Congregation of Children of Israel v. Peres*, 2 Coldw. (Tenn.) 620.

3. *United States*.—*Leatherberry v. Odell*, 7 Fed. Rep. 641.

Alabama.—*Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8.

Colorado.—*Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569.

Connecticut.—*Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520.

Georgia.—*Putney v. Swift*, 54 Ga. 266.

Illinois.—*Williams v. Chicago Coal Co.*, 60 Ill. 149.

Maine.—*Sutherland v. Wyer*, 67 Me. 64.

Maryland.—*Cumberland, etc., R. Co. v. Slack*, 45 Md. 161.

Mississippi.—*Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381.

Missouri.—*Stone v. Vimont*, 7 Mo. App. 277; *Squire v. Wright*, 1 Mo. App. 172.

Pennsylvania.—*King v. Steiren*, 44 Pa. St. 99, 84 Am. Dec. 419; *Chamberlin v. Morgan*, 68 Pa. St. 168.

Tennessee.—*Congregation of Children of Israel v. Peres*, 2 Coldw. (Tenn.) 620.

Wisconsin.—*Barker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630; *Gordon v. Brewster*, 7 Wis. 355.

A mercantile house in New York, by letter dated 19th of February, 1869, engaged the services of K. from that date to the 30th of June following as their salesman in the city of Baltimore, at a certain rate per month. K.

entered upon the service and discharged his duties without complaint, until he was dismissed therefrom by a letter dated the 8th of May, 1869, on the alleged ground that he had been attending to the business of another house. In a suit brought by K. against his employers to recover damages for his wrongful dismissal from their service, it was held that the measure of damages was fixed by the contract—a stipulated salary for a specified period—and the plaintiff was entitled to recover his whole salary under the contract from the 1st of May, the date to which he had been paid, to the 30th of June, inclusive, and the defendants could not claim a reduction therefrom of the amount which the plaintiff earned subsequently to his discharge and before the 30th of June in another employment; they having failed to say that he could not have earned it without a violation of his duty under the contract if he had not been discharged. *Jaffray v. King*, 34 Md. 217.

Agent Presumed to Get the Best Wages.—When an agent obtains employment, it has been held that the presumption is that he gets the best wages he can, which presumption must prevail unless there be shown by the adverse party, or it otherwise appears from the proof, that he accepted less than he could have obtained. *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381.

Where Action is Brought on Contract for Constructive Service.—It has been held that where the plaintiff waits until the expiration of the term, and then sues for the whole wages on the idea of a constructive performance, the principal may show in diminution of damages that after the plaintiff was dismissed he had engaged in other lucrative business, or had an opportunity to make like service. *Gardenhire v. Smith*, 39 Ark. 280; *Fain v. Goodwin*, 35 Ark. 109; *Hendrickson v. Anderson*, 5 Jones (N. Car.) 246; *Brinkley v. Swicegood*, 65 N. Car. 626.

4. **Service must be of Same General Nature.**—*Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Squire v. Wright*, 1 Mo. App. 172; *Costigan v. Mohawk, etc., R. Co.*, 2 Den. (N. Y.) 609, 43 Am. Dec. 758; *Wolf v. Studebaker*, 65 Pa. St. 459.

5. **Service must be in Same Locality.**—*Sheffield v. Page*, 1 Sprague (U. S.) 285; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Harrington v. Gies*, 45 Mich. 374; *Costigan v. Mohawk, etc., R. Co.*, 2 Den. (N. Y.) 609, 43 Am. Dec. 758.

Burden of Proof on the Principal.—The onus is on the principal to prove all the facts necessary to make out his defense.¹

Remedy by Action to Enforce Contract—Compensation Actually Earned.—Independent of and additional to the foregoing remedies is the right to sue for compensation actually earned and due by the terms of the contract. This amount the agent recovers because he has completed either in full or as to a specified part the stipulation between the parties.²

Compensation for "Constructive Service."—It was the prevailing doctrine formerly, and is the doctrine in several states at present, that where an agent has been wrongfully discharged before the expiration of the stipulated term he may elect to treat the contract as continuing, keep himself in readiness to perform it on his part, and after the expiration of the term sue his principal on the contract for the whole of the wages due him by its terms;³ but the better authority favors the rule that an action will not lie to recover, as though actually earned, compensation accruing subsequently to the discharge, but the remedy in such case is by an action for damages arising from the breach of the contract.⁴

Recovery a Bar to Subsequent Action.—Where the agent resorts to one of the above-mentioned remedies, a recovery will be a bar to any subsequent action.⁵

1. *Saxonia Min., etc., Co. v. Cook*, 7 Colo. 569; *Ansley v. Jordan*, 61 Ga. 482; *Ricks v. Yates*, 5 Ind. 115; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Costigan v. Mohawk, etc., R. Co.*, 2 Den. (N. Y.) 609, 43 Am. Dec. 758; *Barker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630.

2. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Gazette Printing Co. v. Morss*, 60 Ind. 153; *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821.

3. *Gandell v. Pontigny*, 4 Campb. 375; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Davis v. Ayres*, 9 Ala. 292; *Ramey v. Holcombe*, 21 Ala. 567; *Fowler v. Armour*, 24 Ala. 194; *Gardenhire v. Smith*, 39 Ark. 280; *Fain v. Goodwin*, 35 Ark. 109; *Webster v. Wade*, 19 Cal. 201, 79 Am. Dec. 218; *Booge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160; *Jones v. Jones*, 2 Swan (Tenn.) 605. See also *Rogers v. Parham*, 8 Ga. 190; *Brinkley v. Swicegood*, 65 N. Car. 626; *Gordon v. Brewster*, 7 Wis. 355.

Thus, it has been held that if the wages are payable by instalments, the agent may sue for and recover each instalment as it becomes due. *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Davis v. Preston*, 6 Ala. 83; *Armfield v. Nash*, 31 Miss. 361; *Booge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160. Compare *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821.

4. *England*.—*Goodman v. Pocock*, 15 Q. B. 576, 69 E. C. L. 576; *Archard v. Hornor*, 3 C. & P. 349, 14 E. C. L. 342; *Smith v. Hayward*, 7 Ad. & El. 544, 34 E. C. L. 154; *Aspdin v. Austin*, 5 Q. B. 671, 48 E. C. L. 671; *Fewings v. Tisdal*, 1 Exch. 295; *Elderton v. Emmons*, 6 C. B. 178, 60 E. C. L. 178; *Clossman v. Lacoste*, 28 Eng. L. & Eq. 140.

Indiana.—*Richardson v. Eagle Mach. Works*, 78 Ind. 424, 41 Am. Rep. 584; *Ricks v. Yates*, 5 Ind. 115.

Kentucky.—*Whitaker v. Sandifer*, 1 Duv. (Ky.) 262; *Chamberlin v. McCalister*, 6 Dana (Ky.) 352.

Massachusetts.—*Moulton v. Trask*, 9 Met. (Mass.) 580.

Missouri.—*Stone v. Vimont*, 7 Mo. App. 277. Compare *Booge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160.

New York.—*Heim v. Wolf*, 1 E. D. Smith (N. Y.) 70; *Moody v. Leverich*, 4 Daly (N. Y.) 401; *Clark v. Marsiglia*, 1 Den. (N. Y.) 317, 43 Am. Dec. 670; *Durkee v. Mott*, 8 Barb. (N. Y.) 423; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285, *overruling* *Thompson v. Wood*, 1 Hilt. (N. Y.) 96; *Huntington v. Ogdensburgh, etc., R. Co.*, 33 How. Pr. (N. Y. Supreme Ct.) 416; *Weed v. Burt*, 78 N. Y. 191.

Ohio.—*James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821.

Virginia.—*Willoughby v. Thomas*, 24 Gratt. (Va.) 521.

Texas.—See *Carroll v. Welch*, 26 Tex. 147.

In *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285, Dwight, Com. of Appeals, in commenting upon the doctrine of "constructive service," said: "This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of authorities, and so wholly irreconcilable to that great and beneficent rule of law that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. The doctrine of 'constructive service' is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor."

5. *Richardson v. Eagle Mach. Works*, 78

What Tender of Service on Part of Agent Necessary.—The agent must have been ready and willing to continue in the principal's service at the time of the latter's refusal to receive him into his employment.¹ It is not necessary, however, that he should go through the barren form of offering to render the service.² His readiness, like any other fact, may be shown by all the circumstances of the case.³

After the Principal has Declined to Give the Agent Employment, however, there is no further duty on the agent's part to be in readiness to perform.⁴

WHERE LAW OPERATES TO REVOKE AGENCY—(a) Death of Principal.—The death of the principal will, by the operation of law, dissolve a contract for the performance of services, and the agent will be entitled to compensation only for services already performed at the time of the principal's death.⁵

(bb) Sickness or Death of Agent.—Similarly, where the agent is prevented by death,⁶ sickness,⁷ or other like inability, occasioned by the visitation of Provi-

Ind. 422, 41 Am. Rep. 584; *Booge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160; *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821.

Where Payment is to be Made in Instalments.—It has been held, however, that if, by the terms of the contract, the principal is to pay to the agent for his personal services to be rendered to him, in two instalments due at different periods, and the principal prevents the agent from complying with the contract and refuses to pay, and the agent thereupon institutes an action against him for the first instalment before the second becomes due, and recovers judgment for that amount, this recovery is no bar to a second suit for the remaining instalment. *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Davis v. Preston*, 6 Ala. 83; *Isaacs v. Davies*, 68 Ga. 169; *Booge v. Pacific R. Co.*, 33 Mo. 212, 82 Am. Dec. 160; *Armfield v. Nash*, 31 Miss. 361. *Compare James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821.

1. *Howard v. Daly*, 61 N. Y. 370, 19 Am. Rep. 285.

2. *Wallis v. Warren*, 4 Exch. 361; *Howard v. Daly*, 61 N. Y. 370, 19 Am. Rep. 285.

3. *Howard v. Daly*, 61 N. Y. 370, 19 Am. Rep. 285.

4. *Howard v. Daly*, 61 N. Y. 370, 19 Am. Rep. 285.

5. *Farrow v. Wilson*, L. R. 4 C. P. 744; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578.

Corporate Death by Act of the Law.—A registered-policy life-insurance company contracted with a general agent for his services for a specified term at a stipulated salary, and, before any breach of the contract on its part, was restrained from further prosecuting its business by order of the court, and a receiver of its assets was appointed. It was held that the agent had no valid claim upon the fund in the hands of the receiver, for damages for breach of the contract, in the absence of evidence of fault on the part of the company. *People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174.

6. **Death of Agent.**—*Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85; *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *George v. El-*

liott, 2 Hen. & M. (Va.) 5. *Compare Plymouth v. Throgmorton*, 1 Salk. 65; *Givhan v. Dailey*, 4 Ala. 336.

In *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618, it was held that where an attorney at law engages to defend a cause for a specified sum and dies before the cause is determined, his administrator may recover from the client upon the *quantum meruit* the amount which the intestate's services were really worth to him.

The Recovery cannot Exceed the Contract Price. or the rate of it for the part of the service performed. *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618. See also *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189.

7. **Illness of Agent—Connecticut.**—*Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560.

Illinois.—*Leopold v. Salkey*, 89 Ill. 420, 31 Am. Rep. 93.

Maine.—*Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

Massachusetts.—*Fuller v. Brown*, 11 Met. (Mass.) 440.

Missouri.—*State v. Roberts*, 60 Mo. 402.

New York.—*Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Fahy v. North*, 19 Barb. (N. Y.) 341; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388.

Texas.—*Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475.

Vermont.—*Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; *Seaver v. Morse*, 20 Vt. 620; *Patrick v. Putnam*, 27 Vt. 759.

Wisconsin.—*Green v. Gilbert*, 21 Wis. 395. See also *Nichols v. Coolahan*, 10 Met. (Mass.) 449; *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82; *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7.

Compare Hunter v. Waldron, 7 Ala. 753; *Greene v. Linton*, 7 Port. (Ala.) 133, 31 Am. Dec. 707.

In *Fenton v. Clark*, 11 Vt. 557, it was held that if A contracted with B to labor for him four months from a given day at ten dollars per month, and was to receive no pay until he had worked the four months, still if he was prevented from completing the four months' labor by reason of sickness he might recover *pro rata* for the services performed on a *quantum meruit*. In delivering the

dence,¹ from fully performing a contract for his personal services, though the contract be for entire performance, a recovery may be had for the services actually rendered, subject to the right of the principal to reduce the same by proof of any damages sustained by him in consequence of the agent's not being able to complete the service.

cc. WHERE AGENCY IS RENOUNCED BY AGENT—(aa) *Where He Reserves the Right to Renounce at Will*.—Where the agent by contract reserves the right to quit his agency at any time, he will be entitled to recover for services which he has rendered, though he leaves capriciously and without good reason.²

Where Contract Requires Notice to be Given before Leaving.—Where a person otherwise an agent at will contracts to give notice before renouncing his agency, he will be liable to his principal for damages sustained, if he fails to do so;³ and a further stipulation that in the event of failure to give notice the agent shall forfeit all or a certain part of his compensation will be enforced,⁴ provided it

opinion of the court in this case, Bennett, J., said: "In the case before the court the plaintiff contracted with the defendant to labor personally for him four months at ten dollars per month, and by the terms of the contract was to receive no pay till he had worked the four months. These services being of a personal character, the contract could not be performed by another; and as the plaintiff was disabled to perform it himself, by reason of sickness, which was the act of God, upon the authority of the foregoing cases the contract was discharged. * * * To hold in a case like this, where the plaintiff has been discharged of his contract by the act of God, that there can be no apportionment upon the technical ground that the contract is entire and its performance a condition precedent, is, to my mind, leaving the substance and adhering to the shadow."

In *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475, it is held that where an agent has on account of sickness broken an entire contract for the performance of services, the law raises an implied promise on the part of the principal to pay such amount of the stipulated price as remains after deducting what it costs to procure a completion of the whole service, and also any damage which has been sustained by reason of the nonfulfilment of the contract.

Where the Sickness could have been Foreseen and Provided against.—The plaintiff contracted to render to the defendant the domestic services of himself and wife for one year at a specified price. Four months and ten days thereafter the wife left the service in anticipation of her confinement. Both were then discharged from the service and the wife was confined before six weeks thereafter. It was held that the plaintiff was not excused by such sickness, which he should have foreseen, and could not recover on a *quantum meruit*. *Jennings v. Lyons*, 39 Wis. 554.

Agent Need Not Wait until the Expiration of the Time Fixed in the Contract.—If the party recovers from his sickness and offers to resume his work during the term and the employer rejects the offer, the laborer may then treat the special contract as rescinded, and may recover for the service already rendered without waiting for the expiration of the time fixed in the agreement for its performance.

2 Chitty on Contracts (11th Am. ed.) 850; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560.

1. 2 Chitty on Contracts (11th Am. ed.) 849.

2. *Provost v. Harwood*, 29 Vt. 219; *Evans v. Bennett*, 7 Wis. 404.

3. *Hunt v. Otis Co.*, 4 Met. (Mass.) 464.

4. *Walsh v. Walley*, L. R. 9 Q. B. 367; *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447, 58 Am. Dec. 718; *Pottsville Iron, etc., Co. v. Good*, 116 Pa. St. 385, 2 Am. St. Rep. 614. See also *Preston v. American Linen Co.*, 119 Mass. 403.

The plaintiff, a weaver, was employed by the defendants as a weekly servant, his wages being regulated by the number of pieces which he wove and delivered to his masters. The wages of the defendants' workmen were ascertained and fixed at noon on Thursday in each week, but were not paid until the next Saturday. By rules embodied in the contract of hire, the workmen were required to give before leaving fourteen days' notice at the time of booking up on Thursday, and a failure to give notice would forfeit all wages due. On a Thursday the sum earned by the plaintiff in the preceding week was ascertained and fixed at fifteen shillings. He commenced another week on the afternoon of the same day and worked during the morning of Friday and earned seven shillings. He left during the forenoon of Friday without having given any notice. It was held that the plaintiff forfeited, by leaving before the Saturday, the wages due on Thursday but not payable until Saturday, as well as the wages earned between noon of Thursday and Friday morning. *Walsh v. Walley*, L. R. 9 Q. B. 367.

What will be Deemed a Stipulation.—Where the agent signs a regulation in the principal's business to the effect that abandonment of the agency without notice will work a forfeiture of compensation, he will, of course, be bound thereby. *Pottsville Iron, etc., Co. v. Good*, 116 Pa. St. 385, 2 Am. St. Rep. 614. And even though he does not sign it, if he enters into the principal's business with the knowledge of such regulation, he will be considered to have assented to it. *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447, 58 Am. Dec. 718.

But evidence that the agent had in his possession a paper containing the printed regu-

is not unreasonable or oppressive;¹ but in the absence of such stipulation no forfeiture will occur.²

(bb) *Where He Has Good Cause—Misconduct of Principal.*—An agent may, on account of the principal's wrongful conduct, be justified in abandoning his contract for the performance of services, and in that event he will be entitled to the value of his services rendered.³

lations of the principal's business is not conclusive evidence that the contents were known to him. *Bradley v. Salmon Falls Mfg. Co.*, 30 N. H. 487. Nor does the fact that he was informed of such regulations after the commencement of his work, and continues to work without objection, show conclusively and as a matter of law that he assented to the rules as part of his contract. *Collins v. New England Iron Co.*, 115 Mass. 23; *Preston v. American Linen Co.*, 119 Mass. 400.

Similarly, Evidence of a Custom in Trade to have printed rules and regulations requiring agents to give notice a certain number of days before leaving, is inadmissible unless the party seeking to avail himself of the custom offers to show that the other party knew of it. *Stevens v. Reeves*, 9 Pick. (Mass.) 197; *Collins v. New England Iron Co.*, 115 Mass. 23.

Circumstances Which will Prevent Forfeiture.

—It is settled that absence, from sickness or other visitation from God, without notice, will not work a forfeiture of wages under such a contract. *Fuller v. Brown*, 11 Met. (Mass.) 440. See also *Heber v. U. S. Flax Mfg. Co.*, 13 R. I. 303. *Pari ratione* any abandonment caused by unforeseen circumstances or events, and which at the time of their occurrence the person employed could not control or prevent from operating to terminate his employment, ought not to be allowed to cause a forfeiture of compensation. Thus, it has been held that an arrest and conviction and imprisonment for crime will exonerate a workman from the duty of giving to his employers two weeks' notice before leaving their services, under a contract by the terms of which he has agreed to give such notice or not claim any wages due. *Hughes v. Wamsutta Mills*, 11 Allen (Mass.) 201.

Whether an Abandonment is Such as to Cause Forfeiture—A Question for the Jury.—It has been held that where an employee under such a contract as mentioned in the text leaves without notice and without cause, it is for the jury to determine whether he has abandoned the service, from evidence, not of his undisclosed intention, but of his acts, and that the forfeiture will be incurred notwithstanding his intention to return, if he remains away so long as to warrant the master in regarding his absence as permanent and procuring another person to supply his place. *Partington v. Wamsutta Mills*, 110 Mass. 467; *Naylor v. Fall River Iron Works Co.*, 118 Mass. 317.

Forfeiture Not Justified by Temporary Absence.

—An operative in the mill of a flax-manufacturing company had agreed in writing to give "two weeks' notice of his desire to quit the service of said company at any time, or in default of said two weeks' notice to forfeit

two weeks' pay." It was held that the agreement did not apply to a temporary absence; that in case of a temporary absence without leave the operative might properly be discharged, but that there would be no forfeiture, under the agreement, of the wages then earned. *Heber v. U. S. Flax Mfg. Co.*, 13 R. I. 303.

1. *Richardson v. Woehler*, 26 Mich. 90; *Schrimpf v. Tennessee Mfg. Co.*, 86 Tenn. 219.

In *Richardson v. Woehler*, 26 Mich. 90, Campbell, J., delivering the opinion of the court, said: "We have no difficulty in holding that the injury caused by a sudden breaking off of a contract of service, by either party, involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay day might be forfeited, should be agreed upon, and should not be an unreasonable or oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected. But the facts set forth in this record do not, we think, bring the case within any such rule. We must be governed by the statement returned, and cannot go beyond what it fairly allows us to infer. The forfeiture under the contract covers all wages due at the time of leaving. This is open to the objection that the employer may have been in arrears, and thus enabled to profit by his own wrong. No such forfeiture could be enforced against wages, as such, which the workman was entitled to have paid to him before he committed any breach of his duty. Again, it does not appear how often wages were payable, and what proportion of the year's earnings could thus be withheld for a breach of contract. It would not be reasonable to make the forfeiture cover a very long period. We cannot know these terms judicially."

2. *Hunt v. Otis Co.*, 4 Met. (Mass.) 464.

3. *Cody v. Raynaud*, 1 Colo. 272; *Bishop v. Ranney*, 59 Vt. 316.

Where Principal Assaults Agent.—Where a principal, without provocation, commits an assault upon his agent, and thereby causes him to fear injury, this has been held a sufficient justification for an abandonment of the agency, and the agent may recover compensation for the services he has performed. *Bishop v. Ranney*, 59 Vt. 316.

Use of Rough Language to Agent.—But where an agent was employed for a fortnight and quit at the end of ten days in consequence of rough language from his principal, it was held that he did not have just cause for leaving, and that he was not entitled to compensation for the ten days. *Marsh v. Ruleson*, 1 Wend. (N. Y.) 515.

Epidemic in Vicinity where Services are to be Performed.—Where, from the prevalence of a fatal disease in the vicinity of the place where an agent has agreed to perform services for a specified time, the danger is such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, it is a sufficient cause for not fulfilling the contract, and the agent may recover reasonable compensation for the services performed.¹

Sickness of the Agent.—A discussion of this question will be found elsewhere in this article.²

(cc) **Where He Has Not Good Cause—Prevailing Rule.**—It is the prevailing rule, both in *England* and in this country, that where an agent contracts with his principal for the entire performance of services, and before the completion of his contract he voluntarily and without cause abandons his employment, he can recover nothing for his services, either on the contract or on a *quantum meruit*.³

Improper Conduct on the Part of Person Other than Principal.—In *Patterson v. Gage*, 23 Vt. 558, 56 Am. Dec. 96, it was held that a hired girl who has contracted to labor for a specified term at a price agreed upon, and who has left the service of her employer previous to the expiration of the term, may nevertheless recover for the labor actually performed by her if it appears that she left in consequence of rudeness and improper conduct towards her by a member of another family residing in the same house, although it appears that her employer had no control over the other family, and that the two families were as distinct from each other as they could be while occupying the same house.

But in *Mullen v. Gilkinson*, 19 Vt. 503, it was held that it was not sufficient cause for abandoning a contract for the performance of services, that the agent had a difficulty with another person in the service of the principal, and the principal refused upon his solicitation to discharge such other person; and in an action to recover for services rendered he was not entitled to recover.

1. *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

Whether Agent has Adequate Cause a Question for the Jury.—Whether or not the agent has adequate cause is a question of fact, to be determined by the jury from the evidence. *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

2. See *supra*, this section, *Where Law Operates to Revoke Agency—Sickness or Death of Agent*.

3. *England*.—*Waddington v. Oliver*, 2 B. & P. N. R. 61; *Spain v. Arnott*, 2 Stark. 256, 3 E. C. L. 400; *Ridgway v. Hungerford Market Co.*, 3 Ad. & El. 171, 30 E. C. L. 59; *Ellis v. Hamlen*, 3 Taunt. 52; *Rex v. Birdbrooke*, 4 T. R. 245; *Sinclair v. Bowles*, 9 B. & C. 92, 17 E. C. L. 340.

Alabama.—*Givhan v. Dailey*, 4 Ala. 336; *Whitley v. Murray*, 34 Ala. 155.

California.—*Hutchinson v. Wetmore*, 2 Cal. 310, 56 Am. Dec. 337; *Hogan v. Titlow*, 14 Cal. 255.

Colorado.—*Cody v. Raynaud*, 1 Colo. 272.

Georgia.—*Henderson v. Stiles*, 14 Ga. 135.

Illinois.—*Eldridge v. Rowe*, 7 Ill. 91, 43 Am. Dec. 41; *Badgley v. Heald*, 9 Ill. 64; *Dunn v. Moore*, 16 Ill. 151; *Hansell v. Erickson*, 28 Ill. 257; *Swanzy v. Moore*, 22 Ill. 63, 74 Am. Dec. 134; *Holmes v. Stummel*, 24 Ill.

370; *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 161; *Thrift v. Payne*, 71 Ill. 408.

Indiana.—*De Camp v. Stevens*, 4 Blackf. (Ind.) 24.

Kentucky.—*Jewell v. Thompson*, 2 Litt. (Ky.) 52; *Morford v. Ambrose*, 3 J. J. Marsh. (Ky.) 688.

Louisiana.—*Word v. Winder*, 16 La. Ann. 111.

Maine.—*Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638.

Massachusetts.—*Stark v. Parker*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; *Davis v. Maxwell*, 12 Met. (Mass.) 286; *Thayer v. Wadsworth*, 19 Pick. (Mass.) 349; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Faxon v. Mansfield*, 2 Mass. 147; *Preston v. American Linen Co.*, 119 Mass. 400.

Minnesota.—*Nelichka v. Esterly*, 29 Minn. 146.

Missouri.—*Caldwell v. Dickson*, 17 Mo. 575; *Schnerr v. Lemp*, 19 Mo. 40; *Henson v. Hampton*, 32 Mo. 408.

New York.—*Lantry v. Parks*, 8 Cow. (N. Y.) 63; *Marsh v. Ruleson*, 1 Wend. (N. Y.) 515; *M'Millan v. Vanderlip*, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; *Jennings v. Camp*, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; *Reab v. Moor*, 19 Johns. (N. Y.) 337; *Thorpe v. White*, 13 Johns. (N. Y.) 53; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189.

North Carolina.—*Dover v. Plemmons*, 10 Ired. (N. Car.) 23.

Ohio.—*Larkin v. Buck*, 11 Ohio St. 561.

Oregon.—*Steeple v. Newton*, 7 Oregon 110, 33 Am. Rep. 705.

Pennsylvania.—*Martin v. Schoenberger*, 8 W. & S. (Pa.) 367.

South Carolina.—*Byrd v. Boyd*, 4 McCord (S. Car.) 246, 17 Am. Dec. 740.

Tennessee.—*Abernathy v. Black*, 2 Coldw. (Tenn.) 314; *Congregation of Children of Israel v. Peres*, 2 Coldw. (Tenn.) 623; *Halloway v. Lacy*, 4 Humph. (Tenn.) 468.

Vermont.—*St. Albans Steamboat Co. v. Wilkins*, 8 Vt. 54; *Brown v. Kimball*, 12 Vt. 617; *Mullen v. Gilkinson*, 19 Vt. 503; *Ripley v. Chipman*, 13 Vt. 268; *Green v. Hulett*, 22 Vt. 188; *Clark v. School Dist. No. 7*, 29 Vt. 217; *Mack v. Bragg*, 30 Vt. 571; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162.

Wisconsin.—*Diefenback v. Stark*, 56 Wis. 462, 43 Am. Rep. 719.

The Modern Rule in Some States.—The doctrine has been laid down in *New Hampshire*,¹ and has been followed in some other states,² that where an agent wrongfully abandons a contract for the performance of services, which is entire in point of time, or otherwise, no recovery can be had upon the contract; but where anything has been done under such agreement, which has been appropriated by the principal, and from which he has received substantial benefit over and above the damages he has sustained from the breach of the contract, the agent may recover upon an implied promise the reasonable worth of the excess, the recovery being limited, however, to the rate agreed upon. In such action, unless otherwise provided by statute, damages cannot be deducted for the breach of the contract to exceed the value of the services, but the principal may forbear to insist on the reduction, and in a separate action recover unlimited damages, such as a jury may allow.³

Waiver by Principal of Forfeiture of Compensation—Receiving Agent Back into Employment.—Where an agent abandons his agency, and the principal, with knowledge of the fact, receives him back into the service without objection and retains him until the end of the period fixed for his agency, the principal thereby waives the right to declare the contract forfeited as to the services actually rendered.⁴

Subsequent Offer to Pay Agent.—Similarly, an offer on the part of the principal to pay the agent, after he has left the service, the amount due to him at the rate

In the Leading Case of *Stark v. Parker*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425, it was held that where the plaintiff agreed to work for the defendant a year for one hundred and twenty dollars, but before the expiration of the year voluntarily left the defendant's service without any fault on the part of the defendant and against his consent, the contract was entire, and that the plaintiff must perform the whole year's service as a condition precedent to his right to recover anything under the contract, and that he could not renounce the contract and recover on a *quantum meruit*.

Where the Contract is Severable.—Where, however, an agent enters into a contract for services, severable in its nature, the right to a periodical payment falling due will not be lost by a subsequent abandonment of the contract. *Taylor v. Laird*, 1 H. & N. 266. See also *Capron v. Strout*, 11 Nev. 304; *Thayer v. Wadsworth*, 19 Pick. (Mass.) 349.

1. *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Elliot v. Heath*, 14 N. H. 131; *Laton v. King*, 19 N. H. 280; *Davis v. Barrington*, 30 N. H. 529.

In *Britton v. Turner*, 6 N. H. 485, 26 Am. Dec. 713, *Parker, J.*, in criticising the prevailing rule as laid down in the text, said: "That such rule in its operation may be very unequal, not to say unjust, is apparent. A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such nonperformance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract and nearly completed it, and then abandoned the further performance although the other party has had the full benefit of all that has been done and has perhaps sustained no actual damage—is

in fact subjected to a loss of all which has been performed in the nature of damages for the nonfulfilment of the remainder, upon the technical rule that the contract must be fully performed in order to a recovery of any part of the compensation. By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more by the breach of the contract than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action."

2. *Indiana*.—*Coe v. Smith*, 4 Ind. 82, 58 Am. Dec. 618; *Ricks v. Yates*, 5 Ind. 115.

Iowa.—*Pixler v. Nichols*, 8 Iowa 106, 74 Am. Dec. 298; *McClay v. Hedge*, 18 Iowa 66; *McAafferty v. Hale*, 24 Iowa 356; *Byerlee v. Mendel*, 39 Iowa 382; *Wolf v. Gerr*, 43 Iowa 339.

Kansas.—*Duncan v. Baker*, 21 Kan. 99.

Michigan.—*Allen v. McKibbin*, 5 Mich. 449.

Missouri.—*Downey v. Burke*, 23 Mo. 228.

Nebraska.—*McMillan v. Malloy*, 10 Neb. 228, 35 Am. Rep. 471; *Parcell v. McComber*, 11 Neb. 209, 38 Am. Rep. 366, 35 Am. Rep. 476, note.

Texas.—*Carroll v. Welch*, 26 Tex. 147.

Thus, *M.* agreed to work for *P.* for one year from October 1st, 1876, for the sum of \$195. He worked five months, and sued for his wages March 2, 1877. It was held that he could recover the actual value of his labor, not exceeding the rate agreed upon, less any damage sustained by *P.* by reason of the failure of *M.* to work the entire year. *Parcell v. McComber*, 11 Neb. 209, 38 Am. Rep. 366.

3. See the note preceding, also titles CROSS-COMPLAINT; COUNTERCLAIMS, in ENCYC. PL. AND PR.

4. *St. Albans Steamboat Co. v. Wilkins*, 8 Vt. 54; *Bast v. Byrne*, 51 Wis. 531, 37 Am. Rep. 841; *Prentiss v. Ledyard*, 28 Wis. 131.

of compensation fixed by the original contract is a waiver of all claim to forfeiture.¹

dd. WHERE AGENCY IS TERMINATED BY MUTUAL CONSENT.—It is the common-law doctrine that where an agency has been terminated by the mutual consent of the agent and principal, no new contract arises by implication of law enabling the agent to recover compensation *pro rata* for services already performed, without a stipulation to that effect; but such stipulation may be inferred from the facts of the case.²

(d) Where Agent Acts for Both Parties to Transaction.—Where Parties are Ignorant of the Double Agency.—It is well settled that where an agent has acted for both parties to a transaction, he cannot recover compensation from one of them to whom the double agency was unknown.³ The decisions go even farther, and hold that the agent cannot claim remuneration from either party, unless it is clearly shown that both parties knew and assented to the double employment.⁴

Where, however, the Double Agency is known and assented to by both principals, they will both be liable to the agent for his compensation.⁵

What Evidence of Knowledge is Required.—The principal's knowledge of the agent's

1. *Hogan v. Titlow*, 14 Cal. 255; *Seaver v. Morse*, 20 Vt. 620; *Boyle v. Parker*, 46 Vt. 343.

2. *Lamburn v. Cruden*, 2 M. & G. 253, 40 E. C. L. 358.

In *Vermont*, however, it has been held to be well settled that when the contract is dissolved by mutual consent before the period at which compensation becomes due, the party may recover his compensation *pro rata* without any express contract to that effect. *Rogers v. Steele*, 24 Vt. 513; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564; *Boyle v. Parker*, 46 Vt. 343.

For a dictum to the same effect in *Texas* see *Carroll v. Welch*, 26 Tex. 147.

Where there is an Agreement at the time of the dissolution of the agency that the agent is to receive *pro rata* compensation, he may, of course, recover that amount. *Thomas v. Williams*, 1 Ad. & El. 685, 28 E. C. L. 180; *North Western Implement Co. v. Rowell*, 52 Minn. 326.

3. *Bollman v. Loomis*, 41 Conn. 581; *Cleveland, etc., R. Co. v. Pattison*, 15 Ind. 70; *Lloyd v. Colston*, 5 Bush (Ky.) 587; *Follansbee v. O'Reilly*, 135 Mass. 80; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *McDonald v. Maltz*, 94 Mich. 172; *Harkness v. Briscoe*, 47 Mo. App. 196; *DeSteiger v. Hollington*, 17 Mo. App. 382; *Watkins v. Cousall*, 1 E. D. Smith (N. Y.) 65; *Vanderpoel v. Kearns*, 2 E. D. Smith (N. Y.) 170; *Carman v. Beach*, 63 N. Y. 97; *Murray v. Beard*, 102 N. Y. 505; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Meyer v. Hanchett*, 39 Wis. 419; *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35. See also *Wadsworth v. Adams*, 138 U. S. 385.

Thus where suit was brought by A as assignee of B on a promissory note executed by a railway company, and the answer was that the note was given for services rendered by B, the payee, as agent of the company, to procure subscriptions of stock, that in the exercise of such agency he had fraudulently and without the knowledge of the company received rewards from persons subscribing lands for stock, for procuring their lands to

be taken by the company, it was held that the agency in behalf of the subscribers was inconsistent with the agency for the company; that it was an act of bad faith, and worked a forfeiture of all right to compensation from the company. *Cleveland, etc., R. Co. v. Pattison*, 15 Ind. 70.

Foundation of the Rule.—Most of the cases cited above are those in which a question of fraud arose; but it seems that actual fraud is not necessary to the application of the rule. In *Scribner v. Collar*, 40 Mich. 378, 29 Am. Rep. 541, *Graves, J.*, said: "The cases are nearly, if not quite, uniform, that where the double employment exists and is not known, no recovery can be had against the party kept in ignorance; and the result is not made to turn upon the presence or absence of designed duplicity and fraud, but is a consequence of established policy." See also *DeSteiger v. Hollington*, 17 Mo. App. 389; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Everhart v. Searle*, 71 Pa. St. 256.

Thus, where the same agent was retained by different persons on commission to negotiate sales or exchanges of their property, and he brought about an exchange between two of them, neither knowing that he was acting for the other, it was held contrary to public policy to allow him a right of action against both to recover his commissions, even though he had acted in good faith. *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541.

4. *Bollman v. Loomis*, 41 Conn. 581; *Finerty v. Fritz*, 5 Colo. 174; *Boyd v. Dullaghan*, 33 Ill. App. 266; *Kronenberger v. Fricke*, 22 Ill. App. 550; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *DeSteiger v. Hollington*, 17 Mo. App. 382; *Capener v. Hogan*, 40 Ohio St. 203; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Everhart v. Searle*, 71 Pa. St. 256.

5. *Alexander v. Northwestern Christian University*, 57 Ind. 466; *DeSteiger v. Hollington*, 17 Mo. App. 382; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528. Compare *Meyer v. Hanchett*, 39 Wis. 419, 43 Wis. 246.

duplicate character should be established, not by mere inference, but by evidence of a full disclosure, or positive proof of knowledge.¹

(e) *Where Agency is Illegal.*—An agent will not be allowed to recover compensation for services of an illegal character; as where they are forbidden by law or are against good morals or public policy.²

(3) *Amount of Remuneration.*—(a) *Where there is an Express Agreement.*—Where there is an express contract fixing the amount of remuneration which an agent is to receive for his services, it is conclusive.³

1. *Frankel v. Wathen*, 58 Hun (N. Y.) 544. See also *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

Compare Culverwell v. Birney, 11 Ont. Rep. 265, in which Cameron, C.J., in giving the opinion of the court, said: "But it does not appear to me that the agent is bound to give express notice to the principal, nor that the principal's assent must be made in express terms. It is sufficient if, from the nature of the circumstances, it appears that the principal must have been aware of the fact, and that by making no active objection at the time he intended not to raise any objection."

2. *England.*—*Allkins v. Juke*, 2 C. P. Div. 375; *Stackpole v. Earle*, 2 Wils. 133; *Wyburd v. Stanton*, 4 Esp. 179.

United States.—*Marshall v. Baltimore, etc.*, R. Co., 16 How. (U. S.) 314; *Trist v. Child*, 21 Wall. (U. S.) 441.

Georgia.—*Warren v. Hewitt*, 45 Ga. 501.

Illinois.—*Byrd v. Hughes* 84 Ill. 174, 25 Am. Rep. 442; *Samuels v. Oliver*, 130 Ill. 73.

Kansas.—*McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213.

Massachusetts.—*Fuller v. Dame*, 18 Pick. (Mass.) 472.

Missouri.—*Nash v. Kerr Murray Mfg. Co.*, 19 Mo. App. 1.

New Hampshire.—*Bixby v. Moor*, 51 N. H. 402.

New York.—*Gray v. Hook*, 4 N. Y. 449; *Harris v. Roof*, 10 Barb. (N. Y.) 489; *Rose v. Truax*, 21 Barb. (N. Y.) 361.

Pennsylvania.—*Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519; *Hatzfield v. Gulden*, 7 Watts (Pa.) 152.

Services as Lobbyist.—No action will lie for services as lobbyist before a legislature, agreements in respect to such services being against public policy and prejudicial to sound legislation. *Marshall v. Baltimore, etc.*, R. Co., 16 How. (U. S.) 314; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Harris v. Roof*, 10 Barb. (N. Y.) 489; *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519.

Where the Services Rendered are Partially Those of a Lobbyist and partially those of an attorney, and are blended together as part and parcel of a single employment, the entire contract is vitiated, and after performance no recovery can be had for the work done as an attorney. *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213.

Acting as Agent in the Illegal Sale of Liquor.—The defendants kept a billiard saloon and a bar for the sale of liquor. The liquor traffic was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon. There was no special

agreement that he should or should not sell liquor, or as to what particular duty he should do, but he was accustomed to work generally in and about the saloon, taking care of the room, building the fire, taking care of the billiard tables, tending at the bar, and waiting upon customers. In the absence of the defendants he had the whole charge of the business. The plaintiff at the time he entered into the service of the defendants knew what business was carried on there. In assumpsit upon a *quantum meruit* it was held that the plaintiff could not recover for any portion of his services. *Bixby v. Moor*, 51 N. H. 402.

Procuring Pardon.—A contract founded upon a promise and engagement to procure signatures and obtain a pardon from the governor for one convicted of a criminal offense and sentenced to punishment is unlawful, and cannot be enforced by an action to recover compensation. *Hatzfield v. Gulden*, 7 Watts (Pa.) 152.

If One Employs a Broker to Purchase and Sell Grain for the Illegal Purpose of "Cornering" the market or controlling the price thereof, and this fact is known to the agent or broker, the latter cannot recover of the principal for his services. *Samuels v. Oliver*, 130 Ill. 73.

3. *England.*—*Warde v. Stuart*, 1 C. B. N. S. 88, 87 E. C. L. 88.

Georgia.—*America L. Assoc. v. Ferrill*, 60 Ga. 414.

Illinois.—*Pierce v. Powell*, 57 Ill. 323.

Kansas.—*Frick v. Larned*, 50 Kan. 776.

Maine.—*Webber v. Dunn*, 71 Me. 331.

Maryland.—*State v. Chase*, 3 Har. & J. (Md.) 183.

Michigan.—*Hamilton v. Frothingham*, 59 Mich. 253; *Rosenfield v. Fortier*, 94 Mich. 29.

Minnesota.—*Northwestern Implement Co. v. Rowell*, 52 Minn. 326.

Nebraska.—*Singer Mfg. Co. v. Doggett*, 16 Neb. 609.

New Jersey.—*Vandyke v. Brown*, 8 N. J. Eq. 657.

New York.—*Weiss v. Farrington*, 49 N. Y. Super. Ct. 512, 100 N. Y. 619; *Martine v. Huyler* (Supreme Ct.), 8 N. Y. Supp. 734; *Ashley v. Wrought Iron Bridge Co.* (Supreme Ct.), 26 N. Y. St. Rep. 757.

Pennsylvania.—*Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620; *American Button-Hole, etc., Co. v. Maurer* (Pa., 1887), 10 Atl. Rep. 762.

Texas.—*Heidenheimer v. Walthew*, 2 Tex. Civ. App. 501; *Callaway v. Boroughs* (Tex., 1892), 19 S. W. Rep. 611; *McCormick v. Bush*, 47 Tex. 191.

Thus, when, by the terms of a contract between principal and agent, it was stipulated that

(b) **Where there is No Express Agreement—Reasonable Amount.**—In the absence of an express agreement fixing the agent's compensation, he will be entitled to what his services are reasonably and fairly worth.¹

Amount to be Determined by the Jury from All the Facts.—In arriving at what will constitute a fair and reasonable remuneration, the jury must take into consideration all the facts and circumstances of the case.² Thus, due regard must be paid to the agent's skill and experience,³ the nature of the service performed,⁴ and the responsibility incurred.⁵

the agent should receive ten per cent. on the entire amount of sales made by him, and that if the principal should resume control so that the agency would cease, then the agent should be paid "in proportion to the services rendered by him previous to the closing of his connection with their business," it was held to be error to instruct the jury in a suit by the agent, whose agency had been so terminated, that he was entitled to recover whatever the evidence might show that his services actually performed were reasonably worth. *McCormick v. Bush*, 47 Tex. 191.

Where the Contract is that Remuneration is to be Fixed by the Principal.—Under a special contract of employment by which it was left to the defendant to determine and fix plaintiff's compensation after the services were performed, at such price and amount as, under the circumstances, defendant should consider right and proper, the defendant having determined to fix the amount pursuant to the contract, it was held that in the absence of fraud or bad faith the amount so fixed was the measure of the compensation to which the plaintiff was entitled. *Butler v. Winona Mill Co.*, 28 Minn. 205, 41 Am. Rep. 277. See also *Taylor v. Brewer*, 1 M. & S. 290.

However, in *Millar v. Cuddy*, 43 Mich. 274, 38 Am. Rep. 181, it was held that an agreement to pay a servant what the employer thinks he is reasonably worth binds the latter to pay what the services are reasonably worth, and does not leave him to fix his wages at such sum as he sees fit after the services are performed, although such an agreement would be valid if understood. See also *Bryant v. Flight*, 5 M. & W. 114.

Where the Agreement is to Pay the Agent What He may See Fit to Charge.—In *Van Arman v. Byington*, 38 Ill. 443, it was held that when a party engages the services of another, as of an attorney at law, to defend a suit, agreeing to pay him therefor whatever he may see fit to charge, the party for whom the services may be rendered is not precluded by the terms of such an agreement from disputing the charge, but the measure of recovery will be whatever the services are reasonably worth.

1. *United States*.—*Martin v. Roberts*, 36 Fed. Rep. 217; *Stanton v. Embrey*, 93 U. S. 548; *West New Jersey Soc. v. Morris*, Pet. (C. C.) 59.

Alabama.—*Taylor Mfg. Co. v. Key*, 86 Ala. 212; *Spence v. Whitaker*, 3 Port. (Ala.) 297.

California.—*Toomy v. Dunphy*, 86 Cal. 639.

Illinois.—*Patten v. Patten*, 75 Ill. 446.

Kansas.—*Jones v. School Dist. No. 47*, 8 Kan. 362.

Maine.—*Weston v. Davis*, 24 Me. 374.

Michigan.—*Millar v. Cuddy*, 43 Mich. 273, 38 Am. Rep. 181; *Montross v. Eddy*, 94 Mich. 100.

New Jersey.—*Ruckman v. Bergholz*, 38 N. J. L. 531; *Van Atta v. McKinney*, 16 N. J. L. 235.

New York.—*Erben v. Lorillard*, 2 Keyes (N. Y.) 567.

Tennessee.—*Arrington v. Cary*, 5 Baxt. (Tenn.) 609.

Vermont.—*Vilas v. Downer*, 21 Vt. 419.

Wisconsin.—*Best v. Sinz*, 73 Wis. 243; *Nau-man v. Zoerhlaut*, 21 Wis. 466.

Hawaii.—*Montgomery v. Montgomery*, 2 Hawaiian 677.

Thus one teaching school for a district without a written contract is entitled to receive the reasonable value of the services performed. *Jones v. School Dist. No. 47*, 8 Kan. 362.

Compensation of Husband as Agent of His Wife.

—Where the husband manages his wife's estate, he will like other agents be entitled, in the absence of special contract, to reasonable compensation for his services within the agency on behalf of such separate estate. *Patten v. Patten*, 75 Ill. 446.

2. *Eggleston v. Boardman*, 37 Mich. 14; *Ruckman v. Bergholz*, 38 N. J. L. 531; *Best v. Sinz*, 73 Wis. 243.

3. **Skill and Experience of Agent.**—*Stanton v. Embrey*, 93 U. S. 548; *Stockbridge v. Crooker*, 34 Me. 350, 56 Am. Dec. 662; *Eggleston v. Boardman*, 37 Mich. 14; *Vilas v. Downer*, 21 Vt. 419.

In *Stockbridge v. Crooker*, 34 Me. 350, 56 Am. Dec. 662, it was held that in awarding compensation for professional services the jury may properly take into consideration the degree of skill exhibited in the performance of them, but they are not imperatively bound to award a sum commensurate with such skill. In this case, *Shepley, C. J.*, in delivering the opinion of the court, said that the law "permits jurors to take into consideration the exhausting studies, the time consumed, and the expenses incurred to acquire great professional knowledge and distinction, or great mechanical or other skill."

4. **Character of Service Performed.**—*Stanton v. Embrey*, 93 U. S. 548; *Eggleston v. Boardman*, 37 Mich. 14; *Stockbridge v. Crooker*, 34 Me. 350, 56 Am. Dec. 662; *Vilas v. Downer*, 21 Vt. 419.

5. *Stockbridge v. Crooker*, 34 Me. 350, 56 Am. Dec. 662.

Custom as Evidence to Fix the Amount.—For the purpose of aiding in the determination of the value of the agent's services, it is proper to receive evidence or the usual price charged and received for similar services by others engaged in the same line of work in the same vicinity.¹

Expert Testimony as to Value of Services.—It is competent for a witness to testify as to the value of an agent's services where he is acquainted with the value of services similar to those rendered.²

(c) **Where Agent Serves beyond Stipulated Time.**—If an agent, employed at an agreed price for a certain time, continues in the same employment after the expiration of the term without any new agreement, the presumption of law is that he continues at the original rate of compensation, and there can be no recovery upon a *quantum meruit*.³

(d) **Where Additional Duties are Imposed upon Agent Employed at Fixed Salary.**—Where the principal, having his agent in his employment at a fixed rate, imposes upon him additional duties and enlarges his powers, the agent cannot, apart from an agreement to that effect,⁴ or some legal custom,⁵ recover any extra wages for the additional services.

Thus, where an agent is employed to solicit pardon for a fugitive from justice to enable him to return to the state, so that the principal may use him as a witness in a claim for which suit has been brought, the amount of the claim is proper for the consideration of the jury in estimating the compensation for such agency. *Kentucky Bank v. Combs*, 7 Pa. St. 543. *Gibson, C.J.*, in delivering the opinion of the court in this case, said: "It is not to be doubted that responsibility in a confidential employment is a legitimate subject of compensation, and in proportion to the magnitude of the interests committed to the agent."

1. **Usage.**—*Stanton v. Embrey*, 93 U. S. 548; *Eggleston v. Boardman*, 37 Mich. 14; *Vilas v. Downer*, 21 Vt. 419; *Kelly v. Phelps*, 57 Wis. 425.

In *Elting v. Sturtevant*, 41 Conn. 180, the testimony of a real-estate broker as to what his charges would have been for certain services was admitted in evidence as tending to show the price ordinarily charged for such services by persons engaged in that business. But it has been stated as a general doctrine, that statements of what the witness himself would have charged for a similar service furnish no criterion for determining the reasonable value of an agent's services, and should not be admitted in evidence. *Fairchild v. Michigan Cent. R. Co.*, 8 Ill. App. 591.

The Amount Charged by an Attorney in a Particular Case has been held inadmissible in evidence to fix the value of the services rendered in the same case by the attorney for the other parties. *Eggleston v. Boardman*, 37 Mich. 14.

2. *Johnson v. Thompson*, 72 Ind. 167, 37 Am. Rep. 152; *Bowen v. Bowen*, 74 Ind. 470; *Marion County v. Chambers*, 75 Ind. 409. See also *Parker v. Parker*, 33 Ala. 459.

Knowledge of Witness as to What Others Charged for Like Services Unnecessary.—It has been held that where the witnesses testified as experts as to the value of the services of a physician, but stated that they had no knowledge as to what other physicians charged for such work, but based their opinion on what

they thought the services were worth, such evidence is competent to go to the jury. *Marion County v. Chambers*, 75 Ind. 409.

3. **Serving beyond Time Named—Presumption.**—*New Hampshire Iron Factory Co. v. Richardson*, 5 N. H. 294; *Doty v. Case*, etc., *Thresher Co.*, 50 Hun (N. Y.) 595; *Spence v. Cotton Mills*, 115 N. Car. 210; *Ranck v. Albright*, 36 Pa. St. 367; *Wallace v. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620. Compare *Taylor Mfg. Co. v. Key*, 86 Ala. 212.

A told B that he would take charge of a certain business for eight hundred dollars a year, but if he should continue in the business more than one year he should expect one thousand dollars after the first year. To this B replied that he would give eight hundred dollars for the first year, but would make no pledges for any other year. A took charge of the business and continued in it two years without any new contract. It was held that A was entitled to only eight hundred dollars for the second year. *New Hampshire Iron Factory Co. v. Richardson*, 5 N. H. 294.

4. *Fraser's Case*, 16 Ct. of Cl. 507; *Jordan v. Jordan*, 65 Ga. 351; *Decatur v. Vermillion*, 77 Ill. 315; *Sidway v. South Park Com'rs*, 120 Ill. 496; *Guthrie v. Merrill*, 4 Kan. 187; *Moreau v. Dumagen*, 20 La. Ann. 230; *Pew v. Gloucester First Nat. Bank*, 130 Mass. 391; *Carr v. Chartiers Coal Co.*, 25 Pa. St. 337. See also *Blanchard v. Jones*, 101 Ind. 542. Compare *Marshall v. Parsons*, 9 C. & P. 656, 38 E. C. L. 275.

The South Park commissioners directed their auditor, whose salary for his services as such was fixed at three thousand dollars, to procure a loan of one hundred thousand dollars for their use, which he did. There was no promise to pay him anything for this service, either express or implied, at the time or before it was rendered. He claimed commissions on the loan, with interest, and brought suit for the same. It was held that he was not entitled to anything for such service beyond his fixed salary as auditor. *Sidway v. South Park Com'rs*, 120 Ill. 496.

5. *U. S. v. Macdaniel*, 7 Pet. (U. S.) 1; *U. S. v. Fillebrown*, 7 Pet. (U. S.) 28.

b. REIMBURSEMENT—(1) For Advances and Expenditures.—An agent is entitled to reimbursements from his principal for all advances and expenditures made and incurred in carrying into effect the purposes of his employment, not in violation of the policy of the law.¹

Needless or Unauthorized Expenditures.—Where, however, an agent makes expenditures in the principal's business which might have been avoided by ordinary diligence,² or which are unauthorized, he is without remedy against his principal.³

(2) For Loss and Damage Sustained—General Rule.—It is a well-settled doctrine that the principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency or in pursuance of the authority conferred upon him, when the actions or transactions are not illegal.⁴

Effect of Statute Limiting the Number of Hours Constituting a Day's Work.—It seems to be the general doctrine in this country, that where there is a statute limiting the number of hours in a day's work, it does not have the effect of giving an agent the right to recover additional compensation for work performed beyond the statutory time. *U. S. v. Martin*, 94 U. S. 400; *Luske v. Hotchkiss*, 37 Conn. 219, 9 Am. Rep. 314; *Brooks v. Cotton*, 48 N. H. 50, 2 Am. Rep. 172; *McCarthy v. New York*, 96 N. Y. 1, 48 Am. Rep. 601.

1. *Sentance v. Hawley*, 13 C. B. N. S. 458, 106 E. C. L. 458; *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Armstrong v. Pease*, 66 Ga. 70; *Beach v. Branch*, 57 Ga. 362; *Warren v. Hewitt*, 45 Ga. 501; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Powell v. Newburgh*, 19 Johns. (N. Y.) 284; *Howe v. Buffalo, etc.*, R. Co., 37 N. Y. 297; *Bacon v. Fourth Nat. Bank (City Ct.)*, 9 N. Y. Supp. 435; *Mohawk, etc.*, R. Co. v. *Costigan*, 2 Sandf. Ch. (N. Y.) 306.

Where Contract Provides that Agent is to be Liable for Expenditures.—Where a contract of agency is entered into expressly providing that the agent shall pay freight charges on goods shipped to him by his principal, the agent is not entitled to reimbursement for paying such freight charges, and evidence of a custom to a different effect is not admissible. *Champion Mach. Co. v. Ervay* (Tex. App., 1890), 16 S. W. Rep. 172.

What will Amount to Sufficient Evidence of Disbursements.—The supervisor of the building of a house is to be reimbursed by his principal for expenditures for labor and material, and in an action therefor proper vouchers are sufficient *prima facie* evidence of payment; it is not essential that the supervisor furnish common-law evidence of the actual delivery of the material or the actual number of days workmen were employed. *Blazo v. Gill*, 143 N. Y. 232.

2. *Brown v. Clayton*, 12 Ga. 574; *Jackson v. Morse*, 3 La. 555.

3. *England.*—*Howard v. Tucker*, 1 B. & Ad. 712, 20 E. C. L. 478; *Edmiston v. Wright*, 1 Campb. 88; *Beaumont v. Boulbee*, 11 Ves. Jr. 358; *Stokes v. Lewis*, 1 T. R. 20.

Louisiana.—*Pelletier v. Roumage*, 2 La. 529; *Jackson v. Morse*, 3 La. 555; *Nolan v. Shaw*, 6 La. Ann. 40; *Garland v. Scott*, 15 La. Ann. 143; *Woodlief v. Moncure*, 17 La.

Ann. 241; *Erwin's Succession*, 16 La. Ann. 132; *Weber v. Coussy*, 12 La. Ann. 534; *Summers v. Clark*, 29 La. Ann. 93.

Massachusetts.—*Keyes v. Westford*, 17 Pick. (Mass.) 273; *Day v. Holmes*, 103 Mass. 306.

Michigan.—*Sheffield v. Linn*, 62 Mich. 151. *New York.*—*Burby v. Roome*, 7 Misc. Rep. (N. Y. C. Pl.) 167.

Pennsylvania.—*Schrack v. McKnight*, 84 Pa. St. 26.

Illustration.—Thus it has been held that an agent cannot recover an amount paid for the services of an attorney unless it appears that such services were necessary or procured at the request of the principal. *Clamagaran v. Sacerdotte*, 8 Martin N. S. (La.) 538.

4. *England.*—*Taylor v. Stray*, 2 C. B. N. S. 175, 89 E. C. L. 175; *Sentance v. Hawley*, 13 C. B. N. S. 458, 106 E. C. L. 458; *Betts v. Gibbins*, 2 Ad. & El. 57, 29 E. C. L. 29; *Toplis v. Grane*, 5 Bing. N. Cas. 636, 35 E. C. L. 256.

United States.—*Bibb v. Allen*, 149 U. S. 481.

Georgia.—*Beach v. Branch*, 57 Ga. 362.

Illinois.—*Haskin v. Haskin*, 41 Ill. 197; *Otter Creek Lumber Co. v. McElwee*, 37 Ill. App. 285.

Louisiana.—*Flower v. Downs*, 6 La. Ann. 538.

Maryland.—*Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125.

Massachusetts.—*Greene v. Goddard*, 9 Met. (Mass.) 212.

Mississippi.—*Denney v. Wheelwright*, 60 Miss. 740.

New York.—*Powell v. Newburgh*, 19 Johns. (N. Y.) 284; *Burby v. Roome*, 7 Misc. Rep. (N. Y. C. Pl.) 167; *Howe v. Buffalo, etc.*, R. Co., 37 N. Y. 297.

"Where an agent, in pursuing the instructions of his principal, and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability the orders of the principal cannot be executed at all, or not so well executed, and this is known by the principal at the time of giving his instructions and creating the agency, if a loss occur to the agent it is most clear that he can look to the principal for indemnity for the damage sustained by him." *Hubbard, J., in Greene v. Goddard*, 9 Met. (Mass.) 212.

Loss must be Incurred in Execution of Agency.—The implied promise of the principal to indemnify his agent extends to such losses and damages as are directly caused by the proper execution of his authority as agent.¹ But, as in the case of expenditures, if the loss arises from the negligence or misconduct of the agent,² or is incurred in an unauthorized transaction, the agent is not entitled to indemnity.³

Where the Act Performed is Illegal.—Where it appears that the act of the agent was illegal on its face, or that the agent knew it was unlawful at the time of performing it, he will not be entitled to indemnity.⁴ If, however, in obeying instructions or orders of the principal, he does acts which are not manifestly contrary to law and which he does not know at the time to be illegal, the principal is bound to indemnify him for loss or damage sustained thereby.⁵

1. *Bartlett v. Smith*, 13 Fed. Rep. 263; *Otter Creek Lumber Co. v. McElwee*, 37 Ill. App. 285; *Haskin v. Haskin*, 41 Ill. 197; *Greene v. Goddard*, 9 Met. (Mass.) 212; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Denney v. Wheelwright*, 60 Miss. 740; *Powell v. Newburgh*, 19 Johns. (N. Y.) 284; *Ramsay v. Gardney*, 11 Johns. (N. Y.) 439; *Burby v. Roome*, 7 Misc. Rep. (N. Y. C. Pl.) 167; *Saveland v. Green*, 36 Wis. 612.

Where A, the agent of B, recovered certain of B's goods in Cape François, by the decree of a competent court there (the same having been attached by C for the debt of D and Co., in whose hands they were, and claimed in court by A), and then sold them and remitted the proceeds to B; and was afterwards, in a suit instituted by C, and connected with the first proceeding, compelled by the threats of the president, Christophe, to confess, contrary to the truth, that at the time of receiving the goods he promised to pay C a sum of money on account of D and Co., and to let judgment go against him, it was held that A might recover from B, his principal, the amount thus paid, it not exceeding the estimated value of B's goods. *D'Arcy v. Lyle*, 5 Binn. (Pa.) 441.

Loss a Good Consideration for Note Given Therefor.—A loss incurred by an agent, in consequence of his acting as such, and for the benefit of his principal, will constitute a consideration to support an express promise of reimbursement. The promise of the principal to indemnify is not an agreement "to answer for the debt, default, or miscarriage of another person," within the meaning of the statute of frauds. *Stocking v. Sage*, 1 Conn. 519.

When Right of Action Accrues.—No right of action at law accrues to an agent before the thing to be indemnified against has happened. *Otter Creek Lumber Co. v. McElwee*, 37 Ill. App. 285; *Saveland v. Green*, 36 Wis. 612; *Mears v. Adreon*, 31 Md. 229. *Compare Flower v. Jones*, 7 Martin N. S. (La.) 140.

Payment of Damages by Agent, without Waiting for Suit to be Brought, Sufficient.—If A. in his own name, but at the request of B. and for him, contracts with M. to charter to the latter a vessel (the property of B.) for a certain use, he is liable to M. for damages resulting to the latter from a breach of the contract by reason of B.'s failure to put the vessel at M.'s disposal as agreed; and with-

out waiting to be sued for such damages he may pay them to M. and thereupon maintain an action against B. to recover the same. *Saveland v. Green*, 36 Wis. 612.

In Equity, however, an agent will be indemnified against liability as well as loss. *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Lacey v. Hill*, L. R. 18 Eq. 182; *Mohawk, etc., R. Co. v. Costigan*, 2 Sandf. Ch. (N. Y.) 306.

2. *Nelson v. Cook*, 17 Ill. 443; *Haskin v. Haskin*, 41 Ill. 197; *Baily v. Burgess*, 48 N. J. Eq. 411.

Illustration — Loss through Misconduct.—Thus, where an agent was subjected to loss and imprisonment in an action against him which arose from his own negligence and misconduct, it was held that he could not recover from his principal, and that an express promise of indemnity would have been void. *Leavitt v. Parks*, 2 Allen (New Bruns.) 282.

Mistake of Law.—Where an auctioneer incurred a loss owing to a mistake of law on his part, it was held that he could not recover from his principal. *Capp v. Topham*, 6 East 392.

Where Loss was Occasioned by Innocent Mistake of Fact in the sale of bonds which the agent had to replace, it was held that he was entitled to indemnity from the principal. *Maitland v. Martin*, 86 Pa. St. 120.

3. *Bensley v. Moon*, 7 Ill. App. 415.

Thus, an agent cannot recover from his principal the amount paid on a judgment against the former, obtained for a false warranty of a horse, without showing that the warranty was authorized or ratified by his principal and made in good faith. *Croom v. Swann*, 1 Fla. 246.

4. *Bibb v. Allen*, 149 U. S. 498; *Moore v. Appleton*, 26 Ala. 633; *Nelson v. Cook*, 17 Ill. 443; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Forniquet v. Tegarden*, 24 Miss. 96; *Howe v. Buffalo, etc., R. Co.*, 37 N. Y. 297; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *Ives v. Jones*, 3 Ired. (N. Car.) 538, 40 Am. Dec. 421; *Cumpston v. Lambert*, 18 Ohio 81, 51 Am. Dec. 442.

5. *Bibb v. Allen*, 149 U. S. 498; *Moore v. Appleton*, 26 Ala. 633; *Nelson v. Cook*, 17 Ill. 443; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Coventry v. Barton*, 17

c. **AGENT'S RIGHT TO LIEN.**—The agent, in general, has a particular right of lien¹ for all his expenditures, losses sustained, and services in and about the property or thing intrusted to his agency, whenever they were proper, or necessary, or incident thereto.²

d. **AGENT'S RIGHT OF STOPPAGE IN TRANSITU.**—Instances of the exercise of this right have arisen almost entirely, if not altogether, in the case of factors and brokers, and a full discussion of this question will be found elsewhere in this work.³

IX. RIGHTS, DUTIES, AND LIABILITIES AS TO THIRD PARTIES—1. **Of Agent to Third Parties**—a. **ON CONTRACT**—(1) *When Acting with Authority*—(a) **Principal Disclosed**—aa. **IN GENERAL.**—In general, when a person acts and contracts avowedly as the agent of another, who is known as the principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal, and involve no personal liability on the part of the agent.⁴

Johns. (N. Y.) 142, 8 Am. Dec. 376; *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 54; *Davis v. Arledge*, 3 Hill (S. Car.) 170, 30 Am. Dec. 360; *Jamieson v. Calhoun*, 2 Spears (S. Car.) 19; *Clark v. Jones*, 16 Lea (Tenn.) 351.

If an agent, acting under the direction of his principal, cuts timber by mistake partly upon the wrong township, and his principal receives the timber and disposes of it, he can recover of his principal what he has been obliged to pay for damages in a suit for trespass. *Drummond v. Humphreys*, 39 Me. 347.

1. For general lien of attorneys, auctioneers, factors, and brokers, see the titles **ATTORNEY AND CLIENT**; **AUCTIONS AND AUCTIONEERS**; **COMMISSION MERCHANTS OR FACTORS**; **BROKERS**. See also the title **LIENS**.

2. *In re Pavy's Patent Felted Fabric Co.*, 1 Ch. Div. 631; *Downie v. Barrie*, 9 R. L. (Can.) 517; *Dowell v. Cardwell*, 4 Sawy. (U. S.) 217; *White v. Sheffield, etc.*, R. Co., 90 Ala. 254, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 428; *Byers v. Danley*, 27 Ark. 77; *Nevan v. Roup*, 8 Iowa 207; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Farrington v. Meek*, 30 Mo. 578, 77 Am. Dec. 627; *Nagle v. McFeeters*, 97 N. Y. 196; *M'Intyre v. Carver*, 2 W. & S. (Pa.) 392, 37 Am. Dec. 519; *Dewing v. Hutton* (W. Va., 1895), 21 S. E. Rep. 780, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 428.

Thus where a principal consigns goods to an agent to sell under an agreement that the latter will accept bills drawn upon him by the former to the amount of goods so consigned on hand, it is a necessary inference that the drafts are to be drawn on the credit of the goods, and to the amount of acceptances outstanding the agent has a lien on the goods in his hands as security, and is entitled to retain the same until the acceptances are paid. *Nagle v. McFeeters*, 97 N. Y. 196.

Priority of Agent's Lien.—In *Dewing v. Hutton* (W. Va., 1895), 21 S. E. Rep. 780, it was held that an agent with unrestricted management of a mercantile, farming, and general trading business carried on in his name, with the right to buy, sell, and exchange, has a lien on all the property accumulated in such business and in his possession, for all advancements made, expenses and liabilities in-

curred, proper, necessary, or incident to such business, which is superior in right to any other lien that may be created on such property by the reputed owner thereof.

The Death of the Principal does not deprive the agent of his lien. *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

3. See the titles **COMMISSION MERCHANTS OR FACTORS**; **BROKERS**; also the title **STOPPAGE IN TRANSITU**.

4. *England.*—*Owen v. Gooch*, 2 Esp. 567; *Johnson v. Ogilby*, 3 P. Wms. 277; *Wake v. Harrop*, 6 H. & N. 768; *Ex p. Hartop*, 12 Ves. Jr. 349; *Green v. Kopke*, 18 C. B. 549, 86 E. C. L. 549.

United States.—*Whitney v. Wyman*, 101 U. S. 392; *Baldwin v. Black*, 119 U. S. 643; *U. S. v. Bevan*, *Crabbe* (U. S.) 324; *Lehman v. Feld*, 37 Fed. Rep. 852; *Newbury Bank v. Baldwin*, 1 Cliff (U. S.) 519, affirmed in 1 Wall. (U. S.) 234.

Alabama.—*Ware v. Morgan*, 67 Ala. 461; *Roney v. Winter*, 37 Ala. 277; *Comer v. Bankhead*, 70 Ala. 493.

California.—*Engels v. Heatly*, 5 Cal. 135; *Merrill v. Williams*, 63 Cal. 70.

Colorado.—*Hewes v. Andrews*, 12 Colo. 161.

Connecticut.—*Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429.

Georgia.—*Tiller v. Spradley*, 39 Ga. 35; *Fleming v. Hill*, 62 Ga. 751.

Illinois.—*Brainard v. Turner*, 4 Ill. App. 61; *Chase v. Debolt*, 7 Ill. 371; *Warren v. Dickson*, 27 Ill. 115; *Seery v. Socks*, 29 Ill. 313; *Stevenson v. Mathers*, 67 Ill. 123.

Indiana.—*Pitman v. Kintner*, 5 Blackf. (Ind.) 250, 33 Am. Dec. 469; *Robeson v. Chapman*, 6 Ind. 352; *Newman v. Sylvester*, 42 Ind. 106.

Iowa.—*Baker v. Chambles*, 4 Greene (Iowa) 428.

Kansas.—*McCubbin v. Graham*, 4 Kan. 397.

Kentucky.—*Lewis v. Harris*, 4 Metc. (Ky.) 353.

Louisiana.—*Spotts v. Cowan*, 9 La. Ann. 520; *Bienvenu v. Vienne*, 18 La. Ann. 113; *Delaroderie v. Hart*, 20 La. Ann. 126; *Marx v. Wheelis*, 21 La. Ann. 140; *Rosenthal v. Myers*, 25 La. Ann. 463; *Mauzy v. Ranger*, 38 La. Ann. 485, 58 Am. Rep. 197; *Hazard v. Lambeth*, 3 Rob. (La.) 378.

66. WHEN AGENT PLEDGES HIS OWN CREDIT.—The presumption is that an agent always intends to bind his principal, and not himself.¹ He may, however, when acting for his principal, openly pledge his own credit, and therefore obligate himself to the performance of a contract which otherwise would devolve on his principal.² He may incur this liability, although he describes himself in a

Maryland.—*Key v. Parnham*, 6 Har. & J. (Md.) 418; *McClernan v. Hall*, 33 Md. 293.

Massachusetts.—*Boston, etc., R. Co. v. Whitcher*, 1 Allen (Mass.) 497; *Southard v. Sturtevant*, 109 Mass. 390; *Raymond v. Crown, etc., Mills*, 2 Met. (Mass.) 319; *Simmonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

Missouri.—*Western Cement Co. v. Jones*, 8 Mo. App. 373; *Humphrey v. Jones*, 71 Mo. 62; *Ziegler v. Fallon*, 28 Mo. App. 295.

New Hampshire.—*Hanover v. Eaton*, 3 N. H. 38; *Sleeper v. Weymouth*, 26 N. H. 34.

New Jersey.—*Tuttle v. Ayres*, 3 N. J. L. 257; *Shotwell v. M'Kown*, 5 N. J. L. 955. See also *Burley v. Kitchell*, 20 N. J. L. 305.

New York.—*Buck v. Amidon*, 4 Daly (N. Y.) 126; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Baer v. Bonyng*, 72 Hun (N. Y.) 33; *McDougall v. Travis*, 24 Hun (N. Y.) 590; *Colvin v. Holbrook*, 2 N. Y. 126; *American Nat. Bank v. Wheelock*, 82 N. Y. 118.

North Carolina.—*Meadows v. Smith*, 12 Ired. (N. Car.) 18; *Davis v. Burnett*, 4 Jones (N. Car.) 71, 67 Am. Dec. 263.

Oregon.—*Stewart v. Perkins*, 3 Oregon 509.

Pennsylvania.—*Campbell v. Baker*, 2 Watts (Pa.) 83; *Roberts v. Austin*, 5 Whart. (Pa.) 313; *Fisher v. Rhodes*, 4 Phila. (Pa.) 94. See also *Joyce v. Sims*, 2 Dall. (Pa.) 223.

South Carolina.—*Waddell v. Mordecai*, 3 Hill (S. Car.) 22; *Rucker v. Smoke*, 37 S. Car. 377, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 410.

Vermont.—*Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332.

In *Stanton v. Camp*, 4 Barb. (N. Y.) 278, the court by Allen, J., said, quoting 1 Am. Leading Cases, 454, note: "When the relation of principal and agent exists in regard to a contract, and is known to the other party to exist, and the principal is disclosed at the time as such, the contract is the contract of the principal, and the agent is not bound unless credit had been given to him expressly and exclusively and it was clearly his intention to assume a personal responsibility." To same effect see *Meeker v. Claghorn*, 44 N. Y. 349. See also *Foster v. Persch*, 68 N. Y. 400, reversing 6 Daly (N. Y.) 164.

Agent when Liable—Principal Disclosed.—"To hold an agent personally liable in cases in which he discloses his principal, and that the services to be rendered are for the sole benefit of his principal, and the contract is within the scope of his authority, it must be shown that credit was given exclusively to the agent, and that the agent was informed of that fact." Per Coleman, J., in *Humes v. Decatur Land Imp., etc., Co.*, 98 Ala. 461. To same effect *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618.

Master of a Vessel.—A ship's master is always bound by his contract, and he can only exempt himself from personal liability, by

expressly confining the credit to the owner or stipulating against his own personal responsibility. 3 Kent Com. 161; *Sydnor v. Hurd*, 8 Tex. 102. See the title MASTERS OF VESSELS.

1. **Presumption.**—*Higgins v. Senior*, 8 M. & W. 834; *Magee v. Atkinson*, 2 M. & W. 440; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Johnson v. Smith*, 21 Conn. 627; *Baker v. Chambles*, 4 Greene (Iowa) 428; *Key v. Parnham*, 6 Har. & J. (Md.) 418; *Steamship Bulgarian Co. v. Merchant's Despatch Transp. Co.*, 135 Mass. 421; *Hall v. Lauderdale*, 46 N. Y. 72; *Genesee Bank v. Patchin Bank*, 19 N. Y. 312.

In *Hall v. Lauderdale*, 46 N. Y. 72, the court by Andrews, J., said: "In construing oral agreements made by an agent courts give effect to the real intention of the parties, unembarrassed by technical rules of construction; and when the act is within the authority, the presumption is that the agent intends to bind the principal and not himself."

Whether Credit Given to Agent—Question of Fact.—Where goods are sold to an agent who, at the time, discloses the name of his principal, and states that the goods may be charged to him or to his principal, and the vendor, not knowing the principal, charges the goods to the agent, it is a question of fact whether or not such exclusive credit is given to the agent as to discharge the principal. *Maryland Coal Co. v. Edwards*, 4 Hun (N. Y.) 432.

When Consideration Moves to Principal.—An agent who binds himself personally to pay will be liable, although the consideration may move to his principal. *Crum v. Boyd*, 9 Ind. 289; *Shordan v. Kyler*, 87 Ind. 44; *Ahrens v. Cobb*, 9 Humph. (Tenn.) 643.

2. *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Bell v. Teague*, 85 Ala. 211; *Nixon v. Downey*, 49 Iowa 166; *McBratney v. Heydecker*, 8 Misc. Rep. (N. Y. C. Pl.) 309; *Durston v. Butterfield*, 66 Barb. (N. Y.) 603; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Strider v. Winch*, 21 Gratt. (Va.) 440.

Warranty of Paper by Agent.—An express warranty that a note is genuine, made by the agent of the seller, will bind the agent personally if it appears that such was the intention. *Wilder v. Cowles*, 100 Mass. 487.

Warranty by Agent.—Where an agent by express contract warrants property sold for a known principal, he will be personally bound to the purchaser, as he adds a personal responsibility to that which he assumes for his principal. *Hull v. Brown*, 35 Wis. 654. See the title WARRANTY.

Agent Indorsing for Principal, but without qualifying the signature, will be held personally liable. *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; *Leadbitter v. Farrow*, 5 M. & S. 345; *Thomas v. Bishop*, 2 Stra. 955.

And this liability exists, although it is

contract as agent, if, instead of attempting to bind his principal, he imposes terms obligatory on himself.¹

cc. WHEN AGENT UNINTENTIONALLY BINDS HIMSELF.—Whether an agent when acting for his principal binds himself or not, is largely a question of intention;² he may, however, when acting for his principal, unintentionally bind himself.³

Parol Evidence Admissible to Show Intention.—Parol evidence, when not contradictory of a written contract, will always be admissible to show the intention of the parties.⁴

Sealed Instruments.—Where an instrument is under seal, and the agent is a direct party thereto, and the principal is not, so that the latter cannot, *ex directo*, be sued thereon, the agent, although describing himself as such, is liable upon the covenants and agreements therein contained as his own personal contract.⁵

dd. WHEN ACTING FOR FOREIGN PRINCIPAL.—It was formerly the rule that agents acting for principals resident in a foreign country were held personally liable upon all contracts made by them for their principals, and this without any distinction whether they describe themselves in the contract or not.⁶ The more

known to the party taking the indorsed paper that he was merely an agent. *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

1. *California.*—*Murphy v. Helmrich*, 66 Cal. 71.

Massachusetts.—*Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

Missouri.—*Overton v. Stevens*, 8 Mo. 622.

Nebraska.—*Morgan v. Bergen*, 3 Neb. 209.

New Jersey.—*Dayton v. Warne*, 43 N. J. L. 659; *Tinken v. Tallmadge*, 54 N. J. L. 119.

2. *Whitney v. Wyman*, 101 U. S. 392; *Brown v. Rundlett*, 15 N. H. 360. And see *supra*, this title, *Manner of Execution of Authority*.

3. *England.*—*Norton v. Herron*, 1 C. & P. 648, 11 E. C. L. 511.

Alabama.—*Bell v. Teague*, 85 Ala. 211.

Kentucky.—*M'Alexander v. Lee*, 3 A. K. Marsh. (Ky.) 483.

Massachusetts.—*Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Mayhew v. Prince*, 11 Mass. 54; *Taber v. Cannon*, 8 Met. (Mass.) 461.

Mississippi.—*Garland v. Stewart*, 31 Miss. 314.

New Hampshire.—*Savage v. Rix*, 9 N. H. 263; *Brown v. Rundlett*, 15 N. H. 360.

New York.—*Mills v. Hunt*, 20 Wend. (N. Y.) 431; *McBratney v. Heydecker*, 8 Misc. Rep. (N. Y. C. Pl.) 309.

Pennsylvania.—*Meyer v. Barker*, 6 Binn. (Pa.) 228.

Tennessee.—*Ahrens v. Cobb*, 9 Humph. (Tenn.) 643.

4. If the contract be not under seal and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal, or with the name of the principal by the agent, or otherwise. The intent developed is alone material, and when that is ascertained, it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be personally liable unless he agreed to be so. *Whitney v. Wyman*, 101 U. S. 392; *Green v. Kopke*, 18 C. B. 549, 86 E. C. L. 549. See also *Hanover v. Eaton*, 3 N. H. 38.

"Where the contract is so drawn that it is

doubtful on its face whether the parties really intended that the agent or his principal should be personally bound, parol evidence is now let in to show what their intention really was." Per Thompson, J., in *Ziegler v. Fallon*, 28 Mo. App. 299.

In *Ferris v. Thaw*, 72 Mo. 450, the court, by Sherwood, C. J., says: "Parol evidence is admissible to establish such intention, as this evidence does not contradict that which is written, but only serves to show that others than those mentioned on the face of the paper are bound also, since the act of the agent is that of his principal; the liability of the latter depending on the act done, and not merely on the form in which such act finds expression."

"But if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." Per Lord Denman, C. J., in *Jones v. Littledale*, 6 Ad. & El. 486, 33 E. C. L. 122. To same effect see *Chandler v. Coe*, 56 N. H. 184, 22 Am. Rep. 437.

Negotiable Paper.—There is a clear exception, however, to the rule, in the case of negotiable paper signed by an agent. *Anderton v. Shoup*, 17 Ohio St. 125.

See *supra*, this title, *Manner of Execution of Authority—Admissibility of Parol Evidence*.

5. *Hall v. Cockrell*, 28 Ala. 513; *Einstein v. Holt*, 52 Mo. 340; *Morgan v. Bergen*, 3 Neb. 209; *Dayton v. Warne*, 43 N. J. L. 659; *Quigley v. DeHaas*, 82 Pa. St. 267; *Steele v. McElroy*, 1 Sneed (Tenn.) 341. See *supra*, this title, *Manner of Execution of Authority*.

6. *Former Rule—England.*—*Peterson v. Ayre*, 13 C. B. 353, 76 E. C. L. 353; *Heal v. Kenworthy*, 10 Exch. 743, 28 Eng. L. & Eq. 537; *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335, *Gonzales v. Sladen*, Bull. N. P. 130.

But this is not the present rule in *England*. See authorities in note immediately following.

Indiana.—*Vawter v. Baker*, 23 Ind. 63, permitting the presumption that the agent is,

modern rule is that it makes no difference whether the principal is a foreigner or not: if by the language of the contract the agent, and not the principal, is bound, such must be its construction; and, on the other hand, if it clearly binds the principal and is in form a contract with him only, the agent must be exonerated.¹

cc. WHEN PRINCIPAL IS IRRESPONSIBLE.—Where an agent contracts for and on behalf of an irresponsible principal, that is, a principal who possesses none of the elements or attributes of a legal entity, and cannot therefore be impleaded in law, he will be personally liable on the contract.²

Nonexisting Principal.—The same rule applies where the contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the former.³

(b) **Agency Undisclosed.**—A person acting as agent for another will be personally responsible if at the time of making the contract in his principal's behalf he fails to disclose the fact of his agency.⁴ By reason of such failure he be

liable to be rebutted by proof that the principal only is liable.

Louisiana.—New Castle Mfg. Co. v. Red River R. Co., 1 Rob. (La.) 145, 36 Am. Dec. 636. This case, however, limits the rule, and allows proof that credit was given to the agent only; and *Maury v. Ranger*, 38 La. Ann. 489, 58 Am. Rep. 197, holding that the rule in the text is now obsolete.

Maine.—McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291; *Rogers v. March*, 33 Me. 106.

New York.—Hochster v. Baruch, 5 Daly (N. Y.) 440. To the contrary, see *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244.

Pennsylvania.—Merrick's Estate, 5 W. & S. (Pa.) 9.

Extent of Rule.—The rule does not extend to a contract made in this country for personal services to be performed in a foreign country by one resident here. *Rogers v. March*, 33 Me. 106. Neither does it apply as between the different states of the Union. *Vawter v. Baker*, 23 Ind. 63; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Rogers v. March*, 33 Me. 106.

1. **Modern Rule — England.**—*Green v. Kopke*, 36 Eng. L. & Eq. 396; *Hutton v. Bulloch*, L. R. 9 Q. B. 572; *Armstrong v. Stokes*, L. R. 7 Q. B. 603; *Wilson v. Zulueta*, 14 Q. B. 405, 68 E. C. L. 405; *Paice v. Walker*, L. R. 5 Exch. 173.

United States.—*Oelricks v. Ford*, 23 How. (U. S.) 49.

Louisiana.—*Maury v. Ranger*, 38 La. Ann. 489, 58 Am. Rep. 197.

Massachusetts.—*Bray v. Kettell*, 1 Allen (Mass.) 80. See also *Barry v. Page*, 10 Gray (Mass.) 398; *Alcock v. Hopkins*, 6 Cush. (Mass.) 484.

New Hampshire.—*Kaulback v. Churchill* 59 N. H. 296.

New York.—*Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618.

Contra.—*Hochster v. Baruch*, 5 Daly (N. Y.) 440.

Stronger Presumption of Agent's Liability in Case of Foreign Principal.—There seems to be

a stronger presumption that the agent contracts personally when acting for a foreign than for a resident principal. *Maury v. Ranger*, 38 La. Ann. 489, 58 Am. Rep. 197.

2. *California.*—*Murphy v. Helmrich*, 66 Cal. 69.

Massachusetts.—*Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

Missouri.—*Blakely v. Bennecke*, 59 Mo. 193; *Fay v. Richmond*, 18 Mo. App. 355; *Hoppe v. Saylor*, 53 Mo. App. 4; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Ziegler v. Fallon*, 28 Mo. App. 295; *McLaughlin v. Concordia College*, etc., 20 Mo. App. 42.

New Jersey.—*Timken v. Tallmadge*, 54 N. J. L. 120; *Booth v. Wonderly*, 36 N. J. L. 255.

See the title SOCIETIES AND CLUBS, as to liability of officers and agents of such organizations.

Illustrations of an Irresponsible Principal.—A married woman, who is incapable of being sued. *Hoppe v. Saylor*, 53 Mo. App. 4.

A military company designated as "Co. I, 49th Regt. Mo. Vols." *Blakely v. Bennecke*, 59 Mo. 193.

A political meeting. *Eichbaum v. Irons*, 6 W. & S. (Pa.) 67, 40 Am. Dec. 540.

Reason for the Rule.—Where there is no responsible principal to whom resort may be had, the law presumes that the agent contracts upon his personal responsibility, and intends to bind himself, and so holds him, for in no other way could the contract have any validity. *Booth v. Wonderly*, 36 N. J. L. 250; *Timken v. Tallmadge*, 54 N. J. L. 117.

3. *Kelner v. Baxter*, L. R. 2 C. P. 183; *Lewis v. Tilton*, 64 Iowa 220, 52 Am. Rep. 436; *Washburn v. Frank*, 31 La. Ann. 427. See also *Frendendall v. Taylor*, 23 Wis. 538, 99 Am. Dec. 203, 26 Wis. 286.

Inaccessible Principal.—In *Bridges v. Bidwell*, 20 Neb. 185, there is a dictum to the effect that if an agent so conducts his business as to render his principal inaccessible, he will be liable to the same extent as if he conceals his character as agent.

4. *England.*—*Gurney v. Womersley*, 4 El. & Bl. 133, 82 E. C. L. 133; *Rabone v. Williams*, 7 T. R. 356, note.

United States.—*YeSeng Co. v. Corbitt*, 9 Fed. Rep. 423; *Allen v. Schuchardt*, 1 Am.

comes subject to all liabilities, express or implied, created by the contract, in the same manner as if he were the principal in interest.¹

Law Reg. N. S. 13, 1 Fed. Cas. 512, No. 236, affirmed 1 Wall. (U. S.) 359.

Alabama.—Brent v. Miller, 81 Ala. 317;

Wood v. Brewer, 73 Ala. 259.

California.—Murphy v. Helmrich, 66 Cal. 69.

Colorado.—Mackey v. Briggs (Colo., 1891), 26 Pac. Rep. 131. See also Hewes v. Andrews, 12 Colo. 161.

Connecticut.—Pierce v. Johnson, 34 Conn. 274.

Georgia.—Garrard v. Moody, 48 Ga. 96.

Illinois.—Wheeler v. Reed, 36 Ill. 81; Bickford v. Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

Indiana.—Merrill v. Wilson, 6 Ind. 426.

Iowa.—Nixon v. Downey, 49 Iowa 166.

Kentucky.—Jones v. Johnson, 86 Ky. 530;

Tutt v. Brown, 5 Litt. (Ky.) 2, 15 Am. Dec. 33.

Louisiana.—Mithoff v. Byrne, 20 La. Ann. 363.

Maryland.—York County Bank v. Stein, 24 Md. 447.

Massachusetts.—Bartlett v. Raymond, 139 Mass. 275; Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24; Hastings v. Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

Michigan.—Mitchell v. Beck, 88 Mich. 342.

Minnesota.—Pratt v. Beaupre, 13 Minn. 187.

Missouri.—McClellan v. Parker, 27 Mo. 162;

Schell v. Stephens, 50 Mo. 375; Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505;

Lapsley v. McKinstry, 38 Mo. 245; Dodd v. Butler, 7 Mo. App. 583.

Nebraska.—Bridges v. Bidwell, 20 Neb. 185.

New Hampshire.—Batchelder v. Libbey (N. H., 1890), 19 Atl. Rep. 570.

New Mexico.—Luna v. Mohr, 3 N. Mex. 56.

New York.—Argersinger v. Macnaughton,

114 N. Y. 539, 11 Am. St. Rep. 687; Knapp v. Simon, 96 N. Y. 289;

Baltzen v. Nicolay, 53 N. Y. 467, reversing 35 N. Y. Super. Ct. 203;

Mills v. Hunt, 20 Wend. (N. Y.) 431; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615, affirming 59 Barb. (N. Y.) 554;

Morrison v. Currie, 4 Duer (N. Y.) 79;

M'Comb v. Wright, 4 Johns. Ch. (N. Y.) 659;

Mahoney v. Kent, 7 Misc. Rep. (N. Y. C. Pl.) 726;

Cabre v. Sturges, 1 Hilt. (N. Y.) 160. See also Cobb v. Knapp,

71 N. Y. 348, 27 Am. Rep. 51, affirming 42 N. Y. Super. Ct. 91;

Rochester Bank v. Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681;

Pentz v. Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558;

Kahn v. Weill, 9 Misc. Rep. (N. Y. C. Pl.) 150;

Dung v. Parker, 52 N. Y. 494, reversing 3 Daly (N. Y.) 89;

Brockway v. Allen, 17 Wend. (N. Y.) 40;

Jemison v. Citizens' Sav. Bank, 44 Hun (N. Y.) 412;

Kneeland v. Coatsworth (Buffalo Super. Ct.), 9 N. Y. Supp. 416;

Whitman v. Johnson, 10 Misc. Rep. (N. Y. C. Pl.) 725, modified 12 Misc. Rep. (N. Y.) 23, 24 Civ. Pro. Rep. (N. Y.) 350.

North Carolina.—Forney v. Shipp, 4 Jones (N. Car.) 527. See also Stamps v. Cooley, 91 N. Car. 316;

Delius v. Cawthorn, 2 Dev. (N. Car.) 90.

Ohio.—Lee v. Fraternal Mut. Ins. Co., 1 Handy (Ohio) 217.

Pennsylvania.—Beymer v. Bonsall, 79 Pa. St. 298; Meyer v. Barker, 6 Binn. (Pa.) 228.

South Carolina.—Conyers v. Magrath, 4 McCord (S. Car.) 392;

Davenport v. Riley, 2 McCord (S. Car.) 198.

South Dakota.—Lindsay v. Pettigrew (S. Dak., 1894), 59 N. W. Rep. 726, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 406.

Texas.—Sydnor v. Hurd, 8 Tex. 98; Johnson v. Armstrong, 83 Tex. 325.

Vermont.—Baldwin v. Leonard, 39 Vt. 260,

94 Am. Dec. 324; Button v. Winslow, 53 Vt. 430;

Royce v. Allen, 28 Vt. 234.

West Virginia.—Poole v. Rice, 9 W. Va. 73.

As to the liability of the agent when third party elects to hold principal when disclosed, see *infra*, this article, *Rights, Duties, and Liabilities as to Third Parties—Of Principal to Third Parties*.

When Agent Liable for Breach of Warranty.—

Where an agent deals as principal and does not disclose his agency, he is personally liable for a breach of warranty. *Blakeman v. Mackay*, 1 Hilt. (N. Y.) 266; *Waring v. Mason*,

18 Wend. (N. Y.) 425; *Argersinger v. Macnaughton*, 114 N. Y. 539, 11 Am. St. Rep. 687.

Transfer of Paper by Agent.—If an agent transfers paper by delivery without disclosing his principal, he will be regarded as a principal in the transaction. *Pugh v. Moore*,

44 La. Ann. 209. See also *Brown v. Ames*, (Minn., 1894), 61 N. W. Rep. 448.

Transfer of Forged Paper by Agent.—If an agent transferring negotiable paper fails to disclose his principal, and the paper proves to be forged, the agent will be personally liable for the consideration received. *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615, affirming 59 Barb. (N. Y.) 554.

1. *Wheeler v. Reed*, 36 Ill. 81; *Welch v. Goodwin*, 123 Mass. 71, 25 Am. Rep. 24;

Argersinger v. Macnaughton, 114 N. Y. 539, 11 Am. St. Rep. 687; *Royce v. Allen*, 28 Vt. 234.

Agent Not Relieved because He Generally Acts as Such.—As an agent who contracts in his own name, without disclosing that he is acting for a principal, incurs a personal liability, which is primary in its character, he will not be relieved from the liability because he generally acts as agent for disclosed principals in other transactions. *Brent v. Miller*, 81 Ala. 317; *Wood v. Brewer*, 73 Ala. 259.

But see *Falk v. Wolfsohn*, 7 Misc. Rep. (N. Y. C. Pl.) 314, where it is held that where a person in his dealings with another as to similar matters has always dealt as an agent of others it is necessary, in order to charge him with liability for the transaction in question, to show acts or statements by him from which an inference could be drawn that he was dealing otherwise than as formerly, or that he interposed his personal liability.

Agent's Duty to Disclose Agency.—"The duty is upon the agent, if he would avoid personal liability, to disclose his agency, not upon others to discover it, and if he fails so to do, and deals with persons unaware of his

Agency Disclosed, but Principal Undisclosed.—The broad rule has been laid down, that one who acts as the agent of an undisclosed principal may be treated as principal by the party with whom he deals; ¹ this, however, has been limited in some instances, and held to apply only in cases where evidence of a trade custom is admissible to show that the agent should be bound, on proof of which the agent is held personally liable. ²

(2) *When Acting with No Authority*—(a) **In General.**—The cases in which an agent acting without authority has been held personally liable are generally classified as follows: First, where the agent makes a false representation of his authority, with intent to deceive; second, where with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and, third, where he undertakes to act, *bona fide*, believing he has authority, but in fact having none. It may be said generally, as to cases fairly brought within either of the first two classes, there can be no doubt as to the personal liability of the self-constituted agent; while the liability of the agent in cases belonging to the third class has sometimes been doubted, the weight of authority is that they also are liable. ³

agency, he must answer personally for the debts he contracts." Per Steele, J., in *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324.

To the same effect see *Murphy v. Helmrich*, 66 Cal. 69; *Hall v. Bradbury*, 40 Conn. 32; *Tippets v. Walker*, 4 Mass. 595; *Hamlin v. Abell*, 120 Mo. 188; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Lapsley v. McKinstry*, 38 Mo. 245; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 63, 10 Am. Dec. 193; *Stone v. Wood*, 7 Cow. (N. Y.) 454, 17 Am. Dec. 529; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Davenport v. Riley*, 2 McCord (S. Car.) 198; *Cruse v. Jones*, 3 Lea (Tenn.) 66; *Kain v. Humes*, 5 Sneed (Tenn.) 610; *Broyles v. McCoy*, 5 Sneed (Tenn.) 602; *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.) 742.

Corporation as Agent.—A corporation acting as agent for an undisclosed principal is liable as a principal, and is entitled, when this liability is sought to be enforced, to all the rights it would possess as the real principal, and may avail itself of the plea of *ultra vires*. *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 19 Am. St. Rep. 482. See the title *ULTRA VIRES*.

1. *Kelner v. Baxter*, L. R. 2 C. P. 174; *YeSeng Co. v. Corbitt*, 9 Fed. Rep. 426; *Andrews v. Allen*, 4 Harr. (Del.) 452; *Welch v. Goodwin*, 123 Mass. 77, 25 Am. Rep. 24; *Argersinger v. Macnaughton*, 114 N. Y. 539, 11 Am. St. Rep. 687.

In *Winsor v. Griggs*, 5 Cush. (Mass.) 210, "G." signed as "agent," his principal at the time being undisclosed; the court, applying the rule in the text, held "G." liable.

In *Ex p. Hartop*, 12 Ves. Jr. 349, Lord Erskine, C.J., says: "No rule of law is better ascertained or stands upon a stronger foundation than this, that where an agent names his principal the principal is responsible, not the agent; but for the application of that rule the agent must name his principal as the person to be responsible." In *Kelner v. Baxter*, L. R. 2 C. P. 180, Byles, J., adds to this that "the mere fact of a person professing to sign a contract for or on behalf or as agent for another will not *per se* prevent

responsibility as a contracting party attaching upon the former."

See *supra*, this title, *Manner of Execution of Authority*.

Applicable to Factors and Brokers.—Mr. Wharton is of the opinion that this rule is specially applicable to auctioneers, factors, and brokers, and its probable application to other classes of agents would be limited to a usage of trade or where the agent acts without authority. Wharton on Agency, § 502. See the authorities in the note immediately following.

2. *Hutchinson v. Tatham*, L. R. 8 C. P. 482; *Dale v. Humfrey*, El. Bl. & El. 1004, 96 E. C. L. 1004, 27 L. J. Q. B. 390; *Fleet v. Murton*, L. R. 7 Q. B. 126.

Test of Liability.—Whether a party shall be considered as acting in his own right or as the agent of another, depends not upon the fact that he contracted in his own name without disclosing his agency, but upon the facts and circumstances of the case. *Collins v. Butts*, 10 Wend. (N. Y.) 400, *affirmed* 13 Wend. (N. Y.) 139.

3. *Smout v. Ilbery*, 10 M. & W. 1; *Randell v. Trimmen*, 18 C. B. 793, 86 E. C. L. 793; *Weare v. Gove*, 44 N. H. 196; *Kroeger v. Pitcairn*, 101 Pa. St. 311, 47 Am. Rep. 718.

While it is not infrequently laid down as a rule of law, that if an agent does not bind his principal he binds himself, this needs qualification, and cannot be said to be universally true or correct. If the form of the contract is such that the agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language when fairly interpreted does not contain a personal undertaking or promise, he is not personally liable, for it is not his contract, and the law will not force it upon him. He may, however, be liable for tortious conduct if he knowingly or carelessly assumes to bind another without authority. *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429.

(b) **When He Has Knowledge of His Want of Authority.**—One who with knowledge of his want of authority, without intending any wrong¹ or by making false representations as to his authority,² executes a contract as the agent of another, is personally liable to the person with whom he is dealing.

Rights of Third Party.—The third party on learning the facts has a right to repudiate the contract and hold the assumed agent immediately responsible for damages.³

(c) **When He Bona Fide Believes He Has Authority**—*aa. WHEN IN FACT HE HAS NONE.*—When a person makes a contract as agent for another, *bona fide* believing that he has authority to so act, and thereby causes an injury to a third person who has honestly relied on the correctness of his position as agent, the latter will be personally liable for such injury.⁴

Principal Not Jointly Liable with Agent.—If the agent exceeds his authority, and makes himself liable, his principal is not jointly liable with him. *Walker v. Haughey*, 25 Ill. App. 135. See also *Layng v. Stewart*, 1 W. & S. (Pa.) 222.

1. *England.*—*Smout v. Ilbery*, 10 M. & W. 1; *Downman v. Jones*, 9 Jur. 454; *Polhill v. Walter*, 3 B. & Ad. 114, 23 E. C. L. 38; *Randell v. Trimen*, 18 C. B. 793, 86 E. C. L. 793; *Firbank v. Humphreys*, 18 Q. B. Div. 54; *Spedding v. Nevell*, L. R. 4 C. P. 212; *Jones v. Downman*, 4 Q. B. 235, 45 E. C. L. 235, note.

Canada.—*Outram v. Doyle*, 1 Russ. & G. 1.

Alabama.—*Ware v. Morgan*, 67 Ala. 468; *Lazarus v. Shearer*, 2 Ala. 718.

Colorado.—*Charles v. Eshleman*, 5 Colo. 113.

Illinois.—*Kadish v. Bullen*, 10 Ill. App. 566; *Frankland v. Johnson*, 147 Ill. 520; *Welker v. Hinze*, 16 Ill. App. 326.

Indiana.—*Newman v. Sylvester*, 42 Ind. 106.

Kentucky.—*Murray v. Carothers*, 1 Metc. (Ky.) 71.

Louisiana.—C. C., §§ 2982, 2979; *Richie v. Bass*, 15 La. Ann. 668; *Hewitt v. Roubeshush*, 24 La. Ann. 254; *Levy v. Lane*, 38 La. Ann. 252.

Maryland.—*Keener v. Harrod*, 2 Md. 70, 56 Am. Dec. 706.

Michigan.—*Solomon v. Penoyar*, 89 Mich. 11.

Minnesota.—*Newport v. Smith* (Minn., 1895), 63 N. W. Rep. 734.

New Hampshire.—*Woodes v. Dennett*, 9 N. H. 55; *Weare v. Gove*, 44 N. H. 196; *Pettin-gill v. McGregor*, 12 N. H. 181; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82.

New York.—*Baltzen v. Nicolay*, 53 N. Y. 467; *Simmons v. More*, 100 N. Y. 140; *White v. Madison*, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481; *Bartholomae v. Kauffmann*, 47 N. Y. Super. Ct. 552. See also *Smith v. Teets*, 1 N. Y. City Ct. 457.

Ohio.—*Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218.

Pennsylvania.—*Kroeger v. Pitcairn*, 101 Pa. St. 311, 47 Am. Rep. 718; *Lasher v. Stimson*, 145 Pa. St. 30, 37 Am. & Eng. Corp. Cas. 615.

South Carolina.—*Hamburg Bank v. Wray*, 4 Strobb. (S. Car.) 90, 51 Am. Dec. 659.

Vermont.—*Clark v. Foster*, 8 Vt. 98.

In *Hall v. Lauderdale*, 46 N. Y. 72, the court by *Andrews, J.*, said: "It is the general rule that an agent, to avoid personal liability, must contract in such a form as to give a remedy against his principal; and if in making a contract in the name of his principal he acts without authority, or beyond it, he becomes personally liable." Citing *Eaton v. Bell*, 5 B. & Ald. 34, 7 E. C. L. 13; *White v. Madison*, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481.

2. *England.*—*Johnson v. Ogilby*, 3 P. Wms. 278; *Randell v. Trimen*, 18 C. B. 793, 86 E. C. L. 793; *Beattie v. Ebury*, L. R. 7 Ch. 791.

Louisiana.—C. C., §§ 2982, 2979; *Richie v. Bass*, 15 La. Ann. 668; *Levy v. Lane*, 38 La. Ann. 252.

New Hampshire.—*Weare v. Gove*, 44 N. H. 196.

New York.—*Noe v. Gregory*, 7 Daly (N. Y.) 283; *Parker v. Knox*, 60 Hun (N. Y.) 550.

Ohio.—*Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218.

Pennsylvania.—*Kroeger v. Pitcairn*, 101 Pa. St. 311, 47 Am. Rep. 718; *Lane v. Corr*, 156 Pa. St. 250.

Washington.—*McReavy v. Eshelman*, 4 Wash. 760.

Contract must be Valid to Hold Agent.—An agent who falsely represents his authority to make a contract on behalf of another is not liable in contract or in tort unless the principal would have been bound by the contract made, had the agent had such authority. So where the contract is void under the statute of frauds the agent will not be liable. *Dung v. Parker*, 52 N. Y. 496, *reversing* 3 Daly (N. Y.) 89; *Baltzen v. Nicolay*, 53 N. Y. 467, *reversing* 35 N. Y. Super. Ct. 203.

3. *White v. Madison*, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481.

4. *England.*—*Smout v. Ilbery*, 10 M. & W. 1; *Weeks v. Propert*, L. R. 8 C. P. 437; *Collen v. Wright*, 8 El. & Bl. 657, 92 E. C. L. 657.

Alabama.—*Ware v. Morgan*, 67 Ala. 468; *Belisle v. Clark*, 49 Ala. 98.

Colorado.—*Charles v. Eshleman*, 5 Colo. 113.

Indiana.—*Newman v. Sylvester*, 42 Ind. 106. In this case the liability of the agent is limited from the statement in the text; it is held that the agent must knowingly or carelessly assume to act without being authorized.

bb. ACTING IN EXCESS OF AUTHORITY ACTUALLY POSSESSED.—Where a person undertakes to enter into a contract as agent for his principal, exceeding the authority delegated to him, and his principal refuses to be bound, the former will be personally liable to the person with whom he contracts.¹

Ground of Liability.—The position of an agent in these cases differs from that of one who acts with knowledge of his want of authority, only in the degree of moral wrong and not in the degree of injury;² the principle upon which his liability rests is that he has been guilty of a wrong or omission depriving the party dealing with him of the benefit of the liability of the principal for whom he assumed to contract.³

New Hampshire.—Weare v. Gove, 44 N. H. 196.

New York.—Noe v. Gregory, 7 Daly (N. Y.) 283.

Ohio.—Farmers' Co-operative Trust Co. v. Floyd, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218.

South Carolina.—Hamburg Bank v. Wray, 4 Strobbh. (S. Car.) 87, 51 Am. Dec. 659; Edings v. Brown, 1 Rich. (S. Car.) 255.

1. *England.*—Parrot v. Wells, 2 Vern. 127; Jones v. Downman, 4 Q. B. 235, 45 E. C. L. 235, note; Simons v. Patchett, 7 El. & Bl. 568, 90 E. C. L. 568.

Alabama.—Lazarus v. Shearer, 2 Ala. 718; Crawford v. Barkley, 18 Ala. 270.

Arkansas.—Dale v. Donaldson Lumber Co., 48 Ark. 188.

Colorado.—Charles v. Eshleman, 5 Colo. 107.

Illinois.—Kadish v. Bullen, 10 Ill. App. 566; Clay v. Clay, 23 Ill. App. 109; Walker v. Haughey, 25 Ill. App. 135.

Indiana.—Lewis v. Reed, 11 Ind. 239; Pitman v. Kintner, 5 Blackf. (Ind.) 250, 33 Am. Dec. 469.

Kentucky.—Sandford v. McArthur, 18 B. Mon. (Ky.) 411.

Louisiana.—C. C., §§ 2982, 2979; Richie v. Bass, 15 La. Ann. 668.

Maryland.—Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706.

Missouri.—Myers Tailoring Co. v. Keeley, 58 Mo. App. 495.

New York.—Meech v. Smith, 7 Wend. (N. Y.) 315; Feeter v. Heath, 11 Wend. (N. Y.) 478; Taylor v. Nostrand, 134 N. Y. 108.

Pennsylvania.—Kroeger v. Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718; Layng v. Stewart, 1 W. & S. (Pa.) 222.

Vermont.—Roberts v. Button, 14 Vt. 195.

In *Feeter v. Heath*, 11 Wend. (N. Y.) 478, a subagent made a contract, and in so doing exceeded his authority. The court by Walworth, Ch., said: "If an agent in making a contract exceeds his authority, the person with whom he contracts may hold him personally responsible for the whole amount due on the contract, although the agent may have the right to claim of his principal remuneration to the extent of the price he was authorized to give. Thus, if I employ an agent to buy for me a horse at a price not exceeding one hundred dollars, and he buys one for which he agrees to give one hundred and ten dollars, he makes himself personally liable to the vendor for the whole purchase money; but as between me and my agent he may insist that I shall take the horse and

allow him the amount I had authorized him to give."

Ratification by Principal.—Where the principal, instead of repudiating the agreement made by the agent, ratifies it upon terms agreed to by the other party, such ratification is equivalent to antecedent authority in the agent, and removes all question of his individual liability from the case. *Hopkins v. Everly*, 150 Pa. St. 117.

Agent Bidding at Public Auction.—Where an agent, employed to bid at a public sale at a limited price, exceeds his authority, he is considered as making the purchase on his own account, and may be sued as a purchaser. *Hampton v. Speckenagle*, 9 S. & R. (Pa.) 212, 11 Am. Dec. 704.

Contracting in Unauthorized Manner.—Where a person undertakes to contract as agent for an individual, and contracts in a manner which is not legally binding upon his principal, he is personally responsible. *Mann v. Richardson*, 66 Ill. 481. See *supra*, this title, *Manner of Execution of Authority*.

2. *Smout v. Ilbery*, 10 M. & W. 1; *Ware v. Morgan*, 67 Ala. 468; *Hamburg Bank v. Wray*, 4 Strobbh. (S. Car.) 87, 51 Am. Dec. 659.

3. *Smout v. Ilbery*, 10 M. & W. 1; *Weeks v. Probert*, L. R. 8 C. P. 437; *Collen v. Wright*, 8 El. & Bl. 657, 92 E. C. L. 657; *Ware v. Morgan*, 67 Ala. 468; *Hall v. Lauderdale*, 46 N. Y. 73.

In *Weare v. Gove*, 44 N. H. 196, the court by Bellows, J., said: "Although no fraud or wrongful motive can be imputed to the agent, still his act is an affirmation that he has authority to make the contract, and he may justly be held responsible for the truth of it; and it is no more than reasonable that he should suffer the consequences of his mistake rather than the party who is misled by it, because, before holding himself out as such agent, it is his duty to ascertain whether his claim so to act is well founded or not; and he surely cannot be heard to complain that others have confided in his assertion of authority, and upon the strength of it have entered into reciprocal engagements with him. Even if wholly innocent of any wrongful purpose, his case falls within the familiar principle that when one of two innocent persons must suffer a loss it ought to be borne by him who has been the means of causing it, by inducing the other to confide in the truth of his representations." To the same effect see *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218.

(d) **Third Party must be Ignorant of Want of Authority.**—To give a party a right of action against a professed agent, he must have been ignorant of the want of authority on the part of the latter and have acted upon the faith of the representations, express or implied, that the professed agent had the authority assumed. Hence, if the party complaining is fully cognizant of all the facts touching the agent's authority, the latter will not be liable.¹

Parties Mutually Mistaken.—Where all the facts are known to both parties and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be bound is no ground for charging the agent.²

(e) **Nature of Liability—Form of Action.**—As a person entering into a contract as agent for another warrants his authority, unless special circumstances or express agreement relieve him from that responsibility,³ it may be stated generally that the remedy against one who assumes to act as the agent of another, and in that capacity undertakes to make a contract binding upon his principal, is in the nature of an action for deceit, or upon the breach of the implied warranty of his authority, according to the facts of the case.⁴

Liability on the Contract.—There is a class of cases, based upon the principle that it is the contract of some one, and if not of the principal it must of necessity be that of the agent,⁵ in which it has been held that the agent may

1. *Jones v. Downman*, 4 Q. B. 235, 45 E. C. L. 235, note; *Ware v. Morgan*, 67 Ala. 461; *Newman v. Sylvester*, 42 Ind. 106; *Murray v. Carothers*, 1 Metc. (Ky.) 71; *Sandford v. McArthur*, 18 B. Mon. (Ky.) 421; *Barry v. Pike*, 21 La. Ann. 221; *Newport v. Smith* (Minn., 1895), 63 N. W. Rep. 734; *Michael v. Jones*, 84 Mo. 578; *Western Cement Co. v. Jones*, 8 Mo. App. 373; *Humphrey v. Jones*, 71 Mo. 62; *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381, *affirmed* 57 N. Y. 331; *Snow v. Hix*, 54 Vt. 478.

In *Hall v. Lauderdale*, 46 N. Y. 72, the court by Andrews, J., said: "If he [the agent] acts within his instructions, and in good faith, especially when the facts are equally known to both parties, he is not personally responsible, although it may happen that the authority itself is void." *Citing Smout v. Ilbery*, 10 M. & W. 1; *Jefts v. York*, 10 Cush. (Mass.) 392; *Walker v. State Bank*, 9 N. Y. 582.

2. *Michael v. Jones*, 84 Mo. 578; *Western Cement Co. v. Jones*, 8 Mo. App. 373; *Humphrey v. Jones*, 71 Mo. 62; *Snow v. Hix*, 54 Vt. 478; *McReavy v. Eshelman*, 4 Wash. 760; *Abeles v. Cochran*, 22 Kan. 406.

Death of Principal Unknown.—When the death of the principal is unknown to both the agent and the contracting party at the time the contract is made, so that there is no binding contract on the principal or his representatives, the agent is not personally responsible. *Smout v. Ilbery*, 10 M. & W. 1; *Carriker v. Whittington*, 26 Mo. 312, 72 Am. Dec. 212; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648. The principle on which this doctrine is founded seems to be that although the authority of the agent has expired, yet the agent is not in fault, nor in the commission of any fraud; but the revocation occurs by the act of God; and although the estate of the principal may not be liable, the agent, acting in good faith, is not liable. *Ginochio v. Porcella*, 3 Bradf. (N. Y.) 277.

3. *White v. Madison*, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481. For authorities holding

generally that there is an implied undertaking by the professed agent that he has the authority he professes to have, see *Lewis v. Nicholson*, 18 Q. B. 503, 83 E. C. L. 503; *Collen v. Wright*, 7 El. & Bl. 313, 90 E. C. L. 313; *Noe v. Gregory*, 7 Daly (N. Y.) 283; *Taylor v. Nostrand*, 134 N. Y. 108, *affirming* (Supreme Ct.) 35 N. Y. St. Rep. 332; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218.

4. *England.*—*Randell v. Trimen*, 18 C. B. 792, 86 E. C. L. 792; *Firbank v. Humphreys*, 18 Q. B. Div. 60; *Collen v. Wright*, 7 El. & Bl. 312, 90 E. C. L. 312; *In re National Coffee Palace Co.*, 24 Ch. Div. 367.

Connecticut.—*Taylor v. Shelton*, 30 Conn. 122.

Illinois.—*Hancock v. Yunker*, 83 Ill. 208.

Maine.—*Noyes v. Loring*, 55 Me. 411; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25.

Massachusetts.—*Abbey v. Chase*, 6 Cush. (Mass.) 56; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Bartlett v. Tucker*, 104 Mass. 341, 6 Am. Rep. 240; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen (Mass.) 338.

Minnesota.—*Skaaraas v. Finnegan*, 32 Minn. 107; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145.

Missouri.—*Byars v. Doore*, 20 Mo. 284.

Nebraska.—*Cole v. O'Brien*, 34 Neb. 68.

New Jersey.—*Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178.

North Carolina.—*Russell v. Koonce*, 104 N. Car. 237; *Delius v. Cawthorn*, 2 Dev. (N. Car.) 90.

Ohio.—*Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218.

Wisconsin.—*McCurdy v. Rogers*, 21 Wis. 204.

5. *St. Peter's Episcopal Church v. Varian*, 28 Barb. (N. Y.) 650. But, as held in this case, in order to fix and enforce this personal liability, it must appear that the party sought to be charged signed as agent—that is, pro-

be liable upon the contract itself, and compelled personally to answer or perform it as if it were his own.¹ But by the weight of authority the agent is not liable upon the contract unless it contains apt words to bind him personally,² for the reason that it is not the contract of the principal, as the assumed

fessed to act for another—and that such act was without authority.

1. *Indiana*.—Terwilliger v. Murphy, 104 Ind. 32.

Iowa.—Andrews v. Tedford, 37 Iowa 314.

Louisiana.—In *Richie v. Bass*, 15 La. Ann. 668 (construing §§ 2979 and 2982 of the La. Civ. Code), the assumed agent is held personally responsible in the precise terms of the contract. To same effect see *Hewitt v. Roubeshush*, 24 La. Ann. 254; *Levy v. Lane*, 38 La. Ann. 252.

Michigan.—Solomon v. Penoyar, 89 Mich. 11.

Minnesota.—Rollins v. Phelps, 5 Minn. 463, distinguishing *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502, on the ground that in the latter case the defendants were public agents.

New Jersey.—Bay v. Cook, 22 N. J. L. 343.

New York.—Dusenbury v. Ellis, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Palmer v. Stephens*, 1 Den. (N. Y.) 480; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *White v. Skinner*, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; *Plumb v. Milk*, 19 Barb. (N. Y.) 74; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Feeter v. Heath*, 11 Wend. (N. Y.) 477.

With the exception of the last two cases, the contract was in writing and signed by the party sought to be charged as agent for another.

In *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200, these cases are considered as somewhat anomalous, and difficult to reconcile with the theory of contracts. And in *Walker v. State Bank*, 9 N. Y. 582, affirming 13 Barb. (N. Y.) 636, it was held that the rule was necessarily limited to written contracts where the agent has subscribed his own name as well as his principal's, and the liability of the agent was established by striking out the signature, which was made without authority. In *White v. Madison*, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481, the court, by Selden, J., says: "If it were necessary * * * to decide the question whether, as a general principle, one entering into a contract in the name of another, without authority, is to be himself holden as a party to the contract, I should hesitate to affirm such a principle;" and adds that "if the act of the agent were fraudulent an action for the deceit would lie, but it would be a concurrent remedy with an action on the warranty." To the same effect see *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381, affirmed 57 N. Y. 331; *Dung v. Parker*, 52 N. Y. 494, reversing 3 Daly (N. Y.) 89, and *Noe v. Gregory*, 7 Daly (N. Y.) 283. In the latter case it is held that if there is fraud the action should be for deceit; if not, on the breach of warranty of authority.

In the case of *Hegeman v. Johnson*, 35

Barb. (N. Y.) 200, the authorities are reviewed, and a distinction adopted between cases that were founded on an executed contract and those that were merely executory, in which latter cases the agent could not be made liable on the contract personally.

In *Hall v. Crandall*, 29 Cal. 568, 89 Am. Dec. 64, the court, by Sanderson, J., said: "Those cases which hold that the agent may be sued upon the contract itself treat all matter which the contract contains in relation to the principal as surplusage, which is in effect to make a new contract for the parties concerned instead of construing the one which they themselves have made." It is further held that the weight of authority is as indicated in the text.

2. As stated in *Randell v. Trimen*, 18 C. B. 793, 86 E. C. L. 793, agents "cannot be sued upon the contracts which they have entered into without authority on behalf of their assumed principals unless they can be shown to be themselves principals."

California.—Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64; *Senter v. Monroe*, 77 Cal. 347; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231.

Connecticut.—Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; *Taylor v. Shelton*, 30 Conn. 122.

Illinois.—Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293; *Neufeld v. Beidler*, 37 Ill. App. 34; *Hancock v. Yunker*, 83 Ill. 208.

Indiana.—Pitman v. Kintner, 5 Blackf. (Ind.) 251, 33 Am. Dec. 469. But see *Terwilliger v. Murphy*, 104 Ind. 32, where it is held that where one person assumes to act as agent of another, but without authority to do so, he makes himself personally liable as a principal in the transaction.

Maine.—Stetson v. Patten, 2 Me. 358, 11 Am. Dec. 111; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25.

Massachusetts.—Abbey v. Chase, 6 Cush. (Mass.) 56; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Bartlett v. Tucker*, 104 Mass. 341, 6 Am. Rep. 240.

Nebraska.—Cole v. O'Brien, 34 Neb. 68.

New Hampshire.—Woods v. Dennett, 9 N. H. 55; *Pettingill v. McGregor*, 12 N. H. 191; *Weare v. Gove*, 44 N. H. 196; *Moor v. Wilson*, 26 N. H. 332.

New York.—White v. Madison, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481; *Dung v. Parker*, 52 N. Y. 494, reversing 3 Daly (N. Y.) 89; *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381, affirmed 57 N. Y. 331; *Noe v. Gregory*, 7 Daly (N. Y.) 283.

North Carolina.—Delius v. Cawthorn, 2 Dev. (N. Car.) 90.

Ohio.—Farmers' Co-operative Trust Co. v. Floyd, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218.

Washington.—McReavy v. Eshelman, 4 Wash. 760.

Wisconsin.—McCurdy v. Rogers, 21 Wis. 199.

agent has no power to bind him, and it is not the contract of the agent, for in making it he did not attempt to bind himself.¹

b. FOR MONEY PAID TO AGENT—(1) In General.—Where money has been paid to an agent for his principal, under such circumstances that it may

1. *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Noyes v. Loring*, 55 Me. 411.

Illustrations.—In *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146, A subscribed a promissory note, and added to his signature "agent for B." He acted without authority from B, and it was held that A was liable only in a special action on the case.

But in *Coffman v. Harrison*, 24 Mo. 524, where a bill was signed "A, agent for B," A, acting without authority, was held to be bound by the contract. Likewise in *Sage v. Sherman, Hill & D. Supp.* (N. Y.) 147, an agent signing "attorney for A B" was held liable on the note.

In *DeWitt v. Walton*, 9 N. Y. 571, a note in the language "I promise to pay" was signed by the agent with the words "agent for the Churchman," and the agent was held as maker of the note, but, as intimated in *Chase v. Pattberg*, 12 Daly (N. Y.) 171, the words "I promise to pay" controlled the decision. See *supra*, this title, *Manner of Execution of Authority*.

Rejecting Part of Contract Not Binding Agent.

—If a contract is entered into by one who assumes to act as the agent of another, but who has not the requisite authority, the contract may be stripped of what the agent had no right to put there, and if it still contains "apt words" to charge him, he is bound to the performance of the contract. *Byars v. Doores*, 20 Mo. 284; *Woodes v. Dennett*, 9 N. H. 55; *Pettingill v. McGregor*, 12 N. H. 191; *Weare v. Gove*, 44 N. H. 196; *Moor v. Wilson*, 26 N. H. 332; *Savage v. Rix*, 9 N. H. 263.

Liability of Attorney in Fact.—Where one as agent and attorney in fact for another executes a note binding his principal, the agent is not liable on the note, even if he had no authority from the principal to make the note; his liability, if any, is in tort for the wrong done, or, waiving the tort, for money loaned. *Lander v. Castro*, 43 Cal. 497.

When Question for Court—When Question for Jury.—When the contract is written, the question is for the court; when it is not written, the question is for the jury. *Collen v. Wright*, 7 El. & Bl. 313, 90 E. C. L. 313.

When Agent Receives Consideration.—When an assumed agent receives the consideration on a contract, an implied promise to pay arises on which an action may be maintained. *Russell v. Koonce*, 104 N. Car. 237.

Burden of Proof.—Where an agent is sued upon a contract which he has made without authority, he can exonerate himself from personal liability only by showing his authority to bind those for whom he has undertaken to act. It is not the plaintiff's duty to show that the assumed agent had no authority, but the duty of the latter to affirmatively show that he had authority. *Gillaspie v. Wesson*, 7 Port. (Ala.) 454, 31 Am. Dec. 715; *Frankland v. Johnson*, 147 Ill. 520; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

In *Clark v. Foster*, 8 Vt. 98, it is held that the plaintiff need show no more than an assumption to act without authority, "and that the *onus probandi* lies on the defendant to rebut the presumption of fraud."

But see *Noe v. Gregory*, 7 Daly (N. Y.) 283, where it is held that after it appears that the defendant assumed to act as agent for a third person the burden of proof is not thereby cast on the defendant to show that he had actual authority to so act, but is upon the plaintiff to show that he did not have such authority.

Measure of Damages.—The damages must be measured, not by the contract, but by the injury resulting from the agent's want of power. *Taylor v. Nostrand*, 134 N. Y. 108, *affirming* (Supreme Ct.) 35 N. Y. St. Rep. 332; *White v. Madison*, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481. See also *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 33 Am. & Eng. Corp. Cas. 218, where it is held that the measure of damages is the loss sustained by the other contracting party by reason of his not having the valid contract which the agent assumed to make. To the same effect see *Simons v. Patchett*, 7 El. & Bl. 568, 90 E. C. L. 568; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231.

In the case of money paid to one acting as the agent of another without authority, which has not been paid over to the principal, the amount paid would be the measure of damages which in this case could be recovered in an action for money had and received. *Jefts v. York*, 10 Cush. (Mass.) 392; *Senter v. Monroe*, 77 Cal. 347; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231.

It seems that if special damages should be incurred in consequence of the agent's failure to bind his principal, such as the costs of an unsuccessful action against the principal to enforce the contract, they may be recovered. *White v. Madison*, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481. But in *Pow v. Davis*, 1 B. & S. 220, 101 E. C. L. 220, the right to recover costs was denied where a person entering into possession of lands under a lease from an agent acting without authority, but *bona fide*, was ejected by the owner.

Assuming Authority to Sell Lands—Damages.

—Where an agent assumes authority to make a contract for the sale of lands for the owner, the injured party may recover damages for the loss of improvements made *bona fide* under the contract. *Skaaras v. Finnegan*, 32 Minn. 107, 31 Minn. 48.

Assumed Authority to Sell Goods—Damages.

—In such a case the measure of damages is the difference between the contract price and what they are worth at the time delivery is to be made. *Parker v. Knox*, 60 Hun (N. Y.) 550.

When Action Solely on Warranty.—The measure of damages is the same as in any other action for a breach of warranty. *In re National Coffee Palace Co.*, 24 Ch. Div. 371.

be recovered back from the latter, the agent is liable as a principal so long as he stands in his original position and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it.¹

(2) *When Paid under Mistake.*—When money is paid voluntarily and by mistake to an agent as such, and he has turned it over to his principal, the agent incurs no responsibility; but if, before paying it over, he learns of the mistake and is notified not to pay it over, he is personally liable.²

When Agency Undisclosed.—If a person receiving money, though an agent in fact, does not disclose his agency to the party making the payment, there is no presumed consent or direction that he pay over, and payment to his principal will be no defense.³

1. *La Farge v. Kneeland*, 7 Cow. (N. Y.) 456. See also *Buller v. Harrison*, Cowp. 565; *Cox v. Prentice*, 3 M. & S. 348; *Frye v. Lockwood*, 4 Cow. (N. Y.) 454; *Metcalf v. Denson*, 4 Baxt. (Tenn.) 565.

As to the liability of public officers and agents for money paid to them, see, generally, the title PUBLIC OFFICERS.

2. *England.*—*Buller v. Harrison*, Cowp. 565; *Cox v. Prentice*, 3 M. & S. 348; *Sadler v. Evans*, 4 Burr. 1984.

United States.—*Elliott v. Swartwout*, 10 Pet. (U. S.) 154; *Penhallow v. Doane*, 3 Dall. (U. S.) 87; *Wallis v. Shelly*, 30 Fed. Rep. 747.

Alabama.—*Thompson v. Stickney*, 6 Ala. 579; *Upchurch v. Norsworthy*, 15 Ala. 705.

Delaware.—*Griffith v. Johnson*, 2 Harr. (Del.) 177.

Georgia.—*Law v. Nunn*, 3 Ga. 90; *McDonald v. Napier*, 14 Ga. 89.

Illinois.—*Smith v. Binder*, 75 Ill. 492.

Kentucky.—*Pool v. Adkisson*, 1 Dana (Ky.) 110. See also *Sinking Fund Com'rs v. Theobald*, 17 B. Mon. (Ky.) 459.

Massachusetts.—*Cabot v. Shaw*, 148 Mass. 459; *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86; *Jefts v. York*, 10 Cush. (Mass.) 392, 12 Cush. (Mass.) 196. See also *Fowler v. Shearer*, 7 Mass. 14.

Michigan.—*Granger v. Hathaway*, 17 Mich. 500. See also *Bailey v. Cornell*, 66 Mich. 107.

Minnesota.—*Shepard v. Sherin*, 43 Minn. 382.

Mississippi.—*O'Connor v. Clopton*, 60 Miss. 349.

New York.—*La Farge v. Kneeland*, 7 Cow. (N. Y.) 456; *Mowatt v. McLelan*, 1 Wend. (N. Y.) 174; *Hearsey v. Pruyn*, 7 Johns. (N. Y.) 179; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 578. See also *Carter v. Stork* (Supreme Ct.), 44 N. Y. St. Rep. 467; *Colvin v. Holbrook*, 2 N. Y. 126.

Vermont.—*Gray v. Otis*, 11 Vt. 628.

See, generally, the titles MISTAKE and PAYMENT.

For authorities holding that when the agent has paid over to his principal he is not liable, see, in addition to the above, *U. S. v. Pinover*, 3 Fed. Rep. 305; *Ashley v. Jennings*, 48 Mo. App. 142; *National Park Bank v. Seaboard Bank*, 44 Hun (N. Y.) 49; *Bixby v. Drexel*, 56 How. Pr. (N. Y. C. Pl.) 478; *Duffy v. Buchanan*, 1 Paige (N. Y.) 453; *Frye v. Lockwood*, 4 Cow. (N. Y.) 456; *Cos-*

tigan v. Newland, 12 Barb. (N. Y.) 456; *Hobensack v. Hallman*, 17 Pa. St. 154; *Metcalf v. Denson*, 4 Baxt. (Tenn.) 565.

When Consideration Fails.—Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it subsequently turns out that such purchase avails the purchaser nothing, no action will lie against the agent. *Engels v. Heatly*, 5 Cal. 135.

Sufficiency of Notice.—"The notice of the mistake, and requirement not to pay to the principal, need not be formal. The rule that, if he pays over without notice, he is not liable, is for the agent's protection; and, to deprive him of the protection, the notice to him should be sufficient to apprise him what the mistake is, and that by reason of it the party paying it to him intends to reclaim it." *Gillfillan, C.J.*, in *Shepard v. Sherin*, 43 Minn. 383.

Who may Give Notice.—The notice must be given by one having some interest or authority. *Shepard v. Sherin*, 43 Minn. 383.

Settlement between Principal and Agent.—When the account between the principal and agent has been settled and closed, the agent is discharged. *Mowatt v. McLelan*, 1 Wend. (N. Y.) 174.

But when the account remains open, and no other change of circumstances has taken place, the agent will not be relieved. *Buller v. Harrison*, Cowp. 566; *Cox v. Prentice*, 3 M. & S. 345; *Mowatt v. McLelan*, 1 Wend. (N. Y.) 174.

No Presumption as to Payment Over.—In an action against an agent by one who has paid money to him for his principal, when it is shown that the money was paid to the agent, it will not be presumed, there being no proof on the subject, that the agent has paid the money over to his principal. *Shipherd v. Underwood*, 55 Ill. 475.

3. *Newall v. Tomlinson*, L. R. 6 C. P. 405; *U. S. v. Pinover*, 3 Fed. Rep. 309; *Smith v. Kelly*, 43 Mich. 390; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Evans on Agency* (2d ed.) 369; *Mechem on Agency*, § 563.

Payment under Mistake of Law.—In case of a voluntary payment under mere mistake of law no action will lie to recover back the money, as the construction of the law is open to both parties, and each is presumed to know it. *Elliott v. Swartwout*, 10 Pet. (U. S.) 137. See the titles MISTAKE; PAYMENT.

(3) *When Money is Illegally Received.*—When money is illegally demanded and received by an agent, from a third person, by compulsion or otherwise, the agent cannot exonerate himself from personal responsibility by paying it over to his principal.¹

c. *IN TORT*—(1) *For Nonfeasance and Misfeasance—Distinctions Made.*—In determining the liability of an agent to third persons for damage resulting from his conduct as agent, a distinction is usually drawn between those cases in which the injury complained of is the result of mere nonfeasance or omission of duty on the part of the agent in the course of his employment, where such default does not amount to misfeasance, and those in which the injury arises from some act of misfeasance or positive wrong on his part.²

Agent Not Liable for Nonfeasance.—With reference to the former class of cases, the established doctrine is that the agent's liability is solely to his principal, there being no privity between him and third persons, but only between him and his principal. Hence, as to all such negligences and omissions of duty, the agent is not liable to third persons, but the general maxim *respondet superior* applies.³

Money Properly Paid to Agent—Not Liable.—Where money is properly paid to an agent, the party ultimately entitled can recover only from the principal; so where the party claims the money in affirmance of the right of the agent to receive it for his principal, he can sue only the principal, and not the agent. *Costigan v. Newland*, 12 Barb. (N. Y.) 456. See also *Shipherd v. Underwood*, 55 Ill. 475; *Colvin v. Holbrook*, 2 N. Y. 126; *Hobensack v. Hallman*, 17 Pa. St. 154.

1. *Shipherd v. Underwood*, 55 Ill. 475; *Moore v. Shields*, 121 Ind. 267; *Seidel v. Peckworth*, 10 S. & R. (Pa.) 442; *Metcalf v. Denson*, 4 Baxt. (Tenn.) 565; *Larkin v. Hapgood*, 56 Vt. 597; *Wright v. Eaton*, 7 Wis. 595. See also *U. S. v. Pinover*, 3 Fed. Rep. 309; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Law v. Nunn*, 3 Ga. 90; *Frye v. Lockwood*, 4 Cow. (N. Y.) 454.

In *U. S. v. Pinover*, 3 Fed. Rep. 309, Choate, D.J., says: "If the agent acts in bad faith, or with knowledge of his principal's want of right to receive the money, or is himself a party to an illegal exaction of the money, or is not authorized by his assumed principal to act for him, as where his power of attorney is a forgery, payment of the money over will be no defense."

Notice Not to Pay Over Unnecessary.—In case of a compulsory payment to an agent, when not made expressly for the use of the principal to charge the agent, notice to him not to pay over is unnecessary. *Snowdon v. Davis*, 1 Taunt. 359; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

2. *Nonfeasance and Misfeasance Distinguished.*—Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all. *Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225. Under some circumstances the omission of an act which one ought to do may amount to a positive misfeasance. *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308; *Horner v. Lawrence*, 37 N. J. L.

46. See notes *infra*, and also the titles MISFEASANCE and NEGLIGENCE.

3. *Agent Not Liable for Nonperformance.*—*Lane v. Cotton*, 12 Mod. 472; *Carey v. Rochereau*, 16 Fed. Rep. 87; *Reid v. Humber*, 49 Ga. 207; *Dean v. Brock*, 11 Ind. App. 507, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 406; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Brown Paper Co. v. Dean*, 123 Mass. 207; *Feltus v. Swan*, 62 Miss. 415; *Bissell v. Roden*, 34 Mo. 63, 84 Am. Dec. 71; *Denny v. Manhattan Co.*, 2 Den. (N. Y.) 115, 5 Den. (N. Y.) 639; *Colvin v. Holbrook*, 2 N. Y. 126; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Mitchell v. Durham*, 2 Dev. (N. Car.) 538; *Henshaw v. Noble*, 7 Ohio St. 226; *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278. See also *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735; *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47; *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225.

For liability of principal for both nonfeasance and misfeasance of his agent see *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Principal to Third Parties*. For the liability of agents in full control see the titles CONTRACTORS and MASTER AND SERVANT.

Lane v. Cotton, 12 Mod. 472, is the leading case on this point and is repeatedly cited as sustaining the proposition stated in the text; but it seems that the question of the agent's liability did not directly arise, the question before the court being whether an action lay against the postmaster-general for the loss of a letter delivered to the postal clerk and lost from the office, and it was held that the postmaster-general was not liable.

Agent's Nonliability for Acts of Omission Explained.—In an action to hold agents liable to third parties for injury sustained in consequence of an alleged dereliction of duty, or nonfeasance on their part in failing to keep premises in their charge in good repair, it was held that the agents were not liable. *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456. In delivering the opinion of

Agent Liable for Misfeasance.—Where the injury results, not from mere nonfeasance or omission of duty by the agent, but from his positive misfeasance,¹

the court *Bermudez, C.J.*, said: "Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either by his negligence, in respect to duties imposed by law upon him in common with all other men. An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, *as agent*, be subject to any obligations toward third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible. The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrongdoing, therefore in an act, *directly* injures a stranger, then such stranger can recover from the agent damages for the injury."

Illustrations — Agent's Nonfeasance. — The agent of a cotton factor is not liable to a third person for loss resulting from his failure to communicate to his principal the directions of such third person as to the sale of cotton shipped by him to the factor. *Reid v. Humber*, 49 Ga. 207.

An agent operating a mill for the benefit of the owner is not liable for damage caused by back water from a permanent dam, the height or structure of which was not changed by him and the damage not resulting from any act of his. *Brown Paper Co. v. Dean*, 123 Mass. 267.

Malice Immaterial—Mississippi.—An agent is liable to no one except his principal for damage resulting from an omission or neglect of duty in respect to the business of his agency, even though such omission be with a malicious intent to injure a third person, and have that effect. Thus in an action brought by the owner of a plantation for damage resulting from the failure of the agent in charge of an adjoining plantation to keep open a drain which it was his duty to keep open, it was held that the agent was not liable, and the fact that he acted maliciously in neglecting and refusing to keep open the drain was immaterial. *Feltus v. Swan*, 62 Miss. 415. But see *infra*, this section, *In Tort—For Fraud and Malice*.

1. Agent Liable for Misfeasance—England.—*Perkins v. Smith*, 1 Wils. 328; *Lysley v. Clarke*, 14 Eng. L. & Eq. 510.

California.—*Brownell v. Fisher*, 57 Cal. 150.

Connecticut.—*Bennett v. Ives*, 30 Conn. 329.

Illinois.—*Johnson v. Barber*, 10 Ill. 425, 50

Am. Dec. 416; *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504.

Indiana.—*McNaughton v. Elkhart*, 85 Ind. 384; *Berghoff v. McDonald*, 87 Ind. 549; *Block v. Haseltine*, 3 Ind. App. 491; *Blue v. Briggs* (Ind. App., 1895), 39 N. E. Rep. 885.

Kentucky.—*Martin v. Louisville, etc., R. Co.*, 95 Ky. 612.

Maine.—*Richardson v. Kimball*, 28 Me. 463.

Massachusetts.—*Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741; *Higginson v. York*, 5 Mass. 341; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

Missouri.—*Harriman v. Stowe*, 57 Mo. 93; *Buis v. Cook*, 60 Mo. 391; *Peckham v. Lindell Glass Co.*, 9 Mo. App. 459; *Martin v. Benoist*, 20 Mo. App. 262.

New Jersey.—*Horner v. Lawrence*, 37 N. J. L. 46.

New York.—*Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47. But see *Phinney v. Phinney*, 17 How. Pr. (N. Y. Supreme Ct.) 197.

Tennessee.—*Erwin v. Davenport*, 9 Heisk. (Tenn.) 44.

Texas.—*Baker v. Wasson*, 53 Tex. 150.

Wisconsin.—*Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225.

See also *Farebrother v. Ansley*, 1 Campb. 343; *Lane v. Cotton*, 12 Mod. 472; *Cary v. Webster*, 1 Stra. 480; *Hills v. Ross*, 3 Dall. (U. S.) 331; *Gravett v. Mugge*, 89 Ill. 218; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Draper v. Arnold*, 12 Mass. 449; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Chapel v. Smith*, 80 Mich. 100; *Lottman v. Barnett*, 62 Mo. 159; *Hardrop v. Gallagher*, 2 E. D. Smith (N. Y.) 523; *Bliss v. Schaub*, 48 Barb. (N. Y.) 339; *Henshaw v. Noble*, 7 Ohio St. 226; *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338; *Hindson v. Markle* (Pa., 1895), 33 Atl. Rep. 74; *Roberts v. State*, 7 Coldw. (Tenn.) 359; *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278.

In Torts the Relation of Principal and Agent does Not Exist; they are all wrongdoers, and may be sued jointly or separately; and the liability of each and all does not cease until payment has been made or satisfaction rendered. *Berghoff v. McDonald*, 87 Ind. 549. See also *supra*, this title, *Delegation—Delegation of Authority by Principal*.

Illustrations.—Where the surveyor of a highway broke open a gate, under an order from the highway board, who erroneously supposed that the gate was across a public highway, it was held that the surveyor was personally liable for the trespass, and the fact that he was bound to obey the order of the board was no defense. *Mill v. Hawker*, L. R. 10 Exch. 92.

An agent who has rendered himself liable for a false imprisonment in commencing suits on behalf of his principal cannot defend himself on the ground that he was acting under instructions from his principal. *Josselyn v. McAllister*, 22 Mich. 300.

or where, according to the better authority, it results from such an omission of duty or act of negligence on the part of the agent as partakes of the char-

An agent employed to collect debts for a firm has no right to apply money in his hands to the payment of debts of an individual partner, even though directed to do so by the partner himself; and if he does so apply it he will be personally liable to creditors of the firm who are injured thereby. *Dwight v. Simon*, 4 La. Ann. 490.

An agent of a trustee who deals fraudulently with the trust estate for his own benefit may be treated as a trustee by construction, and as such held accountable to the *cestui que trust*. *Lehmann v. Rothbarth*, 111 Ill. 185.

Conversion of Goods.—The defendant in an action for the conversion of goods cannot relieve himself from responsibility by showing that he acted as agent for another. *Perkins v. Smith*, 1 Wils. 328; *Parker v. Godin*, 2 Stra. 813; *Gaines v. Briggs*, 9 Ark. 46; *Webb v. Winter*, 1 Cal. 417; *Warder, etc., Co. v. Harris*, 81 Iowa 153; *Barnhart v. Ford*, 37 Kan. 520; *Pool v. Adkisson*, 1 Dana (Ky.) 110; *McPartland v. Read*, 11 Allen (Mass.) 231; *Edgerly v. Whalan*, 106 Mass. 307; *Thompson v. McLean* (Supreme Ct.), 10 N. Y. Supp. 411; *Thorpe v. Burling*, 11 Johns. (N. Y.) 285. See also *Pearson v. Graham*, 6 Ad. & El. 899, 33 E. C. L. 239; *Hudmon v. DuBose*, 85 Ala. 446; *Berghoff v. McDonald*, 87 Ind. 549; *Doty v. Hawkins*, 6 N. H. 247, 25 Am. Dec. 459; *Farrar v. Chauffetete*, 5 Den. (N. Y.) 527; *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; *Berry v. Vantries*, 12 S. & R. (Pa.) 89; *Bacon v. Sondley*, 3 Strobb. (S. Car.) 542, 51 Am. Dec. 646. See also *infra*, page 1135, note 1, and the titles **CONVERSION**; **TROVER**.

A Sewing-machine Agent who, in exchange for a new machine, takes from a married woman a sewing machine and a sum of money both belonging to her husband, is personally liable to the husband for the conversion of the machine. *Rice v. Yocum*, 155 Pa. St. 538.

A Cotton Factor who sells the crop of a tenant under circumstances which would reasonably apprise him of the landlord's lien for rent will be liable to the latter for the conversion of the crop. *Merchants', etc., Bank v. Meyer*, 56 Ark. 499. See also *Ledoux v. Anderson*, 2 La. Ann. 558; *Ledoux v. Cooper*, 2 La. Ann. 586.

Freight Agent.—Where a freight agent refused to deliver freight to the consignee until certain charges had been paid, having no other interest in the goods than as an agent of the railroad company, it was held that an action of replevin would not lie against the agent for the recovery of the goods. *McDougall v. Travis*, 24 Hun (N. Y.) 590. See the title **REPLEVIN**.

Conversion by Principal.—The agent of a bailee is not liable for a conversion by his principal in which he did not actually participate. *McLennan v. Lemen* (Minn., 1894), 59 N. W. Rep. 628.

Agent's Refusal to Deliver in Accordance with Contract Made with Principal.—Where an agent illegally refuses to deliver goods sent by his

principal to him for others, upon a contract for their sale and delivery made with the principal, the remedy is by action against the principal, and not against the agent. *Bradford v. Eastburn*, 2 Wash. (U. S.) 219. See also *Stephens v. Bacon*, 7 N. J. L. 1.

Directors of a Corporation, whether regarded as its agents or its elements, are responsible to third parties for their misconduct. *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255.

In an action for personal injuries caused by the explosion of fireworks which were being set off in a public street in front of a building where the meeting of a political club was being held, it was held that the president of the club at whose direction the display was made was liable, notwithstanding the fact that he was acting as the agent of the other members. *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578. See the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.

Public Officers who are guilty of direct misfeasances or positive wrongs to third persons in the discharge of their official functions incur the same personal liability as private agents. *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44. But see *White v. Phillipston*, 10 Met. (Mass.) 108; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428, *reversing* 15 Johns. (N. Y.) 250. See also *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62, and the title **PUBLIC OFFICERS**.

Illegal Act.—A principal cannot confer upon his agent authority to commit an act prohibited by law, and in such cases the agent is liable as principal. *Swaggard v. Hancock*, 25 Mo. App. 596.

An agent who elects to obey an order to do an illegal act cannot escape the consequences by shifting the liability to the principal. *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Duluth v. Mallett*, 43 Minn. 204; *Elmore v. Brooks*, 6 Heisk. (Tenn.) 49. See also *Bennett v. Bayes*, 5 H. & N. 391, and *supra*, this title, *Delegation—Delegation of Authority by Principal*.

Where the mates of a ship, acting under the unjustifiable command of the captain, assisted in committing an assault upon a seaman, it was held in an action brought by the seaman that they were liable for damages. *Brown v. Howard*, 14 Johns. (N. Y.) 119.

Doing Business without License.—A person who sells liquor or transacts other business without a license where a license is required cannot escape liability by showing that he acted as agent for another. *Winter v. State*, 30 Ala. 22; *Temple v. Sumner*, 51 Miss. 13, 24 Am. Rep. 615; *Isbell v. State*, 13 Mo. 86; *Hays v. State*, 13 Mo. 246; *State v. Bryant*, 14 Mo. 340; *Wason v. Underhill*, 2 N. H. 505. See also the title **INTOXICATING LIQUORS**.

Disobedience of Instructions No Defense.—An agent cannot relieve himself from responsibility for his wrongful act by showing that he acted contrary to the instructions of his principals. *Starkweather v. Benjamin*, 32 Mich. 305.

acter of a misfeasance,¹ the agent is personally liable to third persons, the

Agent Not Liable for Continuance of Nuisance; Former Recovery.—Where an action was brought against an incorporated company for erecting buildings on the plaintiff's land, and judgment was recovered, and subsequently an action of trespass was brought against the agents of the company who had constructed the buildings, for damages for their construction and for the continuance of the nuisance, it was held that the former recovery was a bar to any claim for damages, and that the agents were not liable for the continuance of the nuisance. *Lyman v. Dorr*, 1 Aik. (Vt.) 217. See also *Chapel v. Smith*, 80 Mich. 100.

But a person maintaining a public nuisance cannot relieve himself from liability by showing that he was an agent for another. *Reg. v. Brewster*, 8 U. C. C. P. 208. See also *Reg. v. Osler*, 32 U. C. Q. B. 324.

Third Person Ignorant of Agency.—In an action for damages brought by a workman for an injury resulting from the negligence of the defendant in furnishing him with a defective chain, it was held that the fact that the defendant was the agent of a third person was immaterial if that fact was unknown to the plaintiff until after his right of action had accrued. *Malone v. Morton*, 84 Mo. 436.

The agent is not responsible for misfeasance unless an action would lie against his principal. *Strong v. Colter*, 13 Minn. 82.

Negligence of Employees.—It has been held that an agent is not responsible for the negligence of persons employed by him in the service of his principal. *Stone v. Cartwright*, 6 T. R. 411. But see *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71. And see titles CONTRACTORS; MASTER AND SERVANT, for a full discussion of this branch of the subject.

1. *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Campbell v. Portland Sugar Co.*, 62 Me. 562, 16 Am. Rep. 503; *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308; *Horner v. Lawrence*, 37 N. J. L. 46.

Agent's Liability for Negligence.—In an action for personal injuries caused by the falling of a brick from a wall in course of construction, where the evidence showed that the defendant, who was superintending the work as agent of the contractors, was guilty of negligence in failing to provide scaffolding to prevent bricks from falling to the ground, it was held that the defendant was liable. *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala., 1894), 16 So. Rep. 620. In delivering the opinion of the court Coleman, J., said: "The defendant Thompson invokes the doctrine that an agent or servant is not liable for a mere omission or nonfeasance. The rule is stated as contended for in *Story, Ag.*, § 308, and in *Story, Cont.*, § 171, and there are numerous decisions which fully sustain the text. There are courts of high authority which hold differently. Our attention has not been called to any decision of the question in this state, and, in declaring the law which shall govern, we have carefully considered both lines of decisions. The principle upon which the rule is founded, as declared

by *Story*, is that there is no privity between the servant or agent and third persons, but the privity exists only between him and the master or principal. This relation of privity is that from which arises the maxim *respondet superior*. The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of misfeasance and nonfeasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury. We think the better rule declared in *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504 [quoting from this case and from *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, and *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503]. * * * The rule is broadly stated in 14 AM. AND ENG. ENCYC. OF LAW [1st ed.] 814. We might cite other decisions if deemed necessary. We hold that the mere relation of agency does not exempt a person from liability for any injury to third persons, resulting from his neglect of duty, for which he would otherwise be liable." See also *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

Failure to Repair.—It has been held by some courts that an agent having charge of real estate, and whose duty it is to make all necessary repairs, is not guilty of misfeasance in neglecting to keep the premises in repair, and is not liable for injuries sustained by third persons by reason of his neglect. *Dean v. Brock*, 11 Ind. App. 507; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456. Compare *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503. See also title HIGHWAYS.

Where the agents of a manufacturing corporation had the charge and management of a wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair, but allowed the covering to become old, worn, and insecure, so that a stranger fell through a hole therein and was injured, it was held that the agents were responsible to the injured person equally with their principals. *Campbell v. Portland Sugar Co.*, 62 Me. 562, 16 Am. Rep. 503.

Where an agent undertook to build a trap-door, but did the work so negligently that a stranger fell through and was injured, it was

actual perpetrator of the positive wrong not being permitted to relieve himself from liability by showing that the wrong was done while he was acting in the course of his employment as agent for another. In all such cases he is personally liable, whether he did the wrong intentionally or ignorantly by the authority of his principal; for a principal cannot confer on his agent any authority to commit a tort upon the rights or property of another.¹

(2) *For Fraud and Malice*.—An agent will be held personally liable to third persons for all damages sustained by them in consequence of any fraudulent

held that he was liable to the injured party. *Harriman v. Stowe*, 57 Mo. 93.

The engineer who conducts a train of cars upon a railroad, and a fireman who is hired by him and has charge of the brake under his direction, are both agents of the railroad company, and they and the company are all responsible, either jointly or severally, for an injury resulting from negligence in conducting the train. *Suydam v. Moore*, 8 Barb. (N. Y.) 358. See also *Martin v. Louisville, etc., R. Co.*, 95 Ky. 612.

1. *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47. See also *Higginson v. York*, 5 Mass. 341.

Conversion.—An agent who wrongfully disposes of the goods of another is liable in trover for the conversion, although acting innocently and in behalf of and under the direction of his principal. *Stephens v. Elwall*, 4 M. & S. 259, cited in 14 M. & W. 270; *Hollins v. Fowler*, L. R. 7 H. L. 757, affirming L. R. 7 Q. B. 616; *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Permyer v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110; *Allen v. Hartfield*, 76 Ill. 358; *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581; *McPheters v. Page*, 83 Me. 234, 23 Am. St. Rep. 772; *Coles v. Clark*, 3 Cush. (Mass.) 399; *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495; *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324; *Bercich v. Marye*, 9 Nev. 312; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452. See also *Williams v. Wall*, 60 Mo. 318; *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; and *supra*, this title, *Delegation—Delegation of Authority by Principal*; and *supra*, this section, note 1, page 1133.

Where a clerk, acting innocently under unavoidable ignorance and for his principal's benefit, received the goods of another from an agent of his principal and delivered them to the principal, it was held that he was guilty of a conversion, and liable in trover to the party injured. *Stephens v. Elwall*, 4 M. & S. 259, cited in 14 M. & W. 270. In delivering the opinion of the court Lord Ellenborough, C. J., said: "A person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case."

Compare *Leuthold v. Fairchild*, 35 Minn. 99, in which it is held that an agent who, acting solely for his principal, and by his direction, and without knowing of any wrong, or being

guilty of gross negligence in not knowing of it, disposes of, or assists the principal in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property. To the same effect see the early *Virginia* case *Travis v. Claiborne*, 5 Munf. (Va.) 435, decided on the authority of *Mires v. Solebay*, 2 Mod. 242; and see also *Berry v. Vantries*, 12 S. & R. (Pa.) 89. See the titles *CONVERSION*; *TROVER*.

An Auctioneer who, as agent for one person, innocently sells the property of another, is liable to the true owner for the conversion. *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495. See the title *AUCTIONEERS*.

Sale of Mortgaged Property.—An absolute sale of property mortgaged by a valid deed, which has been duly acknowledged and filed for record, made by any one acting as agent of the mortgagor in exclusion or defiance of the rights of the mortgagee, is a conversion for which such agent is liable to the mortgagee, though the sale is made in good faith, and without actual notice of the mortgage. *Marks v. Robinson*, 82 Ala. 69; *Merchants', etc., Bank v. Meyer*, 56 Ark. 499; *Brown v. James H. Campbell Co.*, 44 Kan. 237; *Coles v. Clark*, 3 Cush. (Mass.) 399; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452. See also *Best Brewing Co. v. Pillsbury, etc., Elevator Co.*, 5 Dakota 62.

2. **Agent Liable for Fraud**.—*Arnot v. Biscoe*, 1 Ves. 95; *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255; *Allen v. Hartfield*, 76 Ill. 358; *Reed v. Peterson*, 91 Ill. 288; *Moore v. Shields*, 121 Ind. 267; *Maichen v. Clay*, 62 Iowa 452; *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Weber v. Weber*, 47 Mich. 569; *Clark v. Lovering*, 37 Minn. 120; *Hamlin v. Abell*, 120 Mo. 188; *Hecker v. DeGroot*, 15 How. Pr. (N. Y. Supreme Ct.) 314; *Gutchess v. Whiting*, 46 Barb. (N. Y.) 139; *Carpenter v. Lee*, 5 Verg. (Tenn.) 265; *Caulkins v. Gas-Light Co.*, 85 Tenn. 683, 4 Am. St. Rep. 786; *Baker v. Wasson*, 53 Tex. 151; *Mann v. McVey*, 3 W. Va. 232; *Wright v. Eaton*, 7 Wis. 595. See also *Cullen v. Thomson*, 4 Macq. H. L. Cas. 441, 9 Jur. N. S. 85; *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *Stainbank v. Fernley*, 9 Sim. 556; *Seddon v. Connell*, 10 Sim. 86; *Lewis v. Equitable Mortg. Co.*, 94 Ga. 572; *Norris v. Kipp*, 74 Iowa 444; *Comstock v. Ames*, 1 Abb. App. Dec. (N. Y.) 411.

Where a principal sent barley to his agent to sell for him, advising him that it was new barley, and the agent sold it for seed barley, for which purpose, not being new, it was useless, and the purchaser having sued the prin-

or malicious¹ acts committed by him on behalf of his principal, and in an action against the agent for fraud the fact that he derived no personal profit or benefit therefrom is immaterial.²

False Representations of Agency.—One who falsely represents himself to be the agent of another is liable in an action on the case to those who are injured by his misrepresentations.³

2. Of Principal to Third Parties—*a. LIABILITY CIVILLY—(1) Agent's Acts Generally.*—It may be stated as a general rule, that where the relation of principal and agent legally exists the principal will be liable to third persons for all acts of an agent in his behalf,⁴ where they were committed in the course and within the scope of the agency,⁵ or where, if not duly authorized, they were

principal and failed to recover, brought an action against the agent for fraud, it was held that the agent was liable as having acted *ultra vires* and having made himself principal in the fraud. *Gutchess v. Whiting*, 46 Barb. (N. Y.) 139.

Fraud on Agent's Creditors.—Where an agent purchases in the name of his principal goods which he is not authorized to purchase, intending thereby to defraud his creditors and prevent them from levying on his goods, unless the transaction be ratified by the principal, the goods so purchased are liable to levy and sale for the debts of the agent. *White v. Cooper*, 3 Pa. St. 130.

An agreement by which goods are placed in the hands of an insolvent agent to be sold, with the understanding that he is to pay to his principal the invoice price thereof and retain the overplus for himself, is not fraudulent, and the agent does not thereby acquire such an interest in the goods as to render them the subject of levy and sale. *M'Cullough v. Porter*, 4 W. & S. (Pa.) 177, 39 Am. Dec. 68.

Harmless Deceit.—The purchaser of land from a real-estate agent has no cause of action against him for misrepresentations or concealments, where such purchaser is not injured thereby; and the fact that the agent receives a greater compensation than is ordinarily paid is immaterial. *Baker v. Brown*, 82 Cal. 64.

Unintentional Concealment.—An agent employed to collect money on a draft is not guilty of a fraudulent concealment for merely failing to disclose a material fact in relation to the transaction, he being ignorant of the fact that the payee is not already acquainted with the same. *Johnson v. Bank of North America*, 5 Robt. (N. Y.) 554.

Property Conveyed to Principal—Agent Not Chargeable as Trustee.—Where an insolvent merchant, through the co-operation of the president of a bank in falsely representing him to be solvent, was enabled to make unusually large credit purchases of goods, and soon thereafter conveyed all his assets to the bank in consideration of a small sum in cash and a large debt to it, and the president, who acted for the bank, knew that the purpose of the debtor throughout was to defraud his other creditors, it is error, upon a bill filed by the other creditors to set aside the conveyance to the bank, to render a decree against the president of the bank personally, inasmuch as he, in the transaction, repre-

sented the bank, and it, not he, is chargeable as trustee. *Delta Bank v. Oliver-Finnie Grocery Co.*, 70 Miss. 868.

1. Malice.—An agent who, through malice, illegally sues out a writ in the name of his principal is liable in an action on the case for damages resulting therefrom. *Warfield v. Campbell*, 35 Ala. 349. See also *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; *Wallace v. Finberg*, 46 Tex. 35; and title ATTORNEY AND CLIENT.

Compare, as to liability of agent for malicious acts, *Feltus v. Swan*, 62 Miss. 415.

2. Caulkins v. Gas-Light Co., 85 Tenn. 683, 4 Am. St. Rep. 786. See also *Moore v. Shields*, 121 Ind. 267; *Wright v. Eaton*, 7 Wis. 595; *Larkin v. Hapgood*, 56 Vt. 597.

3. Liability for False Representations of Agency.—*Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Noyes v. Loring*, 55 Me. 408; *Teale v. Otis*, 66 Me. 329.

The doctrine stated in the text is also recognized in the following cases: *Jenkins v. Hutchinson*, 13 Q. B. 744, 66 E. C. L. 744; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *McHenry v. Duffield*, 7 Blackf. (Ind.) 41; *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *Jefts v. York*, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen (Mass.) 338; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Noe v. Gregory*, 7 Daly (N. Y.) 283. See also, generally, *Smout v. Ilbery*, 10 M. & W. 1; *Randell v. Trimen*, 18 C. B. 786, 86 E. C. L. 786; *Lander v. Castro*, 43 Cal. 497; *Nussbaum v. Heilbron*, 63 Ga. 312; *Potts v. Henderson*, 2 Ind. 327; *Wright v. Baldwin*, 51 Mo. 269; *People v. Johnson*, 12 Johns. (N. Y.) 292; *Doctor v. Gilmartin*, 14 Daly (N. Y.) 206. And see *supra*, this section, *On Contract—When Acting with No Authority*.

4. As to the nature of the acts with regard to which the relation of principal and agent may exist, see *supra*, this title, *Delegation—Delegation of Authority by Principal*.

For the nonliability of the principal where the agent has adverse interest see *supra*, this title, *Duties and Liabilities Inter Se—Of Agent to Principal*.

For the nonliability of the principal where the agent is secretly acting for another see *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Third Parties to Principal*.

5. For a discussion of general and special

subsequently ratified by the principal,¹ with a full knowledge of the circumstances of the case.

(2) *On Contract*—(a) *Liability of Principal Generally*.—The rule holding the principal liable to third persons for acts of an agent applies to all contracts made by an agent acting as such within the scope of his authority.²

agents, secret instructions, and what constitutes authority, as affecting the liability of the principal to third parties, see *supra*, this title, *Nature and Extent of Authority*.

1. For the liability of the principal where he has ratified the acts of an agent, see *infra*, this title, *Ratification*.

2. *United States*.—Minor *v. Mechanics' Bank*, 1 Pet. (U. S.) 70; Lucas *v. Brooks*, 18 Wall. (U. S.) 436; Kirkpatrick *v. Adams*, 20 Fed. Rep. 287; Alderson *v. Crocker*, 28 Fed. Rep. 745; Interstate Tel. Co. *v. Baltimore, etc.*, Tel. Co., 51 Fed. Rep. 49; Lane *v. U. S.*, 27 Ct. of Cl. 85; Post *v. Pearson*, 108 U. S. 418.

Alabama.—Shrimpton *v. Brice* (Ala., 1894), 15 So. Rep. 452; Waring *v. Henry*, 30 Ala. 721; Herring *v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4.

Arkansas.—Russell *v. Cady*, 15 Ark. 540.

California.—Jones *v. Marks*, 47 Cal. 242; Salmon *v. Hoffman*, 2 Cal. 138, 56 Am. Dec. 322; Hellmann *v. Potter*, 6 Cal. 13; Davidson *v. Dallas*, 8 Cal. 227; Fogel *v. Schmalz*, 92 Cal. 472.

Connecticut.—Frost *v. Wood*, 2 Conn. 23; Hudson *v. Whiting*, 17 Conn. 487; Litchfield *v. Church*, 29 Conn. 137; Jones *v. Warner*, 11 Conn. 40; Starkweather *v. Goodman*, 48 Conn. 101, 40 Am. Rep. 152.

Georgia.—City Bank *v. Kent*, 57 Ga. 283.

Illinois.—Wider *v. Branch*, 12 Ill. App. 358; Marckle *v. Haskins*, 27 Ill. 382; Denman *v. Bloomer*, 11 Ill. 177; Las Vegas First Nat. Bank *v. Oberne*, 121 Ill. 25.

Indiana.—Evansville, etc., R. Co. *v. Spellbring*, 1 Ind. App. 167; Blackwell *v. Ketcham*, 53 Ind. 184; Croy *v. Busenbark*, 72 Ind. 48.

Iowa.—Whiting *v. Western Stage Co.*, 20 Iowa 554; Markham *v. Burlington Ins. Co.*, 69 Iowa 515.

Kansas.—Lewis *v. Bourbon County*, 12 Kan. 186.

Kentucky.—Vanada *v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Taylor *v. French*, 1 Bibb (Ky.) 52.

Louisiana.—Pellerin *v. Dungan*, 2 La. Ann. 383; Mackey *v. De Blanc*, 12 La. Ann. 377; Destrehan *v. Louisiana Cypress Lumber Co.*, 45 La. Ann. 920; Kock *v. Bringier*, 19 La. Ann. 183; Hills *v. Upton*, 24 La. Ann. 427; Wallace *v. Lamson*, 20 La. Ann. 243; Eskridge *v. Farrar*, 34 La. Ann. 709.

Maine.—Dyer *v. Burnham*, 25 Me. 9; Bryant *v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

Maryland.—Keener *v. Harrod*, 2 Md. 63, 56 Am. Dec. 706; Swatara R. Co. *v. Brune*, 6 Gill (Md.) 41; Lamm *v. Port Deposit Homestead Assoc.*, 49 Md. 233, 33 Am. Rep. 246.

Massachusetts.—Caswell *v. Cross*, 120 Mass. 545; Rich *v. Crandall*, 142 Mass. 117; Washington Bank *v. Lewis*, 22 Pick. (Mass.) 24; Schendel *v. Stevenson*, 153 Mass. 351.

Michigan.—Atlas Min. Co. *v. Johnston*, 23 Mich. 36; Thompson *v. Clay*, 60 Mich. 627.

Minnesota.—Adamson *v. Wiggins*, 45 Minn. 448.

Mississippi.—Fox *v. Fisk*, 6 How. (Miss.) 328; Carter *v. Taylor*, 6 Smed. & M. (Miss.) 367.

Missouri.—DeBaun *v. Atchison*, 14 Mo. 543; Tate *v. Evans*, 7 Mo. 419; Bensberg *v. Harris*, 46 Mo. App. 404.

New Hampshire.—Clement *v. Leverett*, 12 N. H. 317; Boston Iron Co. *v. Hale*, 8 N. H. 363; Rice *v. Lyndeborough Glass Co.*, 60 N. H. 195.

New Jersey.—Kirkpatrick *v. Winans*, 16 N. J. Eq. 407; Camden Safe Deposit, etc., Co. *v. Abbott*, 44 N. J. L. 257.

New York.—Mills *v. Shult*, 2 E. D. Smith (N. Y.) 139; North River Bank *v. Aymar*, 3 Hill (N. Y.) 262; Durando *v. New York, etc., Steam-Boat Co. (City Ct.)*, 4 N. Y. Supp. 386; Mechanics' Bank *v. New York, etc., R. Co.*, 13 N. Y. 599; Thurman *v. Wells*, 18 Barb. (N. Y.) 500; Malcolm *v. Lyon (C. Pl.)*, 19 N. Y. Supp. 210; Martin *v. Farnsworth*, 49 N. Y. 555; Dollfus *v. Frosch*, 1 Den. (N. Y.) 367; Tradesmen's Bank *v. Astor*, 11 Wend. (N. Y.) 87; Marsh *v. Gilbert*, 4 Thomp. & C. (N. Y.) 259; Hunt *v. Chapin*, 6 Lans. (N. Y.) 139; Cornelius *v. Reiser (City Ct.)*, 11 N. Y. Supp. 904; Cooper *v. Townsend (Supreme Ct.)*, 13 N. Y. Supp. 760; Rich *v. Monroe*, 14 Barb. (N. Y.) 602; Munn *v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Westfield Bank *v. Cornen*, 37 N. Y. 320, 93 Am. Dec. 573; Tucker *v. Woolsey*, 64 Barb. (N. Y.) 142; Schley *v. Fryer*, 100 N. Y. 71.

North Carolina.—Lane *v. Dudley*, 2 Murph. (N. Car.) 119, 5 Am. Dec. 523; Williamson *v. Canaday*, 3 Ired. (N. Car.) 349; Patton *v. Brittain*, 10 Ired. (N. Car.) 8; Hunter *v. Jameson*, 6 Ired. (N. Car.) 252; Ruffin *v. Mebane*, 6 Ired. Eq. (N. Car.) 507.

Ohio.—Lambert *v. Carroll*, Wright (Ohio) 108; Aetna Ins. Co. *v. Church*, 21 Ohio St. 492.

Pennsylvania.—McKillip *v. McIlhenny*, 2 Watts (Pa.) 466; Mundorff *v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531; Mercier *v. Lachenmeyer*, 1 Pa. Leg. Gaz. Rep. 279; Hagerstown Bank *v. Loudon Sav. Fund Soc.*, 3 Grant's Cas. (Pa.) 135; Finlay *v. Stewart*, 56 Pa. St. 183.

Tennessee.—Ezell *v. Franklin*, 2 Sneed (Tenn.) 236; Gordon *v. Buchanan*, 5 Yerg. (Tenn.) 71.

Texas.—Bruce *v. Washington*, 80 Tex. 368; Morgan *v. Darragh*, 39 Tex. 171; Bennett *v. Virginia Ranch, etc., Co.*, 1 Tex. Civ. App. 321.

Vermont.—Alexander *v. Rutland Bank*, 24 Vt. 222; Frisbie *v. Felton*, 65 Vt. 138; Emery *v. Thompson*, 27 Vt. 614.

Virginia.—Yerby *v. Grigsby*, 9 Leigh (Va.) 387; Hopkins *v. Blane*, 1 Call (Va.) 361.

(b) **Where the Other Party has Elected to Hold Agent Liable**—*aa. IN GENERAL.*—An exception to the above rule exists where the other contracting party, with a full knowledge of the circumstances of the case and with freedom of choice, has clearly elected to give an exclusive credit to the agent.¹

bb. REQUISITES OF AN ELECTION A QUESTION FOR THE JURY.—In general, the question of election will depend upon the particular circumstances of the case, and can be only properly dealt with as a question of fact for the jury, subject to the direction of the court.²

West Virginia.—Spence v. Rose, 28 W. Va. 333.

Wisconsin.—Dodge v. McDonnell, 14 Wis. 553.

For minute discussion of the question of agent's authority as determining the principal's liability, see *supra*, this title, *Nature and Extent of Authority*.

1. **Disclosed Principal**—*England.*—Kymer v. Suwercroft, 1 Campb. 109; Addison v. Gaudesqui, 4 Taunt. 579.

United States.—Pope v. Meadow Spring Distilling Co., 20 Fed. Rep. 35.

Conn. eticut.—Jones v. Aetna Ins. Co., 14 Conn. 501.

Delaware.—Bate v. Burr, 4 Harr. (Del.) 130; Bush v. Devine, 5 Harr. (Del.) 375.

Maryland.—Henderson v. Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434.

Massachusetts.—Paige v. Stone, 10 Met. (Mass.) 160, 43 Am. Dec. 420; James v. Bixby, 11 Mass. 34; French v. Price, 24 Pick. (Mass.) 13; Silver v. Jordan, 136 Mass. 319.

Missouri.—Schepflin v. Dessar, 20 Mo. App. 569.

New York.—Hyde v. Paige, 9 Barb. (N. Y.) 150; Cheever v. Smith, 15 Johns. (N. Y.) 276; Ranken v. Deforest, 18 Barb. (N. Y.) 143; *In re Bateman* (C. Pl.), 28 N. Y. Supp. 36; McMounies v. Mackay, 39 Barb. (N. Y.) 561; Meeker v. Claghorn, 44 N. Y. 349.

Tennessee.—Ahrens v. Cobb, 9 Humph. (Tenn.) 643.

Compare Keller v. Singleton, 69 Ga. 703.

Vendor Electing to Sell on Agent's Credit.—Where goods were purchased of the plaintiffs by C., as agent for the defendants, he informing the plaintiffs of his agency at the time, and offering them the liability of the defendants, but the plaintiffs preferred to take C.'s own note, and agreed that he should be the purchaser, and C. gave his note accordingly, and the goods were charged to him on the books of the plaintiffs, it was held that the defendants were not liable for the value of the goods. Ranken v. Deforest, 18 Barb. (N. Y.) 143. See also Pope v. Meadow Spring Distilling Co., 20 Fed. Rep. 37; Wilkins v. Reed, 6 Me. 220, 19 Am. Dec. 211; Chapman v. Durant, 10 Mass. 47; Tudor v. Whiting, 12 Mass. 212; Green v. Tanner, 8 Met. (Mass.) 411; Paige v. Stone, 10 Met. (Mass.) 160, 43 Am. Dec. 420; Ames Packing, etc., Co. v. Tucker, 8 Mo. App. 95; Hyde v. Paige, 9 Barb. (N. Y.) 150.

Extended Credit Given to Agent.—In Rathbone v. Tucker, 15 Wend. (N. Y.) 498, it was held that the taking of a note of an agent at an extended credit, for goods furnished for the benefit of the principal, does not discharge the principal, unless it is affirmatively shown,

on his part, that on the supposition that the debt was paid, or that the personal responsibility of the agent was accepted for it, the principal dealt otherwise with the agent than he would have done had the note not been taken and the extended credit given.

Undisclosed Principal.—The rule stated in the text applies not only to cases where the principal was disclosed at the time of the transaction with the agent, but it applies equally where an undisclosed principal is afterwards discovered. Paterson v. Gandasequi, 15 East 62; Curtis v. Williamson, L. R. 10 Q. B. 57; Woodford v. Hamilton, 139 Ind. 481, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 415, 416; Kingsley v. Davis, 104 Mass. 178; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Rowan v. Buttman, 1 Daly (N. Y.) 412. See Calder v. Dobell, L. R. 6 C. P. 486; Hyde v. Wolf, 4 La. 234, 23 Am. Dec. 484; Sessions v. Block, 40 Mo. App. 569.

In Paterson v. Gandasequi, 15 East 62, Lord Ellenborough, C.J., said: "The law has been settled by a variety of cases, that an unknown principal when discovered is liable on the contracts which his agent makes for him; but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal by knowingly making the agent his debtor."

2. Calder v. Dobell, L. R. 6 C. P. 486; Curtis v. Williamson, L. R. 10 Q. B. 57; Raymond v. Crown, etc., Mills, 2 Met. (Mass.) 319; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Maryland Coal Co. v. Edwards, 4 Hun (N. Y.) 432. See Ferry v. Moore, 18 Ill. App. 141.

A Question for the Jury.—In Maryland Coal Co. v. Edwards, 4 Hun (N. Y.) 432, it was held that where property is sold to an agent who, at the time, discloses the name of his principal, and states that the goods may be charged to him or to his principal, and the vendor, not knowing the principal, charges the goods to the agent, it is a question for the jury whether or not such exclusive credit is given as to discharge the principal.

Credit is Presumed to be Given to Principal.—In Meeker v. Claghorn, 44 N. Y. 349, it was held that if the principal for whom goods have been purchased by an agent claims that the credit was given by the vendor exclusively to the agent, he assumes the burden of establishing such fact by clear proof; the natural presumption being in all cases that credit is given to the principal rather than to the agent. See Foster v. Persch, 68 N. Y. 400.

Commencement of Action against Agent.—It has been held that the commencement of a

Fact of Agency and Name of Principal must be Known.—It is well settled, however, that to make an election valid the party electing must know the name of the principal in addition to the fact of agency.¹

cc. WITHIN WHAT TIME THE PARTY MUST ELECT.—The principal will be released from all liability if the right of election is not exercised by the other party within a reasonable time after such principal is discovered.²

(o) Liability of Undisclosed Principal—au. ON SIMPLE CONTRACTS.—It may be stated as a general rule, that where a simple contract is made by a duly authorized agent, without disclosing his principal, and the other contracting party afterwards discovers that the person with whom he dealt was not the principal, he may abandon his right to look to the agent personally, and resort to the principal.³

suit against the agent after the discovery of the principal is not conclusive proof of an election to charge the agent only. *Ferry v. Moore*, 18 Ill. App. 135; *Raymond v. Crown*, etc., *Mills*, 2 Met. (Mass.) 326.

In the case of *Beymer v. Bonsall*, 79 Pa. St. 298, it was held that the principal in such a case could not be discharged short of satisfaction. See *Maple v. Railroad Co.*, 40 Ohio St. 313, 48 Am. Rep. 685. Compare *Priestley v. Fernie*, 3 H. & C. 977.

But in *Kingsley v. Davis*, 104 Mass. 178, it was held that an action prosecuted to judgment was a bar. *Sessions v. Block*, 40 Mo. App. 569.

Subsequent Demands upon Agent.—In *Calder v. Dobell*, L. R. 6 C. P. 486, it was held that demands made upon the agent by a contracting party after the principal had been disclosed did not necessarily amount to an election on the part of the plaintiff to give credit to the agent, and to him only.

Charging Goods to Agent.—In *Guest v. Burlington Opera House Co.*, 14 Iowa 457, it was held that a person having contracted with an agent, knowing him to be such, for the rent of a piano to be used in the principal's business, cannot, by charging the account to the agent, elect to hold him for the rent instead of the principal, and he is not precluded by so charging from asserting the claim against the principal.

Filing Affidavit against Agent.—It has been held that the mere fact of filing an affidavit of proof against the estate of an insolvent agent of an undisclosed principal, after the undisclosed principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor. *Beymer v. Bonsall*, 79 Pa. St. 298.

Foreign Principal.—It has been said that from the custom of trade the usual decisive indication of an exclusive credit is where the creditor knows there is a foreign principal, but makes his charge in account against the principal. *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335; *Paterson v. Gandasequi*, 15 East 62; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618. See *supra*, this title, *Of Agent to Third Parties—When Acting for Foreign Principal*, p. 1121.

A foreign attachment, attaching the debtor's property, but naming an agent as defendant, is not an election by the plaintiff which prevents his following the principal, even though the plaintiff knew of the agency

at the time of issuing the writ. *Glenn v. Davis*, 2 Grant's Cas. (Pa.) 153.

1. *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Jones v. Aetna Ins. Co.*, 14 Conn. 508; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Graham v. Campbell*, 56 Ga. 258; *Thurston v. Mauro*, 1 Greene (Iowa) 231; *Ballister v. Hamilton*, 3 La. Ann. 401; *Raymond v. Crown*, etc., *Mills*, 2 Met. (Mass.) 319; *Bartlett v. Hawley*, 120 Mass. 92; *Carney v. Dennison*, 15 Vt. 400; *Arnold v. Sprague*, 34 Vt. 409. Compare *Green v. Skeel*, 5 Thomp. & C. (N. Y.) 25; *Moore v. McClure*, 8 Hun (N. Y.) 557.

Electing Party must Know Who the Principal is.—In *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335, Lord Tenterden, C.J., in delivering the opinion of the court said: "At the time of the dealing for the goods the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, that he was an agent; but they were not informed who the principal was. They had not therefore at that time the means of making their election. It is true that they might perhaps have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this *** case falls, in substance and effect, within the first proposition which I have mentioned—the case of a person not known to be an agent—and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known."

2. *Smethurst v. Mitchell*, 1 El. & El. 622, 102 E. C. L. 622; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Irvine v. Watson*, 5 Q. B. Div. 102. See *James v. Bixby*, 11 Mass. 34.

3. *Englandd.*—*Smethurst v. Mitchell*, 1 El. & El. 622, 102 E. C. L. 622; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263; *Calder v. Dobell*, L. R. 6 C. P. 486; *Higgins v. Senior*, 8 M. & W. 834; *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335; *Trueman v. Loder*, 11 Ad. & El. 589, 39 E. C. L. 178.

United States.—*Ford v. Williams*, 21 How. (U. S.) 287; *Pope v. Meadow Spring Distilling Co.*, 20 Fed. Rep. 35.

Connecticut.—*Jones v. Aetna Ins. Co.*, 14 Conn. 507; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174.

Contract within Statute of Frauds.—And this he may do even when the contract is in writing, and is such as is required by the statute of frauds to be in writing; for in such case, parol evidence showing that an additional party is liable in no way contradicts the written instrument.¹

Illinois.—*Fishback v. Brown*, 16 Ill. 74; *Koch v. Willi*, 63 Ill. 144.

Kentucky.—*Wilson v. Thompson*, 1 Metc. (Ky.) 126.

Louisiana.—*Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484.

Maine.—*Upton v. Gray*, 2 Me. 373.

Maryland.—*Henderson v. Mayhew*, 2 Gill (Md.) 393, 41 Am. Dec. 434; *Mayhew v. Graham*, 4 Gill (Md.) 339; *York County Bank v. Stein*, 24 Md. 447.

Massachusetts.—*Raymond v. Crown*, etc., Mills, 2 Met. (Mass.) 319; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 566, 66 Am. Dec. 384; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Lerned v. Johns*, 9 Allen (Mass.) 419; *French v. Price*, 24 Pick. (Mass.) 13; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *Lovell v. Williams*, 125 Mass. 439; *Carroll v. St. Johns*, etc., Soc., 125 Mass. 565; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Schendel v. Stevenson*, 153 Mass. 351.

Missouri.—*Richardson v. Farmer*, 36 Mo. 36, 88 Am. Dec. 129.

Nebraska.—*Lamb v. Thompson*, 31 Neb. 448.

New Hampshire.—*Chandler v. Coe*, 54 N. H. 561.

New Jersey.—*Borcherling v. Katz*, 37 N. J. Eq. 150.

New York.—*Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Duvall v. Wood*, 3 Lans. (N. Y.) 489; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Beebe v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; *McMonnies v. Mackay*, 39 Barb. (N. Y.) 561; *Inglehart v. Thousand Island Hotel Co.*, 7 Hun (N. Y.) 547; *McGraw v. Godfrey*, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 397; *Dykers v. Townsend*, 24 N. Y. 57; *Briggs v. Partridge*, 39 N. Y. Super. Ct. 339; *Meeker v. Claghorn*, 44 N. Y. 349; *Coleman v. Elmira First Nat. Bank*, 53 N. Y. 388; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Jessup v. Steurer*, 75 N. Y. 613.

Oregon.—*Du Bois v. Perkins*, 21 Oregon 189.

Pennsylvania.—*Pennsylvania Ins. Co. v. Smith*, 3 Whart. (Pa.) 521; *Hubbert v. Borden*, 6 Whart. (Pa.) 79; *Youghiogeny Iron*, etc., Co. v. Smith, 66 Pa. St. 341.

South Carolina.—*Bacon v. Sondley*, 3 Strobb. (S. Car.) 542, 51 Am. Dec. 646; *Episcopal Church v. Wiley*, 2 Hill Eq. (S. Car.) 584, 30 Am. Dec. 386.

Vermont.—*Coverly v. Braynard*, 28 Vt. 738.

West Virginia.—*Poole v. Rice*, 9 W. Va. 73.

See also *Porter v. Talcott*, 1 Cow. (N. Y.) 359; *Hubbard v. Tenbrook*, 124 Pa. St. 291, 10 Am. St. Rep. 585; *Harper v. Sinclair*, 7 Wash. 372.

Sale to Manager of Hotel as Principal.—A principal is liable for goods sold to his agent, who is in charge of his hotel, though the principal is undisclosed at the time of the sale, and the goods are delivered and charged

to the agent, who is supposed by the seller to be the proprietor of the hotel. *Schendel v. Stevenson*, 153 Mass. 351.

Surety for Agent of Undisclosed Principal.—If an agent borrow money for his principal and procure another to become surety, without disclosing his relation as agent, the principal is answerable to the surety who pays the debt. *Higgins v. Dellinger*, 22 Mo. 397.

Insurance by Agent—Principal's Liability for Premium.—Where insurance is made by an agent, who pays part of the premium, the company may sue the principal for the rest, though the name of the principal did not appear in the original application. *Pennsylvania Ins. Co. v. Smith*, 3 Whart. (Pa.) 521.

Principal Purchasing as Agent.—The real purchaser for his own benefit is undoubtedly liable, notwithstanding he purchased on the credit of another with that person's consent, without disclosing that he himself was the real party. *Coverly v. Braynard*, 28 Vt. 738.

Partners.—The rule that an undisclosed principal is liable for goods purchased by his agent applies to a case where one of several partners purchases goods in his own name for the use of all. And the liability of the remaining partners is not affected by the giving of his individual note by the partner purchasing the goods. *Duvall v. Wood*, 3 Lans. (N. Y.) 489. See *Tomlinson v. Collett*, 3 Blackf. (Ind.) 436; *Huntington v. Knox*, 7 Cush. (Mass.) 374; *Richardson v. Farmer*, 36 Mo. 35, 88 Am. Dec. 129; *Sessums v. Henry*, 38 Tex. 37. See also the title PARTNERSHIP.

Where One Acts for Himself and a Third Person in making a contract for the conveyance of land to plaintiff, and represents that he owns such land, and plaintiff in reliance on such representations deposits money with him to be applied on the purchase price, and he divides such money between himself and the third person, neither of them having any title to the land, and not conveying it to the plaintiff within the time specified, they are jointly liable for the amount deposited, though the plaintiff was not cognizant of the third person's connection with the transaction at the time of the contract. *Dashaway Assoc. v. Rogers*, 79 Cal. 211.

1. Charging Undisclosed Principal on Written Contract—England.—*Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 Ad. & El. 589, 39 E. C. L. 178.

United States.—*Ford v. Williams*, 21 How. (U. S.) 289; *Exchange Bank v. Hubbard*, 62 Fed. Rep. 112.

Kansas.—*Butler v. Kaulback*, 8 Kan. 669.

Massachusetts.—*Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561, 66 Am. Dec. 384; *Huntington v. Knox*, 7 Cush. (Mass.) 374; *Lerned v. Johns*, 9 Allen (Mass.) 419; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54; *Negus v. Simpson*, 99 Mass. 388; *National L. Ins. Co. v. Allen*, 116 Mass. 398; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314.

bb. ON CONTRACTS UNDER SEAL—Common-law Rule.—It has been laid down as a common-law doctrine, that when a contract is made by an instrument under seal, no one but a party to the instrument is liable to be sued upon it, and therefore if made by an agent or attorney, it must be in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.¹

Modifications of Common-law Rule.—Some of the later decisions, however, qualify this doctrine by holding that when a sealed contract has been executed in such form that it is in law the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of the performance by the other party and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the instrument will be binding on the principal.²

cc. ON NEGOTIABLE CONTRACTS.—Where a person is not a party to a negotiable note or bill of exchange he cannot be charged upon proof that the ostensible party signed or indorsed as his agent, since persons dealing with negotiable contracts are presumed to take them on the credit of the parties whose names appear upon them.³

New Hampshire.—Chandler *v.* Coe, 54 N. H. 561.

New Jersey.—Borcherling *v.* Katz, 37 N. J. Eq. 150.

New York.—Gates *v.* Brower, 9 N. Y. 205, 59 Am. Dec. 530; Barry *v.* Ransom, 12 N. Y. 464; Dykers *v.* Townsend, 24 N. Y. 57; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 394; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617.

Pennsylvania.—Hubbert *v.* Borden, 6 Whart. (Pa.) 79.

Virginia.—Waddill *v.* Seebree, 88 Va. 1012.

In Higgins *v.* Senior, 8 M. & W. 844, Baron Parke said such evidence does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another by reason that the act of the agent is the act of the principal.

In Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314, Holmes, J., said: "Whatever the original merits of the rule, that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."

See the title PAROL EVIDENCE.

1. Clarke *v.* Courtney, 5 Pet. (U. S.) 350; Machesney *v.* Brown, 29 Fed. Rep. 145; Merchants' Bank *v.* Central Bank, 1 Ga. 418; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Ellwell *v.* Shaw, 16 Mass. 42, 8 Am. Dec. 126; Fullam *v.* West Brookfield, 9 Allen (Mass.) 1; Squier *v.* Norris, 1 Lans. (N. Y.) 284; Townsend *v.* Hubbard, 4 Hill (N. Y.) 351; Stone *v.* Wood, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; Guyon *v.* Lewis, 7 Wend. (N. Y.) 26; Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; Spencer *v.* Field, 10 Wend. (N. Y.) 88; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617. See also *supra*, this title, *Manner of Execution of Authority*.

Illustrations.—The rule that an unnamed

principal is bound by the contract of his agent does not apply to a lease under seal. The fact that a lessee takes a lease for an undisclosed principal, but in his own name, will not render such principal liable for the rent. Borcherling *v.* Katz, 37 N. J. Eq. 150. And this has been held to be true though the fact of agency is recited, and it extrinsically appears that the lessee acted as agent, and though the principal occupies the premises without assignment of the lease and furnishes money to pay the rent. Kiersted *v.* Orange, etc., R. Co., 69 N. Y. 343.

2. Moore *v.* Granby Min., etc., Co., 80 Mo. 86; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60; Evans *v.* Wells, 22 Wend. (N. Y.) 341; Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617. See also *supra*, this title, *Manner of Execution of Authority*.

3. *England.*—Siffkin *v.* Walker, 2 Campb. 308; Nicholson *v.* Ricketts, 2 El. & El. 497, 105 E. C. L. 497; Beckham *v.* Drake, 9 M. & W. 96; *In re* Adanson Fibre Co., L. R. 9 Ch. 635, *overruling* South Carolina Bank *v.* Case, 8 B. & C. 427, 15 E. C. L. 256; Emly *v.* Lye, 15 East 7. *United States.*—Dessau *v.* Bours, 1 McAll. (U. S.) 20.

Colorado.—Heaton *v.* Myers, 4 Colo. 59.

Connecticut.—Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225.

Georgia.—Graham *v.* Campbell, 56 Ga. 258. But see Merchants' Bank *v.* Central Bank, 1 Ga. 418.

Indiana.—Kenyon *v.* Williams, 19 Ind. 45.

Iowa.—Thurston *v.* Mauro, 1 Greene (Iowa) 231.

Massachusetts.—Eastern R. Co. *v.* Benedict, 5 Gray (Mass.) 563, 66 Am. Dec. 384; Slawson *v.* Loring, 5 Allen (Mass.) 342, 81 Am. Dec. 750; British North America Bank *v.* Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390; Brown *v.* Parker, 7 Allen (Mass.) 337; Commercial Ins. Co. *v.* Covell, 8 Met. (Mass.) 442; Stack-

dd. WHERE PRINCIPAL HAS SETTLED WITH AGENT.—It is the prevailing rule in the *United States* that an undisclosed principal will not be liable, when subsequently discovered, if he has *bona fide* paid the agent in the mean time, or has made such change in the state of the accounts between the agent and himself that he would be prejudiced by being made personally liable.¹ But in *England*, and in a few decisions in this country, this rule is limited to those cases in which the principal has been induced to pay the agent, or to alter his account by the conduct or the representations of the other contracting party.²

pole v. Arnold, 11 Mass. 27; *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Bartlett v. Hawley*, 120 Mass. 92.

New York.—*Rochester Bank v. Monteath*, 1 Den. (N. Y.) 405, 43 Am. Dec. 681; *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Rogers v. Coit*, 6 Hill (N. Y.) 322; *Merchants' Bank v. Hayes*, 7 Hun (N. Y.) 530; *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617.

Ohio.—*Anderton v. Shoup*, 17 Ohio St. 125; *Collins v. Buckeye State Ins. Co.*, 17 Ohio St. 215, 93 Am. Dec. 612.

Rhode Island.—*Manufacturers', etc., Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418.

Vermont.—*Arnold v. Sprague*, 34 Vt. 402.

West Virginia.—*Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761.

See also *Fuller v. Hooper*, 3 Gray (Mass.) 341; *Negus v. Simpson*, 99 Mass. 392; *Chandler v. Coe*, 54 N. H. 561; *Early v. Wilkinson*, 9 Gratt. (Va.) 70.

In *Beckham v. Drake*, 9 M. & W. 96, Parke, B., in commenting upon the liability of an undisclosed principal on a contract in writing, said: "The case of bills of exchange is an exception, which stands upon the law merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument, by their name or firm, be made liable to an action upon it."

A **Contrary Doctrine** is supported by the following cases: *Mechanics' Bank v. Columbia Bank*, 5 Wheat. (U. S.) 326; *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366; *Hancock Bank v. Joy*, 41 Me. 568; *Roberts v. Austin*, 5 Whart. (Pa.) 313; *Leeds v. Vail*, 15 Pa. St. 185; *Sharpe v. Bellis*, 61 Pa. St. 69, 100 Am. Dec. 618; *Sessums v. Henry*, 38 Tex. 37.

Thus in *Hancock Bank v. Joy*, 41 Me. 568, it was held that a husband may authorize his wife to indorse or accept bills for him in her own name, and he will thereby be bound as indorser or acceptor. See *Reakert v. Sanford*, 5 W. & S. (Pa.) 164; *Leeds v. Vail*, 15 Pa. St. 185.

1. *Fradley v. Hyland*, 37 Fed. Rep. 49; *Thomas v. Atkinson*, 38 Ind. 248; *Yenni v. Ocean Nat. Bank*, 5 Daly (N. Y.) 432; *Fish v. Wood*, 4 E. D. Smith (N. Y.) 327; *Laing v. Butler*, 37 Hun (N. Y.) 144; *Knapp v. Simon*, 96 N. Y. 284; *Rowan v. Buttman*, 1 Daly (N. Y.) 412. See also *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Ketchum v. Verdell*, 42 Ga. 534; *Emerson v. Patch*, 123 Mass. 541.

2. *Irvine v. Watson*, 5 Q. B. Div. 414; *Horsfall v. Fauntleroy*, 10 B. & C. 755, 21 E. C. L. 160; *Davidson v. Donaldson*, 9 Q. B. Div. 623; *Kymer v. Suwercroft*, 1 Campb. 109; *Heald v. Kenworthy*, 10 Exch. 739; *Smyth v. Anderson*, 7 C. B. 21, 62 E. C. L. 21; *Macfarlane v. Giannacopulo*, 3 H. & N. 860; *York County Bank v. Stein*, 24 Md. 448; *Brown v. Bankers, etc., Tel. Co.*, 30 Md. 39; *Cheever v. Smith*, 15 Johns. (N. Y.) 276. See *Bush v. Devine*, 5 Harr. (Del.) 375; *Ballister v. Hamilton*, 3 La. Ann. 401; *Schepflin v. Dessar*, 20 Mo. App. 570; *Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484. Compare *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335; *Armstrong v. Stokes*, L. R. 7 Q. B. 598.

In *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335, Bayley, J., said: "If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller, should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller, where he had looked to the responsibility of the agent."

In *Kymer v. Suwercroft*, 1 Campb. 109, it was held that, if goods are bought by a broker, the principal is liable to the vendor, if called upon when payment is due, although he has previously paid the price of the goods to the broker; but it is otherwise if the day of payment is allowed to pass by without any demand being made upon the principal.

In *Macfarlane v. Giannacopulo*, 3 H. & N. 860, the plaintiff, the owner of a ship, applied to a broker to effect an insurance on it; the broker signed a policy on behalf of the defendant, an underwriter. The ship was lost, and the plaintiff, having applied to the broker for payment, received from him a credit note. It was usual to pay credit notes at a month from their date. Both at the time of signing the policy and of the adjustment the broker had money of the defendant sufficient to pay the loss. Nearly three months after the credit note was given the broker stopped payment, when the plaintiff applied to the defendant for the amount of the loss. It was held that there was no injury to the defendant by the conduct of the plaintiff, which rendered it unjust to call on him for payment, and therefore the case did not fall within the rule of law mentioned in the text.

But the application of this rule has been limited by the later case of *Heald v. Kenworthy*, 10 Exch. 739, in which Parke, B., said: "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal

(3) *Representations—Admissions.*—The statements, representations, and admissions¹ of an agent, made in the execution and within the scope of an authority delegated to him,² and in reference to business depending at the very time,³ will be binding upon the principal as a part of the *res gestæ*.

(4) *Delivery or Payment to Agent.*—Where goods are delivered⁴ or money is paid⁵ to an authorized agent for his principal, the agent's acceptance of such goods or money is deemed by law to be the acceptance of the principal.

is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by word or conduct, the seller cannot afterwards throw off the mask and sue the principal."

1. For discussion of fraudulent representations of agent, see *infra*, this section, *Liability Civilly—In Tort*.

For discussion of the effect of admissions of an agent generally, see the title *ADMISSIONS*, Vol. I., p. 690.

Admissions, etc.—In *Fairlie v. Hastings*, 10 Ves. Jr. 127, Sir William Grant said: "What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of or the inducement to the agreement; therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation."

2. *Representations of Agent with Authority Delegated.*—*Whilden v. Merchants'*, etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; *Willard v. Buckingham*, 36 Conn. 395; *Franklin Bank v. Pennsylvania*, etc., Steam Nav. Co., 11 Gill & J. (Md.) 33; *Lobbell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358; *Fogg v. Pew*, 10 Gray (Mass.) 409, 71 Am. Dec. 662; *Edwards v. Thomas*, 66 Mo. 468; *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 298; *Stockton v. Demuth*, 7 Watts (Pa.) 39, 32 Am. Dec. 735; *Moore v. Dickinson*, 39 S. Car. 441, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 410. See *Sundry Goods, etc.*, v. U. S., 2 Pet. (U. S.) 358; *Ohio, etc.*, R. Co. v. *Savage*, 38 Ill. App. 148; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Browning v. Hinkle*, 48 Minn. 544.

In *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 298, it was held that the representations of an authorized agent of an insurance company with reference to the time of payment of premium are binding upon the company.

3. *Representations Contemporaneous with Business.*—*Linblom v. Ramsey*, 75 Ill. 246; *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208; *Franklin Bank v. Pennsylvania*, etc., Steam Nav. Co., 11 Gill & J. (Md.) 28; *Brooks v. Jameson*, 55 Mo. 505; *Robinson v. Walton*, 58 Mo. 380; *Edwards v. Thomas*, 66 Mo. 468; *Dick v. Cooper*, 24 Pa. St. 217, 64 Am. Dec. 652; *Mundorff v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531. See *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Sundry Goods, etc.*, v. U. S., 2 Pet. (U. S.) 358; *Browning v. Hinkle*, 48 Minn. 544; *U. S. Express Co. v. Rawson*, 106 Ind. 215.

But this rule does not extend to represen-

tations made after the transaction, though in relation to it. *Franklin Bank v. Pennsylvania*, etc., Steam Nav. Co., 11 Gill & J. (Md.) 33; *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208.

In *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208, Parris, J., said: "Representations made by an agent at the time he is contracting for his principal constitute a part of the contract; as much so as if they had been made by the principal; and a fact stated by an agent in relation to a transaction in which he is then engaged, and while it is in progress, forms a part of that transaction. But what he says at another and a subsequent period cannot be evidence against the principal."

4. *Delivery of Goods to Agent.*—*Mead v. Hamond*, 1 Stra. 505; *Staples v. Alden*, 2 Mod. 309; *Rupp v. Stith*, 33 Ind. 244; *Strong v. Dodds*, 47 Vt. 348. See *Cary v. Webster*, 1 Stra. 480; *Matthews v. Haydon*, 2 Esp. 509.

In *Strong v. Dodds*, 47 Vt. 348, it was held that where the plaintiff's agent sold a bill of goods to the defendant and packed and marked and delivered them to a railroad company, and notified defendant of the fact, the company was agent of the defendant and the delivery to it was a good delivery to the defendant. See also the title *SALES*.

In *Rupp v. Stith*, 33 Ind. 244, it was held that where the principal had sent his agent to receive certain property, with power to exercise his judgment as to the quality of the property, and the agent did exercise his judgment, the principal was bound by the acts of the agent in receiving the property, although some of it proved to be of indifferent quality.

Agent's Receipt for Goods Never Delivered.—It has been held that an agent has no power to bind his principal by receipt for goods as delivered which in fact were never delivered. *Grant v. Norway*, 10 C. B. 665, 70 E. C. L. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Coleman v. Riches*, 16 C. B. 104, 81 E. C. L. 104. See *Dyer v. Girard*, 2 Root (Conn.) 55. Compare *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603.

5. *Payment of Money to Agent.*—*Cook v. Cook*, 28 Ala. 660; *Lumley v. Corbett*, 18 Cal. 494; *Hodnett v. Tatum*, 9 Ga. 70; *Peel v. Shepherd*, 58 Ga. 365; *Howe Mach. Co. v. Ballweg*, 89 Ill. 318; *Ward v. Maccoun*, 3 Ind. 407; *Ulrich v. McCormick*, 66 Ind. 243; *Eclipse Wind Mill Co. v. Thorson*, 46 Iowa 181; *Patten v. Fullerton*, 27 Me. 58; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Dougherty v. Vanderpool*, 35 Miss. 165; *Crane v. Halford*, *Wright (Ohio)* 72; *Williams v. Baldwin*, 7 Vt. 506; *Kasson v. Noltner*, 43 Wis. 651.

As to payments to agents with particular

(5) *Notice to Agent*—(a) *Rule Stated*.—It may be stated as a broad proposition that notice to an agent is, in the contemplation of law, notice to the principal.¹

powers, see *supra*, this title, *Nature and Extent of Authority*.

Tender to Agent.—In *Goodland v. Blewith*, 1 Campb. 477, it was held that a tender of money to an agent authorized to receive payment is a good tender to the creditor himself. See *Cummings v. Putnam*, 19 N. H. 569.

1. *England*.—*Sheldon v. Cox*, Ambbl. 626; *Brotherton v. Hatt*, 2 Vern. 574; *Le Neve v. Le Neve*, 3 Atk. 646.

United States.—*Hough v. Richardson*, 3 Story (U. S.) 659; *Varnum v. Milford*, 4 McLean (U. S.) 93; *Astor v. Wells*, 4 Wheat. (U. S.) 466; *Dickerson v. Matheson*, 50 Fed. Rep. 73.

Alabama.—*Huntsville Branch Bank v. Steele*, 10 Ala. 915; *Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379; *Wiley v. Knight*, 27 Ala. 336; *Smyth v. Oliver*, 31 Ala. 39.

Illinois.—*Doyle v. Teas*, 5 Ill. 250; *Rector v. Rector*, 8 Ill. 119.

Iowa.—*Walker v. Ayres*, 1 Iowa 449; *Warburton v. Lauman*, 2 Greene (Iowa) 424; *Keenan v. Missouri, etc., Mut. Ins. Co.*, 12 Iowa 126; *Jones v. Bamford*, 21 Iowa 217.

Kentucky.—*Fowler v. Halbert*, 4 Bibb (Ky.) 52.

Louisiana.—*Fetter v. Field*, 1 La. Ann. 80; *Kemp v. Rowly*, 2 La. Ann. 320; *Cummings v. Harsabrauch*, 14 La. Ann. 722.

Michigan.—*Emerson v. Atwater*, 7 Mich. 12; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Russell v. Sweezy*, 22 Mich. 238; *Sanford v. Nyman*, 23 Mich. 326; *Terry v. Tuttle*, 24 Mich. 206; *Campau v. Konan*, 39 Mich. 362; *Advertiser, etc., Co. v. Detroit*, 43 Mich. 119; *Taylor v. Young*, 56 Mich. 285; *Macomb v. Wilkinson*, 83 Mich. 486; *Davis v. Kneale*, 97 Mich. 72.

Mississippi.—*Doe v. Ingersoll*, 11 Smed. & M. (Miss.) 249; *Ross v. Houston*, 25 Miss. 591, 59 Am. Dec. 231; *Allen v. Poole*, 54 Miss. 323.

Missouri.—*Meier v. Blume*, 80 Mo. 184; *Hickman v. Green*, 123 Mo. 165; *Hedrick v. Beeler*, 110 Mo. 91.

New Hampshire.—*Hovey v. Blanchard*, 13 N. H. 145; *Marshall v. Columbia Mut. F. Ins. Co.*, 27 N. H. 165; *Patten v. Merchants', etc., Mut. F. Ins. Co.*, 40 N. H. 382.

New York.—*Sutton v. Dillaye*, 3 Barb. (N. Y.) 529; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 137; *Jackson v. Sharp*, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; *Ingalls v. Morgan*, 10 N. Y. 178; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Hier v. Odell*, 18 Hun (N. Y.) 314; *Stephens v. Humphries* (Supreme Ct.), 25 N. Y. Supp. 946.

North Carolina.—*Merril v. Sloan*, 1 Murph. (N. Car.) 121; *Farmer v. Willard*, 71 N. Car. 284; *Cowan v. Withrow*, 111 N. Car. 306.

Pennsylvania.—*Barnes v. McClinton*, 3 P. & W. (Pa.) 67, 23 Am. Dec. 62; *Reed's Appeal*, 34 Pa. St. 207.

Tennessee.—*Nashville, etc., R. Co. v. El-*

liott, 1 Coldw. (Tenn.) 612, 78 Am. Dec. 506; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736.

Vermont.—*Hill v. North*, 34 Vt. 604.

West Virginia.—*Hart v. Sandy*, 39 W. Va. 644, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 419.

Wisconsin.—*Knott v. Tidyman*, 86 Wis. 168; *Fox v. Zimmerman*, 77 Wis. 414, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 419.

If such were not the law, notice might be avoided in every case by the employment of an agent. *Sheldon v. Cox*, Ambbl. 626; *Wiley v. Knight*, 27 Ala. 336; *U. S. Bank v. Davis*, 2 Hill (N. Y.) 461; *Cowan v. Withrow*, 111 N. Car. 310.

Reason of the Rule.—In *Kennedy v. Green*, 3 Myl. & K. 699, Lord Brougham says the reason of the rule is, that the "policy and the safety of the public forbid a person to deny knowledge while he is so dealing as to keep himself ignorant, * * * and yet all the while let his agent know, and himself, perhaps, profit by that knowledge."

Attorneys.—Notice of a fact to an attorney when engaged properly in the business of his client becomes in law notice of such fact to the client. *Jones v. Bamford*, 21 Iowa 217. See also *Walker v. Ayres*, 1 Iowa 449; *Allen v. McCalla*, 25 Iowa 464, 96 Am. Dec. 56; *Haven v. Snow*, 14 Pick. (Mass.) 32; and the title ATTORNEY AND CLIENT.

Agents of Corporations.—The rule holding the principal liable for notice given to an agent applies to agents of corporations as well as to those of other principals.

United States.—*Waynesville Nat. Bank v. Irons*, 8 Fed. Rep. 11.

Alabama.—*Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379.

Connecticut.—*Farmers', etc., Bank v. Payne*, 25 Conn. 449.

Louisiana.—*Factors', etc., Ins. Co. v. Marine Dry Dock, etc., Co.*, 31 La. Ann. 149.

Massachusetts.—*National Security Bank v. Cushman*, 121 Mass. 490.

Michigan.—*Advertiser, etc., Co. v. Detroit*, 43 Mich. 116.

Missouri.—*Merchants' Nat. Bank v. Lovitt*, 114 Mo. 525.

New York.—*Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 128; *Holden v. New York, etc., Bank*, 72 N. Y. 292; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9.

Pennsylvania.—*Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347.

South Carolina.—*Webb v. Graniteville Mfg. Co.*, 11 S. Car. 408, 32 Am. Rep. 479.

Tennessee.—*Nashville, etc., R. Co. v. Elliott*, 1 Coldw. (Tenn.) 612, 78 Am. Dec. 506.

Vermont.—*Hart v. Farmers', etc., Bank*, 33 Vt. 252.

Wisconsin.—*Mihills Mfg. Co. v. Camp*, 49 Wis. 130.

In *Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379, *Stone, C. J.*, said: "As against corporations there are peculiar

When it is Not the Agent's Duty to Communicate Such Knowledge, or when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information.¹

When Agent Acts in His Own Interest.—Another exception to the application of the general rule arises in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the agent acts for himself in his own interest and adversely to that of the principal.²

and urgent reasons for a stringent enforcement of the general rule, that knowledge acquired or notice received by an officer or agent within the scope of the agency is deemed notice to the principal, as 'the corporation cannot see or know anything except by the intelligence of its officers.'" See also *Factors*, etc., *Ins. Co. v. Marine Dry Dock*, etc., Co., 31 La. Ann. 149; *Nashville*, etc., *R. Co. v. Elliott*, 1 Coldw. (Tenn.) 619, 78 Am. Dec. 506; *Hayward v. National Ins. Co.*, 52 Mo. 191, 14 Am. Rep. 400.

Notice to Agent Not Notice to Principal for Purpose of Imputing Malice.—In *Reisan v. Mott*, 42 Minn. 49, 18 Am. St. Rep. 489, it was held that the rule that a principal is affected with notice given to or knowledge possessed by his agent does not warrant a legal imputation of malice in the conduct of a principal merely because of a fact known only to the agent. In this case the court said: "Actual malice implies a wrongful purpose or intent in the mind of the person whose conduct is in question. It is not to be conclusively presumed or legally imputed to him merely because of the mental condition or the knowledge of another person, however related to him."

1. *Harrington v. U. S. (The Distilled Spirits)*, 11 Wall. (U. S.) 367; *Hunter v. Watson*, 12 Cal. 377, 77 Am. Dec. 543. See also *Hood v. Fahnestock*, 8 Watts (Pa.) 489, 34 Am. Dec. 489; *Constant v. Rochester University*, 111 N. Y. 604, 7 Am. St. Rep. 769, 133 N. Y. 640.

Also, it has been held that knowledge acquired by an attorney while acting for one client will not affect another client for whom he is acting at the same time in a different case. *Ford v. French*, 72 Mo. 250.

Where, however, such knowledge was not obtained by the attorney from a former client under professional secrecy, it has been held that a subsequent client will be liable. Thus, if an attorney received notice that the person holding the record title of land is not the real owner but merely a trustee, one who subsequently employs the same attorney to attach and levy upon the land as the property of the trustee, will be affected by the attorney's knowledge of the real state of the title, though not communicated to him. *Hart v. Farmers*, etc., Bank, 33 Vt. 252. See also *Abell v. Howe*, 43 Vt. 403.

For cases holding without qualification that knowledge previously acquired by attorney from former client will not be binding upon subsequent client, see note immediately following.

2. *England*.—*Kennedy v. Green*, 3 Myl. & K. 699; *In re European Bank*, L. R. 5 Ch. 358; *In re Marseilles Extension R. Co.*, L. R. 7 Ch. 161; *Cave v. Cave*, 15 Ch. Div. 639.

United States.—*Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243; *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 65 Fed. Rep. 341.

Alabama.—*Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736.

Iowa.—*Davenport First National Bank v. Gifford*, 47 Iowa 575.

Kansas.—*Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784.

Kentucky.—*Lyne v. Kentucky Bank*, 5 J. J. Marsh. (Ky.) 545.

Massachusetts.—*Frost v. Belmont*, 6 Allen (Mass.) 163; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *National Security Bank v. Cushman*, 121 Mass. 490; *Loring v. Brodie*, 134 Mass. 453; *Dillaway v. Butler*, 135 Mass. 479; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Allen v. South Boston R. Co.*, 150 Mass. 206, 15 Am. St. Rep. 185.

Michigan.—*Stevenson v. Bay City*, 26 Mich. 44; *Gallery v. National Exch. Bank*, 41 Mich. 169, 32 Am. Rep. 149.

Missouri.—*Hickman v. Green*, 123 Mo. 165; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 525.

New Jersey.—*Stratton v. Allen*, 16 N. J. Eq. 229; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; *Hightstown First Nat. Bank v. Christopher*, 40 N. J. L. 435.

Texas.—*Harrington v. McFarland*, 1 Tex. Civ. App. 289.

Wisconsin.—*In re Plankinton Bank*, 87 Wis. 378.

See also *Custer v. Tompkins County Bank*, 9 Pa. St. 27; *Terrell v. Mobile Branch Bank*, 12 Ala. 502.

Illustrations.—One of the recent cases on this point is *Dillaway v. Butler*, 135 Mass. 479. A, to whom B was indebted, advised C to lend money to B on the security of a mortgage of personal property, and acted as C's agent in the transaction. With the money thus obtained B paid A the debt he owed him. Both A and B acted in fraud of the Gen. Stat. c. 118, §§ 89, 91; but C had no knowledge of the fraud. It was held that the knowledge of A was not in law imputable to C, although A had acted for C in the negotiation. See also *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710.

Where the Agent Colludes with a Third Party.—Likewise, where the agent colludes with a third party the rule has no application, it being for the protection of innocent third persons, and not for those who use the agent to further their own frauds upon the principal.¹

Subagent.—It is well settled that notice given to a subagent in the transaction of the business for which the agent was employed has the same effect on the principal as if given to the agent, if the agent has the power to employ a subagent, but not otherwise.²

(b) Must Relate to Business within Scope of Agency.—Notice, however, to bind the principal, must have reference to business in which the agent is engaged by authority of his principal.³ Moreover, it is necessary that the transaction in

Where an officer of a corporation in his private capacity sells land to the corporation, he must be held not to represent them in the transaction so as to charge the corporation with the knowledge he may possess of facts derogatory to the title of the land and which he has not communicated to them. As such he is a stranger to the corporation. *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33.

Reason of the Rule as to Agents Acting in Their Own Interest.—In *Frenkel v. Hudson*, 82 Ala. 162, 60 Am. Rep. 736, Somerville, J., in commenting upon the doctrine in the text, says: "It is based upon the principle that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: first, that he will very likely, in such case, act for himself rather than for his principal; and secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject." For further discussion of this question see *supra*, this title, *Duties and Liabilities Inter Se—Of Agent to Principal*.

In *Allen v. South Boston R. Co.*, 150 Mass. 206, 15 Am. St. Rep. 185, the rule of the law as stated above was held to be the correct one, but the reason of the rule was doubted. In that case the court said: "It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal

cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established." For further discussion of this question see *supra*, this title, *Duties and Liabilities Inter Se—Of Agent to Principal*.

1. *National L. Ins. Co. v. Minch*, 53 N. Y. 144; *Hickman v. Green*, 123 Mo. 165; *Musser v. Hyde*, 2 W. & S. (Pa.) 314. See *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Third Parties to Principal*.

2. *Hoover v. Wise*, 91 U. S. 308; *Union Cent. L. Ins. Co. v. Smith* (Mich., 1895), 63 N. W. Rep. 438; *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273; *Rourke v. Story*, 4 E. D. Smith (N. Y.) 54; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Bates v. American Mortg. Co.*, 37 S. Car. 88; *Smith v. Wilson*, 1 Tex. Civ. App. 115.

3. *Alabama*.—*Huntsville Branch Bank v. Steele*, 10 Ala. 924.

Arkansas.—*Whitehead v. Wells*, 29 Ark. 108.

California.—*Bierce v. Red Bluff Hotel Co.*, 31 Cal. 165.

Connecticut.—*Platt v. Birmingham Axle Co.*, 41 Conn. 255.

Georgia.—*Githens v. Murray*, 92 Ga. 748; *Saulsbury v. Wimberly*, 60 Ga. 78.

Illinois.—*Sterling Bridge Co. v. Baker*, 75 Ill. 140.

Iowa.—*Thomas v. Desney*, 57 Iowa 58.

Kansas.—*Roach v. Karr*, 18 Kan. 529, 26 Am. Rep. 788.

Massachusetts.—*Suit v. Woodhall*, 113 Mass. 394; *Allen v. South Boston R. Co.*, 150 Mass. 206, 15 Am. St. Rep. 185.

Michigan.—*Russell v. Sweezey*, 22 Mich. 235; *Campau v. Konan*, 39 Mich. 362.

Minnesota.—*Jefferson v. Leithhauser* (Minn., 1895), 62 N. W. Rep. 277.

Mississippi.—*Illinois Cent. R. Co. v. Bryant*, 70 Miss. 665.

Missouri.—*Hickman v. Green*, 123 Mo. 165; *Haywood v. National Ins. Co.*, 52 Mo. 181, 14 Am. Rep. 400.

Nebraska.—*Merriam v. Calhoun*, 15 Neb. 569.

New Jersey.—*Sooy v. State*, 41 N. J. L. 394.

New York.—*Champlin v. Laytin*, 6 Paige (N. Y.) 202.

Oregon.—*Pennoyer v. Willis*, 26 Oregon 1.

regard to which notice is given should be finally accomplished by the very

Pennsylvania.—Wilson v. McCullough, 23 Pa. St. 445, 62 Am. Dec. 347.

Tennessee.—Nashville, etc., R. Co. v. Elliott, 1 Coldw. (Tenn.) 618, 78 Am. Dec. 506.

Texas.—Smith v. Wilson, 1 Tex. Civ. App. 115.

West Virginia.—Hart v. Sandy, 39 W. Va. 644, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 419.

Wisconsin.—Congar v. Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164.

Notice must be in Regard to Matter within Scope of Agent's Business—Illustrations.—Where the road or machinery belonging to a railroad company was defective and that fact was known to the engineer, the company was held to have knowledge of the fact. Nashville, etc., R. Co. v. Elliott, 1 Coldw. (Tenn.) 618, 78 Am. Dec. 506.

In Congar v. Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164, it was held that a railroad company was not liable for a mistake made by its agent in Chicago, Illinois, in forwarding goods directed to a point near the line of its road in Iowa (such agents having used due care and diligence) although its agents in Iowa knew the proper route for sending the goods. Dixon, C. J., in giving the opinion in the above case, said: "This seems very clear when we consider the reason and ground upon which this doctrine of constructive notice rests. The principal is chargeable with the knowledge of his agent, because the agent is substituted in his place, and represents him in the particular transaction; and it would seem to be an obvious perversion of the doctrine, and to lead to most injurious results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents not engaged in it, and to whom he had delegated no authority with respect to it, but who were employed by him in other and wholly different departments of his business."

Where the purchase of a tract of land was negotiated by an agent, and the fact that the land was, at the time, adversely held by a party in possession was treated as a circumstance which diminished the value of the vendor's interest, the knowledge of the agent of the adverse possession will be the knowledge of the purchaser, and he, not inquiring of the party in possession as to the title, will not be regarded as a *bona fide* purchaser without notice. Russell v. Swezey, 22 Mich. 236. See Taylor v. Young, 56 Mich. 285; Ross v. Houston, 25 Miss. 591, 59 Am. Dec. 231; Hickman v. Green, 123 Mo. 165; Stephens v. Humphries (Supreme Ct.), 25 N. Y. Supp. 946.

The principal who has funds in the hands of an agent for investment is chargeable with notice to the agent that a note purchased by the latter for his principal is based on an illegal consideration. Macomb v. Wilkinson, 83 Mich. 486.

Where a purchaser employs an attorney simply to examine the title of real estate, notice to the attorney of the pendency of a

suit which may affect the title to the property cannot be imputed to his principal. Trentor v. Pothan, 46 Minn. 298. In this case the court said: "We are of the opinion that, in view of the special and limited purpose for which the intervenor employed this attorney, his knowledge of the pendency of this action cannot be imputed to his principal."

In Sandberg v. Palm, 53 Minn. 252, it was held that knowledge by an agent with authority only to sell land, that a house is building on it, is not knowledge by the owner, for the purpose of creating a mechanic's lien under Laws 1889, ch. 200, § 5.

In Walker v. Hannibal, etc., R. Co., 121 Mo. 575, it was held that notice to a conductor that the baggageman on his train, over whom he has no authority, is in the habit of carrying drills on his car for a line company and putting them off near its quarry, is not notice to the railway company.

Insurance Agent.—Notice to an insurance agent through whom an insurance is effected, of facts materially affecting such insurance, constitutes notice to the insurance company.

United States.—Humphry v. Hartford F. Ins. Co., 15 Blatchf. (U. S.) 504; Putnam v. Commonwealth Ins. Co., 18 Blatchf. (U. S.) 368.

Minnesota.—Brandup v. St. Paul F., etc., Ins. Co., 27 Minn. 393.

Missouri.—Hayward v. National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400.

New Hampshire.—Marshall v. Columbian Mut. F. Ins. Co., 27 N. H. 157; Campbell v. Merchants', etc., Mut. F. Ins. Co., 37 N. H. 35, 72 Am. Dec. 324.

New Jersey.—Schenck v. Mercer County Mut. F. Ins. Co., 24 N. J. L. 448; Williams v. Riley, 34 N. J. Eq. 398.

New York.—Van Schoick v. Niagara F. Ins. Co., 68 N. Y. 434; Bennett v. North British, etc., Ins. Co., 81 N. Y. 273, 37 Am. Rep. 501.

Pennsylvania.—People's Ins. Co. v. Spencer, 53 Pa. St. 353, 91 Am. Dec. 217.

Vermont.—Brink v. Merchants', etc., Ins. Co., 49 Vt. 442.

West Virginia.—Simmons v. West Virginia Ins. Co., 8 W. Va. 476.

Wisconsin.—Beal v. Park F. Ins. Co., 16 Wis. 241, 82 Am. Dec. 719; May v. Buckeye Mut. Ins. Co., 25 Wis. 292, 3 Am. Rep. 76.

See also the title INSURANCE.

President of Corporation.—Notice to the president of a corporation, addressed to him in his official character, as to any matter within his supervision, is notice to the corporation.

Colorado.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 249.

Connecticut.—Smith v. Water Com'rs, 38 Conn. 208.

Louisiana.—Factors', etc., Ins. Co. v. Marine Dry Dock, etc., Co., 31 La. Ann. 149.

Missouri.—Central Nat. Bank v. Levin, 6 Mo. App. 543; Mechanics' Bank v. Schaumburg, 38 Mo. 228.

agent to whom such knowledge is communicated,¹ if he was employed for the express purpose of effecting such transaction.

New York.—*Van Leuvan v. Kingston First Nat. Bank*, 6 Lans. (N. Y.) 373.

South Carolina.—*Webb v. Graniteville Mfg. Co.* 11 S. Car. 396, 32 Am. Rep. 479.

Vermont.—*Porter v. Rutland Bank*, 19 Vt. 410.

Virginia.—*Virginia Bank v. Craig*, 6 Leigh (Va.) 399.

Texas.—*Merchants' Nat. Bank v. McAnulty* (Tex. Civ. App., 1895), 31 S. W. Rep. 1091.

See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

But mere private information, obtained beyond the range of his official functions, will not be deemed notice to the corporation. *Mechanics' Bank v. Schaumburg*, 38 Mo. 244; *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312.

Director of Corporation.—It is well settled that notice regarding any matter upon which a corporation is required to act, communicated to the directors when assembled as a board, is notice to the corporation. *Toll Bridge Co. v. Betsworth*, 30 Conn. 380, *Hightstown First Nat. Bank v. Christopher*, 40 N. J. L. 435; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 127; *Pittsburgh Bank v. Whitehead*, 10 Watts (Pa.) 397; *In re Marseilles Extensor R. Co.*, 7 Ch. 161. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

It has been held that notice given the board that certain stock is held by a party as trustee, is binding upon a succeeding board or upon the corporation. *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299.

Also, knowledge of a material fact, imparted by a director of a bank to the board at a regular meeting, is notice to the bank. *Farmers', etc., Bank v. Payne*, 25 Conn. 444; *Pittsburgh Bank v. Whitehead*, 10 Watts (Pa.) 397. See *Custer v. Tompkins County Bank*, 9 Pa. St. 27.

Also, it has been held that where a director having private notice acts as a member of the board, upon the very matter affected thereby, the corporation will be charged with such notice, whether it be communicated to the board or not.

Massachusetts.—*National Security Bank v. Cushman*, 121 Mass. 490; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710.

Missouri.—*Clerks' Sav. Bank v. Thomas*, 2 Mo. App. 367.

New York.—*U. S. Bank v. Davis*, 2 Hill (N. Y.) 451.

Tennessee.—*Union Bank v. Campbell*, 4 Humph. (Tenn.) 394.

But notice to an individual director who has no duty to perform in relation to the subject matter of such notice is not a good constructive notice to the corporation, unless communicated to the board.

England.—*Peruvian R. Co. v. Thames, etc., Marine Ins. Co.* L. R. 2 Ch. 617; *Powles v. Page*, 3 C. B. 16, 54 E. C. L. 16; *In re Carews Estate Act*, 31 Beaw. 39.

Connecticut.—*Farmers', etc., Bank v. Payne*, 25 Conn. 444; *Farrel Foundry v. Dart*, 26 Conn. 376.

Louisiana.—*State Bank v. Senecal*, 13 La. 525.

Maryland.—*U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Winchester v. Baltimore, etc., R. Co.*, 4 Md. 231; *General Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174.

Massachusetts.—*Sawyer v. Pawnsers' Bank*, 6 Allen (Mass.) 207; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24.

New York.—*National Bank v. Norton*, 1 Hill (N. Y.) 572; *U. S. Bank v. Davis*, 2 Hill (N. Y.) 463; *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 127; *Atlantic State Bank v. Savery*, 18 Hun (N. Y.) 41; *La Farge F. Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Getman v. Oswego Second Nat. Bank*, 23 Hun (N. Y.) 503; *Westfield Bank v. Cornen*, 37 N. Y. 320, 93 Am. Dec. 573.

Pennsylvania.—*Wilson v. McCullough*, 23 Pa. St. 445, 62 Am. Dec. 347.

But it has been held that if such notice is given him officially for the purpose of being communicated to the board, although such notice should not be so communicated, the corporation is bound by it. *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Boyd v. Chesapeake, etc., Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *National Bank v. Norton*, 1 Hill (N. Y.) 572.

Stockholder.—Notice to a stockholder in a corporation, in regard to any corporation business, is not notice to the corporation, since a stockholder is in no sense an agent of the corporation. *Housatonic Bank v. Martin*, 1 Met. (Mass.) 294; *Union Canal Co. v. Loyd*, 4 W. & S. (Pa.) 393. See the title STOCKHOLDERS.

Cashier of Bank.—Notice to a cashier as to all matters within the sphere of his business is notice to the bank. *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *Huntsville Branch Bank v. Steele*, 10 Ala. 915; *St. Mary's Bank v. Mumford*, 6 Ga. 49; *America Bank v. McNeil*, 10 Bush (Ky.) 54; *Fall River Union Bank v. Sturtevant*, 12 Cush. (Mass.) 375; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 118; *New Hope, etc., Bridge Co. v. Phenix Bank*, 3 N. Y. 156; *Harrisburg Bank v. Tyler*, 3 W. & S. (Pa.) 373.

See also the titles BANKS AND BANKING; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Officers Generally.—It may be stated generally, that notice to the officer of a corporation having control of a department of business, concerning matters pertaining to such department, is sufficient. *New England Car-spring Co. v. Union India Rubber Co.*, 4 Blatchf. (U. S.) 1; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151.

See also *Hatch v. Ferguson*, 66 Fed. Rep. 668. See also the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

1. *Blackburn v. Vigors*, L. R. 12 App. Cas.

(c) **Must be of Important Facts.**—The notice must be of a matter so material to the transaction as to make it the agent's duty to communicate it to his principal.¹

(d) **When Notice must be Had—During Continuance of Agency.**—It is well established that notice to an agent during the continuance of his agency is binding on his principal.²

After Agency is Terminated.—It is equally well settled that notice to an agent after his agency has ceased will not affect the principal.³

Notice Acquired Prior to Agency.—The question, however, as to whether notice acquired prior to agency may be binding on the principal, has given rise to much diversity of opinion. It is held by some of the authorities that to visit

531; *Irvine v. Grady*, 85 Tex. 120. See General Interest Ins. Co. v. Ruggles, 12 Wheat. (U. S.) 408.

Notice Given to Predecessor, of Agent Transacting Business.—In *Irvine v. Grady*, 85 Tex. 120, it was held that where an assertion in regard to certain cattle of the plaintiff was made by him to an agent employed by the defendants to purchase the cattle, and the agents subsequently abandoned the negotiation, the defendant, in litigation arising from his subsequent purchase of the cattle through other parties, is not affected with knowledge of such assertion made to his agent.

In *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, it was decided that where a broker received material information while acting as agent to effect an insurance for the plaintiffs, which information he failed to communicate to them, and upon his failure to effect the insurance, another agent was appointed who succeeded in effecting it, the principal was not liable for the knowledge possessed by the former agent.

Exception—Agent Employed to Furnish Information.—The *English* decisions, however, have made a distinction between the case where the agent is employed to effect a certain transaction, and where one is employed for the express purpose of furnishing information which may pertain to such transaction. Thus, to illustrate the latter case, it has been held that where a shipowner effects an insurance on a ship he will be affected by the knowledge of the master or ship agent as to the condition of the ship, though such master or agent had no hand in procuring the policy, it being the special function of a master and ship agent to keep their employer informed of all casualties encountered by his ship which would materially influence the judgment of the insured. *Fitzherbert v. Mather*, 1 T. R. 12; *Gladstone v. King*, 1 M. & S. 35; *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511. Compare General Interest Ins. Co. v. Ruggles, 12 Wheat. (U. S.) 408.

In *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, Lord Watson, in commenting upon the difference between a broker employed to effect an insurance, and a ship agent, as to the effect of knowledge possessed by them concerning the ship insured, says: "There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the

other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. There is also, as the Master of the Rolls pointed out, an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principal. So, also, when an agent to insure is brought into contact with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not; but it cannot reasonably be suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing."

1. *Pittman v. Sofley*, 64 Ill. 155; *Day v. Wamsley*, 33 Ind. 147; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319. See *Holden v. New York, etc., Bank*, 72 N. Y. 286.

Source of the Information to be Regarded.—The agent is not bound to charge his mind with rumors or loose information coming to his knowledge, and the principal will not be affected thereby. *Pittman v. Sofley*, 64 Ill. 155; *Kerns v. Swope*, 2 Watts (Pa.) 75; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347; *Mulliken v. Graham*, 72 Pa. St. 484; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 368.

2. *California*.—*Hunter v. Watson*, 12 Cal. 377, 73 Am. Dec. 543.

Connecticut.—*Farmers', etc., Bank v. Payne*, 25 Conn. 448.

Massachusetts.—*Suit v. Woodhall*, 113 Mass. 395; *National Security Bank v. Cushman*, 121 Mass. 490; *Allen v. South Boston R. Co.*, 150 Mass. 206, 15 Am. St. Rep. 185.

New Hampshire.—*Hovey v. Blanchard*, 13 N. H. 145.

New York.—*Constant v. Rochester University* (Super. Ct.), 17 N. Y. Supp. 363; *Hier v. Odell*, 18 Hun (N. Y.) 314.

Oregon.—*Pennoyer v. Willis*, 26 Oregon 1.

Tennessee.—*Nashville, etc., R. Co. v. Elliott*, 1 Coldw. (Tenn.) 618, 78 Am. Dec. 506.

Texas.—*Kauffman v. Robey*, 60 Tex. 311, 48 Am. Rep. 264.

Vermont.—*Hill v. North*, 34 Vt. 604.

3. *Boardman v. Taylor*, 66 Ga. 638; *Great Western R. Co. v. Wheeler*, 20 Mich. 419.

the principal with notice of a fact known to the agent, such notice should have been gained by the agent during the course of the business in which he is employed.¹ The better doctrine, however, appears to be that the principal will be affected not only by notice acquired by the agent during the continuance of the agency, but also by knowledge previously communicated, provided it is present to the agent's mind during the transaction of his duties.²

1. *United States*.—*Satterfield v. Malone*, 35 Fed. Rep. 445 (which declares the doctrine as established in *Pennsylvania*).

Alabama.—*Terrell v. Mobile Branch Bank*, 12 Ala. 504; *Cofer v. Scroggins*, 98 Ala. 342; *Mundine v. Pitts*, 14 Ala. 90; *Pepper v. George*, 51 Ala. 195; *McCormick v. Joseph*, 83 Ala. 401; *Wheeler v. McGuire*, 86 Ala. 398.

Connecticut.—*Farmers', etc., Bank v. Payne*, 25 Conn. 449.

Kentucky.—*Willis v. Vallette*, 4 Metc. (Ky.) 186.

Louisiana.—*Plympton v. Preston*, 4 La. Ann. 356.

New York.—*U. S. Bank v. Davis*, 2 Hill (N. Y.) 451; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478.

Pennsylvania.—*Martin v. Jackson*, 27 Pa. St. 508, 67 Am. Dec. 489; *Barnes v. McClinton*, 3 P. & W. (Pa.) 67, 23 Am. Dec. 62; *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Hood v. Fahnestock*, 8 Watts (Pa.) 492, 34 Am. Dec. 489; *Houseman v. Girard Mut. Bldg., etc., Assoc.*, 81 Pa. St. 256; *Barbour v. Wiehle*, 116 Pa. St. 308.

South Carolina.—*Pritchett v. Sessions*, 10 Rich. (S. Car.) 298.

Texas.—*Taylor v. Taylor* (Tex., 1895), 29 S. W. Rep. 1057.

See also *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736; *Day v. Wamsley*, 33 Ind. 147; *Kaufman v. Robey*, 60 Tex. 311, 48 Am. Rep. 264.

Reason of the Rule.—In *Hood v. Fahnestock*, 8 Watts (Pa.) 492, 34 Am. Dec. 489, the reason for the rule as laid down in the text was stated to be "that no man can be supposed always to carry in his mind the recollection of former occurrences." See also *Pritchett v. Sessions*, 10 Rich. (S. Car.) 298.

But in *Houseman v. Girard Mut. Bldg., etc., Assoc.*, 81 Pa. St. 256, *Sharswood, J.*, said: "It is a mistake to suppose that it [the above-mentioned rule] depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one—that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be." See also *Congar v. Chicago, etc., R. Co.*, 24 Wis. 160, 1 Am. Rep. 164; *U. S. Bank v. Davis*, 2 Hill (N. Y.) 451;

Farmers', etc., Bank v. Payne, 25 Conn. 449; *Advertiser, etc., Co. v. Detroit*, 43 Mich. 116.

Also in *Mountford v. Scott*, 3 Madd. 26, *Sir John Leach* said: "The agent stands in place of the principal, and notice therefore to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal and agent is constituted, and as to all the information which he has previously acquired, the principal is a mere stranger."

Attorneys.—It has been held that notice to an attorney employed by another person in another transaction at another time will not be constructive notice to his client employing him afterwards. *Warrick v. Warrick*, 3 Atk. 294; *Worsley v. Scarborough*, 3 Atk. 392; *Mundine v. Pitts*, 14 Ala. 84; *Pepper v. George*, 51 Ala. 195; *McCormick v. Wheeler*, 36 Ill. 122, 85 Am. Dec. 388; *Campbell v. Benjamin*, 69 Ill. 250; *Herrington v. McCollum*, 73 Ill. 476; *Templeman v. Hamilton*, 37 La. Ann. 754; *Martin v. Jackson*, 27 Pa. St. 508, 67 Am. Dec. 489; *Hood v. Fahnestock*, 8 Watts (Pa.) 492, 34 Am. Dec. 489.

In *Worsley v. Scarborough*, 3 Atk. 392, the court said: "It is settled that notice to an agent or counsel who was employed in the thing by another person, or in another business, and at another time, is no notice to his client who employs him afterwards; and it would be very mischievous if it was so. for the man of most practice and greatest eminence would then be the most dangerous to employ."

2. *England*.—*Dresser v. Norwood*, 17 C. B. N. S. 466, 112 E. C. L. 466. Compare the earlier cases, *Preston v. Tubbin*, 1 Vern. 287; *Lowther v. Carlton*, 2 Atk. 242; *Warrick v. Warrick*, 3 Atk. 291; *Worsley v. Scarborough*, 3 Atk. 392; *Le Neve v. Le Neve*, 3 Atk. 648; *Mountford v. Scott*, 3 Madd. 26; *Hiern v. Mill*, 13 Ves. Jr. 120.

United States.—*Harrington v. U. S. (The Distilled Spirits)*, 11 Wall. (U. S.) 356.

Illinois.—*Dunlap v. Wilson*, 32 Ill. 517; *Burton v. Perry*, 146 Ill. 71. Compare *Williams v. Tatnall*, 29 Ill. 565; *McCormick v. Wheeler*, 36 Ill. 121, 85 Am. Dec. 388.

Iowa.—*Yerger v. Barz*, 56 Iowa 77.

Maine.—*Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

Massachusetts.—*Suit v. Woodhall*, 113 Mass. 391.

Minnesota.—*Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322; *Wilson v. Farmers' Mut. F. Ins. Assoc.*, 36 Minn. 112. Compare *Hayward v. National Ins. Co.*, 52 Mo. 192, 14 Am. Rep. 400.

Missouri.—*Chouteau v. Allen*, 70 Mo. 290.

New Hampshire.—*Hovey v. Blanchard*, 13 N. H. 148; *Patten v. Merchants', etc., Mut. F. Ins. Co.*, 40 N. H. 375.

(6) *In Tort*.—It is a general rule that the principal will be liable where the torts of an agent are done by his express authority, or are the natural consequence resulting from an order given,¹ or where they are committed in the

New York.—*Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9; *Constant v. Rochester University*, 111 N. Y. 604, 7 Am. St. Rep. 769, 133 N. Y. 640. *Compare* *U. S. Bank v. Davis*, 2 Hill (N. Y.) 451; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478.

Oregon.—*Pennoyer v. Willis*, 26 Oregon 1.

Tennessee.—*Union Bank v. Campbell*, 4 Humph. (Tenn.) 398; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. (Tenn.) 479.

Vermont.—*Hart v. Farmers', etc., Bank*, 33 Vt. 252; *Abell v. Howe*, 43 Vt. 403; *Mullin v. Vermont Mut. F. Ins. Co.*, 58 Vt. 113.

Wisconsin.—*Shafer v. Phoenix Ins. Co.*, 53 Wis. 361. *Compare* *Congar v. Chicago, etc., R. Co.*, 24 Wis. 160, 1 Am. Rep. 164; *Pringle v. Dunn*, 37 Wis. 450, 19 Am. Dec. 772.

See *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 161; *Hunter v. Watson*, 12 Cal. 377, 73 Am. Dec. 543; *Whitten v. Jenkins*, 34 Ga. 305.

Reason of the Doctrine.—The authorities sustaining the doctrine as laid down in the text hold that the general rule that the principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty. *Harrington v. U. S. (The Distilled Spirits)*, 11 Wall. (U. S.) 367; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 165; *Whitten v. Jenkins*, 34 Ga. 304; *Page v. Brant*, 18 Ill. 37; *Fairfield Sav. Bank v. Chase*, 72 Me. 229, 39 Am. Rep. 319; *Suit v. Woodhall*, 113 Mass. 392; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. (Tenn.) 483.

In *Dresser v. Norwood*, 17 C. B. N. S. 466, 112 E. C. L. 466, *Pollock, C.B.*, said: "We think that in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal."

Green, J., in delivering the opinion of the court in *Union Bank v. Campbell*, 4 Humph. (Tenn.) 396, said: "We do not intend to controvert the general doctrine that 'notice must come to the agent while he is concerned for the principal, and in the course of the same transaction;' for notice to a party while he is not acting as agent is certainly no notice to a principal for whom he may afterwards act. But the existence of knowledge in an agent when acting for his principal is notice to the principal, however that knowledge may have been acquired. Thus if an agent in his own transaction has had notice of a fact, that notice does not reach his principal, because he is not then acting for his principal; and before he comes to act as such agent, in relation to the subject about which

he had notice, he may have forgotten the whole matter, so that it was never present in his mind while discharging the duties of his agency. But if he had received the notice while he was concerned for the principal, the principal would be bound by it, though the agent might forget the facts, and have no memory of them, during the transaction to which they relate. But certainly, if while an agent is concerned and acting for his principal, he have knowledge of the facts in relation to which notice is necessary, there can be no necessity for giving formal notice of the same facts to the individual who already knows them."

Where, five years before a bank took an assignment of a mortgage, the president of the bank, who was not then acting for the bank, but for a private person, had been informed in a casual conversation that a third person had an equitable interest in the bank, it was held that the president could not be said under the circumstances to have kept such information in his memory, and that therefore the bank was not affected with notice of the equity. *Burton v. Perry*, 146 Ill. 71.

Knowledge Acquired Shortly before Agency Began.—In *Chouteau v. Allen*, 70 Mo. 290, it was held that knowledge acquired not only during the continuance of the agency, but also that possessed by the agent so shortly before as necessarily to give rise to the inference that it remained fixed in his memory when the employment began, binds the principal. See also *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 165; *Haywood v. National Ins. Co.*, 52 Mo. 192, 14 Am. Rep. 400; *Pritchett v. Sessions*, 10 Rich. (S. Car.) 293; *Congar v. Chicago, etc., R. Co.*, 24 Wis. 158, 1 Am. Rep. 164.

Where Agency is Concerned with a Long Series of Transactions.—Where the agency is continuous and concerned with a business made up of a long series of transactions of a like nature and of the same general character, it has been held that knowledge acquired as agent in that business in any one or more of the transactions making up from time to time the whole business of the principal, is notice to the agent and to the principal which will affect the latter in any other of those transactions in which that agent is engaged. *Holden v. New York, etc., Bank*, 72 N. Y. 292. See *Cox v. Pearce*, 112 N. Y. 637.

1. Torts Resulting from Authority Delegated.—*Scott v. Shepherd*, 2 W. Bl. 892; *Hynes v. Jungren*, 8 Kan. 391; *Eaton v. European, etc., R. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Bacheller v. Pinkham*, 68 Me. 255; *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802; *Hewett v. Swift*, 3 Allen (Mass.) 422; *Guille v. Swan*, 19 Johns. (N. Y.) 382, 10 Am. Dec. 234.

In *Eaton v. European, etc., R. Co.*, 59 Me. 520, 8 Am. Rep. 430, *Appleton, C.J.*, said: "If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the

course of the agent's employment, although the principal did not authorize, or justify, or participate in, or even if he disapproved of them.¹

person contracting for doing it would be held responsible."

1. **Torts Committed in the Course of Employment**—*United States*.—Heenrich v. Pullman Palace Car Co., 20 Fed. Rep. 100; Harris v. Louisville, etc., R. Co., 135 Fed. Rep. 116; Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 480.

Arkansas.—Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560.

California.—Turner v. North Beach, etc., R. Co., 34 Cal. 594.

Connecticut.—Church v. Mansfield, 20 Conn. 284; Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154.

Georgia.—Merchants' Nat. Bank v. Guilmarlin, 88 Ga. 800.

Illinois.—Armstrong v. Cooley, 10 Ill. 509; Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Chicago, etc., R. Co. v. Parks, 18 Ill. 468, 68 Am. Dec. 562; Chicago, etc., R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Oxford v. Peter, 28 Ill. 434; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Noble v. Cunningham, 74 Ill. 51; Wabash, etc., R. Co. v. Rector, 104 Ill. 296.

Indiana.—Pittsburgh, etc., R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675.

Louisiana.—Lutz v. Forbes, 13 La. Ann. 609.

Maine.—Stickney v. Munroe, 44 Me. 195.

Maryland.—Baltimore, etc., R. Co. v. Blocher, 27 Md. 278.

Michigan.—Cleveland v. Newsom, 45 Mich. 62.

Missouri.—Garretzen v. Duenckel, 50 Mo. 106, 11 Am. Rep. 405.

New York.—Watson v. Bennett, 12 Barb. (N. Y.) 196; Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; Mali v. Lord, 39 N. Y. 383, 100 Am. Dec. 448; Lee v. Sandy Hill, 40 N. Y. 448; Fifth Ave. Bank v. Forty-second St., etc., R. Co., 137 N. Y. 231.

North Carolina.—Huntley v. Mathias, 90 N. Car. 105, 47 Am. Rep. 516.

Pennsylvania.—Philadelphia, etc., R. Co. v. Brannen (Pa., 1886), 2 Atl. Rep. 429; Flower v. Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251.

South Carolina.—Rucker v. Smoke, 37 S. Car. 377, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 410.

See Roe v. Birkenhead, etc., R. Co., 7 Exch. 36.

Basis for Rule.—This rule of liability is not based upon any presumed authority in the agent to do the acts, but upon the ground of public policy, and that it is more reasonable, where one of two innocent persons must suffer from the wrongful act of a third person, that the principal who has placed the agent in the position of trust and confidence should suffer than a stranger. *Hern v. Nichols*, 1 Salk. 289; *Lee v. Sandy Hill*, 40 N. Y. 448; *Locke v. Stearns*, 1 Met. (Mass.) 560, 35 Am. Dec. 382.

Andrews, J., in delivering the opinion of the court in *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 24, 7 Am. Rep. 293, said: "It is

sufficient to make the master responsible *civiliter*, if the wrongful act of the servant was committed in the business of the master and within the scope of his employment, and this although the servant, in doing it, departed from the instructions of his master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission of the principal, and for injury resulting therefrom to others the principal is justly held liable. If he employs incompetent or untrustworthy agents it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondet superior* applies, provided only that the agent was acting at the time for the principal, and within the scope of the business intrusted to him."

Illustration.—The charter of the defendant village provided that its trustees should be commissioners of highways therein, with the duties and powers of commissioners of highways in towns. Under a written order of the trustees the overseers of highways wrongfully entered the plaintiff's land and moved back a fence which the trustees erroneously supposed was an encroachment on the street. It was held that the plaintiff could maintain trespass. *Lee v. Sandy Hill*, 40 N. Y. 442.

Liability for Penal Act in the Nature of Tort.—Where the train of a railroad company is run through a city at a rate of speed forbidden by charter, it is no defense to an action against the company for violation of such ordinance, that the violation was committed by the company's servants without its consent and contrary to its instructions. *Buffalo v. New York, etc., R. Co.* (Buffalo Super. Ct.), 23 N. Y. Supp. 303, 309.

Usury.—If a person employs another as his agent to lend money, and the agent by the authority or with the knowledge and consent of the principal, charges unlawful interest, the principal will be responsible for the usury. *Rogers v. Buckingham*, 33 Conn. 81; *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Scottish Mortg., etc., Invest. Co. v. McBroom* (N. Mex., 1892), 30 Pac. Rep. 859; *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487; *Cheney v. Woodruff*, 6 Neb. 151.

In *Scottish Mortg., etc., Invest. Co. v. McBroom* (N. Mex., 1892), 30 Pac. Rep. 859, it was held that where an agent of a foreign loaning corporation is acting under a contract therewith, which provides "that all commissions on loans by the company, and all bonuses * * * payable by borrowers from them in respect to such loans, shall belong to the company," he is to be presumed to be acting for the company in collecting commissions on loans in excess of lawful interest, when the company has knowledge of each

Torts Outside the Agent's Employment.—But the principal will not be liable for

step taken by him in their negotiation, although the agent receives the exclusive benefit of the commission.

Where, however, an agent with authority to lend money at a lawful rate, without the knowledge or consent of the principal lends it at usurious rates for his own benefit, the principal cannot be held liable.

England.—*Solarte v. Melville*, 7 B. & C. 430, 14 E. C. L. 73; *Dagnall v. Wigley*, 11 East 43.

United States.—*Eddy v. Badger*, 8 Biss. (U. S.) 238; *Call v. Palmer*, 116 U. S. 98; *Fisher v. Porter*, 23 Fed. Rep. 162; *Sherwood v. Roundtree*, 32 Fed. Rep. 113, *distinguishing* *Call v. Palmer*, 116 U. S. 98.

Connecticut.—*Rogers v. Buckingham*, 33 Conn. 81.

Georgia.—*Boardman v. Taylor*, 66 Ga. 638.

Illinois.—*Ballinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69; *Boylston v. Bain*, 90 Ill. 283; *Phillips v. Roberts*, 90 Ill. 492; *Cox v. Massachusetts Mut. L. Ins. Co.*, 113 Ill. 382, *distinguishing* *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69.

Iowa.—*Gokey v. Knapp*, 44 Iowa 32; *Wyllis v. Ault*, 46 Iowa 46; *Brigham v. Myers*, 51 Iowa 397, 33 Am. Rep. 140.

Minnesota.—*Acheson v. Chase*, 28 Minn. 211.

New Jersey.—*Muir v. Newark Sav. Inst.*, 16 N. J. Eq. 537; *Conover v. VanMater*, 18 N. J. Eq. 481; *Manning v. Young*, 28 N. J. Eq. 568; *Gray v. Van Blarcom*, 29 N. J. Eq. 454; *White v. Dwyer*, 31 N. J. Eq. 40; *Forbes v. Baaden*, 31 N. J. Eq. 381; *Coudert v. Flagg*, 31 N. J. Eq. 394; *Borcherling v. Trefz*, 40 N. J. Eq. 502.

New York.—*Barretto v. Snowden*, 5 Wend. (N. Y.) 181; *Lyon v. Simpson*, 12 Daly (N. Y.) 58; *Condit v. Baldwin*, 21 N. Y. 219 78 Am. Dec. 137; *Bell v. Day*, 32 N. Y. 165; *Fellows v. Oneida County*, 36 Barb. (N. Y.) 655; *Algur v. Gardner*, 54 N. Y. 360; *Van Wyck v. Watters*, 81 N. Y. 352; *Wyeth v. Braniff*, 84 N. Y. 627; *Dusenberry v. Seeley*, 87 N. Y. 634; *Fellows v. Longyor*, 91 N. Y. 330.

Compare *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. White*, 5 Neb. 261, 25 Am. Rep. 487; *Cheney v. Woodruff*, 6 Neb. 151; *Cheney v. Eberhardt*, 8 Neb. 423; *Olmsted v. New England Mortg. Security Co.*, 11 Neb. 487.

Selling Intoxicating Liquors in Violation of Statute.—It was held in *George v. Gobey*, 123 Mass. 289, 35 Am. Rep. 376, that a master is liable to the penalty imposed by the statute of 1875, c. 99, § 16, if his servant in the course of his master's business sells intoxicating liquor, after notice requesting the master not to do so, to a person who has the habit of drinking intoxicating liquor to excess, although the master has instructed the servant not to make a sale to such person, and the sale is without the knowledge and consent of the master. See also *Keedy v. Howe*, 72 Ill. 133; *Worley v. Spurgeon*, 38 Iowa 465; *Kreiter v. Nichols*, 28 Mich. 406; *Kehrig v. Peters*, 41 Mich. 475; *Smith v. Reynolds*, 8 Hun (N. Y.) 130; *Peterson v. Knoble*, 35 Wis. 85.

Selling Adulterated Substances.—For the liability of a principal for illegal sales by his agent of adulterated milk and other substances, see the title ADULTERATION, Vol. I., p. 745.

Assault and Battery.—A principal may be held liable for an assault and battery committed by his agent in the course of his employment. *Turner v. North Beach, etc.*, R. Co., 34 Cal. 594; *St. Louis, etc.*, R. Co. v. *Dalby*, 19 Ill. 353; *Chicago, etc.*, R. Co. v. *Peacock*, 48 Ill. 253; *Chicago, etc.*, R. Co. v. *Bryan*, 90 Ill. 126; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Hanson v. European, etc.*, R. Co., 62 Me. 84, 16 Am. Rep. 404; *Ramsden v. Boston, etc.*, R. Co., 104 Mass. 120, 6 Am. Rep. 200; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274, 7 Am. Rep. 448; *Hoffman v. New York Cent., etc.*, R. Co., 87 N. Y. 25, 41 Am. Rep. 337; *Passenger R. Co. v. Young*, 21 Ohio St. 524; *Palmer v. Charlotte, etc.*, R. Co., 3 S. Car. 580; *Louisville, etc.*, R. Co. v. *Fleming*, 14 Lea (Tenn.) 130.

Thus, in an action brought against a railroad corporation, by a passenger forcibly put out of the cars by their conductor for not paying his fare, which he had in fact paid, it was held to be no ground for exception by them that the jury were instructed that if the conductor removed the plaintiff in the wrongful exercise of a discretionary power conferred upon him by the corporation the latter was liable. *Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.) 465, 64 Am. Dec. 83. See *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293.

But the principal will not be liable for an assault and battery committed by the agent beyond the scope of his employment. Thus, where the plaintiff, after purchasing a ticket as a passenger, applied to the servant of the defendant charged with the duty of checking baggage to have his baggage checked to his place of destination, and by his importunate conduct and abusive language towards the servant provoked a quarrel, in which the servant, to gratify his personal resentment, struck the plaintiff, it was held that the wrongful act of the servant in striking the plaintiff cannot be regarded as authorized by the master, nor as an act done in the execution of the service for which he was engaged by the master. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373. In delivering the opinion in this case the court said: "It seems to us the assault was in no way calculated to facilitate or promote the business for which the servant was employed by the master; nor could it have been supposed to be, or intended as, an act done with that view or object. It is not a case of excess of force and violence in executing the authority of the master, but rather an act beyond such authority, and foreign to the objects of the employment." See also *Meehan v. Morewood* (Supreme Ct.), 5 N. Y. Supp. 710.

For a discussion of the liability of the prin-

torts committed by the agent outside the scope of the authority delegated to him.¹

Excessive Force.—Where a principal authorizes his agent to do an act which implies the use of force, if the agent in the execution of that service goes beyond the proper limits as to the use of force, and commits a trespass by unjustifiable violence, the principal will be liable in an action therefor.²

Corporations are liable to the same extent as individuals would be for injuries done by their agents in the course of their employment.³

principal when the assault committed by the agent is wilful or malicious, see *infra*, this section, *Wanton or Malicious Acts*.

Killing by Agent Not Done in Course of Employment.—Defendants were owners of a brewery, and employed an armed watchman to guard the property and prevent breaches of the peace. Plaintiff's intestate, being intoxicated and disorderly, was pursued by the watchman, and while retreating was shot and killed. It was held that the shooting was not done in the line of the watchman's duty, and that defendants were not liable therefor. *Golden v. Newbrand*, 52 Iowa 59, 35 Am. Rep. 257.

1. Torts beyond Scope of Agent's Authority.—In *Stickney v. Munroe*, 44 Me. 195, it was held that where an agency is limited to the business of keeping mills in repair, leasing the same, and receiving rents therefor, the principal is not liable for the acts of a lessee of the mill in excavating the bed of the river so as to cause damage to a neighboring mill-owner.

Liability of Principal for Tort of Agent Done under Direction of a Third Party.—In *Enos v. Hamilton*, 24 Wis. 658, it was held that where defendants' servant while running logs for them wrongfully obstructed therewith a navigable stream by direction of an officer of a boom company, defendants were liable for damages resulting to the plaintiff.

2. St. Louis, etc., R. Co. v. Dalby, 19 Ill. 353; *Hanson v. European, etc., R. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Hewett v. Swift*, 3 Allen (Mass.) 425; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 120, 6 Am. Rep. 200; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274, 7 Am. Rep. 448; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180, 20 Am. Rep. 480; *Hoffman v. New York Cent., etc., R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337. *Compare* *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455.

Illustrations.—Where a boy of eight years of age jumped upon the steps of a car in a passenger train upon the defendant's road and sat down upon the platform of the car, whereupon he was kicked from the car by the conductor or a brakeman while the train was running at a speed of about ten miles an hour, and was injured, it was held that the company was liable in an action for damages. *Hoffman v. New York Cent., etc., R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337. See *Northwestern R. Co. v. Hack*, 66 Ill. 238.

Andrews, J., in delivering the opinion of the court in *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 134, 21 Am. Rep. 597, said: "It is in general sufficient to make the master re-

sponsible, that he gave to the servant an authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability although the servant abused his authority or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another."

As to doctrine when excessive force is exercised wilfully or maliciously, see *infra*, this section, *Wanton or Malicious Acts*.

3. Corporations—England.—*Eastern Counties R. Co. v. Broom*, 6 Exch. 314.

Illinois.—*St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353.

Maine.—*Hanson v. European, etc., R. Co.*, 62 Me. 88, 16 Am. Rep. 404.

Maryland.—*Lamm v. Port Deposit Homestead Assoc.*, 49 Md. 233, 33 Am. Rep. 246; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311.

Massachusetts.—*Hewett v. Swift*, 3 Allen (Mass.) 420; *Moore v. Fitchburg, etc., R. Corp.*, 4 Gray (Mass.) 465, 64 Am. Dec. 83; *Holmes v. Wakefield*, 12 Allen (Mass.) 580, 90 Am. Dec. 171; *Thayer v. Boston*, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 120, 6 Am. Rep. 200; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177.

New Jersey.—*State v. Morris, etc., R. Co.*, 23 N. J. L. 367; *Brokaw v. New Jersey R., etc., Co.*, 32 N. J. L. 328, 90 Am. Dec. 659.

New York.—*Howell v. Buffalo*, 15 N. Y. 512; *Hickok v. Plattsburgh*, cited in 16 N. Y. 160; *Weet v. Brockport*, cited in 16 N. Y. 161; *Conrad v. Ithaca*, 16 N. Y. 162; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Lee v. Sandy Hill*, 40 N. Y. 442; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30.

North Carolina.—*Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312.

Pennsylvania.—*Erie City Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508.

See also the titles CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Subagents.—Where an agent's authority to employ subagents to transact the business of an agency is shown to exist, either expressly or by implication, the torts of such subagents will be binding upon the principal under circumstances in which the torts of the agent would be binding.¹

Negligence.—Thus the principal is liable for the negligent acts of his agent, done in the course and within the scope of his employment,² and this although the agent deviates from his instructions in the manner of doing the principal's business.³ But if the agent makes a wilful departure from the business he is

Where the Agent's Act is Not Authorized by the Charter of the Corporation.—In *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, it was held that it was no defense to an action against an educational corporation for personal injuries occasioned to a passenger for hire upon a boat used at a public ferry operated by the corporation, through the negligence of the ferryman in managing the boat, that the maintenance of the ferry was *ultra vires*. See *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30.

1. **Subagent.**—*McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178; *Louisville, etc., R. Co. v. Blair*, 4 Baxt. (Tenn.) 407; *California Bank v. Western Union Tel. Co.*, 52 Cal. 289; *Haluptzok v. Great Northern R. Co.*, 55 Minn. 446. See *Dunn v. City Nat. Bank*, 58 Fed. Rep. 174.

But where one is employed by an agent on his own account, such employee being subject only to the control of his agent, whom he serves, and by whom he is paid, the agent's principal is not responsible for the wrongful acts of such employee. *Lindsay v. Singer Mfg. Co.*, 4 Mo. App. 570.

2. **England.**—*Whiteley v. Pepper*, 2 Q. B. Div. 276; *Venables v. Smith*, 2 Q. B. Div. 279; *Quarman v. Burnett*, 6 M. & W. 499.

United States.—*Mandeville v. Cookendorfer*, 3 Cranch (C. C.) 397; *Lowe v. Stockton*, 4 Cranch (C. C.) 537; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468.

Alabama.—*Birmingham Water Works Co. v. Hubbard*, 85 Ala. 179.

California.—*Paige v. Roeding*, 96 Cal. 388.

Connecticut.—*Flint v. Norwich, etc., Transp. Co.*, 34 Conn. 554; *Phelon v. Stiles*, 43 Conn. 426; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635.

Illinois.—*Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Chicago, etc., R. Co. v. McCarthy*, 20 Ill. 385, 71 Am. Dec. 285; *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494; *Noble v. Cunningham*, 74 Ill. 51.

Indiana.—*Block v. Haseltine*, 3 Ind. App. 491.

Kentucky.—*Johnson v. Small*, 5 B. Mon. (Ky.) 26.

Maryland.—*Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400.

Massachusetts.—*Southwick v. Estes*, 7 Cush. (Mass.) 385; *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177.

Michigan.—*Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54.

Minnesota.—*Mulvehill v. Bates*, 31 Minn.

364, 47 Am. Rep. 796; *Osborne v. Masters*, 40 Minn. 103, 12 Am. St. Rep. 698.

Missouri.—*Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

New Jersey.—*Driscoll v. Carlin*, 50 N. J. L. 28.

New York.—*Denny v. Manhattan Co.*, 5 Den. (N. Y.) 639; *Champion v. Bostwick*, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; *McCamus v. Citizens' Gas Light Co.*, 40 Barb. (N. Y.) 380; *Roney v. Aldrich*, 44 Hun (N. Y.) 323; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Roberts v. Johnson*, 58 N. Y. 613; *Ochsenbein v. Shapley*, 85 N. Y. 214; *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392; *Vogel v. New York*, 92 N. Y. 10; *Stroher v. Elting*, 97 N. Y. 102, 49 Am. Rep. 515.

North Carolina.—*Elliott v. Jordan*, Busb. (N. Car.) 298; *Cox v. Hoffman*, 4 Dev. & B. (N. Car.) 180; *Wiswall v. Brinson*, 10 Ired. (N. Car.) 554.

Ohio.—*Pickens v. Diecker*, 21 Ohio St. 215, 8 Am. Rep. 55.

Oregon.—*Oliver v. North Pac. Transp. Co.*, 3 Oregon 87.

Pennsylvania.—*New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224; *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665; *Morgan v. Tener*, 83 Pa. St. 305; *Siner v. Stearne*, 155 Pa. St. 62.

Tennessee.—*Puryear v. Thompson*, 5 Humph. (Tenn.) 397; *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20.

Vermont.—*May v. Bliss*, 22 Vt. 477; *Andrus v. Howard*, 36 Vt. 248, 84 Am. Dec. 680.

Virginia.—*DeVoss v. Richmond*, 18 Gratt. (Va.) 358, 98 Am. Dec. 647.

See also *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *Beckwith v. Oatman*, 43 Hun (N. Y.) 265.

A full discussion of the liability of a master for the negligence of his servant will be found under the title MASTER AND SERVANT.

See also the title NEGLIGENCE and the cross-references there given.

3. **Maryland.**—*Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400.

Massachusetts.—*Wilton v. Middlesex R. Co.*, 107 Mass. 108, 9 Am. Rep. 11.

Michigan.—*Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205.

Missouri.—*Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

New York.—*Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Ochsenbein v. Shapley*, 85 N. Y. 217;

directed to transact, and then commits acts of negligence, the principal will be exonerated from all liability.¹

Wanton or Malicious Acts.—The earlier cases, both in this country and in *England*, support the doctrine that the principal cannot be held liable for the wanton or malicious acts of the agent.² The later decisions, however, incline to the rule making the principal liable for acts of the agent done within the scope of his employment, though they be wanton or malicious,³ and relieving

Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392.

Oregon.—Oliver v. North Pac. Transp. Co., 3 Oregon 87.

Virginia.—DeVoss v. Richmond, 18 Gratt. (Va.) 358, 98 Am. Dec. 647.

See the titles MASTER AND SERVANT; NEGLIGENCE.

1. *England*.—Butler v. Basing, 2 C. & P. 613, 12 E. C. L. 287; Storey v. Ashton, L. R. 4 Q. B. 479; Croft v. Alison, 4 B. & Ald. 590, 6 E. C. L. 614; Stevens v. Woodward, 6 Q. B. Div. 318; Joel v. Morison, 6 C. & P. 501, 25 E. C. L. 511; Woodman v. Joiner, 10 Jur. N. S. 852.

Connecticut.—Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635.

Georgia.—Marsh v. South Carolina R. Co., 56 Ga. 274.

Illinois.—Sawyer v. Martins, 25 Ill. App. 521.

Maine.—Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336.

Maryland.—Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211.

Massachusetts.—Howe v. Newmarch, 12 Allen (Mass.) 49; Herlihy v. Smith, 116 Mass. 265.

Michigan.—Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205.

Minnesota.—Morie v. St. Paul, etc., R. Co., 31 Minn. 351, 47 Am. Rep. 793.

Missouri.—Garretzen v. Duencel, 50 Mo. 104, 11 Am. Rep. 405.

New Hampshire.—Wilson v. Peverly, 2 N. H. 548.

New Jersey.—Aycrigg v. New York, etc., R. Co., 30 N. J. L. 460.

New York.—Richmond Turnpike Co. v. Vanderbilt, 1 Hill (N. Y.) 480; Sheridan v. Charlick, 4 Daly (N. Y.) 338; Haack v. Fearling, 5 Robt. (N. Y.) 528; Cavanagh v. Dinsmore, 12 Hun (N. Y.) 465; Fero v. Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361.

Oregon.—Oliver v. North Pac. Transp. Co., 3 Oregon 87.

Pennsylvania.—Blattenberger v. Little Schuylkill Nav., etc., Co., 2 Miles (Pa.) 309; Bard v. Yohn, 26 Pa. St. 482.

Washington.—Hart v. Maney (Wash., 1895), 40 Pac. Rep. 987.

See the titles MASTER AND SERVANT; NEGLIGENCE.

2. *England*.—M'Manus v. Crickett, 1 East 106; Bowcher v. Noidstrom, 1 Taunt. 568; Ellis v. Turner, 8 T. R. 531.

Alabama.—Selma, etc., R. Co. v. Webb, 49 Ala. 240.

California.—Turner v. North Beach, etc., R. Co., 34 Cal. 594.

Georgia.—Merchants Nat. Bank v. Guil-martin, 88 Ga. 800.

Iowa.—DeCamp v. Mississippi, etc., R. Co., 12 Iowa 348.

Louisiana.—Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512.

Maryland.—Brown v. Purviance, 2 Har. & G. (Md.) 316.

New York.—Richmond Turnpike Co. v. Vanderbilt, 1 Hill (N. Y.) 480; Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448.

North Carolina.—Wesson v. Seaboard, etc., R. Co., 4 Jones (N. Car.) 379.

Tennessee.—Purvey v. Thompson, 5 Humph. (Tenn.) 397.

See also Middleton v. Fowler, 1 Salk. 282; Curtis v. Dinneen, 4 Dakota 245; Johnson v. Barber, 10 Ill. 426, 50 Am. Dec. 416; also Tuller v. Voght, 13 Ill. 278; Illinois Cent. R. Co. v. Downey, 18 Ill. 259; Wood v. Detroit City St. R. Co., 52 Mich. 402, 50 Am. Rep. 259; Philadelphia, etc., R. Co. v. Brannen (Pa., 1886), 2 Atl. Rep. 429; and the title MASTER AND SERVANT.

3. *England*.—Limpus v. London General Omnibus Co., 1 H. & C. 528.

United States.—Chamberlain v. Chandler, 3 Mason (U. S.) 242.

Alabama.—Gilliam v. South, etc., Alabama R. Co., 70 Ala. 268.

Arkansas.—Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560.

Illinois.—Arasmith v. Temple, 11 Ill. App. 39; North Chicago City R. Co. v. Gastka, 128 Ill. 613; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Toledo, etc., R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, etc., R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; Chicago, etc., R. Co. v. Dickson, 63 Ill. 152, 14 Am. Rep. 114; Northwestern R. Co. v. Hack, 66 Ill. 238; Chicago, etc., R. Co. v. Sykes, 96 Ill. 162; Chicago, etc., R. Co. v. Flexman, 103 Ill. 456.

Indiana.—Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103.

Iowa.—McKinley v. Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kansas.—Hynes v. Jungren, 8 Kan. 391; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 5 Am. St. Rep. 766.

Kentucky.—Sherley v. Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

Louisiana.—Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512.

Maine.—Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Massachusetts.—Howe v. Newmarch, 12 Allen (Mass.) 49; Ramsden v. Boston, etc., R. Co., 104 Mass. 120, 6 Am. Rep. 200; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; Levi v. Brooks, 121 Mass. 501.

him from responsibility when the agent steps aside from the business of his

Mississippi.—New Orleans, etc., R. Co. v. Bailey, 40 Miss. 395.

New York.—Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Isaacs v. Third Ave. R. Co., 47 N. Y. 126, 7 Am. Rep. 418; Shea v. Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480; Rounds v. Delaware, etc., R. Co., 64 N. Y. 134, 21 Am. Rep. 597; Hoffman v. New York Cent., etc., R. Co., 87 N. Y. 32, 41 Am. Rep. 337; Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185.

Ohio.—Little Miami, etc., R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Passenger R. Co. v. Young, 21 Ohio St. 524.

Pennsylvania.—Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 372.

South Carolina.—Rucker v. Smoke, 37 S. Car. 377; Redding v. South Carolina R. Co., 3 S. Car. 1, 16 Am. Rep. 681; Palmer v. Charlotte, etc., R. Co., 3 S. Car. 580.

Tennessee.—Cantrell v. Colwell, 3 Head (Tenn.) 471; Springer Transp. Co. v. Smith, 16 Lea (Tenn.) 498; Nashville, etc., R. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296.

Texas.—Dillingham v. Anthony, 73 Tex. 47.

Wisconsin.—Pritchard v. LaCrosse, etc., R. Co., 7 Wis. 232; Craker v. Chicago, etc., R. Co., 36 Wis. 657.

See also Seymour v. Greenwood, 6 H. & N. 359; Detroit, etc., R. Co. v. Barton, 61 Ind. 203; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.) 153; Hays v. Houston, etc., R. Co., 46 Tex. 272; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; and the title MASTER AND SERVANT.

Liability of Corporation for Malicious Acts.—A corporation may be held liable for malicious acts of its agents where an individual would be responsible under similar circumstances.

England.—Whitfield v. South Eastern R. Co., El. Bl. & El. 115, 96 E. C. L. 115; Edwards v. Midland R. Co., 6 Q. B. Div. 287.

United States.—Philadelphia, etc., Co. v. Quigley, 21 How. (U. S.) 202.

Connecticut.—Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Illinois.—Springfield Engine, etc., Co. v. Green, 25 Ill. App. 106.

Maryland.—Carter v. Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311.

Mississippi.—Williams v. Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494.

Missouri.—Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505.

New Jersey.—Vance v. Erie R. Co., 32 N. J. L. 334.

Pennsylvania.—Fenton v. Wilson Sewing Mach. Co., 9 Phila. (Pa.) 189.

Tennessee.—Wheless v. Nashville Second Nat. Bank, 1 Baxt. (Tenn.) 469.

See also the title CORPORATIONS.

Malicious Prosecution by Agents of Corporations.—It seems to be the better doctrine that where a prosecution which is maliciously instituted by an agent of a corporation is in the line of his duty for the purpose of benefit to his principal, and not for any object personal to himself, the corporation will be held responsible.

England.—New South Wales Bank v. Owston, L. R. 4 App. Cas. 270; Walker v. South Eastern R. Co., L. R. 5 C. P. 640; Edwards v. Midland R. Co., 6 Q. B. Div. 287.

United States.—Copley v. Grover, etc., Sewing Mach. Co., 2 Woods (U. S.) 494.

Connecticut.—Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Illinois.—Springfield Engine, etc., Co. v. Green, 25 Ill. App. 106.

Kansas.—Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571.

Michigan.—Govaski v. Downey, 100 Mich. 429.

Mississippi.—Williams v. Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494.

Missouri.—Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505; Cameron v. Pacific Express Co., 48 Mo. App. 99.

New Jersey.—Vance v. Erie R. Co., 32 N. J. L. 334.

Pennsylvania.—Fenton v. Wilson Sewing Mach. Co., 9 Phila. (Pa.) 189.

Tennessee.—Wheless v. Nashville Second Nat. Bank, 1 Baxt. (Tenn.) 469.

See also Cleveland Co-operative Stove Co. v. Koch, 37 Ill. App. 595.

Compare Owsley v. Montgomery, etc., R. Co., 37 Ala. 560; Dally v. Young, 3 Ill. App. 39; Carter v. Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311; Childs v. State Bank, 17 Mo. 213; Levey v. Fargo, 1 Nev. 415; Wallace v. Finberg, 46 Tex. 35. See also the title MALICIOUS PROSECUTION.

It has been held that the corporation will not be liable for the malicious prosecution by its agent, unless it is made to appear that the agent had been previously expressly authorized by the corporation to act as he did, or that the act has been subsequently ratified and adopted by the corporation. Dally v. Young, 3 Ill. App. 39; Carter v. Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311; Levey v. Fargo, 1 Nev. 415.

It has been held in *Missouri*, that where an express agent charged with the duty of protecting property and collecting charges thereon attempts to collect such charges on property unlawfully taken without payment of the charges, and in such attempt as agent mistakenly institutes a criminal prosecution without probable cause, the principal will be liable in an action for malicious prosecution; though where the agent acts as a citizen and for the purpose of vindicating justice, the rule is otherwise. Cameron v. Pacific Express Co., 48 Mo. App. 99. See Gillett v. Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653.

Where the Principal Employs the Agent to Do an Illegal Act, as where a justice orders the illegal detention and imprisonment of a prisoner by a constable, it has been held that the principal will be responsible, whether the agent acts innocently or maliciously. Hynes v. Jungren, 8 Kan. 391. Brewer, J., in delivering the opinion of the court, said: "The question is not presented as to whether the principal is responsible where his agent employed to do a lawful act transcends such

principal and wantonly or maliciously commits an act to accomplish an independent purpose of his own.¹

Fraud.—As in other cases of tort, the principal is liable for the fraudulent acts of his agent in the course and within the scope of his employment, though in fact the principal did not authorize the practice of such acts.²

employment and does a wilful and malicious wrong. For here the act which the principal procures the agent to do is illegal, and whether the agent acted innocently or maliciously, the principal is responsible for the injury."

1. *England.*—*M'Manus v. Crickett*, 1 East 106; *Croft v. Alison*, 4 B. & Ald. 590, 6 E. C. L. 614.

Alabama.—*Gilliam v. South*, etc., *Alabama R. Co.*, 70 Ala. 268.

Illinois.—*Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416; *Tuller v. Voght*, 13 Ill. 278; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Oxford v. Peter*, 28 Ill. 434; *Cleveland Co-operative Stove Co. v. Koch*, 37 Ill. App. 595.

Indiana.—*Evansville*, etc., *R. Co. v. Baum*, 26 Ind. 70.

New York.—*Isaacs v. Third Ave. R. Co.*, 47 N. Y. 126, 7 Am. Rep. 418; *Rounds v. Delaware*, etc., *R. Co.*, 64 N. Y. 134, 21 Am. Rep. 597; *Hoffman v. New York Cent.*, etc., *R. Co.*, 87 N. Y. 32, 41 Am. Rep. 337.

Tennessee.—*Cantrell v. Colwell*, 3 Head (Tenn.) 471.

See also *Middleton v. Fowler*, 1 Salk. 282; *Poulton v. London*, etc., *R. Co.*, L. R. 2 Q. B. 538; *Lyons v. Martin*, 8 Ad. & El. 512, 35 E. C. L. 448; *Richoux v. Mayer*, 29 La. Ann. 828; *Gulf*, etc., *R. Co. v. Moore*, 69 Tex. 157; and the title MASTER AND SERVANT.

Andrews, J., in *Rounds v. Delaware*, etc., *R. Co.*, 64 N. Y. 136, 21 Am. Rep. 597, said: "If, however, the servant, under guise and cover of executing his master's orders and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant as to that transaction does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders."

2. *England.*—*Hern v. Nichols*, 1 Salk. 289. *United States.*—*Andrews v. Solomon*, Pet. (C. C.) 360.

Alabama.—*Herbert v. Huie*, 1 Ala. 18, 34 Am. Dec. 755; *Edinburgh American Land Mortg. Co. v. Peoples (Ala.)*, 1894, 14 So. Rep. 656.

Georgia.—*Lunday v. Thomas*, 26 Ga. 537.

Illinois.—*Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416.

Iowa.—*Noble v. The Steamboat Northern Illinois*, 23 Iowa 109; *Mankin v. Mankin (Iowa)*, 1894, 59 N. W. Rep. 292.

Maryland.—*Andrews v. Clark*, 72 Md. 396.

Massachusetts.—*Locke v. Stearns*, 1 Met. (Mass.) 562, 35 Am. Dec. 382; *Foster v. Essex Bank*, 17 Mass. 508, 9 Am. Dec. 168.

Minnesota.—*Aultman v. Olson*, 34 Minn. 450.

Missouri.—*Goetz v. Flanders*, 118 Mo. 342; *Commerce Bank v. Hoeber*, 88 Mo. 37, 57 Am. Rep. 359.

Nebraska.—*McKeighan v. Hopkins*, 19 Neb. 33.

New York.—*Jackson v. Leonard*, 13 Johns. (N. Y.) 180; *Griswold v. Haven*, 25 N. Y. 599, 82 Am. Dec. 380; *Briggs v. Jones (C. Pl.)*, 28 N. Y. Supp. 709; *Union Bank v. Mott*, 39 Barb. (N. Y.) 180; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Titus v. Great Western Turnpike Road*, 61 N. Y. 237; *Fifth Ave. Bank v. Forty-second St.*, etc., *R. Co.*, 137 N. Y. 231.

Pennsylvania.—*Independent Bldg.*, etc., *Assoc. v. Real Estate Title Co.*, 156 Pa. St. 181; *Millward Cliff Cracker Co.'s Estate*, 161 Pa. St. 157.

South Carolina.—*Johnston v. South Western Railroad Bank*, 3 Strobb. Eq. (S. Car.) 263; *Reynolds v. Witte*, 13 S. Car. 5, 36 Am. Rep. 678.

Texas.—*Henderson v. San Antonio*, etc., *R. Co.*, 17 Tex. 560; *Wright v. Calhoun*, 19 Tex. 412.

Wisconsin.—*McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178.

See also *Wachsmuth v. Martini*, 45 Ill. App. 244; *Newland v. Oakley*, 6 Yerg. (Tenn.) 489.

Grounds of Liability for Agent's Fraud.—*McGowan, J.*, in delivering the opinion of the court in *Reynolds v. Witte*, 13 S. Car. 5, 36 Am. Rep. 678, said: "It is difficult to understand upon what ground the principal should be held liable for the negligence of his agent and not for his fraud, where the act is done or omitted to be done to the very property as to which the agency exists, and in the course of the agency. Fraud by which the property is lost is generally considered one of the forms of gross negligence. What is the proper understanding of the phrase 'within the scope of the agency'? Does 'the scope' include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act, and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within 'the scope of the agency;' but

Misrepresentations.—Accordingly, the fraudulent representations of an agent acting in the course of his employment¹ and in reference to business within

tested by the connection of the act with the property and business of the agency, fraud in taking the very property is as much 'within the scope of the agency' as negligence in allowing others to take it. The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent."

Fraud within Apparent Scope of Authority—Illustrations.—Plaintiff delivered an old certificate of deposit to the agent of Wells, Fargo & Company, for the purpose of having it sent to San Francisco to be renewed; the agent fraudulently procured it to be cashed, and appropriated the money to his own use. It was held that Wells, Fargo & Company were liable, not upon the rule that the agent acted for his principal in that particular transaction, but because he was employed by the company in that character of business, and held out by it as a person authorized and fully to be trusted. *Dougherty v. Wells*, 7 Nev. 368.

In an action for fraud in the sale of cheese, it appeared that defendants represented an unincorporated association, which owned a cheese factory and was engaged in the business of manufacturing cheese. C became the lessee of the factory from the association, agreeing to pay rent and taxes, etc., and to manufacture the cheese for the defendants at a specified sum per hundred pounds. He employed and paid the necessary help for doing the work, defendants having no supervision or control. They furnished the materials, took the products, and sold them in the market as manufactured by themselves. It was held that as to the public they assumed the character of principals, and were liable for the frauds of C or his subordinates in the manufacture of the cheese. *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428.

Fraud beyond Scope of Authority.—But when the agent commits a fraudulent act which is foreign to the transaction in which he was employed, the principal will not be responsible. *Stimpson v. Achorn*, 158 Mass. 342; *Kennedy v. Parke*, 17 N. J. Eq. 415.

Liability of Bank for Special Deposit.—Thus it has been held that a bank is not liable for the loss of a special deposit, to keep which it receives no compensation, by the theft of its cashier or other servant, provided it has not been guilty of gross negligence in any respect. *Merchants Nat. Bank v. Guilmarin*, 88 Ga. 797; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Scott v. Chester Valley Nat. Bank*, 72 Pa. St. 471; *Allentown First Nat. Bank v. Rex*, 89 Pa. St. 308; *Giblin v. McMullen*, L. R. 2 P. C. 317.

Deceit.—The proposition has been laid down, however, by a few cases, that while the false and fraudulent acts of an agent made in the course of his employment may render the principal liable in an appropriate action, an action of tort for the deceit of the agent will not lie against an innocent principal.

Udell v. Atherton, 7 H. & N. 171; *Western Bank v. Addie*, L. R. 1 Sc. & D. Cas. 146; *Wachsmuth v. Martini*, 45 Ill. App. 244; *Kennedy v. McKay*, 43 N. J. L. 288, 39 Am. Rep. 581; *State v. Fredericks*, 47 N. J. L. 469.

But Shipman, J., in commenting upon some of the above-mentioned cases in the opinion given by him in the case of *City Nat. Bank v. Dun*, 51 Fed. Rep. 160, said: "But it is said by the defendant that later English cases, and a well-considered modern case in New Jersey, have denied that an action of deceit would lie against an innocent principal; and the cases of *Udell v. Atherton*, 7 H. & N. 171; *Western Bank v. Addie*, L. R. 1 Sc. & D. Cas. 146; and *Kennedy v. McKay*, 43 N. J. L. 288, 39 Am. Rep. 581, are cited. An examination of each of those cases shows that the old doctrine was not denied that the principal is liable whenever his agent, who is at the time acting within the scope of his authority and for the principal, makes a fraudulent misrepresentation which influences and is acted upon by the plaintiff to his injury; but that the cases turned upon the question whether the alleged agent was, under the circumstances in each case, acting within the scope of his authority. * * * It will thus be seen that the cases upon which reliance is placed show nothing more than a disposition on the part of English judges to demand that, when an innocent principal is made liable, it shall clearly appear that the fraudulent agent was not acting outside the known scope and power of his agency. But the question was re-examined, in the light of the *Addie* case, in *Mackay v. Commercial Bank*, L. R. 5 P. C. 394,—a case in which no doubts of the extent of the agency existed,—and it was held without hesitation, that 'in an action of deceit, whether against a person or a company, the fraud of the agent may be treated, for the purposes of pleading, as the fraud of the principal;' and the language of Lord Willes in *Barwick v. English Joint Stock Bank*, L. P. 2 Exch. 259, is approved: 'The master is answerable for every such [fraudulent] wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved.'"

1. *England.*—*National Exch. Co. v. Drew*, 32 Eng. L. & Eq. 1.

United States.—*City Nat. Bank v. Dun*, 51 Fed. Rep. 160.

Arkansas.—*Morton v. Scull*, 23 Ark. 289.

Florida.—*Wheeler v. Baars*, 33 Fla. 696.

Illinois.—*Wachsmuth v. Martini*, 45 Ill. App. 244.

Indiana.—*Beem v. Lockhart*, 1 Ind. App. 202; *Wolfe v. Pugh*, 101 Ind. 304.

Maryland.—*Lamm v. Port Deposit Homestead Assoc.*, 49 Md. 240, 33 Am. Rep. 246.

Massachusetts.—*Lobdell v. Baker*, 1 Met. (Mass.) 193, 35 Am. Dec. 358; *White v. Sawyer*, 16 Gray (Mass.) 586.

Minnesota.—*Browning v. Hinkle*, 48 Minn. 544.

the scope of his authority¹ will be binding upon the principal, although in

New Jersey.—Kennedy *v.* McKay, 43 N. J. L. 288, 39 Am. Rep. 581; State *v.* Fredericks, 47 N. J. L. 469.

New York.—Sandford *v.* Handy, 23 Wend. (N. Y.) 260; Ferguson *v.* Hamilton, 35 Barb. (N. Y.) 427.

Pennsylvania.—Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464; Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508.

Tennessee.—Tagg *v.* Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479.

Texas.—Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560.

See Lynch *v.* Mercantile Trust Co., 18 Fed. Rep. 486; Nicoll *v.* American Ins. Co., 3 Woodb. & M. (U. S.) 529; Kibbe *v.* Hamilton Mut. Ins. Co., 11 Gray (Mass.) 163; Ripley *v.* Case, 86 Mich. 261; Leavitt *v.* Sizer, 35 Neb. 80; Aron *v.* DeCastro (Supreme Ct.), 13 N. Y. Supp. 372; Union Bank *v.* Campbell, 4 Humph. (Tenn.) 394.

Fraudulent Representations of the Officers of an Insurance Company, concerning the solvency of the corporation and the payment of their capital stock, are no defense to a suit upon a premium note given to the company, unless these representations were held out at the time when the note was made, and for the purpose of obtaining it. Fogg *v.* Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662. See Browning *v.* Hinkle, 48 Minn. 544; Edwards *v.* Thomas, 66 Mo. 468; Ezell *v.* Franklin, 2 Sneed (Tenn.) 237.

1. *Indiana*.—Fort Wayne, etc., Turnpike Co. *v.* Deam, 10 Ind. 563; Beem *v.* Lockhart, 1 Ind. App. 202; Wolfe *v.* Pugh, 101 Ind. 304.

Maine.—Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354.

Maryland.—Lamm *v.* Port Deposit Homestead Assoc., 49 Md. 233, 33 Am. Rep. 246.

Massachusetts.—Lobdell *v.* Baker, 1 Met. (Mass.) 193, 35 Am. Dec. 358; Fogg *v.* Pew, 10 Gray (Mass.) 415, 71 Am. Dec. 662.

Michigan.—Busch *v.* Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563.

Minnesota.—Browning *v.* Hinkle, 48 Minn. 544.

New York.—Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 494; Ferguson *v.* Hamilton, 35 Barb. (N. Y.) 427; Taylor *v.* Guest, 45 How. Pr. (N. Y. Supreme Ct.) 276.

Pennsylvania.—Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464; Erie City Iron Works *v.* Barber, 106 Pa. St. 125, 51 Am. Rep. 508; McNeile *v.* Cridland (Pa., 1895), 31 Atl. Rep. 939.

Texas.—Henderson *v.* San Antonio, etc., R. Co., 17 Tex. 560.

Wisconsin.—Kelly *v.* Troy F. Ins. Co., 3 Wis. 254.

See Sandford *v.* Handy, 23 Wend. (N. Y.) 266.

Illustrations.—In Fort Wayne, etc., Turnpike Co. *v.* Deam, 10 Ind. 563, it was held that representations made by a person who is not the authorized agent of a corporation, in soliciting stock for it, though false, are

not fraudulent so far as the corporation is concerned.

The powers of an agent conducting a sale of mortgaged property, under an appointment from the mortgagee, must be found in the mortgage authorizing the sale; and any representations made by such an agent, beyond the powers contained in the mortgage authorizing the sale, do not bind the mortgagee. Lamm *v.* Port Deposit Homestead Assoc., 49 Md. 233, 33 Am. Rep. 246.

Special Agent.—Where the owners of a ship authorized the master to sell the ship in the same manner as they themselves might or could sell her; and the master sold the ship and at the time of the sale represented to the vendee that she was a registered ship, when in fact she only sailed under a coasting license—it was held that, the master being a special agent for the purpose of the sale, the owners were not answerable for the false representations of the master, who exceeded his authority. Gibson *v.* Colt, 7 Johns. (N. Y.) 390. See Lobdell *v.* Baker, 1 Met. (Mass.) 193, 35 Am. Dec. 358; Hovey *v.* Brown, 59 N. H. 114; Cooley *v.* Perrine, 41 N. J. L. 322, 32 Am. Rep. 210; State *v.* Fredericks, 47 N. J. L. 469. Compare Beem *v.* Lockhart, 1 Ind. App. 202.

But a special agent when acting within the scope of his authority will bind his principal by his misrepresentations as effectually as a general agent. Morton *v.* Scull, 23 Ark. 289; Beem *v.* Lockhart, 1 Ind. App. 202.

Where the Act of Executing an Authority is Itself a Representation of the Existence of Certain Facts.—In *New York*, in the case of Batavia Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 60 Am. Rep. 440, it was said by Finch, J., in delivering the opinion of the court: "It is a settled doctrine of the law of agency in this state, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." See North River Bank *v.* Aymar, 3 Hill (N. Y.) 262; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125; Brooke *v.* New York, etc., R. Co., 108 Pa. St. 544, 56 Am. Rep. 235 (giving decision in a case which was controlled by the law of *New York*).

Thus a carrier corporation has been held to be liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill, has in good faith discounted a draft drawn upon the consignee, although no property was in fact delivered.

perpetrating the fraud the agent acted without the knowledge or consent of the principal.¹

6. **LIABILITY CRIMINALLY.**—The principal is in general not liable *criminally* for the act of his agent unless it is committed by his command or with his assent.²

3. **Of Third Parties to Agent**—*a.* **IN GENERAL.**—A third party is not generally liable to an action brought by an agent in his own name, on a contract made by him as such agent; nor, *per contra*, can an agent be sued on such contract.³

Batavia Bank v. New York, etc., R. Co., 106 N. Y. 195, 60 Am. Rep. 440.

For similar decisions in other states see *Wichita Sav. Bank v. Atchison, etc., R. Co.,* 20 Kan. 519; *Edwards v. Thomas,* 66 Mo. 468; *Sioux City, etc., R. Co. v. Freemont First Nat. Bank,* 10 Neb. 556, 35 Am. Rep. 488; *Hill v. Nation Trust Co.,* 108 Pa. St. 1, 56 Am. Rep. 189. *Compare Grant v. Norway,* 10 C. B. 665, 70 E. C. L. 665; *The Loon,* 7 Blatchf. (U. S.) 244; *The Schooner Freeman v. Buckingham,* 18 How. (U. S.) 182; *Pollard v. Vinton,* 105 U. S. 7; *Hunt v. Mississippi Cent. R. Co.,* 29 La. Ann. 446; *Baltimore, etc., R. Co. v. Wilkens,* 44 Md. 11, 22 Am. Rep. 26; *Louisiana Nat. Bank v. Laveille,* 52 Mo. 380.

The Reiteration by an Agent, of Representations made on behalf of his principal, in order to induce a third party to enter into a contract, will not relieve the principal from responsibility, even though such reiteration is coupled with a personal guaranty by the agent of their truth, and the added responsibility of the agent to stand between the contractor and harm. *Busch v. Wilcox,* 82 Mich. 336, 21 Am. St. Rep. 563.

1. *City Nat. Bank v. Dun,* 51 Fed. Rep. 160; *Wolfe v. Pugh,* 101 Ind. 304; *Elwell v. Chamberlain,* 4 Bosw. (N. Y.) 320; *Halsell v. Musgrave,* 5 Tex. Civ. App. 476; *Henderson v. San Antonio, etc., R. Co.,* 17 Tex. 560.

2. *England.*—*Rex v. Huggins,* 2 Stra. 885; *Somerset v. Hart,* 12 Q. B. Div. 360.

United States.—*U. S. v. Beatty,* Hempst. (U. S.) 487; *U. S. v. Birch,* 1 Cranch (C. C.) 571.

Alabama.—*Nall v. State,* 34 Ala. 262; *Seibert v. State,* 40 Ala. 60.

Indiana.—*Hipp v. State,* 5 Blackf. (Ind.) 149, 33 Am. Dec. 463.

Massachusetts.—*Com. v. Putnam,* 4 Gray (Mass.) 16; *Com. v. Nichols,* 10 Met. (Mass.) 259, 43 Am. Dec. 432.

Michigan.—*People v. Parks,* 49 Mich. 333.

Texas.—*Mitchell v. Mims,* 8 Tex. 6.

Virginia.—*Com. v. Lewis,* 4 Leigh (Va.) 664.

See also *Hern v. Nichols,* 1 Salk. 289; *U. S. v. Paxton,* 1 Cranch (C. C.) 44; *U. S. v. Shuck,* 1 Cranch (C. C.) 56; *U. S. v. Voss,* 1 Cranch (C. C.) 101; *Patterson v. State,* 21 Ala. 571; *Locke v. Stearns,* 1 Met. (Mass.) 562, 35 Am. Dec. 382; *Reynolds v. Witte,* 13 S. Car. 5, 36 Am. Rep. 678; and the title **MASTER AND SERVANT.**

Arrest in Action on Contract.—In *Hathaway v. Johnson,* 55 N. Y. 93, 14 Am. Rep. 186, it was held that a principal cannot be arrested for frauds committed without his knowledge or authority by his agent in purchasing

goods for him, under a statute which authorizes an arrest "where the defendant has been guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought."

Criminal Liability of Principal in Cases Arising under Police Regulations.—There are, however, certain exceptions to the rule as stated in the text, prominent among which are a class of cases arising under revenue laws and police regulations. Thus, in *Atty.-Gen. v. Siddon,* 1 Crompt. & J. 220 (a case of concealing smuggled goods), it was held that a trader is liable to a penalty for the illegal act of a servant done in the conduct of his business, with a view to protect the smuggled goods, though the master be absent at the time the act is done.

Under this exception have been held to come the cases of sales of intoxicating liquors by clerks or agents. See the titles **INTOXICATING LIQUORS; REVENUE LAWS; SEARCHES AND SEIZURES.**

Here belongs also the sale, by agents and servants, of adulterated foods and drinks in violation of statute. See the title **ADULTERATION**, Vol. I, p. 745.

Moreover, there are Cases at Common Law not depending upon such statutory enactments, where the principal was held criminally liable for the acts of his agent, though such acts were done without his knowledge and consent.

Thus, bookdealers and publishers have been held criminally liable for publications issued from their establishments in the ordinary course of their business, although they had no knowledge of the particular act of sale or publication. *Rex v. Walter,* 3 Esp. 21; *Rex v. Gutch, M. & M.* 433, 22 E. C. L. 352. *Compare Reg. v. Holbrook,* 3 Q. B. Div. 60.

Company Liable for Nuisance.—In an indictment against a gas company for a nuisance in conveying the refuse of gas into a great public river, it was held that the directors are answerable for an act done by their superintendent and engineer, made under a general authority to manage the works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued. *Rex v. Medley,* 6 C. & P. 292, 25 E. C. L. 403.

3. *England.*—*Fisher v. Marsh,* 6 B. & S. 411, 118 E. C. L. 411; *Piggott v. Thompson,* 3 B. & P. 147.

United States Courts.—*Thatcher v. Winslow,* 5 Mason (U. S.) 58.

b. AGENT'S RIGHT OF ACTION AGAINST THIRD PARTIES—(1) On Contract—(a) When Made with Agent Personally¹—aa. GENERAL RULE.—When a contract not under seal purports to be made expressly with the agent, the latter may

California.—Lineker v. Ayeshford, 1 Cal. 76, distinguishing Santillan v. Moses, 1 Cal. 92.

Maine.—Garland v. Reynolds, 20 Me. 45.

Massachusetts.—Kent v. Bornstein, 12 Allen (Mass.) 342; Medway Cotton Manufactory v. Adams, 10 Mass. 360.

New York.—Thompson v. Fargo, 43 N. Y. 188, 10 Am. Dec. 342, 63 N. Y. 479; Buckbee v. Brown, 21 Wend. (N. Y.) 110; Gunn v. Cantine, 10 Johns. (N. Y.) 387; Oakey v. Bend, 3 Edw. Ch. (N. Y.) 482; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618.

North Carolina.—Whitehead v. Potter, 4 Ired. (N. Car.) 257.

Texas.—Tinsley v. Dowell, 87 Tex. 23.

Virginia.—Jones v. Hart, 1 Hen. & M. (Va.) 471.

Agent's Lack of Interest Apparent.—Where it appears from a contract that the agent has no direct or beneficial interest therein, the right of redress against the third party is in the principal alone. Bayley v. Onondaga Mut. Ins. Co., 6 Hill (N. Y.) 476, 41 Am. Dec. 759.

1. Agent's Right of Action under the Codes.—The code states uniformly give a right of action to "the trustee of an express trust," and define such a trustee so as to include a "person with whom or in whose name a contract is made for the benefit of another," and thus expressly give to an agent a right of action in his own name. See the codes of procedure of the various states. This provision forms section 449 of the *New York Code of Civil Procedure*.

The *Georgia Code*, under § 2209, gives an agent a right of action under the following circumstances: subd. 1, to "A factor contracting on his own credit;" subd. 2, "Where promissory notes are made payable to an agent of a corporation or joint-stock company;" subd. 3, "In all cases where the contract is made with the agent in his individual name, though his agency be known;" subd. 5, "In cases of agency coupled with an interest in the agent known to the party contracting with him." These provisions of the codes will be found construed in the following cases:

Georgia.—Spain v. Beach, 52 Ga. 494.

Indiana.—North Western Conference v. Myers, 36 Ind. 375; Landwerlen v. Wheeler, 106 Ind. 526; Beard v. Sloan, 38 Ind. 128; Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359.

Iowa.—Rice v. Savery, 22 Iowa 478; Cottle v. Cole, 20 Iowa 482.

Kansas.—Scantlin v. Allison, 12 Kan. 85.

Minnesota.—Cremer v. Wimmer, 40 Minn. 511; Close v. Hodges, 44 Minn. 204.

New York.—Hubbell v. Midbury, 53 N. Y. 98; Davis v. Reynolds, 48 How. Pr. (Chenango County Ct.) 214; Slocum v. Barry, 34 How. Pr. (N. Y. Supreme Ct.) 320; Hutchins v. Smith, 46 Barb. (N. Y.) 235; Brown v. Cherry, 56 Barb. (N. Y.) 635; Minturn v.

Main, 7 N. Y. 220; Grinnell v. Schmidt, 2 Sandf. (N. Y.) 706; Morgan v. Reid, 7 Abb. Pr. (N. Y. Supreme Ct.) 215; Union India Rubber Co. v. Tomlinson, 1 E. D. Smith (N. Y.) 364; Erickson v. Compton, 6 How. Pr. (N. Y. Supreme Ct.) 471.

South Dakota.—Hudson v. Archer, 4 S. Dak. 128.

Code Rule Applied by United States Courts.—Under the *United States Rev. Stat.*, § 914, the rule thus established is applicable to rights of action at law in the courts of the United States held within the state where such statute is in force, any rule of the United States court to the contrary notwithstanding. U. S. Rev. Stat., § 914; Sawin v. Kinny, 93 U. S. 289; Weed Sewing Mach. Co. v. Wicks, 3 Dill. (U. S.) 261; U. S. v. Tracy, 8 Ben. (U. S.) 1.

Illustrations.—It has been held that under the *New York Code Civ. Pro.*, § 449, one who makes a contract with an agent where the agent contracts in his own name, but describes himself as agent, is liable to such agent, notwithstanding the fact that the principal can himself sue thereon. Albany, etc., Iron, etc., Co. v. Lundberg, 121 U. S. 451. In this case a written contract was made, by which "I, Gustaf Lundberg, agent for N. M. Hogland's Sons & Co., of Stockholm, agree to sell, and we, Albany & Rensselaer Iron and Steel Co., Troy, N. Y., agree to buy," certain Swedish iron. The contract contained no other mention of the Swedish firm, and was signed by the purchaser and by Lundberg with his own name merely. The court held that Lundberg had a right of action upon the contract.

This provision of the codes has been held to give a right of action to agents under the following circumstances: The agent of a corporation to whom notes are made payable as an agent. Considerant v. Brisbane, 22 N. Y. 389.

One who has authority of several owners to collect a claim in his own name. Noe v. Christie, 51 N. Y. 270.

The assignee of a claim in trust for a third person. Cummins v. Barkalow, 1 Abb. App. Dec. (N. Y.) 479.

A mercantile agent doing business for others in his own name. Ludwig v. Gillespie, 51 N. Y. Super. Ct. 310.

A general agent of an incorporated association. Habicht v. Pemberton, 4 Sandf. (N. Y.) 657; Myers v. Machado, 6 Abb. Pr. (N. Y.) 198.

An agent who takes a policy of fire insurance in his own name for a known but unnamed principal. Pitney v. Glens Falls Ins. Co., 65 N. Y. 6, affirming 61 Barb. (N. Y.) 335.

One who makes a sale for another, and takes the contract in his own name. Arosemena v. Hinckley, 43 N. Y. Super. Ct. 43.

One who, as the agent of the equitable owner of a debt, takes a chattel mortgage and note in his own name to secure the debt. Close v. Hodges, 44 Minn. 204.

maintain an action thereon,¹ and this is so although at the time of its execution it was known by the third party that he was acting as a mere agent.²

1. *England*.—Sims v. Bond, 5 B. & Ad. 393, 27 E. C. L. 99; Short v. Spackman, 2 B. & Ad. 962, 22 E. C. L. 223.

United States.—Leeds v. Marine Ins. Co., 6 Wheat. (U. S.) 565.

Georgia.—Groover v. Warfield, 50 Ga. 644.

Illinois.—Saladin v. Mitchell, 45 Ill. 79.

Indiana.—Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359.

Kansas.—Douglass v. Wolf, 6 Kan. 88.

Kentucky.—Neff v. Baden, 3 B. Mon. (Ky.) 468; Tharp v. Farquar, 6 B. Mon. (Ky.) 3. See also Harrow v. Dugan, 6 Dana (Ky.) 341; Smith v. Lewis, 3 B. Mon. (Ky.) 229.

Louisiana.—Willard v. Lugenbuhl, 24 La. Ann. 18; Brewster v. Saul, 8 La. 296.

Maryland.—Baltimore Coal Tar, etc., Co. v. Fletcher, 61 Md. 288.

Massachusetts.—Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Tyler v. Freeman, 3 Cush. (Mass.) 261; Huntington v. Knox, 7 Cush. (Mass.) 371; Colburn v. Phillips, 13 Gray (Mass.) 64, *distinguishing* Gilmore v. Pope, 5 Mass. 491; Pelton v. Baker, 158 Mass. 349; Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332.

Missouri.—Hovey v. Pitcher, 13 Mo. 191.

New Hampshire.—Chandler v. Coe, 54 N. H. 561.

New York.—Beebe v. Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; Pentz v. Stanton, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; Manette v. Simpson (Supreme Ct.), 15 N. Y. Supp. 448; Ludwig v. Gillespie, 105 N. Y. 653; Dows v. Cobb, 12 Barb. (N. Y.) 310.

North Carolina.—Brown v. Morris, 83 N. Car. 254.

Ohio.—Evrit v. Bancroft, 22 Ohio St. 172; Potts v. Rider, 3 Ohio 71, 17 Am. Dec. 581.

Pennsylvania.—*In re Merrick's Estate*, 2 Ashm. (Pa.) 485.

Texas.—Frazier v. Moore, 11 Tex. 755.

Vermont.—Culver v. Bigelow, 43 Vt. 247; Woodstock Bank v. Downer, 27 Vt. 482.

West Virginia.—Murdock v. Franklin Ins. Co., 33 W. Va. 407; Deitz v. Providence, etc., Ins. Co., 31 W. Va. 851, 13 Am. St. Rep. 909.

Canada.—Saxton v. Ridley, 13 U. C. Q. B. 522. But the contrary is held in Alsopp v. Hart, 2 Rev. de Lég. 29, K. B. 1817; Nesbitt v. Turgeon, 2 Rev. de Lég. 43, Q. B. 1845.

Story's Agency (9th ed.), § 160a, states the doctrine in these words: "If the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued and be entitled to sue thereon." This statement of the rule was approved in Darrow v. H. R. Horne Produce Co., 57 Fed. Rep. 463, and Dupont v. Mount Pleasant Ferry Co., 9 Rich. (S. Car.) 529.

Where a Third Party Purchases Goods of an Agent, and he has no knowledge of the existence of an agency to make the sale, he is liable to the agent. DuBois v. Perkins, 21 Oregon 189; Keown v. Vogel, 25 Mo. App. 35; Rosser v. Darden, 82 Ga. 219, 14 Am. St. Rep. 152.

Agent a Trustee.—If the agent sustains the character of a trustee solely, he alone is the proper party to bring an action on the contract, Treat v. Stanton, 14 Conn. 445; and this for the reason that the legal title is in the agent. Upson v. Swezey, 40 Conn. 472; Sanford v. Nichols, 14 Conn. 324; Potter v. Yale College, 8 Conn. 60.

Wager Contract.—Under the *New York* statute, 1 N. Y. Rev. Stat. 662, § 9, permitting money lost on wager to be recovered back, it is held that where the money so lost was contributed by several, but was deposited in his own name by one of them acting as an agent for the others, he could only recover the part of the fund owned by him, and that each of the other parties must bring a separate action to recover his share so lost. Ruckman v. Pitcher, 20 N. Y. 9, 1 N. Y. 392.

See also, for the construction of a somewhat similar statute in *Kentucky*, Donahoe v. McDonald, 92 Ky. 123.

See *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Third Parties to Principal—Money Lost on Wager Contracts*.

When Action should be Brought.—The agent must maintain the action while the agency exists. Miller v. State Bank, 57 Minn. 319.

Defense of Want of Interest.—The defendant may always show that another, and not the plaintiff, is the real party in interest. Hays v. Hawthorn, 74 N. Y. 486; Willard v. Lugenbuhl, 24 La. Ann. 18.

2. Paper Payable to Agents.—An illustration of this class of cases is found in those instances in which commercial paper or other contracts are made payable to the agent.

England.—De la Chaumette v. Bank of England, 9 B. & C. 208, 17 E. C. L. 356; Lowndes v. Anderson, 13 Eas. 130.

United States.—Dugan v. U. S., 3 Wheat. (U. S.) 180; Lun v. Robertson, 6 Wall. (U. S.) 277; Orr v. Lacy, 4 McLean (U. S.) 243.

Alabama.—Moore v. Penn., 5 Ala. 135.

California.—Winters v. Rush, 34 Cal. 136.

Illinois.—McHenry v. Ridgely, 3 Ill. 309, 35 Am. Dec. 110; Chadsey v. McCreery, 27 Ill. 252.

In *McConnel v. Thomas*, 3 Ill. 313, a note was payable to W., agent, etc., and it was held that he was the proper party plaintiff, and in its opinion the court, citing 3 Kent Com. 89, said: "If a bill be made payable to A for the use of B, the legal interest is in A, and he must indorse it; and for the same reason A must in such case bring the action."

Indiana.—Shepherd v. Evans, 9 Ind. 260.

Maine.—Bradford v. Bucknam, 12 Me. 15; Bragg v. Greenleaf, 14 Me. 395. Compare *Garland v. Reynolds*, 20 Me. 45 with *Irish v. Webster*, 5 Me. 171.

Massachusetts.—Buffum v. Chadwick, 8 Mass. 103; Little v. O'Brien, 9 Mass. 423; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Fairfield v. Adams, 16 Pick. (Mass.) 381; Fisher v. Ellis, 3 Pick. (Mass.) 322; Van Staphorst v. Pearce, 4 Mass. 258; Norcross v. Pease, 5 Allen (Mass.) 331.

New Hampshire.—Doe v. Thompson, 22 N.

66. WHEN AGENT IS OSTENSIBLE PRINCIPAL.—If an agent, in making a contract with a third party, acts in his own name, and does not disclose the name of his principal, or the existence of an agency, the third party contracts personally with the agent. In such a case the agent becomes, as to the third party, the real contracting party. Therefore the agent has a right of action on the contract,¹

H. 217. In this case a contract was made payable to D. as agent of, etc., and it was held that, the contract being in terms payable to an agent, he might maintain an action upon it.

New York.—Considerant v. Brisbane, 22 N. Y. 389; Fish v. Jacobsohn, 2 Abb. App. Dec. (N. Y.) 132; Davis v. Reynolds, 48 How. Pr. (Chenango County Ct.) 210; Guernsey v. Burns, 25 Wend. (N. Y.) 411; Gunn v. Cantine, 10 Johns. (N. Y.) 387; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618.

North Carolina.—Grist v. Backhouse, 4 Dev. & B. (N. Car.) 362. In this case the court held that where a bill was made payable to A, or order, to the use of B, B has but an equitable right, not a legal interest, and A is the proper party to bring an action thereon.

Pennsylvania.—Hodge v. Comly, 2 Miles (Pa.) 286.

South Carolina.—Jackson v. Heath, 1 Bailey (S. Car.) 355.

Tennessee.—Barbee v. Williams, 4 Heisk. (Tenn.) 522; Cocke v. Dickens, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214. In this case, where a note was made payable to C. as agent, it was held that the legal title and interest in the note were in C., and that the action must be brought in the name of the party in whom the legal title was vested, and that the word agent was simply *descriptio personæ*.

Texas.—Groce v. Herndon, 2 Tex. 410.

Vermont.—Johnson v. Catlin, 27 Vt. 89, 62 Am. Dec. 622; Binney v. Plumley, 5 Vt. 500, 26 Am. Dec. 313; Wheelock v. Wheelock, 5 Vt. 433.

Note Payable to Agent of Association or Corporation.—When a note is made to the agent or treasurer of a private association by name with the addition of his agency or office, he has a right of action thereon in his own name, the addition being merely *descriptio personæ*. Clap v. Day, 2 Me. 305, 11 Am. Dec. 99; Whitcomb v. Smart, 38 Me. 264; Cocke v. Dickens, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

The same is true if he is the agent of a corporation. Martin v. Lamb, 77 Ga. 252; Chadsey v. McCreery, 27 Ill. 253.

Form of Contract.—The right of the agent to maintain an action in his own name against the third party when the instrument is made payable to him, is the same whether the instrument be a promissory note, check, bill of exchange, bill of lading, or insurance contract. Murdock v. Franklin Ins. Co., 33 W. Va. 407.

Bill of Exchange—Check.—Dugan v. U. S., 3 Wheat. (U. S.) 172.

Bill of Lading.—Blanchard v. Page, 8 Gray (Mass.) 281; Griffith v. Ingledew, 6 S. & R. (Pa.) 429, 9 Am. Dec. 444; Sargent v. Morris, 3 B. & Ald. 277, 5 E. C. L. 283.

Insurance Contract.—Browning v. Provincial Ins. Co., L. R. 5 P. C. 263; Provincial Ins. Co. v. Leduc, L. R. 6 P. C. 224; Sargent v. Morris, 3 B. & Ald. 277, 5 E. C. L. 283; Finney v. Commercial Ins. Co., 8 Met. (Mass.) 348, 41 Am. Dec. 515; Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332; Spencer v. Field, 10 Wend. (N. Y.) 88; Deitz v. Providence, etc., Ins. Co., 31 W. Va. 851, 13 Am. St. Rep. 909; Murdock v. Franklin Ins. Co., 33 W. Va. 407.

In Sargent v. Morris, 3 B. & Ald. 277, 5 E. C. L. 283, Bayley, J., says: "In policies of insurance it is a common practice to bring your action either in the name of the agent or the principal."

However, if the policy is under seal and in the agent's name, the right of action against the insurer is exclusively in the agent. Schack v. Anthony, 1 M. & S. 573.

See also *infra*, this section, *On Instruments under Seal*, and also the title *INSURANCE*.

If the Agent Binds Himself Personally for the Fulfilment of a Contract, he has a right of action thereon, and the fact that his principal is a minor is no defense to the action. Nelson v. Nixon, 13 Abb. Pr. (N. Y. C. Pl.) 104.

Negotiable Instrument Indorsed in Blank to Agent for Collection.—Where a negotiable instrument is indorsed in blank and delivered to an agent for collection, the agent has a right of action on such instrument against the party liable thereon.

United States.—Dugan v. U. S., 3 Wheat. (U. S.) 180; Murray v. Lardner, 2 Wall. (U. S.) 110. *Contra*, Thatcher v. Winslow, 5 Mason (U. S.) 58.

Georgia.—Nisbet v. Lawson, 1 Ga. 275.

Illinois.—McConnel v. Thomas, 3 Ill. 313.

Louisiana.—Banks v. Eastin, 3 Martin N. S. (La.) 291.

Massachusetts.—Little v. O'Brien, 9 Mass. 423; Brigham v. Marean, 7 Pick. (Mass.) 40; Sherwood v. Roys, 14 Pick. (Mass.) 172.

New Jersey.—Hamilton v. Vought, 34 N. J. L. 187.

New York.—Guernsey v. Burns, 25 Wend. (N. Y.) 411; Mauran v. Lamb, 7 Cow. (N. Y.) 174; Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342; Ferguson v. Hamilton, 35 Barb. (N. Y.) 427; Welch v. Sage, 47 N. Y. 143, 7 Am. Rep. 423.

Pennsylvania.—Phelan v. Moss, 67 Pa. St. 59; Pearce v. Austin, 4 Whart. (Pa.) 489, 34 Am. Dec. 523; Hodge v. Comly, 2 Miles (Pa.) 286.

In Hodge v. Comly, 2 Miles (Pa.) 286, the court made this distinction: If the plaintiff holds the note as a trustee, he has the right of action; but if he holds it as a mere depository and agent, the right of action is in the principal.

1. Simms v. Bond, 5 B. & Ad. 389, 27 E. C. L. 97; Fisher v. Marsh, 6 B. & S. 411, 118 E. C. L. 411; Evans v. Evans, 3 Ad. & El. 132, 30 E. C. L. 52; Rayner v. Grote, 15 M. & W.

although the principal may also sue thereon in his own name.¹

cc. ON INSTRUMENTS UNDER SEAL.—Where it distinctly appears from an instrument under seal that the seal affixed is that of the agent and not of the principal, the agent only has a right of action thereon, against the third party.²

(b) When Agent Has Beneficial Interest.—When an agent has a beneficial interest in the subject matter of a contract he has a right of action thereon, and he may prosecute the same in his own name.³

359; *Leeds v. Marine Ins. Co.*, 6 Wheat. (U. S.) 565; *Rowe v. Rand*, 111 Ind. 206; *Lapham v. Green*, 9 Vt. 407.

This "class of cases would seem scarcely to require any illustration; for, as the agent acts in his own name, without disclosing any other principal, it follows as an irresistible inference, that the other contracting party binds himself personally to the agent." Story on Agency (9th ed.), § 396.

Ostensible Agent Showing Himself to be Principal.—One who, in the character of an agent, contracts for an unknown and unnamed principal, has a right of action as principal, unless the third party relied on his character as an agent only, and would not have contracted with him as a principal if he had known him to be such. *Schmalz v. Avery*, 20 L. J. Q. B. 228, 15 Jur. 291.

In *Rayner v. Grote*, 15 M. & W. 359, the plaintiff, assuming to act as agent for A, made a written contract for the sale of goods, and the buyer accepted and paid the price of a portion of the goods and then discovered that the plaintiff himself was the real principal in the transaction and not the agent of A. The court granted a recovery to the plaintiff for the nonacceptance by the defendant of the remainder of the goods. In delivering judgment Alderson, B., said: "In many * * * cases, such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule." See also *Boulton v. Jones*, 2 H. & N. 564, 27 L. J. Exch. 1117.

In the case of the *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9, A, who had bought ice of B, ceased to take it on account of dissatisfaction with B, and contracted for ice with C. Subsequently B bought C's business and delivered ice to A without notifying him of his purchase until after delivery and consumption of the ice. *Held*, that B could not maintain an action for the price of the ice against A. The court said: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract; * * * he may contract with whom he pleases; the sufficiency of his reasons for so doing cannot be inquired into."

A person has a right to the benefit he an-

ticipates from the credit and character of the person with whom he contracts. *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 387; *Humble v. Hunter*, 12 Q. B. 310, 64 E. C. L. 310; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Lansden v. McCarthy*, 45 Mo. 106.

1. *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Tyler v. Freeman*, 3 Cush. (Mass.) 261; *Bickerton v. Burrell*, 5 M. & S. 383; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Beebe v. Robert*, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; *Indianapolis, etc., R. Co. v. Tyng*, 63 N. Y. 653, *affirming* without opinion 2 Hun (N. Y.) 311.

And see *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Third Parties to Principal*.

Action for Specific Performance by Execution of Sealed Instrument.—When an agent makes an express unsealed contract in writing in his own name to buy land and to give a deed of trust (i.e., mortgage) thereon to secure unpaid purchase money, he alone has a right of action to compel specific performance of the contract, though the vendor knew the agent was acting for an unnamed principal. *Kelly v. Thuey*, 102 Mo. 522.

Principal Sufficiently Disclosed to Maintain Action.—In *J. H. Hayes Woolen Co. v. McKinnon*, 114 N. Car. 661, where a bill of sale stated that the consideration was paid by "W., agent," etc., for the plaintiffs named, it was held that the principals could bring an action on the contract, although the contract was under seal and signed simply in the name of the agent.

2. *Schack v. Anthony*, 1 M. & S. 573; *Sims v. Bond*, 5 B. & Ad. 389, 27 E. C. L. 97; *Dancer v. Hastings*, 4 Bing. 2, 13 E. C. L. 319; *Berkeley v. Hardy*, 5 B. & C. 355, 11 E. C. L. 251; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *U. S. v. Pasmele*, 1 Paine (U. S.) 252; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Schaefer v. Henkel*, 75 N. Y. 378; *Brown v. Morris*, 83 N. Car. 251; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 129; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214.

In *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617, *affirming* 39 N. Y. Super. Ct. 339, the court said: "We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *dehors* the instrument that the nominal party was acting as the agent of another." See also *Beardsley v. Duntley*, 69 N. Y. 577.

3. *England*.—*Eccleston v. Clipsham*, 1 Saund. 153; *Anderson v. Martindale*, 1 East 497.

Alabama.—*Beyer v. Bush*, 50 Ala. 19.

(c) **Payments Made under Mistake of Fact, or on Illegal Contracts.**—An agent has a right of action against a third person for money paid by the agent to such third person under a mistake of fact,¹ or for money paid by the agent upon an illegal contract, the illegality of the contract being unknown to the agent at the time of such payment.²

(2) **In Tort**—(a) **For Injury to Principal's Property in Agent's Possession.**—An agent who is in the possession of or entitled to the possession of property belonging to his principal by virtue of the agency, and having a special or general property therein, has a right of action against a third person who unlawfully injures or converts such property.³

(3) **For His Own Personal Injury.**—Where the agent sustains a personal loss or injury by reason of the fraud, deceit, misrepresentation, or tortious act of a third person, he may maintain an action against the third person for such loss or injury.⁴

Arkansas.—Beller v. Block, 19 Ark. 566.
Connecticut.—Potter v. Yale College, 8 Conn. 60; Treat v. Stanton, 14 Conn. 445.
Kentucky.—Graham v. Duckwall, 8 Bush. (Ky.) 12.

Maryland.—Harker v. Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670.

Massachusetts.—Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353; Borrowscale v. Bosworth, 99 Mass. 378; Colburn v. Phillips, 13 Gray (Mass.) 64.

North Carolina.—Whitehead v. Potter, 4 Ired. (N. Car.) 257.

New Hampshire.—Porter v. Raymond, 53 N.H. 519; Barnes v. Union M. & F. Ins. Co., 45 N. H. 21.

New York.—Butts v. Collins, 13 Wend. (N. Y.) 139; Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; Toland v. Murray, 18 Johns. (N. Y.) 24; Ladd v. Arkell, 37 N. Y. Super. Ct. 35; Hulse v. Young, 16 Johns. (N. Y.) 1; Minturn v. Main, 7 N. Y. 220; DeForest v. Fulton F. Ins. Co., 1 Hall (N. Y.) 84; Fitzhugh v. Wiman, 9 N. Y. 559; White v. Chouteau, 10 Barb. (N. Y.) 202; Bleecker v. Franklin, 2 E. D. Smith (N. Y.) 93; Bogart v. O'Regan, 1 E. D. Smith (N. Y.) 590.

Ohio.—Evril v. Bancroft, 22 Ohio St. 172.

Pennsylvania.—Girard v. Taggart, 5 S. & R. (Pa.) 27, 9 Am. Dec. 327; Baltimore, etc., Steamboat Co. v. Atkins, 22 Pa. St. 522.

See also, as to the right of an agent beneficially interested to maintain an action against a third party, the titles ATTORNEYS; AUCTIONS AND AUCTIONEERS; COMMON CARRIERS; COMMISSION MERCHANTS OR FACTORS; LIENS; WAREHOUSEMEN; DEL CREDERE COMMISSION.

An Agent for the Sale of Land Who is to Receive a Special Commission for such sale has not such an interest as will give him a right of action against the third party for its breach. Tinsley v. Dowell, 87 Tex. 23.

Where an Agent Pays Money to Protect His Principal's Estate, he is entitled to the same equities that his principal would have been entitled to had he made the payment. Curry v. Curry, 87 Ky. 667, 12 Am. St. Rep. 504.

1. Stevenson v. Mortimer, Cowp. 805; Newall v. Tomlinson, L. R. 6 C. P. 405.

2. Oom v. Bruce, 12 East 225; Kent v. Bornstein, 12 Allen (Mass.) 342.

In the latter case an agent who had authority only to sell goods belonging to his principal and to pay over the proceeds there-

from to his principal exchanged some of the money in his possession, received from the sale of goods, for a counterfeit bill. The court allowed a recovery to the agent for the money so exchanged, and stated that "it plainly appears that" the agent's "right to recover in this action is the only mode in which he can indemnify himself against the rightful claim of his employer for the loss caused by his abuse of the authority intrusted to him."

But an agent who by mistake sells his principal's goods for less than the schedule price cannot call upon an innocent purchaser to make good the difference. Hungerford v. Scott, 37 Wis. 341. See also the titles MISTAKE; PAYMENTS.

3. *England.*—Burton v. Hughes, 2 Bing. 173, 9 E. C. L. 368; Rooth v. Wilson, 1 B. & Ald. 59; Solomons v. Bank of England, 13 East 135, note; De la Chaumette v. Bank of England, 9 B. & C. 208, 17 E. C. L. 356. Williams v. Millington, 1 H. Bl. 81.

Georgia.—Southern Express Co. v. Palmer, 48 Ga. 85.

Illinois.—Owens v. Weedman, 82 Ill. 409.

Kentucky.—In Donahoe v. McDonald, 92 Ky. 123, it is held that when the agent is a bailee he may maintain the action.

Massachusetts.—White v. Dolliver, 113 Mass. 400, 18 Am. Rep. 502.

Maryland.—Dungan v. Mutual Ben. L. Ins. Co., 38 Md. 242.

Michigan.—Stephenson v. Little, 10 Mich. 433.

New York.—Tuthill v. Wheeler, 6 Barb. (N. Y.) 362; Bass v. Pierce, 16 Barb. (N. Y.) 595; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Gorum v. Carey, 1 Abb. Pr. (N. Y. C. Pl.) 285; Thorp v. Burling, 11 Johns. (N. Y.) 285; Cary v. Hotailing, 1 Hill (N. Y.) 312, 37 Am. Dec. 323; Aikin v. Buck, 1 Wend. (N. Y.) 466.

Vermont.—Edwards v. Edwards, 11 Vt. 587, 34 Am. Dec. 711.

See also the titles BAILEE; COMMON CARRIERS; COMMISSION MERCHANTS OR FACTORS; DEL CREDERE COMMISSION; WAREHOUSEMEN; TRESPASS AND TROVER.

The defendant in an action of trover brought by an agent cannot set up property in the principal without showing some title, claim, or interest in himself derived from such principal. Harker v. Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670.

4. Story on Agency, §§ 401 a, 414, 415;

c. **PRINCIPAL'S RIGHT TO CONTROL ACTION BROUGHT BY AGENT.**—The right of the agent to bring an action in his own name, except in the case of a personal injury to himself, is always subject to the direction and control of the principal.¹ The right of the principal to sue takes precedence over that of the agent, but the principal will not be permitted to intervene in such a manner as to defeat any right or interest which the agent may have in the contract.²

d. **DEFENSES TO ACTION BROUGHT BY AGENT.**—Where an agent sues upon a contract in his own name, the defendant may interpose the same defenses that would be available if the action were brought by the principal,³ in addition to such defenses as would be good against the agent only.⁴

e. **LIMIT OF AGENT'S RECOVERY.**—(1) *On Contract.*—When an agent brings an action against a third party for a breach of contract he is entitled to recover damages for its breach, to the same extent as though the action had been brought by the principal.⁵

(2) *In Tort.*—When an agent has a right of action for an injury to the property of his principal in his possession, he may recover, as against a third person, the full measure of damages for such injury.⁶

Wharton on Agency, § 444; Williams v. Milington, 1 H. Bl. 81; Weiss v. Whittemore, 28 Mich. 366.

1. *England.*—Sargent v. Morris, 3 B. & Ald. 277, 5 E. C. L. 283; Morris v. Cleasby, 1 M. & S. 576; Bickerton v. Burrell, 5 M. & S. 385. *United States.*—Walter v. Ross, 2 Wash. (U. S.) 283.

Massachusetts.—Borrowscale v. Bosworth, 99 Mass. 383; Kelley v. Munson, 7 Mass. 319, 5 Am. Dec. 47.

New York.—Schaefer v. Henkel, 75 N. Y. 378; Considerant v. Brisbane, 22 N. Y. 389; Ludwig v. Gillespie, 105 N. Y. 653; Hicks v. Whitmore, 12 Wend. (N. Y.) 548; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Yates v. Foot, 12 Johns. (N. Y.) 1; Vischer v. Yates, 11 Johns. (N. Y.) 23; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618.

Pennsylvania.—Girard v. Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327.

See also *infra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Third Parties to Principal.*

2. Drinkwater v. Goodwin, Cowp. 251; Rowe v. Rand, 111 Ind. 206; Morris v. Cleasby, 1 M. & S. 576; Hudson v. Granger, 5 B. & Ald. 32, 7 E. C. L. 12; Houghton v. Matthews, 3 B. & P. 489.

When the Contract is under Seal in the name of the agent, as before noted, the right of the agent to bring suit is exclusive. See *supra*, this section, *Agent's Right of Action against Third Parties—On Instruments under Seal.*

3. *England.*—Stewart v. Aberdein, 4 M. & W. 218; Rex v. Hardwick, 11 East 578; Harrison v. Vallance, 1 Bing. 45, 8 E. C. L. 394; Smith v. Lyon, 3 Campb. 465; Thomson v. Davenport, 9 B. & C. 78, 17 E. C. L. 335; Solomons v. Bank of England, 13 East 135, note; Humble v. Hunter, 12 Q. B. 311, 64 E. C. L. 311; Grice v. Kenrick, L. R. 5 Q. B. 344; Coppin v. Craig, 7 Taunt. 243, 2 E. C. L. 241.

United States.—Leeds v. Marine Ins. Co., 6 Wheat. (U. S.) 565.

Massachusetts.—Huntington v. Knox, 7 Cush. (Mass.) 371; Lime Rock Bank v. Plimpton, 17 Pick. (Mass.) 159, 28 Am. Dec. 286.

New York.—Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Hogan v. Shorb, 24 Wend. (N. Y.) 458.

In Hayden v. Alton Nat. Bank, 29 Ill. App. 458, the plaintiff deposited money in the defendant's bank in his name "as agent." Under the findings of fact in the case it appeared that this money belonged to his principal, and in an action by the plaintiff against the bank for the sum so deposited, it was held that the defendant could offset against the plaintiff any indebtedness which they held against his principal.

A defendant may always show that he did not contract with the agent as such, but as principal. Humble v. Hunter, 12 Q. B. 311, 64 E. C. L. 311; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93.

4. As to the third party, when sued by the principal, availing himself of equities against the agent, see *infra*, this section, *Of Third Parties to Principal—On the Agent's Contracts—Principal may Maintain Action—When Undisclosed.*

5. Dancer v. Hastings, 4 Bing. 2, 13 E. C. L. 319; Gardiner v. Davis, 2 C. & P. 49, 12 E. C. L. 22; Joseph v. Knox, 3 Campb. 320; Groover v. Warfield, 50 Ga. 644; U. S. Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

In Groover v. Warfield, 50 Ga. 644, cotton agents brought an action to recover damages resulting from a breach of contract by the buyers of cotton from them, consisting in the failure to complete the purchase. The court granted a recovery for full damages, to wit, the difference between the contract price for the cotton and the value thereof on the day of the breach; although the plaintiffs were bound to pay the same when recovered to their consignors.

The recovery in such cases is based on the theory that the agent sues and recovers as trustee for his principal. U. S. Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

6. Finn v. Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128; Pomeroy v. Smith, 17 Pick. (Mass.) 85; Little v. Fossett, 34 Me. 545,

4. Of Third Parties to Principal—*a*. ON THE AGENT'S CONTRACTS—

(1) *Principal may Maintain Action*—(a) *When Disclosed*.—Where an agent contracts for and in the name of his principal, the agent is the mere medium by which the contract is effected, and the principal may enforce the contract to the same effect and in the same manner as though he had made it personally.¹

Equities against Agent.—And the third party will not be entitled to offset any equities thereto which he may have against the agent.²

(b) *When Undisclosed*—*aa*. IN GENERAL.—Where an agent enters into a contract as though made for himself, and the existence of a principal is not disclosed, the principal may, as a general rule, enforce the contract.³

56 Am. Dec. 671; *Mechanics, etc., Bank v. Farmers, etc., Nat. Bank*, 60 N. Y. 40; *Schley v. Lyon*, 6 Ga. 530.

Measure of Damages in Tort.—The special property man in his right of action against a third party or stranger can recover the full damages to the property according to the general rule, and holds the balance beyond his own interest in trust for the owner. *White v. Webb*, 15 Conn. 305, and cases *supra*.

But as against his principal he can only recover to the extent of his interest. *Lyle v. Barker*, 5 Binn. (Pa.) 457; *Schley v. Lyon*, 6 Ga. 530; *Pomeroy v. Smith*, 17 Pick. (Mass.) 85; *Ingersoll v. Van Bokkelen*, 7 Cow. (N. Y.) 670.

1. *Arkansas*.—*Caldwell v. Meshew*, 44 Ark. 564.

Indiana.—*Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359.

Kansas.—*St. Louis, etc., R. Co. v. Thacher*, 13 Kan. 564.

Kentucky.—*Donahoe v. McDonald*, 92 Ky. 123.

Massachusetts.—*Lamson, etc., Mfg. Co. v. Russell*, 112 Mass. 387.

New York.—*Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill (N. Y.) 476, 41 Am. Dec. 759.

Vermont.—*Arlington v. Hinds*, 1 D. Chip. (Vt.) 431, 12 Am. Dec. 704.

Canada.—*Webb v. Sharman*, 34 U. C. Q. B. 410.

General Rule.—In *Destrehan v. Louisiana Cypress Lumber Co.*, 45 La. Ann. 920, the court said: "Whatever an agent does within the scope of his authority is, in legal effect, the act of his principal, who is entitled to its advantages and is also subject to its liabilities."

Principal must Prove Scope of Special Agency.—Where a contract is signed as by a special agent, it is incumbent on the principal to show the extent of the agent's authority or a ratification of the contract. *Johnson v. Alabama Gas, etc., Mfg. Co.*, 90 Ala. 505.

2. *England*.—*Dresser v. Norwood*, 17 C. B. N. S. 466, 112 E. C. L. 466; *Morris v. Cleasby*, 1 M. & S. 579; *Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 E. C. L. 467.

United States.—*Hurlbert v. Pacific Ins. Co.* 2 Sumn. (U. S.) 471.

Illinois.—*Stinson v. Gould*, 74 Ill. 80; *Reutcher v. Huckle*, 3 Ill. App. 144.

Maryland.—*Miller v. Lea*, 35 Md. 396. 6 Am. Rep. 417.

Massachusetts.—*Ilsey v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

New York.—*Ladd v. Arkell*, 40 N. Y. Super. Ct. 150.

In *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill (N. Y.) 476, 41 Am. Dec. 759, it was held that suit should be brought in the name of the principal on a contract which on its face purports to be made by or with an agent having no direct or beneficial interest in the transaction, as the contract is in legal effect made with the principal, and not with the agent.

In *Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 E. C. L. 467, it was held that a party who bought goods of a person whom he knew to be selling them as agent could not set off in an action by the principal for the price, a debt due to him from the agent, even though he did not at the time of the purchase know, and had not the means of knowing, who was the real owner.

3. *England*.—*Skinner v. Stocks*, 4 B. & Ald. 437, 6 E. C. L. 550; *Humphrey v. Lucas*, 2 C. & K. 152, 61 E. C. L. 152; *Grojan v. Wade*, 2 Stark. 443, 3 E. C. L. 481; *Mildred v. Maspons*, L. R. 8 App. Cas. 874; *Phelps v. Prothero*, 16 C. B. 393, 81 E. C. L. 393, 24 L. J. C. P. 225, 1 Jur. N. S. 1170; *Langton v. Waite*, L. R. 6 Eq. 165, 37 L. J. Ch. 345.

In *Sims v. Bond*, 5 B. & Ad. 389, 27 E. C. L. 97, 2 N. & M. 608, Lord Denman says: "It is a well-established rule of law that where a contract, not under seal, is made with an agent in his own name, * * * either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party."

United States.—*Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Ford v. Williams*, 21 How. (U. S.) 287; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 380; *Darrow v. H. R. Horne Produce Co.*, 57 Fed. Rep. 463; *The A. Cheesebrough*, 3 Blatchf. (U. S.) 305. The contrary is held in *U. S. v. Parmele*, 1 Paine (U. S.) 252, even where the agent's character was known.

Alabama.—*Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52.

California.—*Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618.

Colorado.—*Parker v. Cochrane*, 11 Colo. 363.

Georgia.—*Woodruff v. McGehee*, 30 Ga. 158. *Peel v. Shepherd*, 58 Ga. 365; *Spain v. Beach*, 52 Ga. 494.

Illinois.—*Sadina! v. Mitchell*, 45 Ill. 79. *Warder v. White*, 14 Ill. App. 50; *Conklin v. Leeds*, 58 Ill. 178.

bb. SUBJECT TO EQUITIES.—But if the principal assumes the benefits of the con-

Iowa.—Darling *v.* Noyes, 32 Iowa 96.

Kansas.—St. Louis, etc., *R. Co. v. Thacher*, 13 Kan. 564.

Kentucky.—Tutt *v.* Brown, 5 Litt. (Ky.) 1, 15 Am. Dec. 33.

In *Tharp v. Farquar*, 6 B. Mon. (Ky.) 3, the court said that unless the covenant or obligation is express to pay the agent, or a clear implication of the intention that payment should be made to him, the action should be brought in the name of the principal. See also, to same effect, *Smith v. Lewis*, 3 B. Mon. (Ky.) 229; *Harrow v. Dugan*, 6 Dana, (Ky.) 341.

Maine.—*Machias Hotel Co. v. Coyle*, 35 Me. 405, 58 Am. Dec. 712; *Edmond v. Caldwell*, 15 Me. 340; *Putnam v. White*, 76 Me. 554; *Pitts v. Mower*, 18 Me. 361, 36 Am. Dec. 727.

Maryland.—*Oelrichs v. Ford*, 21 Md. 507; *Baltimore Coal Tar, etc., Co. v. Fletcher*, 61 Md. 288; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *York County Bank v. Stein*, 24 Md. 447.

Massachusetts.—*Ilisley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561, 66 Am. Dec. 384; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *National L. Ins. Co. v. Allen*, 116 Mass. 400; *Huntington v. Knox*, 7 Cush. (Mass.) 371.

Minnesota.—*Ames v. First Div. St. Paul, etc., R. Co.*, 12 Minn. 412.

Mississippi.—*Stonewall Mfg. Co. v. Peek*, 63 Miss. 342.

Missouri.—*Briggs v. Munchon*, 56 Mo. 467; *Odessa Bank v. Jennings*, 18 Mo. App. 651.

In *Henderson v. Botts*, 56 Mo. App. 141, it is held that if the contract gave the agent no cause of action, an undisclosed principal can have none.

New Hampshire.—*Bryant v. Wells*, 56 N. H. 152; *Chandler v. Coe*, 54 N. H. 561; *Elkins v. Boston, etc., R. Co.*, 19 N. H. 337.

New York.—*Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Union India Rubber Co. v. Tomlinson*, 1 E. D. Smith (N. Y.) 379; *Erickson v. Compton*, 6 How. Pr. (N. Y. Supreme Ct.) 471; *McKay v. Draper*, 27 N. Y. 256; *Nicoll v. Burke*, 78 N. Y. 580, 8 Abb. N. Cas. (N. Y.) 213, *modifying* 45 N. Y. Super. Ct. 75. See, to same effect, *St. John v. Griffith*, 2 Abb. Pr. (N. Y. Supreme Ct.) 198.

North Carolina.—*Brown v. Morris*, 83 N. Car. 254; *Barham v. Bell*, 112 N. Car. 131.

Ohio.—*Crosby v. Hill*, 15 Rep. 758.

Pennsylvania.—*Gilpin v. Howell*, 5 Pa. St. 41, 45 Am. Dec. 720; *Girard v. Taggart*, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; *Merrick's Estate*, 5 W. & S. (Pa.) 14.

South Carolina.—*Ramsey v. Anderson*, 1 McMull. (S. Car.) 300, *cited in* *Dupont v. Mount Pleasant Ferry Co.*, 9 Rich. (S. Car.) 259, where the general rule is *approved*.

Tennessee.—*Foster v. Smith*, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604.

Vermont.—*Edwards v. Golding*, 20 Vt. 30.

Virginia.—*Waddill v. Sebree*, 88 Va. 1012.

Canada.—*Mair v. Holton*, 4 U. C. B.

505; *Kennedy v. Turnbull*, 15 New Bruns. 378; *Bowmanville Mach. Co. v. Dempster*, 2 Can. Supreme Ct. 21; *Layton v. Smith*, 5 R. & G. 331; *Read v. Hirks*, 2 L. C. J. 161; *Labelle v. Patris*, 4 R. L. 530; *McCarthy v. Cooper*, 8 Ont. Rep. 316, *affirmed in* 12 Ont. App. Rep. 284. In this case an undisclosed principal was allowed to maintain an action for the specific performance of a contract for the sale of lands owned by the principal, signed by the agent in his own name. See also *V. Hudon Cotton Co. v. Canada Shipping Co.*, 13 Can. Supreme Ct. 401, *reversing* 3 L. N. 170.

When Principal must Give Notice.—A party entering into a contract under the assumed character of an agent, either upon concealing or falsely representing the name of the principal when in fact he is the real principal, cannot maintain an action on such contract as principal, without first giving the third party notice of his real character. *Foster v. Smith*, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604; *Bickerton v. Burrell*, 5 M. & S. 383.

Principal must Show Agency.—The principal must show the agency and the power of the agent to bind him at the time of making the contract. *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618.

Insurance Contracts.—Where an agent makes an insurance contract for his principal who is undisclosed, and the policy is in the name of the agent who has no insurable interest in the property insured, the principal may recover in case of a loss, from the underwriters, by an action brought in his own name. *McCollum v. Aetna Ins. Co.*, 20 U. C. C. P. 289; *Stearns v. Reidy*, 18 Ill. App. 582; *Bell v. Gilson*, 1 B. & P. 345, and note of *De Vignier v. Swanson*, 1 B. & P. 345; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263.

See title INSURANCE.

Foreign Principal.—A foreign principal may maintain an action in his own name for goods sold by his agent, although no principal is disclosed at the time of the sale. *Barry v. Page*, 10 Gray (Mass.) 398; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Ilisley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

But in *Merrick's Estate*, 5 W. & S. (Pa.) 9, the contrary was held. The court said that where exclusive credit is given to and by a factor acting for a foreign principal, a suit cannot be sustained by the principal except through the factor.

Principal Residing in Another State of the Union.—In *Barham v. Bell*, 112 N. Car. 131, the court said: "We do not regard it as entirely settled that a foreign principal cannot maintain an action upon such a contract [where the principal is undisclosed]; but however this may be, it seems clear that while the states of the American Union are in some senses foreign to each other, yet, so far as concerns the reason of the rule, *** they do not bear the same reciprocal relations as does one of these states to a transatlantic country."

Agent's Contract with Common Carrier.—In

tract, unless the agent is devoid of the *indicia* of property or authority,¹ he must do so subject to all the equities thereto existing between the third party and the agent.²

St. Louis, etc., *R. Co. v. Thacher*, 13 Kan. 564, an agent acted for himself and also for an undisclosed principal, and entered into a contract in his own name with the defendant company for the transportation of certain cattle, a part of the cattle belonging to the agent and part to the principal. The cattle were injured in transportation, through the negligence of the defendant company. The principal was allowed to maintain an action in his own name for the loss which he had sustained.

In *Elkins v. Boston, etc., R. Co.*, 19 N. H. 337, 51 Am. Dec. 184, it was held that where an agent without disclosing the name of the principal makes a contract with a common carrier to transport property of the principal, the latter may maintain an action in his own name against the carrier to recover damages for the loss of the property.

1. *England*.—*Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 E. C. L. 467; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Drakeford v. Piercy*, 7 B. & S. 515; *Baring v. Corrie*, 2 B. & Ald. 137.

United States.—*McCobb v. Lindsay*, 2 Cranch (C. C.) 215.

Georgia.—*Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152.

Maine.—*Traub v. Milliken*, 57 Me. 67, 2 Am. Rep. 14.

New Jersey.—*Bernshouse v. Abbott*, 45 N. J. L. 531, 46 Am. Rep. 789.

New York.—*Harrison v. Ross*, 44 N. Y. Super. Ct. 230.

Ohio.—*Crosby v. Hill*, 39 Ohio St. 100.

Broker and Factor.—Where goods are sold by a broker without disclosing his principal, the purchaser, when sued by the principal for the price, cannot set off a debt due to him from the broker. But where a sale is made by a factor, the purchaser, as a general rule, where the principal is undisclosed may set off a debt owing him from the factor. *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339.

The reason for this rule with regard to brokers is thus stated by the court in *Baring v. Corrie*, 2 B. & Ald. 137: The broker "has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that that cannot be so, unless the principal delivers over to him the possession and indicia of property."

When Set-off must Accrue.—In *McCobb v. Lindsay*, 2 Cranch (C. C.) 215, it was held that the set-off must be due and payable at the time when the right to offset equities is claimed.

In *Kennedy v. Turnbull*, 15 New Bruns. 378, it was held that the right of set-off must accrue before the third party had knowledge of a principal.

2. *England*.—*Sims v. Bond*, 5 B. & Ad. 389, 27 E. C. L. 97, 2 N. & M. 608; *Gibson v. Winter*, 5 B. & Ad. 96, 27 E. C. L. 47; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263; *Isberg v. Bowden*, 8 Exch. 859; *George v. Clagett*, 7 T. R. 355; *Carr v. Hinchliff*, 4 B. & C. 547, 10 E. C. L. 408; *Rabone v. Williams*, 7 T. R. 356, note; *Fish v. Kempton*, 7 C. B. 687, 62 E. C. L. 687; *Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 E. C. L. 467; *Isberg v. Bowden*, 8 Exch. 858; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Morris v. Cleasby*, 1 M. & S. 579.

Canada.—*Bowmanville Mach. Co. v. Dempster*, 2 Can. Supreme Ct. 21; *Kennedy v. Turnbull*, 15 New Bruns. 378.

United States.—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 380; *Leeds v. Marine Ins. Co.*, 6 Wheat. (U. S.) 565.

California.—*Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Amann v. Lowell*, 66 Cal. 306; Civ. Code, § 2336.

Georgia.—*Woodruff v. McGehee*, 30 Ga. 158; *Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152; *Ruan v. Gunn*, 77 Ga. 53; Code, § 2204.

Illinois.—*Saladin v. Mitchell*, 45 Ill. 79; *Stinson v. Gould*, 74 Ill. 80.

Indiana.—*Nave v. Hadley*, 74 Ind. 157.

Iowa.—See *Conable v. Lynch*, 45 Iowa 84, where a holder under a conditional sale or as agent is distinguished.

Kentucky.—*Tutt v. Brown*, 5 Litt. (Ky.) 1, 15 Am. Dec. 33; *Violet v. Powell*, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548.

Maine.—*Traub v. Milliken*, 57 Me. 67, 2 Am. Rep. 14.

Maryland.—Pub. Gen. Laws, art. 2, § 8; *Baltimore Coal Tar, etc., Co. v. Fletcher*, 61 Md. 288; *Oelrichs v. Ford*, 21 Md. 507; *Miller v. Lea*, 35 Md. 396, 6 Am. Rep. 417; *York County Bank v. Stein*, 24 Md. 447.

Massachusetts.—*Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561, 66 Am. Dec. 384; *Locke v. Lewis*, 124 Mass. 7, 26 Am. Rep. 631; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Ilisley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

Missouri.—*Henderson v. Botts*, 56 Mo. App. 141; *Bruen v. Kansas City Agricultural, etc., Assoc.*, 40 Mo. App. 425.

New Jersey.—*Bernshouse v. Abbott*, 45 N. J. L. 542, 46 Am. Rep. 789.

New York.—*Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Wright v. Cabot*, 47 N. Y. Super. Ct. 229.

Ohio.—*Miller v. Sullivan*, 39 Ohio St. 79.

Pennsylvania.—*Girard v. Taggart*, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; *Merrick's Estate v. Frame v. William Penn Coal Co.*, 97 Pa. St. 309.

Tennessee.—*Foster v. Smith*, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604.

Third Party must Show Lack of Knowledge.—And the third party, in order to avail himself, at the principal's suit, of any equities as against the agent, must be able to show that he did not know and had no means of knowing that the party with whom he was contracting was a mere agent in the transaction.¹

cc. **EXCEPTIONS.**—There are, however, exceptions to the rule that the undisclosed principal may sue upon a contract made with the agent as principal. Thus, where the contract is under seal, and the existence of an agency is undisclosed;² or where the contract is a negotiable bill or note, and the party seeking to avail himself of it as principal is not named in the instrument;³ or where a personal trust or confidence is reposed by the other party in the agent who contracted in his own name;⁴ or, according to some authorities, where

See also *Dakota Code*, § 1372; *Montana Civ. Code*, § 3116.

Prerequisites to Right of Set-off.—In *Ex p. Dixon*, 4 Ch. Div. 133, the court held that in the case of a contract of sale the following conditions must be complied with to establish a set-off: "1, that the sale should be made by a person intrusted with the possession of the goods; 2, that the agent should sell the goods as his own, and in his own name as principal, by the authority of the principal; and 3, that the purchaser dealt with the agent as, and believed him to be, the principal in the transaction up to the time when the set-off occurred."

1. *England*.—*Semenza v. Brinsley*, 18 C. B. N. S. 467, 114 E. C. L. 467. See also *Fish v. Kempton*, 7 C. B. 687, 62 E. C. L. 687; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Baring v. Corrie*, 2 B. & Ald. 137.

Constructive Notice of Fact of Agency.—In *Miller v. Lea*, 35 Md. 407, 6 Am. Rep. 417, the court, after referring to the general rule that the third party at the suit of the principal is entitled to the benefit of all equities as against the agent when the fact of the agency is undisclosed, says: The third party "must be cautious and not act regardless of the rights of the principal, * * * if he has any reasonable grounds to believe that the party with whom he deals is but an agent. Hence, if the character of the seller is equivocal, if he is known to be in the habit of selling sometimes as principal and sometimes as agent, * * * and the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off. If by due diligence the buyer could have known in what character the seller acted, there would be no justice in allowing the former to set off a bad debt at the expense of the principal."

It is held that a mere general knowledge on the part of the third party that the person with whom he is contracting is a factor, if he also carry on business on his own account, will not be sufficient to charge the third party with notice, and that he must know or have good reason to believe that such person is acting as the agent for some other person in that particular transaction. *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 347; *Moore v. Clementson*, 2 Campb. 22.

And the defendant is a competent witness on the question of knowledge. *Frame v. William Penn Coal Co.*, 97 Pa. St. 309.

Knowledge of Agency Only.—Where a purchaser at a sale made by an agent under a power in a mortgage has knowledge of the fact of agency, though not of the principal's name, he is put on inquiry as to the name of the principal; and if, instead of paying the purchase money according to the terms of the sale, he makes an agreement with the agent prejudicial to the rights of the principal, he can claim no advantage from his ignorance of the principal's name. *Whelan v. McCreary*, 64 Ala. 319.

2. *Sims v. Bond*, 5 B. & Ad. 393, 27 E. C. L. 97; *Humble v. Hunter*, 12 Q. B. 310, 64 E. C. L. 310; *Dancer v. Hastings*, 4 Bing. 2, 13 E. C. L. 319; *Berkeley v. Hardy*, 5 B. & C. 355, 11 E. C. L. 251; *Schack v. Anthony*, 1 M. & S. 573; *Carnegie v. Waugh*, 2 D. & R. 277, 16 E. C. L. 85; *Clarke v. Courtney*, 5 Pet. (U. S.) 319; *U. S. v. Parmele*, 1 Paine (U. S.) 252; *Baltimore Coal Tar etc., Co. v. Fletcher*, 61 Md. 288; *Schaefer v. Henkel*, 75 N. Y. 378; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Briggs v. Parttridge*, 64 N. Y. 357, 21 Am. Rep. 617, *affirming* 39 N. Y. Super. Ct. 339; *Brown v. Morris*, 83 N. Car. 254; *Barham v. Bell*, 112 N. Car. 131; *Cocke v. Dickens*, 4 Yerg. (Tenn.) 35, 26 Am. Dec. 214.

3. *Fuller v. Hooper*, 3 Gray (Mass.) 341; *Chandler v. Coe*, 54 N. H. 561; *U. S. Bank v. Lyman*, 20 Vt. 666. See also *supra*, this title, *Manner of Execution of Authority*.

4. *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13.

In *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9, the court, by Endicott, J., said: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract: as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind; or when he relies upon the character or qualities of an individual; or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into."

Undisclosed Principal, One with Whom the Other Party would Not have Dealt.—If the person who seeks to avail himself of a contract made by another is one with whom, for personal reasons, the other party to the agreement would

the agent contracts expressly in writing as principal.¹

b. FOR PROPERTY WRONGFULLY TRANSFERRED TO THIRD PARTY—(1) When Principal may Recover—(a) In General.—The principal may, in general, recover his own property or its value from third persons, where it has been transferred or disposed of by an agent contrary to his instructions or duty,² unless the principal has invested the agent with the *indicia* of title to the property or authority to make such disposition, and the third party be a *bona fide* purchaser for value and without notice;³ when redress will be denied, for the

not have contracted had he known that such person was the real principal, it has been held, for the reasons just stated, that such an undisclosed principal could not avail himself of the contract. *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. See also *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9.

Indemnity Contracts.—In *Peoria Second Nat. Bank v. Diefendorf*, 90 Ill. 396, it is held that the rule that a promise to an agent is one to the principal, upon which he may maintain an action, is not to be applied to the prejudice of a promisor who is ignorant of that relation. It cannot be applied in behalf of an unknown principal so as to convert a promise of indemnity upon a draft, understood as made to the payee, into one as made to the drawer, and change the relation of the promisor towards the drawer from one of guarantor as supposed, into that of principal debtor.

1. *Humble v. Hunter*, 12 Q. B. 310, 64 E. C. L. 310.

Some cases have gone even further, and held that where one signed a note or bill as "principal" he could not prove that he was in fact a surety for another signing the same instrument.

See the title ACCOMMODATION PAPER, Vol. I., p. 344.

2. *United States*.—*Warner v. Martin*, 11 How. (U. S.) 224.

Arkansas.—*Hill v. Coolidge*, 33 Ark. 626.
Colorado.—*Thatcher v. Kaucher*, 2 Colo. 698.

Illinois.—*Bertholf v. Quinlan*, 68 Ill. 297.
New Hampshire.—*Holton v. Smith*, 7 N. H. 446; *Burnham v. Holt*, 14 N. H. 367; *Nixon v. Brown*, 57 N. H. 34. See also *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

New York.—*Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, 58 N. Y. 73, 17 Am. Rep. 208; *Western Transp. Co. v. Marshall*, 37 Barb. N. Y. 509, *affirmed* 4 Abb. App. Dec. (N. Y.) 576, 6 Abb. Pr. N. S. (N. Y.) 280; *Meiggs v. Meiggs*, 15 Hun (N. Y.) 453; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541, 15 Wend. (N. Y.) 477; *Edwards v. Dooley*, 120 N. Y. 540, a *firming* (Supreme Ct.) 13 N. Y. St. Rep. 596.

Pennsylvania.—*McMahon v. Sloan*, 12 Pa. St. 229, 51 Am. Dec. 601.

See also *Georgia Code*, § 2206.

Common-law Rule.—The common-law rule as to the power of an agent to bind his principal by disposition of his goods is stated in *Warner v. Martin*, 11 How. (U. S.) 224, as follows: "That to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been either in market overt and without knowledge of

the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment and whom the buyer did not know to be transgressing his instructions, or that he had not such notice as the law deems equivalent to raise that presumption."

Agent's Liability No Defense.—The fact of the liability of the agent to the principal for his wrongful act is no defense to the principal's action against a third party, *Bertholf v. Quinlan*, 68 Ill. 297; or that the third party has promised to pay the agent for an indebtedness owing the principal. *Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215.

3. *England*.—*Boyson v. Coles*, 6 M. & S. 14.

United States.—*Calais Steamboat Co. v. Scudder*, 2 Black (U. S.) 372.

California.—*Brewster v. Sime*, 42 Cal. 147.
Georgia.—*Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152.

Illinois.—*Koch v. Willi*, 63 Ill. 144; *Hemstreet v. Burdick*, 90 Ill. 444.

Maryland.—*Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

Michigan.—*Walker v. Detroit Transit R. Co.*, 47 Mich. 338.

New Hampshire.—*Nixon v. Brown*, 57 N. H. 34.

New York.—*Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Devlin v. Pike*, 5 Daly (N. Y.) 85; *Shearer v. Barrett*, Hill & D. Supp. (N. Y.) 71; *Moore v. Miller*, 6 Lans. (N. Y.) 396; *Dows v. Greene*, 16 Barb. (N. Y.) 72; *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, 58 N. Y. 73, 17 Am. Rep. 208.

Pennsylvania.—*McMahon v. Sloan*, 12 Pa. St. 229, 51 Am. Dec. 601; *Barker v. Dinsmore*, 72 Pa. St. 429, 13 Am. Rep. 697; *Quinn v. Davis*, 78 Pa. St. 15.

Prerequisites to Create Estoppel in Principal.—In *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, the court said: "Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent. * * * First, the owner must clothe the person assuming to dispose of the property, with the apparent title to or authority to dispose of it; and second, the person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real." The court also said: "It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a

reason that where one of two innocent parties must suffer, it must be the one who made the commission of the wrong possible.¹

parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession." *Citing* *Dyer v. Pearson*, 3 B. & C. 38, 10 E. C. L. 13; *Newsom v. Thorton*, 6 East 17; *Taylor v. Kymer*, 3 B. & A. 320, 23 E. C. L. 81; *Ballard v. Burgett*, 40 N. Y. 314. "But the owner must go farther and do some act of a nature to mislead third persons as to the true possession of the title." See also *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208.

Mere Possession as Indication of Title or Authority.—The mere possession of a chattel by whatever means acquired, if there be no other indicia of property or authority to sell from the true owner, will not enable the possessor to give a good title. *Gilman Linseed Oil Co. v. Norton*, 89 Iowa 434; *Covill v. Hill*, 4 Den. (N. Y.) 323; *Edwards v. Dooley*, 120 N. Y. 540, *affirming* 13 N. Y. St. Rep. 596; *Brewster v. Sime*, 42 Cal. 147.

In *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, the owner of certain bank shares delivered them to his broker indorsed with a blank assignment and irrevocable power of transfer, and this was held to be such investment of title as would estop the principal from a recovery where the broker pledged the securities as collateral for a loan.

In *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, the owner of a valuable ring placed it in the possession of an agent, a dealer and trader in jewelry, who had no established place of business, to obtain a match for it or, failing in that, to secure an offer for it. The agent sold the ring. The principal was allowed to recover from the third party for the value of the ring, and the court held that the principal had not clothed the agent with such indicia of property that he could convey a good title.

Possession of Auctioneer or Factor.—But where the agent, from the nature of his employment as an auctioneer or factor, is invested with the possession of his principal's property, the indicia of authority to sell will be presumed, *Nixon v. Brown*, 57 N. H. 34; see also *Smith v. Clews*, 105 N. Y. 283, 59 Am. Rep. 502; but not to pledge or dispose of the property by other means than by a sale. *Boisblanc's Succession*, 32 La. Ann. 109; *Newsom v. Thorton*, 6 East 17.

Agent's Construction of Ambiguous Authority.—When an agent is invested with authority which is so uncertain as to be susceptible of two different constructions and the agent adopts the one least favorable to his principal, the principal cannot repudiate the agent's selection as unauthorized. *Chetwood v. Berrian*, 39 N. J. Eq. 203; *Ireland v. Livingston*, L. R. 5 H. L. 416.

Lickbarrow v. Mason, 2 T. R. 63; *Root v. French*, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; *Nixon v. Brown*, 57 N. H. 39; *Towle v. Leavitt*, 23 N. H. 373, 55 Am. Dec. 195; *Voss v. Robertson*, 46 Ala. 490; *Devlin v. Pike*, 5 Daly (N. Y.) 85.

When Agent Can Give Better Title than He Has.

—The general rule that no one can transfer a better title than he himself possesses must be taken with some exceptions: *first*, in the case of negotiable instruments transferred by indorsement in the usual form and to a *bona fide* holder, *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18, 97 Am. Dec. 70, 1 Am. Rep. 71; *second*, in the case of a transfer by indorsement and delivery of a bill of lading to a *bona fide* purchaser for value by the agent to whom the consignor and principal has indorsed and delivered, *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *third*, at common law, in the case of goods sold in market overt, *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220; *Baring v. Currie*, 2 B. & Ald. 148; *McMahon v. Sloan*, 12 Pa. St. 229, 51 Am. Dec. 601; *fourth*, where an agent having his principal's money in his possession pays the same to a third party in a *bona fide* transaction. *Burnham v. Holt*, 14 N. H. 367; *Lang v. Smyth*, 7 Bing. 284, 20 E. C. L. 130; *Mason v. Waite*, 17 Mass. 560. See also *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

Circumstances of Sale Putting Buyer on Inquiry.—In *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195, the plaintiff left his carriage with B., a carriage maker, to be repaired, and directed him to sell the same if he had an opportunity. At the same time B.'s property was under attachment and subsequently was sold, and after the sale B. directed the auctioneer to sell the carriage, which was done and the defendant bid it off. The court held that the circumstances were such as to put the defendant on inquiry, and that he could not hold the property as against the plaintiff, and that under the circumstances it was the defendant's duty to inquire into the nature and extent of the authority conferred by the principal and deal with the agent accordingly.

Equity will Protect Third Party.—Where a third person has purchased from an agent in a *bona fide* transaction and paid the consideration under the supposition that the agent was duly authorized to make the sale, a court of equity will protect the purchaser, if it can do so consistently with principles of law. *Union Mut. L. Ins. Co. v. Masten*, 3 Fed. Rep. 881.

Factor's or Agent's Acts.—In *England*, and in many of the states of the Union, statutes have been enacted for the protection of third persons who, in good faith, deal with agents or factors who are entrusted by their principals with the possession of, or documents of title to, property. For a construction of some of the various statutes, see the following authorities: *Navulshaw v. Brownrigg*, 1 Sim. N. S. 573, 2 De G. M. & G. 441; *Jewan v. Whitworth*, L. R. 2 Eq. 692; *Cole v. North Western Bank*, L. R. 10 C. P. 354, 44 L. J. C. P. 233; *Kaltenbach v. Lewis*, L. R. 10 App. Cas. 617, and *Vickers v. Hertz*, L. R. 2 H. L.

(b) *Property, Bartered, Pledged, or Mortgaged.*—Where an agent having only the *indicia* of authority to sell, barter,¹ pledges,² or mortgages³ his principal's property to a third party, the principal may recover from the third party the property or its value, as an authority to sell means a sale for cash.⁴

(c) *Property Used to Pay Agent's Debt*—*aa. BY AGENT.*—Where an agent, as such, having a general authority to sell, transfers his principal's goods to a third party in payment of his (the agent's) debt, the principal may, as a general rule, recover from the third party the goods so transferred, or the value thereof.⁵

Sc. 113; *Shaw v. Merchant's Nat. Bank*, 101 U. S. 557, *construing* the *Missouri* statute; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, *construing* the *Missouri* and *New York* statutes; *Commercial Bank v. Hurt*, 99 Ala. 130; *George v. Louisville Fourth Nat. Bank*, 41 Fed. Rep. 257, *construing* the *Kentucky* statute; *Whitlock v. Hay*, 58 N. Y. 487; *Soltau v. Gerdau*, 119 N. Y. 380, 16 Am. St. Rep. 843; *Macky v. Dillinger*, 73 Pa. St. 85; *Price v. Wisconsin Marine, etc., Ins. Co.*, 43 Wis. 269. See also the title *FRAUDULENT SALES*.

1. *Guerreiro v. Peile*, 3 B. & Ald. 616, 5 E. C. L. 399; *Howard v. Chapman*, 4 C. & P. 508, 19 E. C. L. 499; *Stewart v. Rounds*, 7 Ont. App. Rep. 515; *Bertholf v. Quinlan*, 68 Ill. 297; *Lowry v. Beckner*, 5 B. Mon. (Ky.) 41; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Holton v. Smith*, 7 N. H. 446; *Taylor, etc., Organ Co. v. Starkey*, 59 N. H. 142; *Hayes v. Colby*, 65 N. H. 192; *Stewart v. Rounds*, 7 Ont. App. Rep. 515.

2. *England.*—*Fielding v. Kymer*, 2 Brod. & B. 639, 6 E. C. L. 309; *Fletcher v. Heath*, 7 B. & C. 517, 14 E. C. L. 94; *Paterson v. Tash*, 2 Stra. 1178; *Maanss v. Henderson*, 1 East 335; *Newsom v. Thorton*, 6 East 17; *M'Combie v. Davies*, 6 East 538, 7 East 5; *Boyson v. Coles*, 6 M. & S. 14; *De Bouchout v. Goldsmid*, 5 Ves. Jr. 211.

United States.—*Warner v. Martin*, 11 How. (U. S.) 224; *Thurber v. Cecil Nat. Bank*, 52 Fed. Rep. 513. But see *Evans v. Potter*, 2 Gall. (U. S.) 13.

Alabama.—*Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Voss v. Robertson*, 46 Ala. 483.

Georgia.—*Macon First Nat. Bank v. Nelson*, 38 Ga. 391.

Massachusetts.—*Kinder v. Shaw*, 2 Mass. 398; *Loring v. Brodie*, 134 Mass. 453.

Missouri.—*Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89.

New Hampshire.—*Holton v. Smith*, 7 N. H. 446.

New York.—*Henry v. Marvin*, 3 E. D. Smith (N. Y.) 71.

Pennsylvania.—*Sheffer v. Montgomery*, 65 Pa. St. 329.

Tennessee.—*Read v. Cumberland Tel., etc., Co.*, 93 Tenn. 482.

Texas.—*McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818.

But compare *Wisp v. Hazard*, 66 Cal. 459.

See also the titles *COMMISSION MERCHANTS OR FACTORS; PLEDGE AND COLLATERAL SECURITY*.

3. *Switzer v. Wilvers*, 24 Kan. 384, 36 Am. Rep. 259; *Macon First Nat. Bank v. Nelson*, 38 Ga. 391.

4. *To Sell for Cash.*—*Holton v. Smith*, 7 N.

H. 446; *Taylor, etc., Organ Co. v. Starkey*, 59 N. H. 142; *Hayes v. Colby*, 65 N. H. 192. In this case the court said: "If the defendant had reasonable cause for believing that he was dealing with an agent authorized to make sales and receive payment, he had no reasonable cause for believing that the agent was authorized to exchange the plaintiff's goods, * * * or to receive payment in anything but money."

See also *supra*, this title, *Nature and Extent of Authority*.

5. *England.*—*DeBouchout v. Goldsmid*, 5 Ves. Jr. 211; *Martin v. Coles*, 1 M. & S. 140; *Paterson v. Tash*, 2 Stra. 1178; *Maanss v. Henderson*, 1 East 335.

United States.—*Warner v. Martin*, 11 How. (U. S.) 224; *Merrick v. Bernard*, 1 Wash. (U. S.) 479.

Illinois.—*School Trustees v. McCormick*, 41 Ill. 323.

Iowa.—*Payne v. Potter*, 9 Iowa 549; *Thompson v. Barnum*, 49 Iowa 392.

Maine.—*Rodick v. Coburn*, 68 Me. 170; *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220.

Massachusetts.—*Stanley v. Gaylord*, 1 Cush. (Mass.) 546, 48 Am. Dec. 643.

Missouri.—*Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298.

The common-law rule as expressed in the two above cases would be modified by the factor's act. Mo. Laws 1869, p. 91. See also *Allen v. St. Louis Nat. Bank*, 120 U. S. 32.

New Hampshire.—*Holton v. Smith*, 7 N. H. 446; *Gould v. Blodgett*, 61 N. H. 115; *Rice v. Lyndeborough Glass Co.*, 60 N. H. 195.

New York.—*Henry v. Marvin*, 3 E. D. Smith (N. Y.) 71.

Ohio.—*Murdock v. Nat. Tube Works*, 3 Cinc. L. Bull. (Ohio) 409, 1 Clev. L. Rep. (Ohio) 147.

Vermont.—*Stewart v. Woodward*, 50 Vt. 78.

Wisconsin.—*Whitney v. State Bank*, 7 Wis. 620.

Demand Not Necessary.—The owner may maintain the action against the third party for trover or conversion without a previous demand. *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749; *Rodick v. Coburn*, 68 Me. 170; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Warner v. Martin*, 11 How. (U. S.) 224.

Agent with Lien.—Where an agent has a lien upon his principal's goods he may secure his debt with the goods to the extent of his lien. And where the third party takes them only to the extent of such lien, the principal must tender the amount of the lien due the agent before he will be entitled to recover the goods so pledged. *Warner v. Martin*, 11

bb. BY SEIZURE UNDER EXECUTION OR ATTACHMENT.—Where property is placed in the possession of a party as agent, and he has no tangible interest in the property, and the property is seized under an attachment or execution against the agent for his debt, the principal may recover the property from the person making such seizure.¹

(d) *Securities.*—Where an agent makes an unauthorized release or transfer of securities belonging to his principal, the latter may recover for the securities so released or transferred unless he has conferred upon the agent the usual *indicia* of ownership or right of disposal, and the release or transfer be to one who acquires on the faith of such *indicia* without notice and for a valuable consideration.²

(2) *Principal may Follow Property.*—And where the principal is entitled to recover the property or the proceeds therefrom, he may follow the same and recover, so long as it is distinguishable and separable from other property or assets, from any person, unless he is a *bona fide* holder for value and without notice.³

How. (U. S.) 225; *M'Combie v. Davies*, 7 East 5; *Daubigny v. Duval*, 5 T. R. 604; *Ambrose v. Evans*, 66 Cal. 74.

1. *Loomis v. Barker*, 69 Ill. 360; *Benner v. Michel*, 23 La. Ann. 489; *Farmers, etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215; *Selkirk v. Cobb*, 13 Gray (Mass.) 313; *Waldo v. Peck*, 7 Vt. 434; *Hall v. Williams*, 27 Vt. 405.

And in case of a sale under execution no interest or title will pass to a purchaser. *Sires v. Newton*, 1 Wash. Ter. 356.

Principal Estopped by Knowledge and Acquiescence.—But where a principal has full knowledge of supplemental proceedings against his agent, where the property of the principal in the hands of the agent is sought to be applied as the property of the agent to the payment of a judgment against him, and such principal fails to intervene or otherwise protect his interests, he will be estopped from complaining if a loss ensues. *Murne v. Schwabacher*, 2 Wash. Ter. 191.

In *Reed v. McIlroy*, 44 Ark. 346, the court said: "In a proper case a creditor may subject what is only apparently the property of an agent to the payment of his debt;" and it was held that such a proper case would arise where the creditor had been misled by appearances or by the conduct of the parties into giving the agent credit upon a false basis. See also, to same effect, *Benner v. Michel*, 23 La. Ann. 489.

West Virginia.—The *West Virginia Code*, p. 704, § 13, provides that if any person transacts business as a trader, with the addition of the words "factor," "agent," or "and company," and fails to disclose the name of his principal by a proper sign or publication as therein provided, or if any person transact such business in his own name, all the property, etc., used in such business shall, as to the creditors of such person, be liable for his debts. This does not apply to a licensed auctioneer or to a commission merchant. It has been held that a person selling agricultural implements as agent for the manufacturers, receiving a commission for his services in disposing of the same, although on his sign appear the words "Mfrs.' Agent," is not within the operation of this statute,

and property belonging to his principal seized under an execution against the agent may be recovered by the principal. *Brown Mfg. Co. v. Deering*, 35 W. Va. 255.

Mississippi.—Under a similar statute, *Mississippi Code*, § 1300, it is held that on a failure to give the required notice the property in the agent's possession would be subject to execution against him, regardless of whether the creditors were misled or their claims antedated the business. *Quin v. Myles*, 59 Miss. 375; *Gumbel v. Koon*, 59 Miss. 264.

As to a construction of this statute where a business is conducted by a husband as agent for his wife, see *Schoofield v. Wilkings*, 60 Miss. 238; *Harris v. Robson*, 68 Miss. 506.

2. *Brewster v. Sime*, 42 Cal. 147; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 361; *Crocker v. Crocker*, 31 N. Y. 507, 88 Am. Dec. 291; *Edwards v. Schoharie County Nat. Bank*, 47 Hun (N. Y.) 469.

Transfer by Agent of Negotiable Notes Payable to Principal.—In *Robinson v. Anderson*, 106 Ind. 152, it is held that where an agent with mere authority to sell goods and take notes payable to his principal in settlement, and to collect such notes as may be sent to him for collection, surrenders to the maker before they are due, without the consent of his principal, notes belonging and payable to the latter, and receives therefor notes of like amount, maturing at the same dates, payable to himself, the principal is not bound by the transaction, and may recover on the original notes.

In *Read v. Cumberland Tel., etc., Co.*, 93 Tenn. 482, it was held that a corporation making a transfer of its stock with knowledge of a lack of authority on the part of the agent who directs and signs the transfer, may be compelled to restore the principal to his rights as stockholder. See also the title *STOCK*.

3. *England.*—*Jackson v. Clarke*, 1 Y. & J. 216; *Whitecomb v. Jacob*, 1 Salk. 160; *Taylor v. Plumer*, 3 M. & S. 562; *Ex p. Dumas*, 1 Atk. 232; *Ex p. Emery*, 2 Ves. 674; *Scott v. Surman*, Willes 400.

United States.—*Dow v. Berry*, 18 Fed. Rep. 121; *German Sav. Inst. v. Adae*, 8

c. FOR MONEY WRONGFULLY PAID TO OR APPROPRIATED BY THIRD PARTY—(1) *When Principal may Recover*—(a) *In General*—When, in violation of his duty, an agent makes a payment or appropriation of his principal's money to a third person, the principal may recover from the third person for the money so misapplied, unless the third person is a *bona fide* holder for value and without notice.¹

Fed. Rep. 106; *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *U. S. v. State Bank*, 96 U. S. 35; *May v. Le Claire*, 11 Wall. (U. S.) 217; *Thompson v. Perkins*, 3 Mason (U. S.) 232.

Illinois.—*Drovers' Nat. Bank, etc., v. O'Hare*, 18 Ill. App. 182.

Massachusetts.—*Denston v. Perkins*, 2 Pick. (Mass.) 86; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367. Compare *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159, 28 Am. Dec. 286. See *LeBreton v. Peirce*, 2 Allen (Mass.) 8.

New York.—*Gerard v. McCormick*, 130 N. Y. 261, 41 N. Y. St. Rep. 284, *affirming* 29 N. Y. St. Rep. 709; *Roca v. Byrne*, 145 N. Y. 182; *Hutchinson v. Reed, Hoffm. Ch.* (N. Y.) 316; *Duguid v. Edwards*, 50 Barb. (N. Y.) 297; *Howe v. Shiels*, 1 City Ct. Rep. (N. Y.) 128, *distinguishing* *Levy v. Cavanagh*, 2 Bosw. (N. Y.) 100; *Dows v. Kidder*, 84 N. Y. 131.

Virginia.—*Overseers of Poor v. Virginia Bank*, 2 Gratt. (Va.) 545, 44 Am. Dec. 399.

Extent of Right to Follow Proceeds.—In *Overseers of Poor v. Virginia Bank*, 2 Gratt. (Va.) 545, 44 Am. Dec. 399, the court said: "The well-settled principles of law entitle a principal in all cases where he can trace his property, whether it be in the hands of the agent or of his representatives or assignees, to reclaim it unless it has been transferred *bona fide* to a purchaser of it, or assignee for value without notice. In such cases it is wholly immaterial whether the property be in its original state or has been converted into money, securities, negotiable instruments, or other property, if it be distinguishable and separable from the other property or assets and has an ear-mark or other appropriate identity."

In *Scott v. Surman*, Willes 400, a case where goods were consigned to an agent for sale, and he sold them and received money, and a short time afterwards became bankrupt, the court held that if the agent did not purchase with the proceeds any specific thing capable of being distinguished from the rest of his property, the principal could not recover the whole proceeds of the sale from the assignees, but must come in with the other creditors *pro rata*. But if the thing purchased remains *in specie* in the agent's hands at the time of his bankruptcy, the principal could recover the goods in trover from the assignees; or if the agent who sold the goods for his principal became bankrupt before payment and his assignees afterwards received the money for them, the principal could recover it from them in an action for money had and received; or if the agent on such a sale had taken notes in payment from the vendee, payable to him at a future time, and his assignees afterwards received the money due on the notes, the prin-

cipal could recover it from the assignees in a like action. See also *Thompson v. Perkins*, 3 Mason (U. S.) 232.

1. *United States*.—*U. S. v. State Bank*, 96 U. S. 30; *German Sav. Inst. v. Adae*, 8 Fed. Rep. 106; *St. Louis v. Johnson*, 5 Dill. (U. S.) 241; *Hourquebie v. Girard*, 2 Wash. (U. S.) 212; *Bank of Commerce v. Russell*, 2 Dill. (U. S.) 215.

Alabama.—*Childers v. Bowen*, 68 Ala. 221.

Illinois.—*Rusk v. Newell*, 25 Ill. 226.

Kansas.—*Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90.

Louisiana.—*Boisblanc's Succession*, 32 La. Ann. 109.

Massachusetts.—*Mason v. Waite*, 17 Mass. 560; *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32.

Michigan.—*Neely v. Rood*, 54 Mich. 134, 52 Am. Rep. 802.

New Jersey.—*Demarest v. New Barbadoes Tp.*, 40 N. J. L. 604.

New York.—*Gerard v. McCormick*, 130 N. Y. 261, 41 N. Y. St. Rep. 284, *affirming* 29 N. Y. St. Rep. 709. See also *Ford v. Union Nat. Bank*, 13 N. Y. Wkly. Dig. 352, *affirmed* in 88 N. Y. 672; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *Van Alen v. American Nat. Bank*, 52 N. Y. 1, *reversing* 3 Lans. (N. Y.) 517. But see *Pascoag Bank v. Hunt*, 3 Edw. Ch. (N. Y.) 583, apparently contrary to above rule.

Pennsylvania.—*Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215; *Frazier v. Erie Bank*, 8 W. & S. (Pa.) 18.

Virginia.—*Overseers of Poor v. Virginia Bank*, 2 Gratt. (Va.) 544, 44 Am. Dec. 399.

Hawaii.—*Ing Choi v. Ung Sing*, 8 Hawaiian 499.

Test of Bona Fides.—To charge a third person as a party to the misappropriation of a trust fund, it must be shown that he knowingly partakes in the breach of trust; "that he must know or have proof of facts which in law characterize the transaction as a breach of trust." *Chicago Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218.

Extent of Principal's Right of Recovery.—The principal must be able to point out his fund or the proceeds derived from it and to trace it through its transformations so as to show that it is not a fund or product to which all other creditors of the delinquent might have an equal right to resort. *Trust, etc., Bank v. Buffalo First Nat. Bank*, 15 Fed. Rep. 858. And the right of the principal ceases only when the means of ascertainment fail. *Overseers of Poor v. Virginia Bank*, 2 Gratt. (Va.) 544, 44 Am. Dec. 399; *Van Alen v. American Nat. Bank*, 52 N. Y. 1, *reversing* 3 Lans. (N. Y.) 517.

Right of Principal against Bank Receiving

(b) **Proceeds of Restrictively Indorsed Paper.**—Commercial paper in the possession of an agent, as such, bearing a restrictive indorsement, will be notice to all persons subsequently dealing with it that it was intended for a special purpose, and, unless it appears to the contrary, that the principal does not intend to transfer the title or ownership of the proceeds thereof. A third person, therefore, who appropriates the proceeds of such paper to another than its designated object, will be liable to the principal for such misappropriation.¹

(c) **Money Lost on Wager Contracts.**—Where an agent as a party to a gambling transaction loses his principal's money therein, the principal, in those jurisdictions permitting money lost on a wager to be recovered by the loser from the winner, may recover from the latter the amount so lost.²

(2) **Principal may Follow Fund.**—Equity will regard the beneficial owner and follow the fund for his benefit through any number of transmutations so long as it can be identified.³

Deposit from Agent.—In *Frazier v. Erie Bank*, 8 W. & S. (Pa.) 18, it was held that if an agent procure the note of his principal to be discounted, and deposit the proceeds in a bank in his own name, the principal may maintain an action therefor against the bank, though the bank had no notice, when the deposit was made, that the money deposited did not belong to the agent. See also *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32. But if the debt had been paid in answer to the agent's checks, the liability of the bank, in the absence of interference by the principal, would have been extinguished. *Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215.

Loan by Agent of Principal's Money—Effect of Subsequent Notice to Borrower.—If an agent receives the money of his principal and lends it, taking a promissory note payable to himself, the note belongs to the principal, and the borrower may not pay the agent after he has been informed of the principal's superior right. *Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215. See also *Childers v. Bowen*, 68 Ala. 221.

Principal's Money Paid by Agent for the Benefit of Third Party.—In *Young v. Dibrell*, 7 Humph. (Tenn.) 270, it was held that where an agent paid out the money of his principal in discharge of a debt due by another, that the principal had no cause of action against him for whose benefit his money had been paid, as no one can be a debtor without his own consent.

1. *Treuttel v. Barandon*, 8 Taunt. 100, 4 E. C. L. 33; *Sigourney v. Lloyd*, 8 B. & C. 622, 15 E. C. L. 319, 5 Bing. 525, 15 E. C. L. 527; *Sweeny v. Easter*, 1 Wall. (U. S.) 173; *Circleville First Nat. Bank v. Monroe Bank*, 33 Fed. Rep. 408; *In re Armstrong*, 33 Fed. Rep. 405; *Levi v. Missouri Nat. Bank*, 5 Dill. (U. S.) 104; *Crown Point First Nat. Bank v. Richmond First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Cecil Bank v. Farmers Bank*, 22 Md. 148; *McBain v. Seligman*, 58 Mich. 204; *McBride v. Farmers' Bank*, 25 Barb. (N. Y.) 657, *affirmed* 26 N. Y. 450; *Blaine v. Bourne*, 11 R. L. 119, 23 Am. Rep. 429; *City Bank v. Weiss*, 67 Tex. 331, 60 Am. Rep. 29. See also the titles BANKS AND BANKING, and BILLS AND NOTES.

Indorsement—"Pay, etc., for My Use."—In

Sigourney v. Lloyd, 8 B. & C. 622, 15 E. C. L. 319, 5 Bing. 525, 15 E. C. L. 527, a payee indorsed generally to the plaintiff, who indorsed as follows: "Pay B. or order for my use." The defendants discounted the instrument and applied the proceeds to the credit of B. It was held that the indorsement was sufficient notice to prevent its transfer for the benefit of any person other than the plaintiff, that all subsequent indorsees were to be considered as trustees for him, and that whoever advanced any money on it did so at his peril.

Indorsement for Collection.—In *Sweeny v. Easter*, 1 Wall. (U. S.) 166, the court said that the meaning of an indorsement "for collection" was to limit the effect which would have been given to the indorsement without the use of those words, and the expression used warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the property in the note or its proceeds. See also *Crown Point First Nat. Bank v. Richmond First Nat. Bank*, 76 Ind. 561, 40 Am. Rep. 261; *Cecil Bank v. Farmers Bank*, 22 Md. 148.

Indorsement Not Indicating Restriction.—Where the principal has invested the agent with what appears to the world as an absolute title by an indorsement in blank, with nothing to excite inquiry or suspicion, an innocent third party dealing with such agent as owner will be protected. *Morris v. Preston*, 93 Ill. 221; *Hackett v. Reynolds*, 114 Pa. St. 328.

2. *Mason v. Waite*, 17 Mass. 560; *Causidiere v. Beers*, 2 Keyes (N. Y.) 198; *Allen v. Watson*, 2 Hill (S. Car.) 319.

Principal's Wager Contracts.—Where an agent for his principal places his principal's money on a wager, the principal is the proper party to recover it from the stakeholder. *Vischer v. Yates*, 11 Johns. (N. Y.) 23; *Donahoe v. McDonald*, 92 Ky. 123. Or where by statute a recovery of money lost on a wager is permitted and the principal and agent are both interested, each must bring an action to recover his share of the fund lost. *Ruckman v. Pitcher*, 20 N. Y. 9, 1 N. Y. 392.

3. *England.*—*Pennell v. Deffell*, 4 De G. M. & G. 372, *distinguishing In re West of England, etc., Dist. Bank*, 11 Ch. Div. 772; *In re Hallett's Estate*, 13 Ch. Div. 696.

d. FOR MONEY PAID UNDER MISTAKE OF FACT—Principal may Recover.—Where an agent under a mistake of fact makes a payment of his principal's money to a third person, which ought not to have been made, the third person will be liable to the principal for the money so received.¹

e. FOR BREACH OF WARRANTY AND MISREPRESENTATION—Principal may Recover Damages.—Whether the principal is disclosed or not, if his agent enters into a contract for his benefit and there is a breach of warranty or fraudulent representation, on the part of the third party, to the damage of the principal, he may recover from such third party for any loss or damage caused thereby.²

f. FOR SURREPTITIOUS DEALINGS OF THIRD PARTY WITH AGENT—Principal's Rights.—As a general rule, based on grounds of public policy, an agent cannot act so as to bind his principal, where he has or represents interests adverse to those of his principal.³ Where, therefore, an agent, by reason

United States.—Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54; U. S. v. State Bank, 96 U. S. 30; South Park Com'rs v. Kerr, 13 Fed. Rep. 502.

Alabama.—Preston v. McMillan, 58 Ala. 84; Lehman v. Lewis, 62 Ala. 129.

Illinois.—Haines v. Haines, 54 Ill. 74; Drov'er's Nat. Bank, etc., v. O'Hare, 18 Ill. App. 182.

Indiana.—Riehl v. Evansville Foundry Assoc., 104 Ind. 70.

Louisiana.—Hall v. Sprigg, 7 Martin (La.) 243, 12 Am. Dec. 506.

Michigan.—Neely v. Rood, 54 Mich. 134, 52 Am. Rep. 802.

Minnesota.—St. Paul Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75.

Missouri.—Richardson v. St. Louis Nat. Bank, 10 Mo. App. 246.

New York.—Roca v. Byrne, 145 N. Y. 182; Importers, etc., Nat. Bank v. Peters, 123 N. Y. 272; Van Alen v. American Nat. Bank, 52 N. Y. 1.

North Carolina.—Whitley v. Foy, 6 Jones Eq. (N. Car.) 34, 78 Am. Dec. 236. But see Campbell v. Drake, 4 Ired. Eq. (N. Car.) 94.

Pennsylvania.—Farmers', etc., Nat. Bank v. King, 57 Pa. St. 202, 98 Am. Dec. 215.

Rhode Island.—Greene v. Haskell, 5 R.I. 447. See, for a full discussion of this subject, the title TRUSTS AND TRUSTEES.

1. *Stevenson v. Mortimer*, Cowp. 805; *Ancher v. Bank of England*, 2 Doug. 638. See also *Georgia Code*, § 2205, and the title MISTAKE.

Illustrations of Money Paid under Mistake.—In *Stevenson v. Mortimer*, Cowp. 805, Lord Mansfield said: "Where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent."

In *Ancher v. Bank of England*, 2 Doug. 638, a bill of exchange was drawn by the plaintiff, and was restrictively indorsed; by a subsequent forged indorsement it came into the possession of the defendant. On the maturity of the bill, the plaintiff's agent, believing that the defendants were entitled to payment, paid the bill. The court held that the plaintiff could recover from the defendant the money so paid.

Illegal Fees Exacted of Agent.—It seems that where illegal fees are exacted from the agent, the principal may recover them from the person demanding and receiving the same, as well as a penalty for such exaction where the penalty is imposed by statute. *Holman v. Frost*, 26 S. Car. 290.

2. *Perkins v. Evans*, 61 Iowa 35; *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579; *Tuckwell v. Lambert*, 5 Cush. (Mass.) 23; *Odessa Bank v. Jennings*, 18 Mo. App. 651; *Beebe v. Robert*, 12 Wend. (N. Y.) 417, 27 Am. Dec. 132; *White v. Owen*, 12 Vt. 361. See also the titles FRAUD AND MISREPRESENTATION; SALES.

Right of Action for Misrepresentations of Third Party to Agent.—In *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579, the court said: "In case of a purchase * * * of goods by an agent, even if the principal be not disclosed, or the bill of sale be made to the agent himself, the property, immediately upon the execution of the contract, vests in the principal; and the right of action upon an implied warranty, or on fraudulent representations made to the agent, is in the principal; for the damages, which ground the action, follow the property."

The principal's right of action is not affected by the fact that exclusive credit was given to the agent, it being known that he was contracting for a principal. *White v. Owen*, 12 Vt. 361.

3. See *supra*, this title, *Duties and Liabilities Inter Se—Of Agent to Principal*.

England.—*Smith v. Sorby*, 3 Q. B. Div. 552, 28 Moak's Rep. 455; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. Div. 549, 28 Moak's Rep. 549; *Panama, etc., Tel. Co. v. India Rubber, etc., Co.*, L. R. 10 Ch. App. 515.

Alabama.—*Miller v. Louisville, etc., R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722.

Illinois.—*Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568; *Fish v. Leser*, 69 Ill. 394; *Wiley v. Stewart*, 122 Ill. 545.

Iowa.—*Fisher v. Lee* (Iowa, 1895), 63 N. W. Rep. 442.

Michigan.—*Moore v. Mandlebaum*, 8 Mich. 433.

Minnesota.—*Hegenmyer v. Mark*, 37 Minn. 6, 5 Am. St. Rep. 808.

Missouri.—*Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 411.

New York.—*Claffin v. Farmers', etc., Bank*,

of secret inducements offered by a third person or by conspiring with him to perpetrate a fraud on his principal, enters into a contract for his principal, the latter, if the rights of third parties have not intervened, may avoid or rescind the contract;¹ or, in a proper case, he may elect not to rescind, and may recover from the third party such damages resulting from the wrongful act as the court may deem just and equitable.²

g. IN TORT—(1) *Injury to Property in Agent's Possession*.—Any person who wrongfully injures or converts the principal's property while in his agent's possession is liable to the principal for such injury or conversion, as the possession of the agent is the possession of the principal.³

(2) *Loss of Service by Wrongful Act of Third Party*.—Where a third party wrongfully induces an agent to abandon the object of his agency,⁴ or by a

25 N. Y. 293, 24 How. Pr. (N. Y.) 1, *reversing* 36 Barb. (N. Y.) 540; *Cassard v. Hinman*, 6 Bosw. (N. Y.) 8; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85, *reversing* 20 Barb. (N. Y.) 468.

Ohio.—*U. S. Rolling Stock Co. v. Atlantic*, etc., R. Co., 34 Ohio St. 450, 463, 32 Am. Rep. 380.

Texas.—*Cunningham v. Holcomb*, 1 Tex. Civ. App. 334.

See also *People v. Overysse* Tp., 11 Mich. 222; *Flint, etc., R. Co. v. Dewey*, 14 Mich. 477; *Hannah v. Fife*, 27 Mich. 172; *McKay v. Williams*, 67 Mich. 547; *Miner v. Belle Isle Ice Co.*, 93 Mich. 109.

Secret Bonus by Other Party to Agent.—In *Smith v. Sorby*, 3 Q. B. Div. 552, 28 Moak's Rep. 455, it is held that where a secret bonus is given to an agent, with intent to interest his mind in favor of a third party, and the agent subsequently enters into a contract with such giver on behalf of his principal, and is actually influenced by such bonus in assenting to stipulations prejudicial to the interests of his principal, even though the bonus was not given with direct reference to that contract, the contract is fraudulent as against the principal, and voidable at his option. See also *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. Div. 549, 28 Moak's Rep. 549.

Such Contracts Voidable in Equity at Suit of Principal.—In *Fish v. Leser*, 69 Ill. 394, it is held that where an agent, employed by his principal to sell property, makes a sale to a purchaser for whom he is acting as agent in effecting the purchase, a court of equity will not at the suit of the purchaser enforce a specific performance of the contract, but the principal in equity may avoid the contract.

1. In *Panama, etc., Tel. Co. v. India Rubber, etc., Co.*, L. R. 10 Ch. 515, the telegraph works company agreed with the telegraph cable company to lay a cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable also for the sum named to be paid to him by instalments, payable by the works company when they received the instalments from the cable company, and the court held that, under the

circumstances, the agreement between the engineer and the works company was a fraud, which entitled the cable company to have their contract rescinded, and to receive back the money which they had paid under their contract. In delivering judgment in this case, James, L. J., said: "According to my view of the law of this court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him."

2. *Glaspie v. Keator*, 12 U. S. App. 281, 5 C. C. A. 474, 56 Fed. Rep. 203.

Recovery against Agent.—In *Keator v. St. John*, 42 Fed. Rep. 585, it is held that the principal may recover from the agent the bonus he has received, and also damages for false representations made by the agent to him.

3. *England*.—*Wilbraham v. Snow*, 2 Saund. 472; *Manders v. Williams*, 4 Exch. 339.

United States.—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

Massachusetts.—*Holly v. Huggeford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502.

Maine.—*Cutter v. Copeland*, 18 Me. 127.

New York.—*Faulkner v. Brown*, 13 Wend. (N. Y.) 64; *Cary v. Hotailing*, 1 Hill (N. Y.) 311, 37 Am. Dec. 323.

Ohio.—*Greenfield First Nat. Bank v. Marietta, etc., R. Co.*, 20 Ohio St. 275.

Vermont.—*Waldo v. Peck*, 7 Vt. 434.

The Possession of the Agent is constructive possession in the principal. *Thorp v. Burling*, 11 Johns. (N. Y.) 285.

Owner who has Temporarily Parted with Possession.—But where the owner of property has by contract parted with the possession for a given time, he cannot maintain an action for trespass against one who takes it from the person who is entitled to it, while the contract is in force. *Soper v. Sumner*, 5 Vt. 274.

4. *England*.—*Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216, 20 Eng. L. & Eq. 169.

Georgia.—*Salter v. Howard*, 43 Ga. 601; *Jones v. Blocker*, 43 Ga. 331.

personal injury to the agent incapacitates him from performing his duties as agent,¹ or wrongfully prevents the agent from the performance of such duties,² the principal, if his interests are injured by such wrongful act, may recover from the third party to the extent of his loss caused by such injury.

h. PRINCIPAL'S RIGHT OF ACTION SUPERIOR TO AGENT'S—(1) *In General*.—The principal's right to enforce a contract made for his benefit is paramount to that of the agent, and in a case where either of them may bring an action on the contract the principal may intervene and terminate the agent's right.³ But such intervention will not be permitted to operate in such a manner as to deprive the agent of any claim or lien he may have on the subject matter of the contract.⁴

(2) *Third Party cannot Dispute Agency*.—When a principal assumes a contract, whether made by an agent or a subagent; whether authorized or not, the third party, at the principal's suit to enforce the same, cannot question the authority of the agent.⁵

i. DEFENSES TO PRINCIPAL'S ACTION—(1) *Payment to Agent*.—Where the principal is undisclosed and there is no notice that there is a principal, or where the principal has invested the agent with the *indicia* of authority to receive payment, a payment to the agent is a good payment and will release the third party from liability to the principal.⁶

(2) *Fraudulent Acts of Agent*.—As the principal is liable to third persons in a civil suit for fraud, misfeasance, or neglect of duty on the part of his agent while within the scope of his authority, so at the suit of the principal to enforce a contract made by an agent, whether the principal be disclosed or not at the time of the making of the contract, the third party may set up any defense thereto by reason of fraud or misrepresentation on the part of the agent, whereby he was induced to enter into the contract.⁷

Massachusetts.—Walker v. Cronin, 107 Mass. 555.

New Hampshire.—Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

North Carolina.—Haskins v. Royster, 70 N. Car. 601, 16 Am. Rep. 780.

South Carolina.—Huff v. Watkins, 15 S. Car. 82, 40 Am. Rep. 680, *distinguishing* Burgess v. Carpenter, 2 S. Car. 7, 16 Am. Rep. 643; Daniel v. Swearengen, 6 S. Car. 297, 24 Am. Rep. 471.

See also the title MASTER AND SERVANT.

1. Marys Case, 9 Coke 112; Ames v. Union R. Co., 117 Mass. 541, 19 Am. Rep. 426.

This is *doubted* in Burgess v. Carpenter, 2 S. Car. 7, 16 Am. Rep. 643, unless the injured person is a menial servant. But see Daniel v. Swearengen, 6 S. Car. 297, 24 Am. Rep. 471, where the general rule is applied and the above case *distinguished*.

2. St. Johnsbury, etc., R. Co. v. Hunt, 55 Vt. 570, 45 Am. Rep. 639.

3. Hudson v. Granger, 5 B. & Ald. 27, 7 E. C. L. 10; Sadler v. Leigh, 4 Campb. 195; Warder v. White, 14 Ill. App. 50; Pitts v. Mower, 18 Me. 361, 36 Am. Dec. 727; McKay v. Draper, 27 N. Y. 264.

4. Morris v. Cleasby, 1 M. & S. 576; Drinkwater v. Goodwin, Cowp. 255; Girard v. Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327.

In Warder v. White, 14 Ill. App. 50, the court said: "The rule of law is that the right of the principal to sue is paramount to that of the agent, and in cases where either may bring the action, the former, by giving notice to the other contracting party, puts

an end to the agent's right of action, except in cases where the agent has a lien upon the subject matter of the action equal to the claim of the principal."

5. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 2 Colo. 248; Mayer v. McLure, 36 Miss. 389, 72 Am. Dec. 190; Squier v. Stockton, 5 La. Ann. 120, 52 Am. Dec. 583.

May Show Real Party in Interest.—But a defendant may show that the agent with whom he dealt, and not the plaintiff, is the real party in interest, and to that end may ask the plaintiffs, in the case of a sale, whether they charged the property sold to the defendant, and where the money would go if paid, and what interest the plaintiffs had in the sale made by the agent. Bronson v. Herbert, 95 Mich. 478.

6. Lumley v. Corbett, 18 Cal. 494; Clark v. Smith, 88 Ill. 298; Saladin v. Mitchell, 45 Ill. 80; Peel v. Shepherd, 58 Ga. 365; Eclipse Wind Mill Co. v. Thorson, 46 Iowa 181; Pitts v. Mower, 18 Me. 361, 36 Am. Dec. 727; Huntington v. Knox, 7 Cush. (Mass.) 371; Packer v. Hinckley Locomotive Works, 122 Mass. 484; Kornemann v. Monaghan, 24 Mich. 36; Butler v. Dorman, 68 Mo. 362, 30 Am. Rep. 795; Lough v. Thornton, 17 Minn. 253; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; DuBois v. Perkins, 21 Oregon 189.

As to the authority of the agent to receive payment, see *supra*, this title, *Nature and Extent of Authority*.

7. Arkansas.—Morton v. Scull, 23 Ark. 289. Georgia.—Byne v. Hatcher, 75 Ga. 289.

(3) *Judgments when Conclusive*.—Agents and principals are not, as such, in privity with each other in respect to property rights, and the principal is not concluded in that regard by a suit brought against his agent.¹

X. RATIFICATION.—1. *Nature*.—Ratification as it relates to the law of agency is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority; and this results as effectively to establish the duties, rights, and liabilities of an agency as if the acts ratified had been fully authorized in the beginning.²

Ratification of Contract—No New Consideration.—So that in the case of contracts no new or additional consideration is required to support the ratification, for in adopting the contract the ratifier accepts it as duly authorized from the beginning with the original consideration.³

Illinois.—Rockford, etc., R. Co. v. Shunick, 65 Ill. 223.

Indiana.—Du Souchet v. Dutcher, 113 Ind. 249; Haskit v. Elliott, 58 Ind. 493; Madison, etc., R. Co. v. Norwich Sav. Soc., 24 Ind. 457.

Massachusetts.—Brown v. Hartford F. Ins. Co., 117 Mass. 479.

Mississippi.—Lawrence v. Hand, 23 Miss. 103; Mayer v. McLure, 36 Miss. 389.

New York.—Sanford v. Handy, 23 Wend. (N. Y.) 260; Bennett v. Judson, 21 N. Y. 238; Elwell v. Chamberlin, 31 N. Y. 611; Smith v. Tracy, 36 N. Y. 79. See also Graves v. Spier, 58 Barb. (N. Y.) 387; National L. Ins. Co. v. Minch, 5 Thomp. & C. (N. Y.) 545, 53 N. Y. 149.

Pennsylvania.—Mundorff v. Wickersham, 63 Pa. St. 89, 3 Am. Rep. 531.

South Dakota.—Union Trust Co. v. Phillips (S. Dak., 1895), 63 N. W. Rep. 903. See also Wyckoff v. Johnson, 2 S. Dak. 91.

Virginia.—Crum v. U. S. Min. Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116.

Wisconsin.—Kickland v. Menasha Wooden Ware Co., 68 Wis. 34; Law v. Grant, 37 Wis. 548.

See also *supra*, this title, *Rights, Duties, and Liabilities as to Third Parties—Of Principal to Third Parties*; and the title **FRAUD AND MISREPRESENTATION**.

1. Warner v. Comstock, 55 Mich. 615. See also the title **RES ADJUDICATA**.

Judgment against Agent Held Binding against Principal.—Where the plaintiff's commission merchant, who had purchased and delivered highwines in performance of the plaintiff's contract, and had exercised due care and prudence in the matter, upon learning that the purchaser had shipped part of the same and was in the act of shipping the balance without payment replevied the same, giving the plaintiff notice to prosecute the suits, which he failed to do, and the commission merchant was defeated in the suits, the bills of lading having been transferred to innocent purchasers, after which he paid over the proceeds of the wines he had replevied to the parties entitled to the same in the replevin suit, it was held, in an action by the plaintiff against the commission merchant to recover the proceeds of the sale of the wines, that the plaintiff could not recover, as the adjudication in the replevin suits was binding on him and showed that they belonged

to other persons. Phillips v. Moir, 69 Ill. 155.

But in *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502, it was held that one whose property has been replevied by a writ against his agent or his bailee can retake it by replevin from the plaintiff in the first action, even during the pendency of that action. In delivering the opinion of the court in this case, Devens, J., said: "Unless the judgment against the agent or bailee who happens to be in possession of property will settle conclusively the title of the principal, there is no reason why such principal may not maintain this action. But it has been decided, which certainly is a much stronger case, that even a judgment against the principal will not necessarily settle the title of his bailee, such bailee not having been a party to the action. *Globe Works v. Wright*, 106 Mass. 207."

It seems that a judgment against one as an agent, although recovered for the debt of the principal, who is a nonresident, does not bind the latter, and trespass will lie by him against a person buying his goods at an execution sale on such a judgment. *Coe v. English*, 6 Houst. (Del.) 562.

Recovery against Agent when Not Bar to Suit against Third Person.—In an action against the vendor of certain lands, for fraud in the sale thereof to the plaintiff, which fraud was effected by the connivance of the plaintiff's agent with the vendor of the land, it was held that the fact that the plaintiff had recovered a judgment against the agent for the amount the latter had received from the vendor as being a secret profit to which the plaintiff was entitled, did not operate, although the judgment was satisfied, as a bar to an action for deceit against the vendor. *Glaspie v. Keator*, 12 U. S. App. 281, 5 C. C. A. 474, 56 Fed. Rep. 203.

2. *Ward v. Evans*, 3 Salk. 118, 2 Ld. Raym. 923; *Brook v. Hook*, 24 L. T. 34; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Wilson v. Dame*, 58 N. H. 392. See also *infra*, this title, *Effect of Ratification*.

Ratification is the adoption of an unauthorized transaction, by the party beneficially interested. *Schwartz v. Weber* (Supreme Ct.), 6 N. Y. St. Rep. 688.

3. *Drakely v. Gregg*, 8 Wall. (U. S.) 267; *Brook v. Hook*, 24 L. T. 34; *Grant v. Beard*, 50 N. H. 129.

Ratification of Contract.—"Ratification is in

Rescission of Ratification.—The ratification, when once made with full knowledge, if even for a moment, is effective, and the principal is bound thereby.¹

Ratification after Disavowal.—A disavowal will not prevent a subsequent ratification,² unless after the disavowal by the principal the third party has abandoned the transaction.³

2. Who may Ratify.—Ratification of a particular act or contract may be made by any one in whose behalf the act or contract has been made, provided such person is capable himself of doing the act or entering into the contract.⁴

A Corporation may ratify a contract made in its behalf, provided it be within its powers, not *ultra vires*, or otherwise illegal.⁵

Ultra Vires Acts of Corporation.—It cannot, however, subsequently ratify an act which it could not have done when it occurred. A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority.⁶

general the adoption of a previously formed contract, notwithstanding a vice that rendered it relatively void; and by the very nature of the act of ratification, confirmation, or affirmation (all the terms are in use to express the same thing) the party confirming becomes a party to the contract, he that was not bound becomes bound by it and entitled to all the proper benefits of it, he accepts the consideration of the contract as a sufficient consideration for adopting it, and usually this is quite enough to support the ratification. A mere ratification cannot of course correct any defect in the terms of the contract. If it is in its very terms invalid for want of consideration or for any other defect, a mere ratification can add nothing to its binding force." Lowrie, J., in *Pearsoll v. Chapin*, 44 Pa. St. 17.

A suit to enforce the obligation of a party ratifying an unauthorized act is in effect a suit upon the original contract, and not upon the act of ratification. *Grant v. Beard*, 50 N. H. 129.

1. *Smith v. Cologan*, 2 T. R. 189, note; *Clark v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Vaughn v. Sheridan*, 50 Mich. 155; *Beall v. January*, 62 Mo. 434; *Andrews v. Aetna L. Ins. Co.*, 92 N. Y. 596; *Silverman v. Bush*, 16 Ill. App. 437; *McGeoch v. Hooker*, 11 Ill. App. 649; *Brock v. Jones*, 16 Tex. 461.

See also *infra*, this section, *Prerequisites of Valid Ratification—Knowledge of Material Facts*.

Disaffirmance of Ratification.—In *Whitfield v. Riddle*, 78 Ala. 99, it was held that the affirmation of an assumed agency in the disposition of property, when made with full knowledge of the facts, is a single act; and that when a party has once ratified such transaction he cannot afterwards be heard to disaffirm it when it turns out contrary to his expectations.

2. *Woodward v. Harlow*, 28 Vt. 338.

3. No Ratification after Abandonment by Third Party.—*Wilkinson v. Harwell*, 13 Ala. 660. In this case, where an agent sold land of his principal without authority, and the principal refused to ratify the sale, and the vendee abandoned it, it was held that the principal could not afterwards affirm the act of his agent and enforce the agreement.

4. *Watkins v. Durand*, 1 Port. (Ala.) 251; *Taymouth Tp. v. Koehler*, 35 Mich. 22.

5. *Planters' Bank v. Sharp*, 4 Smed. & M.

(Miss.) 75, 43 Am. Dec. 470; *Clarke v. Lyon County*, 8 Nev. 188; *Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137; *Pennsylvania Bank v. Reed*, 1 W. & S. (Pa.) 101; *Whitwell v. Warner*, 20 Vt. 425; *Leggett v. New Jersey Mfg., etc., Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Everett v. U. S.*, 6 Port. (Ala.) 166, 30 Am. Dec. 584; *Frankfort, etc., Turnpike Co. v. Churchill*, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159. See also the titles CORPORATION; ULTRA VIRES.

So in *Kelsey v. Crawford County Nat. Bank*, 69 Pa. St. 429, it was said that the maxim which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is usually to be presumed from the absence of dissent.

The Vote of a Town Meeting properly called for that purpose, accepting the report of a person assuming to act as agent for the town in conducting certain suits, and authorizing him to compromise suits then pending, was a ratification of his acts. *Kinsley v. Norris*, 60 N. H. 131.

Ratification by Retention of Benefits.—In *Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137, it was held that where property was purchased for a corporation by two of its officers, who gave several notes in the corporate name for the purchase money, and afterwards the property was claimed by the corporation and converted to its own use, this amounted to a ratification of what the officers had done, and that even if the notes were originally given without authority, the corporation was liable upon them.

The Government is liable for the illegal acts of its agents when expressly ratified. *Wiggins' Case*, 3 Ct. of Cl. 412.

Stranger Cannot Deny the Ratification.—If the principal recognizes and affirms the existence and acts of an agent, a mere stranger will not be permitted to controvert either. *Scott v. Detroit Young Men's Soc.*, 1 Doug. (Mich.) 119.

6. *Ashbury R. Carriage, etc., Co. v. Riche*, L. R. 7 H. L. 653; *McCracken v. San Francisco*, 16 Cal. 591; *Grogan v. San Francisco*, 18 Cal. 608; *Zottman v. San Francisco*, 20 Cal. 102, 81 Am. Dec. 96; *People v. Swift*, 31 Cal. 28; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *San Diego Water Co. v. San Diego*,

So where the supervisors of a county possessed no authority to make a subscription or issue bonds in the first instance without the prior sanction of the qualified voters thereof, they could not ratify a subscription already made without such authority.¹

Contracts Made without Statutory Formalities.—And generally, where a contract is invalid for failure to comply with formalities prescribed by statute, a corporation cannot validate it by subsequent ratification.²

Ratification by Agents.—An agent may ratify such acts as he himself has the power to do,³ but he cannot ratify his own unauthorized act.⁴

59 Cal. 517; *Lucas v. White Line Transfer Co.*, 70 Iowa 550, 59 Am. Rep. 449; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Highway Com'rs v. Van Dusan*, 40 Mich. 431; *Horton v. Thompson*, 71 N. Y. 513; *Smith v. Newburgh*, 77 N. Y. 130; *Hazard v. Durant*, 11 R. I. 196. See also the title *ULTRA VIRES*.

A Contract Ultra Vires is void, and cannot be made valid by a subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make they cannot affirm. A void act can never become valid merely because it remains unquestioned. Per *Biddle, J.*, in *Tippecanoe County v. Lafayette, etc.*, R. Co., 50 Ind. 86.

In *Ashbury R. Carriage, etc., Co. v. Riche*, L. R. 7 H. L. 653, it was held that the contract in question being in its inception void as contrary to law, could not be ratified even by the whole body of incorporators. Lord Cairns forcefully said: "If the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made? * * * It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then the shareholders, finding out what had been done, could sanction subsequently what they could not antecedently have authorized."

1. *Marsh v. Fulton County*, 10 Wall. (U. S.) 676. In this case Field, J., said: "A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. * * * They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization."

2. *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Nash v. St. Paul*, 8 Minn. 172, 11 Minn. 174; *Jefferson County v. Arrighi*, 54 Miss. 668; *People v. Flagg*, 17 N. Y. 589; *Brady v. New York*, 20 N. Y. 312; *Spence*

v. Wilmington Cotton Mills, 115 N. Car. 210, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 430; *Hague v. Philadelphia*, 48 Pa. St. 528; *Pratt v. Swanton*, 15 Vt. 147.

3. *Mound City Mut. L. Ins. Co. v. Huth*, 49 Ala. 529; *Whitehead v. Wells*, 29 Ark. 99; *Palmer v. Cheney*, 35 Iowa 281.

An Agent of a Municipal Corporation cannot ratify the unauthorized act of another officer of the corporation in a matter over which he has not authority. *Sceery v. Springfield*, 112 Mass. 512.

Ratification by Agent of Private Corporation.—Where the agent of a private corporation makes an unauthorized sale or disposition of its property, the full knowledge thereof and acquiescence therein by another agent, the scope of whose authority covers such transaction, may constitute a ratification thereof by the corporation. *Singer Mfg. Co. v. Belgart*, 84 Ala. 519.

Ratification by Railroad Company.—The adoption or confirmation by a railroad company of the unauthorized act of an employee must be by some chief officer or person having sufficient authority and discretion to act and speak for the company in order to amount to a ratification. *Gulf, etc., R. Co. v. Reed*, 80 Tex. 362.

Ratification by General Agent.—A general agent has no authority to ratify the acts of a stranger done in the name of his principal, unless the power of appointing agents has been delegated to him by the principal. *Ironwood Store Co. v. Harrison*, 75 Mich. 197.

Taking of Note by Attorney.—Where it appeared that the defendant, an attorney, having for collection a claim of the plaintiff, without his knowledge collected the same in Confederate money and loaned it to a third party, who afterwards became bankrupt, taking a note therefor payable to the plaintiff, who afterwards received from the defendant the receipt of other attorneys to whom the note had been delivered for collection, and after having kept it a few days and made inquiry about the drawer, returned it and demanded the money of the defendant; the evidence also tending to show that an agent who had been sent by the plaintiff to look after his claim, upon being informed of the transaction, had expressed himself as satisfied with it—it was held that the jury might well infer a ratification, if not by the plaintiff, at least from the agent in assenting to the transaction. *Whitehead v. Wells*, 29 Ark. 99.

4. *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Hotchin v. Kent*, 8 Mich. 526.

Ratification by Partners.—So a partner as a duly authorized agent may ratify in behalf of the firm.¹

Infants and Incompetent Persons.—An infant cannot empower an agent or attorney to act for him, and therefore he cannot affirm what one has assumed to do in his name as such. Persons incompetent to act, and generally persons incompetent from whatever reason to do an act, cannot affirm the act when done by one in their behalf.²

3. What Acts may be Ratified—*a.* IN GENERAL.—As a corollary to the general rule as to who may ratify acts of a supposed agent, it may be stated, as a general rule, that acts which may be ratified are such as the ratifier might have himself done in the first instance, except that an agent cannot ratify acts of a subagent who assumed an authority which could not be delegated.³ The power to ratify necessarily supposes power to make the contract in the first instance.⁴

Void and Voidable Acts.—Acts therefore which are absolutely null and void cannot be ratified, but those which are merely voidable may be.⁵ So a contract void as against public policy, or against a statute, cannot be ratified, for the confirmation is, of course, affected with the original taint and is necessarily illegal.⁶

Contracts Tainted with Fraud.—So where there is fraud of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy, and hence cannot be permitted;⁷ but where the transaction is contrary only to good faith and fair dealing, when it affects individual interests only, ratification is allowable; for if the party with a full knowledge of all the facts voluntarily confirms it, he bars himself from the relief which he otherwise might have had.⁸

1. *Forbes v. Hagman*, 75 Va. 179. See also the title **PARTNERSHIP**.

So in *Harper v. Devene*, 10 La. Ann. 724, where a note issued in the partnership name by a clerk was shown to one of the partners, who corrected the date, saying it was all right, it was held a ratification.

Where one of the new members of a firm received property from an agent of the old firm, such act was held to constitute a ratification. *Callanan v. Van Vleck*, 36 Barb. (N. Y.) 324.

2. *Doe v. Roberts*, 16 M. & W. 778; *Trueblood v. Trueblood*, 8 Ind. 195; *Armitage v. Widoe*, 36 Mich. 124; *Fonda v. Van Horn*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

3. See *supra*, this title, *Delegation—Delegation of Authority by Agent*.

Acceptance of Payment of Account for Attorney.

—In *O'Connor v. Arnold*, 53 Ind. 203, where an account was placed in the hands of an attorney for collection and the debtor paid a part of the claim to a person who occupied the same office with the attorney, but who had no connection with him, and who gave a receipt for the money so paid, signed by him as for said attorney, it was held that the attorney could not ratify his act on the ground that the agency involved in its duties especial learning and professional skill, and could not be delegated except by the consent of principal.

Act of Public Officer.—The act of a public officer exceeding the authority conferred on him by law may be adopted and ratified by the party for whose benefit it is done. *Farmers L. & T. Co. v. Walworth*, 1 N. Y. 435.

So in *Armstrong v. Garrow*, 6 Cow. (N. Y.) 465, it was held that the act of the sheriff in releasing a defendant arrested on a *ca. sa.* on receiving the promissory note of a third person, might have been ratified by the plaintiff by receiving the note. See also *Pilkington v. Green*, 2 B. & P. 151; *Sugars v. Brinkworth*, 4 Campb. 46; *Corning v. Southland*, 3 Hill (N. Y.) 552. See also the title **PUBLIC OFFICERS**.

4. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96.

5. *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Decuir v. Lejeune*, 15 La. Ann. 569; *Newsom v. Hart*, 14 Mich. 237; *Jefferson County v. Arrighi*, 54 Miss. 668; *Macfarland v. Heim*, 127 Mo. 327; *Spence v. Wilmington Cotton Mills*, 115 N. Car. 210, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 430.

6. *Negley v. Lindsay*, 67 Pa. St. 217, 5 Am. Rep. 427; *Shelton v. Marshall*, 16 Tex. 344.

7. *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Negley v. Lindsay*, 67 Pa. St. 217, 5 Am. Rep. 427; *Garrett v. Gonter*, 42 Pa. St. 143. See *infra*, this section, *Criminal Acts—Forgery*.

8. *Jones v. Emery*, 40 N. H. 348; *Masson v. Bovet*, 1 Den. (N. Y.) 69, 43 Am. Dec. 651; *Matteawan Co. v. Bentley*, 13 Barb. (N. Y.) 641; *Wheaton v. Baker*, 14 Barb. (N. Y.) 594; *Pearsoll v. Chapin*, 44 Pa. St. 9.

Money Obtained under False Pretense.—In *Scott v. New Brunswick Bank*, 23 Can. Supreme Ct. 277, it was held that payment to one falsely representing himself as agent of the creditor might be ratified and the agency

b. TORTS.—The doctrine of ratification applies as well to torts when done to the use or for the benefit of him who subsequently adopts them, as to matters of contract.¹

What Amounts to Adoption of Tort.—But to hold one responsible for the tortious act of another not committed by him or by his order, the adoption must be explicit, and with a full knowledge of the facts.²

c. CRIMINAL ACTS—FORGERY.—The adoption or ratification of the criminal act of another tending to shield the criminal or to compound the crime is of no effect.

View that Forgery cannot be Ratified.—Applying this doctrine, it has been held in *England* and in some of the states of the Union, that where an act of signing is a forgery, the act cannot, from considerations of public policy, be ratified;³

adopted though the person receiving the money had committed an indictable offense by making such representations.

Misappropriation of Funds.—It is a well-settled principle, that if an agent or trustee convert the property confided to him, the principal, or *cestui que trust*, may, at his election, ratify the transaction, and claim whatever profit is made by it. *Motley v. Motley*, 7 Ired. Eq. (N. Car.) 211. See also the title TRUSTS AND TRUSTEES.

Usurious Contracts.—If an agent to loan money takes from the borrower a bonus or commission in addition to the interest allowed by law, without the knowledge or authority of the lender, his principal, and the latter afterwards ratifies the act of the agent with knowledge of the facts, the loan is usurious. *Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69. See *Rogers v. Buckingham*, 33 Conn. 81; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Bliven v. Lydecker*, 130 N. Y. 102, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 429. See also the title USURY.

The rule as laid down by some authorities goes further, and the transaction is regarded as tainted with usury by such act of the agent without his principal's knowledge. *Philo v. Butterfield*, 3 Neb. 256; *Joslin v. Miller*, 14 Neb. 91.

1. *Hull v. Pickersgill*, 1 Brod. & B. 282, 5 E. C. L. 83; *Morehouse v. Northrop*, 33 Conn. 380; *Lee v. West*, 47 Ga. 311; *Tucker v. Jerris*, 75 Me. 184; *Exum v. Brister*, 35 Miss. 391; *Forbes v. Hagman*, 75 Va. 178.

Tort must be to the Use of Ratifiers.—"He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment; for in that case, *Omnis ratihabitio retrahitur et mandato aquiparatur.*" 4 Inst. 317.

Chief Justice Tindal, in *Wilson v. Tumman*, 6 M. & G. 236, 46 E. C. L. 236, thus states the law: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same

extent as by and with all the consequences which follow from the same act done by his previous authority."

One cannot be held liable by reason of his ratification of a tort not committed in his interest. *Wilson v. Barker*, 4 B. & Ad. 614, 24 E. C. L. 124.

So where suit was brought against the general agent of a sewing-machine company for a forcible trespass committed by employees while removing a machine by his direction and in compliance with the orders of the company from the premises of one who held it under a sewing-machine lease which had been forfeited, it was held that the defendant was not liable on the ground of ratification, inasmuch as the act complained of was not done in his interest or for his benefit, and the only interest involved was that of his principals. *Smith v. Lozo*, 42 Mich. 6.

2. *Tucker v. Jerris*, 75 Me. 184.
3. *Brook v. Hook*, 24 L. T. 34; *Owsley v. Philips*, 78 Ky. 517, 39 Am. Rep. 258, *distinguishing* *Forsythe v. Bonta*, 5 Bush (Ky.) 547; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *McHugh v. Schuylkill County*, 67 Pa. St. 391, 5 Am. Rep. 445; *Negley v. Lindsay*, 67 Pa. St. 217, 5 Am. Rep. 427; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702.

A Material Alteration of written instrument may be ratified. See the title ALTERATION OF INSTRUMENTS.

Doctrine of Ratification not Applicable to Forgery.—It may be added in sound reason that cases of ratification are those where the act was pretended to have been done for or under the authority of the party sought to be charged, which cannot be in case of a forgery. *Brook v. Hook*, 24 L. T. 34.

"One who commits the crime of forgery by signing the name of another to a promissory note does not assume to act as the agent of the person whose name is forged. * * * Where the act done constitutes a crime and is committed without any pretense of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it. * * * As has been well said, it is impossible in such a case to attribute any motive to the ratifying act but that of concealing the crime and suppressing the prosecution." Per Mitchell, C. J., in *Henry v. Heeb*, 114 Ind. 275.

and a promise to pay a forged note in consideration that the holder will forbear prosecution is not a ratification, and, as a new agreement, is void as founded on an illegal consideration.¹

Estoppel to Set up Forgery.—If, however, the owner of the note takes it, or changes his status with respect to it, on the faith of the promise or attempted ratification of the party whose name is forged, the latter is estopped from denying his adoption and making defense.²

Mortgage under Forged Power of Attorney.—In *Garrett v. Gonter*, 42 Pa. St. 143, it was held that a mortgage executed under the authority of a forged power of attorney was the subject of ratification, and it was intimated, on the other hand, that the forged letter was not. This is not contrary to the rule stated above as to forged instruments, for the mortgage was executed in the name of the principal by a professed agent acting under a real or pretended authority.

1. *Brook v. Hook*, L. R. 6 Exch. 89; *Williams v. Bayley*, L. R. 1 H. L. 200; *M'Kenzie v. British Linen Co.*, L. R. 6 App. Cas. 82.

Promise to Pay Forged Paper Invalid.—In *Williams v. Bayley*, L. R. 1 H. L. 200, where a father made a mortgage to secure the amount of bills forged by his son, which were then given up to him, it was held that the transaction, being made with a view to stopping the prosecution, was invalid.

In *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702, it was held that a promise, by one whose indorsement on a note is forged, to pay the same, is void as against public policy.

In *Brook v. Hook*, L. R. 6 Exch. 89, the facts were as follows: The plaintiff had received the note from the forger, J., on the day of its date, and before it was due he had an interview with defendant and showed him the note. The defendant denied that the signature was his, and declared it to be a forgery of J., upon which the plaintiff said he would commence criminal proceedings against him. The defendant in order to prevent this said he would hold himself responsible on the note in the following memorandum: "I hold myself responsible for a bill dated," etc. The Court of Exchequer held that the memorandum could not be construed as a ratification, since the act it was assumed to ratify was illegal and void, and the memorandum was against public policy, being founded upon an illegal consideration.

2. *M'Kenzie v. British Linen Co.*, L. R. 6 App. Cas. 82; *Ashpitel v. Bryan*, 3 B. & S. 492, 113 E. C. L. 492; *Freeman v. Cooke*, 2 Exch. 654; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546.

Acceptance of Forged Bill—Estoppel.—So the acceptance of a forged bill of exchange has been held to be binding on the acceptor—not, however, from the force of the doctrine of ratification, but upon the theory of estoppel. *Mather v. Maidstone*, 18 C. B. 273, 86 E. C. L. 273; *Leach v. Buchanan*, 4 Esp. 226; *Hall v. Fuller*, 5 B. & C. 750, 12 E. C. L. 368; *U. S. Bank v. State Bank*, 10 Wheat. (U. S.) 333; *State v. Benoist*, 39 Mo. 500; *Van Duzer v. Howe*, 21 N. Y. 531; *Dodge v. Columbus Nat. Exch. Bank*, 20 Ohio St. 234. See also the title **BILLS AND NOTES**.

Sanction after Maturity and Negotiation.—In *Woodruff v. Munroe*, 33 Md. 147, it is held that if, in an action against an indorser of a promissory note by the *bona fide* holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a *bona fide* holder.

Refraining from Obtaining Security.—In *Casco Bank v. Keene*, 53 Me. 103, where, on account of the defendant's admission of the genuineness of the signature, the bank refrained from proceedings against the person from whom they had received it, an instruction that "if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security, * * * and they thereby sustained an injury, then the defendant would be estopped from denying his signature," was held correct.

Silence—Failure to Repudiate.—This estoppel may arise from a failure to repudiate or from silence on the part of him whose signature is forged. *Reg. v. Smith*, 3 F. & F. 504; *Reg. v. Beardsley*, 1 F. & F. 329; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Weed v. Carpenter*, 4 Wend. (N. Y.) 219.

Facts Not Amounting to Estoppel.—In *Smith v. Tramel*, 68 Iowa 488, it was held that when a party whose name had been forged to a note merely assured the holder that the note would be paid, he did not thereby ratify the signature.

Where A presented to the officers of a bank, for payment, bills of the bank from a genuine plate, but with one forged signature, and they hesitated for some time whether to receive them, but, before A left, returned them to him, still being in doubt whether they were counterfeit or not, it was held that there was no ratification of the forged signature so as to make the bank liable. *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111.

Forgery—Acceptance of Indemnity.—In *Jones v. Hamlet*, 2 Sneed (Tenn.) 256, it was held that where a party accepts a conveyance of property to a trustee as indemnity against promissory notes upon which his name has been forged, he thereby adopts and ratifies the debt.

Neither re-execution nor redelivery is necessary. *Fitzpatrick v. School Com'rs*, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76.

Effect on Subsequent Acts.—In *De Feriet v. America Bank*, 23 La. Ann. 310, 8 Am. Rep. 597, where a confidential clerk had forged a check which the employer had ratified, and

View that Forgery may be Ratified.—In some of the states of the Union, on the other hand, the doctrine obtains that if the party whose signature has been forged, with a full knowledge of all the circumstances as to the signature, and intending to be bound thereby, acknowledges it as his own, he is bound to the same extent as if it had been originally signed by his authority, although his action does not amount to an estoppel, provided the ratification is not made conditional upon the immunity of the criminal.¹

4. Prerequisites to Valid Ratification—*a. DESIGNATION OF PRINCIPAL.*—The existence of a principal is one of the essential elements of a ratification; although it is not necessary that he should be named by the person assuming to act as his agent, yet there should be a sufficient description to indicate the person intended.²

had continued the clerk in his employ, it was held that the employer was liable for another subsequent forgery.

1. *Union Bank v. Middlebrook*, 33 Conn. 95; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Livings v. Wiler*, 32 Ill. 387; *Forsyth v. Day*, 46 Me. 177; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Wellington v. Jackson*, 121 Mass. 157; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Cravens v. Gillilan*, 63 Mo. 28; *Howard v. Duncan*, 3 Lans. (N. Y.) 174; *Commercial Bank v. Warren*, 15 N. Y. 577; *Crout v. De Wolf*, 1 R. I. 393. See also *Forsythe v. Bonta*, 5 Bush (Ky.) 547, distinguished in *Owsley v. Philips*, 78 Ky. 517, 39 Am. Rep. 258.

Doctrine of Ratification Held Applicable to Forgery.—In *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447, it was held that by ratifying and adopting a forged signature upon commercial paper, the person whose signature has been forged becomes liable thereon, although no words of agency appear upon the paper and no facts were shown sufficient to constitute an estoppel *in pais*. Dewey, J., said: "The only question upon this part of the case is, whether a signature made by an unauthorized person under such circumstances as show that the party placing the name on the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full, and intentionally made and designed to signify an adoption of the signature. The defendants insist that it cannot, by such evidence as would in other cases warrant the jury in finding an adoption; and that nothing short of an estoppel, having the element of actual damage from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading the holder of it, will have this effect. As to the person himself whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction as to the effects of ratifying an unauthorized act in the two supposed cases. In the first case the actor has no authority any more than in the last. The contract receives its whole validity from the ratification. It may be ratified where there was no pretense of agency. In the other case the individual who presents the note thus signed passes the same as a note signed by the promisor either by his own proper

hand or written by some one by his authority.

* * * It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same and thus confirm what was originally an unauthorized and illegal act. * * * It is, however, urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offense."

In *Weed v. Carpenter*, 4 Wend. (N. Y.) 219, where a person for a series of years forged the name of his friend as indorser of his notes and bills, with the knowledge of his friend, who, although judgments were obtained and executed against him in suits on such forged indorsements, never disavowed such acts until the person committing the forgeries had absconded, in the meantime suffering the actions against him to go by default and attempting no defense, it was held that proof of these facts was admissible in evidence, and that from it the jury might imply an authority from the indorser to the maker thus to use his name.

2. *Wilson v. Tummam*, 6 M. & G. 236, 46 E. C. L. 236; *Stainsby v. Frazers Metallic Life Boat Co.*, 3 Daly (N. Y.) 98.

Principal Named or Designated.—In *Watson v. Swann*, 11 C. B. N. S. 756, 103 E. C. L. 756, where an insurance broker, being instructed to effect an open policy for the plaintiff against jettison only, "subject to declaration thereafter," and being unable to do so, declared certain deck cargo shipped for Ostend on board one of the plaintiff's vessels on the back of a general policy which he had previously effected for himself "upon any kind of goods and merchandise, as interest might appear," and got it initialed by the underwriters, it was held, a loss having occurred, that it was not competent for the plaintiff to maintain an action against the underwriters upon the policy, the contract not having been made by him or on his behalf at the time. Willes, J., said: "The law obviously requires that the person for whom the agent professes to act must be a person capable of being

b. ACTS DONE IN CAPACITY OF AGENT.—A ratification by a principal of the acts of an agent can only be effectual between the parties when the act was done by the agent on account of the principal, not on his own account or on account of some third person.¹ Where one buys in his own name for

ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract. In the present case the policy was effected on goods 'to be valued and declared as interest might appear.' No person was pointed out at the time the policy was effected as the person who was to be the owner of the goods insured. * * * A stranger who had given him no orders to effect a policy for him clearly cannot by any supposed ratification assume the benefit of the contract."

No Principal in Existence.—In *Kelner v. Baxter*, L. R. 2 C. P. 174, it was held that when a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it; and a stranger cannot by a subsequent ratification relieve him from that liability. The plaintiff in this case had sold goods to the directors of a projected corporation. Erle, C.J., after showing that if the company had been in existence at the time the contract was entered into there would be no doubt that the defendants would have signed as agents, said: "It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding upon it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract, and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made."

Adoption by Corporation of Acts in Its Behalf Done Prior to Incorporation.—In *Marchand v. Loan*, etc., Assoc., 26 La. Ann. 389, it was held that a claim for money expended and time employed for the organization and benefit of the association before its incorporation, could not be regarded and enforced as a debt of the institution. There is not complete accord among the authorities upon this subject, however, and some courts hold that the corporation is bound to pay the expenses incurred by its promoters in organizing the corporation. *Low v. Connecticut*, etc., R. Co., 45 N. H. 370. See also the titles CORPORATIONS; PROMOTERS OF CORPORATIONS.

Ratification by Administrator.—In *Foster v. Bates*, 12 M. & W. 226, where the act ratified was done in behalf of the intestate's estate prior to the appointment of an administrator, it was held that, as the act of the agent was ratified by the plaintiff after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be the agent.

This seems to present an exception to the general rule, but reasonably enough, for the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate. See also *Hull v. Pickersgill*, 1 Brod. & B. 282, 5 E. C. L. 83.

1. *England.*—*Wilson v. Tumman*, 6 M. & G. 236, 46 E. C. L. 236; *Watson v. Swann*, 11 C. B. N. S. 756, 103 E. C. L. 756; *Ancona v. Marks*, 7 H. & N. 686.

United States.—*Johnson v. Johnson*, 31 Fed. Rep. 700.

California.—*Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 431.

Illinois.—*Grund v. Van Vleck*, 69 Ill. 478; *Collins v. Waggoner*, 1 Ill. 51; *Beveridge v. Rawson*, 51 Ill. 504.

Indiana.—*Crowder v. Reed*, 80 Ind. 1; *Meiners v. Munson*, 53 Ind. 138.

Massachusetts.—*Richardson v. Payne*, 114 Mass. 429.

Minnesota.—*Mitchell v. Minnesota Fire Assoc.*, 48 Minn. 278, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 431.

Missouri.—*Hammerslough v. Cheatham*, 84 Mo. 13.

New York.—*Collins v. Suau*, 7 Robt. (N. Y.) 623; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315; *Kirchner v. Schmid*, 7 Misc. Rep. (N. Y. Com. Pl.) 455, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 431.

Texas.—*Commercial, etc., Bank v. Jones*, 18 Tex. 811. See also *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546.

Antiquity of the Rule.—This rule of law was stated in the Year Book 7 Hen. IV., fol. 35, where it was declared that if a bailiff take a heriot claiming property in it himself, the subsequent assent of the lord would not amount to a ratification; but if he take it as bailiff of the lord, the subsequent assent amounts to a ratification of the bailiff's act.

Agency must be Assumed.—The relation of principal and agent is necessarily implied by the term "ratification." *Pittsburgh, etc., R. Co. v. Gazzam*, 32 Pa. St. 347.

In *Webb v. Cole*, 20 N. H. 490, it was held that if a servant, having his master's money for a specific purpose, makes use of it in performing a service which he, without his master's privity, has undertaken for another, the master cannot, by afterwards adopting the servant's act as his own, charge that other party upon the contract made by him with the servant.

Earl, J., in *Hamlin v. Sears*, 82 N. Y. 327, states the rule as follows: "The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books and set forth by all the text writers upon the law of agency. But the

himself, another cannot adopt the transaction as principal.¹

c. KNOWLEDGE OF MATERIAL FACTS.—Knowledge of all material facts and circumstances is an essential element to an effective ratification; without such knowledge the adoption of the acts of an unauthorized agent, or one who has exceeded his authority, will not bind the principal; but on the contrary, if he has given his assent while in ignorance of the facts of the case, he may, on being informed, disavow the unauthorized transaction.²

doctrine properly applies only to cases where one has assumed to act as agent for another; and then a subsequent ratification is equivalent to an original authority."

Knowledge by Third Party of Ratifier's Interest in Subject Matter.—But it has been held that, although an agent may have contracted in his own name and without express authority of his principal, the latter may ratify and enforce a contract made with a person having notice of the principal's rights in the subject matter. *Robinsons v. Lincoln Sav. Bank*, 85 Tenn. 363.

1. *Balloch v. Hooper*, 6 Mackey (D. C.) 421; *Fellows v. Commissioners' Ct.*, 36 Barb. (N. Y.) 655.

2. *England*.—*Fitzgerald v. Dressler*, 7 C. B. N. S. 374, 97 E. C. L. 374; *Lewis v. Read*, 13 M. & W. 834.

United States.—*Owings v. Hull*, 9 Pet. (U. S.) 607; *Rust v. Eaton*, 24 Fed. Rep. 830; *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. Rep. 347; *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395; *Pacific Rolling Mill Co. v. Dayton, etc.*, R. Co., 7 Sawy. (U. S.) 61.

Alabama.—*Wheeler v. McGuire*, 86 Ala. 398; *Simon v. Johnson* (Ala., 1895), 16 So. Rep. 884.

California.—*Dean v. Bassett*, 57 Cal. 640; *Dupont v. Wertheman*, 10 Cal. 354; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Miller v. Board of Education*, 44 Cal. 166.

Colorado.—*Field v. Small*, 17 Colo. 386.

Georgia.—*Turner v. Wilcox*, 54 Ga. 593; *De Vaughn v. McLeroy*, 82 Ga. 687; *Hardeman v. Ford*, 12 Ga. 205; *New Ebenezer Assoc. v. Cress Lumber Co.*, 89 Ga. 125; *Mapp v. Phillips*, 32 Ga. 72.

Illinois.—*Kerr v. Sharp*, 83 Ill. 199; *Stein v. Kendall*, 1 Ill. App. 101; *Mathews v. Hamilton*, 23 Ill. 470; *Reynolds v. Ferree*, 86 Ill. 570; *Proctor v. Tows*, 115 Ill. 138; *Bensley v. Brockway*, 27 Ill. App. 410.

Iowa.—*Roberts v. Rumley*, 58 Iowa 301; *Tidrick v. Rice*, 13 Iowa 214; *White v. Morgan*, 42 Iowa 113; *Potter v. Harvey*, 30 Iowa 502; *Beebe v. Equitable Mut. L., etc., Assoc.*, 76 Iowa 129; *Eggleston v. Mason*, 84 Iowa 630.

Kansas.—*Bohart v. Oberne*, 36 Kan. 284; *St. John, etc., Co. v. Cornwell*, 52 Kan. 712.

Kentucky.—*Fletcher v. Dysart*, 9 B. Mon. (Ky.) 413.

Louisiana.—*Delaney v. Levi*, 19 La. Ann. 251; *Mummy v. Haggerty*, 15 La. Ann. 268.

Maine.—*Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Morrell v. Dixfield*, 30 Me. 157; *Thorndike v. Godfrey*, 3 Me. 429.

Maryland.—*Bannon v. Warfield*, 42 Md. 22; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456, 77 Am. Dec. 311;

Busby v. North America L. Ins. Co., 40 Md. 588, 17 Am. Rep. 634; *Adams Express Co. v. Trego*, 35 Md. 47.

Massachusetts.—*Manning v. Leland*, 153 Mass. 510; *Chaffee v. Blaisdell*, 142 Mass. 538; *Murray v. C. N. Nelson Lumber Co.*, 143 Mass. 250; *Thacher v. Pray*, 113 Mass. 291; *Dickinson v. Conway*, 12 Allen (Mass.) 487; *Combs v. Scott*, 12 Allen (Mass.) 493; *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690.

Michigan.—*Hurley v. Watson*, 68 Mich. 531.

Minnesota.—*Woodbury v. Larned*, 5 Minn. 339; *Humphrey v. Havens*, 12 Minn. 298.

Mississippi.—*Baker v. Byrne*, 2 Smed. & M. (Miss.) 193; *Meyer v. Baldwin*, 52 Miss. 263.

Missouri.—*Hyde v. Larkin*, 35 Mo. App. 366; *Steunkle v. Chicago, etc., R. Co.*, 42 Mo. App. 73.

Nebraska.—*Dietz v. City Nat. Bank*, 42 Neb. 584; *Holm v. Bennett*, 43 Neb. 808.

New Hampshire.—*Gould v. Blodgett*, 61 N. H. 115; *Hovey v. Brown*, 59 N. H. 114; *Grant v. Beard*, 50 N. H. 129.

New Jersey.—*Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728; *Titus v. Cairo, etc., R. Co.*, 46 N. J. L. 393; *Dowden v. Cryder*, 55 N. J. L. 329; *Dugan v. Lyman* (N. J. Eq., 1895), 23 Atl. Rep. 657.

New Mexico.—*Kirchner v. Laughlin* (N. Mex., 1892), 28 Pac. Rep. 505.

New York.—*Keeler v. Salisbury*, 33 N. Y. 648; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Rowan v. Hyatt*, 45 N. Y. 138; *Seymour v. Wyckoff*, 10 N. Y. 213; *Bell v. Day*, 32 N. Y. 165; *Thompson v. Craig*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 29; *Brass v. Worth*, 40 Barb. (N. Y.) 648; *Roach v. Coe*, 1 E. D. Smith (N. Y.), 175; *Hoffman v. Livingston*, 46 N. Y. Super. Ct. 552; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Ritch v. Smith*, 82 N. Y. 627; *People v. Schuyler*, 17 Hun (N. Y.) 106.

Pennsylvania.—*Pittsburgh, etc., R. Co. v. Gazzam*, 32 Pa. St. 340; *Zoebis v. Rauch*, 133 Pa. St. 532; *Merrick Thread Co. v. Philadelphia Shoe Mfg. Co.*, 115 Pa. St. 314; *Moore v. Patterson*, 28 Pa. St. 505.

Tennessee.—*Williams v. Storm*, 6 Coldw. (Tenn.) 203.

Texas.—*Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516; *Battaglia v. Thomas*, 5 Tex. Civ. App. 563.

Vermont.—*Saville v. Welch*, 58 Vt. 683.

Wisconsin.—*Dodge v. McDonnell*, 14 Wis. 553; *Ætna Ins. Co. v. North Western Iron Co.*, 21 Wis. 458.

"No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously

Careless Ignorance.—And a ratification without such knowledge, even though ignorance be due to carelessness on the part of the principal, is not binding.¹

Deliberate Ignorance.—But ignorance which is intentional or deliberate will not defeat the principal's ratification.²

Ratification Voidable in Part.—A ratification of an act under a misapprehension of the full scope of the act is voidable to the extent of the mistake.³

Ignorant Acceptance of Profits or Goods.—Even the acceptance of profits and the

unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud." Per Story, J., in *Owings v. Hull*, 9 Pet. (U. S.) 607.

Illustrations of Ratifications in Ignorance of Facts.—In *Thacher v. Pray*, 113 Mass. 291, where one without authority sold the plaintiff's goods, receiving in payment a bank check, which he indorsed to the plaintiff in payment of a debt due to the latter, and he appropriated the same in ignorance of the sale—in an action to recover the value of the goods it was held that the plaintiff's acts did not amount to a ratification of the sale.

In *Scott v. Turley*, 9 Lea (Tenn.) 631, a principal, in ignorance of the facts, received from his agent the note of a third person, on which he recovered judgment, and had filed his bill to reach equitable assets of the debtor, when he learned of the full facts in the matter, and at once amended his bill, making the agent a party, repudiating his act in taking the note, and seeking to make him liable for the debt. The agent having answered to the merits, it was held that the principal was entitled to the relief prayed for under his amended bill.

Principal Not Liable for Fraud of Which He is Ignorant.—A person cannot be guilty of a fraud committed by his agent unless he in some way participated in it, and his ratification of a trade fraudulently made by his agent does not become an adoption of the fraud by him if he were ignorant of it. *Colvin v. Peck*, 62 Conn. 155. See also *Stanley v. Chamberlin*, 39 N. J. L. 565.

So in *Nichols v. Bruns*, 5 Dakota 28, it was held that one was not liable for the fraudulent representations of an unauthorized agent by accepting the benefits without knowledge of the representations.

Innocent Misrepresentations of Agent.—Where an agent is deceived about the real facts, and makes representations to his principal based upon his mistaken apprehension of the facts, the acts of the principal will not be held to ratify a contract. *Owensboro Bank v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211; *Mummy v. Haggerty*, 15 La. Ann. 268.

Legislative Ratification.—In *People v. Schuyler*, 17 Hun (N. Y.) 106, it was held that the legislature, not having full knowledge of the facts, could not be held to have intended to ratify a contract shown to be illegal.

1. *Lewis v. Read*, 13 M. & W. 834; *Freeman v. Rosher*, 13 Q. B. 780, 66 E. C. L. 780; *Combs v. Scott*, 12 Allen (Mass.) 493; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

2. *Schutz v. Jordan*, 32 Fed. Rep. 55; *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. Rep. 347; *Niemeyer Lumber Co. v. Moore*, 55 Ark. 240; *Jewell Nursery Co. v. State* (S. Dakota, 1894), 59 N. W. Rep. 1025. See *Rogers v. Kneeland*, 10 Wend. (N. Y.) 219.

Where bailiffs sent by the landlord to dis-train for rent upon a certain farm exceeded their authority in taking beyond the limits of the farm cattle belonging to another person than the tenant, and the cattle were sold and the landlord received the proceeds, the landlord was held not liable in trover unless the jury should find that he ratified the acts of the bailiffs with knowledge of the facts, or that he chose without inquiry to take the risk upon himself and adopt the whole of their acts. *Lewis v. Read*, 13 M. & W. 834. See also *Stokes v. Mackay*, 140 N. Y. 649.

3. *Miller v. Board of Education*, 44 Cal. 166. But see *infra*, this section, *Ratification of Whole Act*.

General Ratification of Agent's Acts.—In *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235, it was held that a general ratification of all acts done by an agent authorized by a power of attorney does not extend to unauthorized conveyances executed in his name, although such conveyances are on record.

Unauthorized Sale—Receipt of Money.—In *Lester v. Kinne*, 37 Conn. 9, where an agent for the sale of real estate exceeded his instructions in selling a part of the property in regard to which he was authorized only to negotiate for a sale, and his principal afterwards impliedly ratified all his acts by receiving the money for the sale of all the land, but it appeared that he did not know that the portion in question had been sold, it was held that the agreement of the agent was neither authorized nor ratified.

Unauthorized Condition in Contract.—In *Pacific Rolling Mill Co. v. Dayton, etc., R. Co.*, 7 Sawy. (U. S.) 61, a vote of the directors of a corporation authorizing the secretary to execute a mortgage to secure the payment of a specific debt was held not to authorize him to insert a provision for the payment of attorney's fees, and that a subsequent ratification of the mortgage, with no other knowledge of the contents than the original vote, did not amount to a ratification of the provision.

Usurious Contract of Agent.—Where an agent, in making a loan, secures a bonus for himself without his principal's knowledge, the principal does not, by receiving the security and seeking to enforce it, ratify such unauthorized act of the agent. *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137. Compare *Austin v. Harrington*, 28 Vt. 130. See also the title *Usury*.

use of goods will not amount to a ratification of the agent's acts, if done in ignorance of the circumstances connected with such acts,¹ except perhaps after years of acquiescence.²

Recovery of Goods Sold by Agent without Authority.—A principal may recover goods sold by one without authority, even though he has accepted the proceeds in ignorance of their source.³

Ratification of Agent's Warranty.—A principal who by accepting the purchase money ratifies a sale made under a general authority, is bound by a warranty of the agent;⁴ but where there is a mere special authority to sell property of

1. *Bell v. Cunningham*, 3 Pet. (U. S.) 69; *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. Rep. 349; *Herring v. Skaggs*, 73 Ala. 446; *Howe Machine Co. v. Ashley*, 60 Ala. 496; *Bott v. McCoy*, 20 Ala. 578, 56 Am. Dec. 223; *Evans v. Chicago, etc., R. Co.*, 26 Ill. 189; *Manning v. Gasharie*, 27 Ind. 399; *Roberts v. Rumley*, 58 Iowa 301; *Bohart v. Oberne*, 36 Kan. 284; *Pennsylvania, etc., Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; *Manning v. Leland*, 153 Mass. 510; *Etna Ins. Co. v. North Western Iron Co.*, 21 Wis. 458.

In *Manning v. Gasharie*, 27 Ind. 399, where an agent authorized to buy goods for cash, without the knowledge of his principal made an unauthorized purchase on credit, it was held that the acceptance and use of the goods by the principal did not operate as a ratification.

Knowledge Acquired after Receiving Benefits—Restoration.—Where the knowledge that a person assuming to act as agent has exceeded his authority does not reach the principal until it is out of his power to restore what he received through the transaction which he seeks to repudiate, the principal is not bound to make such a restoration as a condition of the repudiation. *Humphrey v. Havens*, 12 Minn. 208.

Retention after Knowledge.—But if the principal retains the proceeds after he has knowledge he will be held to ratify the act. *McDowell v. McKenzie*, 65 Ga. 630; *Wallace v. Lawyer*, 90 Ind. 499; *Davis v. Krum*, 12 Mo. App. 279; *Smith v. Tracy*, 36 N. Y. 79.

Taking of Security.—Where a principal accepts security for a debt he will be presumed to have taken it with full knowledge, and to have ratified the arrangements made by his agent. *Meehan v. Forrester*, 52 N. Y. 277.

But in *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157, where a principal took security from an agent for the payment of moneys which he had previously and without authority collected from debtors of the principal and wrongfully appropriated to his own use, it was held that this would not amount to a ratification of payments made to the agent where the principal had not full knowledge of all the material facts when the security was taken.

Malicious Attachment.—In *Oberne v. O'Donnell*, 35 Ill. App. 180, it was held that a principal does not render himself liable for the tort of his agent in maliciously suing out an attachment; by receiving and appropriating the fruits thereof, unless he is shown to have full knowledge of all the material facts and circumstances of the tort.

Ratification by Corporation.—In *Hyde v. Larkin*, 35 Mo. App. 366, it was held that if the ratification by a corporation of the unauthorized contract of its agent consists in its having received the consideration of the contract, it must be proved that the corporation, through its proper officer or officers, knew of the terms of the contract, and on what account the money was by them received.

In *Etna Ins. Co. v. North Western Iron Co.*, 21 Wis. 458, it was held that where agents of an insurance company received money for insuring iron, which they transmitted to the company, by whom it is accepted, this was not a ratification of an unauthorized contract made by the agents of the company, unless the company knew on what account the money was received, and the terms of the contract. See also *Bell v. Cunningham*, 3 Pet. (U. S.) 69; *Getty v. C. R. Barnes Milling Co.*, 40 Kan. 281; *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 269; *Wellsburg First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

Remedy of Party Injured by Agent's Conduct.—If the agent fraudulently misrepresented his authority, and the principal has received the avails of the fraud without knowledge of the agent's fraudulent conduct, the remedy of the party injured, against the principal, is not upon the contract in damages, but by rescission of the contract and suit for the consideration paid. *Titus v. Cairo, etc., R. Co.*, 46 N. J. L. 393.

2. *Hyatt v. Clark*, 118 N. Y. 563. In this case, in delivering the opinion of the court, Vann, J., citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 429, said: "Having received the benefits of the contract, she [the plaintiff] could not, after years of acquiescence, suddenly invoke the aid of the courts to relieve her of any further obligation because she had but recently discovered a fact that she should have ascertained, and which the law presumes that she did ascertain, long before."

3. *Thacher v. Pray*, 113 Mass. 291.

In *Thompson v. Craig*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 29, it was held that ratification of representations made upon a sale of personal property by one not shown to have been authorized, nor to have assumed to act as agent of the seller, was not established by proof that the buyer, after discovering the defect, informed the seller of such representations, and offered to return the thing sold, and that the seller refused to accept it. To establish such ratification, knowledge of all the facts before receiving the fruits of the sale must be shown.

4. *Cochran v. Chitwood*, 59 Ill. 53.

a kind not usually sold with warranty, the receipt of the proceeds of the sale in ignorance of any such undertaking is not a ratification thereof.¹

Knowledge of Another Agent Imputed to Principal.—Knowledge of the facts by another agent where the matter is within the scope of his agency is sufficient.²

Knowledge of Legal Effect.—It is not necessary that the principal, in order to bind himself by a ratification, should have a knowledge of the legal effect of the facts within his knowledge; a knowledge of the facts alone is sufficient.³

d. RATIFICATION OF WHOLE ACT.—A ratification in part will not be allowed, but to be effective there must be a ratification of the whole act, for the law will not allow a principal to claim that which benefits him and repudiate the rest.⁴

1. *Smith v. Tracy*, 36 N. Y. 79; *Bennett v. Judson*, 21 N. Y. 238; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137.

In *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210, it was held that an action to recover the price of a horse sold by a special agent, brought after it has ceased to be practicable to avoid the sale and restore the vendor and vendee to their original positions, the horse having died in possession of the vendee, does not constitute a ratification of an unauthorized warranty made by the agent.

2. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565.

3. *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Kelley v. Newburyport*, etc., *Horse R. Co.*, 141 Mass. 496; *Hyatt v. Clark*, 118 N. Y. 567.

4. *England*.—*Cornwall v. Wilson*, 1 Ves. 509; *Hovil v. Pack*, 7 East 164; *Billon v. Hyde*, 1 Atk. 128.

United States.—*Rader v. Maddox*, 150 U. S. 128.

Alabama.—*Crawford v. Barkley*, 18 Ala. 270.

Arkansas.—*Nichlase v. Griffith*, 59 Ark. 641.

Colorado.—*Burkhard v. Mitchell*, 16 Colo. 376.

Georgia.—*Southern Express Co. v. Palmer*, 48 Ga. 85; *Hunter v. Stembridge*, 17 Ga. 243; *Hardeman v. Ford*, 12 Ga. 205.

Illinois.—*Barhydt v. Clark*, 12 Ill. App. 646; *Henderson v. Cummings*, 44 Ill. 325; *Cochran v. Chitwood*, 59 Ill. 53.

Indiana.—*Travellers Ins. Co. v. Patten*, 119 Ind. 416.

Iowa.—*Warder v. Pattee*, 57 Iowa 515; *Roberts v. Rumley*, 58 Iowa 301; *Beidman v. Goodell*, 56 Iowa 592; *Krider v. Western College*, 31 Iowa 547.

Louisiana.—*Stanard Milling Co. v. Flower*, 46 La. Ann. 315.

Massachusetts.—*New England Marine Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56.

Mississippi.—*Watts v. Bonner*, 66 Miss. 629.

Nebraska.—*Rogers v. Empkie Hardware Co.*, 24 Neb. 653.

New Hampshire.—*Hovey v. Blanchard*, 13 N. H. 145; *Tasker v. Kenton Ins. Co.*, 59 N. H. 438; *Grant v. Beard*, 50 N. H. 129.

New York.—*Moss v. Rossie Lead Min. Co.*, 5 Hill (N. Y.) 137; *Corning v. Southland*, 3 Mill (N. Y.) 552; *Elwell v. Chamberlin*, 31

N. Y. 611; *Crans v. Hunter*, 28 N. Y. 389; *Farmers' L. & T. Co. v. Walworth*, 1 N. Y. 433; *Benedict v. Smith*, 10 Paige (N. Y.) 128.

North Carolina.—*Rudasill v. Falls*, 92 N. Car. 222.

Oregon.—*Coleman v. Stark*, 1 Oregon 115.

Pennsylvania.—*Siemens Regenerative Gas-Lamp Co. v. Horstmann* (Pa., 1889), 16 Atl. Rep. 490; *Pennsylvania Natural Gas Co. v. Cook*, 123 Pa. St. 170.

Tennessee.—*Fort v. Coker*, 11 Heisk. (Tenn.) 579; *Seago v. Martin*, 6 Heisk. (Tenn.) 308.

Texas.—*Haldeman v. Chambers*, 19 Tex. 1; *Williams v. Chambers* (Tex. Civ. App., 1894), 26 S. W. Rep. 270.

Vermont.—*McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557; *Newell v. Hurlburt*, 2 Vt. 351.

Wisconsin.—*Strasser v. Conklin*, 54 Wis. 102; *Saveland v. Green*, 40 Wis. 431.

Ratification must Cover Whole Act—Illustrations.—So a principal cannot claim the benefit of a purchase obtained by his agent by the use of misrepresentations, and at the same time repudiate misrepresentations as unauthorized. *Lane v. Black*, 21 W. Va. 617. Nor can a debtor have the benefit of a compromise and release effected by his agent with creditors without adopting all the representations made by the agent to the creditors in negotiating the same. *Crans v. Hunter*, 28 N. Y. 389.

Where an attorney compromises a debt of his principal, who, after a full knowledge of all the facts attending it, retains the money paid on such compromise, the principal will be held bound by it, and will not be permitted to ratify it so far only as it is for his interest and to repudiate the residue. *Henderson v. Cummings*, 44 Ill. 325.

One cannot, while affirming an unauthorized contract of sale, repudiate the consideration which formed an integral part thereof, and recover another and different consideration. *Barhydt v. Clark*, 12 Ill. App. 646.

Sale and Remittance.—In *Deering v. Grundy County Nat. Bank*, 81 Iowa 222, it was held that a principal whose agent had special power to sell property and remit the proceeds could not ratify the agent's act in sending the money without also ratifying the sale of the property, since the two acts together constitute only one transaction, which must be ratified or disapproved as a whole.

Ratification of Part with Full Knowledge.—So, conversely, a ratification of a part of an unauthorized transaction with full knowledge of the facts amounts to a ratification of the whole.¹

A Contract Wholly Unauthorized cannot be ratified in part by a principal, but he must adopt the whole or none.²

No Conditional Ratification.—So there can be no ratification by the principal on condition that he shall suffer no loss.³

Usurious Contracts.—It is well established in some jurisdictions that contracts for the loan of money, made by an agent of the lender, who exacts for himself a bonus above the legal interest, constitute an exception to the rule requiring ratification to include the whole act. In such cases if it appears that the illegal proceedings of the agent were without the knowledge of the lender, and that the latter was free from the intention to violate or evade the usury laws, he may enforce that part of the contract which he intended should be made and repudiate the rest.⁴

c. MUTUALITY—HOW FAR NECESSARY.—The fact that the parties do not stand on an equal footing will not prevent the ratification by the party for whose benefit the act is done.⁵

1. *Gaines v. Miller*, 111 U.S. 395; *Ferguson v. Carrington*, 9 B. & C. 59, 17 E. C. L. 330; *Krider v. Western College*, 31 Iowa 547; *Hayes v. Kedzie*, 11 Hun (N. Y.) 581; *Farmers' L. & T. Co. v. Walworth*, 1 N. Y. 433; *Heermans v. Clarkson*, 64 N. Y. 173; *Corning v. Southland*, 3 Hill (N. Y.) 552; *Commercial Bank v. Warren*, 15 N. Y. 580; *Meyer v. Smith*, 3 Tex. Civ. App. 37; *Strasser v. Conklin*, 54 Wis. 102.

Partial Ratification with Knowledge.—In *Tallman v. Kimball*, 74 Hun (N. Y.) 279, it was held that an owner of a building who adopts some of the acts of a mechanic making repairs thereon, and pays for the labor performed and some of the material furnished upon the building, ratifies all the acts of such mechanic in the purchase of all materials, and becomes liable for all the material used in the building.

In *Krider v. Western College*, 31 Iowa 547, where an agent had contracted a debt, and executed a mortgage on the property of the principal to secure the same, it was held that a ratification of the debt by the principal, having knowledge of the whole transaction, operated as a ratification of the mortgage also.

2. *Alabama*.—*Crawford v. Barkley*, 18 Ala. 270.

Arkansas.—*Daniels v. Brodie*, 54 Ark. 216.

Georgia.—*Hodnett v. Tatum*, 9 Ga. 70; *Southern Express Co. v. Palmer*, 48 Ga. 85.

Illinois.—*Delaware, etc., R. Co. v. Thayer*, 41 Ill. App. 192.

Iowa.—*Davenport Sav. Fund, etc., Assoc. v. North American F. Ins. Co.*, 16 Iowa 74; *Beidman v. Goodell*, 56 Iowa 592; *Roberts v. Rumley*, 58 Iowa 301.

Louisiana.—*Elam v. Carruth*, 2 La. Ann. 275.

Michigan.—*Peninsula Bank v. Hanmer*, 14 Mich. 208; *Widner v. Olmstead*, 14 Mich. 124.

Missouri.—*Nichols v. Kern*, 32 Mo. App. 1.

Nebraska.—*Esterly Harvesting Mach. Co. v. Frolkey*, 34 Neb. 110.

New York.—*Wheeler & Wilson Mfg. Co. v. Elbersson*, 84 Hun (N. Y.) 501.

Oregon.—*Kyle v. Rippey*, 20 Oregon 446; *Coleman v. Stark*, 1 Oregon 115; *Crabtree v. St. Paul Opera-House Co.*, 39 Fed. Rep. 746.

No Partial Ratification of Unauthorized Contract.—A principal cannot ratify an unauthorized contract as to the price named therein and repudiate it as to the mode of payment. *Shoninger v. Peabody*, 57 Conn. 42, 14 Am. St. Rep. 88.

In *Wells v. Hickox* (Kan., 1895), 40 Pac. Rep. 821, where an agent procured the indorsement of a note given by the debtor for the price of goods, it was held that the principal could not accept the transaction without the condition.

3. *Fort v. Coker*, 11 Heisk. (Tenn.) 579.

4. *Muir v. Newark Sav. Inst.*, 16 N. J. Eq. 537; *Anonymous*, 40 N. J. Eq. 509; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137, 21 Barb. (N. Y.) 181; *Bell v. Day*, 32 N. Y. 165.

But a different rule prevails in some jurisdictions. *Joslin v. Miller*, 14 Neb. 91. See also the title *USURY*.

In conformity with the doctrine of the text, it has been held that an action by the principal to collect the debt does not constitute a ratification so as to charge him with usury, even though he has knowledge thereof before bringing suit. *Estevez v. Purdy*, 66 N. Y. 446; *Jordan v. Humphrey*, 31 Minn. 495. See the title *USURY*.

5. *Routh v. Thompson*, 13 East 274; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 106.

So long as the condition of the parties remains unchanged the principal's right of ratification cannot be prevented by the fact that the other party to the contract objects. *Andrews v. Aetna L. Ins. Co.*, 92 N. Y. 596.

Mr. Justice Story, in his work on Agency, § 248, says in regard to the rule stated in the text: "As, from what has been said, the principal thus acquires a right to elect whether he will adopt the unauthorized act or not, it must be admitted that the parties do not generally stand upon equal terms; since the principal may always elect to ratify the act if it is for his benefit, and to disavow it if it is to his injury."

Want of Mutuality.—Where a contract sought to be ratified is partly executory, and the party seeking to ratify does so to avail himself of the unauthorized act in order to enforce a claim against a third person, such ratification is held, on the ground of want of mutuality, to be of no effect unless agreed to by such third party.¹ As stated by an eminent judge, the rule that a subsequent ratification is equivalent to a prior command, seems applicable only to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on the fact whether there is a ratification or not.²

Notice to Quit under Lease.—So it is held that notice to quit under a lease given by an unauthorized person, although subsequently ratified by the landlord, will not establish by relation a notice by the latter.³

1. *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103; *Lowber v. Connit*, 36 Wis. 183; *Townsend v. Corning*, 23 Wend. (N. Y.) 435.

In *Dodge v. Hopkins*, 14 Wis. 638, Dickson, C.J., denying the universality of the rule that a subsequent ratification is equally effectual as an original authority, says: "The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the foundation of a right in favor of the party who has ratified, and those where it is made the basis of a demand against him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal, by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. The principal in such case may, by his subsequent assent, bind himself, but if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them."

Ratification of Insurance Subsequent to Loss.—In *Hogedorn v. Oliverson*, 2 M. & S. 485, it was held to be no objection to the recovery of the amount of insurance, that the ratification of the act in procuring the policy was subsequent to the loss.

Mr. Wharton, in his work on Agency, § 81, speaks of this case as follows: "At the first glance this would appear to have been a case in which the owner was able to play fast and loose. * * * But this view is only superficial. Though personally the owner might have had this choice, the contract itself was absolute. The insurer who insures a ship, in consideration of a premium paid in, agrees to do something for a valuable and adequate consideration. He insures for whomsoever it may concern. His duties are fixed on the closing of the contract. The premium paid him cannot be recovered back from him; the insurance, if the vessel be lost, is due from him as a fair consideration for the contract. Whether the owner can sue upon the contract is a mere matter of form, for the agent can

sue in case the principal cannot. The insurer has lost nothing by the fact of the agent being unauthorized; he has been lulled into no false security, no intervening rights have been sacrificed by him. He insured the vessel on his own terms, and by those terms he is bound."

2. *Lawrence, J.*, in *Right v. Cuthell*, 5 East 499. This rule is adopted by Mr. Justice Story in his work on Agency, § 246, and by Mr. Evans (Ewell's Evans on Agency *49).

In *Solomons v. Dawes*, 1 Esp. 83, it was held that where in an action of trover the demand of the goods is not made by the party himself, a refusal on the ground that the party applying is unknown or not properly authorized is not sufficient to support the action. So also where the issue is on a subsequent demand and a refusal to a plea of tender, the demand must be by a person with authority to receive it, and a ratification of an unauthorized demand is not sufficient. *Coore v. Callaway*, 1 Esp. 115; *Coles v. Bell*, 1 Campb. 478, note.

It has been held that a stoppage *in transitu* by an unauthorized agent will not divest the right of the purchaser. *Bird v. Brown*, 4 Exch. 786.

3. *Right v. Cuthell*, 5 East 491; *Doe v. Walters*, 10 B. & C. 626, 21 E. C. L. 159; *Doe v. Goldwin*, 2 Q. B. 143, 42 E. C. L. 610; *Brahn v. Jersey City Forge Co.*, 38 N. J. L. 74.

The reason is that the tenant must act upon the notice at the time it is given, and it must therefore, at that time, be such a notice as he can act upon with security; and if authority by relation were sufficient, the tenant would be subjected to the injustice of being left in doubt as to his action until the ratification or disavowal of the principal. Per *Van Syckel, J.*, in *Brahn v. Jersey City Forge Co.*, 38 N. J. L. 74.

Lord Ellenborough in *Right v. Cuthell*, 5 East 491, held that the subsequent adoption of a notice, signed by two of the joint tenants, purporting to be on behalf of themselves and the other, did not validate it, "because," said he, "the tenant was entitled to such a notice as he could act upon with certainty at the time it was given; and he was not bound to submit himself to the hazard whether the third coexecutor chose to ratify the act of his companions or not, before the six months elapsed." This opinion is cited and approved in the case cited above.

There are cases, however, holding the con-

5. Implied Ratification—*a*. IN GENERAL.—The ratification of an unauthorized act is effective more frequently by implication from the acts and conduct of the person in whose behalf the act is done, inconsistent with any intention other than the adoption of such act, than by express words, the ratification being inferred from circumstances which the law considers equivalent to an express ratification.¹

Ratification Favored—Question for Jury.—Although it is said that the conduct of the principal will be liberally construed in favor of a ratification or adoption of the acts of the agent,² yet a ratification is not to be presumed from a doubtful state of facts, but the question should be left to the jury.³

trary, as in *Roe v. Pierce*, 2 Campb. 96, where it was held that notice by the steward of a corporation was sufficient when subsequently ratified by the corporation in bringing suit. And in *Goodtitle v. Woodward*, 3 B. & Ald. 689, 5 E. C. L. 424, a notice to quit given by the agent for several trustees, acting under authority signed by some only at the time of giving notice, but by the rest subsequently, was held sufficient. This decision may be supported, however, on other grounds than ratification, as the original notice was legal. See *Doe v. Summersett*, 1 B. & Ad. 135, 20 E. C. L. 361.

The weight of authority, however, seems to be as stated in the text, and is adopted by modern text-books. See Story on Agency, § 246.

1. *Searing v. Butler*, 69 Ill. 575; see also *Cairncross v. Lorimer*, 7 Jur. N. S. 149; *Truesdail v. Ward*, 24 Mich. 117; *Heyn v. O'Hagen*, 60 Mich. 150.

2. *Byrne v. Doughty*, 13 Ga. 46; *Szymaushi v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382; *Terril v. Flower*, 6 Martin (La.) 584; *Codwise v. Hacker*, 1 Cai. (N. Y.) 526.

Slight Circumstances and Small Matters will sometimes suffice to raise the presumption of ratification. *Byrne v. Doughty*, 13 Ga. 53.

Acts of Ratification must Change Other Party's Position.—To be sufficient, the acts of ratification must be something by which the party, by relying upon them, may be prejudiced. *Doughaday v. Crowell*, 11 N. J. Eq. 201.

Evidence of Ratification must be Inconsistent with Any Other Interpretation.—To justify a presumption of ratification the facts and circumstances depended upon must be inconsistent with a different intention. *Heyn v. O'Hagen*, 60 Mich. 150; *Taylor v. Agricultural, etc., Assoc.*, 68 Ala. 229.

Intention to Ratify.—If the facts show a ratification, the intention of the parties is immaterial; so that to constitute the conversations and acts of the principals, with knowledge of the facts, a ratification, it is not material whether a ratification was contemplated or not. *Hazard v. Spears*, 2 Abb. App. Dec. (N. Y.) 353.

Illustrations—Circumstances Sufficient to Show Ratification.—Where a principal when informed of a purchase by his agent did not deny the agent's authority, but merely complained of the manner in which it was executed, it was held that he was bound. *Johnson v. Jones*, 4 Barb. (N. Y.) 369.

So where the defendant when informed of a purchase made by one assuming to act as

his agent, said that it was all right and directed payment for the goods purchased. *Hess v. Baar*, 14 Misc. Rep. (N. Y. C. Pl.) 286, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 429, affirming 11 Misc. Rep. (N. Y. City Ct.) 619.

Where an unincorporated company made assessments for carrying into effect a contract, made by an officer of the company on behalf of the company, and afterwards appointed an agent to negotiate an alteration of the contract with the other party, it was held that they thereby ratified the contract, and could not deny the officer's authority to bind the company by contract. *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

In a writ of entry against a savings bank, the mortgagee in possession of the demanded premises, the plaintiff claimed that it did not appear that the bank authorized any one to act for it in loaning money and accepting the mortgage, but it was held that the setting up of the mortgage as a defense was ample evidence of ratification. *Gibson v. Norway Sav. Bank*, 69 Me. 579.

When an agent of A guaranteed the payment of goods that B might order, A agreed to the guarantee provided he had sufficient funds belonging to B to meet the bill, which he had. A delivered a statement of the goods purchased by B to his agent, who paid the account. It was held that A ratified his agent's act. *Burgess v. Harris*, 47 Vt. 322.

Circumstances Insufficient to Show Ratification.—In *Johnson v. Craig*, 21 Ark. 533, it was held that where an agent makes a contract for the sale of lands, which is not binding upon his principal, a letter from the principal to the purchaser requesting him to give up or decline the purchase is not an affirmation of the contract.

It has been held that a voluntary payment of a certain sum to indemnify for expenses incurred in a service voluntarily rendered is not a ratification which makes the payee the agent of the principal as regards such services. *Camp v. U. S.*, 113 U. S. 648.

Taking Security for Loss against Unauthorized Act Not Ratification.—In *Lazard v. Merchants'*, etc., Transp. Co., 78 Md. 1, it was held that an acceptance by a principal of a transfer of his agent's property, voluntarily offered to cover any loss that the former might sustain by the agent's unauthorized act, does not constitute a ratification or acquiescence in such act, where the latter is at once repudiated and liability therefor denied.

3. *Lewis v. Read*, 13 M. & W. 834; *Abbott*

Implied from Previous Acts.—Various acts and circumstances may give rise to the implication of ratification. So ratification may be implied from the previous acts of the principal under similar circumstances.¹

Express Ratification of Subsequent Similar Acts.—The express ratification of subsequent acts of the same nature, with full knowledge of previous unauthorized acts, is evidence from which a ratification may be inferred.²

Express Authority for the Future.—But express authority to do an act at some future time will not amount to a ratification of that act already accomplished without the knowledge of the principal.³

b. BY ACCEPTING BENEFITS.—Implied ratification most frequently arises from the acceptance of benefits which are the result of the unauthorized acts, for

v. May, 50 Ala. 97; *Burr v. Howard*, 58 Ga. 564; *Byrne v. Doughty*, 13 Ga. 46; *Robinson v. Chapline*, 9 Iowa 91; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Stokes v. Mackay*, 140 N. Y. 649; *Garrett v. Gonter*, 42 Pa. St. 143; *Hortons v. Townes*, 6 Leigh (Va.) 47; *Cooper v. Schwartz*, 40 Wis. 54.

When Ratification Question for Jury.—Where there is any evidence tending to show the assent of the principal to the acts of the agent, these acts, in connection with such evidence of the principal's assent thereto, should be allowed to go to the jury; and if the acts of the alleged agent are of such a nature or so continuous in their character as to furnish in themselves any reasonable ground of inference that the plaintiff knew of them, and would not have permitted the assumed agent thus to act in the absence of authority for so doing, the acts themselves are, at least, competent evidence to be submitted to the jury to prove the agency. *Gimon v. Terrell*, 38 Ala. 208.

In *Heath v. Paul*, 81 Wis. 532, it was held that evidence that the principal, after denying his liability to pay certain money borrowed on checks by an agent who had the management of his store, said that he expected to pay it "if it went into the store to pay for goods," was not sufficient to carry the question of ratification to the jury.

1. *Austin v. Burroughs*, 62 Mich. 181; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 206, 37 Am. Dec. 203. See also *Chicago, etc., R. Co. v. James*, 24 Wis. 388; *Gibson v. Snow Hardware Co.*, 94 Ala. 346, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 437, 438.

Illustrations of Ratification Implied from Previous Acts.—So though an agent exceeds his authority in making a certain contract, yet if he had previously made contracts of a similar character, which had been approved by the principal, the latter will be bound by the contract in question if he permits it to be performed by the other party without notice that the agent exceeded his authority in making it. *Gallinger v. Lake Shore Traffic Co.*, 67 Wis. 529.

In *Chicago, etc., R. Co. v. James*, 24 Wis. 388, it was held that the facts that the vice-president of a railway company had been for years in the habit of appointing local agents to look after its timber lands; that these had sold stumpage and timber thereon; that the company had brought suit on one

of these contracts of sale and obtained judgment, the amount of which was paid to the local agent; and that the latter was accustomed each year to make a full report in writing to said vice-president and pay the moneys in his hands into the treasury—justified a jury in finding that the company knew and acquiesced in the authority thus exercised, and was bound by such contract of sale made by its local agent.

2. *Hall v. Chicago, etc., R. Co.*, 48 Wis. 317.

Not Necessarily a Ratification.—In *Oglesby v. Smith*, 38 Mo. App. 67, it was held that the fact that the principal accepted a second vehicle brought by his agent from a stable to which he was not sent, did not ratify his previous act in bringing the first one therefrom.

3. Illustrations — Subsequent Express Authority.—*Moore v. Lockett*, 2 Bibb. (Ky.) 67, 4 Am. Dec. 683. In this case it was held that a letter subsequent to an unauthorized sale, giving an agent power to sell, does not legalize the previous sale not ratified under the power.

In *Rice v. McLarren*, 42 Me. 157, it was held, however, that a subsequent authorization of the act was a ratification. In this case the authority was very broad, directing the agent to do whatever would accomplish the act, and there was no subsequent attempt to revoke it.

In *Farmers' Mut. F. Ins. Co. v. Marshall*, 29 Vt. 23, where a person representing himself as the agent for the plaintiffs, an insurance company, obtained from the defendant, and forwarded to the plaintiffs, an application for insurance on the 17th of March, and the plaintiffs, knowing what he had done, afterwards appointed him their agent to obtain applications, taking bonds for the faithful discharge of his duties, dated the 25th of December previous, it was held that the plaintiff had ratified his agency in the transaction with the defendant.

But it has been held that merely retaining an agent who has exceeded his authority on several occasions is not necessarily a ratification of his unauthorized acts. *Deacon v. Greenfield*, 141 Pa. St. 467.

By Dating Back a Power of Attorney to legalize a prior act the principal is estopped from showing that it was executed subsequently. *Milliken v. Coombs*, 1 Me. 343, 10 Am. Dec. 70.

where one with full knowledge receives profits or benefits he may be presumed to have ratified and accepted the conditions by which they are effected.¹

1. *United States*.—Robinson *v.* Mutual Ben. L. Ins. Co., 16 Blatchf. (U. S.) 194; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299.

Alabama.—Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229; Jones *v.* Atkinson, 68 Ala. 167.

Arkansas.—Kelly *v.* Carter, 55 Ark. 112; Pike *v.* Douglass, 28 Ark. 59; Daniels *v.* Brodie, 54 Ark. 216.

Colorado.—Breed *v.* Central City First Nat. Bank, 4 Colo. 481.

Connecticut.—Dunn *v.* Hartford, etc., Horse R. Co., 43 Conn. 434.

Georgia.—Murray *v.* Walker, 44 Ga. 58; McDowell *v.* McKenzie, 65 Ga. 630; Turner *v.* Wilcox, 54 Ga. 593; Ketchum *v.* Verdell, 42 Ga. 534.

Illinois.—Pope *v.* Lowitz, 14 Ill. App. 96; Hall *v.* Harper, 17 Ill. 82; Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 385; Harris *v.* Simmerman, 81 Ill. 413; Connett *v.* Chicago, 114 Ill. 233; Searing *v.* Butler, 69 Ill. 575; Cochran *v.* Chitwood, 59 Ill. 53.

Indiana.—Wallace *v.* Lawyer, 90 Ind. 499; Hauss *v.* Niblack, 80 Ind. 407; Fuch *v.* Wilson, 59 Ind. 93; Indianapolis *v.* Skeen, 17 Ind. 628.

Iowa.—Mathews *v.* Gilliss, 1 Iowa 242; Warder *v.* Pattee, 57 Iowa 515; Beidman *v.* Goodell, 56 Iowa 592; Milligan *v.* Davis, 49 Iowa 126; Chamberlain *v.* Collinson, 45 Iowa 429; Eikenberry *v.* Edwards, 67 Iowa 14; White *v.* Morgan, 42 Iowa 113; Eadie *v.* Ashbaugh, 44 Iowa 519.

Kansas.—Babcock *v.* Deford, 14 Kan. 408; Ehrsam *v.* Mahan, 52 Kan. 245; Waterson *v.* Rogers, 21 Kan. 529; Durham *v.* Carbon Coal, etc., Co., 22 Kan. 232.

Louisiana.—Szymanski *v.* Plassan, 20 La. Ann. 90, 96 Am. Dec. 382; Massieu's Succession, 24 La. Ann. 237.

Maine.—Hastings *v.* Bangor House, 18 Me. 436.

Maryland.—Maddux *v.* Bevan, 39 Md. 485; Reynolds *v.* Davison, 34 Md. 662.

Massachusetts.—Episcopal Charitable Soc. *v.* Episcopal Church, 1 Pick. (Mass.) 372; Harrod *v.* McDaniels, 126 Mass. 413; Arnold *v.* Spurr, 130 Mass. 347; Bassett *v.* Brown, 105 Mass. 551; French *v.* Price, 24 Pick. (Mass.) 13; Cushman *v.* Loker, 2 Mass. 106; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Ely *v.* James, 123 Mass. 36; Churchill *v.* Palmer, 115 Mass. 310.

Michigan.—Filer *v.* Jenks, 38 Mich. 585; Jennison *v.* Parker, 7 Mich. 355; Bacon *v.* Johnson, 56 Mich. 182; Pratt *v.* Campbell, Harr. (Mich.) 236; Hutchings *v.* Ladd, 16 Mich. 493; Nichols *v.* Shaffer, 63 Mich. 599; Gardner *v.* Warren, 52 Mich. 309; Vaughn *v.* Sheridan, 50 Mich. 155.

Missouri.—Ruggles *v.* Washington County, 3 Mo. 496; Barrett *v.* Davis, 104 Mo. 549.

Nebraska.—Hughes *v.* North America Ins. Co., 40 Neb. 626; Swartz *v.* Duncan, 38 Neb. 782.

New Hampshire.—Low *v.* Connecticut, etc.,

R. Co., 46 N. H. 284; Hatch *v.* Taylor, 10 N. H. 538.

New Jersey.—Tooker *v.* Sloan, 30 N. J. Eq. 394; Keim *v.* Lindley (N. J., 1893), 30 Atl. Rep. 1063; Cooley *v.* Perrine, 41 N. J. L. 322, 32 Am. Rep. 210.

New York.—Hazard *v.* Spears, 2 Abb. App. Dec. (N. Y.) 353; Harnett *v.* Garvey, 36 N. Y. Super. Ct. 327; Codwise *v.* Hacker, 1 Cal. (N. Y.) 526; Moss *v.* Rossie Lead Min. Co., 5 Hill (N. Y.) 137; Palmerton *v.* Huxford, 4 Den. (N. Y.) 166; Houghton *v.* Dodge, 5 Bosw. (N. Y.) 326; Farmers', etc., Bank *v.* Sherman, 6 Bosw. (N. Y.) 181; Smith *v.* Tracy, 36 N. Y. 79; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Krumm *v.* Beach, 25 Hun (N. Y.) 293; Merritt *v.* Bissell, 84 Hun (N. Y.) 194; Commercial Bank *v.* Warren, 15 N. Y. 577; Bliven *v.* Lydecker, 130 N. Y. 102, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 429.

North Carolina.—Rudasill *v.* Falls, 92 N. Car. 222.

Ohio.—Frank *v.* Jenkins, 22 Ohio St. 597; State *v.* Perry, Wright (Ohio) 662.

Oregon.—Coleman *v.* Stark, 1 Oregon 115.

Pennsylvania.—Kramer *v.* Dinsmore, 152 Pa. St. 264; Wright *v.* Burbank, 64 Pa. St. 247; Mundorff *v.* Wickersham, 63 Pa. St. 87, 3 Am. Rep. 531.

Tennessee.—Seago *v.* Martin, 6 Heisk. (Tenn.) 308.

Texas.—Hicks *v.* Ross, 71 Tex. 358; Carter *v.* Roland, 53 Tex. 540; Sessums *v.* Henry, 38 Tex. 37.

Utah.—Brown *v.* Parsons, 10 Utah, 223

Vermont.—Baptist Convention *v.* Ladd, 58 Vt. 95.

Washington.—Konnerup *v.* Frandsen, 8 Wash. 551.

Wisconsin.—Saveland *v.* Green, 40 Wis. 431; Miles *v.* Ogden, 54 Wis. 573; Reid *v.* Hibbard, 6 Wis. 175; Morse *v.* Ryan, 26 Wis. 356; Pierce *v.* O'Keefe, 11 Wis. 180; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

In Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229, Brickell, C. J., said: "Ratification is more often implied from the acts and conduct of parties having an election to avoid or to confirm than found expressed in words. And it is implied whenever the acts and conduct of the principal, having full knowledge of the facts, are inconsistent with any other supposition than that of a previous authority or an intention to abide by the act though it was unauthorized. Here the association accepted all the benefits of the transaction, received and appropriated to its own uses the money obtained on the promissory notes.*** Having received and retained the benefits of this transaction, with full knowledge of all the facts, the association has ratified and confirmed it, unless intentional fraud is imputed, for which there is neither room nor reason."

Illustrations of Ratification by Acceptance of Benefits.—If a principal appropriates the proceeds of a trespass, ratification is properly implied. Exum *v.* Brister, 35 Miss. 391; Byne *v.* Hatcher, 75 Ga. 289.

Acceptance Accompanied with Words of Dissent.—Although the principal may expressly declare that he will not sanction the unauthorized act, a ratification may be shown from his acts of acceptance.¹

Receiving Goods Purchased by Agent.—So if an agent purchases goods without authority, or contrary to his instructions, but the principal receives the goods, sells them, or otherwise disposes of them on his own account, he will be held to have ratified the purchase.²

The principal is bound by a receipt for money given by an agent who had no authority, if he receives the money and applies it for his own benefit in the manner expressed in the receipt. *Lyman v. Norwich University*, 28 Vt. 560.

Acceptance of a deed by one for another without authority is ratified by the other in subsequently accepting it himself. *Ward v. Small*, 90 Ky. 198, 12 Ky. L. Rep. 58.

In *Clydesdale Horse Co. v. Bennett*, 52 Mo. App. 333, it was held that the subsequent disposal by the principal, of property returned by the purchaser to an agent who sold the property, was a ratification of the agent's acts.

Liability for Nuisance.—One who employs a contractor to do a work not in its nature a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, if he accepts the work in that condition becomes at once responsible for the nuisance. *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349.

Declaration of Ownership.—It has been held that a mere declaration by the alleged principal, of the ownership of stock bought in his name by the alleged agent, is not a sufficient ratification. So in *Rutland, etc., R. Co. v. Lincoln*, 29 Vt. 206, where a person subscribed for stock in the testator's name during the life of the latter, but without his authority, it was held that the testator's declaration that he had stock of the kind and amount subscribed for did not amount to a ratification of the subscription.

Receipt of Part of Consideration.—In *Harris v. Miner*, 28 Ill. 135, it was held that the mere receipt of a portion of money realized from property improperly sold by the sheriff will not be construed as a ratification of the sale.

Duty to Return.—It has been held, however, that it is not the duty of the principal, upon refusing to ratify an agreement whereby his assumed agent has received money, to return the same. *Turner v. Brooks*, 2 Tex. Civ. App. 451.

1. So in *Hatch v. Taylor*, 10 N. H. 538, where a person assuming to act as agent for another exchanged a horse belonging to the latter for another horse, and the owner refused to sanction the exchange, but before reclaiming his horse participated in the purchase of the horse received in exchange from the party who had thus obtained possession of him, it was held that there was a ratification.

2. *England.*—*Cornwal v. Wilson*, 1 Ves. 509.

United States.—*Clark v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Willinks v. Hollings-*

worth, 6 Wheat. (U. S.) 241; *Bell v. Cunningham*, 3 Pet. (U. S.) 81; *Loraine v. Cartwright*, 3 Wash. (U. S.) 151.

Arkansas.—*Pike v. Douglass*, 28 Ark. 59.

Georgia.—*Ketchum v. Verdell*, 42 Ga. 534;

Byrne v. Doughty, 13 Ga. 46; *McDowell v. McKenzie*, 65 Ga. 630.

Illinois.—*Evans v. Chicago, etc., R. Co.*, 26 Ill. 189.

Louisiana.—*Slocumb v. Cagle*, 22 La. Ann. 165.

Massachusetts.—*French v. Price*, 24 Pick. (Mass.) 13; *Sartwell v. Frost*, 122 Mass. 184; *Odiorne v. Maxcy*, 13 Mass. 178.

Pennsylvania.—*Haworth v. Truby*, 138 Pa. St. 222.

Illustrations—Goods Purchased by Agent.—So in *McDowell v. McKenzie*, 65 Ga. 630, it was held that a merchant whose agent purchased goods on credit could not refuse to pay when he had received and sold the goods and kept the proceeds, especially where he had paid other bills made by the same agent. And in *Sartwell v. Frost*, 122 Mass. 184, where A managed a business for B, but without authority to purchase on credit, except upon the written order of B, A purchased of C goods without such an order, and C was ignorant of the conditions of the agency. B took possession of the stock and sold it, including the goods sold by C. It was held that B by so doing ratified the purchase by A.

Where a railroad corporation receives railroad material bought upon its credit and for its use by one of its officers without authority, and uses it for the corporate purposes for which it was designed, this is an adoption and ratification of the act of the officer. The directors using the material so purchased are bound to inquire, and are presumed to know, whether it was paid for or not; it is not, therefore, essential to an adoption of the act of the officer that the directors should know the terms of the contract. *Scott v. Middletown, etc., R. Co.*, 86 N. Y. 200, 4 Am. and Eng. R. R. Cas. 114.

In *Woods v. Rocchi*, 32 La. Ann. 210, it was held that where a party buys certain merchandise through the agency of a broker who falsely represents the price to be less than the vendor agrees to sell for, and, before the delivery of the whole of the merchandise, a notice of the real price is brought home to the buyer, he will be held to have ratified the contract made by the broker if he receives the balance of the merchandise without repudiating the contract.

In *Bearce v. Bowker*, 115 Mass. 129, where T., who was indebted to B., agreed to supply him with lumber, which he ordered of S., representing himself to be B.'s agent, and S. sent the lumber to B., with bills made out as

Accepting Results to Prevent Further Loss.—Ratification, however, does not arise when the principal accepts the results of the unauthorized act, not as a matter of choice, but merely for his own protection, to prevent further loss or liability therefrom.¹

Acceptance of Proceeds of Loan.—The acceptance of the proceeds of a loan or of the benefits thereof, though made without authority, has been held a sufficient ratification.²

against B., which bills B. received and retained without giving notice to S. that he was buying of T., it was held that B. had ratified T.'s action, and was liable to S. But see *Carson v. Cummings*, 69 Mo. 325.

Principal Adopting Purchase cannot Object to Time of Purchase.—By accepting the results of the agent's act the principal adopts his acts entirely, and cannot object to a misuse or an excessive use of his authority. In *Whilden v. Merchants, etc.*, Nat. Bank, 64 Ala. 1, it was held that where the principal received cotton purchased by his broker on order and made no objection as to the time within which the order was executed, he thereby ratified the purchase, and could not afterwards raise any objection as to the time.

Note for Removal of Lien from Goods.—In *Cassidy v. Aldhous* (C. Pl.), 58 N. Y. St. Rep. 49, it was held that ratification of an unauthorized purchase of goods could not be inferred from an agreement to give a note for removal of a lien upon such goods where there was no promise to pay for the goods.

Part Payment.—In *Culver v. Warren*, 36 Kan. 391, it was held that part payment of an amount claimed to be due on a grain deal, the purchase and sale having been ordered by telegraph, is an acknowledgment of some liability, and a ratification of the agency of the telegraph company in the transmission of its messages.

Action for Money Had and Received—Evidence.—Where goods are purchased by another without authority, and are brought into a merchant's store without his knowledge or consent and placed upon his shelves, there must be some evidence that he sold the goods and received the money therefor in order to make him liable in an action for money had and received to plaintiff's use. *Leshner v. Loudon*, 85 Mich. 52.

1. *Triggs v. Jones*, 46 Minn. 277.

Accepting Results to which Entitled without Ratification.—Where the principal receives the proceeds of an unauthorized sale of his goods there will not necessarily be a ratification if he would have the right to receive it without ratifying. *White v. Sanders*, 32 Me. 188.

So in *Walker v. Walker*, 5 Heisk. (Tenn.) 425, where an agent, instructed by his principal to remit a sum of money by express, purchased a check drawn by a party in good credit on New York, and forwarded it to the principal, who sent it on for payment, but the drawer becoming insolvent, the check was dishonored; it was held that the principal's transmittal was no ratification, the agent having violated his instructions as to the mode of transmitting the money, and that the agent was liable to him for the loss.

Accepting Unauthorized Work Incorporated in Building.—And in *Mills v. Berla* (Tex. Civ. App., 1893), 23 S. W. Rep. 970, it was held that the owner of a building upon which work had been done, without authority from him, of such a character that it could not be removed, did not, by subsequently using the building, subject himself to liability for the value of the unused work.

Retaining Security.—The retention of security to prevent loss is not necessarily a ratification. In *Nye v. Swan*, 49 Minn. 439, where an agent, intrusted with money to buy land, loaned the money without the authority or knowledge of the principal, at a usurious rate of interest, and took a deed for the land in form of an absolute deed as security, it was held that the principal did not ratify the act of the agent in the usurious loan by accepting the deed in order to avail himself of it as security for the money actually loaned, with legal interest. To the same effect is *Jordan v. Humphrey*, 31 Minn. 495.

So in *Crooker v. Appleton*, 25 Me. 131, where an agent was sent by A, with a note in her favor against B, with authority only to receive a sum of money thereon and return the note; he received the money, and made an arrangement with B, in pursuance of which he gave up the note and received certain other papers, and carried the money and papers to A, who "took the money and was displeased with the papers, saying she was cheated out of her money;" it was held that this was not a ratification of the acts of the agent.

2. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640; *Taylor v. Agricultural, etc., Assoc.*, 68 Ala. 229; *Las Vegas First Nat. Bank v. Oberne*, 121 Ill. 25; *Ward v. Pattee*, 57 Iowa 515; *McLean v. Ficke* (Iowa, 1895), 62 N. W. Rep. 753; *Perkins v. Boothby*, 71 Me. 91; *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. (Mass.) 372; *Watson v. Bigelow*, 47 Mo. 413; *Hazard v. Spears*, 4 Keyes (N. Y.) 469; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Shiras v. Morris*, 8 Cow. (N. Y.) 60; *Wright v. Burbank*, 64 Pa. St. 247; *Thurston v. James*, 6 R. I. 103; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

Illustrations—Acceptance of Benefits of Loan.—When an agent without the authority or knowledge of his principal borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal for money had and received. *Perkins v. Boothby*, 71 Me. 91.

But in *Spooner v. Thompson*, 48 Vt. 259,

The Acceptance of Rents under an unauthorized lease, with full knowledge of the facts, is strong evidence of a ratification.¹

A Settlement with an Agent with Full Knowledge of his unauthorized acts, and payment or receipt of balance due him, has been held to amount to a ratification;² and if the principal receive the agent's notes in full settlement, he thereby ratifies the acts of his agents in making the collections so remitted.³

it was held that if money borrowed by the agent on the credit of the principal, without authority, went into the principal's business without the latter's knowledge, although he had the benefit thereof, he was not liable therefor to the person of whom it was borrowed, in the absence of a promise to pay.

In *Trenton First Nat. Bank v. Badger Lumber Co.*, 54 Mo. App. 327, it was held that a corporation which after knowledge of the facts retained money remitted to it in payment of the indebtedness to it of one of its agents, ratified the unauthorized act of the agent in raising the money upon a note made in the corporation name.

But since there can be no ratification without a full knowledge of the facts, it has been held that where a person who was legally bound to pay off and discharge a mortgage upon the defendant's property, borrowed a sum of money without the defendant's knowledge or privity, but assuming to be his agent, and paid off the mortgage, the defendant was not responsible to the party making the loan, even though he enjoyed the benefit of the discharge of the mortgage. *Henry v. Wilkes*, 37 N. Y. 562.

Accepting Benefit of Credit Obtained.—In *Fouch v. Wilson*, 59 Ind. 93, it was held that a principal authorizing her agent to purchase certain land, and pay towards the same a sum of money in his hands, and to sign all necessary papers, was precluded from repudiating a mortgage executed by him in her name, to secure his own note given for the unpaid balance, the principal having taken possession knowing of the mortgage.

Loan by Agent of Corporation.—So a corporation which retains and uses money borrowed for it by an officer without authority ratifies the loan. *Willis v. St. Paul Sanitation Co.*, 53 Minn. 370; *Lyman v. Norwich University*, 28 Vt. 560; *Taylor v. Agricultural, etc., Assoc.*, 68 Ala. 229. But in *Holderness v. Baker*, 44 N. H. 414, it was held that the fact that a town through its officers holds possession and control of notes given by one of them for an unauthorized loan of the town money to himself did not operate as a ratification of the loan.

1. *Lindroth v. Litchfield*, 27 Fed. Rep. 894; *Reynolds v. Davison*, 34 Md. 662; *Clark v. Hyatt*, 55 N. Y. Super. Ct. 98; *Fleming v. Ryan*, 10 Misc. Rep. (N. Y. C. Pl.) 420.

So in *Burkhard v. Mitchell*, 16 Colo. 376, it was held that a landlord ratified a lease for two years, made by an agent having authority to lease for but one year, by accepting without objection rent accruing after the expiration of the first year.

And in *No. 121 Madison Ave. v. Osgood* (C. Pl.), 44 N. Y. St. Rep. 489, it was held that the acceptance of and action upon a re-

lease by a tenant of a right to a renewal of the lease constitutes a ratification by a landlord of the arrangement by which such release was procured by his agent.

In *Torrence v. Shedd*, 112 Ill. 466, it was held that the collection of a small portion of rents due from a tenant under a lease, after knowledge of the making of an unauthorized contract by the lessor's agent, is not a ratification of such contract for the sale of the lands; nor is the retention of the possession of the leased property obtained under such agent's contract, where the lessor had the right to declare a forfeiture and take forcible possession of the demised premises.

2. *Turner v. Wilcox*, 54 Ga. 593; *Warneken v. Marchand*, 18 La. Ann. 147; *Reed v. Ritchey*, 2 La. Ann. 797; *Sentell v. Kennedy*, 29 La. Ann. 679; *Beall v. January*, 62 Mo. 434.

Settlement as Ratification.—In *Beall v. January*, 62 Mo. 434, it was held that where a party orders his agent at specified dates to make sales for him, and receives an account of sales from him, and subsequently gives the agent notes for the balance due on such sales, with full knowledge that his instructions have been disobeyed, he cannot, in a suit on such notes by the agent, urge as a defense thereto that his instructions were disobeyed and he was damaged thereby, and that the notes were without consideration.

In *Francis v. Kerker*, 85 Ill. 190, where an agent sold corn of his principal to his own firm, and gave the principal a statement thereof, and no objection was made for two years, and the parties had a settlement of accounts, in which no allusion was made to the transaction, it was held that the principal thereby ratified the sale so made by the agent.

So in *Richmond Mfg. Co. v. Starks*, 4 Mason (U. S.) 296, where it appeared that a factor was authorized to sell goods at a limited price, and he afterwards sold them below that price, and sent an account to his principal of the sales and prices, and authorized him to draw for the balance of account; and the principal received the account and drew for the balance, and made no objection, in his letters or otherwise, to the conduct of the factor in the sales, it was held that there was sufficient evidence of a ratification.

3. *Luckie v. Johnston*, 89 Ga. 321; *Lafette v. Godchaux*, 35 La. Ann. 1161.

Agent's Notes Taken in Place of Notes Converted by Him.—If an agent receives a note for collection and improperly converts the same, but the principal with a knowledge of the same takes the agent's own notes, he will be bound thereby, and cannot recover from a third person. *Cushman v. Loker*, 2 Mass. 106.

Acceptance of Fruits of Compromise.—The acceptance of the fruits of a compromise by the principal is a ratification of the settlement made in his behalf, and he is bound thereby.¹

Dealing with Agent's Notes.—Ratification will be implied where the principal pays the notes of his agent or otherwise deals with them as his own.²

Filling Order Procured by Agent.—If the principal receives from the agent an order for goods and ships the goods, it has been held that he ratifies the contract.³

1. *Delaney v. Levi*, 19 La. Ann. 251; *Culverhouse v. Marx*, 39 La. Ann. 809; *Kelley v. Newburyport, etc.*, *Horse R. Co.*, 141 Mass. 496; *Jackson v. Badger*, 35 Minn. 52; *Keeler v. Salisbury*, 33 N. Y. 648; *Ives v. Ives*, 80 Hun (N. Y.) 136; *Adams v. Smith*, 19 Nev. 259; *Tate v. Marco*, 27 S. Car. 493; *Strasser v. Conklin*, 54 Wis. 102.

Illustrations—Acceptance of Compromise.—In *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251, where one entered into an agreement to submit a certain claim to arbitration, assuming to act as agent, it was held that the subsequent acceptance by the principal of an assignment from the assumed agent of the award made upon such submission, and his subsequent assignment of it to another party, were emphatic acts of ratification.

In *Hauss v. Niblack*, 80 Ind. 407, where some of a number of bondsmen employed an attorney at a certain fee to settle suits pending against all, and the others, with knowledge of the contract, enjoyed the fruits of the compromise, it was held that the latter thereby ratified the contract, and were liable with the others for the fee.

In *Haar v. Industrial Ben. Assoc.*, 71 Hun (N. Y.) 554, it was held that a woman who received a draft for a smaller sum than her claim, payable to her order, and indorsed it and received the money thereon, ratified the act of her husband in making an adjustment of her claim, knowing at the time that her husband had entered into negotiations for the settlement of her claim.

In *Tooker v. Sloan*, 30 N. J. Eq. 394, a release by an attorney in fact of the holder of a mortgage, the latter having accepted the consideration from the former with knowledge of the release, was held binding on the principal, though the attorney exceeded his authority.

In *Higginbotham v. May*, 90 Va. 233, 17 Va. L. J. 439, where the holder of a note sent it to an attorney with instructions to renew if possible, but otherwise to sue, and after judgment received from the attorney a new note and a sum of money with an intimation that it had been agreed that if a small balance was soon paid it would be received in settlement of the judgment, and the holder accepted the note and the money, announcing the balance still due, and did nothing further for five years, he was held to have ratified the act of the attorney.

In *Burke v. Milwaukee, etc.*, *R. Co.*, 83 Wis. 410, it was held that the fact that a railroad company received and retained an amount furnished by a friend of its defaulting agent constituted a ratification of the act of its auditor in representing that such payment

would cover the shortage in the agent's account and prevent his discharge.

Acceptance of Conveyance.—Where an agent without authority accepts a deed of land to his principal as a payment on a debt due the principal, a retention by the latter of the title is a ratification. *Miles v. Ogden*, 54 Wis. 573.

Where the deed is received as security for the debt merely, in the absence of evidence to the contrary it will be presumed that the principal was advised of the arrangement, and if he received it without knowledge, that he adopted whatever arrangement his agent may have made. *Meehan v. Forrester*, 52 N. Y. 277.

In *Carter v. Roland*, 53 Tex. 540, it was held that the fact that the principal received specific property under an unauthorized compromise of a judgment for the property and money, without knowledge of the facts, did not amount to a ratification.

Abandonment of Suit.—In *Hoit v. Cooper*, 41 N. H. 111, it was held that the abandonment of a suit by the principal operates as a ratification of a compromise of the suit by an agent.

Compromise with Agent.—It has been held that if an agent makes an unauthorized sale, and steals the proceeds, and the principal subsequently compromises with the agent, the principal by such compromise ratifies the sale. *Ogden v. Marchand*, 29 La. Ann. 61. See *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9.

2. *Harrod v. McDaniels*, 126 Mass. 413; *Dow v. Spenny*, 29 Mo. 386; *Commercial Bank v. Warren*, 15 N. Y. 577.

Illustrations—Dealings with Notes.—So in *Baer v. Lichten*, 24 Ill. App. 311, it was held that a principal who accepts and retains the proceeds of a note, knowing that it was transferred by his agent upon an unauthorized indorsement, ratifies such indorsement.

In *Allin v. Williams*, 97 Cal. 403, it was held that an indorsement, by a principal whose name had been indorsed upon a note without authority, of a waiver thereon of payment, presentment, protest, and notice, was sufficient ratification of the prior indorsement by the attorney.

A mere subsequent unconditional promise to pay, however, by one in whose name a note has been executed without authority, is not, as a matter of law, a ratification, but evidence from which a ratification may be inferred. *Commercial Bank v. Bernero*, 17 Mo. App. 313. See also *Owsley v. Phillips*, 78 Ky. 517, 39 Am. Rep. 258.

3. *Billings v. Mason*, 80 Me. 496; *Hitchcock v. Griffin, etc.*, *Co.*, 99 Mich. 447; *Boyd v. Baldwin*, 12 Misc. Rep. (N. Y. City Ct.) 549.

Entry on Land Purchased or Leased.—An entry on land purchased or leased by an unauthorized agent, and the making of improvements thereon, is held to be a ratification.¹

Accepting Proceeds of Sale by Agent.—If one accepts the proceeds of a sale made in his behalf by an unauthorized agent, or an agent who has exceeded his authority, this will amount to a ratification.²

Implied Ratification of Representations by which Contract was Procured.—When a contract has been ratified with a full knowledge of the facts, by accepting the benefits thereunder, the principals cannot deny the unauthorized representations of the agent by means of which the contract was brought about, even though such representations are fraudulent.³

1. *Ehrmanntraut v. Robinson*, 52 Minn. 333; *Vanderbilt v. Persse*, 3 E. D. Smith (N. Y.) 428; *Hall v. White*, 123 Pa. St. 95.

Sale of Land Received in Exchange by Agent.—In *Chambers v. Haney*, 45 La. Ann. 447, it was held that an agent's unauthorized act in exchanging lands which he was only authorized to sell was ratified by a subsequent sale of the land received in exchange, made by the principal.

2. *Illinois*.—*Nicholson v. Doney*, 37 Ill. App. 531.

Indiana.—*Wallace v. Lawyer*, 90 Ind. 499; *Barnett v. Gluting*, 3 Ind. App. 419.

Iowa.—*Palmer v. Cheney*, 35 Iowa 281.

Maine.—*White v. Sanders*, 32 Me. 188.

Michigan.—*Ripley v. Case*, 86 Mich. 261; *Vaughn v. Sheridan*, 50 Mich. 155.

Minnesota.—*Tilleny v. Wolverton*, 54 Minn. 75.

Mississippi.—*Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617.

Missouri.—*Norton v. Bull*, 43 Mo. 113.

New York.—*Johnson v. Jones*, 4 Barb. (N. Y.) 369; *Krumm v. Beach*, 25 Hun (N. Y.) 293.

Pennsylvania.—*Warden v. Eichbaum*, 3 Grant's Cas. (Pa.) 42; *Hetfield v. Addicks*, 154 Pa. St. 1.

Wisconsin.—*Pierce v. O'Keefe*, 11 Wis. 180; *Parish v. Reeve*, 63 Wis. 315.

Proceeds of Sale Accepted.—In *Norman v. Bennett*, 32 W. Va. 614, it was held that the act of an agent in giving a title bond was ratified by receiving from the purchaser notes to be credited on the bond.

Where an agent acting in good faith sold notes belonging to the principal, to one who, although having constructive notice of want of authority in the agent to make the sale, purchased the notes in good faith, and remitted the purchase money to the principal, the latter, by electing to retain the fruits of the sale after receiving knowledge of the facts, thereby ratified the unauthorized acts of the agent, and could not, while claiming the right to retain the money, replevy the notes from the purchaser, especially where the principal had suffered no prejudice. *Deering v. Grundy County Nat. Bank*, 81 Iowa 222.

Claiming Title to Property Exchanged by Agent.—In *Jones v. Atkinson*, 68 Ala. 167, it was held that an agent having made without authority an exchange of a mule for a horse, a claim and assertion by the principal of right and title to the horse, with knowledge

of the facts, was a ratification. See also *Merrill v. Rokes*, 54 Fed. Rep. 450.

Deed Executed in Blank.—In *Reed v. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247, where a wife executed a deed in blank as to the name of the grantee and in other respects, and delivered such deed to her husband, to sell and convey her real estate therein described, and the husband thereafter sold said real estate, and filled the blanks in the deed and delivered it, and the wife with full knowledge received the proceeds, it was held that she by so doing ratified the sale and conveyance.

Ratification of Sale by Execution of Instrument.—In *Mahony v. Ungrich* (Super. Ct.), 14 N. Y. Supp. 375, it was held that a sale by the agent of one of two owners in common of land was ratified by the other by joining in the deed. So in *McClintock v. South Penn Oil Co.*, 146 Pa. St. 144, it was held that a formal assignment executed by a husband and wife, indorsed on an option for the purchase of land held by the wife, which her husband had previously contracted to transfer to the assignee by an agreement indorsed on the option, and which was delivered to the assignee, is such a ratification by her of her husband's agreement as by its own force will validate it without any further acceptance by the assignee, where there has been no previous rescission or exchange of possession. See also *State Bank v. McCorkell* (Iowa, 1894), 60 N. W. Rep. 197; *Townsend v. Kennedy* (S. Dak., 1894), 60 N. W. Rep. 164.

3. *Herring v. Skaggs*, 73 Ala. 446; *Riser v. Walton*, 78 Cal. 490; *Du Souchet v. Dutcher*, 113 Ind. 249; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698; *Albitz v. Minneapolis, etc., R. Co.*, 40 Minn. 476; *Mayer v. Dean*, 115 N. Y. 556; *Union Trust Co. v. Phillip* (S. Dak., 1895), 63 N. W. Rep. 903; *Barnard v. Roane Iron Co.*, 85 Tenn. 139; *Gulf, etc., R. Co. v. Pittman*, 4 Tex. Civ. App. 167; *Morse v. Ryan*, 26 Wis. 356.

Partial Ratification Not Permitted.—The principal cannot separate the legal power from the illegal elements of the contract and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained. *Smith v. Tracy*, 36 N. Y. 83. See also *supra*, this section, *Prerequisites to Valid Ratification—Ratification of Whole Act.*

Ratification of Agent's False Representations.—In *Fairchild v. McMahon*, 139 N. Y. 290, it

c. BY SILENT ACQUIESCENCE—(1) *General Rule*.—As a general rule, silence on the part of the principal for a length of time without a sufficient excuse or explanation will amount to a ratification of the acts of an agent, especially where such acquiescence has a tendency to mislead the agent.¹

Duty to Disavow.—The principal should disavow the unauthorized act within a reasonable time after notice thereof; as to what is a reasonable time, the question will depend upon the circumstances of each case.²

was held that a mortgagee who accepts a mortgage procured by the fraudulent representation of his agent is bound by such representation, even though innocent himself.

And in *Mitchell v. Finnell*, 101 Cal. 614, it was held that one who authorized another as his agent to effect a settlement with a third person, said to have stolen his property, ratified the agent's act in procuring a note from such third party, by subsequently indorsing the note with full knowledge that it was given in settlement of the supposed claim, and of the manner in which it was obtained by the agent, although the note was obtained by false representations.

Duty of Principal to Make Inquiries.—In *Busch v. Wilcox*, 82 Mich. 336, 21 Am. St. Rep. 563, it was held that it was the duty of the principal to make all necessary inquiry into the facts, acts and representations of the agent before adopting the contract, and that it was not the duty of the person contracting with the self-constituted agent to inform the principal.

1. See the following note.

2. *United States*.—*Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270; *Smith v. Sheeley*, 12 Wall. (U. S.) 358; *Law v. Cross*, 1 Black. (U. S.) 533; *Benedict v. Maynard*, 4 McLean (U. S.) 569; *Abbe v. Rood*, 6 McLean (U. S.) 108.

Alabama.—*Whilden v. Merchants', etc., Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Lee v. Fontaine*, 10 Ala. 755, 44 Am. Dec. 505.

Colorado.—*Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248, 96 U. S. 640; *King v. Rea*, 13 Colo. 69; *Breed v. Central City First Nat. Bank*, 6 Colo. 235, 4 Colo. 481.

Georgia.—*Owsley v. Woolhopter*, 14 Ga. 124; *Bray v. Gunn*, 53 Ga. 144.

Illinois.—*Swartwout v. Evans*, 37 Ill. 442; *Francis v. Kerker*, 85 Ill. 190; *Indianapolis, etc., R. Co. v. Morris*, 67 Ill. 295; *Hall v. Harper*, 17 Ill. 82; *Williams v. Merritt*, 23 Ill. 623; *McGeoch v. Hooker*, 11 Ill. App. 649; *Johnston v. Berry*, 3 Ill. App. 256; *Hurd v. Marple*, 2 Ill. App. 402; *Pope v. Lowitz*, 14 Ill. App. 96; *People v. Frost*, 46 Ill. App. 197.

Iowa.—*Farwell v. Howard*, 26 Iowa 381; *Hayes v. Steele*, 32 Iowa 44; *Burlington Gas Light Co. v. Greene*, 22 Iowa 508.

Kentucky.—*McConnell v. Bowdry*, 4 T. B. Mon. (Ky.) 392; *Clay v. Spratt*, 7 Bush (Ky.) 334.

Louisiana.—*Johnson v. Carrere*, 45 La. Ann. 847; *Raymond v. Palmer*, 41 La. Ann. 425; *Pitts v. Shubert*, 11 La. 286, 30 Am. Dec. 718; *Lafitte v. Godchaux*, 35 La. Ann. 1161;

Woods v. Rocchi, 32 La. Ann. 210; *Mangum v. Bell*, 20 La. Ann. 215; *Kehler v. Kemble*, 26 La. Ann. 713.

Maine.—*Perkins v. Boothby*, 71 Me. 91; *Johnson v. Wingate*, 29 Me. 404; *Blanchard v. Waite*, 28 Me. 51, 48 Am. Dec. 474.

Maryland.—*Maddux v. Bevan*, 39 Md. 485.

Massachusetts.—*Brigham v. Peters*, 1 Gray (Mass.) 139; *Frothingham v. Haley*, 3 Mass. 68; *Lent v. Padleford*, 10 Mass. 230, 6 Am. Dec. 119; *Odiorne v. Maxcy*, 13 Mass. 178; *Amory v. Hamilton*, 17 Mass. 103; *Bassett v. Brown*, 105 Mass. 551.

Michigan.—*Cooper v. Mulder*, 74 Mich. 374.

Minnesota.—*Hawkins v. Lange*, 22 Minn. 557; *Wisconsin v. Torinus*, 26 Minn. 1.

Mississippi.—*Thurmond v. Carter*, 50 Miss. 127; *Meyer v. Morgan*, 51 Miss. 21, 21 Am. Rep. 617; *Crane v. Bedwell*, 25 Miss. 507.

Missouri.—*Peck v. Ritchey*, 66 Mo. 114.

Nebraska.—*Swartz v. Duncan*, 38 Neb. 782.

New Hampshire.—*Nixon v. Brown*, 57 N. H. 34; *Wright v. Boynton*, 37 N. H. 9, 72 Am. Dec. 319.

New Jersey.—*Chetwood v. Berrian*, 39 N. J. Eq. 203.

New York.—*Crans v. Hunter*, 28 N. Y. 389; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.*, 90 N. Y. 607; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Hope v. Lawrence*, 50 Barb. (N. Y.) 258; *Johnson v. Jones*, 4 Barb. (N. Y.) 369; *Grannis v. Hobby* (Supreme Ct.), 43 N. Y. St. Rep. 828; *Sage v. Sherman*, 2 N. Y. 417; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Watson v. Gray*, 4 Abb. App. Dec. (N. Y.) 540; *Hazard v. Spears*, 2 Abb. App. Dec. (N. Y.) 353; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300; *Rogers v. Kneeland*, 10 Wend. (N. Y.) 219; *Murray v. Biningar*, 3 Keyes (N. Y.) 107; *Benedict v. Smith*, 10 Paige (N. Y.) 128; *Thompson v. Craig*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 29.

Nevada.—*Abernathie v. Consolidated Virginia Min. Co.*, 16 Nev. 260.

North Carolina.—*Brown v. Smith*, 67 N. Car. 245.

Pennsylvania.—*Bredin v. Dubarry*, 14 S. & R. (Pa.) 27; *Philadelphia, etc., R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128; *Lindsley v. Malone*, 23 Pa. St. 24; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. St. 426; *Graff v. Callahan*, 158 Pa. St. 380; *Gordon v. Preston*, 1 Watts (Pa.) 387, 26 Am. Dec. 75.

Tennessee.—*Fort v. Coker*, 11 Heisk. (Tenn.) 579; *Western, etc., R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208; *Hart v. Dixon*, 5 Lea (Tenn.) 336; *McClure v. Ewartson*, 14 Lea (Tenn.) 495; *Southern Oil Works v. Jefferson*, 2 Lea (Tenn.) 581.

Texas.—*Hammond v. Hough*, 52 Tex. 63.

No Ratification without Opportunity to Repudiate.—The principal, however, must

Vermont.—*Bigelow v. Denison*, 23 Vt. 564; *Orleans Nat. Bank v. Fassett*, 42 Vt. 432; *Beecher v. Grand Trunk R. Co.*, 43 Vt. 133; *Judevine v. Hardwick*, 49 Vt. 180.

West Virginia.—*Curry v. Hale*, 15 W. Va. 867.

Wisconsin.—*Hall v. Chicago, etc., R. Co.*, 48 Wis. 317; *Walworth County Bank v. Farmers' Loan, etc., Co.*, 16 Wis. 629; *Kelly v. Phelps*, 57 Wis. 425; *Cooper v. Schwartz*, 40 Wis. 54; *Saveland v. Green*, 40 Wis. 431; *McWhinnie v. Martin*, 77 Wis. 182.

When Silence a Ratification.—Chancellor Kent states the law briefly as follows: "When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed." 2 Kent Com. 616.

In *Mobile, etc., R. Co. v. Jay*, 65 Ala. 113, *Somerville, J.*, said: "It is true that mere knowledge on the part of the principal, of an agent's unauthorized action, will not make silence, or noninterference, in all cases, amount to ratification. But it would in those cases where the party dealing with the agent is misled or prejudiced; or where the usage of trade requires, or fair dealing demands, a prompt reply from the principal. In all such cases the principal, if dissatisfied with the act of the agent and fully informed of what has been done, must express his dissatisfaction within a reasonable time."

In *DeLand v. Dixon Nat. Bank*, 111 Ill. 396, it was held that although silence was strong evidence of ratification to be given to the jury, yet an instruction that the silence was a ratification was erroneous.

Illustrations—Failure to Object or Disavow Held Ratification.—Where it appears that various shipments were procured by the agent of the principals (commission merchants), which shipments were to be sold by the latter; that as such shipments were forwarded, the agent made advances thereon, of which the principals were informed; but that they made no objection until the agent sued to recover his advances, when they set up as a defense that he had exceeded his instructions in not allowing sufficient margin for protection against loss, it was held that the conduct of the principals was a clear ratification of the agent's acts. *Featherston v. Graham*, 17 La. Ann. 42.

In *Saveland v. Green*, 40 Wis. 431, where the owner of a vessel, when informed by a broker that he had procured his vessel to be chartered at a specified rate, did not disaffirm the contract either to the broker or to the charterer, it was held that the jury might infer a ratification.

In *Bryce v. Clark (C. Pl.)*, 42 N. Y. St. Rep. 471, it was held that a principal who, after presentation of a bill for advertising in a certain periodical, the advertisement having been ordered by his agent without authority, permitted such advertisement to appear in subsequent issues of the periodical without notifying the publisher to discontinue, or of

the want of authority in the agent, was liable for the advertisement.

In *Postmaster Gen. v. Norvell, Gilp. (U.S.)* 122, it was held that the retention of a bond from the 15th of July to the 25th of September, without objection to its sufficiency, would authorize the conclusion that it was accepted.

Wrongful Attachment.—In *Pollock v. Gantt*, 69 Ala. 374, 44 Am. Rep. 519, it was held that where an attachment was sued out by an agent without authority, and the principal did not repudiate the suit, the latter was liable in damages.

Sale of Land—Estoppel.—When the unauthorized act is a contract for sale of land, acquiescence, to bind the principal, must be by such act as will operate as an estoppel when the agreement is required to be in writing. *Zimpelman v. Keating*, 72 Tex. 318.

Partners.—In *Forbes v. Hagman*, 75 Va. 168, where one member of a firm was informed by its agent that the latter had, in the firm name and for its use and benefit, instituted a suit against a firm debtor and caused him to be arrested and detained in prison, and such partner made no inquiry as to the grounds of the arrest, gave no directions, and took no steps for the debtor's relief or discharge, it was held that the firm was bound by the acts of its agent and all the partners were responsible for the consequences of such acts.

Silence Not Ratification—Delay in Bringing Suit.—Mere delay in bringing a necessary suit cannot be held to be a ratification of an unauthorized act of an agent, where the principal expressly repudiates the act. See *McClure v. Evarston*, 14 Lea (Tenn.) 495. And in *Holland v. Van Beil*, 89 Ga. 223, it was held that ratification of the unauthorized receipt by an agent, of a less amount than the face of a promissory note, in full payment, did not result from a mere failure to bring suit upon the note for any time less than the limitation, in the absence of knowledge on his part.

Agreement Subject to Ratification by Principal.—In *Abbe v. Rood*, 6 McLean (U. S.) 106, the principle of ratification by silent acquiescence is recognized, but it is held that if the agent has entered into an agreement, notifying the debtor that he will submit it to his principal for ratification, unless he shall ratify it there is no binding obligation.

Sale under Limited Authority.—In *White v. Langdon*, 30 Vt. 599, the general rule was held not to be applicable without limitation to the case of an agent to whom is given a special and limited authority to sell property. In such a case it was held that, upon hearing of the sale in violation of his orders, the principal was not bound to give notice of his claim, and that his mere silence should not ordinarily be construed as a ratification.

Negligence in Principal in Failing to Prevent unauthorized fraudulent acts does not estop him from disavowing such acts. *Schmidt v. Garfield Nat. Bank*, 64 Hun (N. Y.) 298; *McIntosh v. Battel*, 68 Hun (N. Y.) 216.

have full knowledge of the act of his agent, and there can be no ratification if he has had no opportunity to repudiate the unauthorized act.¹

Reasonable Time a Question for Jury.—What is a reasonable time should be left to the determination of a jury in the light of all the circumstances of the case.²

Failure to Disavow Instantly.—Mere failure, however, to repudiate instantly the unauthorized act, is not necessarily a ratification.³

1. *Walters v. Munroe*, 17 Md. 154, 77 Am. Dec. 328; *Williams v. Storm*, 6 Coldw. (Tenn.) 203; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Ladd v. Hildebrandt*, 27 Wis. 135, 9 Am. Rep. 445. See also *supra*, this section, *Prerequisites to Valid Ratification—Knowledge of Material Facts*.

No Opportunity to Disavow.—In *McIntosh v. Battel*, 68 Hun (N. Y.) 216, it was held that an owner of real estate could not be held responsible for its sale made by his agent upon the ground that for two days after the making of the contract of sale and the departure of the agent without fully explaining his action, he delayed to repudiate the authority and to disavow the contract.

In *Saville v. Welch*, 58 Vt. 683, where an agent fraudulently obtained possession of goods by ordering them of the plaintiff in the name of his assumed principal, who received a bill and invoice of the goods and delivered the bill to the agent at his request and on being told by the agent that he had ordered the goods as he did that they might not be attached, it was held that the silence of the defendant was not a ratification, it appearing that the agent did not tell him that the goods were bought on his, the defendant's, credit.

Record of Deed of Unauthorized Agent.—The record of a deed executed by an agent without authority is not *per se* notice to the principal. *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

2. *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa 67; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Cooper v. Schwartz*, 40 Wis. 54.

Reasonable Time.—No strict rule can be laid down as to what is a reasonable time, or what is a sufficient delay to amount to a ratification, but this must be determined by a consideration of all the circumstances. The rule is well stated as follows: "Where, with a knowledge of the facts, the principal acquiesces in the act of the agent, under such circumstances as would make it his duty to repudiate such acts if he would avoid them, such acquiescence is a confirmation of the acts of the agent." Per *Johnson, J.*, in *Curry v. Hale*, 15 W. Va. 875.

In *McWhinnie v. Martin*, 77 Wis. 182, where one employed a real estate agent to negotiate a sale of land, authorizing him to get offers, and the agent afterwards informed the principal that he had made a contract for sale at a price named, that the purchaser had made part payment and deposited the balance in bank and taken possession of the land, it was held that by remaining silent two months the principal ratified the sale.

In *Hoosac Min., etc., Co. v. Donat*, 10 Colo. 529, silence for more than three months after notice of the execution of an unauthorized

lease was held to amount to a ratification. And in *Alexander v. Jones*, 64 Iowa 207, where an agent sold land without authority, but the principal made no objection for four years, during which time the purchasers had improved the land, and during three years of the time the agent had resided in the same town with his principal, but had at length absconded without having paid his principal any of the purchase money, it was held that there was a ratification of the sale.

A Question for the Court—Massachusetts.—In *Massachusetts*, however, whether the disavowal has been within a reasonable time is held to be a question of law for the court, to be decided upon all the circumstances of the case, unless something equivocal in those circumstances or material facts in dispute require a submission to the jury with instructions. *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.) 432; *Kupfer v. South Parish*, 12 Mass. 185. See *Bassett v. Brown*, 105 Mass. 557.

3. *Miller v. Excelsior Stone Co.*, 1 Ill. App. 273; *Caswell v. Cross*, 120 Mass. 545; *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337.

When Failure to Disavow need Not be Instantaneous.—The rule of the text applies especially where the principal receives no direct benefit from the unauthorized act of his agent, and the party dealing with the agent is not misled or prejudiced by his failure to repudiate the act promptly, and a prompt reply is not demanded by fair dealing or the usage of trade, a ratification will not be presumed from his mere silence. *Mobile, etc., R. Co. v. Jay*, 65 Ala. 113.

Duty to Disavow, when Imperative.—In *Myers v. New York Mut. L. Ins. Co.*, 32 Hun (N. Y.) 321, it was held that where the unauthorized act of an agent is done in the execution of a power granted, but in a mode not sanctioned by the power and in excess or misuse of it, ratification is implied from slight acts of confirmation on the part of the principal, and his duty to disavow at once is imperative.

The necessity of prompt disavowal of the acts of an agent in excess of his authority is, however, denied in some cases. *Lewin v. Dille*, 17 Mo. 70.

What is a Prompt Disavowal.—In *Clay v. Spratt*, 7 Bush (Ky.) 334, it was held that an instruction that if the principal failed to disavow promptly the unauthorized act he would be held to have ratified it, was proper. The court said: "The use of the word 'promptly' in the instructions given at defendants' instance is particularly objected to. It is insisted that [the principal] was not required to use the utmost possible despatch in disavowing the sale. We agree that he was not, but we do not think the word 'promptly'

Prompt Disavowal Demanded by Usage or to Prevent Loss.—But when the usage of trade requires it, or when a delay might mislead the agent or other parties, upon notice from the agent informing his principal of his transaction it is the duty of the latter to repudiate promptly the act if he wishes to avoid liability.¹

Failure to Examine Report of Agent.—A principal should within a reasonable time examine his agent's report, and disavow such acts as are unauthorized; and if he fails to do so, his silence will be deemed good evidence of a ratification.² So it has been held that a ratification may be inferred where the agent has informed his principal of his acts by letter but received no reply.³

Delay in Hope of Gaining Advantage.—When the principal delays in the hope of gaining an advantage, his failure to disavow will be held to be a ratification.⁴

admits of that construction in the connection in which it is used. It implies only that he should not have been dilatory: should have been guilty of no unnecessary delay; and this was a correct exposition of the law."

1. *Meister v. Cleveland Dryer Co.*, 11 Ill. App. 227; *Farwell v. Howard*, 26 Iowa 381; *Ball v. Bender*, 22 La. Ann. 496; *Oliver v. Johnson*, 24 La. Ann. 460; *Maddux v. Bevan*, 39 Md. 485; *Bredin v. Dubarry*, 14 S. & R. (Pa.) 27.

Illustrations.—So in *Law v. Cross*, 1 Black (U. S.) 533, it was held that when an agent at a distant port departs from his instructions for the supposed advantage of his principal, the principal must repudiate the act, if at all, as soon as he has information of it.

And in *McGeoch v. Hooker*, 11 Ill. App. 649, it was held that a principal who, when notified by an agent buying for him on margins of a sale made, does not object thereto, will be held to have ratified the act.

In *Oliver v. Johnson*, 24 La. Ann. 460, it was held that an agent who exceeded his authority in the collection and investment of the proceeds of notes, was not liable therefor if the principal, on being advised of the collection and investment by the agent himself, fails to notify him promptly that he repudiates his acts.

2. *Bell v. Cunningham*, 3 Pet. (U. S.) 69; *McCord v. Manson*, 17 Ill. App. 118; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa 67; *Meyer v. Morgan*, 51 Miss. 26, 24 Am. Rep. 617; *Austin v. Wilson* (Buffalo Super. Ct.), 33 N. Y. St. Rep. 503, 11 N. Y. Supp. 565; *Ruffner v. Hewitt*, 7 W. Va. 585.

Examining Report of Agent.—Where an agent for disbursing funds makes a report to his principal, showing his disbursements, and accompanied with a draft for the balance in his hands, the principal must within a reasonable time (a question for the jury) examine the report, and make known to the agent any objections which he may desire to make thereto. Failing so to do within a reasonable time, his silence will be treated as a ratification of the agent's disbursements. *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa 67.

In *Hawkins v. McGroarty*, 110 Mo. 546, it was held that the testimony of the agent that he immediately notified the principal of an unauthorized sale and that the latter expressed no disapprobation, did not justify finding a ratification, where the principal denied that he had seen the agent or heard from him until he had sold to a third party.

3. *Teasdale v. McPike*, 25 Mo. App. 341; *Lindsley v. Malone*, 23 Pa. St. 24. But see *Bosseau v. O'Brien*, 4 Biss. (U. S.) 395.

Retaining Agent's Letters without Reply.—In *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300, where it was shown that the agent informed his principal by letter on the 18th of July of his action, but the principal did not answer the letter until the 29th of October following, it was held that the delay amounted to a ratification of the agent's conduct.

In *Foster v. Rockwell*, 104 Mass. 167, where it was shown that on the 21st of October a letter was mailed by the agents giving definite notice of their acts in the purchase and shipment of goods; that no reply was made to this letter; that the first expression of disapprobation on the part of the principal was in a letter dated the 29th of October in reply to one of the 26th stating that the property had probably been lost—it was held that there was sufficient evidence of ratification.

In *Francis v. Kerker*, 85 Ill. 190, where an agent sold corn of his principal to his own firm and gave the principal a statement thereof, and no objection was made for two years, and the parties had a settlement of accounts in which no allusion was made to the transaction, it was held that the principal thereby ratified the sale so made by the agent.

In *Palmer v. Gould* (Supreme Ct.), 44 N. Y. St. Rep. 802, it was held that receipt by a principal of a copy of a contract for the sale of land made by an agent without authority, accompanied by a blank power of attorney for his signature, is not sufficient notice for him that his agent has entered into such a contract without authority, to make his retention thereof without objection a ratification, where it bears the signature only of the other party thereto.

4. **Speculative Delay.**—*Featherston v. Graham*, 17 La. Ann. 42.

Where a party was informed on May 20th that his broker had sold stock previously purchased on his account, but remained silent, and in September demanded an account of sales, which was received without objection, and several months later brought an action against the broker, claiming that such sales were premature, it was held that if he did not intend to assent to this transaction of the broker he should have notified him at once, and not having dissented within a reasonable time a ratification of the broker's acts would be presumed. *Hanks v. Drake*, 49 Barb. (N.

Silence Accompanied with Possession of Property.—Where the silent acquiescence is accompanied with the possession of property the presumption of ratification is naturally increased.¹ So if with full knowledge the principal holds doubtful notes for an unreasonable time, this failure to repudiate his agent's act in receiving them will be held a ratification.²

Act Done in the Presence of Principal.—If an act is done by the agent in his presence his silence or failure to repudiate will amount to a ratification.³

Agent Failing to Notify Principal Estopped to Claim Silence a Ratification.—An agent may forfeit his right of construing the silence of his principal as an implied acquiescence, by delaying in the giving of notice to his principal until an election to approve or disapprove would be attended with no benefit to the latter.⁴

Silence of One of Two Joint Agents.—The rule of ratification by silent acquiescence applies to principals only, and not to joint agents. So the failure of one of two joint agents to repudiate the separate act of his fellow does not ratify the same.⁵

Silent Acquiescence by Corporation.—The principle of ratification by silence is applicable to corporations in the same manner as to natural persons.⁶ But in

Y.) 186. So also in *McGeoch v. Hooker*, 11 Ill. App. 649.

In *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617, where an agent sold without authority cotton of his principal, it was held that the principal was entitled to no more time than was needful to examine the tendency of the cotton market, and to bring his mind to the conclusion whether he had better accept the price for which his factor had sold or take the chance of a rise, and that he could not keep that subject open for nearly three months and then repudiate the sale.

1. *McConnell v. Bowdry*, 4 T. B. Mon. (Ky.) 392; *Miles v. Ogden*, 54 Wis. 573. See also *supra*, this section, *Implied Ratification—By Accepting Benefits*.

The principal may, however, upon learning that the agent exceeded his authority, repudiate the act without restoring the property, if, before he learned of the unauthorized act, he had disposed of the property so that he could not restore it, or if its restoration would be of no practical value to the other party. *Humphrey v. Havens*, 12 Minn. 298.

2. *Plano Mfg. Co. v. Buxton*, 36 Minn. 203.

So in *Jennison v. Parker*, 7 Mich. 355, where, in the principal's absence, his clerk received of his debtor a draft, and accepted the same, to be applied, when paid, on the debtor's account, and after the draft fell due the plaintiff wrote the debtor respecting it, not repudiating the act of the clerk, and, on subsequently seeing the debtor, offered to return the unpaid draft, it was held that this was sufficient evidence from which a jury might infer a ratification by the plaintiff of the act of the clerk.

Offer to Surrender Note of No Avail at Trial.—In *Southern Oil Works v. Jefferson*, 2 Lea (Tenn.) 581, it was held that the plaintiff's conditional or unconditional offer at a trial, to surrender a draft which formed part of the contract sued upon, will not rebut the inference from long acquiescence and retention of

the draft that the holder ratified the contract made by his agent.

3. *Owsley v. Woolhopter*, 14 Ga. 124.

So where one stands by and hears a contract made for him by another, he is bound by such contract. *James v. Russell*, 92 N. Car. 194; *Bronson v. Chappell*, 12 Wall. (U. S.) 681.

4. *Williams v. Merritt*, 23 Ill. 623; *Amory v. Hamilton*, 17 Mass. 109.

5. *Penn v. Evans*, 28 La. Ann. 576.

Full knowledge and acquiescence therein however, by another agent the scope of whose authority covers the unauthorized act, will amount to a ratification. *Singer Mfg. Co. v. Belgart*, 84 Ala. 519.

6. *Melledge v. Boston Iron Co.*, 5 Cush (Mass.) 158, 51 Am. Dec. 59; *Hoyt v. Thompson*, 19 N. Y. 207; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.*, 90 N. Y. 607; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. St. 426.

Act of Corporation Officer Ratified by Silent Acquiescence.—"When the president of a corporation executes in its behalf and within the scope of its charter a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act." Per Gray, J., in *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371. See also *Fitzgerald, etc., Constr. Co. v. Fitzgerald*, 137 U. S. 109; *Augusta, etc., R. Co. v. Kittel*, 52 Fed. Rep. 63.

In *Belleville Sav. Bank v. Winslow*, 35 Fed. Rep. 471, where the president of a bank attempted to compromise in behalf of the bank with a debtor of the bank, and the bank rejected the compromise, but the debtor was not notified of this, and the collaterals relinquished by the debtor were sold by the bank, and the bank, by its transactions for seven years, so acted as to justify a belief in its acquiescence in the compromise, it was held that the bank, by its action, had ratified the compromise.

the case of corporations, especially governmental bodies, it would seem to be reasonable not to require as prompt a disavowal as in the case of an individual, the operations of such bodies being more complex.¹

(2) *Where Act is Done by a Stranger.*—A distinction is made in some cases between acts which are done by a duly appointed agent in excess of his authority, and acts of a mere stranger or volunteer done in behalf of an alleged principal, it being maintained that in the latter class of cases it is not incumbent upon him for whose benefit the act is done to disavow promptly such act—indeed, that he is required to take no notice thereof and can be bound only by an affirmative answer.²

In *Kelsey v. Crawford County Nat. Bank*, 69 Pa. St. 426, where a question arose as to the ratification of the acts of a bank cashier by the corporation, Williams J., said: "In delivering the opinion of the court [in *Pennsylvania Bank v. Reed*, 1 W. & S. (Pa.) 101] Rogers, J., said: 'It is a very clear and salutary rule in relation to agencies, that when the principal, with the knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them under the pretense that they were done without authority or even contrary to instructions. * * * When the principal has been informed of what has been done, he must dissent and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed.' If, then, the directors of the bank were informed that the cashier had offered the reward, it was their duty promptly to disavow the act if they did not intend that the bank should be bound by it. * * * Nor was it necessary, in order to bind the bank by their acquiescence, that notice should have been given to the directors when sitting in their official capacity as a board. If they were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act if they were unwilling that the bank should be bound by it."

In *Indianapolis Rolling Mill v. St. Louis*, etc., R. Co., 120 U. S. 256, it was held that when a board of directors with knowledge of their agents' acts, did not disaffirm their action within six months, they ratified the same.

So in *Walworth County Bank v. Farmers' L. & T. Co.*, 16 Wis. 629, where a sale of property belonging to a railroad company was made by its president in part payment of a debt due from the company, and which sale was in fact unauthorized, it was held that if the fact of the sale had been communicated to its board of directors and was openly talked of at one of their meetings, but they did nothing to disaffirm it, this would be deemed a ratification of the sale.

Employment of Physician by Railroad Company.—A company impliedly ratifies the act of a conductor or other officer in employing a physician, if, after a full knowledge of all the facts, it does not disaffirm the employment. *Terre Haute, etc., R. Co. v. Stockwell*, 118 Ind. 100; *Cairo, etc., R. Co. v. Mahoney*, 82 Ill. 75, 25 Am. Rep. 299; *Toledo, etc., R. Co. v. Rodrigues*, 47 Ill. 188; *Toledo, etc., R. Co. v. Prince*, 50 Ill. 26.

So in *Indianapolis, etc., R. Co. v. Morris*

67 Ill. 295, where the conductor of the defendant railway company brought a brakeman who had received a serious injury while in defendant's service, to the plaintiff's house to be cared for, and immediately thereafter telegraphed to the officers of the company the facts, and they did not notify the plaintiff that the company would not be responsible, it was held that the company by their silence ratified the acts of their agent.

1. In *School Dist. No. 6 v. Aetna Ins. Co.*, 62 Me. 330, Peters, J., said: "A presumption from the nonaction of a corporation like a school district would be less readily inferable than in the case of individuals, who can more readily act. A district can be bound only by some recorded vote, or some act, or an acquiescence upon their part as a corporation, equivalent thereto." See also *Davis v. School Dist. No. 2*, 24 Me. 349.

In *Delafield v. Illinois*, 2 Hill (N. Y.) 175, 26 Wend. (N. Y.) 192, Bronson, J., said: "Under particular circumstances, the silence of the principal for a very few days, after he is advised of an act done by his agent, may amount to strong presumptive evidence of ratification, especially where such silence has a tendency to mislead the opposite party. But it will never do to apply so rigorous a rule where a state is the principal."

2. *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385; *Searing v. Butler*, 69 Ill. 575; *Foster v. Rockwell*, 104 Mass. 167; *Kelly v. Phelps*, 57 Wis. 425. See also *Powell v. Henry*, 27 Ala. 612; *White v. Langdon*, 30 Vt. 599.

View that Silence No Ratification of Act of Volunteer.—This doctrine is maintained by a learned writer as follows: "Where the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account. But when the person doing the business is a mere volunteer, who has officiously interfered in the affairs of another person, and has effected an insurance or made a purchase for him, I do not conceive that the other person is bound to answer a letter from the intermeddler informing him of the contracts so made in his name, nor that his silence can be construed into a ratification. Certainly no case has gone this length, and the opinion of the great Cujas is that this is no ratification." 1 Livermore on Agency, p. 50.

Silence Ratification as to Third Parties.—But it has been held that mere inaction may operate as a ratification so far as concerns third parties, yet not amount to that in favor of the agent.¹

Silence Some Evidence of Ratification.—The better rule, however, seems to be that although the relation of the parties as principal and agent is an important consideration, yet in the case of a mere stranger or volunteer, the silence of the alleged principal, when fully informed of the unauthorized act, is evidence of a ratification, though far less strong.²

Silence Likely to Mislead.—But in the case of a mere stranger, as well as in the case of an agent exceeding his authority, silence with notice on the part of the party for whose benefit the act is done, which is likely to cause injury to or mislead other parties, should be held to amount to a ratification.³

d. BY SUIT.—Implied ratification arises also where the alleged principal claims and seeks to enforce by suit rights based upon the unauthorized acts of an agent or other person acting in behalf of the principal.⁴ Ratification

1. *Triggs v. Jones*, 46 Minn. 277.

2. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Foster v. Rockwell*, 104 Mass. 172; *Harrod v. McDaniels*, 126 Mass. 415; *Myers v. New York Mut. L. Ins. Co.*, 32 Hun (N. Y.) 321; *Ladd v. Hildebrant*, 27 Wis. 135, 9 Am. Rep. 445.

Silence Evidence of Ratification for Jury.—In *Philadelphia, etc., R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128, these principles are fully discussed by Woodward, J. In delivering the opinion of the court he said: "To say that silence is no evidence of it [ratification] is to say there can be no implied ratification of an unauthorized act, or at the least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself; and if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means." The learned judge, continuing, criticised the statement of Livermore quoted in the note above, and generally the view of the civil law writers. "It is to be remembered," said he, "that such writers are not laying down a rule of evidence to govern trials by jury, but are declaring rather the effect upon the judicial mind of the party's silence. It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may imply it."

Failure to Disclose a Forgery.—In *Duconge v. Forgay*, 15 La. Ann. 37, it was held that the failure to denounce a forgery as soon as advised of it did not render a person liable upon the forged note or others subsequently disposed of.

When Agent Acts for Himself, Not as Agent.—In *Hamlin v. Sears*, 82 N. Y. 327, it was held that where an agent has wrongfully taken the property of his principal and sold it, not as agent, but on his own account, mere silence on the part of the owner does not confirm the sale. The owner, upon discovery of the wrong, is not required to make im-

mediate efforts to regain his property; and silence, short of the time prescribed by the statute of limitations, will not bar his claim.

After Revocation.—In *Kelly v. Phelps*, 57 Wis. 425, it was held that after revocation of an agent's authority the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done by such agent in pursuance of the original authority.

3. In *Heyn v. O'Hagen*, 60 Mich. 157, this view is adopted. *Champlin, J.*, in delivering the opinion of the court, said: "Whether silence operates as presumptive proof of ratification of the act of a mere volunteer, must depend upon the particular circumstances of the case. If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to and relying upon such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency." A similar rule is stated by the Supreme Court of *Wisconsin* in the case of *Saveland v. Green*, 40 Wis. 438.

4. *England.*—*Ferguson v. Carrington*, 9 B. & C. 59, 17 E. C. L. 330; *Smith v. Hodson*, 4 T. R. 211.

Arkansas.—*Drennen v. Walker*, 21 Ark. 539.

Indiana.—*Knowlton v. School City of Logansport*, 75 Ind. 103; *Kyser v. Wells*, 60 Ind. 261.

Iowa.—*Eadie v. Ashbaugh*, 44 Iowa 519.

Kentucky.—*Owensboro Bank v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211.

Massachusetts.—*Pratt v. Putnam*, 13 Mass. 361; *Folger v. Mitchell*, 3 Pick. (Mass.) 396; *Sutton v. Cole*, 3 Pick. (Mass.) 232; *Hampshire v. Franklin*, 16 Mass. 76.

Mississippi.—*Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Walker v. Mobile, etc., R. Co.*, 34 Miss. 245; *Augusta Bank v. Conrey*, 28 Miss. 667.

New Hampshire.—*Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Ham v. Boody*, 20 N. H. 411, 51 Am. Dec. 235; *Payne v. Smith*, 12 N. H. 34.

may arise also from the nature or kind of defense to an action.¹

Suit to Enforce Contract.—If one seek to enforce a contract made on his behalf, he will be deemed to have authorized or subsequently ratified it;² thus in trying to enforce the payment of notes received by an agent, the principal ratifies the agent's act.³

Suit to Recover Price of Goods.—An action by the owner of goods to recover the price thereof, either from the agent⁴ who has disposed of them without

New York.—*Wilmot v. Richardson*, 4 Abb. App. Dec. (N. Y.) 614.

Ohio.—*Woodward v. Suydam*, 11 Ohio 363.

Suit on Agent's Unauthorized Contracts, etc.—Where a principal appeared in court and presented an attachment which had been sent out in his name by a person assuming to act as his agent, it was held that this was a full recognition of the authority to execute the bond. *Dove v. Martin*, 23 Miss. 588; *Augusta Bank v. Conrey*, 28 Miss. 667.

Where, during a creditor's absence from the country, an attorney, without the creditor's knowledge, accepted from a debtor a confession of judgment, and afterwards the partner of the creditor requested the attorney to issue execution, it was held that this was sufficient to show acceptance of the judgment by the creditor, as against subsequent judgment creditors. *Johnston v. McAusland*, 9 Abb. Pr. (N. Y. Supreme Ct.) 214.

By bringing suit, however, the principal does not release the agent from a claim for negligence. *Owensboro Bank v. Western Bank*, 13 Bush (Ky.) 526, 26 Am. Rep. 211.

Suit for Money Received without Authority.—In *Benson v. Liggett*, 73 Ind. 452, where an agent without authority received money for his principal and subsequently loaned the money, it was held that an action by the principal against the administrators of the agent ratified the receipt, but not the loan made by him.

Suit to Recover Loan—Insufficient Security.—In *St. Mary's Bank v. Calder*, 3 Strobb. (S. Car.) 403, it was held that where an agent is authorized to lend money, but he takes insufficient security therefor, the fact that the principal commences a suit against the borrower to recover the money lent is not necessarily a ratification and approval of the security taken. In this case *Wardlaw, J.*, said: "By testing the value of the security which was taken, the plaintiff did not assent to its sufficiency, or acknowledge the propriety of its being taken. He was entitled to the use of all the securities which his agent took; if he was not wanting in diligence, the agent has suffered nothing from his use of them. If the agent was liable for taking insufficient security, collection of part of the money by the principal would have been a relief to him *pro tanto*. Entire failure to collect after effort made leaves the loss of the principal and liability of the agent as they were before the effort made."

Recording Levy.—Where a return by a sheriff showed that he delivered seisin and possession of land taken in execution to the agent instead of the attorney of the creditor, the recording thereof was held to amount to a subsequent ratification. *Pratt v. Putnam*,

13 Mass. 364. See also *Herring v. Polley*, 8 Mass. 113.

Suit to Try Title.—In *Gillis v. Bailey*, 17 N. H. 18, it was held that a suit prosecuted by a corporation in the lessee's name was not a ratification of a lease made by their agent, the suit being brought merely to try the title.

1. *Gibson v. Norway Sav. Bank*, 69 Me. 579.

2. *Cake's Appeal*, 110 Pa. St. 65; *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570.

Illustrations—Suit to Enforce Contract as Ratification.—An action against the mortgagor to recover possession of land is a ratification of the act procuring the mortgage. *North Brookfield Sav. Bank v. Flanders*, 161 Mass. 335.

So an action for goods, claiming under a mortgage, was held to ratify the act of an attorney in taking the mortgage in the plaintiff's name. *Partridge v. White*, 59 Me. 564. And in *Eaton v. Knowles*, 61 Mich. 625, it was held that a wife whose husband had assumed to act as her agent in purchasing a mortgage, ratifies his act by bringing suit for breach of covenant in the deed of assignment.

Where an officer, having served a writ of replevin, allowed, as the special agent of the plaintiff, the property replevied to remain in the possession of a third person, who made an agreement in writing, not under seal, with the officer, to redeliver the property to him on demand, and to guarantee to him, as the agent of the plaintiff, a reasonable rent for the use thereof in the mean time, and the plaintiff brought an action on the contract in his own name, it was held that the contract was made with the officer as the agent of the plaintiff, and that the bringing of the action thereon was a ratification of the agency. *Fiedler v. Smith*, 6 Cush. (Mass.) 336.

Pleading Contract—Proof of Ratification.—In *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, it was held that the act of the assumed agent of a corporation was ratified by the corporation in pleading, in a mandamus proceeding in which it was plaintiff, the existence of the contract made by the agent.

3. *Beidman v. Goodell*, 56 Iowa 592; *Eadie v. Ashbaugh*, 44 Iowa 519; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Taylor v. Gardiner*, 8 Manitoba 310; *Ingraham v. Barber*, 72 Ga. 158.

4. *Wilson v. Poulter*, 2 Stra. 859; *Billon v. Hyde*, 1 Atk. 126; *Union Trust Co. v. Phillips* (S. Dak., 1895), 63 N. W. Rep. 903; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Frank v. Jenkins*, 22 Ohio St. 597.

In *Beloit Bank v. Beale*, 34 N. Y. 473, it was held that where a principal, with full knowledge of a fraud perpetrated by his

authority, or from the vendee,¹ as for debt due, is *prima facie* evidence of ratification of the unauthorized sale.

6. Ratification of Instruments under Seal.—It is a rule of common law that the authority to execute a contract must be of the same dignity as is required in the execution of the authority conferred, and so the ratification of an unauthorized act, the authority for which might have been by parol, may be made in any manner expressing assent; but a deed or other sealed instrument cannot be ratified except by writing under seal.²

agent in the disposition of property purchased with his money, elects to prosecute to judgment for the money so misappropriated, he affirms the acts of his agent, and cannot afterwards pursue the property which he had elected to treat as that of his agent. See also *Morris v. Rexford*, 18 N. Y. 552.

1. *Pardridge v. Bailey*, 20 Ill. App. 351; *Bailey v. Pardridge*, 134 Ill. 188, *affirming* 35 Ill. App. 121; *Lloyd v. Brewster*, 4 Paige (N. Y.) 537, 27 Am. Dec. 88.

Assumpsit for Value of Goods.—The owner of the goods may, however, bring suit to recover the value of goods upon an implied promise to pay, and such action will not necessarily ratify the unauthorized contract of sale made by the agent. So where a salesman in a store sold goods, and at the same time agreed to take back damaged goods previously sold by him to the purchaser, and his principal, denying his authority to make such a promise, repudiated the agreement, and notified the purchaser that he would not take back the former goods, the bringing of a subsequent action by the principal to recover the price of the goods last sold does not necessarily ratify the agent's unauthorized agreement, so as to prevent the plaintiff from recovering without performing that agreement; but in such case the authority of the agent to make the promise, and the ratification of his promise by the principal, are both questions of fact for the determination of the jury; and a charge which assumes that he had authority, or that there was a sufficient ratification to bind the principal, was properly refused. *Carew v. Lillenthall*, 50 Ala. 44.

And in *Gould v. Blodgett*, 61 N. H. 115, it was held that an action of assumpsit against a person to whom the agent has delivered his principal's property in payment of his own debt is not a ratification of the unauthorized delivery.

An Action of Trover, however, is not such a suit as ratifies the unauthorized act of the agent, but on the other hand, being expressly for the recovery of the goods themselves, such an action disaffirms the unauthorized disposition of the chattels. *Smith v. Hodson*, 4 T. R. 211. In this case it was held that if a bankrupt on the eve of his bankruptcy fraudulently delivers goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover.

Sale of Land—California.—Under the *California Civ. Code*, §§ 2309-10, which provides that when a particular mode or form is necessary to confer authority, ratification can be made only in the same manner, it is held

that acceptance of part of the purchase money paid for land and bringing suit for the balance are not a ratification. See *Salfield v. Sutter County Land Imp., etc., Co.*, 94 Cal. 546.

Suit for Price No Ratification of Warranty.—Bringing a suit for the price of a horse, which the agent had sold, was held not a ratification of an unauthorized warranty. *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210.

Sale Made on Unauthorized Terms.—In *Shoninger v. Peabody*, 59 Conn. 588, it was held that the ratification of an agent's sale on the terms on which he testifies it was made was not shown by continuing an action for the purchase price after his testimony, when this is contradicted by the other party.

2. *Georgia.*—*Beal v. Crafton*, 5 Ga. 301; *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Pollard v. Gibbs*, 55 Ga. 45.

Illinois.—*Maus v. Worthing*, 4 Ill. 26.

Maine.—*Stetson v. Patten*, 2 Me. 358, 11 Am. Dec. 111; *Paine v. Tucker*, 21 Me. 138, 38 Am. Dec. 255.

Michigan.—*Palmer v. Williams*, 24 Mich. 328.

Mississippi.—*Adams v. Power*, 52 Miss. 828.

Missouri.—*Hawkins v. McGroarty*, 110 Mo. 550, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 436.

New Hampshire.—*Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

New Jersey.—*Tappan v. Redfield*, 5 N. J. Eq. 339.

New York.—*Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Wells v. Evans*, 20 Wend. (N. Y.) 251; *Slocum v. Gilman*, 84 Hun (N. Y.) 405.

Pennsylvania.—*McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Cooper v. Rankin*, 5 Binn. (Pa.) 613; *Bellas v. Hays*, 5 S. & R. (Pa.) 427, 9 Am. Dec. 385; *Grove v. Hodges*, 55 Pa. St. 504.

Tennessee.—*Turbeville v. Ryan*, 1 Humph. (Tenn.) 113, 34 Am. Dec. 622; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306.

Texas.—*Zimpelman v. Keating*, 72 Tex. 318.

Where Authority Required to be in Writing.—In *Ragan v. Chenault*, 78 Ky. 545, it was held that an agent could not bind his principal as surety for another unless his authority so to do was in writing, the statute requiring it, and that a subsequent parol ratification by the principal, of such act, did not make the original signing effective.

Principal Estopped to Deny Deed.—But such a deed may become binding upon the principal on the ground of estoppel.¹

Ratification by Partnership.—In the case of a partnership, however, it is now well established in most of the states of the Union that a sealed contract relating to the partnership business, executed by one of the several partners, is binding on all, although without authority under seal, if they subsequently ratify it by giving their assent, which may be proved by the acts of the parties and the circumstances of the case, or by their verbal declarations or admissions.²

Seal Surplusage.—When, however, no seal was required, the mere fact that the instrument has been so executed will not necessitate a ratification under seal.³

Antedated Power of Attorney.—Where an attorney appointed by parol executed a bond in the name of the principal and afterwards the principal gave him a regular power of attorney, dated prior to the bond, this was held a good ratification of the bond. *Milliken v. Coombs*, 1 Me. 343, 10 Am. Dec. 70.

Assignment of Mortgagee's Interest.—Where a sheriff sold certain mortgaged premises under an order of court, void by reason of want of authority in the court to make the order, and by direction of the mortgagee made a deed by which he undertook to convey the fee of the lands, it was held, in a suit in equity against the mortgagee and others, that the sheriff must be regarded as acting as the private agent of the mortgagee, that the deed would be upheld to the extent of the mortgagee's interest, and would operate as an assignment of his legal estate in the premises, and that the fact that the authority from him to the sheriff was by parol would not render the instrument void under the statute of frauds, since the mortgagee's admission of the facts in his answer to the bill in which the transaction was relied upon, was a ratification. *Stoney v. Shultz*, 1 Hill Eq. (S. Car.) 465, 27 Am. Dec. 429.

Contract for Sale of Land.—As it is not necessary that a contract for the sale of land be in writing, an unauthorized contract for the sale may be ratified in any manner showing an assent thereto. *Powell v. Gossom*, 18 B. Mon. (Ky.) 179; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Brown v. Eaton*, 21 Minn. 409; *Dickerman v. Ashton*, 21 Minn. 538; *Goss v. Stevens*, 32 Minn. 472; *Breithaupt v. Thurmond*, 3 Rich. (S. Car.) 216.

Parol Acknowledgment of Authority under Seal.—In *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152, it was held that a subsequent parol acknowledgment that an agent had authority under seal to execute a prior deed was competent, but that if the agent had no such authority the subsequent parol acknowledgment and ratification of the deed would not bind the principal.

1. *Palmer v. Williams*, 24 Mich. 328; *Hyatt v. Clark*, 118 N. Y. 563.

Deeds Binding Principal by Estoppel.—In *Zimelman v. Keating*, 72 Tex. 318, it was held that if the principal adopt the sale and receive the purchase money, with full knowledge of the facts, it would be a ratification by estoppel.

So in *Grove v. Hodges*, 55 Pa. St. 504, it

was held that the principal, by accepting the proceeds of the unauthorized execution of a deed, was bound by it as if he had signed and sealed it. And in *Fouch v. Wilson*, 59 Ind. 93, it was held that a principal, after taking possession of land mortgaged, could not deny the unauthorized act of his agent in securing the mortgage.

2. *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Smith v. Kerr*, 3 N. Y. 144; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286, 5 Johns. Ch. (N. Y.) 351; *Bond v. Aitken*, 6 W. & S. (Pa.) 165, 40 Am. Dec. 550; *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738; *Peine v. Weber*, 47 Ill. 41; *Pike v. Bacon*, 21 Me. 280, 38 Am. Dec. 259; *Swan v. Stedman*, 4 Met. (Mass.) 548; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731; *Purviance v. Sutherland*, 2 Ohio St. 486; *McDonald v. Eggleston*, 26 Vt. 154, 60 Am. Dec. 303. See also the title PARTNERSHIP.

In some jurisdictions, however, this strictness of the rule at common law is adhered to. See *Tappan v. Redfield*, 5 N. J. Eq. 339; *Turbeville v. Ryan*, 1 Humph. (Tenn.) 113, 34 Am. Dec. 622; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261, 44 Am. Dec. 306. See also the title PARTNERSHIP.

3. *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Minor v. Willoughby*, 3 Minn. 225; *Dickerman v. Ashton*, 21 Minn. 538; *Adams v. Power*, 52 Miss. 828; *Worrall v. Munn*, 5 N. Y. 240, 55 Am. Dec. 330; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Evans v. Wells*, 22 Wend. (N. Y.) 340; *State v. Spartanburg, etc.*, R. Co., 8 S. Car. 129. But see *Pollard v. Gibbs*, 55 Ga. 45.

Lease Ratified by Parol.—And in *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338, it was held that a parol ratification of a lease for seven years gives to the tenant an estate at will, and if it continue more than a year, an estate from year to year, of which he cannot be dispossessed except upon having received three months' notice.

In California it is expressly provided by statute that a ratification can be made only in the manner that would have been necessary to confer an original authority, or where an oral authorization would suffice by accepting or retaining the benefit of the act, with notice thereof. Cal. Civ. Code, § 2310. See *Bordeferre v. Den*, 106 Cal. 594; *Goetz v. Goldbaum* (Cal., 1894), 37 Pac. Rep. 646.

Exception to General Rule—Massachusetts.—A notable exception to the general rule obtains in *Massachusetts*, where it is held that in other cases, as well as in the case of partnership, a sealed instrument may be ratified by parol.¹

7. Effect of Ratification—*a.* IN GENERAL.—By the ratification of the unauthorized act the relation of principal and agent, with all the rights and duties incident thereto, is as fully established as if the authority had been conferred originally; the ratification relates back to the time of the performance of the acts, as expressed in the familiar maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*²

1. *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Swan v. Stedman*, 4 Met. (Mass.) 548.

2. *Wolff v. Horncastle*, 1 B. & P. 316; *Goodtitle v. Woodward*, 3 B. & Ald. 689, 5 E. C. L. 424; *Foster v. Bates*, 12 M. & W. 226; *Heslop v. Baker*, 8 Exch. 417; *Wilson v. Tumman*, 6 M. & G. 242, 46 E. C. L. 242; *Buron v. Denman*, 2 Exch. 167; *Macleane v. Dunn*, 1 M. & P. 761.

United States.—*Bronson v. Chappell*, 12 Wall. (U. S.) 681; *Drakely v. Gregg*, 8 Wall. (U. S.) 242; *Clark v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 338; *Courcier v. Ritter*, 4 Wash. (U. S.) 549.

Alabama.—*McGowen v. Garrard*, 2 Stew. (Ala.) 479; *Reynolds v. Dothard*, 11 Ala. 531; *Lee v. Fontaine*, 10 Ala. 755, 44 Am. Dec. 505; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Chapman v. Lee*, 47 Ala. 143; *Cox v. Robinson*, 2 Stew. & P. (Ala.) 91.

Arkansas.—*Irons v. Reyburn*, 11 Ark. 378; *Gist v. Harkrider* (Ark., 1891), 15 S. W. Rep. 187.

California.—*Taylor v. Robinson*, 14 Cal. 396.

Colorado.—*Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248.

Connecticut.—*Bulkeley v. Derby Fishing Co.*, 2 Conn. 252, 7 Am. Dec. 271; *Church v. Sterling*, 16 Conn. 388; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

Georgia.—*Perry v. Hudson*, 10 Ga. 362; *Southern Express Co. v. Palmer*, 48 Ga. 85; *Bray v. Gunn*, 53 Ga. 144; *Lee v. West*, 47 Ga. 311; *Weaver v. Ogletree*, 39 Ga. 586.

Kentucky.—*Barbour v. Craig*, Litt. Sel. Cas. (Ky.) 213.

Illinois.—*Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330; *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Goodell v. Woodruff*, 20 Ill. 191; *Ohio, etc., R. Co. v. Middleton*, 20 Ill. 629; *Roby v. Cossitt*, 78 Ill. 638.

Indiana.—*U. S. Express Co. v. Rawson*, 106 Ind. 215; *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770; *Henry v. Heeb*, 114 Ind. 275; *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85.

Iowa.—*Bell v. Byerson*, 11 Iowa 233, 77 Am. Dec. 142; *Coffin v. Gephart*, 18 Iowa 256; *Smith v. Tramel*, 68 Iowa 488.

Louisiana.—*Kehlor v. Kemble*, 26 La. Ann. 713; *Sentell v. Kennedy*, 29 La. Ann. 679; *Bloodworth v. Jacobs*, 2 La. Ann. 25; *Dunbar v. Bullard*, 2 La. Ann. 810; *Overby v.*

Overby, 18 La. Ann. 546; *Meyers v. Simmons*, 19 La. Ann. 370.

Maine.—*Cowan v. Wheeler*, 31 Me. 439; *Forsyth v. Day*, 46 Me. 176; *Blanchard v. Waite*, 28 Me. 51, 48 Am. Dec. 474; *Fiske v. Holmes*, 41 Me. 441.

Massachusetts.—*Williams v. Mitchell*, 17 Mass. 98; *Lent v. Padelford*, 10 Mass. 230, 6 Am. Dec. 119; *Fisher v. Willard*, 13 Mass. 379; *Odiorne v. Maxcy*, 15 Mass. 39; *Frothingham v. Haley*, 3 Mass. 68; *Brigham v. Peters*, 1 Gray (Mass.) 139; *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111; *Eaton v. Littlefield*, 147 Mass. 122.

Michigan.—*Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Detroit v. Jackson*, 1 Dougl. (Mich.) 106.

Minnesota.—*Lowry v. Harris*, 12 Minn. 255; *Goss v. Stevens*, 32 Minn. 472; *Wisconsin v. Torinus*, 26 Minn. 1; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145.

Mississippi.—*Baker v. Byrne*, 2 Smed. & M. (Miss.) 193; *Kountz v. Price*, 40 Miss. 341.

Missouri.—*Ruggles v. Washington County*, 3 Mo. 496; *Little v. Stettheimer*, 13 Mo. 572; *Summerville v. Hannibal, etc., R. Co.*, 62 Mo. 391; *Golson v. Ebert*, 52 Mo. 260; *Nesbitt v. Helser*, 49 Mo. 383.

Nebraska.—*Rich v. State Nat. Bank*, 7 Neb. 201, 29 Am. Rep. 382.

New Hampshire.—*Despatch Line of Packets v. Bellamy Mfg. Co., etc.*, 12 N. H. 205, 37 Am. Dec. 203; *Low v. Connecticut, etc., R. Co.*, 46 N. H. 284; *Grant v. Beard*, 50 N. H. 129; *Davis v. Haverhill School Dist.*, 44 N. H. 399.

New Jersey.—*Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728.

New York.—*Rogers v. Kneeland*, 10 Wend. N. Y. 219; *Cairnes v. Bleeker*, 12 Johns. (N. Y.) 300; *Weed v. Carpenter*, 4 Wend. (N. Y.) 219; *Towle v. Stevenson*, 1 Johns. Cas. (N. Y.) 110; *Brower v. Lewis*, 19 Barb. (N. Y.) 574; *Smith v. Tracy*, 36 N. Y. 79; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Hankins v. Baker*, 46 N. Y. 666; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Watson v. Gray*, 4 Abb. App. Dec. (N. Y.) 540.

Ohio.—*Pollock v. Cohen*, 32 Ohio St. 514; *Woodward v. Suydam*, 11 Ohio 360.

Pennsylvania.—*Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654; *Vanhorne v. Frick*, 6 S. & R. (Pa.) 90; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. St. 426; *Berger's Appeal*, 96 Pa. St. 443.

Texas.—*Brock v. Jones*, 16 Tex. 461; *Vincent v. Rather*, 31 Tex. 77, 98 Am. Dec. 516.

Torts.—And this rule is applicable to cases of tort as well as to cases of contract.¹

Ratification Irrevocable.—A ratification once made is irrevocable.²

b. AS BETWEEN PRINCIPAL AND AGENT.—The ratification operates *per se* as an adoption of the act of the agent, and not merely as presumptive evidence of previous authority.³

Ratification Releases Agent.—And by the act of ratification the principal assumes all responsibility for the act or contract, and the agent is thereby relieved if his act has been done as agent merely.⁴ The principal in ratifying the act confirms it as done, and so cannot hold the assumed agent responsible for not doing the act in the manner in which he would have been bound to perform it if authorized.⁵

Entitles Agent to Expenses.—And the agent is entitled to all expenses incurred as if he had acted with full authority.⁶

c. LIABILITY OF PRINCIPAL AND AGENT TO THIRD PARTIES.—By the act of ratification the principal assumes the same liability with respect to third parties as if he had conferred authority in the beginning.⁷ Upon ratifying the putting of his name to a note the principal becomes as liable as if he had made the note originally.⁸

Distinction between Ratification of Contracts and Torts.—As to the liability of the agent to third parties subsequent to the ratification, a distinction must be observed between contracts and torts. The ratification of the agent's unauthorized contracts transfers all the rights and liability therein to the alleged principal.⁹ But the ratification of the agent's tortious acts, although it relieves him of all liability to his principal, does not remove his personal liability to the party injured.¹⁰

Vermont.—Whitwell v. Warner, 20 Vt. 425; Bigelow v. Denison, 23 Vt. 564; Brooks v. Fletcher, 56 Vt. 624.

Virginia.—Downer v. Morrison, 2 Gratt. (Va.) 237.

Wisconsin.—Weiseger v. Wheeler, 14 Wis. 101; Brown v. La Crosse City Gas Light, etc., Co., 21 Wis. 51; Stewart v. Mather, 32 Wis. 344.

Effect is Given to the Specific Act Only.—As was held in Baldwin v. Burrows, 47 N. Y. 199, the ratification is not retroactive to the extent of binding the principal for other acts in excess of the authority of the agent.

1. Wilson v. Tumman, 6 M. & G. 242, 46 E. C. L. 242. See also *supra*, this section, *What Acts may be Ratified*.

2. Silverman v. Bush, 16 Ill. App. 437; Andrews v. Aetna L. Ins. Co., 92 N. Y. 596; Avila v. Manhattan Chemical Co., 32 Hun (N. Y.) 1; Rowland v. Barnes, 81 N. Car. 234; Brock v. Jones, 16 Tex. 461. See *supra*, this section, *Ratification—Nature*.

3. Commercial Bank v. Warren, 15 N. Y. 577.

4. See Spittle v. Lavender, 2 Brod. & B. 452, 6 E. C. L. 224; Aetna Ins. Co. v. Sabine, 6 McLean (U. S.) 393; Bray v. Gunn, 53 Ga. 144; Sheffield v. Ladue, 16 Minn. 388, 10 Am. Rep. 145; Collins v. Butts, 10 Wend. (N. Y.) 399; Berger's Appeal, 96 Pa. St. 443.

5. Menkens v. Watson, 27 Mo. 163.

6. Frixione v. Tagliaferro, 10 Moore P. C. 175; Hovil v. Pack, 7 East 164.

7. Spittle v. Lavender, 2 Brod. & B. 452, 6 E. C. L. 224; Maclean v. Dunn, 4 Bing. 722, 15 E. C. L. 129; Burns v. Lane, 23 Ill. App. 504; Moore v. Pendleton, 16 Ind. 481; Sheffield v.

Ladue, 16 Minn. 388, 10 Am. Rep. 145; Watson v. Gray, 4 Abb. App. Dec. (N. Y.) 540; Hess v. Baar, 14 Misc. Rep. (N. Y. C. Pi.) 286, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 429.

8. Walter v. School Trustees, 12 Ill. 63; Bigelow v. Denison, 23 Vt. 564.

9. Spittle v. Lavender, 2 Brod. & B. 452, 6 E. C. L. 224; Bray v. Gunn, 53 Ga. 144; Roby v. Cossitt, 78 Ill. 638; Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146.

Third Party's Rights against Agent.—But in Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62, it was maintained that the subsequent ratification of an unauthorized note did not relieve the agent of his liability thereon. Certainly this would be the law where the authority was so executed as to render the agent liable thereon. Lucas v. Barrett, 1 Greene (Iowa) 510; Palmer v. Stephens, 1 Den. (N. Y.) 471.

10. Stephens v. Elwall, 4 M. & S. 259; Featherstonhaugh v. Johnston, 8 Taunt. 237, 4 E. C. L. 86; Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177; Richardson v. Kimball, 28 Me. 463.

Act in Behalf of Government.—There is an exception to the general rule, however, in the case of the crown or government; for it is held that if the crown ratifies an act, the character of the act becomes altered; the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but he has a remedy against the crown only. Buron v. Denman, 2 Exch. 167. See also McKeel v. Bass, 5 Coldw. (Tenn.) 151; Waller v. Parker,

d. AS TO INTERVENING RIGHTS.—An exception to the general rule as to the retroactive effect of the ratification of an unauthorized act prevails in the interest of third parties who have acquired rights in the mean time; in such case the ratification will not be permitted to disturb the vested rights of outside parties.¹ So a ratification cannot defeat an attachment levied on the property of a debtor after a sale by or to the agent.²

Vested Rights—Where, however, the doctrine of relation is applied merely for the protection of a clearly superior equity, such an application would be consistent with recognized legal principles, even though it should interfere with the claims of third persons resting upon an inferior equity.³

XI. TERMINATION—1. By Act of Parties—a. IN ACCORDANCE WITH AGREEMENT.—Where the agreement constituting the agency provides or contains a stipulation or reservation that the agency may be revoked by the principal he may do so in accordance therewith, even though it is coupled with an interest.⁴

5 Coldw. (Tenn.) 476, where it was held to be a good defense that the tortious acts were done by order of the defendant's military superior.

1. *Parmelee v. Simpson*, 5 Wall. (U. S.) 81; *Johnson v. Johnson*, 31 Fed. Rep. 700; *Stoddard's Case*, 4 Ct. of Cl. 511; *Wittenbrock v. Bellmer*, 57 Cal. 12; *Lampson v. Arnold*, 19 Iowa 479; *Fiske v. Holmes*, 41 Me. 441; *McMahan v. McMahan*, 13 Pa. St. 376, 53 Am. Dec. 481; *Planters Bank v. Sharp*, 4 Smed. & M. (Miss.) 75, 43 Am. Dec. 470.

On this point Mr. Justice Story says: "Where an act is beneficial to the principal and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule [that ratification binds the principal, not only as to his agent, but as to third persons, and gives the ordinary rights and remedies both for and against him] seems generally applicable. *** On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third person to the consequences." Story on Agency, §§ 245, 246.

As was said in *McCracken v. San Francisco*, 16 Cal. 624: "If an individual pretending to be the agent of another should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract, if between its date and the attempted ratification he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone. So, also, contracts made upon an assumed agency for a single woman cannot be ratified by her, after marriage, without the consent of her husband; for her power to contract alone ceases with her marriage."

2. *Norton v. Alabama Nat. Bank* (Ala.,

1894), 14 So. Rep. 874, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 436; *Taylor v. Robinson*, 14 Cal. 396; *Pollock v. Cohen*, 32 Ohio St. 525; *Conner v. Littlefield*, 79 Tex. 76.

Intervening Rights of Third Parties Protected.—In *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612, it was held that the subsequent ratification of an assignment, by the principal, did not defeat the lien of a creditor who had caused a garnishment to be served.

In *Kempner v. Rosenthal*, 81 Tex. 12, it was held that the ratification of the receipt by an agent to collect a debt, of a conveyance of property in satisfaction of the debt, will not relate back to the time of the receipt of such conveyance, so as to defeat the lien of an attachment, levied in the mean while upon the property, although the deed was recorded before the levy.

3. *Williams v. Butler*, 35 Ill. 552. In this case it was held that the creation of a partnership by an agent without authority, if ratified by the person so made a partner, establishes that relation, and will cut off the intervening rights of third persons, if the doctrine is applied for the protection of a superior equity.

4. *Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co.*, 35 Fed. Rep. 22.

Termination in Accordance with Contract.—In *Doyle v. Phoenix Ins. Co.*, 25 Nova Scotia 436, it was held that under a contract of employment of a general agent for an insurance company providing that each party might terminate the agreement by giving the other written notice to that effect, and that the agent should not be entitled to any commission upon premiums collected or received after the expiration of such notice, either party might terminate it at a moment's notice.

A provision in an agreement between the owner of certain real estate, and a broker authorized to sell it upon certain terms, that the principal may withdraw the authority by giving the broker thirty days' notice and by paying him the agreed commissions if the property was sold within thirty days after the withdrawal, was held to be equivalent to a stipulation that it shall not be withdrawn otherwise. *Witherell v. Murphy*, 147 Mass. 417.

Tacit Renewal from Continuances.—In Stand-

Agreement for Term, if Satisfactory.—An agreement to employ one for a definite time, provided he prove satisfactory to the principal, may be terminated by the latter when in his judgment he is justified.¹

b. REVOCATION BY PRINCIPAL—(1) *In General*.—If no term of service has been agreed upon, the principal may at any time revoke the authority of his agent so far as it relates to things to be done and remaining unexecuted, unless the authority is coupled with an interest, or conferred for a valuable consideration to the principal.²

Authority to Sell Lands—To Appropriate Funds.—So an authority to sell land or other property, when not coupled with an interest, may be revoked at any time before the actual sale takes place,³ as may also an authority to appropriate funds for a purchase, or the payment of debts.⁴

ard Oil Co. v. Gilbert, 84 Ga. 714, it was held that where a written contract creating an agency for one year, at a fixed compensation, had been continued for successive years, there was a tacit renewal from year to year, and the agency could not be revoked so as to deprive the agent of monthly compensation for an unexpired portion of a year. See also *Sines v. Superintendents of Poor*, 58 Mich. 503.

1. *Tyler v. Ames*, 6 Lans. (N. Y.) 280.

And, on the other hand, a provision authorizing the termination for neglect or refusal, etc., dishonesty, or noncompliance with rules does not deprive the principal of the power to determine the employment so long as the agent is not in default. *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843.

A Mere Stipulation as to Compensation, that it is to be so much a year or month, does not constitute a contract for the time mentioned. *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Palmer v. Marquette, etc., Rolling Mill Co.*, 32 Mich. 274; *Haney v. Caldwell*, 35 Ark. 156; *Franklin Min. Co. v. Harris*, 24 Mich. 115.

But in *Norton v. Cowell*, 65 Md. 359, it was held that an offer to give employment upon terms stated, stipulating that "if you give me satisfaction at the end of the first year, I will increase your salary accordingly," was an agreement for one year.

2. *England*.—*Dalton v. Irvin*, 4 C. & P. 289, 19 E. C. L. 389; *Read v. Rann*, 10 B. & C. 438, 21 E. C. L. 106; *Mestaer v. Atkins*, 5 Taunt. 381; *Bristow v. Taylor*, 2 Stark. 50, 3 E. C. L. 312.

United States.—*Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843; *Wilcox, etc., Sewing Mach. Co. v. Ewing*, 141 U. S. 627.

California.—*Parke v. Frank*, 75 Cal. 364; *Brown v. Pforr*, 38 Cal. 550; *Barr v. Schroeder*, 32 Cal. 610.

Colorado.—*Darrow v. St. George*, 8 Colo. 592.

Georgia.—*Phillips v. Howell*, 60 Ga. 411.

Indiana.—*Kindig v. March*, 15 Ind. 248.

Louisiana.—*Spear v. Gardner*, 16 La. Ann. 383; *Jacobs v. Warfield*, 23 La. Ann. 395; *Babin's Succession*, 27 La. Ann. 114.

Maryland.—*Creager v. Link*, 7 Md. 259; *Attrill v. Patterson*, 58 Md. 226.

New Jersey.—*Hartshorne v. Thomas*, 43 N. J. Eq. 419.

Oregon.—*Simpson v. Carson*, 11 Oregon 361.

Pennsylvania.—*Blackstone v. Buttermore*, 53 Pa. St. 266; *Coffin v. Landis*, 5 Phila. (Pa.) 176; *Peacock v. Cummings*, 46 Pa. St. 434; *Hartley's Appeal*, 53 Pa. St. 212, 91 Am. Dec. 207.

Authority of Agent to Effect a Contract.—In *Warwick v. Slade*, 3 Campb. 127, it was held that the authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip till such time as they have actually subscribed the policy. And in *Farmer v. Robinson*, cited in 2 Campb. 339 note, it was held that although the agent had entered into a verbal agreement for the sale, but no written contract had been signed, as required, the principal might revoke the agency.

Client may Change Attorney.—A client has a right to change his attorney at his own volition, whatever may be his motive. *Trust v. Repoor*, 15 How. Pr. (N. Y. Super. Ct.) 570. See the title ATTORNEY AND CLIENT.

Revocation in Bad Faith.—In *Michael v. Nashville Mut. Ins. Co.*, 10 La. Ann. 737, it was held that a foreign insurance company, doing business through an agent here, cannot frustrate a claim in our courts on a contract with it by revoking its agent's power on the eve of the suit for a loss of which it has been notified. Such a proceeding, it was said, savored of bad faith; and an exception by the agent, when cited, that he was no longer such, would be overruled.

3. *Chambers v. Seay*, 73 Ala. 372; *Brown v. Pforr*, 38 Cal. 550; *Stensgaard v. Smith*, 43 Minn. 11; *Shisler's Estate*, 2 Pa. Dist. Rep. 588.

Remittance by Debtor to His Agent.—But a remittance of money or goods by a debtor to his agent, to be delivered to a creditor in discharge of his debt, is irrevocable after the creditor has assented thereto and signified his assent to the agent. *Creager v. Link*, 7 Md. 259.

4. *Gibson v. Minet*, 9 Moore 31; *Taylor v. Lendey*, 9 East 54; *Howard College v. Pace*, 15 Ga. 486; *Solomon v. Nicholas*, 113 Ill. 351; *Lewis v. Sawyer*, 44 Me. 332; *Dole v. Bodman*, 3 Met. (Mass.) 139; *Kelly v. Roberts*, 40 N. Y. 432.

Money Intrusted to Agent to Settle Suit.—In *Phillips v. Howell*, 60 Ga. 411, it was held that where one without consideration intrusted an agent with a sum of money to settle a lawsuit she had the power of revocation until the settlement was complete.

Stipulation against Revocation.—This power of revocation exists even though it be expressly stipulated that the agency is irrevocable¹ or exclusive.²

Authority Executed Wholly or in Part.—Of course if the authority has been executed it cannot then be revoked.³ As to revocation after partial execution, an eminent author states as the true principle, that if the authority admits of severance, or of being revoked as to the part which is unexecuted, either as to the agent or to third persons, then the revocation will be good as to the part unexecuted, but not as to the part already executed.⁴

Revocation after Sale Effected by Agent.—The agent cannot be deprived of the fruits of his labors; and when a sale is virtually effected by a duly authorized agent, if the principal takes the matter into his own hands he is still liable for the commission to his agent, since the latter is the procuring cause.⁵

(2) **When Agency is Coupled with an Interest.**—But an exception to the general rule as to the power to revoke exists where the authority or agency is coupled with an interest, given for a valuable consideration, or is part of a security.⁶

What Constitutes Authority Coupled with Interest.—To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power must be vested in the person to whom the agency or power is given,

Authority to Attorney to Collect Claims.—A direction to an attorney having claims in his hands for collection, to pay a part thereof in payment of the debt of a third person, may be revoked at any time before execution. *Beers v. Spooner*, 9 Leigh (Va.) 153.

So in *Swartz v. Earls*, 53 Ill. 237, it was held that this was merely an authority to the attorney to dispose of the proceeds of the claim in that manner, and such authority could at any time be revoked.

Authority to Pay Out Certain Moneys.—A subcontractor received money of the general contractor in excess of what was due him, as the agent of the general contractor, to pay debts due to laborers and materialmen, whereby to protect the principal from liability from the enforcement of liens, but instead of paying out the money deposited it with another for safe keeping, under a promise of the latter to pay the same only to the depositor, or upon his written order. The depository, on the demand of the principal to whom the money belonged, delivered the same to him. It was held that the depository was not liable to the agent for a breach of his contract, the principal having the right to revoke the agency of the subcontractor at any time before he paid out the money as directed. In such case the delivery of the money to the true owner will relieve the depository of liability to the agent from whom he received it. *Solomon v. Nicholas*, 113 Ill. 351.

Indorsees of Bill Agent for Payee.—An indorsee who holds a bill merely as the payee's agent has no interest therein, and his agency may be revoked. *Barker v. Prentiss*, 6 Mass. 430.

1. *Smart v. Sandars*, 5 C. B. 895, 57 E. C. L. 895; *Walker v. Denison*, 86 Ill. 142; *MacGregor v. Gardner*, 14 Iowa 326; *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Peacock v. Cummings*, 46 Pa. St. 434.

2. *Chambers v. Seay*, 73 Ala. 372; *Sanborn v. Rodgers*, 33 Fed. Rep. 851.

3. So in *People v. North River Sugar Re-*

fining Co., 121 N. Y. 582, 18 Am. St. Rep. 843, *affirming* 54 Hun (N. Y.) 354, it was held that the revocation of an authority, after it had been executed, could not avail to annul a contract made in conformity thereto.

4. Story on Agency (9th ed.), § 466; *Hodgson v. Anderson*, 3 B. & C. 842, 10 E. C. L. 247.

5. *Attrill v. Patterson*, 58 Md. 226; *Warren Chemical, etc., Co. v. Holbrook*, 118 N. Y. 586; *Keys v. Johnson*, 68 Pa. St. 42. See also *supra*, this title, *Duties and Liabilities Inter Se—Of Principal to Agent*.

Expenses Incurred by Agent before Revocation.—It may be stated generally, that if the agent, in the prosecution of the business of his principal, has fairly and in good faith, before notice of the revocation, entered into any engagements or come under any liability, the principal will be bound to indemnify him. *U. S. v. Jarvis*, Dav. (U. S.) 274.

In *Meister v. Cleveland Dryer Co.*, 11 Ill. App. 227, where the goods to be sold had been offered to a customer at an authorized price and the agent had agreed to sell at the stated price, it was held that the principal was bound by the agent's acts. See *supra*, this title, *Duties and Liabilities Inter Se—Of Principal to Agent*; also the title *BROKERS*.

6. *Bromley v. Holland*, 7 Ves. Jr. 28; *Walsh v. Whitcomb*, 2 Esp. 565; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 203; *Viser v. Bertrand*, 16 Ark. 296; *Hynson v. Noland*, 14 Ark. 710; *Posten v. Rasette*, 5 Cal. 467; *Guthrie v. Wabash R. Co.*, 40 Ill. 109; *Walker v. Denison*, 86 Ill. 142; *Le Moyne v. Quimby*, 70 Ill. 399; *Baker v. Baird*, 79 Mich. 255; *Hill v. Day*, 34 N. J. Eq. 150; *Hutchins v. Hebbard*, 34 N. Y. 24; *Wheeler v. Knaggs*, 8 Ohio 169; *Fisher v. New York, etc., Coal Field R., etc., Co.*, 31 W. N. C. (Pa.) 502.

Failure of Consideration.—Where, however, the consideration fails, the agency becomes revocable. *Ex p. Smither*, 1 Deac. 413; *Dunbar v. Foreman*, 40 S. Car. 500, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 446.

so that he may deal with it in his own name;¹ such that in the event of the principal's death the authority could be exercised in the name of the agent.² There must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority.³ So an interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation.⁴

Agency for Protection of Party Authorized.—But where the agency is created for the protection of the party authorized, where it is a part of the security or necessary to effectuate it, it is then coupled with an interest and irrevocable,⁵ as

1. *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 203; *Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co.*, 35 Fed. Rep. 25; *Brookshire v. Vonnannon*, 6 Ired. (N. Car.) 231.

Chief Justice Marshall, in *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, said: "The power must be engrafted on an estate in the thing. The words themselves seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it."

2. *Bonney v. Smith*, 17 Ill. 531; *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76.

Partners.—The partnership of the parties does not of itself constitute a power coupled with an interest. *Travers v. Crane*, 15 Cal. 12.

Power to Receive without Assignment of Debt.

—To authorize the execution of a power, after the death of the principal, there must be an interest in the subject of the power; where a creditor has power to receive a debt, for liquidating his own claim, without an assignment of the debt, or any security to which the power is ancillary, the power is revoked by the death of the principal. But where a person pays money to another and receives as a security an order on a third person for the amount so paid, such order is a power coupled with an interest in the subject of the power, and is not revoked by the death of the principal, and the fact that the principal is administrator does not alter the rule. But if the holder of such order, after the death of the maker, and knowing of such death, pays money to a creditor of the maker, upon the faith of such order, he does so in his own wrong and without authority. *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412.

Auctioneer.—An auctioneer who is employed to sell goods has not such an interest as will prevent revocation. *Taplin v. Florence*, 10 C. B. 744, 70 E. C. L. 744.

Interest Conferred by Contemporary Contract.—The interest in the subject matter may be one conferred by a contract contemporaneous with the act creating the agency. *Sanborn v. Rodgers*, 33 Fed. Rep. 851.

3. *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76.

4. **Authority to Sell on Commission.**—*Raleigh v. Atkinson*, 6 M. & W. 670; *Walker v. Walker*, 125 U. S. 339; *Chambers v. Seay*, 73 Ala. 372; *Barr v. Schroeder*, 32 Cal. 609; *McGriff v. Porter*, 5 Fla. 373; *Gilbert v. Holmes*, 64 Ill. 549; *Alworth v. Seymour*, 42 Minn. 526; *Simpson v. Carson*, 11 Oregon 361; *Blackstone v. Buttermore*, 53 Pa. St. 266; *Coffin v. Landis*, 46 Pa. St. 426.

Power to Lend Money for Commission.—The power to lend money and collect interest for an annual commission is not a power coupled with an interest. *Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co.*, 35 Fed. Rep. 22.

Agency to Sell Land on Commission.—An agreement to pay an agent for the sale of land, according to price obtained from purchase, is revocable. *Hamilton v. Frothingham*, 59 Mich. 253; *In re Shisler's Estate*, 2 Pa. Dist. Rep. 588.

Agency to Solicit Insurance on Commission.—An insurance agent soliciting insurance under an agreement for a commission upon the premiums received and renewals has no such interest in the subject matter as will take away the right of the principal to terminate the agency. *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843.

Power of Attorney to Operate a Patent.—An instrument by which a patentee appoints another his "sole agent" for the purpose of working and developing the business of the patent, in consideration of a payment to be made by the latter to the former as royalty of a specified sum for each article, with power to negotiate the sale of the patent, gives the agent no interest in the patent. *Johnson R. Signal Co. v. Union Switch, etc., Co.*, 59 Fed. Rep. 20.

An Authority to Collect a Debt upon a Commission of one half of the amount to be collected may be revoked at any time. *Hartley's Appeal*, 53 Pa. St. 212, 91 Am. Dec. 207; *Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co.*, 35 Fed. Rep. 22.

So in *Flanagan v. Brown*, 70 Cal. 254, where the owner of a promissory note delivered it, indorsed in blank, to another, with power to manage, transfer, or dispose of it, under an agreement whereby its proceeds were to be equally divided between them, it was held that the transferee was a mere agent for collection, and a release of the note subsequently executed by the owner to the payee was a defense to an action by the agent.

5. *Walsh v. Whitcomb*, 2 Esp. 565; *Skinner v. Ft. Wayne, etc., R. Co.*, 58 Fed. Rep. 55; *Barr v. Schroeder*, 32 Cal. 609.

A Warrant of Attorney to Confess a Judgment is not revocable, and the court may grant

where the power to collect a debt is given as a security for the purpose of reimbursing the agent.¹ A power to sell, where the property is delivered to the agent to dispose of it for the protection of himself and other creditors, is an authority coupled with an interest, and therefore irrevocable.²

(3) *How Effected*.—Revocation may be effected in any manner showing the intention of the principal to withdraw his authority, either expressly or by implication; even though the authority be in writing or under seal, it is held that it may be revoked by parol.³

leave to enter up the judgment though the party does revoke it. *Odes v. Woodward*, 2 *Ld. Raym.* 849; *Eneu v. Clark*, 2 *Pa. St.* 234, 44 *Am. Dec.* 191; *Kindig v. March*, 15 *Ind.* 248. But a simple power from a principal to his attorney, authorizing him to confess judgment in favor of a third person, which is unsupported by a consideration and is not given as a security for a debt, is held to be revocable. See *Evans v. Fearn*, 16 *Ala.* 689, 50 *Am. Dec.* 197.

Order of Debtor to Agent to Pay Creditor.—In *Goodwin v. Bowden*, 54 *Me.* 424, it was held that if a debtor having funds in the hands of his agent verbally orders him to pay a creditor, and the agent promises to execute the order, and the creditor relies upon the agent's promise, the debtor's power to control so much of the funds as is necessary to redeem such promise is gone.

Agency Conferred on Surety.—In *Hynson v. Noland*, 14 *Ark.* 710, it was held that the authority to act as agent in the receipt, control, and disbursement of the public moneys, given by an officer having charge of public moneys, to one of his securities, for the protection of himself and co-securities, is in the nature of a power coupled with an interest, and irrevocable.

1. **A Power of Attorney to Collect and receive money** to secure previous advances is not revocable, *Farrell v. Amberg*, 8 *Misc. Rep.* (N. Y. C. Pl.) 220; but, so far as the agent is concerned, only to the amount of the advances, *Marziou v. Pioche*, 8 *Cal.* 536. In the latter case *Burnett, J.*, said: "It makes no difference whether the advances he made before or after the power is given, so they are approved by the principal. And when the principal, as in this case, expressly gives the power, for the very purpose of providing the means to return the advances made by the agent, there would seem to be no doubt as to the irrevocable character of this power."

2. *Hodgson v. Anderson*, 3 *B. & C.* 842, 10 *E. C. L.* 247; *Gaussen v. Morton*, 10 *B. & C.* 731, 21 *E. C. L.* 157; *Watson v. King*, 4 *Campb.* 272; *Knapp v. Alvord*, 10 *Paige* (N. Y.) 205, 40 *Am. Dec.* 241; *Bergen v. Bennett*, 1 *Cal. Cas.* (N. Y.) 1, 2 *Am. Dec.* 281; *Raymond v. Squire*, 11 *Johns.* (N. Y.) 47; *Marfield v. Douglass*, 1 *Sandf.* (N. Y.) 360; *Smyth v. Craig*, 3 *W. & S.* (Pa.) 14.

A agreed with B to deliver some cotton at the gin of C, to be ginned, and then taken by B and sold, and the proceeds applied to the payment of a debt which A owed B, and some other debts which A was owing, and the balance, if any remained, to be paid over by B to A. After the cotton was delivered at the gin of C, A gave notice to C not to let B

have the cotton, but C notwithstanding delivered it to B, and A then brought an action against C for the cotton. It was held that B had a power to take and sell the cotton, coupled with an interest irrevocable by A, and that A could not therefore maintain an action against C for delivering it to him. *Denson v. Thurmond*, 11 *Ark.* 586.

Advances by a Factor.—As to the effect on the revocability of the authority of a factor, of the fact that advances have been made by the factor on goods intrusted to him, see *Smart v. Sandars*, 5 *C. B.* 895, 57 *E. C. L.* 895; *Brown v. M'Gran*, 14 *Pet.* (U. S.) 480; *Marziou v. Pioche*, 8 *Cal.* 536; and for a discussion of this subject see the title *COMMISSION MERCHANTS OR FACTORS*.

3. *Copeland v. Mercantile Ins. Co.*, 6 *Pick.* (Mass.) 198; *Rochester v. Whitehouse*, 15 *N. H.* 468; *Brookshire v. Brookshire*, 8 *Ired.* (N. Car.) 74, 47 *Am. Dec.* 341.

Disposition of Subject Matter.—Any disposition of the subject of the agency inconsistent with the authority conferred may operate as a revocation. *Simonton v. Minneapolis First Nat. Bank*, 24 *Minn.* 216.

The Sale of the Property by the principal or the execution of the power conferred will amount to a revocation. *Walker v. Denison*, 86 *Ill.* 142; *Gilbert v. Holmes*, 64 *Ill.* 548; *Torre v. Thiele*, 25 *La. Ann.* 418; *Elliot v. Barrett*, 144 *Mass.* 256.

An Assignment of a Judgment is held to be a revocation of the authority of the plaintiff's attorney to control the same. *Trumbull v. Nicholson*, 27 *Ill.* 149.

A Demand for Property sent to an agent terminates the agency. *Potter v. Merchants' Bank*, 28 *N. Y.* 641, 86 *Am. Dec.* 273; *Comley v. Dazian*, 114 *N. Y.* 161.

Bringing Suit.—In *Walker v. Barrington*, 28 *Vt.* 781, it was held that the bringing of an action on book account is not *per se* a revocation of an authority previously given by the plaintiff to the defendant to pay to a third person certain items contained in the plaintiff's account.

Appointment of Another Agent, when Revocation.—The mere appointment of another agent to execute the purpose will not operate as a revocation of the first appointment when not incompatible therewith. *Jones v. Commercial Bank*, 78 *Ky.* 413; *Hatch v. Coddington*, 95 *U. S.* 48.

So a landowner may employ several different agents to act for him in the sale of his land. *Ahern v. Baker*, 34 *Minn.* 98. And an authority given by a principal to an agent, to collect debts, is not necessarily revoked by the appointment of another to collect the same. *Davol v. Quimby*, 11 *Allen* (Mass.) 208.

Subagents.—The revocation of the authority of the primary agent operates as a revocation of the authority of the subagent.¹

(4) *When Effective—Notice of Revocation—As to the Agent.*—The act of revocation, so far as the agent is concerned, becomes operative from the time he has actual notice thereof; notice to third parties without notice to the agent will not effect a revocation as to him.²

As to Third Persons.—On the other hand, although notice is given to the agent, the revocation is effective as to third parties only when it is made to them, and acts of the agent in dealing with third parties without notice are binding on the principal.³ Where an agent is appointed in a particular busi-

But in *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198, it was held that an authority to sell given to one was revoked by a joint authority conferred on this one and another.

Sale by One of Two Independent Agents.—But a sale by one will operate as a revocation of the authority of the others. *Ahern v. Baker*, 34 Minn. 98.

General Superseding Special Agent.—The appointment to a general agency has been held to be a revocation of a special agency from the same principal. *Rapier v. Louisiana Equitable L. Ins. Co.*, 57 Ala. 101.

Severance of Interest of Joint Principals.—Where the principals jointly appoint an agent to act in a matter in which they are jointly interested, a severance of their interest revokes the authority. *Rowe v. Rand*, 111 Ind. 206.

Dissolution of Partnership.—So the dissolution of a partnership effects a revocation of an agency therefor. *Schlater v. Winpenny*, 75 Pa. St. 321.

Payment for Services as agreed may operate as a termination of the authority. *Reed v. Latham*, 40 Conn. 452.

Repeal of Statute Authorizing Public Agent.—An appointment of an agent of the state is revoked by a repeal of the statute under which the appointment is made. *State v. Walker*, 88 Me. 279; *Dudley v. Greene*, 35 Me. 14.

Louisiana.—In this state a power of attorney is revoked by the interdiction of the principal, but continues in force until the judgment to that effect has been rendered. The mandate does not expire by the seclusion of the principal or his confinement for treatment in an insane asylum, but it does by his seclusion. *Phelps v. Reinach*, 38 La. Ann. 547.

1. *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

In *Lehigh Coal, etc., Co. v. Mohr*, 83 Pa. St. 228, 24 Am. Rep. 161, it was held that the death of an agent acting under a letter of attorney containing a power of substitution was a revocation of the authority of an agent substituted by him under the power.

Subagent Deriving Authority from Principal.—But where the authority of the subagent emanates from the principal it is not affected by the revocation of the authority of the agent from whom he received his appointment. *Smith v. White*, 5 Dana (Ky.) 383.

2. *Salte v. Field*, 5 T. R. 215; *Weile's Case*, 7 Ct. of Cl. 535; *Fellows v. Hartford, etc., Steamboat Co.*, 38 Conn. 197.

In *North Chicago Rolling Mill Co. v. Hyland*, 94 Ind. 448, a foreign corporation having leased its works to its agent, and he, without authority from such corporation, continuing to operate the works in its name and retaining in his service an employee of the corporation without notice to him of the change, it was held that the corporation was liable to the employee.

Revocation by Letter.—If the revocation is made by letter it takes effect from the time of his receipt of the letter, and not from the date of mailing. *Robertson v. Cloud*, 47 Miss. 208. And his authority cannot be affected by a letter never received by him. *Sayre v. Wilson*, 86 Ala. 151.

Demand by Person without Evidence of Authority.—In *Tingley v. Parshall*, 11 Neb. 443, where by written contract A constituted B his agent to loan money and take securities for the payment of the same, and expressly provided that the authority could be revoked at A's written request, it was held that a demand for the securities, in writing, signed by a party claiming to be an attorney of A, without a written order, or proof of his authority, was not sufficient to authorize A to maintain an action for the face value of the securities.

3. *England.*—*Anonymous v. Harrison*, 12 Mod. 346.

United States.—*Lanusse v. Barker*, 3 Wheat. (U. S.) 101; *Johnson v. Christian*, 128 U. S. 374.

California.—*Van Dusen v. Star Quartz Min. Co.*, 36 Cal. 571, 95 Am. Dec. 209; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. Rep. 138.

Connecticut.—*Fellows v. Hartford, etc., Steamboat Co.*, 38 Conn. 197.

Illinois.—*Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Murphy v. Ottenheimer*, 84 Ill. 39, 25 Am. Rep. 424.

Indiana.—*Longworth v. Conwell*, 2 Blackf. (Ind.) 469; *Foellinger v. Leh*, 110 Ind. 238.

Louisiana.—*Harris v. Cuddy*, 21 La. Ann. 388.

Maryland.—*Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Baltimore v. Eschbach*, 18 Md. 276; *Andrews v. Clark*, 72 Md. 396.

Massachusetts.—*Com. v. Barnstable Sav. Bank*, 126 Mass. 526; *Rice v. Barnard*, 127 Mass. 241.

Mississippi.—*Planters' Bank v. Cameron*, 3 Smed. & M. (Miss.) 609.

Missouri.—*Lamothe v. St. Louis, etc., Marine R., etc., Co.*, 17 Mo. 204; *Fanning v. Cobb*, 20 Mo. App. 577.

ness, parties dealing with him in that business have a right to rely upon the continuance of his authority until in some way informed of its revocation.¹

Statutes Requiring Record of Revocation.—In some states the revocation of a power is required to be deposited for record in the proper office; and where the revocation is recorded according to the statute, the authority is terminated although the agent has no actual notice.² This principle, however, does not apply to a case where the agent had only a special authority to do a particular act.³

Constructive Notice.—Whatever is sufficient to put the party on inquiry is equivalent to actual notice.⁴

New Hampshire.—*Davis v. Lane*, 10 N. H. 160; *Beard v. Kirk*, 11 N. H. 393.

New York.—*Williams v. Birbeck, Hoffm. Ch.* (N. Y.) 359; *Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37; *Marsh v. Gilbert*, 4 Thomp. & C. (N. Y.) 259; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183; *Edwards v. Schaffer*, 49 Barb. (N. Y.) 291; *McNeilly v. Continental L. Ins. Co.*, 66 N. Y. 23; *Clafin v. Lenheim*, 66 N. Y. 301; *Barkley v. Rensselaer, etc.*, R. Co., 71 N. Y. 205.

Pennsylvania.—*Morgan v. Stell*, 5 Binn. (Pa.) 305.

Rhode Island.—*Anthony v. Phillips*, 17 R. I. 188, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 448.

South Carolina.—*Montgomery v. Eveleigh*, 1 McCord Eq. (S. Car.) 267.

Texas.—*Etna L. Ins. Co. v. Hanna*, 81 Tex. 487.

Vermont.—*Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634.

Virginia.—*Smith v. Watson*, 82 Va. 712.

Rule as to Notice Substantially Same as on Dissolution of Partnership.—It is well settled that where a general authority has once been conferred its revocation takes effect as to third persons only after it becomes known to them, unless indeed the principal has done his full duty in making it known; and when an authority is revoked, it is in general the duty of the principal to notify those persons who have had dealings with the agent as such; the rule on this subject being substantially the same as those relating to the dissolution of a copartnership and the power of a partner after the dissolution to bind the firm. *Per Seymour, J.*, in *Fellows v. Hartford, etc.*, *Steamboat Co.*, 38 Conn. 197.

Rule that Loss should Fall on One Enabling Agent to Act.—This rule of law is clearly in accordance with the principle that the one whose acts have contributed to enable another to do an act causing loss should suffer the loss rather than an innocent third party. *Caldwell v. Neil*, 21 La. Ann. 342, 99 Am. Dec. 738.

Payment to Agent without Notice.—So if without notice of revocation one makes a payment to an agent he cannot be held liable by the principal. *Meyer v. Hehner*, 96 Ill. 400; *Ulrich v. McCormick*, 66 Ind. 243; *Howe Mach. Co. v. Simler*, 59 Ind. 307; *Packer v. Hinkley Locomotive Works*, 122 Mass. 484.

Where one has been accustomed to pay premiums upon an insurance policy to an agent and to obtain proper receipts, and has paid his last premium to such agent but has not

obtained a receipt, he must have actual notice of the revocation of an agent's authority to receive the premiums before he can be charged with default. *Braswell v. American L. Ins. Co.*, 75 N. Car. 8.

Power to Represent Principal in Lawsuits.—Though a power to represent the principal in lawsuits, granted by public act, be revoked by private letter, courts and suitors without notice may consider the mandate as still subsisting. *Girard v. Hirsch*, 6 La. Ann. 651.

Corporation Succeeding Company of Same Name

—Where the defendant carrying on business under a corporate name authorized an agent to draw bills on his factor, and subsequently transferred the business to a company organized under the same name, it was held that he was liable to the factor for money paid or bills drawn by the agent after the transfer, and paid, without notice of the transfer. *Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37.

Revocation of Authority to Honor subsequent to Acceptance, but before Presentation.—The defendant authorized the plaintiff to honor drafts of a certain party, but shortly after he revoked the authority. Before the revocation, however, drafts were drawn on the plaintiff which were honored, but the drafts were not presented until after the notice of revocation was received, and could not have been so presented; it was held that defendant was liable to plaintiff for amount of drafts so made. *Gelpcke v. Quentell*, 74 N. Y. 599.

Service of Process on Agent of Corporation in Ignorance of Revocation.—In *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. L. 67, 64 Am. Dec. 412, it was held that service of process upon an agent of a corporation, duly appointed to accept service of all lawful process against the corporation, but whose authority had been determined, was sufficient, and bound the corporation, the plaintiff being ignorant of the termination of the agency.

1. *Per Field, J.*, in *Southern L. Ins. Co. v. McCain*, 96 U. S. 84.

2. *Arnold v. Stevenson*, 2 Nev. 234.

But the recording of the revocation where it is not necessary does not amount to a constructive notice. *Williams v. Birbeck, Hoffm. Ch.* (N. Y.) 368; *James v. Morey*, 2 Cow. (N. Y.) 296, 14 Am. Dec. 475.

3. *Watts v. Kavanagh*, 35 Vt. 34.

4. *Williams v. Birbeck, Hoffm. Ch.* (N. Y.) 359. See the title NOTICE.

Constructive Notice.—Notice by the principal of the contents of a written agreement with his agent which terminates the agency is sufficient notice of the termination of the agency. *Van Dusen v. Star Quartz Min. Co.*, 36 Cal. 571, 95 Am. Dec. 209.

Constructive Notice—How Far Question of Law or Fact.—If the evidence relied on is doubtful or controverted, the question of notice should be left to the jury;¹ but the question whether the circumstances were sufficient to put the parties on inquiry, that is, whether they amount to constructive notice, is a question of law.²

Effect of Revocation and Notice.—After revocation and due notice the principal cannot be held liable for acts of his agent subsequent thereto.³

c. RENUNCIATION BY AGENT.—The agent also has the power to put an end to the agency, and may at his will and pleasure, upon reasonable notice, renounce the power conferred upon him by his principal.⁴

Renunciation on Account of Conduct of Principal.—As the principal is justified in terminating the agency for the misconduct of the agent, so where the principal's conduct is calculated to interrupt the relation, the agent may terminate the agency with a full reservation of his rights.⁵

Implied Renunciation—Rights of Principal.—And, on the other hand, where the agent by his words or acts shows a clear intention to renounce, or give up his agency, the principal may treat it as abandoned.⁶

When Agent Renouncing Liable to Principal.—But after accepting an agency for a definite time, the agent cannot renounce it without incurring liability to his principal for any loss that may result to him from this cause.⁷

2. By Operation of Law—*a.* DEATH OF PRINCIPAL.—It is a well-established rule of the common law that the death of the principal puts an end to the

It is immaterial from what source the notice comes; the notice may be given by the agent as well as by the principal. *Vail v. Judson*, 4 E. D. Smith (N. Y.) 165.

1. *McNeilly v. Continental L. Ins. Co.*, 66 N. Y. 23; *Perrine v. Jermyn*, 163 Pa. St. 497.

2. *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550; *Claffin v. Lenheim*, 66 N. Y. 301; *Howe v. Thayer*, 17 Pick. (Mass.) 91.

Notice of the appointment of another agent is sufficient notice of the revocation of the authority of the former one when the execution of the agency by both is incompatible. *Johnson v. Youngs*, 82 Wis. 107; *Clark v. Mullenix*, 11 Ind. 532.

3. *Gunter v. Stuart*, 87 Ala. 196; *Groneweg v. Kusworm*, 75 Iowa 237; *Satterthwaite v. Loomis*, 81 Tex. 64; *Blair v. Sheridan*, 86 Va. 527.

And there is no necessity for the principal to disavow the unauthorized act as between himself and the agent. *Kelly v. Phelps*, 57 Wis. 425.

4. *Barrows v. Cushway*, 37 Mich. 481; *U. S. v. Jarvis, Dav.* (U. S.) 274; *Story on Agency*, § 478.

If an agent acts under an authority conferred upon him, this amounts to a tacit acceptance of the agency although he writes to his principal refusing the agency and requesting him to appoint another agent. *George v. Sandel*, 18 La. Ann. 535.

Agent Repudiating Agency and Acting for Self.—And if one who is clearly an agent for another to purchase property repudiates the agency and acts for himself, using his own funds, he cannot be declared a trustee for his principal although the latter may have been misled by conduct of the former. *First Nat. Bank v. Bissell*, 2 McCrary (U. S.) 73.

5. *Conrey v. Brandegee*, 2 La. Ann. 132.

6. Principal Treating Agency as at an End.—In *Stoddart v. Key*, 62 How. Pr. (N. Y. Su-

preme Ct.) 137, where an agent wrote his principal that "I have determined to sell out and give up this business; if you want it, come or send on, and I will give you the figures which I will take; this is final"—it was held that the principal, after having made a fair attempt to settle, and having reason to suspect the agent's good faith, was justified in treating the agency as abandoned, and in appointing another agent; and that a sale of the list of subscribers afterwards by the former agent, or an attempt on his part to release them, was invalid.

In *Safford v. Kinsley*, 40 Vt. 506, where the principal furnished money to an agent for the purpose of buying certain goods, and the agent made the purchase, but also bought other goods which he was not authorized to buy, and when the principal came to take his goods the agent claimed that he should take the whole lot and refused to designate the goods bought in accordance with instructions, it was held that this refusal had the same effect as an absolute refusal, and that the principal was entitled to treat it as an entire repudiation by the agent of his agreement.

In *Case v. Jennings*, 17 Tex. 661, where an agent having authority to sell a negro slave attempted to run off, dispose of, and conceal the negro, it was held that his conduct amounted to an absolute abandonment and renunciation of his agency.

7. *Per Ware, J.*, in *U. S. v. Jarvis, Dav.* (U. S.) 274; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60.

When Founded upon a Valuable Consideration an agency cannot be renounced without subjecting the agent to a liability for any damages the principal may sustain thereby. So in *White v. Smith*, 6 Lans. (N. Y.) 5, it was held that stockbrokers are liable for damages sustained by their employer by reason of a renunciation of the agreement.

agency when the authority is not coupled with an interest. and no act of agency subsequent thereto is binding upon the estate of the principal, for no one can do an act in the name of one who is dead.¹

Death of One Joint Principal.—And in the case of joint principals the death of one revokes the agent's authority;² not, however, when they are joint and several principals as trustees.³

Death of Client.—So the authority of an attorney at law is revoked by the death of his client, and without a new retainer from the personal representative he has no authority.⁴

Authority Coupled with an Interest.—But where the power is coupled with an interest in the subject matter of the agency, the agent may execute the authority, as his rights survive the death of the principal.⁵

1. *England.*—*Watson v. King*, 4 Campb. 272; *Wallace v. Cook*, 5 Esp. 117; *Smout v. Ilbery*, 10 M. & W. 1; *Campanari v. Woodburn*, 15 C. B. 400, 80 E. C. L. 400.

United States.—*Boone v. Clarke*, 3 Cranch (C. C.) 389; *Galt v. Galloway*, 4 Pet. (U. S.) 341; *McClaskey v. Barr*, 50 Fed. Rep. 712.

Alabama.—*Scruggs v. Driver*, 31 Ala. 274; *Saltmarsh v. Smith*, 32 Ala. 404.

California.—*Ferris v. Irving*, 28 Cal. 645.

Florida.—*McGriff v. Porter*, 5 Fla. 373.

Georgia.—*Wellborn v. Weaver*, 17 Ga. 273, 63 Am. Dec. 235; *Jones v. Beall*, 19 Ga. 171.

Massachusetts.—*Farnum v. Boutelle*, 13 Met. (Mass.) 159; *Lincoln v. Emerson*, 108 Mass. 87.

New Hampshire.—*Gale v. Tappan*, 12 N. H. 145, 37 Am. Dec. 194; *Wilson v. Edmonds*, 24 N. H. 517.

Ohio.—*Johnson v. Johnson*, *Wright (Ohio)* 594; *Easton v. Ellis*, 1 Handy (Ohio) 70; *McDonald v. Black*, 20 Ohio 185, 55 Am. Dec. 448.

Texas.—*Primm v. Stewart*, 7 Tex. 178; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274.

Vermont.—*Gifford v. Thomas*, 62 Vt. 34; *Michigan State Bank v. Leavenworth*, 28 Vt. 209; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11.

Virginia.—*Huston v. Cantril*, 11 Leigh (Va.) 142.

Illustrations—Revocation by Death.—So the power to sell real estate or other property, unless coupled with an interest, is determined by the death of the principal, *Scruggs v. Driver*, 31 Ala. 274; and the authority to occupy land is revoked by the death of the principal. *Lincoln v. Emerson*, 108 Mass. 87; *Coney v. Sanders*, 28 Ga. 511. A deed made after the death of the principal, in his name, under a power of attorney, is inoperative. *Harper v. Little*, 2 Me. 14, 11 Am. Dec. 25; *McDonald v. Hannah*, 51 Fed. Rep. 73.

An agent appointed to complete a sale of property of his principal, in which the agent himself has no interest, cannot act after the principal's death. *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274.

A mere power of attorney to transfer stock is revoked by the death of the principal. *Given's Appeal* (Pa., 1888), 16 Atl. Rep. 75. A power to carry on the principal's business, not vesting in the agent any interest in the subject matter of the agency, is terminated by the death of the principal. *Krumdick v.*

White, 92 Cal. 143. In *Darr v. Darr*, 59 Iowa 81, where an agent received for collection certain notes, but before the notes fell due the principal died and the makers became insolvent, it was held that the agent's power ceased with the death of the principal, after which he had no authority to collect the notes.

2. *Travers v. Crane*, 15 Cal. 12; *Johnson v. Wilcox*, 25 Ind. 182; *Marlett v. Jackman*, 3 Allen (Mass.) 287.

Death of Partner.—In *New York Bank v. Vanderhorst*, 32 N. Y. 553, where an agent of a firm, authorized to draw checks against the firm's bank account for the use of the firm, continued so to do after the death of one of the members of the firm, both he and the bank being in ignorance of the death, checks so drawn were held to bind the firm. The authority continued in a qualified form. In this case the parties had the right to draw the money of the firm, and not having objected thereto, nobody else could do so. But see *Tasker v. Shepherd*, 6 H. & N. 575.

3. *Wilson v. Stewart*, 5 Pa. L. J. 450.

An authority delegated to an attorney from three trustees having a power coupled with an interest, and from the survivors or survivor of them, to sell and convey lands, is not revoked by the death of one of the trustees. Such delegation being joint and several, the attorney is invested with the full powers of the surviving trustees so as to pass both the beneficial and legal estates. *Wilson v. Stewart*, 5 Pa. L. J. 450.

4. *Palmer v. Reiffenstein*, 1 M. & G. 94, 39 E. C. L. 370; *Turnan v. Temke*, 84 Ill. 286; *Risley v. Fellows*, 10 Ill. 531; *Gleason v. Dodd*, 4 Met. (Mass.) 333; *Stirnermaun v. Cowing*, 7 Johns. Ch. (N. Y.) 275. See also the title ATTORNEY AND CLIENT.

5. See *supra*, this section, *When Agency is Coupled with an Interest*. *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Travers v. Crane*, 15 Cal. 12; *Gilbert v. Holmes*, 64 Ill. 548; *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 1, 2 Am. Dec. 281.

The Contrary Doctrine seems to be established in *England*. See *Watson v. King*, 4 Campb. 272, where it was ruled by Lord Ellenborough that a power coupled with an interest is necessarily revoked by the death of the principal.

Power Coupled with Interest Irrevocable by Death.—In *Merry v. Lynch*, 68 Me. 94, where, by the terms of the agency, the agent was to sell the goods and out of the proceeds pay

Exception to Rule as to Authority Coupled with Interest.—The rule is otherwise, however, even in the case of an authority coupled with an interest, where it is expressly conditioned that the authority is to be executed within the principal's lifetime.¹ So upon an indorsement and delivery for the purpose of collection, as the legal title is passed to the agent, he may continue his authority notwithstanding the death of the principal.²

Acts Done Bona Fide without Notice of Principal's Death.—The rule has been held not to apply to those acts which must be done in the name of the agent.³ But the

certain liens, and other claims and notes which he held against the principal, it was held that the power was not extinguished by the death of the principal.

Stock as Collateral, Power to Sell.—Where a broker had sold stock short for a customer, and in accordance with the usual custom had borrowed the stock for delivery, becoming himself obligated to return the borrowed stock, and borrowing from time to time as required to replace the stock previously borrowed, and while the transaction was so kept alive the customer died, it was held that the broker had authority, acting in good faith, to continue it in the same manner until the appointment and qualification of a legal representative of the estate of the deceased, upon whom the proper notice could be served in order to close it. *Hess v. Rau*, 95 N. Y. 359.

Power to Sell and Dispose of Proceeds Revoked by Death.—A mere naked power to sell and dispose of the proceeds, even to pay claim of the agent, is determined by the death of the grantor, as there is no interest created in the subject of the agency. So in *Houghtaling v. Marvin*, 7 Barb. (N. Y.) 412, it was held that where there is merely given a power to a creditor to receive a debt expressly for the purpose of liquidating the claim of the creditor, but unaccompanied by an assignment of the debt or by any security to which the power might have been ancillary, it is revoked by the death of the principal. If the power to collect is given expressly as security for the debt, it is irrevocable.

In *McGriff v. Porter*, 5 Fla. 373, it was held that a mere power to enter upon certain premises and carry away and sell property thereon upon default in payment of a certain debt was not coupled with an interest, and was revoked upon the death of the debtor. See also *Huston v. Cantril*, 11 Leigh (Va.) 142.

In *Garber v. Myers*, 32 Ill. App. 175, it was held that a power of attorney to collect certain rents and apply them to the payment of a note when due was only a naked power of attorney revoked by the death of the principal.

In *Farmers' L. & T. Co. v. Wilson*, 139 N. Y. 284, it was held that the power of an agent to collect and receive rents falling due to his principal ceases upon the death of the latter where the agent was entitled merely to commissions on rents collected.

1. *Staples v. Bradbury*, 8 Me. 181, 23 Am. Dec. 494.

2. *Moore v. Hall*, 48 Mich. 143; *Boyd v. Corbitt*, 37 Mich. 52.

But the mere power to collect certain notes,

given into the hands of the agent, will be determined by the death of his principal. So in *Darr v. Darr*, 59 Iowa 81, it was held that in such a case the agent was not liable for failure to collect, though during the delay the makers became insolvent.

3. **Acts Effective in Agent's Name Held Binding though Done after Principal's Death.**—*Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267; *Cassiday v. M'Kenzie*, 4 W. & S (Pa.) 282. And in *Ish v. Crane*, 13 Ohio St. 574, it was held that a *bona fide* transaction by an agent not necessarily to be done in the name of the principal, as a deed, but a matter *in pais* merely, done after the death of the principal, but in ignorance of the event, is nevertheless valid and binding on the personal representative.

These cases are certainly contrary to the weight of authority both in *England* and the *United States*. But the views announced in them agree with the civil law and have received the sanction of eminent writers. Story in his work on Agency, §§ 494-5, upholds in reason the rule of the civil law, but acknowledges the contrary rule as established in *England* and the *United States*. See also Wharton on Agency, § 104.

In *Travers v. Crane*, 15 Cal. 12, speaking of *Cassiday v. M'Kenzie*, 4 W. & S. (Pa.) 282, and pointing out that the opinion, except so far as it related to the particular facts, was a mere dictum, Baldwin, J., said: "The opinion, therefore, of the learned judge may be regarded more as an extrajudicial indication of his views on the general subject than as the adjudication of the court upon the point in question. But according all proper weight to this opinion as the judgment of a court of great respectability, it stands alone among common-law authorities, and is opposed by an array too formidable to permit us to follow it." See also *Clayton v. Merrett*, 52 Miss. 353.

Chancellor Kent says: "By the civil law, and the law of those countries which have adopted the civil law, the acts of an agent done *bona fide* after the death of his principal, and before notice of his death, are valid and binding on his representatives. But this equitable principle does not prevail in the English law, and the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest." 2 Kent Com. 646.

Contract by Letter Sent prior to Death.—In *Garrett v. Trabue*, 82 Ala. 227, where the agent sent an order by mail, on the day before the death of his principal, to a non-resident merchant, with whom he had a general arrangement for goods to be supplied on

weight of authority maintains the doctrine of the common law that the death of the principal operates as an instantaneous revocation, and that acts of agency done after the death of the principal are void even though the death is unknown to the agent.¹

Payment to or Purchase by Agent after Principal's Death.—So the payment to an agent after the death of the principal will not operate as a discharge, even though made in actual ignorance of the principal's death;² and a purchase of goods by an agent for his principal, made after his death, but before the agent has notice thereof, is not binding upon the estate of the principal.³

Liability of Agent for Acts Done after Principal's Death.—Where the death of the principal is unknown to both parties the agent cannot be held responsible.⁴ But if

orders during the year, and the merchant filled the order within a reasonable time, in ignorance of the death of the principal, it was held that the contract was binding as of the day on which the order was deposited in the mail. See also *Hatchett v. Molton*, 76 Ala. 410.

1. Death of Principal Held Instantaneous Revocation—England.—*Farrow v. Wilson*, L. R. 4 C. P. 744; *Houstoun v. Robertson*, 6 Taunt. 448; *Blades v. Free*, 9 B. & C. 167, 17 E. C. L. 351; *Smout v. Ilbery*, 10 M. & W. 1; *Campanari v. Woodburn*, 15 C. B. 400, 80 E. C. L. 400.

United States.—*Washington Bank v. Peirson*, 2 Cranch (C. C.) 685; *Galt v. Galloway*, 14 Pet. (U. S.) 332.

Alabama.—*Moore v. Wallis*, 18 Ala. 458.

Illinois.—*Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427.

Iowa.—*Lewis v. Kerr*, 17 Iowa 73; *Royal Ins. Co. v. Davies*, 40 Iowa 469, 20 Am. Rep. 581.

Maine.—*Green v. Young*, 8 Me. 14, 22 Am. Dec. 218.

Mississippi.—*Clayton v. Merrett*, 52 Miss. 353.

New York.—*Farmers' L. & T. Co. v. Wilson*, 139 N. Y. 284.

Tennessee.—*Jenkins v. Atkins*, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

Vermont.—*Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Davis v. Windsor Sav. Bank*, 46 Vt. 728.

The Supreme Court of the United States, in *Galt v. Galloway*, 4 Pet. (U. S.) 344, said that "no principle is better settled than that the powers of an agent cease on the death of his principal. If an act of agency be done subsequent to the decease of the principal, though his death be unknown to the agent, the act is void." See *Long v. Thayer*, 150 U. S. 522.

Where an agent has merely authority to convey certain real estate in his principal's name, and has no vested interest in the property, a sale made by him after the death of his principal, in ignorance of that event, is absolutely void, and cannot be made valid by the assent of the party to whom the land descends. *Lewis v. Kerr*, 17 Iowa 73.

Statutory Changes.—In view of its apparent hardship, the common-law rule has been modified by statute in several states in conformity to the civil law. So in *Georgia*, as early as 1785, it was provided by statute that the power of an agent should not be deter-

mined by the death of the principal until notice. It was held, however, that this applied only to powers made outside the state. See *Coney v. Sanders*, 28 Ga. 511.

In *Maryland* it is provided that the dealings of an agent within the scope of his authority, subsequent to the principal's death, are valid in favor of parties having no notice. Md. Pub. Gen. Laws, art. 10, § 25, p. 91. See *Eichelberger v. Sifford*, 27 Md. 330.

So in *South Carolina*. Gen. Stat. 1882, § 1302.

In the *Louisiana Code*, §§ 3027-3034, it is provided, as in the civil law, that if the attorney is ignorant of the death, the transactions done by him during this state of ignorance are considered as valid.

In the *California Civ. Code*, §§ 6996-7003, as in the *Dakota Civ. Code*, §§ 1150, 1151, it is provided that the agency is terminated by notice to the agent of the death of the employer, etc.

2. Long v. Thayer, 150 U. S. 520; *Clayton v. Merrett*, 52 Miss. 353; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11.

Payment of Bank Deposits.—So the authority to pay out bank deposits is revoked by the death of the principal, and subsequent payments are at the expense of the bank. *Davis v. Windsor Sav. Bank*, 46 Vt. 728.

Agency for Specified Time.—In *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578, it was held that where a clerk had been hired for three years at a stipulated salary to carry on a branch store for his employer, the death of the latter before the expiration of the three years put an end to the contract. But in *Ferreira v. Sayres*, 5 W. & S. (Pa.) 210, it was held that the death of one partner did not discharge the firm from subsisting contracts with an agent of the firm for a period of time not then expired.

3. Rigs v. Cage, 2 Humph. (Tenn.) 350, 27 Am. Dec. 559.

4. Smout v. Ilbery, 10 M. & W. 1; *Blades v. Free*, 9 B. & C. 167, 17 E. C. L. 351; *Carriger v. Whittington*, 26 Mo. 311, 72 Am. Dec. 212.

In *Smout v. Ilbery*, 10 M. & W. 1, a leading case on this question and one much discussed, a husband who had been in the habit of getting provisions from a merchant went abroad, leaving his wife and family in England. It was held that the wife was not liable for goods supplied to her after her husband's death, but prior to the time when she had notice thereof, as the agency was terminated

an agent presumes to act after the death of the principal he may be treated as trustee, and is liable as such to the estate of his assumed principal.¹

b. DEATH OF AGENT.—The death of the agent of course puts an end to the agency;² and where two or more agents are appointed to act jointly, the death of one operates to revoke the authority of the others.³

Subagents.—As to subagents also, the death of the agent puts an end to their authority.⁴

c. INSANITY OF EITHER PARTY—Insanity of Principal.—As a general rule, it may be stated that where a principal becomes insane after appointing an agent this operates *per se* as a revocation or suspension of the agent's authority, except in cases where a consideration has been given, or the power is otherwise coupled with an interest.⁵ But it has been held that until the insanity has been properly established by an inquisition, it will not operate as a revocation.⁶

by no fault of hers. Nor are his executors bound. *Blades v. Free*, 9 B. & C. 167, 17 E. C. L. 351.

1. *Lowrie v. Saltz*, 75 Cal. 349.

2. *Adriance v. Rutherford*, 57 Mich. 170; *Gage v. Allison*, 1 Brev. (S. Car.) 495, 2 Am. Dec. 682; *Charleston v. Duncan*, 3 Brev. (S. Car.) 386; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

Effect of Death of Agent.—A contract between a planter and a factor or commission merchant, whereby the latter binds himself to furnish supplies for the working of the plantation, and to receive and sell the products of the place for the benefit of the planter, is a contract of agency, and terminates at the death of the agent; and by such death the planter is absolved from all obligations to continue the contract, and the heirs of the agent are not bound by the contract. Such an agreement is personal, and not heritable. *Shiff v. Lesseps*, 22 La. Ann. 185.

Upon the death of his agent the principal may take possession of all his goods and replevy them from the agent's administrator. *Adriance v. Rutherford*, 57 Mich. 170. So the price of goods sold by a factor is payable, not to his administrator, but to the merchant who consigned them to him. *Burdett v. Willett*, 2 Vern. 638; *Whitecomb v. Jacob*, 1 Salk. 160; *Merrick's Estate*, 8 W. & S. (Pa.) 402. If the administrator of the agent receive the fund, he receives it as the agent of the principal. *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296.

3. *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180; *Salisbury v. Brisbane*, 61 N. Y. 617.

Death of Partner where Firm is Agent.—So in *Martine v. International L. Ins. Co.*, 53 N. Y. 339, 13 Am. Rep. 529, it was held that where a firm is appointed to an agency, such agency ceases upon the death of one of the members of the firm, and the principal is not bound by the subsequent acts of a surviving member.

4. **Subagents.**—*Lehigh Coal, etc., Co. v. Mohr*, 83 Pa. St. 228, 24 Am. Rep. 161. In this case it was held that the death of an agent acting under a letter of attorney containing a power of substitution acts as a revocation of the authority of an agent substituted by him under the power. To the same effect is *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371; *Peries v. Aycinena*, 3 W. & S. (Pa.) 64.

Where, however, the authority of the sub-agent emanates from the principal, it is not affected by the death of the agent, from whom he merely receives the appointment. *Smith v. White*, 5 Dana (Ky.) 376.

5. *Bunce v. Gallagher*, 5 Blatchf. (U. S.) 481; *Berry v. Skinner*, 30 Md. 567; *Matthies-sen, etc., Refining Co. v. M'Mahon*, 38 N. J. L. 537; *Hill v. Day*, 34 N. J. Eq. 150; *Blake v. Garwood*, 42 N. J. Eq. 276; *Wallis v. Manhattan Co.*, 2 Hall (N. Y.) 495.

Effect of Insanity of Principal Discussed.—

The law and the reason therefor is clearly stated by Parker, C. J., in *Davis v. Lane*, 10 N. H. 156. He said: "Upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest and not irrevocable, there exists at all times a right of supervision in the principal, and power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues. When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being, otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased; for after the principal was deprived of the power to exercise any will upon the subject there could be no assent or acquiescence, or evidence of any kind, to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke. * * * If, on the recovery of the principal, he manifests no will to terminate the authority, it may be considered as a mere suspension. And his assent to acts done during the suspension may be inferred from his forbearing to express dissent when they came to his knowledge."

6. **Whether Inquisition of Lunacy Necessary.**—*Wallis v. Manhattan Co.*, 2 Hall (N. Y.) 495. In this case the court reasoned thus: "There would be no safety in admitting any other

Estoppel to Set Up Insanity.—And if the principal has enabled the agent to hold himself out as having authority, and the insanity of the principal is not known to those who deal with the agent within the scope of the authority he appears to possess, the principal and those who claim under him may be precluded from setting up the insanity as a revocation.¹

The Insanity of the Agent would seem to constitute a natural as well as a necessary revocation of his authority, for the principal cannot be presumed to intend that acts done for him and to bind him shall be done by one who is incompetent to understand or to transact the business which he is employed to execute.²

d. BANKRUPTCY OF EITHER PARTY—Principal.—By an act of bankruptcy the principal loses control of the subject matter of the agency, and therefore the agency, unless coupled with an interest, is thereby determined.³

Power to Do Mere Formal Act.—But a power to do a mere formal act, as a power of attorney to sign an indorsement on the certificate which the bankrupt himself might have been compelled to execute, is not revoked by the bankruptcy of the principal.⁴

Agent.—The bankruptcy of the agent revokes his authority,⁵ except where

evidence of a fact which is to have an operation so extensive, and sound policy requires us to adopt this rule. * * * If the mere fact of lunacy operated, like death, to revoke the power instantly, then any acts done under it, during the existence of the disease, would be void, even if the parties were ignorant of the principal's situation."

But in *Bunce v. Gallagher*, 5 Blatchf. (U. S.) 489, Shipman, J., said, referring to the general rule: "This is well-settled doctrine, though it has been intimated that before the authority of an agent can be suspended by the insanity of the principal occurring after the execution of the power, the fact of lunacy must be established under an inquisition. Still, I apprehend that whether the fact were formally established or not, the agent could not justify or support an act under the authority originally given, done after the agent had knowledge of the incapacity of his principal."

In *Motley v. Head*, 43 Vt. 633, it was held that where a person loses power to bind himself by his own acts, it is true as a general principle that that works a like loss in all those upon whom he has conferred the power to bind him; but being put under guardianship for insanity would not warrant the court to hold that that terminated an agency previously created by him, it not appearing that the insanity was of that character which disqualified a person from entering into a valid contract. See also *Drew v. Nunn*, 4 Q. B. Div. 669, opinion of Brett, L. J.

1. *Davis v. Lane*, 10 N. H. 156; *Drew v. Nunn*, 4 Q. B. Div. 661.

2. *Ewell's Evans on Agency*, p. 99; *Story on Agency*, § 487.

3. *Parker v. Smith*, 16 East 382; *Ex p. Snowball*, L. R. 7 Ch. 534; *In re Daniels*, 6 Biss. (U. S.) 405.

Effect of Bankruptcy of Foreign Principal.—But it has been held that the bankruptcy of the principal in England will not affect the validity of a bill drawn by his duly authorized agent in New York without notice

of the bankruptcy of the principal, inasmuch as the operation of the English assignment of bankruptcy is not extraterritorial, and does not operate as a legal transfer of property in the United States. *Ogden v. Gillingham*, 1 Baldw. (U. S.) 38.

When Revocation by Bankruptcy Takes Effect.

—In *Ex p. Snowball*, L. R. 7 Ch. 548, the court, by Mellish, L. J., said: "We are of opinion that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still if after the act of bankruptcy but before the adjudication property is conveyed under the power to a *bona fide* purchaser, who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee. It is obvious that a power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself; and wherever a sale would be binding on a bankrupt, if no adjudication follows, it is binding on the trustee under a subsequent adjudication if the purchaser had no notice of an act of bankruptcy having been committed by the seller at the time of the sale." See also *In re Daniels*, 6 Biss. (U. S.) 405.

In England a factor after his act of bankruptcy may, representing his assignee, enforce the lien on his principal's property. *Hudson v. Granger*, 5 B. & Ald. 27, 7 E. C. L. 10; *Drinkwater v. Goodwin*, Cowp. 251.

4. *Dixon v. Ewart*, 3 Meriv. 327.

5. *Scott v. Surman*, Willes 400; *Hudson v. Granger*, 5 B. & Ald. 27; *Godfrey v. Furzo*, 3 P. Wms. 185; *Evans on Agency* (2d Eng. ed.) *106.

The Insolvency of an agent to sell merchandise terminates his authority. *Audenried v. Betteley*, 8 Allen (Mass.) 302.

Bankruptcy of Agent.—With respect to the effect of the bankruptcy of the agent, and the principal's rights, the English authorities are thus summarized by Mr. Evans in his work on

the act to be performed by the agent is merely formal.¹

e. MARRIAGE OF FEME SOLE.—The marriage of a *feme sole* would, at common law, operate to revoke the agency conferred by her;² and so now where the execution of the agency would dispose of property or rights in which her husband acquires an interest, an agency created by her is revoked by subsequent marriage.³ But an agency with respect to property over which she, though married, may execute sole authority, is in no way affected by her marriage.⁴

f. EFFECT OF WAR.—The existence of a state of war as between the citizens or subjects of the respective belligerents, *ipso facto* dissolves all commercial partnerships, agencies, and contracts executory, requiring for their continual existence commercial intercourse or communication.⁵

Certain Agencies Not Revoked.—But limited agencies which may be exercised without intercourse or communication between the citizens of the belligerent powers may lawfully continue.⁶

Agency (Ewell's Evans on Agency, p. 123): " (1) The order and disposition clause of the Bankruptcy Act, 1869 (sect. 15, subsect. 5), does not apply: (a) To property in possession of a person as factor, *Whitfield v. Brand*, 16 M. & W. 282; (b) To property, money, bills, or goods in the hands of the bankrupt for a specific purpose, *Tooke v. Hollingworth*, 5 T. R. 227. (2) If the person in possession of the property remitted to him for a special purpose has a lien upon it, the trustee has a good claim against the remitter to the extent of such lien. *Drinkwater v. Goodwin*, Cowp. 256. (3) If such property has been wrongfully disposed of, the principal may follow the proceeds so long as they are distinguishable. *Frith v. Cartland*, 34 L. J. Ch. 301. (4) If the property is mixed by the agent with his own, the whole becomes liable to satisfy the trusts. *Frith v. Cartland*, 34 L. J. Ch. 301. (5) Notice of the trust or of a specific appropriation will defeat the title of third parties who deal with the property inconsistently with such trust or appropriation. *Steele v. Stuart*, L. R. 2 Eq. 84. (6) When a person pays money into a bank to be applied in a specific manner, and the banker stops payment before taking any step towards applying it to the purpose, the payer cannot recover the money paid, but has merely a right of proof as a general creditor. *Re Barnard's Banking Co.*, 39 L. J. Ch. 635. But where the country bank has applied the money, and the town agent has received it for the specific purpose, the payer may recover. *Farley v. Turner*, 26 L. J. Ch. 710."

As to what classes of agents were "fiduciary characters" within the meaning of the former national bankrupt acts, see 24 Alb. L. J. 424.

1. *Dixon v. Ewart*, 3 Meriv. 327; *Robson v. Kemp*, 4 Esp. 233; *Alley v. Hotson*, 4 Camp. 325.

2. *Charnley v. Winstanley*, 5 East 266; *M'Can v. O'Ferrall*, 8 Cl. & F. 30; *Kent Comm.*, p. 645; *Story on Agency*, § 481.

3. *Wambole v. Foote*, 2 Dakota 1; *Judson v. Sierra*, 22 Tex. 365.

Authority Coupled with Interest.—The revocation is not effected when the authority is coupled with an interest. So in *Eneu v.*

Clark, 2 Pa. St. 234, it was held that if a *feme sole* gives a warrant of attorney to confess judgment on his bond, and afterward marry, the warrant is not revoked.

Marriage of Single Man Held Revocation.—In *Henderson v. Ford*, 46 Tex. 627, it was held that the power of attorney to sell land, the home of a single man, was revoked by his marriage. But see *Joseph v. Fisher*, 122 Ind. 399.

4. Where a woman retains the right to administer her paraphernal property without her husband's assistance, her marriage will not revoke the powers of an agent previously intrusted with its administration. *Reynolds v. Rowley*, 2 La. Ann. 890. See also, as to the husband's right, *Joseph v. Fisher*, 122 Ind. 399.

5. *Potts v. Bell*, 8 T. R. 548; *The William Bagaley*, 5 Wall. (U. S.) 377; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *Ward v. Smith*, 7 Wall. (U. S.) 447; *Montgomery v. U. S.*, 15 Wall. (U. S.) 395; *U. S. v. Lapene*, 17 Wall. (U. S.) 601; *Kershaw v. Kelsey*, 100 Mass. 561; *Hale v. Wall*, 22 Gratt. (Va.) 430. And see the title WAR.

Civil War.—This principle is applicable to civil as well as to international wars. *Billgerry v. Branch*, 19 Gratt. (Va.) 393, 100 Am. Dec. 679.

Power of Attorney to Sell Land Revoked.—In *Conley v. Burson*, 1 Heisk (Tenn.) 145, it was held that a power of attorney from a person in the United States to one in the Confederate States to sell land was revoked by the existence of the war. So in *Howell v. Gordon*, 40 Ga. 302.

6. *Ward v. Smith*, 7 Wall. (U. S.) 447; *New York L. Ins. Co. v. Davis*, 95 U. S. 425; *Mayer's Case*, 3 Ct. of Cl. 249; *Stoddart's Case*, 6 Ct. of Cl. 340; *Queyrouze's Case*, 7 Ct. of Cl. 402; *Buford v. Speed*, 11 Bush (Ky.) 338; *Small v. Lumpkin*, 28 Gratt. (Va.) 832.

Unauthorized Investments by Agents.—Such an agency continues, with all its rights, duties, and obligations, as to the property of the principal. The investment of moneys collected in Confederate bonds could not have been made without the sanction of the principal. *Botts v. Crenshaw*, Chase Dec. (U. S.) 224; *Anderson v. The Bank*, Chase Dec.

Agencies to Collect and Preserve Property.—So an agency for the purpose of collecting debts, or for the protection and preservation of property, is not affected by the existence of war, but may be lawfully continued, provided it does not necessitate the transfer of such property to the principal who is a belligerent.¹

Time of Creation of Such Agency.—It has been held, however, that such an agency must have been created before the war began.²

Assent of Parties Necessary to Continuance.—In order to the subsistence of the agency, during the war, it must have the assent of the parties thereto.³

g. ACCOMPLISHMENT OF PURPOSE—LAPSE OF TIME.—Where the agency is by agreement limited to a definite time, or is conferred for the accomplishment of some definite object, it will be determined in due course by the expiration of the time or by the conclusion of the transaction for which it was created.⁴

(U. S.) 535. See also *Maloney v. Stephens*, 11 Heisk. (Tenn.) 738.

In *U. S. v. Quigley*, 103 U. S. 595, where a merchant residing in Georgia removed at the commencement of hostilities, leaving an agent for the collection of debts due him, who collected the money, but invested it in cotton, which was afterwards captured and destroyed, it was held that he might recover from his agent.

As to the right to make such unauthorized investments, *Davis, J.*, in *Fretz v. Stover*, 22 Wall. (U. S.) 108, said: "If it were otherwise, then, as long as the war lasted, every Northern creditor of Southern men was at the mercy of the agent he had employed before the war commenced."

Confiscation of Property of Principal.—An agent is not responsible, however, for the confiscation of the property by his government, if he has used due diligence. *Newton v. Bushong*, 22 Gratt. (Va.) 628; *Mauran v. Alliance Ins. Co.*, 6 Wall. (U. S.) 1; *Garrison v. Kings*, 35 Tex. 183.

1. *United States*.—*Conn v. Penn*, 1 Pet. (C. C.) 496; *Denniston v. Imbrie*, 3 Wash. (U. S.) 396; *U. S. v. Grossmayer*, 9 Wall. (U. S.) 72.

Louisiana.—*Monsseax v. Urquhart*, 19 La. Ann. 482.

Mississippi.—*Shelby v. Offutt*, 51 Miss. 128.

New York.—*Robinson v. International L. Assur. Soc.*, 42 N. Y. 54, 1 Am. Rep. 490; *Sands v. New York L. Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535.

Tennessee.—*Jones v. Harris*, 10 Heisk. (Tenn.) 98; *Darling v. Lewis*, 11 Heisk. (Tenn.) 125; *Maloney v. Stephens*, 11 Heisk. (Tenn.) 738.

Virginia.—*King v. Hanson*, 4 Call (Va.) 259; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614, 3 Am. Rep. 218; *Mutual Ben. L. Ins. Co. v. Atwood*, 24 Gratt. (Va.) 497, 18 Am. Rep. 652; *New York L. Ins. Co. v. Hendren*, 24 Gratt. (Va.) 536.

But see *Blackwell v. Willard*, 65 N. Car. 555, 6 Am. Rep. 749.

Agency to Collect for Alien Enemy.—As was said by *Kent, C.J.*, in *Clarke v. Morey*, 10 Johns. (N. Y.) 70: "If aliens are ordered away in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit." And in *Ward v. Smith*, 7 Wall. (U. S.) 447, *Field, J.*, said: "When an agent appointed to receive money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal

to pay the demand, and of course the interest which it bears. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal. * * * Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor."

In *Murrell v. Jones*, 40 Miss. 565, where a party resident in Mississippi, a short time before the fall of New Orleans, intrusted bills of exchange to an agent to sell, which after the surrender were sold for Confederate currency, it was held that the surrender did not revoke the agent's authority.

2. **Power to Create Ceases with Beginning of War.**—*U. S. v. Grossmayer*, 9 Wall. (U. S.) 72. In this case *Davis, J.*, said: "We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have in time of war an agent residing in the territory of the other, to whom his debtor could pay his debt in money or deliver to him property in discharge of it; but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities."

3. Per *Bradley, J.*, in *New York L. Ins. Co. v. Davis*, 95 U. S. 429. Continuing, he said: "It [the continuance of such agency during war] is not compulsory, nor can it be made so, on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use of the principal, into the agent's hands; but not otherwise."

4. *Blackburn v. Scholes*, 2 Campb. 341; *Cliquot's Champagne*, 3 Wall. (U. S.) 140; *Irby v. Lawske*, 62 Ga. 216.

Illustrations by Accomplishment of Purpose.—So in *Benoit v. Conway*, 10 Allen (Mass.) 528, it was held that the authority conferred on the town treasurer to borrow money for the adjustment of a state tax was terminated by the adjustment of the tax without the necessity of making the loan.

Power delegated to an agent to "fix and determine" a matter over which he has no original power outside of the agency is expended when he has once acted. *Douvielle v. Manistee County*, 40 Mich. 585.

Authority to Find Purchasers.—So an authority to find a purchaser is terminated so soon as this is accomplished.¹

Authority to Purchase.—And a delivery of property to the principal is a termination of the authority of the agent employed to purchase.²

Agency to Procure Insurance.—The authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy. *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 413, 53 Am. Rep. 197.

Authority to Receive Payment.—An agent employed to sell property has no authority to receive payment on securities after he has parted with their possession, sending them to his principal. *Strachan v. Muxlow*, 24 Wis. 21.

Authority to Secure Debt.—In *Wallace v. Gould*, 91 Ill. 15, it was held that where an agent is employed to secure a debt of his principal, which he does by taking the indorsement of notes by the debtor to his principal, his agency does not cease while he still holds the notes, and his acts have not been approved by his principal.

But upon surrender of the notes to the principal his agency ceases; and parol evidence is inadmissible to show that on taking such a note he verbally agreed, the maker

might pay it to himself when due. *Strachan v. Muxlow*, 24 Wis. 21.

1. **Agent to Sell Lands.**—In *Short v. Millard*, 68 Ill. 292, where the owner of land employed an agent to sell, agreeing, if the latter would find a purchaser at a certain price, to pay him five hundred dollars, it was held that as soon as the agent procured the purchaser his agency ceased. See also *Moore v. Stone*, 40 Iowa 259.

The authority of a real-estate agent and his duty to his principal ceases upon the delivery of the title papers and payment for the property. *Walker v. Derby*, 5 Biss. (U. S.) 134.

Where an Agent was Appointed for the Sale of Machines, and the only provision in regard to the duration of the agency was an agreement by the principal to furnish the agent such number of machines as he could sell prior to a certain date, it was held that the agency terminated at that date so as to discharge the agent's sureties. *Gundlach v. Fischer*, 59 Ill. 172.

2. *Foster v. Calhoun, Dudley* (S. Car.) 75.

INDEX.

- A, 1**
 - "A" distinguished from "the," 1
 - "A" sea, 1
 - As equivalent of "the," 1
 - Equivalent to "at," 1
- ABANDON, 1**
 - Children, 2
 - Desertion, 2
 - Distinguished from gift or barter, 2
 - For torts, 3
 - Invention, 3
 - Land, 3
 - Lease, 3
 - Question of law or fact, 2
 - Trademark, 2
- ABANDONMENT, see ADVERSE POSSESSION.**
- ABANDONMENT AND TOTAL LOSS, 4**
 - Absolute total loss, 207
 - Acceptance, 34**
 - Effect, 34
 - Effect upon notice, 34
 - Estoppel, 36
 - Evidence of, 35
 - Intent, 35
 - Necessity, 34
 - Question of construction, 36
 - Question of law or fact, 35
 - Raising vessel, 35
 - Repairs, 35
 - Silence, 36
 - Taking possession, 35
 - Time of taking effect, 36
 - What amounts to, 35
 - Who may accept, 36
 - Actual total loss, 6**
 - Capture, 7
 - Cargo, 6, 7
 - Cost of repairs exceeding value, 8
 - Definition, 6
 - Destruction of property insured, 6
 - Freight, 7, 11**
 - Loss of vessel, 11
 - When actual total loss of freight, 11
 - Illustrations, 7
 - Justifiable sale, 8
 - Memorandum articles, 9**
 - Articles reaching port *in specie*, 10
 - Delivery impossible, 10
 - Necessity of actual total loss, 9
 - Test for determining whether loss is actual, 9
 - Missing ship, 7
 - Perishable articles, 11
 - Presumption of loss, 7
 - Sale by necessity, 8
 - Seizure, 7
 - Ship, 6,
- Abandonment, etc., cont'd.*
 - Spes recuperandi*, 7
 - Subject matter losing its form and species, 6
 - Total loss of value, 7
 - "Total loss only," 12
 - Total loss to insured, 7
 - Total loss with benefit of salvage, 12
 - Vessel missing, 7
 - Wreck, 7
- Agents, 30, 39**
- Application confined to insurance, 5**
- Apportionment of freight, 40**
- Apprehension of loss, 24**
- Blockade, 23**
- Bottomry bonds, 5**
- Capture, 23**
- Constructive total loss, 13**
 - Cargo, 13, 14
 - Computation, 16**
 - Expense of repairs and transshipment, 17
 - General average, 18
 - Jettison, 18
 - One-third new for old, 17
 - Salvage, 18
 - Statu quo*, 17
 - Straining and weakening, 17
 - Stranded vessel, 17
 - Submerged vessel, 17
 - Undervalued policies, 18
 - Value of vessel, 16
 - Vessels built for particular trade, 17
 - Wages and provisions, 17
 - Whether cost of repairs to be estimated, 17
- Criteria, 13**
- Definition, 13**
- Imminence of peril, 14**
 - Result of peril not conclusive, 15
 - Test of the prudent owner, 14
- Loss of adventure, 16**
- One-half loss to ship, 13**
- Quantum of damage, 13**
- Ship, 13**
- Definition, 5**
- Divisions of the subject, 6**
- Effect of abandonment, 36**
 - Absence of formal instrument, 36
 - Apportionment of freight, 40
 - Bottomry bond, 38
 - Compromise, 36
 - General principles, 36
 - Insured as agent of insurer, 39
- Insurers' liabilities, 38**
 - Expenses for saving property, 38
 - Freight, 38

Abandonment, etc., cont'd.

- Repairs, 38
- Wages, 38
- Master as agent of insurer, 39
- Mortgage, 38
- Rights to which insurer succeeds, 37**
 - Compensation from foreign government, 37
 - Compensation from tortfeasor, 37
 - General average contribution, 37
 - Proceeds and profits, 37
 - Rights of action, 37
- Salvage, 39
- Time when insurers' rights and liabilities arise, 38
- Title of the property, 36
- Unauthorized abandonment, 37
- When insured's interests affected, 38
- Election to abandon, 19
- Embargo, 23
- Freight, 27**
 - Actual total loss, 11
 - Apportionment of, 40
 - Constructive total loss of ship, 28
 - Cost of forwarding, 27
 - Fifty per cent rule, 27
 - Liability of insurer, 38
 - Loss of cargo, 28
 - Transshipment, 27
 - When ship must be repaired and goods delivered *in specie*, 28
- Master**
 - As agent of insurer, 39
 - Purchase of vessel by master, 33
- Memorandum articles, 9
- Missing vessel, 7
- Negligence, 19**
 - Duty of insured, 19
 - Loss not directly due to negligence, 19
- Notice of abandonment, 30**
 - Form and sufficiency, 31**
 - Absolute and explicit, 31
 - Claim for total loss, 31
 - Conditional, 31
 - Ground of abandonment, 31
 - Parol, 31
 - Question for jury, 31
 - Whether particular form necessary, 31
 - Whether word "abandon" is necessary, 31
 - Sale before abandonment, 30
- Time of notice, 32**
 - Agreement of parties, 33
 - Harmless delay, 32
 - Loss continuing total, 32
 - Particular provisions in policy, 32
 - Question of law or fact, 32
 - Reasonable time, 32
 - To whom notice given, 30
- Waiver and revocation, 33**
 - Abandoned vessel purchased by master or owner, 33
 - By master not ratified, 34
 - By master ratified by owner, 34
 - By owner, 34
 - Insured acting as agent, 34
 - Purchase before abandonment, 34
- Who may give notice, 30**
 - Agent, 30
 - Examples, 30
 - Joint owners, 30
 - Legal and equitable owners, 30

Abandonment, etc., cont'd.

- Master, 30
- Mortgaged vessel, 30
- One-third new for old, 17
- Outfits, 29
- Perishable articles, 11
- Profits, 28
- Questions of law and fact:**
 - Acceptance, 35
 - Reasonable time, 32
 - Sufficiency of notice, 31
 - Reason of the doctrine, 5
- Repairs:**
 - Acceptance, 35
 - Cost of repairs exceeding value, 8
 - Duty of insured to repair or transship, 19
 - Expense of repairs and transshipment, 17
- Right of insurer to repair, 21**
 - Against the will of the owner, 21
 - Time, 22
 - Sufficiency of repairs, 22
- Revocation of notice, 33
- Right of abandonment (see also *supra*, this title, NOTICE OF ABANDONMENT), 19**
 - Abandonment must be entire, 22
 - Depends on state of facts, 21
- Duty of insured to repair or transship, 19**
 - Allowing unnecessary sale, 20
 - Loss due to negligence, 19
 - Neglect to repair, 19
 - Neglect to transship, 20
 - River craft, 20
 - Voluntary surrender of cargo free of freight, 20
 - Withholding means of repair, 20
- Limitations of the right, 19
- Peril within policy, 20
- Right of insurer to repair, 21
- Successive perils, 21
- When abandonment is justified, 22**
 - Abandonment not favored, 23
 - Apprehension of peril, 24
 - Blockade, 23
 - Capture, 23
 - Embargo, 23
- Freight, 27, 29**
 - Constructive total loss of ship, 28
 - Cost of forwarding, 27
 - Fifty per cent rule, 27
 - Loss of cargo, 28
 - Transshipment, 27
 - When ship must be repaired and goods delivered *in specie*, 28
- General principles, 22
- Loss after termination of risk, 23
- Loss and retardation of voyage, 25**
 - Freight, 26
 - Insurance for the voyage, 25
 - Insurance on goods, 25
 - Insurance on ship, 25
 - Loss of cargo, 25
- Offer to abandon, 23
- Outfits, 29
- Partial loss, 23
- Profits, 28
- Restoration after capture, 24
- Sale by necessity, 27
- Sale under decree, 27
- Seizure by pirates, 23
- Stranding, 26

Abandonment, etc., cont'd.

Submerged vessel, 26

Total loss, 22

Total loss of part of cargo, 29

Sale before abandonment, 30

Salvage:

Estimate in determining total loss, 18

Total loss with benefit of salvage, 12

Definition of salvage, 12

Salvage passing without abandonment,

12

Whose property, 12

Stranding, 17, 26

Two policies, 30

Valued policy, 18

Waiver of notice, 33

When abandonment is justified, 22

ABATEMENT, 41

Ouster by, 41

ABATEMENT OF LEGACIES, 42**Annuities, 43, 54**Abatement *inter se*, 55

Annuity charged on personalty a general legacy, 54

Annuity paid from income, 43

As to mode of valuation, 54

Charged on land devised, 54

Priority over residuary legacies, 43

Specific gifts out of real estate, 55

Whether payable out of income or capital, 43

Charities, bequest to, 48

Children, bequest to, 46

Collateral inheritance tax, 56

Definition, 42

*Demonstrative legacies, see infra, this title,***SPECIFIC AND DEMONSTRATIVE LEGACIES.****General legacies (see also *supra*, this title,****ANNUITIES), 45**

Bequests for erection of monuments, 48

Bequests for maintenance or education of minors, 47

Bequest to charities, 48

Bequest to children, 46

Bequest to creditor in satisfaction of debt, 48

Bequest to servant, 45

Bequest to sister, 48

Bequest to wife, 46

Bequest to wife in lieu of dower, 48

Consideration for the legacy, 48

Bequest to creditor where debt is already liquidated, 50

Bequest to executors, 50

Bequest to husband, 50

Bequest to pay debt of a friend, 51

Rights must subsist at time of testator's death, 51

To creditor in satisfaction of debt, 48

To Wife in lieu of dower, 48

Creditors, 50

Express direction of testator, 49

Lien on realty, 49

Pretermitted children, 49

Whether a bequest in lieu of dower has priority over specific legacies, 49

Dependence, 46

Effect of near relationship, 46

Illustrations, 45

Intent, 51

Abatement *inter se*, 53

1 C. of L.—78.

Abatement, etc., cont'd.

Afterwards, 52

Burden of proof, 52

Direction to executor, 52

Illustrations, 52

Imprimis, 52

In the first place, 52

In the second place, 52

Intent to create priority must be clear,

51

Presumption of intended equality, 52

Special direction as to legacies for life,

54

Testator supposing there will be sufficiency, 53

Where testator constitutes two residues, 53

Where there is but one general legacy,

54

Legacy of stock, 56

Specific and demonstrative legacies, 56

The general rule, 45

Where bequest a mere bounty, 46

Gift of legacy duty, 56

Intent:**General legacies, 51**Abatement *inter se*, 53

Afterwards, 52

Burden of proof, 52

Direction to executor, 52

Illustrations, 52

Imprimis, 52

In the first place, 52

In the second place, 52

Intent to create priority must be clear,

51

Presumption of intended equality, 52

Special direction as to legacies for life,

54

Testator supposing there will be sufficiency, 53

Where testator constitutes two residues, 53

Where there is but one general legacy,

54

Specific and demonstrative legacies, 56, 59

Lapsed interests, 60

Costs of administration suit, 61

Lapsed legacies, 61

Lapsed specific legacy, 61

Liability of lapsed devise, 60

Residuary devisees, 61

Where lapsed devise descends to heir, 60

Where lapsed devise falls into residuary devise, 60

Where there is no charge of debts, 61

Pretermitted children, 49**Residuary legacies, 42**

Annuity paid from income, 43

Conduct of legatee, 44

Debts charged on a particular fund, 44

General rule, 42

Legatee relieved of liability by testator,

44

Mortgaged property, 44

Residue at time of testator's death, 43

Special direction of testator, 45

Subsequent deficiency of assets, 43

Whether annuity takes precedence, 43

Specific and demonstrative legacies, 56

Contribution in favor of general legatees,

60

Abatement, etc., cont'd.

- Demonstrative legacies, 57
- Devise in lieu of dower, 58
- Devise to heir, 57
- Effect of general charge of legacies, 60
- Fund given in fractional parts, 59
- General legacies, 56
- In general, 56
- Intention of testator, 56, 59
- Pro rata* abatement, 57
- Specific bequest of all testator's personal property, 59
- Specific devisees and legatees, 57
- Statutory provisions, 62
- Stock, 56
- Wife:
 - Bequest to, 46
 - Provision in lieu of dower, 48, 58
- ABATEMENT OF NUISANCES, 63**
- Abatement without process of law, see infra,*
- MUNICIPAL CORPORATIONS; PRIVATE INDIVIDUALS.**
- Acquiescence, 74
- Action at law, 63
- Ancient common-law remedies, 63
- Animals: killing dangerous animals, 82, 84
- Assize of nuisance, 63
- Bowling alley, 92
- By process of law, 63
- Criminal proceedings, 76**
- Abatement forms no part of the punishment, 77
- Extent of abatement, 78
- Generally, 76
- Municipal corporations, 77
- Nature of order, 78
- Nuisance must be continuing, 77
- Order for abatement, 76
- Requiring officer to execute order, 78
- Strangers affected, 78
- To whom order is given, 78
- What judgment may embrace, 76
- When ordered, 77
- Where offense is pardoned, 78
- Decree, 76
- Definition, 63
- Delay (see also *infra*, **INJUNCTIONS**), 74
- Destruction of buildings, 94, 96
- Dogs: killing dogs, 82
- Encroachments, 84
- Houses of ill fame, 93, 96
- Indictment, see infra*, **CRIMINAL PROCEEDINGS.**
- Injunction, 64**
- Balancing conveniences, 70
- Clear right of plaintiff, 71
- Decree, 76
- Delay and acquiescence, 74**
- Assent, 75
- Delay accompanied with acquiescence, 75
- Denial of relief, 74
- Expensive erections, 75
- Denial of right by answer, 68
- Digging deep holes, 70
- Discretion of court, 69
- Enjoining municipality, 92, 93
- Establishment of right at law, 66
- Examples of equitable interference, 64, 67
- Inadequacy of legal remedy, 69
- Instances of irreparable injury, 70

Abatement, etc., cont'd.

- Invasion of substantial right, 70
- Issue made to a jury, 68
- Locality of nuisance, 67
- Mere diminution of value, 69
- Must be clear case of nuisance, 67
- Necessity of substantial injury, 67
- Private nuisance, 65
- Public nuisance, 64
- Quantum* of damage, 70
- When equity will interfere, 64
- Whether acquittal on indictment is a bar, 65
- Who may maintain a bill, 71**
- Examples, 71, 74
- Obstructions on highways, 72
- Private nuisance, 71
- Public nuisance, 71
- Purely public nuisances, 73
- Suit brought by municipal corporation, 74
- Suits by state, 74
- Laches, 74
- Municipal corporations, 74**
- Abatement without process of law, 87**
- Appropriating private property, 94
- Bowling alley, 92
- Cases of necessity, 92, 95
- Conclusiveness of state's determination that a thing is a nuisance, 88
- Declaring the keeping of bees a nuisance, 90
- Destruction of buildings, 96
- Destruction of property, 93
- Extent of municipal control, 88
- Fire limits, 92
- Houses of ill fame, 93, 96
- How power conferred, 87
- Injunction to restrain city, 92
- Liability of municipality, 95
- Method of abatement, 93
- Necessary means, 93
- Neglect in matter of nuisances, 95
- Notice, 94
- Nuisances *per se*, 92
- Offensive odors and gases, 93
- Ordinance arbitrarily declaring a thing to be a nuisance, 90
- Power to be reasonably exercised, 96
- Public health and safety, 91
- Service of order of removal, 95
- Source of power, 87
- Summary abatement, 93
- Suppression of use, 96
- Use authorized by common law or statute, 90
- When power to abate implied, 87
- Where fact of nuisance is evident, 96
- Wooden buildings within certain limits, 92
- Criminal proceedings, 77**
- Notice, 86**
- Municipal corporations, 94**
- Obstructions on highways, 72
- Pardon, 78
- Power of court to order abatement, 64
- Private individuals, 79**
- Instances of exercise of right, 79
- Limitations upon right of abatement, 82**
- Allowing nuisance, 84
- Choice of modes of abatement, 86
- Dangerous animals, 84

Abatement, etc., cont'd.

Discontinued, 84
 Disturbance to the public peace, 86
 Encroachments, 84
 Excessive abatement, 85
 Nuisance must actually exist at the time, 83
 Party acting at his peril, 82
 Reasonable notice, 86

Notice, 86

Origin of the right to abate, 79

Private nuisance abatable by person aggrieved, 79

Who may abate, 79

Private nuisance, 79

Public nuisance, 80

Authorities analyzed, 81

Killing dogs, 82

Older authorities, 80

True rule, 80

Where individual sustains no special injury, 80

Quod permittat prosternere, 63

State, 74

Suit in equity, see *infra*, INJUNCTION.

Without process of law, see *infra*, MUNICIPAL CORPORATIONS; PRIVATE INDIVIDUALS.

Writ of nuisance, 64

ABBREVIATIONS, 97

Acknowledgments, 531

A. D., 99

Adm'r, 98

Ads., 97

A. M., 99

And., 98

Bk., 97

Br., 97

C. B. & Q. R. R. Co., 98

Citz., 97

Co., 98

Com., 98

C. P. C. C., 99

Dec., 99

Deeds, 100

Definition, 97

Description of land, 100

Dolls., 98

"E. and O. E.," 452

Effect of, 97

Ex. A., 98

Feby., 99

Ind., 98

In general, 97

Int., 98

Judicial notice 98

In general, 98

Names of places, 98

Officers, 98

Time, 99

J. P., 99

La., 98

Legal terms, 101, 161

MS., 99

N. P., 99

Octb., 99

O. F. B. A., 97

p. a., 98

Parol evidence, 99

Admissibility, 99

Usage, 100

Wills, 100

P. M., 99

Abbreviations, cont'd.

Reports, 101, 161

Suff., 97

Supt., 98

Tax proceedings, 100

Text-books, 101, 161

Vs., 97

"&," 97

ABDICATE, 161**ABDUCTION, 162**

Abduction as a crime, 173

Common-law rule, 173

Defenses, 178

Connivance of parent, 178

Consent of female, 178

Ignorance of age, 179

Justifiable taking, 178

Merger of offense, 179

Parent's harsh treatment, 179

Previous chastity, 179

Taking for the purposes of marriage, see *infra*, MARRIAGE.

What are, 178

Marrying female under age without consent of parent or guardian, 173

Under statutes, 173

In general, 173

The taking, 174

Active influence for the illicit purpose necessary, 174

Chastity of the woman, 178

Force or violence necessary, 174

For concubinage, 177

For prostitution, 177

From parent's custody, 176

Gist of the offense, 175

Instances, 174

Instances of what amounts to a taking, 175

Intention to return, 176

Living apart from parent, 177

Object of the taking, 177

Purpose of taking must be proved, 177

What constitutes, 174

When the offense is complete, 176

Abduction of child (see also *infra*, EVIDENCE), 167

As to measure of damages, see *infra*, MEASURE OF DAMAGES.

Gist of the action, 168

Rights of parent, 167

Father, 167

General rule, 167

Guardian, 168

Master and apprentice, 168

Mother, 167

One *in loco parentis*, 168

Stepfather, 168

When action does not lie, 169

Abandonment of child, 169

Emancipation of child, 169

Enticement of daughter for purpose of marriage, 170

Father and mother living apart, 170

In general, 167

Mother's consent procured by fraud, 171

Notice from parent, 169

Abduction of husband (see also *infra*, EVIDENCE), 166

As to measure of damages, see *infra*, MEASURE OF DAMAGES.

Abduction, cont'd.

- Common-law rule, 166
- Conflict of authority, 166
- Gist of the action, 167
- Habeas corpus*, 167
- Misconduct of the parties, 167
- Modern decisions, 166
- Remedies of wife, 166
- When the action does not lie, 167
- Abduction of wife** (see also *infra*, EVIDENCE), 163
 - As to measure of damages*, see also *infra*, MEASURE OF DAMAGES.
- Action barred, 163
- Consent of wife, 163
- Enticement must be active, 163
- Gist of the action, 164
- Habeas corpus*, 165
- Harboring wife in good faith, 164
- Harboring wife who leaves husband because of ill treatment, 164
- Loss of wife's society, 164
- Malice, 165
- Notice by husband not to harbor wife, 164
- Remedies of husband, 163
- Rights of husband, 163
- Right of parents to harbor and protect child, 165
- When action does not lie, 164
- Chastity, 179
- Chastity of the woman, 178
- Confession of defendant, 181
- Consent of female, 178
- Consent of parents, 181
- Damages*, see *infra*, MEASURE OF DAMAGES; EVIDENCE.
- Definition, 163
- Evidence**, 179
 - Confession of defendant, 181
 - Corroborative evidence, 182
- Damages**, 172
 - Exemplary damages, 172
 - Pecuniary circumstances of defendant, 171
 - What may be shown as mitigation of damages, 171
- Evidence of the commission of other like offenses, 182
- Intent, 181
- Motive, 181
- On abduction of child**, 180
 - Age of child, 180
 - Female's moral character, 181
 - In mitigation of damages, 181
 - Legal custody, 181
 - Parent's consent, 181
- On abduction of husband**, 180
- On abduction of wife**, 179
 - Acts of husband, 180
 - Declarations of third person, 180
 - Letters of wife, 180
 - Statements of wife, 179
 - Statements of wife as to husband's ill treatment, 179
 - Statements to prove state of wife's feelings towards husband, 180
 - Statements of acts of defendant, 181
- Exemplary damages, 171, 172
- Habeas corpus*, 165, 167
- Marriage**, 178
 - Enticing of daughter for purpose of marriage, 172, 178

Abduction, cont'd.

- Marrying female under age without consent of parent, 172, 178
- Measure of damages**, 171, 181
 - In action by husband**, 171
 - Dependent upon the prior relations of the parties, 171
 - Excessive damages, 171
 - How previous relations shown, 171
 - Pecuniary circumstances of defendant, 171
 - Punitive damages, 171
 - Reason of the rule, 171
 - What may be shown in mitigation of damages, 171
 - In action by parent**, 172
 - Exemplary damages, 172
 - General rule, 172
 - Where no claim is made for special damages, 172
 - In action by wife**, 172
- ABET**, 182
- ABEYANCE**, 182
 - Fee, or inheritance, being in abeyance, 182
 - Freehold being in abeyance, 183
- ABIDE**, 183
 - Abide and perform, 184
 - Abide the decision, 184
 - Abide the event, 184
 - Abide the judgment, 184
 - Arbitration, 184
 - Await and abide, 184
 - Costs abiding the event, 184
- ABIDING CONVICTION**, 184
- ABILITY**, 185
 - Ability to support wife, 185
- ABJURE**, 185
- ABLE**, 185
- ABLE BODIED**, 185
- ABODE**, 185
- ABORTION**, 186
 - Accessories and accomplices**, 191, 390
 - Corroboration of woman not necessary, 192, 193
 - Persons aiding and abetting, 192
 - The woman herself, 191
 - Administering, 189
 - Attempts**, 193
 - Attempt defined, 193
 - Effect of failure, 193
 - Whether punishable, 193
 - Books as evidence, 194
 - Burden of proof**, 195
 - As to advice of physician, 195
 - As to necessity of abortion, 195
 - Consent of woman, 188, 196
 - Death of child, 190
 - Death of mother, 190
 - Defenses**, 195
 - Advice of physician, 195, 196
 - Non-pregnancy, 196
 - Definition, 186
 - Dying declarations, 193
 - Elements of the offense, 188
 - Evidence**, 193
 - Advice of physician, 195
 - Burden of proof, 195
 - Cause of death, 194
 - Circumstances, 195
 - Corroboration of woman not necessary, 192, 193
 - Death of woman, 194

Abortion, cont'd.

Dying declarations, 193

Experts, 194

Instruments, 194

Intent, 188

Medical books, 194

Of woman, 192, 193

Res gestæ, 193

Experts, 194

How offense regarded, 187

At common law, 187

With consent of woman after quickening, 187

With consent of woman before quickening, 187

By statute, 188

Instruments as evidence, 194

Intent, 188

Evidence of, 188

Implied, 189

Knowledge of pregnancy, 188

Necessity of proof, 188

Means, 189

Administering, 189

Ineffectual means, 190

Noxious thing, 189

Whether mode of accomplishment material, 190

Miscarriage, 186

Noxious thing, 189

Offense at common law, 187

Offense by statute, 188

Persons selling, advertising, or giving away instruments or drugs, 192

Physician's advice, 195, 196

Pregnancy, 188

Non-pregnancy as a defense, 196

Stage of pregnancy, 188

When pregnancy ceases, 188

Principals, 191

Quick with child, 187, 188

Res gestæ, 193

Admissibility in evidence, 193

Declaration to physician, 194

Exclamations indicating present pain, 194

Narrative of past transactions, 194

Results, 190

At common law, 190

By statute, 190

Death of child, 190

Death of child after birth, 191

Death of mother, 190

Who may be criminally liable, 191

As accessories or accomplices, 191

As principals, 191

Persons selling, advertising, or giving away instruments or drugs, 192

Without consent of woman, 188

Woman's liability, 191

ABOUT, 196

About the person, 196

About the premises, 197

About to expire, 196

About to sail, 197

Assignment for the benefit of creditors, 196

Attachment laws, 197

Charter party, 197

Description of lands, 198

ABOVE, 200**ABRIDGE, 201****ABROAD, 201****ABSCOND, 201**

Affidavit, 202

Arrest, 202

Not leaving the state, 202

Temporary absence, 202

ABSCONDING DEBTOR, 201, 203**ABSENCE, 203**

Absence of officers, 205

ABSENT, 203

Absent and absconding debtor, 203

Absent officers and soldiers, 205

Attachment laws, 203

Death, 205

Intention to remain away formed after departure, 204

Non-resident distinguished from absent defendant, 204

Prior presence, 204

ABSENT AND ABSCONDING DEBTOR, 203**ABSENTEE, 205****ABSOLUTE, 205**

Absolute conveyance, 208

Absolute conviction, 207

Absolute fee simple, 208

Absolute imbecility, 208

Absolute interest, 206

Absolute nullities, 208

Absolute ownership of personal property, 208

Absolute purchase of pew, 207

Absolute right of individuals, 207

Absolute title, 208

Absolute total loss, see **ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE).**

Absolute total loss, 206

Minors, 207

Whether in conveyances the term "absolute" carries the fee, 207

Wills, 208

ABSOLUTELY, 208

Absolutely entitled, 209

Absolutely incompatible, 208

Absolutely necessary, 209

Due absolutely, 208

ABSORPTIVE SUBSTANCE, 209**ABSTRACT, 209****ABSTRACTING, 209****ABSTRACT OF TITLE, 210**

Arrangement and form, 217

Abstracting documents, 218

Acknowledgment, 218

Conveyances in general, 218

Execution, 218

Execution sales, 219

Extinction of dower and curtesy, 218

Judicial sales, 218

Liens and incumbrances, 219

Miscellaneous, 219

Necessary grantors and their power to convey, 218

Particulars of the documents which the abstract should set forth, 218

Tax sales, 219

Trusts and powers, 218

What parts quoted and what abstracted merely, 218

Wills, 218

Caption, 217

Generally, 217

Index, 217

Official searches, 218

Abstract, etc., cont'd.

- Order, 217
- Plats and sketches, 218
- The transaction complete, 218
- As evidence, 219**
 - In Illinois, 220
 - In Texas, 220
 - Of lost deeds, 219
 - Tax sales, 220
- Caveat emptor*, 211, 213
- Contents and sufficiency, 211**
 - Constructive notice, 211
 - Conveyances, 211
 - Duty of vendor, 211
 - Effect of recording statutes, 212
 - Incumbrances, 211
 - In general, 211
 - Patents, 211
 - Period for which title shown, 212
 - Reference to original documents, 211
 - Summary of grants, 211
 - What abstract should contain, 211
 - What vendor must disclose, 211
- Definition, 211**
- Duty to examine, 211**
- Liability of examiners of titles, 220**
 - Actual damage necessary, 221
 - Duty of employer, 221
 - Examiner not an insurer, 220
 - Failure to make necessary searches, 220
 - General rule as to degree of care and skill, 220
 - Mistake as to quantity of land conveyed, 220
 - Public officers, 217
 - Relying on marginal notes and entries, 221
 - Survival of liability, 220
 - Trust relation, 220
 - Want of due care, 220
 - Who may enforce, 221
- Limitation of actions, 221**
- Object of abstract, 211**
- Period for which title shown, 212**
 - English rule, 212
 - Practice in the United States, 212
- Preliminary, 216**
- Preparing the abstract, 216**
- Reasonable time, 214, 215**
- Recording acts, 216**
 - Effect of, 212
- Searching, 216**
 - Duty of officials, 216
 - Effect of official search, 216, 217**
 - Official's liability, 217
 - Where there is no actual loss from error, 217
 - Liability of officer upon his bond, 217
 - Reasonable regulations, 216
 - Registry laws, 216
 - Right of access to public records, 216
- Showing the title by the abstract, 214**
 - Title to be approved by attorney, 215
- Vendee's objections, 215**
 - English practice, 215
 - Reasonable time, 215
 - Vendee's right to verification, 215
 - Verification of abstract, 215
- Warranty deed conveying clear title with abstract, 215**
- Time of delivering the abstract, 213**
 - English rule, 213

Abstract, etc., cont'd.

- Extension of time, 214
- Reasonable time, 214
- Rule at law, 214
- Rule in equity, 214
- Waiver of delay, 214
- Who must furnish the abstract, 212**
 - Agreement that vendor shall investigate, 213
 - Caveat emptor*, 211, 213
 - Default of vendee, 213
 - Default of vendor, 213
 - In England, 212
 - In United States, 212
 - Right to hold abstract as security, 213
 - Special agreement, 213
 - Whether abstract implied in every case, 213
 - Whether purchaser must examine for himself, 211, 213
- ABSURDITY, 221**
- ABUSE:**
 - Abuse of discretion, 222
 - Abuse of woman or child, 222
- ABUSE AND MISUSE, 221**
- ABUT, 222**
 - Adjoining lot or abutting on the street, 222
 - A stream intervening, 223
 - County road intervening, 223
 - Railroad intervening, 223
 - Rear of lot, 222
- ABUTTER, 222**
- ABUTMENT, 223**
- ABUTTING OWNERS, 224**
 - Butters upon rural roads, 236**
 - Construction of underground passage-way, 243
 - Drovers' rights and liabilities, 239
 - Extent of abutters' rights in rural roads, 242
 - Fencing up part of highway, 243
 - Grass, 242
 - Herbage, 242
 - How rights are protected, 243
 - Hunting on highway, 238
 - Minerals, 242
 - Pipe lines, 239
 - Poles, 240
 - Private railroad, 242
 - Public have only easement of passage, 238
 - Restriction upon rights of public, 236
 - Rights of rural abutter at common law, 237
 - Rural abutter as proprietor, 237
 - Rural and urban highways distinguished, 236
 - Sewers, 241
 - Soil of highway, 242
 - Steam railroads, 241
 - Trees, 242
 - Where abutter owns fee, 243
 - Definition, 224**
 - In broadest sense, 224
 - In ordinary legal sense, 224
 - Easement of access, 225**
 - Absolute right of access, 225
 - Access obstructed by semi-public improvements, 227
 - Bridges and viaducts, 226
 - Due compensation when deprived of right, 226

Abutting, etc., cont'd.

- Heaping snow in front of abutting premises, 226
- In general, 225
- Injunction to enforce right, 226
- Interference with right, 226
- Obstruction by electric railways, 227
- Obstruction by pipe lines, 228
- Obstruction by steam railroad, 227
- Obstruction by street railroads, 227
- Obstruction by telegraph and telephone poles, 228
- Obstruction of right, 226
- Ordinance authorizing the stationing of coaches in front of abutting premises, 226
- Question of ownership of fee, 225
- Species of private property, 225
- Easement of light and air, 228
- Elevated railroads: light and air, 229
- Eminent domain, 226, 229
 - Compensation for indirect impairment in value by public improvements, 231
 - Common-law rule, 231
 - Damages allowed under constitutions or statutes, 233
 - Deprivation of possession, 231
 - Impairment of usefulness and value, 231
 - Negligent and unskilful work, 232
- Compensation for obstruction of right of access, 226
- Lateral and subjacent support, 229
- Obstruction by electric railroad, 227
- Obstruction by horse railroads, 228
- Obstruction by pipe lines, 228
- Obstruction by steam railroad, 227
- Obstruction by telegraph and telephone poles, 228
- Excavations, see *infra*, STREETS AND SIDEWALKS.
- Highways, see *infra*, ABUTTERS ON RURAL ROADS.
- Injunction: obstructions to access, 228
- Lateral and subjacent support, 229
 - Acquired easement of support, 230
 - Buildings and additional burdens, 230
 - Compensation, 229
 - Opening, surveying, and grading of streets, 229
 - Right in general, 229
- Liability of abutting owners, 242
 - Defects in highway, 243
 - Expenses of public improvements, 244
 - Where defect in highway is occasioned by abutter, 244
- Light and air, 228
- Pipe lines: rural roads, 239
 - Acquiescence of abutter, 240
 - Compensation to abutting owner, 239
 - Right of abutter to remove pipes, 239
- Projections, see *infra*, STREETS AND SIDEWALKS.
- Rights of abutters, 225
- Scope of article, 225
- Snow. heaping snow in front of abutting premises, 226
- Streets and sidewalks: right to use of streets, 234
 - Awnings, 235, 236
 - Bay window, 235

Abutting, etc., cont'd.

- Considerations determining the question of reasonableness, 235
- Crowds blockading street, attracted by advertisements in window, 236
- Depositing building materials, 234
- Deposit of goods by tradesman, 235
- Drays, trucks, etc., 235
- Excavation rendering street unsafe, 236
- Excavations, 236
 - For purposes of deposit, 234
- Fruit-stand, 235
- Hay scales, 235
- Implied consent of city, 236
- Liability of municipality, 236
- Merchants unloading goods, 235
- Passageway, 235
- Porch, 236
- Projections as nuisances, 235
- Revocation of permission as to projections and excavations, 236
- Right of municipality to forbid excavations, 236
- Stairway, 235
- Steps, 235
- Use must be reasonable, 235
- ACADEMY, 244
- ACCEPT, 245
 - Accept and receive distinguished, 245
 - Acceptable price, 245
 - Acceptance, see ACCOMMODATION PAPER.
- ACCESS, 246
 - Access of light, 246
- ACCESSION, 247
 - Accessio credit principalis*, 248
 - Accession falls to the principal, 248
 - Application of the doctrine to personality, 268
 - Articles not substantially changed, 249
 - Chattel mortgages, 254
 - Articles in incomplete state, 254
 - Lien upon increment of property mortgaged, 254
 - Live stock, 254
 - Plants and shrubs, 254
 - Crops, 255
 - Definition, 247
 - Fixtures, see *infra*, PERSONALTY WHEN ANNEXED TO REALTY.
 - French and Louisiana codes, 247
 - From what causes due, 247
 - General principles, 247
 - Labor performed upon, or materials added to, property without owner's consent, 249
 - By wilful trespasser, 251
 - Liability of owner for compensation, 252
 - Involuntary wrongdoer, 252
 - Measure of recovery, 252
 - Wilful wrongdoer, 252
 - Under a bona fide mistake as to ownership, 246
 - Change must be sufficient to destroy identity, 250
 - Relative value of completed product and original materials, 250
 - Specification, 250
 - Test as to value, 251
 - Trees made into boards, 250
 - What constitutes a change of species, 253
 - Change of identity, 253
 - Various tests, 253
 - Wilful trespasser and mere wrongdoer, 253

Accession, cont'd.

When no liability exists, though there is honest mistake, 252

Manure, 255

Mistake, see *infra*, LABOR PERFORMED UPON, OR MATERIALS ADDED TO, PROPERTY WITHOUT OWNER'S CONSENT.

Mortgages, see *infra*, CHATTEL MORTGAGES.

Natural, artificial, and mixed accession, 247

Owner of principal materials, 248

Personalty annexed to realty, 255

Agreement that house shall remain personally, 256

Building covered by mortgage, 256

By third party, 255

Consent of owner of land to erection of house, 256

Crops, 255

General rule, 255

House built upon land of another, 255

How subsequent purchaser affected by such agreement, 256

Intention, 256

Manure made upon farm, 255

Personalty of one person attached to the realty of another, 255

Qualification of rule, 256

Rail fence built upon land, 255

Trees, 255

Scope of the article, 247

Summary of the doctrine, 248

Trees, 255

Union of materials must be complete, 249

ACCESSORY (see also ABORTION; ACCOMPLICE), 257

Accessory after the fact, 264

Accessory's knowledge of felony, 267

Accessory rendering assistance, 267

Aid rendered for other purposes, 268

Assistance rendered through agent, 268

Felony must be complete, 266

Generally, 266

Harboring by wife or kindred, 268

Indictment and conviction before principal, 264

Knowledge of accessory requisite, 267

Mere inaction or admission, 268

Receiving stolen property, 267

Same party guilty both before and after the fact, 269

What constitutes an accessory after the fact, 267

When larceny is complete, 267

Accessory before the fact, 268

Crime committed as a probable consequence of advice, 266

Dependence of accessory upon principal, 263.

Direct communication unnecessary, 266

Indictment and conviction before principal is convicted, 264

In general, 264

Intent, 264

Criminal design necessary, 264

Feigned accomplice, 264

Illustrations, 264

Knowledge and concealment of fact that crime is to be committed, 265

Regarded as a substantive offense, 263

Accessory, cont'd.

Relation between the crime and incitement, 265

Soliciting and inciting, 265

When a different crime is committed, 265

Withdrawal of advice, 266

Wrong person murdered, 266

Acquittal of principal, 269

Acting through innocent agent, 260

Admissions, 269

Affray, 917

Assault and battery, 261

Assault with intent to commit rape, 262

Confessions, 269

Definition, 257

Accessory after the fact, 258

Accessory before the fact, 258

Accessory generally, 257

Principal and accessory before the fact distinguished, 258

Dependence of accessory on principal, 262

As modified by statute, 263

Accessory after the fact, 264

Accessory before the fact, 263

Accessory before the fact regarded as substantive offender, 263

Accessory before the fact to a murder, 263

At common law, 262

In what manner dependent, 263

In what manner distinct, 262

Statute of limitations, 263

Distinguished from principal, 258

Accomplice distinguished from principal, 259

Acting innocent agent, 260

Actors in a common criminal design, 259

Constructive presence, 258

Modified by criminal codes, 258

One of the confederates signaling to another, 259

Party absent from the scene to facilitate the commission of a crime, 259

Presence necessary to constitute accessory, 258

When all the participants are principals, 259

Evidence, 268

Accessory may controvert principal's guilt, 269

Accessory's guilt dependent upon that of principal, 269

Admissions, 269

Confessions, 269

Corroboration of evidence of accessory after the fact, 270

Plea of guilty, 269

Record of principal's conviction, 270

Statutory modifications, 269

Whether acquittal of principal is a bar to conviction of accessory, 269

Extradition, 271

House of ill fame, 262

Intent, 264

Jurisdiction, 271

Crime committed in another county or state, 271

Knowledge and concealment of fact that crime is to be committed, 265

Limitation of actions, 263

Manslaughter, 262

Misdemeanors, 261

*Accessory, cont'd.***Offenses which admit of accessories, 260**

- Arresting one on a forged warrant, 261
- Arson, 262
- Assault and battery, 261
- Assault with intent to commit rape, 261
- Betting on election, 262
- Common-law felony, 260
- Forgery, 262
- Gaming house, 262
- House of ill fame, 262
- Manslaughter, 262
- Misdemeanors, 261
- Passing counterfeit money, 262
- Selling liquor without a license, 262
- Statutory felony, 260
- Treason, 260
- Plea of guilty, 269
- Principal distinguished from, 260
- Punishment, 270
- Same party guilty both before and after the fact, 269
- Soliciting and inciting, 265
- Treason, 260
- Who may be an accessory, 260

Witnesses, see infra, EVIDENCE.

ACCIDENT (see also ACCIDENT IN EQUITY; ACT OF GOD), 272

For definition in accident insurance, see ACCIDENT INSURANCE.

- Accident and negligence, 272
- Accidental shooting, 274
- Accidentally striking another, 274
- Animals, 274
- Assault, 274
- Business misfortunes, 272
- Children, 274
- Civil damage act, 274
- Equitable definition, 272
- Explosions, 274
- Fences, 274
- Fires, 275
- Floods, 274
- Handling dangerous goods, 275
- Horses, 275
- Ice and snow, 275
- Inevitable accident, 587
- Leakage of water from neighboring dam or reservoir, 273
- Manslaughter, 274
- Omission, 272
- Personal injuries, 273
- Railroads, 273
- Snow storm, 273
- Telegraph wire, 273

ACCIDENT (IN EQUITY), 277

- Administration of estates, 282
- Annuities, 282
- Apprenticeship, 282
- Bills and notes, 282
- Boundaries, 282
- Confusion of boundaries, 282
- Contracts, 283
- Definition, 277, 278
- Essentials to equitable jurisdiction, 279
- Forfeitures and penalties, 279**
 - Accidental default of mortgagor, 279
 - Failure to redeem land, 279
 - General rule, 279
- In what cases equity will intervene, 279
- In what cases equity will not interpose, 282

*Accident, etc., cont'd.***Judgments, 280**

- Illness of counsel, 280
- No relief in case of negligence, 280
- Relief against judgments, 280
- Jurisdiction in equity, 278
- Lost papers, 282, 283
- Mere expectancies, 283
- Mistake distinguished from, 278
- Negligence, 282
- Origin and rationale of the equitable jurisdiction, 278

Powers, 281

- Charities, 281
- Creditors, 281
- Defective execution, 281
- Defects will be remedied in equity, 281
- Donee of the power, 281
- Husbands, 281
- Illegitimate children, 281
- Jurisdiction confined to powers created by private individuals, 281
- Non-execution, 281
- Powers coupled with a trust, 281
- Purchasers, 281
- Relief forbidden by equity, 281
- Remote relations, 281
- Strangers, 281
- To whom relief will be granted, 281
- Wives and legitimate children, 281

Scope of article, 278

Subsequent acquisition of jurisdiction by courts of law, 279

Surprise distinguished from, 278

ACCIDENT INSURANCE, 284**Accident defined, 291**

- Accident caused by disease, 293
- Asphyxiation, 294
- Death by accident, 292
- Death by fright, 294
- Disease caused by accident, 293
- Drowning, 294
- Fighting, 294
- In general, 291, 294
- Intentional injuries, 294
- Jumping from train, 292
- Negligence, 294
- Poison, 294
- Somnambulism, 294
- Stepping off cars, 294
- Sting of insect, 294
- Stumbling under railroad trains, 294
- Suicide while insane, 294
- Sunstroke, 292
- Swinging Indian clubs, 292
- Unforeseen result of ordinary occupation, 292

Accidents and injuries usually excepted, 306

Accidents and injuries usually insured against, 291

Accidents to insured in special occupations, 302

- Change of occupation, 302
- Change of occupation question for jury, 303
- Classification of agent binding an insurer, 304
- Description of occupation, 302
- Engineer chopping wood, 304
- Exposure not incidental to occupation, 304
- General classification no waiver of express exception, 304

Accident, etc., cont'd.

- Injuries received in more hazardous occupations, 303
- Occupation defined, 303
- Proprietor of ice business delivering ice, 304
- Provisions against other or more hazardous occupations, 302
- Refers to profession, not acts, 303
- Risks classified by the company, 303

Agents, 328

- Agent of mutual benefit association, 328
- Company estopped from denying authority of agent, 329
- Knowledge by agent of false statement, 328
- Knowledge of agent imputed to insurer, 329
- Knowledge of agent that insured had lost an eye, 329
- Misstatements in application, 328
- Power to waive conditions and forfeitures, 328
- Proviso in policy limiting agent's authority, 329

Amount of recovery, 332

- Final proofs submitted before expiration of period of disability, 333
- Income erroneously stated, 333
- Loss of time and profit, 332
- Money value of time, 332
- Weekly indemnity, 332

Application, 286

- Application not part of contract, 286
- Differing from policy, 286, 288
- General rule of construction, 286
- Policy differing from application, 286, 288
- Policy referring to the application, 286
- Receipt and acceptance of application, 288
- Statements as to bodily or mental infirmity, 286
- Statement as to marriage, 287
- Statements as to occupation, 287
- Statement as to other insurance, 287
- Statements expressing the applicant's understanding of the effect of the insurance, 286

Arbitration, 327

- Mutual benefit societies, 327
- Provisions of the policy, 327
- When submission a condition precedent, 327
- When submission not a condition precedent, 327

Asphyxiation, 294, 315**As soon as possible, 324**

- Burden of proof, voluntary exposure, 308
- Casualty insurance distinguished from, 285

Consideration of the terms of the policy, 291**Construed most strongly against insurer, 306****Conveyances, see *infra*, INJURIES TO PASSENGERS BY PUBLIC OR PRIVATE CONVEYANCE.****Damages, see *infra*, AMOUNT OF RECOVERY.****Death by accident, 292, 293****Death caused by disease, 315**

- Accident occasioned by fits, 318

Accident, etc., cont'd.

- Blood-poison, 316
- Disease accelerated by accident, 317
- Disease not the proximate cause of death, 315
- Disease the reasonable and natural cause of accident, 315
- Duodenitis, 316
- Embolism, 316
- Epilepsy, 317
- Epileptic fit, 317
- Erysipelas, 316, 318
- Exceptions to special diseases, 318
- Fatty degeneration of the heart, 317
- Hernia, 318
- Insanity, 318
- Malignant pustule, 317
- Peritonitis, 316
- Provision in the policy, 315
- Temporary fainting spell, 327
- Tetanus, 316

Death caused by fright, 294**Definition, 285****Drowning, 294****Drunkenness, 318****Estoppel: denying payment of premiums, 290****Evidence, 330**

- Declarations of the insured, 331
- Direct and positive proof, 330
- Establishing proviso limiting insurer's liability, 332
- Evidence of physician, 331
- Exercise of due care, 332
- Presumption against intentional injury, 332
- Presumption against suicide, 331
- Presumptions, 331
- Proof of death by violent, external, and accidental means, 330
- Records, 332
- Res gesta*, 331

Examination of body, 324**Exceptions, 306****External, 294****External, violent, and accidental means, 294**

- Construction of the provision, 294
- Effects not at once apparent, 296
- Examples, 294, 296
- Meaning of external, 294
- Suicide while insane, 295
- Violent, accidental, external, and visible means, 294

Eyes, 302**Fighting, 294****Getting on or off railroad cars, 312****Gymnastic or athletic exercise, 319****Immediate, 323****Inhalation of gas, 315****Injuries received in the discharge of duty, 306****Injuries to passengers by public or private conveyance, 305**

- General nature of the provision, 305
- Injury received while changing conveyances, 305
- Person on train for other purposes than travel, 305
- Railroad engineer, 305
- Walking not included, 305

Insanity (see also *infra*, SUICIDE WHILE INSANE):

Accident, etc., cont'd.

- Death inflicted by insane person, 322
- Intention, 294
- Intentional injuries, 322**
 - Death inflicted by insane person, 322
 - Intentional injury inflicted by another, 322
 - Intentional injuries inflicted by insured, 313, 314, 322
 - Nature of the provision, 322
- Intoxication, 318, 319**
 - Definition, 319
 - Evidence of intoxication, 319
- Jumping from train, 292
- Lifting or over-exertion, 319
- Limbs, see infra, LOSS OF CERTAIN MEMBERS OF THE BODY.*
- Loss of certain members of the body, 300**
 - Eyes, 302
 - Feet, 301
 - Hand no longer useful, 301
 - Hands, 301
 - In general, 300
 - Paralysis of both legs, 301
 - Partial disablement, 300
 - Permanent disablement, 300
 - Severance, 301
 - Temporary disability, 300
- Marriage: statements in application, 287**
- Negligence, 294, 307, 308**
 - Want of due diligence, 310**
 - Contemplated risks, 310
 - Due care in performing customary duties 311
 - Examples, 310, 311
 - Express exception of incidental risk, 311
 - Risks impliedly assumed, 310
 - The stipulation, 310
- Noncompliance with rules and regulations of carrier or corporation, 313**
- Notice and proof of injury, 323**
 - "As soon as possible," 324
 - Condition precedent, 323
 - Dissecting body, 324
 - Estoppel, 324
 - Examination of body, 324
 - Immediate notice, 323
 - Indemnity, payable at designated place, 325
 - In general, 323
 - Notice in case of disability, 323
 - Notice to agent, 324
 - Unreasonable condition, 323
- Waiver of notice, 325**
 - Acting upon verbal notice, 325
 - Failure to give notice, 325
 - Irregularities in notice, 325
 - Of written notice, 325
 - Refusal of agent to recognize claim, 325
 - What is a reasonable time, 324
 - When compliance impossible, 323
 - When question for jury and when for the court, 324
- Occupation (see also *infra*, ACCIDENTS TO INSURED IN SPECIAL OCCUPATIONS; TOTAL DISABILITY):**
 - Change of occupation, 302, 303
 - Statements in application, 287
- Other insurance, 287**
- Passengers, see infra, INJURIES TO PASSENGERS BY PUBLIC OR PRIVATE CONVEYANCES.*

Accident, etc., cont'd.

- Accidents BY PUBLIC OR PRIVATE CONVEYANCES.**
- Payment of premiums, 287, 288**
 - By order on wages, 289**
 - Examples, 289
 - In general, 289
 - Where no wages are earned, 289
 - Default in premium falling due after the accident, 288
- Estoppel to deny payment, 290**
 - By acknowledgment of payment in policy, 290
 - By language of policy, 290
- Forfeiture for nonpayment, 290
- Inconsistency between application and policy, 288
- In general, 287
- Installments, 287
- Notice, 288
- Premium sent by mail, 288
- Receipt and acceptance of application, 288
- Waiver by agent of conditions as to payment, 289
- When policy takes effect, 288
- Poison, 294, 314
- Policy, 286**
 - Application not made part of contract, 286
 - Consideration of the terms of the policy, 291
 - Differing from application, 286, 288
 - Form of policy, 291
 - General nature of policy, 291
 - In general, 291
 - Policy differing from application, 286
 - Policy referring to application, 286
 - Scope of policy, 291
 - Ultra vires* contract, 291
- Premiums, see *infra*, PAYMENT OF PREMIUMS.**
- Proof of injury, see infra, NOTICE AND PROOF OF INJURY.*
- Proximate cause, 327**
 - Death following accidental runaway, 327
 - Necessity, 327
 - Suicide of person insane from accident, 327
- Questions of law and fact: reasonable time, 324**
- Railroad employes, 306, 313**
- Reasonable doubt: injury while violating the law, 321**
- Reasonable time, 324**
- Riding on platform, 312**
- Roadbed, 312**
- Self-inflicted injuries, 313, 314, 322**
- Somnambulism, 294**
- Special occupation, see infra, ACCIDENTS TO INSURED IN SPECIAL OCCUPATIONS.*
- Stepping off cars, 294**
- Sting of insect, 294**
- Stumbling under railroad train, 294**
- Suicide, 327**
 - Of person insane from accident, 327
 - Presumptions against, 331
 - Suicide while insane, 294, 295
 - Suicide or self-inflicted injuries, 313**
 - Refers to voluntary commission of act, 313

Accident, etc., cont'd.

- Self-inflicted injuries, 314
- Suicide sane or insane, 314
- Suicide while insane, 313
- Usual provision in policy, 313
- Sunday: injury while violating the Sabbath, 320
- Sunstroke, 292
- Surgical operation or medical treatment, 318
- Taking poison, 314**
 - Conflict of opinion, 314
 - Illustrations of accidental poisoning, 314
 - In general, 314
 - What is poison, 315
- Time of instituting suit, 325**
 - Failure to cite defendant until expiration of time specified, 327
 - Provisions of the policy, 325
 - Right of action accrues, 326
 - Time in which beneficiary must bring suit, 326
 - When the time begins to run, 326
 - When time begins to run against beneficiary in case of death, 326
- Total disability, 296**
 - Attorney at law, 296, 298
 - Barber, 298
 - Billiard-saloon keeper, 299
 - Carpenter, 300
 - Construction of the provision, 296
 - Farmer, 296
 - Ice man, 297
 - Indemnity for, 296
 - Laborer, 297
 - Leather-cutter and merchant, 299
 - Loss of fingers, 300
 - Merchants, 298
 - Particular business, 299
 - Permanent disability to prosecute one's usual or some other occupation, 297
 - Physician, 297
 - Retired gentleman, 299
 - Solicitor, 296
 - Switchman, 297
 - To labor, 300
 - To prosecute an occupation whereby the insured can obtain a livelihood, 287
 - To prosecute one's usual employment, 296
 - To transact any and all kinds of business, 300
 - To transact any and every kind of business pertaining to one's occupation, 298
 - Total loss of business time, 300
- Unnecessary danger, see infra, VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.*
- Violation of law, 319**
 - Assault provoked by quarreling, 321
 - Casual connection between violation and injury, 319
 - Illustrations, 319, 321
 - Injuries received while fighting, 321
 - Must be violation of criminal law, 319
 - Proof beyond reasonable doubt, 321
 - Proximate cause of the accident, 320
 - Scope of the provision, 319
 - Violation of Sabbath law, 320
 - "While engaged in or in consequence of unlawful act," 320
 - While violating the law, 321

Accident, etc., cont'd.

- Voluntary exposure to unnecessary danger, 306**
 - Alighting from a car while in motion, 308
 - Bathing in deep water, 309
 - Burden of proof, 308
 - Circumstances which do not show voluntary exposure, 309
 - Circumstances which show voluntary exposure, 308
 - Cleaning gun not known to be loaded, 309
 - Climbing over stationary car, 308
 - Driving in race so as to bring on collision, 308
 - Effect of negligence, 307
 - Exposure to obvious risk of injury, 307
 - Falling asleep on railroad track, 308
 - In general, 306
 - Jumping on track in front of approaching engine, 308
 - Negligence, 308
 - Riding on platform of car, 309
 - Running beside moving train, 309
 - Stepping from train at night, 309
 - Traveling on railroad track at night, 308
 - Usual form of modern policy, 306
 - Voluntary act and voluntary exposure distinguished, 309
 - Voluntary exposure to necessary danger, 309
 - Walking on sidewalk on railroad bridge, 309
 - What is voluntary exposure, 307
- Waiver of forfeiture for nonpayment, 290
- Waiver of notice, 325
- Walking or being on railroad, 308, 309**
 - Ends of extraordinarily long ties, 312
 - Examples, 311, 312
 - Exception in policy, 311
 - Meaning of roadbed, 312
- ACCOMMODATING, 333**
- ACCOMMODATION PAPER, 334**
 - Agency, 349**
 - Agent with general power to make and indorse commercial paper, 349
 - Authority of agent to authorize and indorse negotiable paper, 1034
 - Bona fide* holder, 350
 - Delegation of authority, 978
 - Power to agent, 349
 - Bona fide holders, 360**
 - Amount of recovery against accommodation acceptor, 369**
 - Holder paying less than full value for paper, 369
 - Paper fraudulently diverted, 370
 - Person paying full value, 369
 - Pledgrees, 368
 - Transferee of entire interest, 370
 - Burden of proof, 368**
 - Effect of evidence of accommodation, 368
 - Notice of restrictions, 369
 - Paper diverted from its proper use, 369
 - Paper fraudulently circulated, 369
 - Presumption that holder is a *bona fide* holder for value, 368
 - Contrast with business paper, 361
 - Corporation paper, 349
 - Paper issued by agent, 349
 - Partnership paper, 348
 - Rights in general, 360

Accommodation, etc., cont'd.

- Transferee after maturity, 362**
 - Agreement not to negotiate after maturity, 364
 - Generally, 362
 - Purchaser from holder for value, 362
 - Transferee from accommodated party after maturity, 363
- Transferee before maturity, 360**
- Understanding that maker is not liable, 362**
- Want of consideration, 361**
- When chargeable with notice of accommodation character of instrument, 367**
 - Duly negotiated by acceptor or drawer, 368
 - How far notice of accommodation character affects rights, 367
 - Indorsed note in hands of maker, 367
 - Irregular indorsement, 368
 - Presumptive notice, 367
 - Successive indorsers, 367
- Who is, 365**
 - General rule, 365
- Pledgee, 365**
 - Amount of recovery against accommodation acceptor or maker, 369
 - For antecedent debt, 365
 - In New Hampshire, 366
 - Of diverted paper, 366
 - Paper procured by fraudulent representations, 367
 - Payment of antecedent debt, 366
 - Whether pledgee is a *bona fide* holder, 365
 - Sufficiency of consideration, 366
 - Right of accommodation party to become holder, 365
 - Total want of consideration, 365
- Burden of proof, 368**
- Bona fide holder, 368**
 - Effect of evidence of accommodation, 368
 - Notice of restrictions, 369
 - Paper diverted from its proper use, 369
 - Paper fraudulently circulated, 369
 - Presumption that holder is a *bona fide* holder for value, 368
 - To show consent of all partners, 346
- Cashier of bank, 349**
- Checks, 345**
- Conflict of laws: place of the contract, 342**
- Consideration, 336**
 - Absence of consideration, 336
 - Accommodation party holding security or interested in proceeds, 337
 - Bill drawn subject to state of accounts, 336
 - Consideration for accommodation indorser after delivery, 337
 - Credit to party accommodated as consideration, 337
- Gross bills and notes, 338**
 - Bills paid for in bills of the purchaser, 338
 - Implied contract of indemnity, 338
 - Payment gives right of action, 338
 - Suretyship, 338
 - Whether accommodation paper, 338
- General principles, 336**

Accommodation, etc., cont'd.

- Must be a loan of credit, 336**
- Renewal accommodation note, 337**
- Contribution**
 - Successive accommodation parties, 357**
 - Accommodation indorser and surety maker, 360
 - Agreement for contribution, 357
 - Circumstances showing joint liability, 358
 - Parol evidence to prove agreement, 358
 - The California doctrine, 360
 - The Georgia doctrine, 360
 - The North Carolina doctrine, 359
 - The Ohio doctrine, 359
 - The Vermont doctrine, 360
 - When not entitled to, 357
 - Whether entitled to, 357
- Corporations:**
 - Bona fide purchaser, 349
 - Cashier of bank, 349
 - Implied power to execute, 348
 - In violation of express statute, 349
 - Notice of accommodation character, 349
- Costs, 355**
- Gross bills and notes, 338**
 - Bills paid for in bills of the purchaser, 338
 - Implied contract of indemnity, 338
 - Payment gives right of action, 338
 - Suretyship, 338
 - Whether accommodation paper, 338
- Death, 341**
 - As a revocation, 341
 - Death of accommodation party, 341
 - Ignorance of accommodation character of paper, 341
 - Ignorance of accommodation party's death, 341
 - Where holders know of accommodation, 341
- Definitions, 335**
 - Narrow use of term, 336
 - Of accommodation paper, 335
 - Of accommodation party, 336
- Delivery, 340**
- Expense, 355**
- Extinguishment**
 - Payment, 386**
 - Bankruptcy, 388
 - Manner of payment, 387
 - Part payment by accommodated party, 388
 - Payment before maturity, 387
 - Payment by accommodated party is extinguishment, 386
 - Reason for rule, 387
 - Recovery, 387
 - Fraudulent conveyances, 350**
 - General obligations of parties, 350**
 - Accommodated party, 350
 - Accommodation party, 350
 - Fraudulent conveyances, 350
 - Holder, see *infra*, BONA FIDE HOLDERS.**
 - Inception of the contract, 340**
 - Indemnity, 351, 355**
 - Inoperative until negotiated, 340**
 - Lex loci contractus*, 342**
 - Married women, 350**
 - Nature and essentials of accommodation paper, 336**

Accommodation, etc., cont'd.

Negotiations, 340

Notice, 385*As to when holder is chargeable with notice of accommodation character of the instrument, see infra, BONA FIDE HOLDERS.*

Accommodation indorser paying without notice, 385

Demand of accommodation drawer or indorser, 386

Indorser before delivery, 385

Indorser who knows that drawer is not entitled to notice, 385

Maker or acceptor insolvent, 385

Security held by indorser, 385

Whether accommodation drawer or acceptor is entitled to notice, 385

Whether accommodation party is entitled to notice, 385

Parol Evidence, 343

Comakers, 343, 344

Conversation at and before acceptance, 343

One contracting as "principal," 344

Relation of comakers and parties successively liable distinguished, 344

To prove character of instrument, 343

To prove irregular indorsement, 343

To show agreement for contribution, 358

To show principal debtor, 344

To show who is the accommodation party, 343

When one party is principal and the other is surety, 343

Partnership, 345*Bona fide purchaser*, 348

Burden of proof to show that all members of the firm consented to the act, 346

How consent proved, 347

Power of one partner to issue, 345

Party accommodated, 339

At whose request, 339

Incidental benefit, 339

Indorsement for accommodation of two, 339

May become holder for value, 340

Need not be party to instrument, 339

Person requesting signature for another, 339

Who is, 339

Payment**When extinguishment**, 386

Bankruptcy, 388

Manner of payment 387

Part payment by party accommodated, 388

Payment by accommodated party in extinguishment, 386

Reason for rule, 387

Recovery, 387

Place of the contract, 342

Acceptance, 342

Indorsement, 342

Usury, 342

Pledge and collateral security**Whether pledgee is bona fide holder**, 365

Amount of recovery against accommodation acceptor or maker, 369

Accommodation, etc., cont'd.

For antecedent debt, 365

In Alabama, 366

In New Hampshire, 366

Of diverted paper, 366

Paper procured by fraudulent representations, 367

Payment of antecedent debt, 366

Sufficiency of consideration, 366

Position of party accommodated, 350

Accommodation instrument given to a partner, 351

Consideration accepted with intention of accommodating plaintiff, 351

No right of action, 350

Presentment, 385**Revocation**, 340

Before negotiation, 340

By death, 341

As a revocation, 341

Death of accommodation party, 341

Ignorance of accommodation party's death, 341

Where holders know of accommodation, 341

How accomplished, 341

Notice of revocation, 341

Prior accommodation indorsers, 341

*Rights and liabilities of parties to accommodation paper, see infra, BONA FIDE HOLDERS; GENERAL OBLIGATIONS OF PARTIES; POSITION OF PARTY ACCOMMODATED; RIGHTS OF ACCOMMODATION PARTY AFTER PAYMENT; SUCCESSIVE ACCOMMODATION PARTIES.***Rights of accommodation party after payment**, 351Acceptor *supra protest*, 353

Accommodation acceptor, 352

Accommodation indorsers, 354

Accommodation makers and acceptors, 353

Against party accommodated, 351

Amount of recovery of accommodation indorsers, 355

Effect of fraud, 352

Expenses incurred in consequence of default, 355

Indemnity, 351

Indemnity of accommodation indorsers, 356

Right of accommodation indorser against prior parties, 356

Right of action of accommodation indorsers, 354

Right to costs, 355

Surety drawers, 353

Set off, 373**Statute of frauds**, 344

Bank checks, 345

Verbal promise to indorse or accept, 344

Written acceptance or indorsement for accommodation, 345

Subrogation**To creditor's security**, 371

Collateral security in the hands of holder, 372

In general, 371

Payment essential, 372

Securities available to accommodation party without payment, 372

Accommodation, etc., cont'd.

- Security held by accommodation party for indemnity, 372
- Subrogation of creditor to securities of accommodation indorser, 371
- Subrogation to judgment, 371
- To defenses against holder, 373**
 - Debtor, 373
 - Defenses strictly personal, 373
 - Failure of consideration, 373
 - Incapacity of plaintiff to sue maker, 373
 - Statement of the doctrine, 373
 - Usury, 373
 - Want of capacity in drawer, 373
- Successive accommodation parties, 356**
- Contribution, 357**
 - Accommodation indorser and surety maker, 360
 - Agreement for contribution, 357
 - Circumstances showing joint liability, 358
 - Parol evidence to prove agreement, 358
 - The California doctrine, 360
 - The Georgia doctrine, 360
 - The North Carolina doctrine, 359
 - The Ohio doctrine, 359
 - The Vermont doctrine, 360
 - When not entitled to, 357
 - Whether entitled to, 357
- Liable in order of name, 356
- Reason for rule of liability, 357
- Rights and liabilities generally, 356
- When co-sureties, 357
- Suretyship, 353**
 - Accommodation party as, 371
- As to third parties, 374**
 - Discharge by breach of condition, 379**
 - Accommodation paper used as security for future advances, 380
 - Agreement to negotiate the instrument in a certain state, 383
 - Bank crediting person with proceeds of accommodation paper, 384
 - Binding effect of immaterial condition of accommodation party, 382
 - Diversion, 379
 - Diversion: when use is limited, 380
 - Effect of diversion, 383**
 - Transferee with notice, 383
 - Transferee without notice, 384
 - In general, 379
 - Instrument given to raise money transferred directly to creditor, 382
 - Instrument intended to pass to a particular party, 383
 - Liability of accommodation party increased by diversion, 382
 - Misuse of proceeds, 382
 - Note "negotiable and payable at" particular bank, 381
 - Trover for diverted accommodation paper, 384
 - What amounts to a diversion, 380
 - When bank is payee, 381
- Discharge by dealings with principal, 375**
- Discharge by dealings with principal:**
 - Accommodation acceptor and maker, 377
 - Comaker discharged, 378

Accommodation, etc., cont'd.

- Different grounds for the rule, 378
- English doctrine, 375
- English doctrine at law, 375
- English doctrine in equity, 376
- Giving time to maker or acceptor, 376
- Mere forbearance to sue, 377
- The Indiana rule as to acceptor or maker, 377
- The New York rule as to acceptor or maker, 377
- United States authorities, 376
- Whether accommodation acceptor discharged by indulgence to drawer, 377
- Whether accommodation acceptor or maker discharged as surety, 377
- Whether accommodation maker is discharged by time to indorser, 377
- Whether time to indorser discharges payee, 377
- Holders without notice, 374
- Holders with notice, 374
- Surety drawers, 353
- Whether surety for all purposes, 371
- Transfer after maturity, see infra, BONA FIDE HOLDERS.*
- Usury, 342**
 - By what law governed, 342
- ACCOMPANY, 388**
- ACCOMPLICES (see also ABORTION; ACCESSORIES), 389**
- Accomplice as witness.**
 - Right to pardon of accomplice testifying for prosecution, see infra, PARDON.*
- Competency, 393**
 - Accomplice who is not indicted, 394
 - Competency for one another, 395
 - Civil cases, 394
 - Common-law rule, 393
 - Defendant who has pleaded guilty, 396
 - How witness rendered admissible for state, 395
 - Infamy, 394
 - Promise of reward, 394
 - Separate indictment, 394
 - Statutory changes, 396
 - When tried jointly, 395
 - When tried separately, 395
 - Witness guilty as principal, 394
- Corroboration, 399**
- Corroboration:**
 - At common law, 399**
 - In general, 399
 - Instruction of court, 400
 - Perjury, 400
 - Rule of practice, 401
 - Unsupported testimony of party, 399
 - When uncorroborative evidence may be introduced, 401
 - By statute, 401**
 - Necessity of corroboration, 401
 - In general, 401
 - When sufficient, 402**
 - Actions for penalties and forfeitures, 405
 - Civil actions, 405
 - Confession by accused, 404
 - Collateral facts, 403
 - Corpus delicti*, 403
 - Crime charged in indictment, 403

Accomplices, cont'd.

- Identity of prisoner, 404
- In trials for misdemeanors, 405
- Must be upon material point and connect prisoner with crime, 403
- Need not refer to particular statement, 404
- One accomplice corroborating another, 405
- Possession of stolen property, 404
- Prisoner seen in neighborhood, 404
- Upon every fact, 402
- When several persons are charged, 404
- Whether it must be direct, 402, 403
- Whether wife may corroborate, 405

Credibility, 398

- At common law, 398
- Evidence to be received with caution, 398
- Full cross examination, 399
- Testifying under promise of leniency, 399

Principal admitted against accessory, 398**When admitted as witness, 397**

- Discretion of the court, 397
- Discretion of the prosecuting officer, 398

English rule, 397**Method of introducing an accomplice, 397****More than one accomplice, 398****Principal admitted against accessory, 398****Reason for admission, 397****United States rule, 397****Bribery, 391****Definition, 389****Duress, 391****Feigned accomplices, 392****Gaming, 392****Incest, 390****Includes all participants in crime, 389****Infamy, 394****Intent, 391****Misdemeanors, 389****Pardon, 406****Right to pardon of accomplice testifying for prosecution:**

- Approval, 406
- Equitable right only, 407
- Immunity does not extend to other crimes, 407
- Implied promise, 406
- Proclamation promising a conditional pardon, 406
- Refusal of accomplice to testify before trial jury, 407
- Right of prosecuting officer, 406
- Statute holding out pardon, 406
- Where the pardoning power can act before conviction, 407
- Where the pardoning power cannot act before conviction, 407
- Whether a bar to indictment, 407

Penalties, 405**Reasonable doubt, 393****Receiving stolen goods:**

- Innocently concealing stolen property, 392
- Whether receiver is an accomplice, 393
- Spectators, 391

*Accomplices, cont'd.***Sunday sales, 390****Testifying under promise of leniency, 394, 399****Use of the term, 390****Who is an accomplice, 390****Abortion, 390****Accessory after the fact, 393****Breaking jail, 391****Bribery, 391****Criminal intent, 391****Duress, 391****Feigned accomplices, 392****Gaming, 392****General test, 390****Incest, 390****Innocently concealing stolen property, 392****Mere knowledge that a crime is to be committed, 391****Mere spectators, 391****Persons morally guilty but not indictable, 390****Purchasing articles the sale of which is forbidden, 390****Question of law or fact, 393****Receiver of stolen goods, 393****Sunday sales, 390****Witnesses, see *infra*, ACCOMPLICE AS WITNESS.****ACCORD AND SATISFACTION, 408****Acceptance, 421****Satisfaction by stranger, 426****Agreement not to prosecute, 413****Assault, 410****Claim for damages, 409****Consideration (see also *infra*, PART PAYMENT OF LIQUIDATED DEBT ON DEMAND), 412****Adequacy, 412****Agreement not to prosecute, 413****Equitable value, 412****Generally, 412****Legality, 412****Marriage brokerage contract, 313****Valuable, 412****Covenant, 411****Damage to property, 410****Definition, 408****Effect, 409****Execution of the accord, 420****Acceptance, 421****Acceptance implies act of will, 422****Accord without satisfaction, 422****Conditional acceptance, 422****Full, complete, and perfect satisfaction, 421****Necessity, 420****Performance, 421****Presumption from lapse of time, 427****Promise accepted in satisfaction, 423****Authorities discussed, 426****Bond satisfied by judgment, 424****Conflicting authorities, 424****Failure to perform fault of party complaining, 425****Mutual promises, 426****Necessity of performance, 423****Right of action suspended, 423****Verbal agreement, 423****When execution of promise unnecessary, 424**

Accord, etc., cont'd.

- Receipt, 422
- Satisfaction of entire demand, 422
- Tender of performance, 423
- Who may execute the accord, 426
 - Acceptance of performance by stranger, 426
 - Agent, 426
 - Debtor, 426
 - Stranger, 426
- Executors and administrators, 410
- False imprisonment, 410
- Form, 411
 - Covenant, 411
 - Distinction between bond with a condition and covenant, 411
 - Judgment, 412
 - Statute of frauds, 411
 - Writ of error, 412
- Fraud, 428, 430
 - Mere formal execution of promise, 429
 - Rescission upon notice of fraud, 430
 - Satisfaction by third party in collusion with debtor, 429
- Illegal consideration, 412
- Illegal obligation, 409
- Joint parties, 427
 - Composition of suit brought against one joint debtor, 427
 - Joint creditors, 428
 - Joint debtors, 427
 - Joint tortfeasor, 428
 - Partners, 428
 - Release not under seal, 427
 - Whether all are discharged, 427
- Judgment, 412, 414
 - Payment by note of third party for less sum than judgment debt, 417
- Marriage brokerage contract, 413
- Misrepresentation, 428
- Mistake, 428
 - Adequacy of consideration, 429
 - Advice of attorney, 419
 - Erroneous account, 429
 - Examples, 429
 - Trifling mistake, 429
 - What constitutes a mutual mistake, 429
 - Whether necessary to refund amount paid, 429
- Novation, 409
- Partnership, 427, 428
- Part payment of liquidated debt or demand, 413
 - Comments on common-law rule, 414
 - Common-law rule, 413
 - Condition of parties not rendered better, 417
 - Creditor retaining property, 418
 - Debtor relinquishing property, 418
 - Draft upon third person, 419
 - Giving additional security, 419
 - Must be no agreement for price, 418
 - Note for judgment debt, 417
 - Notes of stranger with debtor as indorser, 419
 - Parol release of a judgment, 414
 - Part payment no satisfaction, 413
 - Payment at different place, 416
 - Payment at earlier date, 416
 - Payment by check, 416
 - Payment by negotiable note of debtor, 416

Accord, etc., cont'd.

- Payment by note of third person, 417
- Payment by stranger, 416
- Payment in property, 417
- Payment of less sum after a debt is due, 413
 - Payment of less sum at time and place where greater is due, 413
- Receipt, 415
- Receipt of principal, 414
- Release, 415
- Relinquishment of part and security for remainder, 419
- Statutes, 414
- The Georgia rule, 415
- The Maine rule, 414
- Variant mode of payment, 415
- When defendant pays part and also surrenders claims, 415
- Part payment of unliquidated or contingent demand, 419
- Payment, 409
- Personal estate, 409
- Personal injuries, 410
- Presumption of execution, 427
- Promise accepted in satisfaction, see *infra*, EXECUTION OF THE ACCORD.
- Real property, 409
- Receipt, 422
 - Part payment of liquidated debt or demand, 415
- Release, 409
 - Part payment of liquidated debt or demand, 415
- Rescission, 409, 430
- Satisfaction, see *infra*, EXECUTION OF THE ACCORD
- Statute of frauds, 411
- Subject matter of the accord, 409
 - Assault, 410
 - Claim for damages, 409
 - Damage to property, 410
 - Executors and administrators, 410
 - False imprisonment, 410
 - Illegal obligation, 409
 - Personal estate, 409
 - Personal injuries, 410
 - Real property, 409
 - Unliquidated demand, 409
- Tender of performance, 423
- The agreement of accord, 409
- Unliquidated demand, 409
- Writ of error, 412
- ACCORDING, 430
- ACCORDING TO LAW, 430
 - Acknowledgments, 540
- ACCORDINGLY, 430
- ACCOUNT, 431
- ACCOUNTABLE, 431
- ACCOUNTABLE RECEIPT, 431
- ACCOUNTANT, 432
- ACCOUNTING OFFICER, 432
- ACCOUNTS, 433
 - Agents' accounts, see AGENCY
 - Account rendered, 436
 - Claiming beyond amount of bill rendered, 436
 - Conclusiveness, 436
 - Duress, 436
 - Effect of rendering account, 326
 - Definition, 436
 - Fraud, 436

Accounts, cont'd.

- Money advanced upon account, 436
- Account sales, 436
- Account settled, 436
 - Conclusiveness, 436
 - Definition, 436
 - Of trustees and executors, 436
- Account stated, 437
 - Admissions to third parties, 438
 - Agents, 437
 - Agreement as to correctness of accounts, 442
 - Acquiescence, 444
 - Actual examination or admission of correctness, 444
 - Agreement as to balance struck, 443
 - Agreement as to the items and balance, 443
 - Assent of party to be charged, 444
 - Acceptance for a given sum, 447
 - Accounts adjusted in presence of both parties, 446
 - Admissions must be unconditional, 446
 - Assent before or after suit, 445
 - Assent express or implied, 445
 - Assent implied from conduct, 446
 - Assent obtained by misrepresentations, 445
 - Assent under duress, 445
 - Assignment of account, 445
 - Claiming balance, 447
 - Counterclaims not deducted, 454
 - Effect of not including all transactions between the parties, 454
 - Evidence of assent, 445
 - Evidence of settlement, 447
 - Form, 444
 - Giving bill of exchange, 447
 - Giving due bills, 447
 - Giving evidence of indebtedness, 447
 - Giving I O U's, 447
 - Giving promissory note, 447
 - In general, 444
 - Necessity of signature, 444
 - Necessity of writing, 444
 - Objection to particular item, 447
 - Payment as admission of correctness, 446
 - Payment without objection, on accounts rendered, 446
 - Promise to pay another's debt, 445
 - Promising to pay an account received without objection, 448
 - Receiving the balance, 447
 - Retaining account rendered without objection, 448
 - Accounts sent by mail, 451
 - Admissions to third parties, 453
 - Applicable to merchants only, 449, 450
 - Bank and depositor, 449
 - Conclusiveness of retention, 452
 - Containing balances brought forward from other accounts rendered, 452
 - Effect of letters "E. and O. E." 452
 - "Errors and omissions excepted," 452
 - Evidence, 453
 - Explanation of retention, 453
 - Form of account rendered, 452
 - For whom inference available, 452

Accounts, cont'd.

- General principles, 448
 - In Pennsylvania, 451
 - Origin of the rule, 449
 - Reasonable time, 451
 - Rule applied to business men generally, 450
 - Statement of rule by the early authorities, 449
 - Statute of limitations, 452
 - Whether evidence of an account settled, 449
- Scope of matters covered, 453
 - Time of assent, 445
- Final adjustment, 443
- General principles, 442
- Lapse of time, 444
- Appraisers, 437
- Arbitrators, 437
 - Balance of account stated is principal, 457
- As a new promise, 456
 - Blended with other matters, 457
 - Generally, 456
 - Interest on balance, 457
 - Original items not provable, 456
 - Proof of items unnecessary, 456
 - Whether money secured by deed is recoverable upon an account stated, 457
 - Whether suit can be maintained on original items, 457
- As payment, 458
- Conclusiveness, 458
 - Estoppel, 458
 - Generally, 458
 - Notes for balance settled, 459
 - On person rendering account, 458
 - Partial failure of consideration, 459
 - Party settling up matters within his knowledge at time of settlement, 459
- Definition, 437
- Executors and administrators, 438
 - Allowance of account by executor or administrator, 439
 - Statute of limitations, 439
 - Suit upon, 438
- Impachment, see *infra*, IMPEACHING SETTLED OR STATED ACCOUNTS.
- Infants, 438
- Joint parties, 438
- Married woman, 438
- Officer of corporation, 437
- Officer of municipal corporation, 438
- Parties, 437
- Partners, 439
- Previous transactions, 440
 - Debts not due *in presenti*, 441
 - Equitable and legal demands, 441
 - Illustrations, 441
 - Notice of previous transactions of monetary character, 440
 - Original debt void, 442
 - Original indebtedness not recoverable, 442
 - Single items, 440, 441
 - Single or cross demands, 440
 - Transaction within the statute of frauds, 442
- Promise, 455
 - Compromise, 456
 - Consideration, 455

Accounts, cont'd.

- Express or implied, 455
- Future or conditional promise, 455
- Generally, 455
- Implied, 437
- New consideration arising, 455
- Public officers, 438, 439
- Question of law or fact, 454
- Ratification, 438
- Wife and husband jointly, 438
- Wife as agent of husband, 438
- Admissions, 674, 718
- Agents, 437
- Arbitrators, 437
- Balance of account distinguished from, 435
- Bank accounts, 436, 449
- Book accounts, 436
- Burden of proof, impeachment, 460, 461
- Current accounts, 435
- Definition**, 434
 - Account and balance of account distinguished, 435
 - Generally, 434
 - Meaning of, in statute providing for reference, 434
 - Various kinds of accounts, 435
- Duress, 436, 445, 446
- Estoppel, 458
- Executors and administrators, accounts stated, 438
- Fraud**, 436
 - Impeachment, 460
 - Surcharging and falsifying, 464
- Husband and wife, 438
- Impeaching settled or stated accounts** (see *infra*, SURCHARGING AND FALSIFYING), 460
 - Accounts between partners, 460
 - Accounts settled with knowledge, 461
 - Burden of proof, 459, 461
 - Collateral impeachment, 462
 - Effect of release, 461
 - Equity, 460
 - Generally, 460
 - Gross fraud, 463
 - Ground, 460
 - Immaterial error in settlement, 462
 - Mistake or error, 463
 - Recovery for items not included, 462
 - Settled accounts opened with reluctance, 462
- Impeachment** :
 - Lapse of time, 464
 - Usury, 465
- Interest on balance, 457
- Mail, 451
- Married women, 438
- Mistake** :
 - Impeachment, 460
 - Surcharging and falsifying, 464
- Officers of private corporations, 437
- Open accounts**, 435
 - Assignability, 435
 - Definition, 435
 - Examples, 435
- Partnership: accounts stated, 439
- Payment: account stated as, 458
- Public officers, 438, 439
- Reasonable time, 451
- Receipt, 461
- Statute of frauds, 442
- Surcharging and falsifying, 463

Accounts, cont'd.

- Effect of, 464
- Meaning of the terms, 463
- When leave granted, 464
- When the fraud or mistake does not taint entire settlement, 464
- Whether party may go beyond items of bill, 464
- Usury, 465
- ACCOUNTS RENDERED**, see ACCOUNTS.
- ACCOUNTS STATED**, see ACCOUNTS.
- ACCRETION**, 467
 - Accretion and reliction compared, 473
 - Alluvion defined, 467
 - Apportionment**, 477
 - Adjacent property owners, 477
 - In general, 477
 - Island in private waters, 478
 - Methods of apportionment, 477, 478
 - Modifications of rules of apportionment, 478
 - Artificial causes, 468
 - Avulsion, 471
 - Compensation for risk of loss, 476
 - Definition, 467
 - De minimis non curat lex*, 476
 - Imperceptible, 469, 470
 - "Imperceptible increase," 469
 - Islands** :
 - Apportionment, 478
 - Doctrine of accretion and reliction as applicable to, 475
 - Island formed by, 475
 - Islands in private waters, 476
 - Islands in public waters, 475
 - Stream between island and mainland dried up, 474
 - Lakes and ponds, 474
 - Meaning of the term "imperceptible," 469
 - Natural action of the water, 468
 - Navigable waters, 468
 - Perpetuities, 472
 - Property in accretions**, 469
 - Adverse possession, 472
 - Avulsion, 471
 - Banks of river subject to public use, 472
 - Flats, 470
 - Future accretions, 471
 - General rule, 469
 - Gradual as distinguished from sudden increase, 471
 - Increase must be gradual, 470
 - Increase must be imperceptible, 470
 - Legislature depriving owner of right, 472
 - Lessee's rights, 471
 - Liens, 472
 - Necessity of title to water line, 473
 - Owner of the shore, 469
 - Part of original tract, 469
 - Purpresture, 472
 - Rationale of rule as to property in, 476
 - Right to, as dependent upon contiguity, 473
 - Statutes, 471
 - Sudden formation, 471
 - Public policy, 476
 - Rationale of rule as to property in, 476
 - Reappearance of land after submergence, 474
 - Reliction** :
 - Defined, 473
 - Lakes and ponds, 474

Accretion, cont'd.

- Proof to be made by a claimant by relic-
tion, 474
- Reason of the rule, 474
- Rescission must be slow and gradual, 473
- Stream between island and mainland
dried up, 474
- Rights of littoral proprietor, 468
- Seaweed, 467
- ACCRUE**, 479
- ACCRUED**, 479
- ACCRUED COSTS**, 479
- ACCRUER**, 480
- ACCRUING**, 479
- ACCRUING INTEREST**, 480
- ACCUMULATED SURPLUS**, 481
- ACCUMULATIONS**, 481
- ACCUSATION**, 481
- ACCUSED**, 481
- ACCUSTOMED**, 482
- ACID PHOSPHATE**, 482
- ACKNOWLEDGE**, 482
- ACKNOWLEDGMENTS**, 484
 - Abandonment: separate examination, 521
 - Abbreviations, 531
 - "According to law," 540
 - Acquaintance, 545, 546
 - Acquainted, 569
 - Agency, 971
 - Amendments*, see *infra*, **CERTIFICATE**.
 - Attorney and client, 494
 - Burden of proof, 561
 - To impeach certificate, 561
 - Certificate**, 526
 - Amendment**, 552
 - Before instrument has been recorded,
553
 - By the court**, 554
 - Court of equity, 554
 - In California, 554
 - In Ohio, 554
 - In Pennsylvania, 554
 - In South Dakota, 554
 - In Texas, 554
 - By the officer**, 552
 - After officer's term has expired, 552,
553
 - After the instrument has been re-
corded, 552
 - Corrections not contradicting the cer-
tificate, 553
 - Power conferred by statute, 553
 - Whether officer has a right to correct
errors, 552
 - As evidence**, 555
 - How far conclusive**, 556
 - Acknowledgments of married women,
557
 - Certificate conclusive in absence of
fraud, 557
 - Certificate *prima facie* evidence, 556
 - In Kentucky, 558
 - In Maryland, 558
 - In Mississippi, 558
 - In North Carolina, 558
 - In Tennessee, 558
 - In Texas, 558
 - Married woman's deed, 556
 - Omitted facts, 556
 - Sheriff's deed, 556
 - Unrequired recitals, 559
 - In general, 555

Acknowledgments, cont'd.

- Of acknowledgment, 555
- Of delivery, 555
- Of execution, 555
- Presumption as to time of delivery,
556
- Showing want of acknowledgment**, 558
 - Estoppel, 559
 - Showing want of jurisdiction, 558
 - Wife denying execution of deed, 559
- At end of deed, 526
- By agent, 971
- Clerical errors**, 547
 - Immaterial mistakes, 547
 - Obvious clerical errors, 547
- Compliance with statute**, 538
 - "According to law," 540
 - "Acknowledged before me," 540
 - Acknowledgments by married women,
539
 - Certificate must show every material
fact, 538
 - Certificate must show substantial com-
pliance with statute, 538
 - In Kentucky, 539
 - In Pennsylvania, 539
 - In Virginia, 539
 - In Texas, 539
 - In Washington, 540
 - Strict compliance, 540
 - Sufficiency decided by court, 541
- Conflicting statements of locality**, 527
- Date**, 529
 - Earlier, 529
 - Erasure, 529
 - Omission, 529
 - Whether statement of date is essential,
529
- Errors and omissions**, 546
- Equivalent expressions**, 550
- Explanation of deed to married woman**,
520
- Expressions not equivalent**, 551
- Fact of acknowledgment**, 541
 - Acknowledgment of delivery, 541
 - Acknowledgment shown by implica-
tion, 542
 - Adoption of signature by acknowledg-
ment, 541
 - Explanation of deed, 542
 - Illustrations, 541
 - Must be shown, 541
 - Omission by clerical error, 542
 - Presumption that deed was acknowl-
edged, 541
 - Voluntary acknowledgment, 542
 - Whether term "acknowledgment" is
essential, 542
- Forms**, 526
- Impeachment**, 560
 - Burden of proof, 561
 - Certificate presumed to be correct, 561
 - In Missouri, 560
 - Mere preponderance of evidence, 561
 - Nature of evidence required, 560
 - Officer as witness, 562
 - Officer contradicting certificate, 562
 - Officer proving execution, 562
 - Officer testifying in favor of certificate,
562
 - Presumption in favor of regularity of
certificate, 561

Acknowledgments, cont'd.

- Unsupported testimony of grantor, 561
- Want of recollection, 560
- In body of deed, 527
- In form of jurat, 526
- In general, 526
- Liability of officer for making false certificate,** 555
 - Dereliction must be intentional, 555
 - Duty to know truth of facts certified, 535
 - In general, 555
 - Measure of damages, 555
 - Notary public, 555
 - Officer's negligence must be proximate cause of damage, 555
- Magistracy and conformity, 535**
 - Acknowledgments without the state, 535
 - Authority of officer at time of taking acknowledgment, 535
 - Certificate authenticating officer's signature, 536
 - Certificate of conformity after record of deed, 537
 - Certificate that acknowledgment is according to law, 536
 - Certificate that clerk is clerk of a court of record, 536
 - Clerical error in commission accompanying certificate, 536
 - Double certificate for acknowledgments out of state, 535
 - Judicial notice that certain courts are courts of record, 537
 - Under Michigan Code, 537
 - Valid *inter partes* without certificate, 537
 - When second certificate necessary, 535
- Married women, 517, 552
- Name and identity of grantor, 542**
 - Certificate must show that grantor was known to officer, 544
 - Certificate must state that witness was acquainted with grantor, 544
 - Exceptions to general rule requiring recital of personal acquaintance, 545
 - Fatal variance in name, 543
 - Husband and wife, 545, 546
 - Name of grantee for that of grantor, 543
 - Personal acquaintance shown by implication, 545
 - "Personally," 545
 - Place for name of grantor left blank, 542
 - Recital that officer is "satisfied" as to identity of grantor, 546
 - Variances in name held not fatal, 543
 - What amounts to personal acquaintance, 546
- Official character of officer, 530**
 - Dual official character, 532
 - Extrinsic evidence of official character, 532
 - Initials and abbreviations, 531
 - Judicial notice, 530
 - Official character shown in signature alone, 532
 - Person taking acknowledgment of deed in another state, 531
 - Presumption of authority, 531

Acknowledgments, cont'd.

- Representations of officer as *prima facie* evidence of authority, 531
- Statement of official character in body of certificate, 531
- Surplusage in description, 532
- Whether certificate must show, 530
- Whether source of authority must be stated, 531
- Omissions:**
 - Held not fatal, 547
 - Held fatal, 549
 - Relinquishment of dower, 549
 - Relinquishment of homestead, 549
 - On separate sheet from deed, 526
- Parol evidence to aid defective certificate,** 551
 - Inadmissibility, 551
 - Material words, 552
 - Statement of private examination, 551
- Place of certificate, 526
- Presumption of venue, 528
- Seal, 532**
 - Device of seal prescribed by statute, 533
 - Necessity, 532
 - No official seal provided, 534
 - Place of seal, 534
 - Private seal, 534
 - Seal preceding signature, 534
 - Seal presumed to be that of officer using it, 533
 - Seal unnecessary unless required by statute, 534
 - Statement that seal was affixed, 534
 - Use of seal belonging to another officer, 534
 - Use of the words "no seal" in certified copy, 535
 - Whether seal must be copied into the record, 534
 - Whether want of seal vitiates certificates, 533
- Separate examination, 517
- Should be indorsed on deed, 526
- Showing where acknowledgment was made, 527
- Signature, 529**
 - Defective certificate as an attestation, 530
 - Necessity of signature, 529
 - Variance in signature, 529
 - Whether name of officer must appear in body of certificate, 530
- Statutory requirements, 526
- Surplusage, 552**
 - Rejection, 552
 - Relinquishment of dower in conveyance of wife's estate, 552
- Time of making, 527
- Venue supplied by extrinsic evidence, 528
- Venue supplied from deed, 528
- What it must certify, 538
- Whether deed may be read to supply deficiencies in certificate, 546
- Chattel mortgage, 491
- Clerks, 500
- Conflict of laws, 504
- Consuls and ambassadors, 506
- Corporations, 510**
 - Acknowledgment as act of corporation, 511

Acknowledgments, cont'd.

- Acknowledgment by officer as his own act, 511
- Articles of incorporation, 512
- Attorney for corporation, 512
- Authority to make, 510
- By officer affixing seal, 510
- By officers of corporation, 510
- Curing defective acknowledgments, 562**
 - By statute, 564
 - Acknowledgments before unauthorized officers, 565
 - Constitutionality of curing acts, 567
 - Affecting mode of proof only, 567
 - As to deeds of married women, 568
 - As to vested rights, 568
 - Creating title, 568
 - In general, 567
 - Construction of statutes, 568
 - Curing defects after lapse of time, 565
 - Defects not cured, 565
 - Extra-territorial effect of, 564
 - Generally, 564
 - How far retroactive, 566
 - After judgment, 566
 - After suit brought, 569
 - In general, 566
 - Mistake in grantor, 566
 - Pending judgment, 566
 - In Michigan, 566
 - Statutory provisions, 564
 - Want of certificate of official character, 505
 - Want of seal, 565
 - By subsequent acknowledgment, 562
 - Fraudulent acknowledgment, 564
 - In general, 562
 - Long acquiescence, 563
 - Married woman, 562
 - Ratification by widow, 563
 - Receiving purchase money, 563
 - Refusal to reacknowledge, 563
 - Subsequent confirmation, 563
 - Proof by subscribing witnesses, 569
- Deed, see infra, CERTIFICATE.*
- Deed acknowledged but not attested, 486
- De facto* officer, 495
- Definition, 484
- Deputies, 496
- Divorce, separate examination, 521
- Estoppel, married women, 521, 559
- Evidence (see also CERTIFICATE; PAROL EVIDENCE), 485**
 - Acknowledgment as proof of execution of deed, 486
 - Admissibility of deed acknowledged but not recorded, 485
 - To impeach certificate, 560
- Husband and wife, see infra, MARRIED WOMEN.*
- Impeachment of certificate, see infra, CERTIFICATE.*
- Interested officer, 493
- Interpreters, 519
- Judges, 500, 506
- Judicial notices:**
 - Official character of officer giving certificate, 530
 - That certain courts are courts of record, 537
- Justices of the peace, 500

Acknowledgments, cont'd.

- Married women, 512**
 - Assent of husband, 513
 - Certificate, 539
 - As evidence, 556, 557
 - Compliance with law, 539
 - Deeds executed by both husband and wife, 513
 - Deed from husband and wife to wife's lands acknowledged by husband alone, 513
 - Deed from husband to wife, 513
 - Deed not acknowledged by husband, 514
 - Deed to lands of husband not acknowledged by wife, 514
 - Essential part of deed, 512
 - In California, 513
 - Necessity of acknowledgment, 491, 512
 - Power of court to order woman to acknowledge deed, 514
 - Refusal to acknowledge, 514
- Separate examination, 514**
 - Abandonment, 521
 - Acknowledgment in open court, 516
 - Act free from compulsion, 520
 - Apart from husband, 521
 - Certification, 517
 - Contract to convey land, 515
 - Conveyance authorizing married woman to convey without separate examination, 516
 - Deeds executed before marriage, 516
 - Divorce, 521
 - Estoppel, 521
 - Examination by a commission, 516
 - Examination must be personal, 521
 - Exceptions and qualifications of rule, 521
 - Explanation in husband's presence, 519
 - Explanation of contents, 518
 - Fact of explanation need not be stated, 520
 - Fact of separate examination must appear in certificate, 517
 - Generally, 514
 - General requirements, 517
 - In Alabama, 523
 - In Arizona, 522
 - In Arkansas, 522
 - In California, 523
 - In Canada, 515
 - In Delaware, 524
 - In District of Columbia, 524
 - In Florida, 524
 - In Georgia, 522
 - In Idaho, 524
 - In Illinois, 522
 - In Indiana, 522
 - In Iowa, 522
 - In Kansas, 522
 - In Kentucky, 524
 - In Louisiana, 524
 - In Maine, 522
 - In Michigan, 522
 - In Minnesota, 522
 - In Missouri, 522
 - In Montana, 523
 - In Nevada, 524
 - In New Jersey, 524
 - In New Mexico, 524
 - In New York, 523
 - In North Carolina, 524

Acknowledgments, cont'd.

In Pennsylvania, 524
 In Rhode Island, 525
 In South Carolina, 525
 In Tennessee, 523, 525
 In Texas, 525
 In West Virginia, 525
 In Wisconsin, 523
 In Wyoming, 525
 Immaterial points need not be explained, 519
 Interpreters, 519
 Necessity of acknowledgment 523
 Origin and object of the practice, 516
 Recent statutes, 522
 Separation, 521
 Source of wife's knowledge immaterial, 518
 Specific performance, 516
 Statement that she does not wish to retract, 520
 Statutes requiring separate examination, 523
 Statutory provisions, 514
 Unacknowledged executory contract, 516
 Voluntary act and deed, 520
 What constitutes a separate examination, 521
 When explanation unnecessary, 519
 When separate examination not necessary, 516
 Where yet required, 523
 Whether certificate must show explanation, 520
 Whether explanation must be private, 519
 Who may make the explanation, 518
 Wife already informed, 519
 Whether husband and wife must acknowledge deed at the same time, 513, 526
 Wife unnecessarily joining with husband, 514
 Master in chancery, 502
 Mortgages, 491
 Necessity to validity of deed, 488
 Actual notice, 492
 As against persons without notice, 489
 Chattel mortgage, 491
 Constructive notice, 492
Married woman's deed, see infra, MARRIED WOMEN.
 Deed good as between the parties, 488
 In general, 488
 Miscellaneous instrument, 490
 Mortgage, 491
 Registration without acknowledgment, 490
 Whether recorded unacknowledged deed is notice, 490, 492
 No part of deed, 488
 Notaries public, 500, 505
 Object, 484
 Origin, 488
 Parol evidence certificate, 551
 Personal acknowledgment, 569
 "Personally," 545, 546
Privy examination, see infra, MARRIED WOMEN.
 Recognizances, 486
 Recording acts, 485

Acknowledgments, cont'd.

Necessity of admitting deed to record, 485
 Whether recorded unacknowledged deed is notice, 490, 492
 Whether record is essential to admissions of deeds in evidence, 485
 Relationship of officer taking, 494
 "Satisfied," 546
Seal, see infra, CERTIFICATE.
Separate examination, see infra, MARRIED WOMEN.
Signature, see infra, CERTIFICATE.
 Sunday, 526
Time when acknowledgment must be made, 525
 Before completion of deed, 525
 Deed executed by two grantors, 526
 Husband and wife, 513, 526
 Immaterial, 525
 In absence of statute, 525
 Legal holiday, 526
 Sunday, 526
 When offered in evidence, 526
Whether the officer's act is ministerial or judicial, 485
 Examples, 487, 488
 Held judicial, 487
 Held ministerial, 487
 Whether unauthorized sheriff's deed is validated by, 486
Who may make (see also, *infra*, MARRIED WOMEN), 507
 Acknowledgment by one of several grantors, 507
 Agent, 508
 Attorney, 508
Corporations, 510
 Acknowledgment as act of corporation, 511
 Acknowledgment by officer as his own act, 511
 Articles of incorporation, 512
 Attorney for corporation, 512
 Authority to make, 510
 By officer affixing seal, 510
 By officers of corporation, 510
 Husband as attorney for wife, 508
 Infant *feme covert*, 507
 In general, 507
 Mental capacity, 507
 Partners, 509
 Proof of agent's authority, 509
 Several grantors, 507
 Sheriff's deed, 508
Who may take, 493
 Acknowledgment after expiration of officer's term, 495
 Competency depends on statute, 493
De facto officer, 495
Deputy, 496
 Deputy clerk, 497
 Deputy recorder, 496
 Power to take acknowledgments, 496
 Presumption as to authority, 496
 Presumption as to appointment, 496
 Signature by deputy, 497
 Taking acknowledgments in deputy's own name, 497
Ex officio officer, 495
Extra-territorial acknowledgments, 498
 Acknowledgment before clerk of another county than that of registration, 499

Acknowledgments, cont'd.

- Effect of division of county, 499
- States in which they are held invalid, 499
- States in which they are held valid, 498
- In foreign countries, 505**
 - Consular officers, 506
 - Judges, 506
 - Mayors, 506
 - Notaries public, 505
- In other states, 501**
 - Acknowledgment before witnesses, 504
 - By what law validity determined, 504
 - Certificate of magistracy or conformity, 505
 - Commissioners, 502
 - Commissioners of deeds, 503, 505
 - Deed acknowledged in another state, 505
 - Examples, 502
 - Formalities required, 504
 - In Louisiana, 504
 - Master in chancery, 502
 - Officers of other states, 501
 - Place of residence of person making acknowledgment, 504
 - Presumption as to foreign law, 505
 - Proof of official character, 504
- Interest, 493
- Officer also attesting witness, 494
- Officer who is attorney or agent for grantor, 494
- Officer who is grantee or mortgagee, 493
- Officer who is trustee in a deed of trust, 493
- Preferred creditor, 494
- Relationship, 494
- Within the state, 499**
 - Clerks, 500
 - County auditors, 501
 - Judges, 500
 - Justices of the peace, 500
 - Mayors, 501
 - Notaries, 500
 - Under United States statutes, 500

ACQUAINTANCE, 569

- Acknowledgments, 545, 546

ACQUAINTED, 569

- Acknowledgments, 569

ACQUETS AND CONQUETS, 570

ACQUIESCENCE, 570

- Ratification of agent's acts by, see AGENCY.*
- Admissions, 672
- Distinguished from laches, 570

ACQUIRED, 571

ACQUITTAL, 572

ACQUITTANCE, 572

ACQUITTED, 573

ACRE, 574

ACROSS, 574

ACT, 575

- Act complained of, 575
- Real covenants, 576
- Referring to section of statute, 576
- Whether "act" implies intention, 576
- Whether term includes both ministerial and judicial acts, 576

ACTING, 577

- Acting attorney, 577

ACT OF GOD, 584

- As affecting the performance of contracts, 588
- Contracts for personal services, 591

Act, etc., cont'd.

- Death, 590
- Destruction of premises, 589
- Destruction of subject matter, 590
- Destruction of vessel chartered, 589
- Express contract, 588
- In general, 588
- Obligation implied by law, 592
- One of two alternative obligations, 590
- Substantial performance, 592
- Reason of rule, 590
- Where the contract has reference to continued existence of a particular person or thing, 590
- Whether defense in case of express contract, 588
- Carriers of goods, 592**
 - Act of God not proximate cause of loss, 594
 - Act of God one of several causes, 595
- Burden of proof, 597**
 - Contracts of carriers and contracts in general, 599
 - Excuse for delay in delivery, 599
 - Freezing of canal, 599
 - Implied undertaking to deliver within reasonable time, 598
 - Upon carrier, 597
 - Upon contracts to perform certain stipulated acts, 599
 - Whether carrier must show absence of negligence, 597
- Delay of carrier, 596
- Freezing of goods in transit, 593
- Liability as insurers, 592
- Loss wholly independent of carrier's fault, 597
- Negligence of carrier as a co-operative cause, 595
- Unseaworthy vessel, 596
- When act of God remote or indirect cause, 594
- Conditions, 599**
 - Conditions annexed to bonds, 600
 - Conditions precedent, 599
 - Conditions subsequent, 600
- Death, 590
- Definitions, 584
- Freezing of canal, 585
- Freezing of river, 585
- Freshets, 585
- Inevitable accident distinguished from, 587
- Lightning, 585
- Lightning, earthquakes, tempests, 586
- Loss by collision, 586
- Negligence, 595
- Occurrences which might have been anticipated, 585
- Perils of sea distinguished from, 587
- Proximate and remote cause, 595
- Snow storm, 585
- Sudden gust of wind, 586
- Tornadoes, 585
- Unprecedented flood, 585
- ACT OF INSOLVENCY, 600**
- ACTION, 577**
 - Appeal from probate, 579
 - As equivalent to controversy, 579
 - Attachment, 579
 - Certiorari, 579
 - Claim filed against estate of decedent, 579

Action, cont d.

- Contempt, 579
- Contested election, 580
- Criminal proceedings, 580
- Divorce case, 580
- Eminent domain, 580
- Equity proceedings, 578
- Execution, 578
- Ex parte* proceedings, 580
- Foreign attachment, 580
- Habeas corpus, 580
- Insolvency proceedings, 580
- Judgment on bond and warrant of attorney, 579
- Mandamus, 580
- Mechanic's lien, 580
- Penalty, 580
- Petition for location of highway, 581
- Probate proceedings, 581
- Proceedings against executor or administrator, 582
- Removal acts, 582
- Replevin, 582
- Set off, 582
- Scire facias, 582
- Suit distinguished from, 578
- Suit in admiralty court, 579
- Used as equivalent to a right of action, 583
- Voluntary submission to court, 583
- Writ of error, 583

ACTIO PERSONALIS MORITUR CUM PERSONA, 583**ACTIVE TRUST**, 583**ACTUAL**, 601

- Actual annual income, 601
- Actual bias, 601
- Actual cash payment, 601
- Actual change of possession, 601
- Actual confinement, 601
- Actual contest, 601
- Actual control, care, or management, 602
- Actual cost, 602
- Actual damages, 602
- Actual dedication, 602
- Actual delivery, 602
- Actual determination, 602
- Actual expenses, 603
- Actual first cost, 602
- Actual force, 603
- Actual fraud, 603
- Actual military service, 607
- Actual notice, 604
- Actual occupancy, 604
- Actual ouster, 605
- Actual record, 605
- Actual residence, 605
- Actual seizin, 605
- Actual seizure, 605
- Actual service, 605
- Actual settler, 605
- Actual time, 606
- Actual use, 606
- Actual value, 607

ACTUALLY.

- Actually dwells, 602
- Actually employed, 603
- Actually engaged, 603
- Actually in session, 604
- Actually sold, 606

ACTUAL POSSESSION, see **ADVERSE POSSESSION.***ACTUAL TOTAL LOSS*, see **ABANDONMENT AND TOTAL LOSS.***ACTUS DEI*, 608**A. D.**, 99**ADD**, 608**ADDITION**, 608**ADDITIONAL**, 608**ADDRESS OF LETTERS**, 609

- Death of party upon whom notice is to be served, 609
- Domicil or residence, 609
- Mistake, 609
- Residence or place of business, 609
- Sufficient address, 609

ADEMPION OF LEGACIES, 610

Advancements distinguished from, 612

By acquisition, 629

- Collection of insurance policies, 630
- Collection of promissory note, 630
- Distinction between enforced and voluntary payments, 630
- Doctrine confined to specific legacies, 630

Foreclosure of mortgage, 630

General rule, 629

Limitations of the rule, 631

Money on deposit, 630

By alienation, 623**Conveyances of real estate**, 626

- Common-law rule, 626
- Leasehold interests and terms for years, 626
- Revocation by subsequent conveyances, 626
- Statutory modifications, 626
- Subsequent conveyances, 626
- Surrender of lease, 626

Destruction, 627

Loss, 627

Mortgages, 627

Pledges, 627

Property lost at sea, 627

Sales and gifts, 623

- Ademption *pro tanto*, 625
- Bequest of proceeds, 624
- Bond and mortgage, 625
- General rule as to existence of subject of bequest, 623
- Intention of testator—American rule, 625
- Intention of testator—English rule, 625
- Question of testator's intent, 625
- Sale of property bequeathed, 623
- Shares of stock, 625
- Subject matter of bequest replaced by other property of like character, 624
- Unexecuted intention, 625

By portions on the analogy of advancements, 613**By persons in loco parentis**, 613Ademption operates *pro tanto* only, 622

Advanced portion must be a gift, 616

Advanced portion must be ejusdem generis, 618

- Accomplishment by testator of purpose for which legacy is given, 619
- Bequest of money addeemed by gift of stock, 619
- Examples, 618
- Gift and legacy need not be in all respects identical, 619
- Object of gift different from purpose expressed in will, 620
- Pecuniary legacy and gift of realty, 618

Ademption, etc., cont'd.

- Pecuniary legacy and gift of stock of jewelry, 618
- Qualifications, 619
- Question of intention, 619
- Statement of the rule, 618
- Advanced portion only presumed to be intended to adeem**, 620
 - Intent of testator controls, 620
 - Presumption rebutted by parol, 621
 - Rebuttal of the presumption, 620
 - Silence of legatee, 622
 - Subsequent unfulfilled promise, 622
 - Testator's declaration, 621
- Bequest of residue of estate, 617
- Gift must be made to legatee, 616
- Gift must be of a substantial amount, 617
- Gift must be subsequent to the testament, 620
- Gift one ninth part of legacy, 618
- Giver must be a testator, 614
- Insignificant sums of money, 617
- Legacy must be certain in amount, 616
- Obligation to make the advance, 616
- Reasons for the rule 613
- Testator must be *in loco parentis***, 614
 - Aunt or uncle, 615
 - Circumstances necessary to constitute the relation, 615
 - Definition of *in loco parentis*, 615
 - Father, 615
 - Father of illegitimate child, 615
 - Grandfather, 615
 - Mother, 615
 - Proof of the relation, 616
 - Statutes of affiliation, 615
 - Testator's housekeeper, 615
- The doctrine analyzed and qualifications discussed, 614
- The doctrine criticised, 622
- The doctrine stated generally, 613
- Where bequest is contingent and subsequent gift certain, 617
- Whether direction in testament is necessary, 620
- Whether direction in testament is necessary:**
 - In general, 620
 - When testament contains provisions against ademption, 620
 - When testament provides for ademption, 620
- Rule not to be extended, 623
- Statutory modifications of the doctrine, 623
- The doctrine criticised, 622
- By removal**, 628
 - Bequest of bank deposit, 629
 - General rule when the property is localized by the instrument, 628
 - Removal by fraud, 629
 - Removal by necessity, 629
 - Temporary removal, 629
 - When the element of locality is unimportant, 629
- By transformation, alteration, and conversion**, 627
 - Change effected by enactment, 628
 - Change from one species in legal classification to another, 628
 - Change in articles of partnership, 628

Ademption, etc., cont'd.

- Conversion without knowledge of testator, 628
- General rule, 627
- Result of strict application of rule, 628
- Definition, 611
- Devises, 611
- Intestate succession, 611
- Modes of ademption, 613
- Revival of adeemed legacies**, 631
 - General legacy made specific by later instrument, 631
 - Intention of testator, 631
 - Subsequent codicil confirming will, 631
 - Revocation of wills distinguished from, 612
 - Satisfaction distinguished from, 611
 - Scope of article, 610
- ADEQUACY**, 632
- ADEQUATE**, 632
 - Adequate cause, 632
 - Adequate crossings, 632
 - Adequate provocation, 632
- ADEQUATE CAUSE**, 632
- AD FILUM AQUÆ**, 633
- ADHERING**, 633
- ADIT**, 633
- ADJACENT**, 633
 - Adjoining distinguished from, 633, 635
- ADJOINING**, 633, 635
 - Adjacent distinguished from, 633, 635
 - Arson, 637
 - Burglary, 636
 - Change of venue, 636
 - Distinguished from appertaining, 637
- ADJOURNMENT**, 636
 - Additional, special, and adjourned term, 639
 - A part of the session, 638
 - Distinction between prorogation and adjournment, 639
 - Distinguished from recess, 639
 - Extension of term, 639
 - Power of court, 639
 - Suspension, 638
 - To a day certain, 638
 - When adjournment is complete, 639
- ADJUDGED**, 640
 - Sums adjudged, 640
- ADJUDICATE**, 641
- ADJUDICATION**, 641
- ADJUST**, 641
- ADJUSTMENT**, 641
- ADMEASUREMENTS**, 642
- ADMINISTER**, 642
- ADMINISTERING**, 189
- ADMINISTERING POISON**, 642
- ADMINISTRATION**, 643
- ADMINISTRATIVE**, 644
- ADMIRALTY JURISDICTION**, 645
 - Bottomry, 661
 - Causes of maritime nature**, 648
 - In general, 648
 - What are, 648
 - Chattel mortgages, 664
 - Charter party, 662
 - Contracts*, see *infra*, MARITIME CONTRACTS.
 - Courts of admiralty in the United States**, 647
 - Circuit court of appeals and supreme court**, 647
 - Statutes, 647
 - When appeal may be direct to circuit court, 648
 - When appeal may be direct to supreme court, 647

Admiralty, etc., cont'd.

- District courts, 647
 - Constitutional grant of power, 647
 - Exclusive jurisdiction, 647
- State courts, 648
 - Maritime liens, 648
 - Proceedings *in personam*, 648
 - Suit for wages, 648
 - When courts have jurisdiction, 648
- Crimes, 668
 - Foreigners, 668
 - Foreign ports, 668
 - High seas, 668
 - In England, 668
 - In United States, 668
 - Jurisdiction dependent on statute, 668
 - Offenses within a state, 668
- Definition, 645
- Demurrage, 661
- High seas, 649
 - Definition, 649
 - In criminal statutes, 649
 - Penal statutes, 668
- History and development, 645
- Limits and extent of jurisdiction, 646
 - Courts in American colonies, 646
 - High court of admiralty, 646
 - In England, 646
 - In United States, 646
- Marine insurance, 662
- Maritime contracts, 660
 - Accounts, 661
 - Additional agreement, 661
 - Affreightment, 652
 - Bottomry, 661
 - Building contracts, 663
 - Building materials and supplies, 664
 - Contract for machinery of a vessel, 664
 - Contract to repair on land, 664
 - Liens created by local law, 664
 - Repairs and necessities, 664
 - Whether contracts for building are maritime, 663
- Care of vessel, 662
- Charter parties, 661
- Claim of stevedore, 663
- Contract must be in its essence maritime, 661
- Demurrage, 661
- Examples, 660, 665
- General principles, 660
- Maritime insurance, 661
- Mortgages, 664
- Partnership contracts, 661
- Pilotage, 661, 662
- Preliminary contracts, 661
- Respondentia*, 661
- Sales, 661
- Salvage, 661, 662
- Storage of grain in ship, 663
- Subject matter determines the jurisdiction, 660
- Towage, 661
- Transportation of passengers, 662
- Wharfage, 661, 662
- What gives a maritime character to services, 660
- Whether jurisdiction depends upon power of Congress to regulate commerce, 651
- Maritime insurance, 662
- Maritime torts, 656
 - Bridges 657

Admiralty, etc., cont'd.

- Claim for personal injuries connected with other matters, 658
- Death by wrongful act, 658
 - In absence of federal or state legislation, 658
 - In Alaska, 659
 - In England, 659
 - Libel, 659
 - Lien, 659
 - Where there are state statutes, 659
- Examples, 656, 660
- Fire on shore from steamboat, 657
- Injury to person, 657
- Injury to vessel by bridge or draw, 657
- Locality of tort determines jurisdiction, 649, 656, 658
- Nominal damages, 658
- Substantial rights, 658
- Taking property at sea, 658
- Wharves, 657
- Whether confined to wrongs resulting from direct force, 658
- Whether jurisdiction depends upon power of Congress to regulate commerce, 651
- Navigable waters, 649
 - Act of 1845, 650
 - Canals connecting navigable waters, 651
 - Contract of affreightment, 652
 - Early view, 649
 - Ebb and flow of the tide, 649
 - General rule as to what are navigable waters, 649
 - Genesee Chief case, 649, 650
 - Great lakes, 650
 - Internal rivers and waters, 651
 - Low water mark, 649
 - Salvage, 651
 - Waters navigable by vessels used in commerce, 649
 - Waters navigable in fact, 651
 - Waters wholly within a state, 651
 - Whether jurisdiction dependent upon power of Congress to regulate commerce, 651
- Persons subject to the jurisdiction, 652
 - Consideration that should influence court in exercising jurisdiction or not, 653, 654
 - Controversies between foreign seamen, 653
 - Cruelty or hardship, 654
 - Discretion in exercising jurisdiction in matters between foreigners, 652
 - Distribution of proceeds of sale of foreign vessel, 654
 - Foreigners of different governments, 654
 - General rule, 652
 - Lex loci contractus*, 652
 - Matters happening in foreign waters, 652
 - Parties subject to foreign government, 652
 - Practice in courts of admiralty, 652
 - Protest of consul, 654
 - Supplies to domestic ships in foreign ports and *vice versa*, 653
 - Treaties, 652
 - Voyage abandoned, 654
 - Voyage completed, 654
 - When differences adjusted by consuls, 654
- Petitory and possessory actions, 665

Admiralty, etc., cont'd.

- Distinction in England, 665
- Equitable title, 666
- Foreigners, 666
- In the United States, 665
- Pilotage, 661, 662
- Prize causes, 666
 - Captures on land and inland waters, 666
 - Captures on the high seas and in port, 667
 - District courts, 666
 - Foreign neutral port, 667
 - Forfeitures and penalties, 667
 - In England, 666
 - In United States, 666
 - Ransom bills, 667
 - Recapture on land, 666

Respondentia, 661

Salvage, 661, 662

Stevodore, 663

Torts, see infra, MARITIME TORTS.

Towage, 661, 662

Vessels that are within the jurisdiction, 654

- General rule, 654
- Ships of war belonging to a foreign nation, 654
- Vessels engaged in service of a municipality, 654
- What is a vessel, 655**
 - Abandoned wreck, 655
 - Barge, 655
 - Bath house built on boats, 655
 - Boat in unfurnished condition, 655
 - Canal boat, 655
 - Criterion, 655
 - Dredge, 655
 - Floating dock permanently moored, 655
 - Floating elevator, 655
 - Floating hotel, 655
 - General rule, 655
 - Light boat, 655
 - Marine pump, 655
 - Old steamboat, 655
 - Raft, 655
 - Tug, 655
 - United States revised statutes, 655
 - Wharf boat, 655

Waters within the jurisdiction, see infra, HIGH SEAS; NAVIGABLE WATERS.

Wharfage, 661, 662

ADMISSIONS, 670

- Accessory, 269
- Accounts, 674, 718
- Acquiescence, 672**
 - Accounts, 674
 - Circumstances must call for some action, 674
 - Declarations by stranger, 675
 - Essentials, 673
 - Statement made in the course of judicial hearing, 674
 - Strangers, 675
- Affidavits, 720
- Against interest, 675, 683
- Agency, 969, 1143
- Agents (see also, infra, ATTORNEY AND CLIENT; HUSBAND AND WIFE), 690, 693, 969, 1143**
 - Parties referred to for information, 701
 - Admissions as to other matters, 702
 - Interpreter of the party's selection, 702
 - Party referring bound by, 702

Admissions, cont'd.

- Rule stated, 701
- Through telephone operator, 702
- Where there is no intention to be bound, 702
- When admissions of agents are admissible, 690**
 - Admissions by general agents as to past transactions, 697
 - Admissions not made at time of transaction, 695
 - Agent acting without authority, 691
 - Agents of railroads, 697
 - Concerning transactions then depending, 694
 - Corporation agents and employes, 693
 - During continuance of agency, 693
 - Preliminary proof of agency, 691
 - Public officers, 693
 - Res gesta*, 694
 - Special instructions, 695
 - Where special authority to admit is given, 697
 - Whether admission of agent is admissible to prove agency, 690
 - Whether admission of agent is admissible to prove scope of authority, 691
- Answers in chancery, 704
- Assignment, 684
- Assignment for benefit of creditors, admissions of assignor, 689
- Attorney and client, 698**
 - Admissions in common conversation, 698
 - Admissions made for purpose of dispensing with proof, 698
 - Admissions of attorney's clerk, 700
 - Distinct and formal admissions, 698
 - Must be made during the agency, 698
 - Must be within scope of authority, 698
 - Question of law or fact, 699
 - Rule as to agents generally applies, 698
 - When made before suit, 698
 - When receivable on subsequent trial, 699
- Bankruptcy:**
 - Declarations of a bankrupt against assignee, 686
- Bills and notes:**
 - Admissions of former holder, 685
 - Admissions of payee of note after parting with his interest, 688
 - Joint makers of promissory notes, 705
- Books as evidence, 718
- Boundaries, 683
- By whom admissions may be made (see also, infra, AGENTS; ATTORNEY AND CLIENT; CONSPIRACY; HUSBAND AND WIFE; PARTNERSHIP; SURETYSHIP).**
 - Acknowledgment of trust, 682
 - Admissible to show character of claim asserted, 684
 - Admission must be made while title is in the party, 685
 - Admission of indebtedness as against prior creditor, 689
 - Admissions after title has been transferred, 686
 - Admissions against interest, 675
 - Admissions before title acquired, 686
 - Admissions in disparagement of title, 680
 - Admissions of ancestor, 682
 - Admissions of assignor for benefit of creditors, 689

Admissions, cont'd.

Admissions of assured after issuance of policy, 689
 Admissions of *cestui que trust*, 679
 Admissions of debtor in attachment proceedings, 689
 Admissions of deputy sheriff, 680
 Admissions of former holder of negotiable note, 685
 Admissions of party in possession, 684
 Admissions of nominal party used against him in subsequent suit, 679
 Admissions of obligee of a bond, 686
 Admissions of payee of note after parting with his interest, 688
 Admissions of testator, 682
 Admissions of the grantor of land, 680, 681
 Assignment of chattel or chose in action, 684
 Assignor and assignee, 681
Bona fide purchaser, 685
 Boundaries, 683
 Contradicting declarations against interest by declarations in favor of interest, 684
 Declarations in disparagement of title, 676
 Declarations must be against interest, 683
 Declarations of a bankrupt against assignee, 686
 Declarations of intestate, 682
 Demand stale or suspicious, 685
 Evidence of a conversation by telephone, 678
 Executors and administrators, 679
 Former administrator, 682
 Generally, 675
 Guardian, 678
 Locator of mining claim, 681
 Marriage, 676
 Must be against interest at the time, 676
 Of judgment debtor, 682
 Of mortgagee, 682
 One of several owners, 683
 Parties to the record, 678
 Persons jointly interested, 703
Persons jointly interested (see also *infra*, PARTNERSHIP).
 Admissions not competent proof of fact of interest, 704
 Answers in chancery, 704
 By statute, 705
 Community of interest, 706
 Corporation officers, 707
 Declarations in declarant's interest, 704
 Declarations of inhabitants, 706
 Devisees and legatees, 707
 Distributees, 707
 Executors and administrators, 707
 Fraud or collusion, 703
 Generally, 703
 Heirs, 707
 Interest must be subsisting at time of admission, 704
 Joint contractors, 705
 Joint interest, 706
 Joint makers of promissory note, 705
 One of two joint beneficiaries under an insurance policy, 704
 Person need not be party of record, 708
 Privies, 680
Prochein amy, 678

Admissions, cont'd.

Quantum of interest, 706
 Stockholders, 707
 Surviving promisor and executor of copromisor, 706
 Tenant for life and remainderman, 707
 Tenants in common, 707
 Trustees, 707
 Where admission is competent against only one of several codefendants, 708
 Real parties, 679
Res gesta, 676
 Self-serving declarations, 676
 Strangers, 677, 713
 Trustees, 679
 Vendor, 682
 Commercial paper, 671
Compromise:
 Admissibility of admissions made with a view to a compromise, 714
 Admissions of independent facts, 716
 Confidence, 715
 In general, 714
 Negotiations to effect compromise must appear, 715
 Offers of money to buy peace, 714
 Reason for the rule, 714
 Without prejudice, 715
 Confessions distinguished from, 670
Conspiracy:
 Admissibility of admissions of coconspirators, 711
 Foundation must be laid before admissions receivable, 713
 In general, 711
 Made after completion of abandonment of enterprise, 712
 Made during the pendency of unlawful enterprise, 711
 Made in the absence of the other conspirators, 712
 Not competent against one when made before his connection with enterprise, 712
 Contractor, joint contractor, 705
 Corporations, officers, 693, 707
 Definitions, 670
 Depositions, 720
 Direct, 671
 Duress, 716
Executors and administrators, 707
 Admissions of, 679
 Admissions of former administrators, 682
 Surviving promisor and executor of copromisor, 706
 Fraud or collusion, 703
Guardian and Ward:
 Admissions of guardian, 678
 Harboring wife or kindred, 268
Husband and wife, 700
 Authority must be proved, 701
 Declarations of wife after marriage, 701
 Declarations of wife before marriage, 701
 During agency, 700
 Husband's admissions as to wife's separate estate, 700
 When husband sues in right of wife, 701
 Wife's admissions affecting husband, 700
 Within scope of agency, 700
 Implied from acquiescence, 671
 Implied from assumed character, 671

Admissions, *conf'a.*

- Implied from conduct, 671
- Implied from silence, 671
- Instances of admissions in criminal cases, 671
- Interpreters, 702
- Joint tenants and tenants in common, 707
- Letters, 671, 717, 722
 - Unanswered letters, 673
 - Where the original letter is answered, 673
- Limitation of actions, admissions of partner, 709
- Marriage, 676
- Mode and requisites of proof, 721**
 - Action for false imprisonment, 722
 - Admission heard in conversation, 722
 - Any competent witness who heard them, 721
 - Contradictory statements, 722
 - General rule, 721
 - Letters, 722
 - Matters distinct from the admission, 722
 - Precise language, 721
 - Province of the jury, 722
 - Testimony in former trial, 722
 - Whole admission must be proved, 721
 - Mortgages, declarations of mortgagee, 682
- Officers of corporations, 693, 707
- Partnership, 708**
 - Admissibility of admissions of one partner against another, 708**
 - Acknowledgment after dissolution but before statute, 709
 - After the termination of the partnership, 708
 - General rule, 708
 - Must be during continuance of partnership, 708
 - Must be within scope of partnership, 710
 - Not competent to prove fact of partnership, 710
 - Note indorsed by partners, 709
 - Partner authorized to settle business of firm, 709
 - Partnership provable by successive declarations of members, 711
 - Taking debt out of statute of limitations, 709
 - Admissibility of admissions of coconspirators:**
 - What is a sufficient foundation, 713
 - When receivable before *prima facie* case established, 713
- Payment of money into court, 671, 719
- Pleadings, 719
- Public officers, 693
- Railroads:**
 - Employés of railroad, 697
- Receipts, 718
- Res gesta*, 676
- Silence, 672**
 - Accounts, 674
 - Circumstances must call for some action, 674
 - Declarations by stranger, 675
 - Essentials, 673
 - Statement made in the course of judicial hearing, 674
 - Strangers, 672
 - Stockholders, 707

Admissions, *cont'd.***Suretyship:****Principal against surety, 702**

- Admissions after the transaction, 703
- Admissions before the transaction, 703
- Admissions of a defaulting agent, 703
- Bank clerk, 703
- General rule, 702

Telegraph and telephone companies:

- Admissions by telephone, 717
- Evidence of conversation by telephone, 678

Title, admissions in disparagement of, 676, 680

To whom admissions may be made, 675

- Against interest, 675
- In general, 675
- Strangers, 675

Trusts and trustees, 705

- Acknowledgment of trust, 682
- Admissions of *cestui que trust*, 679
- Admissions of trustees, 678

Weight of evidence, 723

- Admissions deliberately made, 723
- Province of the jury, 724
- Uncorroborated verbal admission, 723
- When of little weight, 723

What admissions are receivable, 713

- Accounts rendered, 718
- Admissions by telephone, 717
- Admissions in pleadings, 719
- Admissions of a witness, 720
- Admissions stated as facts, 713
- Admissions under duress, 716
- Admissions with a view to a compromise, 714**
 - Admissions of independent facts, 716
 - Confidence, 715
 - In general, 714
 - Negotiations to effect compromise must appear, 715
 - Offers of money to buy peace, 714
 - Reason for the rule, 714
 - Without prejudice, 715

Affidavits, 720

- Bank books, 718
- Bill brought for injunction, 720
- Bonds, 718
- Documentary admissions, 717
- Depositions, 720
- Generally, 713
- Hearsay, 714
- Judicial admissions, 719
- Matters material to the issue, 716
- Memoranda, 718
- Notes, 718
- Partnership books, 718
- Payment of money into court, 719
- Receipts, 718
- Telegrams, 718
- Uncertainty of statement, 714
- When instrument inoperative for purpose intended, 718
- When parol admissions *in pais* receivable, 716

Without prejudice, 715

Witnesses, 720

ADMIT, 724

ADMONISH, 724

ADMR, 98

ADOPT, 724

ADOPTION OF CHILDREN, 726

- Abandonment of child by father, 727
 - Affecting devolution of property, 727
 - Civil law, 726
 - Common law, 726
 - Conflict of laws, 733
 - Constitutionality of adoption statutes, 727
 - Consent and notice, 729**
 - Abandonment of child, 730
 - Consent of guardian, 730
 - Consent of next friend, 730
 - Consent of parents, 729
 - Husband and wife, 731
 - Service of notice, 730
 - When dispensed with, 729
 - When parent is deprived of civil rights 730
 - Decree of adoption, 734
 - Definition, 726
 - Extra-territorial effect of adoption, 733
 - Fraud, 736
 - Husband and wife, 732
 - Mistake, 736
 - Nature and requisites of adoption proceedings, 727**
 - Contract as to property, 728
 - Judicial procedure, 727
 - Ministerial acts, 727
 - Noncompliance with statute, 728
 - Presumption of adoption, 728
 - Proceedings *in rem*, 727
 - Strict compliance, 728
 - Substantial compliance with statute, 728
 - Notice, see infra, CONSENT AND NOTICE.*
 - Origin, 726
 - School fund, 727
 - Setting aside decree of adoption, 734**
 - Abuse of child by adopting parents, 735
 - Collateral attack, 736
 - Fraud, 736
 - How and when decree set aside, 734
 - In general, 734
 - Mistake, 736
 - When natural parent may revoke, 734
 - Who may adopt, 731**
 - Generally, 731
 - Joint adoption by husband and wife, 732
 - Whether consent of other spouse is necessary, 731
 - Who may be adopted, 732
- ADRIFT, 737**
- ADS., 97, 739**
- ADULT, 737**
- ADULTERATION, 738**
- Action for penalty, 742
 - Alcoholic liquors, 739
 - Articles which may be adulterated, 743
 - At common law, 738
 - Butter, 740
 - By statute, 739
 - Cream included in the term milk, 741
 - Criminal offense, 738
 - Definition, 738
 - Diseased fish, 740
 - Intent, 744
 - Knowledge, 744
 - Lard, 740
 - Master's liability for act of servant, 745
 - Milk, 741**
 - City ordinances, 741
 - Kind of foreign matter immaterial, 741
 - Sampling milk, 742

Adulteration, cont'd.

- Skimmed milk, 742
 - Obtaining sample without disclosing official character, 743
 - Oleomargarine, 740, 744
 - Proof, 743
 - Sale in restaurant, 744
 - Samples, 742, 743
 - Skimmed milk, 742
 - Unsound meat, 739
 - Whether statutory mode of proof is exclusive, 743
 - Wine, 744
- ADULTERY, 746**
- By the canon law, 747**
 - Cause for divorce, 747
 - Definition, 747
 - Ecclesiastical offense, 747
 - By the common law, 747**
 - Civil injury, 747
 - Definition, 747
 - Whether indictable, 747
 - Confessions, 756
 - Consent of woman, 752
 - Divorced persons, 750
 - Evidence, 752**
 - Admissible against one only of two joint defendants, 757
 - In general, 752
 - Of carnal act, 752**
 - Acts after the offense charged, 754
 - Acts before offense is charged, 753
 - Acts must be connected with the offense charged, 754
 - Character or reputation of woman for chastity, 753
 - Circumstantial evidence, 752
 - Conduct, 753
 - Corroborative evidence, 753
 - Defendant's sex, 755
 - Improper familiarities, 754
 - Man's virility, 756
 - Name of *particeps criminis*, 755
 - Other like acts, 753
 - Sexual intercourse, 754
 - Situation and opportunity, 753
 - Time and place, 755
 - Visiting bawdy house, 753
 - When one witness sufficient, 755
 - Of the marriage, 756**
 - Actual marriage, 756
 - Certificate, 756
 - Confessions, 756
 - How proved, 756
 - In general, 756
 - Name of the person to whom married 756
 - Record of marriage, 756
 - What proof necessary, 756
 - Sufficiency of proof, 757
 - Fornication, 748, 750
 - Living in adultery, 752
 - Marriage, see infra, EVIDENCE.*
 - Mistake, 751
 - Punishment, 757
 - Question of law and fact, 757
 - Statutes making adultery a crime, 747**
 - Canon-law definition adopted, 748
 - Carnal knowledge, 750
 - Common-law definition adopted, 748
 - Consent of woman not essential, 752
 - Criminal intent, 750

Adultery, conf'd.

- Ignorance of fact, 751
- Illicit intercourse in ignorance of marriage, 752
- In general, 747
- Intent, 750
 - Ignorance of law, 751
 - Inferred from criminal act, 751
- Intercourse between unmarried and divorced persons, 750
- Marriage not known to be bigamous, 751
- Married man and single woman, 748
- Mistake, 751
- One of the parties must be married, 750
- Single man and married woman, 748, 749
- Statutes defining the offense, 750
- Unmarried defendant, 748, 749
- Unmarried man and married woman, 749
- Unmarried woman cannot commit the offense, 750
- What constitutes, 748
- Whether both parties need be married, 750

AD VALOREM, 757**ADVANCE, 757****ADVANCES, 757***Advances by agent, see AGENCY.*

- Distinguished from advancement, 757
- Expenses for the support of minor child, 758
- Factors, 759
- Lien upon crops, 758
- Loan and advance, 758
- Pecuniary nature, 758

ADVANCEMENTS, 760*Advancements, see ADEMPTION OF LEGACIES.*

- Adeption of legacies distinguished from, 612
- Advances distinguished from, 757
- Annuity, 768
- Application of the doctrine of advancements, 785
- Basis of the doctrine, 761
- Between whom advancements may be made, 769
 - (See also *infra*, GRANDPARENT AND GRANDCHILD; HUSBAND AND WIFE; PARENT AND CHILD; PARENT-IN-LAW AND SON-IN-LAW.)
- Aunt and niece, 775
- Burden of proof, 771
- Father-in-law and daughter-in-law, 775
- General principles, 763
- Indebtedness of parent to child, 771
- Older and younger brothers, 775
- Presumption, 769
- Property purchased in name of one for whom vendee is under obligation to provide, 769
- Statutes, 771
- Uncle and nephew, 775
- When presumption of advancement strongest, 770
- Consideration, 766
- Declarations, 776
- Definition, 760
- Disability of donee, 785
- Donor must die intestate, 763
 - In general, 763
 - Partial intestacy, 763
 - Wills, 763
- Dower, 782

Advancements, conf'd.

- Dying declarations, 777
- Equality of distribution the basis, 762
- Establishing child in business, 768
- Executors and administrators, 782
- Gift changed to advancement and *vies versa*, 780
- Advancement irrevocable without donee's consent, 781
- Debts changed to advancements, 780
- Donor may change advancement to gift without donee's consent, 780
- May not change gift to advancement, 780
- Will referring to gift or debt as advancement, 781
- Grandparent and grandchild, 774
 - Advancements made to parent, 775
 - "Child" held to include "grandchild," 774
- In general, 774
- Presumption, 775
- Transfer must be made after death of parent, 774
- Hotchpot, 764, 785
 - Effect of bringing property into hotchpot, 786
- How same may be determined, 775
- Husband and wife, 773
 - Husband and wife and child, 773
 - Husband and wife and stranger, 773
 - Presumption, 773
 - Title in wife and husband jointly, 773
- Intention, 775
 - Agreement, 785
 - As determined by will, 777
 - Circumstances, 776
 - Declarations, 776
 - Declarations part of the *res gestæ*, 777
 - Dying declarations, 777
 - Effect of evidence of indebtedness, 778
 - Declarations of donor, 779
 - Gifts intended and accepted as advancements, 779
 - Prima facie* loan, 778
 - Release of all claims against ancestor's estate, 780
 - Statement signed by donee, 779
- Entries in books, 780
 - Amounts shown to have been repaid, 780
 - Evidence of intention, 780
 - False or excessive entries, 780
 - Insufficient to show an advancement, 780
 - Sufficient to show an advancement, 780
- How intention may be shown, 776
- Memorandum, 777
- No reference in will to advancements received, 778
- Parol evidence, 776
- Preponderance of evidence of intention, 776
- Question of intention, 775
- Subsequent declarations, 777
- Time of the intention, 775
- Transfer must be voluntary, 775
- When will directs gifts to be considered as advancements, 777
- Interest, 785
- Intestacy, see *infra*, DONOR MUST DIE INTESTATE.

Advancements, cont'd.

Life insurance policy, 768, 784

Mortgage interest, 766

Must be a completed transfer, 762.

Donor must act himself, 763

Donor's right gone, 763

Immediate possession of donee, 762

In donor's lifetime, 762

Legal title, 763

Property at the risk of donee, 763

Testamentary provision, 763

Of what advancements may consist, 764

Coparceners, 764

Hotchpot, 764

In general, 764

Personal property, 767

Annuity, 768

Apprenticeships, 768

Casual gifts, 767

Establishing child in business, 768

Failure of father to collect of son rent of land leased, 769

Father taking security in child's name for money loaned, 769

Intention, 768

Life insurance policy, 768

Money expended for child's education, maintenance, and travels, 767

Omission of father, 769

Payments for child's pleasure, 768

Presents of considerable value, 767

Presents of inconsiderable value, 767

Provisions for child's permanent good, 768

Question dependent upon parent's means, 767

Stock purchased in child's name, 768

Will specifying what to be considered as advancements, 767

Personalty, 764**Real property, 765**

Consideration moving from father, 765

Contingent interest, 766

Conveyance by third party, 765

Gifts of mortgage interests, 766

Invalid gifts of lands, 766

Lands in another state, 766

Lease, 766

Life estate, 766

Presumption, 765

Rebutting presumption, 766

Recital of nominal consideration, 766

Remainder, 766

Rents, 766

Reversion, 766

Substantial consideration, 766

Voluntary conveyance from father to child, 765

Realty or personalty, 764**Statutory regulation, 764****Under the English system of primogeniture, 764****Where the common law has been adopted, 765****Origin of the doctrine, 761****Parent and child, 771**

Evidence of different intention, 771

Indebtedness of parent to child, 771

Parent receiving the rents, 772

Parent remaining in possession, 772

Purchase by parent in joint names of son and stranger, 772

1 C. of L.—So.

Advancements, cont'd.

Rebutting presumption, 771

Restrictions and reservations, 772

Transfer to daughter and child, 773

Title in joint names of parent and child, 772

Transfer to daughter and husband, 773

What not sufficient to overcome the presumption, 772

Parent-in-law and son-in-law, 773

Consent of wife, 774

Personalty, 773

Realty, 774

Time of transaction, 774

Parent's means and surroundings, 767**Parol evidence, 776****Personal property, see infra, OF WHAT ADVANCEMENTS MAY CONSIST.****Real property, see infra, OF WHAT ADVANCEMENTS MAY CONSIST.****Refusing to come in at original division, 786****Remainder, 766****Requisites, see infra, DONOR MUST DIE INTTESTATE; MUST BE A COMPLETED TRANSFER.****Res gestæ, 777****Reversion, 766****Rights and remedies of parties to advancements, 781**

Administrator's rights, 782

Defective advancements, 783

Donee need not accept advancement 781

Dower, 782

Grandchildren accounting for advancements to their parents, 781

Lapse of time, 783

Power of wife to divide property, 783

Purchaser of an heir's interest, 782

Purchaser of expectancy, 782

Release by donee of interest in ancestor's estate, 781

Resettling terms, 781

Specific performance, 783

Transfer in fraud of creditors, 782

Widow's interest, 782

Roman law, 762**Specific performance, 783****Stock purchased in child's name, 768****Support, education, and maintenance, 767****Testamentary provision, 763****Transfers, see infra, MUST BE A COMPLETED TRANSFER.****Value of advancements, 783**

Future advancement, 784

How computed, 783

Improvements, 784

Interest, 785

Life insurance policy, 784

Present advancement, 783

Property destroyed or made valueless, 784

Rents and profits, 784

Value at time made, 783

Value fixed by will, 784

Value of a life estate, 783

Value of the gift, 767

What constitutes, see infra, OF WHAT ADVANCEMENTS MAY CONSIST.**Will:**

Directing gifts to be considered as advancements, 777

Advancements, cont'd.

- No reference in will to advancements received, 778
- Referring to gift or debt as advancement, 781
- Value fixed by will, 784
- ADVANTAGE**, 786
- ADVANTAGEOUSLY**, 786
- ADVENTURE**, 786
- ADVERSE POSSESSION**, 787

Abandonment, see *infra*, **CONTINUOUS POSSESSION**.

Actual possession, 822

- Acts of ownership, 823
- As a prerequisite to constructive possession, 865
- By occupation, 825
- By payment of taxes**, 831
 - Effect of payment of taxes, 831
 - Necessity of payment of taxes, 831
 - Payment of taxes in connection with other circumstances, 831

Cultivation, 827

- Cultivation of part of tract, 828
- Cutting timber, fire-wood, etc., 827
- Going upon land, 827
- Grazing cattle, 828
- Occasional acts of working and improving, 827
- Ordinary use and taking of ordinary profits, 827
- Reaping, 827
- What sufficient cultivation, 827

Cutting timber, 824, 827

Dependent upon circumstances, 823

Enclosure, 828

- Enclosure without residence, 829
- In general, 828
- Necessity of actual fencing, 829
- Substantial fence, 829
- Question of law or fact, 829
- Should be a complete enclosure, 830
- Sufficiency of enclosure, 829
- Temporary breaches in fence, 830
- Timber lands, 829

Entry under conveyance from one having color of title, 824

Entry upon part of tract, 825

Evidence of, 825

General rule, 822

Legal owner in possession of part of the tract, 825

Naked possession without color of title, 824

Necessity, 822

Occupation, 825

- Acts indicating and serving as notice of intention to appropriate, 826
- Entry to survey tract, 826
- Erection of temporary structures, 826
- In general, 825
- Occasional acts of ownership, 825
- Mining lands, 826
- Residence by tenant or vendee, 827
- Taking sand and gravel from time to time, 825
- When question for jury, 827

Situation of lands, 823

Swamp land, 824

Timber lands, 824, 829

Usual tests of entry and possession, 822

Adverse, etc., cont'd.

- Uses to which lands are applied, 823
- When actual occupation, cultivation, or residence unnecessary, 823
- Wild lands, 824
- Adverse user, 789
- Agency**.
 - Between principal and agent, 815
- Attornment, 838
- Boundaries**:
 - Extent of possession where there are overlapping boundaries**, 871
 - Both parties in possession of part of overlap, 871
 - Both parties in possession outside of overlap, 871
 - Constructive possession follows title, 871
 - Pennsylvania doctrine as to conflicting surveys, 873
 - Possession by holder of inferior title inside and by owner outside of overlap, 872
 - Possession of outside overlap by claimant under colorable title, 873
 - Possession of overlap by claimant under colorable title, 872
 - Subsequent entry by owner, 873
 - Where owner does not have possession, 872
 - Where owner has possession, 871
 - Notice, 834

Extent of possession where there are overlapping boundaries, 871

Both parties in possession of part of overlap, 871

Both parties in possession outside of overlap, 871

Constructive possession follows title, 871

Pennsylvania doctrine as to conflicting surveys, 873

Possession by holder of inferior title inside and by owner outside of overlap, 872

Possession of outside overlap by claimant under colorable title, 873

Possession of overlap by claimant under colorable title, 872

Subsequent entry by owner, 873

Where owner does not have possession, 872

Where owner has possession, 871

Notice, 834

Burden of proof (see also *infra*, **PRESUMPTION**).

Ouster, 887

To prove the adverse possession, 887

Claim of right to whole tract, 867

Color of title (see also *infra*, **EXTENT OF ADVERSE POSSESSION**), 824, 846.

864

Actual possession, 824

As a prerequisite to constructive possession, 864

Claim of title distinguished from, 846

Definition, 846

Definitions assuming necessity of a writing, 846

Entry under conveyance from one having color of title, 824

Good faith, 861

In general, 846

Inoperative conveyances, 850

Administrator's deed without authority, 854

Break in chain of title, 855

Color of title limited to land described, 858

Conveyance by public officer without authority, 853

Conveyance of fee by life tenant, 852

Deed by married woman, 853

Deeds by Indians, 858

Defective acknowledgment, 857

Defective condemnation proceedings, 851

Defects in title appearing dehors the immediate conveyance, 852

Defects on face of writing, 855

Description of the land, 858

Executory contract of purchase and bond to convey, 859

Forged deed, 855

Adverse, etc., cont'd.

- Fraud on part of grantor, 853
 - Grant from foreign government or state, 858
 - In general, 850
 - Instrument insufficiently witnessed, 857
 - Instrument must apparently convey title, 857
 - Instrument must have grantor and grantee, 858
 - Instrument which on its face shows grantor without title, 856
 - Irregular appointment of person acting officially, 854
 - Irregularities in proceedings on which conveyance is based, 854
 - Lost deed, 860
 - No authority in person acting as agent or attorney, 853
 - No authority in person acting officially, 853
 - No jurisdiction of person, 854
 - No title in grantor, 852
 - North Carolina rule where defects appear on face of writing, 856
 - Not containing words of conveyance, 859
 - Omission of seal, 856
 - Omission of wife's privy examination, 857
 - Patents, 851
 - Power of attorney not produced, 853
 - Pre-emption certificate and claim, 860
 - Question of law or fact, 861
 - Quit-claim deeds, 860
 - Sheriff's deed, 851
 - Sufficiency of description, 859
 - Tax certificates, 860
 - Tax deed not regular on its face, 856
 - Unrecorded instruments, 860
 - Void certificate, 851
 - Void judgment or decree of court, 851
 - Void mortgage foreclosure, 851
 - Want of capacity in grantor, 853
 - What sufficient, 851
 - Wills, 851
 - Instrument insufficient to give color as evidence of claim of title, 847
 - Mere naked possession without color of title, 824
 - Necessity of a writing, 846
 - Statutory definitions, 846
 - What constitutes, 848
 - Descent cast, 850
 - Execution sale without deed, 849
 - Generally, 848
 - In Missouri, 848
 - Necessity of a writing, 848
 - Parol gift or purchase, 850
 - Statutory requirement, 849
 - Surveys, 849
 - Whether essential to adverse possession, 847
 - Adverse possession with or without color of title, 848
 - In general, 847
 - Occupation of part of tract, 847
 - Statutes requiring color of title, 847
 - Tennessee doctrine, 847
- Constructive possession, see infra, EXTENT OF ADVERSE POSSESSION.*
- Continuous possession, 834*
- Abandonment, 841

Adverse, etc., cont'd.

- Illustrations, 841
 - In general, 841
 - Intention to abandon, 841
 - Intention to return, 842
 - Mere lapse of time, 841
 - Presumption, 841
 - When the statutory bar is complete, 842
 - Acknowledgment of superior title, 838
 - Agreement not to bring suit, 839
 - Agreement to arbitrate, 839
 - Agreement to arbitrate or suspend suit, 838
 - Attornment, 838
 - Execution of quit-claims, 838
 - Offer to purchase or rent property, 840
 - Purchase of outstanding claims, 839
 - Purchase of tax title, 840
 - Rule stated, 838
 - Continuity in point of locality, 835
 - Effect of interruption, 837
 - Entry by another adverse claimant, 837
 - Entry for purpose of discovering evidence of adverse occupation, 837
 - Entry with proposed purchaser, 837
 - General rule, 834
 - Interruption during suspension of statute, 837
 - Interruption of possession, 835
 - Intrusion, 835
 - Intrusion unknown to possessor, 837
 - Nature of re-entry required, 836
 - Question of law or fact, 837
 - Re-entry, 835
 - Re-entry by true owner, 836
 - Re-entry upon any part of the land, 837
 - Suit by true owner, 840
 - Dismissed suit, 840
 - Recovery, 840
 - Unsuccessful suit, 840
 - Tacking, 842
 - Administrator, 843
 - Continuity shown by parol, 845
 - Corporations, 844
 - Execution and judicial sale, 843
 - How the requisite privity may arise, 844
 - Husband and wife, 843
 - Life tenant and remainderman, 843
 - Prior possession must have been *bona fide*, 845
 - Relying upon grantor's possession of other lands, 845
 - Rule stated, 842
 - Sheriff's deed, 844
 - Successive disseisors, 842
 - When paper evidence of transfer unnecessary, 845
 - Where there is no privity, 843
- Cultivation, see infra, ACTUAL POSSESSION.*
- Curtesy, 808
 - Cutting timber, 824, 827
 - Declarations, 798, 891
 - Definition, 789
 - Disclaimer, 798, 812, 815, 834
 - Dower, 808, 821
 - Easements, 875
 - Effect of adverse possession, 883
 - Bar to ejectment, 883, 886
 - Bar to relief in equity, 884
 - Period less than the prescribed time, 885

Adverse, etc., cont'd.

- Right to maintain action of ejectment, 886
- Whether adverse possession vests title, 883
- Ejectment, 884**
 - As a bar to, 884
 - Right of adverse claimant to maintain ejectment, 886
- Elements, 795
- Enclosure*, see *infra*, **ACTUAL POSSESSION**.
- Essential elements, 795
- Estoppel, vendor, and purchaser, 800
- Evidence** (see also *infra*, **BURDEN OF PROOF**; **QUESTIONS OF LAW AND FACT**).
 - Cases where evidence has been held sufficient to show adverse possession, 888
 - Cases where evidence has been held insufficient to show adverse possession, 888
 - Clear proof required, 887
 - Presumptions, 888**
 - Entry by second son upon death of father, 890
 - In favor of title to true owner, 889
 - Lapse of time, 889
 - Offer to purchase title, 890
 - Presumption of ouster, 890
 - Title decreed to plaintiff, 889
 - Where adverse possession of land is once taken under color of title, 889
 - What evidence admissible, 890**
 - Assessment of lands, 892
 - Certificate of entry, 892
 - Declarations to show character of possession, 891
 - Declarations to show that possession is not adverse, 891
 - General reputation, 892
 - Invalid deed, 890
 - Payment of taxes, 892
 - Record of suit, 891
 - Res gestæ*, 891
 - Testimony of witnesses, 892
- Exclusive possession, 834**
 - How shown, 834
 - Necessity, 834
 - Part of tract, 834
- Executors and administrators tacking, 843
- Extent of adverse possession, 861**
- Mixed possession, 869**
 - Definition, 869
 - When neither claimant has true title, 870
 - When true owner is in possession of part of the land, 869
- Overlapping boundaries, 871**
 - Both parties in possession of part of overlap, 871
 - Both parties in possession outside of overlap, 871
 - Constructive possession follows title, 871
 - Pennsylvania doctrine as to conflicting surveys, 873
 - Possession by holder of inferior title inside and by owner outside of overlap, 872
 - Possession of overlap by claimant under colorable title, 872
 - Possession outside of overlap by claimant under colorable title, 873

Adverse, etc., cont'd.

- Subsequent entry by owner, 873
- Where owner does not have possession, 872
- Where owner has possession, 871
- With color of title, 847, 862**
 - Constructive possession, 862
 - General rule, 862
 - Limitation of the general rule, 864
- Prerequisites to constructive possession, 864**
 - Actual possession of part of land, 865
 - Alienation of part actually occupied, 865
 - Claim of right to whole tract, 867
 - Color of title, 864
 - Color of title derived from several writings, 865
 - Constructive possession limited to colorable title, 865
 - Evidence of color of title, 867
 - Good faith, 868**
 - Fraud must be actual, 869
 - Good faith not essential to acquisition of title by actual possession, 868
 - Knowledge of defect must be actual, 869
 - Question of law or fact, 869
 - Reliance by claimant with color, on claim of title only, 868
 - Possession by mistake, of land not covered by colorable title, 867
 - Possession required, 866
 - Under instrument describing land in separate parcels, 866
 - Under title void as to part only, 866
 - Where land claimed consists of separate tracts, 866
 - Without color of title, 861
- Fences*, see *infra*, **ENCLOSURE**.
- General reputation, 892
- Good faith, 861**
 - As a prerequisite to constructive possession, 868
 - Fraud must be actual, 869
 - Knowledge of defect must be actual, 869
 - Question of fact, 869
- Highway, 880**
 - Abandoned highway, 881
 - As against municipality, 878, 880
 - As against private owner, 880
 - Equitable estoppel, 882
 - Partial encroachment, 881
 - Public nuisance, 881
 - Where the possession is not adverse, 881
- Hostile possession and claim of right, 796**
 - Declarations, 798
 - Disclaimer of title, 798
- Executory contracts of purchase, 799**
 - After payment of purchase money, 801
 - As to third parties, 800
 - Before payment of purchase money, 799
 - Entering into possession under agreement to purchase, 800
 - Estoppel, 800
 - Parties holding under vendee, 800
 - Sub-purchasers, 800
 - Vendee by title bond, 800
- General principles, 796
- Hostility, 798
- Husband and wife, 820**
 - As between husband and wife, 820

Adverse, etc., cont'd.

- As to third parties, 821
- Dower of wife, 821
- Examples, 820, 821
- Landlord and tenant, 810**
 - Claimants under tenant, 811
 - Death of landlord, 810
 - Disclaimer, 810
 - Failure to pay rent, 811
 - Limitation of rule, 811
 - Possession of tenant the possession of landlord, 810
 - Purchase of tax title, 811
 - Repudiation of relationship, 810
 - Surrender of possession to landlord, 811
 - Tenant at will, 810
 - Tenant holding over, 811
 - Where owner must have cause of action, 811
- Life tenant and remainderman, 807**
 - After the life estate has fallen in, 809
 - As against the remainderman—before life estate has fallen in, 807
 - Curtesy, 808
 - Grantee in fee of tenant for life, 809
 - Grantee of life tenant, 808
 - Life estate acquired by adverse possession, 809
 - Possession of widow, 808
- Mortgagor and mortgagee, 815**
 - After foreclosure sale, 816
 - Disclaimer, 815
 - Possession by mortgagee, 817
 - Possession of grantee of mortgagor, 816
 - Possession of mortgagor, 815
 - Purchaser from trustee, 811
 - Recognition of mortgage, 817
- Must be hostile to all the world, 797
- Parent and child, 821**
 - After child attains majority, 822
 - In general, 821
 - Where title is in child, 821
 - Widow, 821
- Principal and agent, 815
- Purchaser *pendente lite*, 818
- Recognition of title in another, 797
- Tenants in common, 801**
 - Actual ouster, 803
 - Claiming under deed to whole, 804
 - Conveyance by cotenant, 806
 - Entry and exclusive claim to the whole, 804
 - Evidence required, 804
 - Excluding entry, 804
 - Exclusive possession, 805
 - Exclusive possession and reception of rents and profits, 804
 - Mere reception of rents and profits, 804
 - Must be an ouster, 801
 - Notice to cotenant, 805
 - Notorious act of ouster, 802
 - Partition, 805
 - Payment of taxes accompanied by possession, 805
 - Purchase at tax sale, 804
 - Question of law or fact, 806
 - Refusal to pay over rents, 804
 - Rule in general, 801
 - Taking rents and profits and claiming land as his own, 804
 - What amounts to ouster, 803

Adverse, etc., cont'd.

- Where no notice is given, 805
- Trust estates, 812**
 - As between trustee and *cestui que trust*, 812
 - As to third parties, 814
 - Constructive trusts, 813
 - Deed in trust made to secure *bona fide* debts, 813
 - Disclaimer, 812
 - Express trusts, 812
 - Purchaser from trustee, 814
 - Secret trusts, 813
 - Trustee guilty of breach of trust, 815
 - What amounts to repudiation, 813
- Verbal assertion of claim, 797
- Vendor and purchaser, 818**
 - Acquisition of tax title, 818, 819
 - Execution sale, 819
 - Intention must be manifest, 819
 - Possession of vendee, 820
 - Possession of vendor, 818
 - Re-entry by vendor, 820
 - Where originally subordinate, 798
- Husband and wife, 820**
 - As between husband and wife, 820
 - As to third parties, 821
 - Dower of wife, 821
 - Examples, 820, 821
 - Tacking, 843
- Intent, 789**
 - Agreement upon line, 793
 - Boundaries, 791
 - In general, 789
 - Intention must be manifest, 790
 - Intention to claim as owner, 790
 - Occupation by mistake, 791
 - Occupation in belief that land is vacant, 790
 - One claiming title only to a specified line, 792
- Landlord and tenant, 810**
 - Claimants under tenant, 811
 - Death of landlord, 810
 - Disclaimer, 810
 - Failure to pay rent, 811
 - Limitation of rule, 811
 - Possession of tenant the possession of landlord, 810
 - Purchase of tax title, 811
 - Repudiation of relationship, 810
 - Surrender of possession to landlord, 811
 - Tenant at will, 810
 - Tenant holding over, 811
 - Where owner must have cause of action, 811
- Mines and mining claims, 826, 874
- Mixed possession*, see *infra*, EXTENT OF ADVERSE POSSESSION.
- Mortgages:**
 - Between mortgagor and mortgagee, 815**
 - After foreclosure sale, 816
 - Disclaimer, 815
 - Possession by mortgagee, 817
 - Possession of grantee of mortgagor, 816
 - Possession of mortgagor, 815
 - Purchaser from trustee, 814
 - Recognition of mortgage, 817
 - Possession must be open and notorious, 832

*Adverse, etc., cont'd.***Municipal corporations.**

- Adverse user of abandoned highway, 878, 881
- Cases holding that title can be acquired against municipality, 878
- Cases holding that title cannot be acquired against municipality, 880
- Equitable estoppel, 882
- Highways, 878, 881
- Land held in private right, 882
- Navigable river, 881
- No prescription for public nuisance, 881
- Parks, 878
- Partial encroachment on public road, 881
- Property dedicated to public use, 878
- Public square, 879
- Streets, 878
- Where the possession is not adverse, 881

Notice:

- Constructive notice, 834
- Whether actual notice is necessary, 833

Notorious, see *infra*, OPEN AND NOTORIOUS POSSESSION.**Occupation, see *infra*, ACTUAL POSSESSION.****Open and notorious possession, 832**

- Actual knowledge of the owner, 833
- Actual notice unnecessary, 833
- Against a mortgagee, 832
- Boundaries, 834
- Constructive notice, 833
- Disclaimer, 834
- General reputation, 832
- Part of tract, 834
- Possession under deed duly recorded, 833
- Secret possession, 832
- The general rule, 832

Ouster:

- Actual ouster, 803
- Burden of proof, 887
- Presumption of, 890
- Question of law or fact, 887

Parent and child, 821

- After child attains majority, 822
- In general, 821
- Where title is in child, 821
- Widow, 821

Parks and squares, 879**Pendente lite, 812****Permissive possession, 794**

- Effect of, 794
- Instances, 795

Presumptions of law, 888**Public lands, 875****Quarries, 874****Questions of law and fact, 886**

- Actual possession, 827
- Continuous possession, 837
- Good faith, 869
- Joint tenants and tenants in common, 806
- Mixed question, 886
- Ouster, 887
- Sufficiency of enclosure, 829
- What constitutes adverse possession, 886

Quit-claim, 838**Remainders:**

- Life tenant and remainderman, 807
 - After the life estate has fallen in, 809
 - As against the remainderman, before life estate has fallen in, 807
- Curtesy, 808

Adverse, etc., cont'd.

- Grantee in fee of tenant for life, 809
- Grantee of life tenant, 808
- Life estate acquired by adverse possession, 809

Possession of widow, 808**Tacking, 843****Res gesta, 891****Right of way, 875****Secret trusts, 813****State lands, 876****Subjects of adverse possession, 874**

- Before patent issued by state, 877
- Cases holding that title can be acquired against municipality, 878
- Easements, 875
- General rule, 874
- Highways, 800, 878
 - Abandoned highway, 881
 - As against municipality, 880
 - As against private owner, 880
 - Equitable estoppel, 882
 - Partial encroachment, 881
 - Where the possession is not adverse, 881
- Land covered by water, 877
- Mines, 874
- Parks, 878
- Personalty, 874
- Property dedicated to public use, 878
- Property held in private right, 879
- Public lands, 875
- Public nuisance, 881
- Public squares, 879
- Quarry, 874
- Right of way, 875
- Several classes of property considered, 874
- State lands, 876
- Statutory adverse possession of state lands, 877
- Streets, 878
- Water, 875

Land covered by water, 877**Mines, 874****Parks, 878****Personalty, 874****Property dedicated to public use, 878****Property held in private right, 879****Public lands, 875****Public nuisance, 881****Public squares, 879****Quarry, 874****Right of way, 875****Several classes of property considered, 874****State lands, 876****Statutory adverse possession of state lands, 877****Streets, 878****Water, 875****Tacking, 842****Continuity shown by parol, 845****Corporations, 844****Execution and judicial sale, 843****How the requisite privity may arise, 844****Husband and wife, 843****Life tenant and remainderman, 843****Paper evidence of transfer unnecessary, 845****Prior possession must have been bona fide, 845****Relying upon grantor's possession of other lands, 845****Rule stated, 842****Sheriff's deed, 844****Successive disseisors, 842****Where there is no privity, 843****Taxes:****As to adverse possession by payment of taxes, see *infra*, ACTUAL POSSESSION.****Tax title, 840****Vendor and vendee, 819****Whether purchase is admission of owner's right, 840****Tenants in common, 801****Actual ouster, 803****Claiming under deed to whole, 804****Conveyance by co-tenant, 806**

Adverse, etc., cont'd.

- Entry and exclusive claim to the whole, 804
- Evidence required, 804
- Excluding entry, 804
- Exclusive possession, 805
- Exclusive possession and reception of rents and profits, 804
- Merereception of rents and profits, 804
- Must be an ouster, 801
- Notice to co-tenant, 805
- Notorious act of ouster, 802
- Partition, 805
- Payment of taxes accompanied by possession, 805
- Purchase at tax sale, 804
- Question of law or fact, 806
- Refusal to pay over rents, 804
- Rule in general, 801
- Tenant taking rents and profits and claiming land as his own, 804
- What amounts to ouster, 803
- Where no notice is given, 805

Trusts and trustees, 812

- As between trustee and *cestui que trust*, 812
- As to third parties, 814
- Constructive trusts, 813
- Deed in trust made to secure *bona fide* debts, 813
- Disclaimer, 812
- Express trusts, 812
- Purchaser from trustee, 814
- Secret trusts, 813
- Trustee guilty of breach of trust, 815
- What amounts to repudiation, 813

Vendor and purchaser:

- As between vendor and vendee, 818
- Acquisition of tax title, 818, 819
- Execution sale, 819
- Intention must be manifest, 819
- Possession of vendee, 820
- Possession of vendor, 818
- Re-entry by vendor, 820
- Executory contracts of purchase, 799**
 - After payment of purchase money, 801
 - As to third parties, 800
 - Before payment of purchase money, 799
 - Entering into possession under agreement to purchase, 800
 - Estoppel, 800
 - Parties holding under vendee, 800
 - Sub-purchasers, 800
 - Vendee by title bond, 800

What constitutes, 789

What constitutes, see *infra*, ACTUAL POSSESSION; CONTINUOUS POSSESSION; EXCLUSIVE POSSESSION; HOSTILE POSSESSION AND CLAIM OF RIGHT; INTENT; OPEN AND NOTORIOUS POSSESSION; OUSTER; PERMISSIVE POSSESSION.

Water, 875

Wild lands, 824

ADVERSE USER, 789**ADVERTISEMENTS, 893****ADVICE, 893****ADVICE OF COUNSEL, 894**

Accord and satisfaction, 429

As a defense, 897

*Advice, etc., cont'd.***Contempt, 898**

- Advice no justification, 898
- Contempt not wilful or defiant, 898
- General rule, 898
- Qualifications of the rule, 898

Criminal actions, 897

False arrest and imprisonment, 899

In actions generally, 897

Libel and slander, 899

Malicious prosecution, 899

Advice must be given before prosecution, 903

Advice of detectives, 905

Advice of justice of the peace, 904

Advice of pettifogger, 904

Advice of police officer, 905

After-acquired knowledge not communicated to counsel, 903

Cases holding that advice establishes probable cause, 900

Cases holding that advice negatives malice, 900

Cases holding that advice of counsel is evidence both to establish probable cause and to negative malice, 901

Disclosure of facts by client, 900

Effect of advice as evidence, 906

Effect of advice as to costs, 907

General rule, 899

Good faith of client in acting upon advice, 906

Omission of material facts, 902

Qualifications of attorney, 903

Question of law or fact, 906

Reputation of attorney, 904

Requisites as to evidence of facts communicated, 903

Requisites as to the advice given, 903

Statement that the plaintiff was liable to prosecution, 903

Where attorney entertains doubts, 906

Where attorney is personally interested in subject-matter, 905

Perjury, 898

Where a question of law is involved, 898

Where the question is one of fact, 898

To clients generally, 897

Trustees, 907

As to costs, 907

In England, 907

In United States, 907

Violation of law, 897

Contempt (see also *infra*, AS A DEFENSE), 896

Liability of attorney for contempt in giving improper advice, 896

Liability of attorney to client for failure to advise, 896

Liability of attorney to client for improper or erroneous advice, 894

Attorney may not profit by his erroneous advice, 895

Attorney's undertaking, 894

No warranty of correctness of opinion, 895

Sale by client to attorney, 896

Where the advice is fraudulent, 895

Advice, etc., cont'd.

Liability of attorney to third persons, 896
 Libel and slander, whether a defense, 899
Malicious prosecution:
 Whether a defense, 899
 Advice must be given before prosecution, 903
 Advice of detectives, 905
 Advice of justice of the peace, 904
 Advice of pettifogger, 904
 Advice of police officer, 905
 After-acquired knowledge not communicated to counsel, 903
 Cases holding that advice establishes probable cause, 900
 Cases holding that advice negatives malice, 900
 Cases holding that advice of counsel is evidence both to establish probable cause and to negative malice, 901
 Disclosure of facts by client, 900
 Effect of advice as evidence, 906
 Effect of advice as to costs, 907
 General rule, 899
 Good faith of client in acting upon advice, 906
 Omission of material facts, 902
 Qualifications of attorney, 903
 Question of law or fact, 906
 Reputation of attorney, 904
 Requisites as to the advice given, 903
 Requisites as to evidence of facts communicated, 903
 Statement that plaintiff was liable to prosecution, 903
 Where attorney entertains doubts, 906
 Where attorney is personally interested in subject matter, 905
 Questions of law and fact, 906
The advice a privileged communication, 897
 Reason of the rule, 897
 Waiver by client, 897
ADVISE, 907
ADVOCATE, 908
ADVOWSON, 908
AEROLITE, 908
AFFAIRS, 908
 Affairs of a railroad, 909
 County affairs, 908
AFFECT, 909
 Affect in the sense of affect injuriously, 909
 Affecting a substantial right, 909
 Real estate affected, 909
AFFECTING, 909
AFFIDAVIT, 909
 Admissions, 720
 Answer, 911
 Deposition distinguished from, 910
 Jurat of clerk, 911
 Oath and affidavit, 909
 Testimony and affidavit, 911
AFFINITY, 911
 Between kinsman of wife and kinsman of husband, 912
 Death of spouse, 913
 In general, 911
AFFIRM, 913
AFFIRMANCE, 913
AFFIRMATION, 914
AFFIRMATIVE, 913
AFFIRMATIVE PREGNANT, 914
AFFIX, 914

AFFRAY, 915

Abusive language, 916
 Accessories, 917
 Actual fighting necessary, 916
 Appearing in private place armed with dangerous weapons, 915
 Arrest, 917
 Assault distinguished from, 917
 At common law, 915
 Burden of proof, 916
 By two or more persons, 916
 Consent, 917
 Definition, 915
 Elements of the offense, 916
 Intention, 916
 Justification, 916
 Liability of affrayers, 916
 Mutual consent, 917
 Punishment, 918
Public place, 917
 Distinguished from assault, 917
 Essential ingredient of the offense, 917
 Need not originate in public place, 917
 What is, 917
 Riot distinguished from, 915
 Self-defense, 916
 Statutes defining, 915
Suppression of affrays, 917
 Arrest by officer, 918
 Arrest by private person, 917
 Breaking doors, 918
 Killing, 918
 Separating combatants, 918
 Terror of the people, 917
AFFREIGHTMENT, 918
AFORE, 918
AFORESAID, 918
 As aforesaid, 918
 Brought up as aforesaid, 919
 County aforesaid, 918
 Places aforesaid, 918
 Purposes aforesaid, 918
 Time aforesaid, 919
 Wills, 919
AFORETHOUGHT, 920
AFOUL, 920
AFRICAN, 921
AFTER, 921
 After conviction, 921
 After date, 922
 After judgment, 923
 After passage of the act, 922
 After the payment, 921
 Computation of time, 923
AFTER-ACQUIRED LAND.
 Agent's authority to sell, 1011
AFTERNOON, 924
 Adjournment, 924
 Intoxicating liquors, 924
AGAINST, 925
 Against her will, 926
 Against law, 926
 Against the form of the statute, 925
 Testifying against, 925
AGE, 927
 Definition, 927
 Time at which a certain age is attained, 92.
 First moment of the day next before the twenty-first anniversary, 927
 Capacity to commit crime, 928
 First moment of twenty-first anniversary, 928

Age, cont'd.

Illegal voting, 927

Twenty-one years and full age, 927

AGENCY, 930

(See ACCIDENT INSURANCE.)

Accidental losses, 1064

Accommodation paper, 349

Agent with general power to make and indorse commercial paper, 349

Authority of agent to draw and indorse negotiable instruments, 1034

Bona fide holder, 350

Power to agent, 349

Accounts, 437, 1086

Accountable only to principal, 1088

Accounting in equity, 1094

Account stated, 1094

Awaiting directions as to manner of re-mitting, 1092

Bank deposits, 1090

Commingle principal's property with his own, 1089

Compensation where agent fails to keep, 1101

Demand by principal for accounting, 1091

Depreciation in value, 1090

Disputing principal's title, 1091

Duty of agent, 1086

Duty to keep regular accounts, 1089

Effect of accepting account, 1087

Failure to account, 1088

Form of action, 1088

Illegal taxes, 1088

Interest, 1093

Keeping and rendering, 1086

Legality of transaction immaterial, 1088

Loss by theft, 1090

Misapplication, 1094

Nature of action against agent, 1087

Necessity of demand, 1092

Neglect or refusal to pay after demand, 1094

Neglect to notify principal of collection, 1094

Neglect to pay when no demand is necessary, 1094

Profits, 1086

Retention of property for agent's indemnity, 1093

Showing that agent has been divested of possession by title paramount, 1091

Sufficiency of demand, 1092

Wagers, 1088

When agent receives interest, 1094

When demand not necessary, 1092

Acquiescence, see *infra*, RATIFICATION.

Acquiring adverse interests, 1085

Agent to settle with creditors, 1085

Attorneys, 1086

Failure of principal to furnish funds to pay taxes, 1086

In general, 1085

Lease of premises occupied by principal, 1086

Purchase of principal's land at tax sale 1085

Sheriff's sale, 1086

Acting for both parties (see also *infra*, REMUNERATION), 966, 1073

Attorneys, 1074

Consent of principals, 1074

Limitation, 1074

Agency, cont'd.

Rule stated, 1073

Where interests are not conflicting, 1074

Action by agent against third parties, see *infra*, LIABILITY OF THIRD PARTIES TO AGENT.

Action by principal against third party, see *infra*, LIABILITY OF THIRD PARTIES TO PRINCIPAL.

Admissions, 969, 1143

Adoption of the agent of another, see *infra*, APPOINTMENT.

Advances, see *infra*, REIMBURSEMENT.

Adverse interests, see *infra*, GOOD FAITH.

Adverse possession.

Between principal and agent, 815

Agent, see *infra*, LIABILITY OF AGENT.

Agent, definition, 938

Agent dealing for his own benefit, see *infra*, GOOD FAITH AND LOYALTY.

Agent to borrow, 1035

Agent to employ, 1034

Agent to lend, 1035

Liability for negligence, 1065

Agent to manage business or property, 1022

Agent to manage hotel, 1023

Agent to manage plantation, 1023

Binding principal as surety, 1025

Borrowing, 1025

Disposing of business, 1024

Engaging in a different business, 1025

Examples, 1022, 1024

Executing notes, 1025

General agent of mining company, 1023

Keeping up stock, 1023

Mortgages, 1024

Power coextensive with business, 1022

Sue and defend, 1022

Surgical aid, 1023

Agent to purchase, see *infra*, GOOD FAITH.

Agent to receive payment, 1025

Commuting debt, 1028

Diligence, 1066

From what authority will be implied:

Authority to release, 1028

Making the contract, 1026

Payment of unindorsed note, 1026

Payment without inspection of securities, 1026

Possession of bond and mortgage, 1026

Possession of securities, 1026

Presentation of bill, 1025

Receipt of interest, 1026

Withdrawal of securities, 1026

Implied powers, 1025, 1029

Attachment, 1030

Authority to indorse, 1030

Authority to sue, 1029

Authority to transfer claim, 1030

Employment of counsel, 1029

Giving acquittance, 1030

Indemnity, 1030

Part payment, 1030

Receiving declarations, 1030

Release, 1028, 1030

Surrender of securities, 1030

Transferring securities, 1031

Liability for negligence, 1066

Medium of payment, 1027, 1066

Authority to release, 1028

Bonds, 1027

Agency, cont'd.

- Cannot set off for debt due himself, 1028
- Checks, 1027
- Compounding debt, 1028
- Drafts, 1027
- Exchanging the security, 1028
- Merchandise, 1028
- Notes, 1027
- Payment must be in money, 1027
- Substituting note payable to agent, 1028
- Release by, 1028
- Time of payment**, 1029
 - Effect of usage, 1029
 - Extension of time, 1029
 - Receiving payment before due, 1029
 - When extension is authorized, 1029
- Agent to sell:**
 - Duties of agent for sale of property, 1067
 - Liability for negligence, 1067
- Agent to settle**, 1031
 - Acquiring adverse interests, 1085
 - Credits, 1031
 - Implied powers, 1031
 - Limitation of powers, 1031
 - Other matters, 1031
 - Receiving personal property, 1031
 - Reference to arbitration, 1031
 - Settlement must be for benefit of principal, 1032
- Agent to ship, 1034
- Alien enemies**, 945, 1229
 - As agents, 945
 - As principals**, 942
 - In general, 942
 - Mutual consent, 943
 - Partnership, 943
 - Whether war *ipso facto* terminates agency, 943
- Appointment**, 948
 - Adoption of the agent of another**, 966
 - Brokers, 966
 - General rule in case of adverse interests, 966
 - Insurance agent, 966
 - Strict proof required, 967
 - Where one may be agent for both parties, 966
 - Advancing money to carry on business, 949
 - Agent appointing agent, 949
 - Agent need not be appointed directly, 949
 - Agreement by purchaser made with vendor, 949
 - Agreement to become surety on a bond, 949
 - Appointment by principal and acceptance by agent, 948
 - By corporations**, 950
 - Authority to execute sealed instruments, 952
 - Delegation of authority, 976
 - General rule as to power to appoint, 950
 - Implied appointment, 952
 - Seal, 951
 - Vote of directors, 951
 - By parol**, 955
 - Authority to execute written instruments, 956
 - Bills and notes, 956

Agency, cont'd.

- Construction, 957
- Contract for lease, 956
- Contract for sale of lands, 955
- Examples, 955
- Filling blanks, 955
- General rule, 955
- Indirect appointment, 957
- In Pennsylvania, 956
- Statute of frauds, 957
- When sufficient, 955
- Where statute requires a writing, 956
- Written authority to convey land, 956
- Compensation, 950
- Correspondence as to sale of real estate, 949
- Created by law, 948
- Duration, 950
- Essential elements of other contracts, 948
- Evidence**, 950, 967
 - Adjudication of the fact of agency, 970
 - Admissions, 969
 - Burden of proof, 968
 - Circumstances and conduct of the parties, 969
 - Competency of principal and agent as witnesses, 969
 - Evidence may be either direct or indirect, 968
 - Evidence of general reputation, 970
 - In general, 967
 - Merely assuming to act as agent, 969
 - Parol evidence, 970
 - Question of law or fact, 967
 - Where the appointment is in writing**, 970
 - Appointment under seal, 970
 - As between other parties, 970
 - Loss of original document, 970
- Examples, 950
- How established or disproved, 950, 967
- Implied**, 957
 - Attorney, 958
 - Co-owners, 959
 - From conduct**, 959
 - Accepting benefits, 965
 - Acquiescence, 959
 - Bank, 963
 - Carrying on business in name of another, 961
 - Circumstances which justify the inference of agency, 962
 - Clerks, 963
 - Delivery of subscription paper, 965
 - Denial of ratification, 964
 - Effect of ratification, 964
 - Essentials of ratification, 965
 - Estoppel, 959, 960
 - General rule, 959
 - Giving a note to collect, 963
 - Giving one custody of personalty, 962
 - Giving one money to invest, 963
 - Good faith, 962
 - Holding out one as agent, 960
 - How agency limited, 962
 - Implied from single transaction, 961
 - Indorsing notes, 961
 - Intention immaterial, 960
 - Limit of principal's responsibility, 962
 - Long-continued silence coupled with knowledge, 966

Agency, cont'd.

- Making note payable at certain bank, 965
- Ratification must have been with full knowledge, 965
- Recognition of agent's acts, 965
- Series of transactions, 961
- Servants, 963
- Silence, 966
- Subsequent ratification equivalent to original authority, 965
- Third person must have relied upon agency, 962
- From the relation of the parties, 957
- Husband as agent of wife, 958
- Presumption of law, 957
- Wife as agent of husband, 957
- Wife's authority by necessity, 958
- Partner, 958
- Partner binding firm under seal, 959
- Intention, 948, 950
- Intention implied from conduct, 949
- Mere contractor, 949
- Name by which transaction was called immaterial, 950
- Necessity, 948
- One employed to receive and report bids, 949
- Presumption of acceptance, 948
- Promise to accept indorsement, 949
- Requisites, 948
- Seals, 952**
 - Authority by parol from assignee in bankruptcy, 953
 - Authority implied from circumstances, 954
 - Common-law rule, 952
 - Insertions in deeds, 954
 - Instrument executed in presence and at request of principal, 953
 - Interposition of equity, 955
 - Seal regarded as surplage, 953
 - When seal necessary, 952
- Subagents, see infra, DELEGATION OF AUTHORITY.*
- When made by natural persons, 948
- Will of principal, 948
- Arbitration and award: authority of agent to settle to submit to arbitration, 1031
- Assault and battery: liability of principal, 1153
- Attachment:**
 - Agent to receive payment, 1030
 - Seizure of principal's property under attachment against agent, 1175
- Attorney and client: authority of collecting agent to employ counsel, 1029
- Authority.**
 - See also *infra*, CONSTRUCTION OF AUTHORITY; AGENT TO RECEIVE PAYMENT; AGENT TO MANAGE BUSINESS; AGENT TO LEND; AGENT TO SELL; MANNER OF EXECUTION OF AUTHORITY.
 - Powers *prima facie* incident to every authority, 997
 - Illustrations of powers necessarily implied, 997
 - In general, 997
 - Necessary to carry into effect the principal power, 997
- Bankruptcy of agent or principal, 1227

Agency, cont'd.

- Banks and banking: implied appointment of agent, 963
- Bills of lading:**
 - Action by agent, 1164
 - Agent to ship, 1034
- Bills and notes, 956**
 - Acceptance of forged bill, 1186
 - Action by agent where note is payable to agent of association or corporation, 1164
 - Action by agent where negotiable instrument is indorsed in blank to agent for collection, 1164
 - Action by agent where paper is payable to himself, 1163
 - Action by undisclosed principal, 1171
- Agent to draw and indorse negotiable instruments, 1032**
 - Accommodation paper, 1034
 - Amount of instrument must be pursuant to authority, 1034
 - Authority strictly pursued, 1033
 - Express power, 1032
 - How authority is shown, 1032
 - Illustrations of implied power, 1032
 - Implied from duties to be performed, 1032
 - Implied power, 1032
 - Must be for benefit of principal, 1034
 - Parol evidence, 1032
 - Provisions as to date of maturity, 1034
 - Sealed instrument, 1032
 - Subject to strict interpretation, 1033
- Agent to manage business executing bills and notes, 1025
- Authority of agent to sue in his own name, 1030
- Delegation of authority, 973
- Implied power to execute negotiable notes by agent to purchase, 1022
- In whose name they should be executed, 1042
- Liability of undisclosed principal, 1139
- Parol evidence, 1032**
 - Action between original parties, 1052
 - Action by *bona fide* holder, 1054
 - Inadmissibility, 1053
 - Instrument not indicating principal, 1053
 - Parties affected with notice, 1053
 - To discharge agent, 1053
 - When admissible, 1052
 - When parol evidence admitted, 1054
- Payment by, 1027
- Ratification, 1201
- Borrow:**
 - Authority of agent to borrow, 1035
- Borrowing money:**
 - Agent to manage business, 1025
 - Brother and sister, 1099
- Burden of proof:**
 - Agent making contract without authority, 1129
 - Appointment, 968
- Business, see infra, AGENT TO MANAGE BUSINESS.*
- Chattel mortgage: wrongful mortgage by agent, 1174
- Checks:**
 - Payment by, 1027
- Classes of agents, 939

Agency, cont'd.

- Clerks: implied authority of clerks, 963
- Collections*, see *infra*, AGENT TO RECEIVE PAYMENT.
- Compensation and Commission*, see *infra*, REMUNERATION FOR SERVICES RENDERED.
- Competency to be agent**, 945
 - Alien enemies, 945, 1229
 - Infants, 945
 - In general, 945
 - Married women, 946
 - Persons *non compos mentis*, 945
 - Slaves, 946
- Competency to be principal**, 939
 - Alien enemies, 942
 - In general, 942
 - Mutual consent, 943
 - Partnership, 942
 - Whether war *ipso facto* terminates agency, 943
 - Corporations, 944
 - In general, 945
 - Member of corporation as agent, 945
 - Modern doctrine, 945
 - Drunkards, 945
 - How disability determined, 939
 - Individuals, 939
 - Infants, 940
 - Appearance by attorney, 941
 - Delivery by agent, 941
 - Infant partner, 940
 - Infant's acts by agent held valid, 942
 - Parent acting for infant, 941
 - Power of attorney made by infant, 941
 - Power to appoint an agent, 940
 - Prejudicial and beneficial agents, 941
 - Warrant of attorney by infant and another, 942
 - Joint tenants and tenants in common, 944
 - Kinds of incompetency, 939
 - Married women**, 942
 - By common law, 942
 - By statute, 942
 - Confessing judgment, 942
 - Conveyance of wife's lands, 942
 - Wife's separate estate, 942
 - Partnerships**, 943
 - Generally, 943
 - Implied power to appoint agents, 944
 - Persons legally incompetent, 940
 - Persons naturally incompetent, 940
 - Persons *non compos mentis*, 940
- Compromise**: acceptance of fruits as ratification by principal, 1201
- Conduct*, see *infra*, APPOINTMENT; LIABILITY.
- Confession of judgment**, 999
- Married women, 942
- Confusion of goods**:
 - Agent commingling principal's property with his own, 1089
 - Bank deposits, 1090
 - How principal's funds should be deposited, 1090
 - Loss by theft, 1090
- Construction of authority**:
 - See *infra*, AGENT TO MANAGE BUSINESS OR PROPERTY; AGENT TO RECEIVE PAYMENT; AGENT TO SETTLE; BILLS AND NOTES—AGENCY TO DRAW AND INDORSE; BORROW—AGENT TO BORROW; EMPLOY—AGENT TO EMPLOY; LEASE—

Agency, cont'd.

- AGENT TO LEASE; LEND—AGENT TO LEND; MORTGAGE—AGENT TO MORTGAGE; PERSONALTY—AGENT TO SELL; PURCHASE—AGENT TO PURCHASE; REAL ESTATE—AGENT TO SELL; SHIP—AGENT TO SHIP.
- Implied authorities**, 1002
 - Authority to exchange, 1003
 - Illustrations, 1002
 - Implied authority limited to like acts or like dealings, 1002
 - In general, 1002
 - Recognition of similar acts, 1002
- Where authority is ambiguous**, 1001
 - Construction *bona fide* adopted by agent, 1001
 - Usual course of dealings, 1001
- Written authorities**, 998
 - Agent to confess judgment, 999
 - General powers construed with reference to subject matter, 1000
 - General words, 1000
 - Illustrations, 1000
 - Implied authorities of special agents, 998
 - Intention of the parties, 999
 - Object of the power, 999
 - Parol evidence, 1001
 - Question for court, 998
 - Restricted to individual business and use of principal, 1000
 - Strict interpretation, 999
 - Usage and custom, 997, 1001
- Contract of agency** (see also *infra*, APPOINTMENT), 937
 - Created by law, 937
 - Definition, 937
 - Express or implied, 937
 - Illustrations, 938
 - Ostensible agency, 937
 - Partnership as a branch of, 937
 - Under the codes, 937
- Contractor, whether an agent, 949
- Contracts**, see *infra*, APPOINTMENT; LIABILITY OF AGENTS TO THIRD PARTIES; RATIFICATION.
- Liability of Principal*, see *infra*, LIABILITY OF PRINCIPAL TO THIRD PARTIES.
- Liability of agent, 1050, 1051
- Conversion, 1063
- Corporations**:
 - Appointment by corporation**, 950
 - Authority to execute sealed instruments, 952
 - General rule as to power to appoint, 950
 - Implied appointment, 952
 - Seal, 951
 - Vote of directors, 951
 - Competency to be principal**, 944
 - In general, 945
 - Member of corporation as agent, 945
 - Modern doctrine, 945
 - Delegation of authority**:
 - Removal, 976
 - Notice to agent as notice to corporation, 1144
 - Ratification**, 1182
 - Ignorance, 1191
 - Loan by agent of corporation, 1200
 - Coupled with an interest*, see *infra*, TERMINATION.

Agency, cont'd.

Credit (see also *infra*, PERSONALTY; PURCHASE), 1059, 1060

Crime committed through innocent agent, 260

Criminal acts:

Ratification, 1185

Criminal liability of principal for act of agent, 1161

Death:

Effect where agency is coupled with an interest, 1223

Of client, 1223

Of one joint principal as revocation, 1223

Death of agent, 1226

Remuneration, 1108

Death of principal, 1222

Acts done *bona fide* without notice of principal's death, 1224

Agent's liability as trustee, 1226

Contract by agent where death is unknown, 1127

Exception to rule as to authority coupled with interest, 1224

Liability of agent for acts done after principal's death, 1225

Payment to or purchase by agent after principal's death, 1225

Remuneration, 1108

Whether instantaneous revocation, 1225

Deceit, liability of principal, 1159

Declarations, agent to receive payment, 1030

Deeds:

Manner of execution, 1035

When agent bound, 1041

Definitions, 937

Agent, 938

Authority, 938

Contract of agency, 937

Principal, 938

Subagent, 938

Delegation of authority (see also *infra*, SUBAGENTS), 449, 450

By principal, 971

Certificates of acknowledgment by married women, 971

Contracting a marriage, 971

Definitions, 971

Exceptions to the rule, 971

General rule, 971

Illegal and immoral acts, 971

Lobbyists, 971

Personal acts, 971

Qualifications of general rule, 978

Delegation of authority by agent, 972

Agent to receive money, 973

Authority to make promissory notes, 973

Authority to redelegate implied, 979

Agent to charter ship, 980

Banks, 979, 980

Broker of merchandise, 979

Departure from express directions not justified, 979

Master of vessel, 980

Necessity, 979

Stockbroker, 979

Usage of trade, 979

Delegatus non potest delegare, 972

General rule, 972

Ministerial, executive, or mechanical duties, 978

Agency, cont'd.

Accommodation acceptances, 978

Auctioneer, 979

Bills of exchange, 979

General freight agent, 978

General rule, 978

Insurance, 979

Sales of land, 979

• Subscription paper, 979

Nature of agency, 980

Public officers, 973

Rule applied to various classes of agents, 973

Verbal authority to sell land, 973

Delivery to agent, 1143

Demand:

Agency denied or repudiated by agent, 1093

Limitation of the rule, 1092

Necessity of demand, 1091

When not necessary, 1092

Denying principal's title, 1091

Diligence, see *infra*, REASONABLE SKILL AND DILIGENCE.

Dissolution, see *infra*, TERMINATION.

Drunkard as principal, 940

Duration, see *infra*, TERMINATION.

Duties and Liability, see *infra*, LIABILITY.

Duties and liabilities inter se.

See *infra*, FIDELITY TO INSTRUCTIONS; GOOD FAITH AND LOYALTY; REASONABLE SKILL AND DILIGENCE.

As to keeping and rendering accounts, see *infra*, ACCOUNTS.

Duties and liabilities of principal, see *infra*, REIMBURSEMENT.

Duties and liabilities of principal to agent, see *infra*, REMUNERATION FOR SERVICES RENDERED.

Employing agent, 1034

Estoppel, 960, 965

Acceptance of forged bill, 1186

Principal estopped to deny deed, 1212

To set up insanity, 1227

Evidence, see *infra*, APPOINTMENT.

Exchange, authority to exchange is not authority to purchase, 1024

Execution, see *infra*, MANNER OF EXECUTION OF AUTHORITY.

Execution: seizure of principal's property under execution against agent, 1175

Expenses, see *infra*, REIMBURSEMENT.

Expert testimony as to value of services, 1116

False representations:

Liability of agent for false representations of agency, 1136

Ratification, 1202

Fidelity to instructions, 1058

Action, 1062

Adoption by principal, 1060

Agent bound faithfully to follow instructions, 1058

Agent to buy goods, 1059

Circumstantial variance, 1061

Credit, 1059

Emergency, 1061

Failure to insure, 1060

Illustrations, 1059

Illegal acts, 1061

Immoral acts, 1061

Insurance, 1068

Agency, cont'd.

- Intention, 1060
- Investing contrary to instructions, 1063
- Liability for loss, 1059, 1060
- Liability of agent for disobedience of instructions, 1058
- Limit of rule, 1062
- Measure of damages, 1063
- Nature of the liability, 1062
- Obscurity, 1062
- Presumption, 1060
- Qualifications and exceptions, 1061
- Selling to irresponsible party, 1059
- Uncertainty and ambiguity in instructions, 1062
- Unremunerated agent**, 1060
 - In general, 1060
 - Responsibility after entering upon performance, 1060
- Usages and customs, 1062
- Violating instructions in reference to manner of remitting, 1059
- Violating instructions to sell for a certain price, 1059
- Forgery:**
 - Acceptance of forged bill, 1186
 - Estoppel, 1186
 - Invalidity of promise to pay forged paper, 1186
 - Ratification, 1185, 1187
- Fraud**, see *infra*, GOOD FAITH.
 - Compensation of agent, 1102
 - Fraud of agent as a defense to action by principal, 1180
 - Liability of agent, 1135
 - Liability of principal to third parties, 1158
 - Ratification of contracts tainted with fraud, 1184
- Fraudulent sales, 1174
- Gambling contracts, 972
- General and special agencies**, 985
 - Authority as affected by usage or custom**, 996
 - Examples, 996, 997
 - In general, 996
 - Interpreting powers of agent, 997
 - May employ means justified by usage, 996
 - Usage not known to principal, 996
 - Authority modified by instructions**, 994
 - General agents, 994
 - General agents:**
 - Instructions known to third parties, 995
 - Instructions not known to third parties, 994
 - Special agents**, 995
 - Instructions contravening apparent authority, 995
 - Instructions properly a part of authority, 995
 - Secret instructions, 995
 - Character of agency, 986
 - Definition of general agent, 985
 - Definition of special agent, 985
 - Distinction between general and special agencies, 985
 - General agent as to particular business, 985
 - Presumption, 986

Agency, cont'd.

- Principal bound according to extent of apparent authority, 986
- Territorial limitation of authority, 985
- Third parties must ascertain agent's authority**, 987
 - Agents of private corporations, 988
 - In general, 987
 - Power in writing, 988
 - Public officers, 988
- Universal agencies, 987
- When principal is bound**, 988
 - Acts authorized by implication, 988
 - Acts authorized directly, 988
 - Acts within apparent authority, 989
 - Authority determined by nature of act, 989
- General agencies**, 990
 - Act must be within power to bind principal, 991
 - Agent acting within general authority, 992
 - Authority not unlimited, 990
 - Examples, 990-993
 - Exceeding authority, 990
 - Principal not bound, 992
 - Selling property of principal, 991
- In general, 988
- Special agencies**, 993
 - Acts in disregard of instructions, 993
 - Authority must be strictly pursued, 993
 - Inquiry as to extent of authority, 994
 - Theory upon which principal is held liable, 990
- Good faith and loyalty**, 1071
- Acquiring adverse interests:**
 - Agent discovering defect in principal's title, 1085
- Acting for both parties** (see also *infra*, REMUNERATION), 966, 1073
 - Attorneys, 1074
 - Consent of principals, 1074
 - Limitation, 1074
 - Rule stated, 1073
 - Where interests are not conflicting, 1074
- Agent to purchase purchasing for himself**, 1077, 1082
 - In general, 1082
 - Purchase at tax sale, 1083
 - Purchase regarded as purchase on behalf of his principal, 1083
- Statute of frauds**, 1083
 - Agreement by agent to advance money, 1084
 - Illustrations, 1084
 - Principal furnishing funds after the purchase, 1084
 - Principal showing by parol that purchase was made for his benefit, 1083
 - When ejectment lies, 1085
 - When principal supplies no part of the purchase money, 1084
 - Where principal has present interest in the lands, 1084
- When agent may act on his own account, 1082
- Compensation where agent acquires adverse interests, 1102

Agency, cont'd.

- Dealing in agency for his own benefit, 1072
- Employing principal's property in his own business, 1073
- Extent of rule, 1071
- Gifts and conveyances obtained by agent, 1071
- Gifts and conveyances obtained from principal, 1071
- Gratuities received by agent, 1073
- Letting contract to himself, 1075
- Making profit out of agency, 1072
- Necessity of rule, 1071
- Placing himself in a position antagonistic to his principal, 1071
- Principal's rights against third party having surreptitious dealings with agent, 1178
- Profits made out of subject matter of agency, 1072
- Purchasing for less price than that named, 1072
- Selling for higher price than that named, 1072
- Speculating, 1071
- Trustees, 1073
- Uniting opposite characters of buyer and seller, 1075
 - Adoption of transaction by principal, 1080
 - Agent's clerk, 1079
 - Agent to purchase purchasing from himself, 1077, 1082
 - Agent to sell a patent right, 1081
 - Agent to sell purchasing for himself, 1077
 - Commissions, 1082
 - Dealing directly with principal, 1081
 - Duty as to disclosure, 1081
 - Duty of principal upon repudiation, 1080
 - Implied adoption of principal, 1080
 - Judicial sales, 1080
 - Party must offer to make return, 1076
 - Presumption of invalidity, 1082
 - Principal must disapprove within reasonable time, 1080
 - Purchases from agent, 1080
 - Purchase through third party, 1079
 - Rights of third parties, 1076
 - Sale by public auction, 1079
 - Sale not void, 1080
 - Statement of rule, 1075
 - Stock-broker, 1077
 - Usage and custom, 1076
 - Whether actual fraud must be shown, 1076
- Government contracts, 972
- Gratuitous services, 1007
 - Agent member of principal's family, 1099
- Holding out one as agent, 960
- Husband and wife (see also *infra*, MARRIED WOMEN), 975
 - Implied agency of husband for wife, 958
 - Implied agency of wife for husband, 957
- Illegal acts, 971, 1061, 1068
 - Liability of agent, 1133
 - Government contracts, 972
 - Lottery tickets, 972
 - Marriage-brokerage contracts, 972
 - Reimbursement for losses, 1118

Agency, cont'd.

- Remuneration, 1114
- Stock-gambling, 972
- Suppression of evidence, 972
- Trading with public enemy, 972
- Implied agency, see *infra*, APPOINTMENT.
- Indemnity, see *infra*, REIMBURSEMENT.
- Infant:
 - As agent, 945
 - As principal, 940
 - Appearance by attorney, 941
 - Delivery by agent, 941
 - Infant partner, 940
 - Infant's acts by agent held valid, 940
 - Parent acting for infant, 941
 - Power of attorney made by infant, 941
 - Power to appoint an agent, 940
 - Prejudicial and beneficial agents, 941
 - Warrant of attorney by infant and another, 942
 - Ratification, 1174
- Insanity, 1227
 - Insanity of agent, 945, 1226
 - Insanity of principal, 940, 1226
- Insurance, 968
 - Duty of agent to insure, 1068
 - Agent's liability, 1068
 - Examples, 1068
 - In the absence of instructions, 1068
 - Insurance imperfectly made, 1069
 - Instructions to insure, 1068
- Instructions, see *infra*, FIDELITY TO INSTRUCTIONS; GENERAL AND SPECIAL AGENCIES.
- Interest, 1093
 - Liability, 1093
 - Misapplication, 1094
 - Neglect or refusal to pay after demand, 1094
 - Neglect to notify principal of collection, 1094
 - Neglect to pay when no demand is necessary, 1094
 - Retention of property for agent's indemnity, 1093
 - When agent receives interest, 1094
- Intoxicating liquors:
 - Liability of agent selling without license, 1133
 - Liability of principal, 1153
- Joint agents:
 - Execution of authority by one, 1057
 - When execution is by all, 1057
- Joint tenants and tenants in common:
 - Competency to be principal, 944
- Lease, 956
 - Agent to lease, 1018
 - Agent leasing his own lands with those of principal, 1019
 - Implied powers to take lease, 1019
 - Lease for unauthorized period, 1019
 - Power to lease implied, 1018
 - Scope of powers, 1019
 - Under seal, 1018
 - Ratification by acceptance of rents, 1200
 - Ratification of notice to quit under lease, 1194
- Legacies: services rendered in expectation of legacy, 1098
- Lend: authority of agent to lend, 1035
- Letters: retaining agent's letters as ratification, 1206

Agency, cont'd.

Liability of agent to principal.

See *infra*, FIDELITY TO INSTRUCTIONS;
GOOD FAITH AND LOYALTY; REASON-
ABLE SKILL AND DILIGENCE.

*As to keeping and rendering accounts, see
infra*, ACCOUNTS.

Liability of agent to third parties:

Agent executing bills and notes in his own name:

Agency appearing from body of the instrument, 1044

Agent as payee and indorser, 1047

Bank officers, 1048

Indorsement sufficient to transfer title, 1048

Indorsement without recourse, 1048

Note payable to an agent, 1048

Notice, 1047, 1048

Personal liability, 1048

Rule in equity, 1048

Agent personally liable, 1044

Application of the general rule, 1042

Consideration moving to principal, 1043

Corporate seal, 1047

Corporation signature followed by that of officer, 1042

Descriptio personae, 1043

Illustrations, 1042

Intention, 1045

Name of agent printed on margin, 1047

Not necessary that principal's name appear in signature, 1046

Principal impliedly disclosed, 1047

Signature in principal's name, 1046

Showing that writing is act of principal, 1042.

Signature followed by official designation, 1043

Signature in agent's name, 1044

Undisclosed principal, 1046

When agent exempt from liability, 1042

When both principal and agent bound, 1042

When principal bound and agent not, 1042

Where principal has adopted agent's name as his own, 1045

Agent executing sealed instrument in his own name, 1038

Adding descriptive words indicating that he is agent, 1038

Agent not bound, 1040

Contract in principal's name, 1040

Conveyances of estates, 1041

Description in signature, 1039

Description occurring in body of instrument, 1039

Parol evidence, 1051, 1052

Action between original parties, 1052

Action by *bona fide* holder, 1054

Admissibility of parol evidence to discharge agent or charge principal, 1051

Ambiguous instrument, 1052

General rule, 1051

Illustrations, 1051

Inadmissibility, 1053

Instrument not indicating principal, 1053

Parties affected with notice, 1053

To discharge agent, 1053

Agency, cont'd.

When admissible, 1052

When parol evidence admitted, 1054

Principal a corporation, 1040

Recital of authority in instrument, 1040

Restrictive words, 1040

Seal surplusage, 1039

That agent not bound a mere presumption, 1039

When agent bound, 1038

For money paid to agent, 1129

In general, 1129

Liability of agent as principal, 1129

Recovering back from agent, 1129

When money is illegally received, 1131

Compulsory payments, 1131

When paid under mistake, 1130

Before he has turned money over to principal, 1130

Money properly paid to agent, 1131

Payment under mistake of law, 1130

What amounts to payment, 1130

When agency undisclosed, 1130

Where he has turned it over to principal, 1130

Where notified of mistake, 1130

On contract, 1119

Agency undisclosed, 1122

Agency disclosed, but principal undisclosed, 1124

Breach of warranty, 1123

Extent of liability, 1123

General rule, 1122

Agent unintentionally binding himself, 1121

Describing himself as agent, 1121

In general, 1119

Non-existing principal, 1122

Parol evidence to show intention of parties, 1121

Presumption as to whom agent intends to bind, 1120

Principal disclosed, 1119

Sealed instruments, 1121

When acting for foreign principal, 1121

When acting with no authority, 1124

Action for deceit, 1127

Breach of implied warranty, 1127

Burden of proof, 1129

Death of principal unknown, 1127

Form of action, 1127

In general, 1124

Measure of damages, 1129

Nature of liability, 1127

Parties mutually mistaken, 1127

Rejecting part of contract not binding agent, 1129

Right to repudiate the contract, 1125

Third party must be ignorant of want of authority, 1127

When he bona fide believes he has authority, 1125

Acting in excess of authority actually possessed, 1126

Ground of liability, 1126

When he has no authority at all, 1125

When he has knowledge of his want of authority, 1125

When agent pledges his own credit, 1120

Agency, cont'd.

- When consideration moves to principal, 1120
- When principal is irresponsible, 1122
- Simple contracts made by agent, 1150
- Torts, 1131**
 - Conversion, 1135
 - Conversion of goods, 1133
 - Continuance of nuisance, 1134
 - Doing business without license, 1133
 - Directors of corporation, 1133
 - Examples, 1131, 1133
 - Failure to repair, 1134
 - False representations of agency, 1136
 - Fraud, 1135
 - Fraud on agent's creditors, 1136
 - Illegal act, 1133
 - Malice, 1135
 - Misfeasance, 1131
 - Negligence, 1134
 - Negligence of employés, 1134
 - Nonfeasance, 1131, 1132
 - Nonfeasance and misfeasance distinguished, 1131
 - Nonperformance, 1131
 - Public officers, 1133
 - Sale of mortgaged property, 1135
- Liability of principal to agent, see infra, RE-IMBURSEMENT; REMUNERATION FOR SERVICES RENDERED.*
- Liability of principal to third parties, 1136**
 - Agent's acts generally, 1136
 - Admissions, 1143
 - Contemporaneous with business, 1143
 - Criminal liability, 1161
 - Delivery to agent, 1143
 - Notice to agent, see infra, NOTICE TO AGENT.*
- On contract, 1137**
 - Generally, 1137
 - Undisclosed principal, 1139**
 - Bills and notes, 1141
 - Charging undisclosed principal on written contract, 1140
 - Contracts under seal, 1141**
 - Common-law rule, 1141
 - Modifications of the common-law rule, 1141
 - Contract within statute of frauds, 1140
 - Partners, 1140
 - Simple contracts, 1139
 - Where principal has settled with agent, 1142**
 - In England, 1142
 - In United States, 1142
- Where other party has elected to hold agent liable, 1138**
 - Disclosed principal, 1138
 - Fact of agency and name of principal must be known, 1139
 - Foreign principal, 1139
 - In general, 1138
 - Requisites of election a question for the jury, 1138
 - Undisclosed principal, 1138
 - Vendor electing to sell on agent's credit, 1138
 - Within what time the party must elect, 1139
- Payment of money to agent, 1143
- Representations, 1143**
 - In general, 1143

Agency, cont'd.

- Of agent with authority delegated, 1143
- Torts, 1151**
 - Assault and battery, 1153
 - Committed in the usual course of employment, 1152
 - Corporations, 1154
 - Deceit, 1159
 - Excessive force in executing principal's orders, 1154
 - Express order of principal, 1151
 - Fraud, 1158
 - Fraud within apparent scope of authority, 1159
 - Fraudulent representations in course of agent's employment, 1159
 - Liability of bank for special deposit, 1159
 - Misrepresentations, 1159
 - Natural consequence of principal's order, 1151
 - Negligence, 1154
 - Sale of intoxicating liquors, 1153
 - Subagents, 1155
 - Torts outside the agent's employment, 1153
 - Torts resulting from authority delegated, 1151
 - Usury, 1152
- Wanton or malicious acts, 1156**
 - Liability of principal, 1156
 - Within scope of agent's employment, 1156
- Liability of third parties to agent, 1161**
 - Agent's right of action on contract, 1162**
 - Agent a trustee, 1163
 - Agent ostensible principal, 1164
 - Bill of lading, 1164
 - Defenses to action brought by agent, 1167
 - Form of contract, 1164
 - Injury to principal's property in agent's possession, 1166
 - Instruments under seal, 1165
 - Insurance contract, 1164
 - Limit of agent's recovery, 1167**
 - In tort, 1167
 - On contract, 1167
 - Negotiable instrument indorsed in blank to agent for collection, 1164
 - Note payable to agent of association or corporation, 1164
 - Ostensible agent showing himself to be principal, 1165
 - Paper payable to agents, 1163
 - Payment made on illegal contracts, 1166
 - Payment made under mistake of fact, 1166
 - Personal injury to agent, 1166
 - Principal's right to control action, 1167
 - Under the code, 1162
 - Wager contract, 1163
 - When agent has beneficial interest, 1165
 - When made with agent personally, 1162
 - In general, 1161
 - Liabilities of third parties to principal:**
 - Defenses to principal's action, 1180
 - Conclusiveness of judgment, 1181
 - Fraudulent acts of agent, 1180

Agency, cont'd.

- Judgment against agent, 1181
- Payment to agent, 1180
- For breach of warranty, 1178
- For misrepresentation, 1178
- For money paid under mistake, 1178
- For money wrongfully paid to or appropriated by third party, 1176**
 - Extent of principal's right to recovery, 1176
- Loan by agent of purchase money, 1177
- Money lost on wager contracts, 1177
- Proceeds of restrictively indorsed paper, 1177
- Right against bank, 1176
- When principal may recover, 1176
- Whether principal may follow fund, 1177
- For property wrongfully transferred to third party, 1172**
 - Agent's construction of ambiguous authority, 1173
 - Estoppel in principal, 1172
 - Factor's acts, 1173
 - Mere possession as indication of title, 1173
 - Property bartered, pledged, or mortgaged, 1174
- Property used to pay agent's debt, 1174**
 - By agent, 1174
 - By seizure under execution or attachment, 1175
 - Necessity of demand, 1174
 - Principal estoppel by knowledge and acquiescence, 1175
- Unauthorized release or transfer of securities, 1175
- When agent can give better title than he has, 1173
- When principal may recover, 1172
- For surreptitious dealings of third party with agent, 1178
- On agent's contracts:**
 - Whether principal may maintain action, 1168**
 - Availing himself of equities against agent, 1171
 - Broker and factor, 1170
 - Constructive notice of fact of agency, 1171
 - Equities against agent, 1168, 1169
 - Foreign principal, 1169
 - Insurance contracts, 1169
 - Party must show he had no knowledge of agency, 1171
 - Undisclosed principal one with whom other party would not have dealt, 1171
 - Undisclosed principal suing upon bill or note, 1171
 - Undisclosed principal suing upon contract under seal, 1171
 - When disclosed, 1168
 - When set-off must accrue, 1170
 - When undisclosed, 1168
 - Principal's right of action superior to agent's, 1180
- Torts, 1179**
 - Injury to property in agent's possession, 1179
 - Loss of service by wrongful act of third party, 1179

Agency, cont'd.

- Preventing performance by agent, 1180
- Third party inducing agent to abandon agency, 1179
- Whether third party can dispute agency, 1180
- Lien, 1119
- Lobbying contracts, 971
- Losses; see *infra*, REIMBURSEMENT.
- Lottery tickets, 972
- Loyalty, see *infra*, GOOD FAITH.
- Malice:**
 - Liability of agent, 1135
 - Liability of principal, 1156
- Managing agent*, see *infra*, AGENT TO MANAGE BUSINESS.
- Manner of execution of authority (see also *infra*, BILLS AND NOTES), 1035**
 - Formal execution, 1035
 - General rule, 1035
- Instruments under seal, 1036**
 - Agent bound, 1038
 - Agent for principal, 1037, 1038
 - Agent not bound, 1040
 - Agent using apt words to charge himself, 1038
 - Contract in principal's name, 1040
 - Conveyances of estates, 1041
 - Executed in presence of principal, 1038
 - General rule, 1036
 - Imperfect execution, 1038
 - Illustrations, 1037
 - Instrument reciting that it is executed by agent, 1038
 - Must be in name of principal, 1036
 - Must purport to be the deed of principal, 1036
 - One seal sufficient for several principals, 1037
- Parol evidence, 1051**
 - Admissibility of parol evidence to discharge agent or charge principal, 1051
 - Ambiguous instrument, 1052
 - General rule, 1051
 - Illustrations, 1051
 - Principal a corporation, 1040
 - "Principal by agent," 1037
 - That agent and not principal is bound a mere presumption, 1039
 - Where seal is surplusage, 1039
 - Whether agent's name should appear, 1038
- Intent of parties, 1035
- In whose name contract should be, 1035
- Joint agents, 1057**
 - Authority conferred on partnership, 1057
 - Contrary intention, 1057
 - Execution by one, 1057
 - Public agents, 1057
 - When principal is bound, 1057
- Public officers, 1056
- Simple contracts other than negotiable instruments, 1050**
 - Execution in principal's name, 1051
 - General rule, 1050
 - Intention controlling, 1050
 - When agent bound, 1050, 1051
- Marriage-brokerage contracts, 972
- Married women:**
 - As principal, 942

Agency, cont'd.

- By common law, 942
- By statute, 942
- Confessing judgment, 942
- Conveyance of wife's lands, 942
- Wife's separate estate, 942
- Married women as agents, 946**
 - As agent for husband, 946
 - Illustrations, 946
 - In general, 946
 - Limitations of doctrine, 946
 - As agent for third parties, 947
 - Husband as wife's agent, 947
- Master and servant:**
 - Implied appointment of servant as agent, 963
- Measure of damages:**
 - Agent making contract without authority, 1129
- Medium of payment, see infra, AGENT TO RECEIVE PAYMENT.*
- Mistake:**
 - Compulsory payments, 1131
 - Liability of agent in doubtful matter of law, 1064
 - Money illegally received, 1131
 - Payment of money to agent by mistake, 1130
 - Undisclosed agency, 1130
- Money, see infra, AGENT TO RECEIVE PAYMENT.*
- Mortgage:**
 - Agent to mortgage, 1017**
 - Agent mortgaging for his own benefit, 1017
 - Canceled mortgage, 1018
 - Power to insert usual clauses, 1017
 - Redemption from mortgage, 1018
 - When authority to mortgage not implied, 1018
- Mortgages:**
 - Authority of agent to manage business, 1024
- Name:**
 - As to in whose name agent should act, see infra, MANNER OF EXECUTION OF AUTHORITY.*
- Negligence (see also infra, REASONABLE SKILL AND DILIGENCE):**
 - Compensation, 1101
 - Liability of agents to third parties, 1134
 - Liability of principal to third parties, 1155
- Nonfeasance and misfeasance distinguished, 1131
- Notice of revocation, 1220**
 - As to agent, 1220
 - As to third parties, 1220
 - Constructive notice, 1221
 - Constructive notice question of law or fact, 1222
 - Effect of revocation and notice, 1222
 - Payment to agent without notice, 1221
 - Revocation by letter, 1220
 - Statutes requiring record of revocation, 1221
- Notice to agent, 1144**
 - After agency is terminated, 1149
 - Agent employed to furnish information, 1149
 - Agents of corporations, 1144
 - Attorneys, 1144
 - Continuance of agency, 1149

Agency, cont'd.

- Corporate officers generally, 1148
- General rule, 1144
- Knowledge acquired shortly before agency, 1151
- Must be of important facts, 1149
- Must relate to business within scope of agency, 1146**
 - Cashier of bank, 1148
 - Director of corporation, 1148
 - Illustrations, 1147
 - Insurance agent, 1147
 - President of corporation, 1147
 - Principal not bound otherwise, 1146
 - Stockholder, 1148
- Notice acquired prior to agency, 1149
- Notice given to predecessor of agent, 1149
- Source of information to be regarded, 1149
- Subagent, 1146
- To impute malice to principal, 1145
- When agent acts in his own interest, 1145
- When agent colludes with a third party, 1146
- When it is not agent's duty to communicate such knowledge, 1145
- When notice must be had, 1149
- Whether binding upon principal, 1144
- Nuisance: liability of agent, 1134
- Officers, see OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. For officers of municipal corporations, see MUNICIPAL CORPORATIONS.*
- Parent and child:**
 - Parent as agent for infant, 941
 - Remuneration, 1099
- Parol evidence, 1051**
 - Admissibility of parol evidence to discharge agent or charge principal, 1051
 - Ambiguous instrument, 1052
 - Appointment, 970
 - Bills and notes executed in agent's own name, 1052**
 - Action between original parties, 1052
 - Action by *bona fide* holder, 1054
 - Inadmissibility, 1053
 - Instrument not indicating principal, 1053
 - Parties affected with notice, 1053
 - To discharge agent, 1053
 - When admissible, 1052, 1054
 - Construction of written authorities, 1001
 - General rule, 1051
 - Illustrations, 1051
 - Intention to contract as agent, 1054
 - Simple contracts, 1054
 - To charge undisclosed principal, 1055
 - To discharge agent who has contracted in his own name, 1055
 - To enable undisclosed principal to bring an action, 1055
 - To show that purchase of real estate was made for benefit of principal, 1083
- Partnership:**
 - Agent of partnership, 958**
 - Partner as agent of partnership, 958
 - Power of partnership to bind firm under seal, 959
 - Branch of the law of, 937
 - Competency of partnership to be principal, 943**
 - Generally, 943

Agency, cont'd.

- Implied power to appoint agents, 944
- Dissolution by war, 943
- Liability of partners where one partner purchases goods in his own name, 1140
- Ratification, 1174
- Whether one partner may execute an authority conferred on the partnership, 1057
- Payment** (see also *infra*, AGENT TO RECEIVE PAYMENT):
 - As to money wrongfully paid to or appropriated by third party, see infra*, LIABILITY OF THIRD PARTIES TO PRINCIPAL.
 - Liability of agent, 1120
 - Money paid under mistake, 1178
 - Power to receive, 1014
- Payment to agent**, 1143
 - As a defense to action by principal, 1180
 - Without notice of revocation, 1221
- Personalty:**
 - Agent to sell**, 1012
 - Credit authorized by custom, 1014
 - Giving further time, 1014
 - Goods of different principals sold in lump, 1013
 - Implied powers, 1013
 - May give exclusive right to sell, 1014
 - Must act within authority, 1012
 - Powers of traveling salesmen**, 1017
 - Hotel bills, 1017
 - To hire horses, 1017
 - To receive payment, 1016
 - To sell samples, 1017
 - Power to receive payment**, 1014
 - Doctrine of "holding out," 1015
 - Effect of notice on bill for goods, 1016
 - General rule, 1014
 - Order given to agent, 1016
 - Power to make contract does not include power to collect, 1015
 - Sale and delivery by agent, 1015
 - Sales on credit, 1015
 - Sales over counter, 1016
 - Usage, 1016
 - Power to warrant**, 1014
 - Price, 1012
 - Sale by sample, 1013
 - Sale for future delivery, 1013
 - Sale on approval, 1013
 - Sale on credit, 1014
 - Sale to himself, see infra*, GOOD FAITH.
- Pledge:**
 - Power of agent to sell, to pledge, 1004
 - Wrongful pledge by agent, 1174
 - Power, see infra*, AUTHORITY.
- Power to sell** (see also *infra*, PERSONALTY—AGENT TO SELL; REAL ESTATE—AGENT TO SELL):
 - Agent giving away, 1004
 - Barter or exchange, 1004
 - Consideration must be in money, 1003
 - Payment in negotiable paper, 1003
 - Payment of debts of owner, 1005
 - Pledge, 1004
 - Power exhausted by sale, 1005
 - Time of sale, 1005
 - To sell generally, 1003

Agency, cont'd.

- Power of attorney.**
 - Warrant of attorney by infant and another, 942
- Principal** (see also *infra*, COMPETENCY TO BE PRINCIPAL; LIABILITY OF PRINCIPAL), 938.
 - Delegation of authority, see infra*, DELEGATION OF AUTHORITY.
- Purchase:**
 - Agent to purchase**, 1020
 - Credit**, 1020
 - General agent, 1020
 - Illustrations, 1021
 - Power to purchase not implied, 1020
 - When furnished with funds, 1021
 - When no funds are furnished, 1021
 - Implied powers**, 1021
 - Agent to purchase on credit, 1021
 - Credit, 1021
 - Execution of negotiable notes, 1022
 - In general, 1021
 - Modification of contract, 1021
 - Kind, 1020
 - Must observe authority, 1020
 - Specific amount, 1020
 - Authority to exchange is not authority to purchase, 1024
- Questions of law and fact:**
 - Amount of remuneration where there is no express agreement, 1115
 - Appointment, 967
 - Construction of authority, 998
 - Diligence for the jury, 1068
 - Election to hold agent responsible, 1138
 - Extent of agent's authority, 986
 - Implied promise to remunerate agent, 1097
 - Ratification implied, 1195
 - Reasonable time for ratification, 1205
 - Whether agency is general or special, 986
- Ratification:**
 - Act done on account of some third person, 1188
 - Act done on agent's own account, 1188
 - Acts not done in capacity of agent, 1188
 - Aquiescence**, 1203
 - Act done in presence of principal, 1207
 - Agent failing to notify principal estopped to claim silence a ratification, 1207
 - Corporations, 1207
 - Delay in hope of gaining advantage, 1206
 - Duty to disavow, 1203
 - Failure to disavow instantly, 1205
 - Failure to examine agent's report, 1206
 - General rule, 1203
 - Opportunity to repudiate, 1204
 - Prompt disavowal demanded by usage, 1206
 - Prompt disavowal to prevent loss, 1206
 - Reasonable time a question for jury, 1205
 - Retaining agent's letters without reply, 1206
 - Silence accompanied with possession of property, 1207
 - Silence of one of two joint agents, 1207
 - Speculative delay, 1206
 - When silence is a ratification, 1204
 - When silence is not a ratification, 1204
 - Where act is done by stranger, 1208

Agency, cont'd.

- As to third parties, 1209
- In general, 1208
- Silence likely to mislead, 1209
- Some evidence of ratification, 1209
- By suit, 1209
- Contracts tainted with fraud, 1184
- Corporations, 1191
- Criminal acts, 1185
- Effect of, 1213**
 - As between principal and agent, 1214
 - As to intervening rights, 1215
 - Entitling agent to expenses, 1214
 - In general, 1213
- Liability of principal and agent to third parties, 1214**
 - Distinction between ratification of contracts and torts, 1214
 - In general, 1214
- Ratification irrevocable, 1214
- Releases agent, 1214
- Torts, 1214
- Vested rights, 1215
- Forgery, 1185**
 - Acceptance of forged bill, 1186
 - Doctrine of ratification held applicable to forgery, 1187
 - Estoppel, 1186
 - Estoppel to set up forgery, 1186
 - Invalidity of promise to pay forged paper, 1186
 - Whether doctrine of ratification applicable to, 1185
- Ignorance of material facts, 1189
- Implied ratification, 1195**
 - Acceptance accompanied with words of dissent, 1198
 - Acceptance of compromise, 1201
 - Acceptance of proceeds of loan, 1199
 - Acceptance of rents, 1200
 - Accepting benefits, 1196
 - Accepting proceeds of sale by agent, 1202
 - Accepting results to prevent further loss, 1199
 - By silent acquiescence, 1203
- By suit, 1209**
 - Goods disposed of by agent without authority, 1210
 - On agent's unauthorized contracts, 1210
 - To enforce contract, 1210
 - To recover price of goods, 1210
- Circumstances insufficient, 1195
- Dealing with agent's notes, 1201
- Entry on land purchased or leased, 1202
- Express authority for the future, 1196
- Express ratification of subsequent similar acts, 1196
- Favored, 1195
- Filling order procured by agent, 1201
- Illustrations, 1195
- Illustrations of ratification by acceptance of benefits, 1197
- Implied from previous acts, 1196
- In general, 1195
- Loan by agent of corporation, 1200
- Of false representations of agent, 1202
- Of representations by which contract was procured, 1202
- Question for jury, 1195

Agency, cont'd.

- Ratification of sale by execution of instrument, 1202
- Receiving goods purchased by agent, 1198
- Retaining security, 1199
- Settlement as ratification, 1200
- Settlement with agent with full knowledge, 1200
- Knowledge of material facts, 1189
- Misappropriation of funds, 1185
- Mutuality, 1193
- Nature, 1181
- Necessity of new consideration, 1181
- Notice to quit under lease, 1194
- Of contract, 1181
- Prerequisites to valid ratification, 1187**
 - Act done in capacity of agent, 1188
 - Act done on account of principal, 1188
 - Act done on account of third party, 1188
 - Designation of principal, 1187
 - Existence of principal, 1187
- Knowledge of material facts, 1189**
 - Careless ignorance, 1190
 - Deliberate ignorance, 1190
 - Ignorant acceptance of profits or goods, 1190
 - In general, 1189
 - Innocent misrepresentations of agent, 1190
 - Knowledge of agent imputed to principal, whether, 1192
 - Knowledge of legal effect, 1192
 - Ratification by corporation, 1191
 - Ratification of agent's warranty, 1191
 - Ratification voidable in part, 1190
 - Recovery of goods sold by agent without authority, 1191
 - Taking security, 1191
- Mutuality, 1193**
 - How far necessary, 1193
 - Notice to quit under lease, 1194
 - Ratification of insurance subsequent to loss, 1194
 - Want of mutuality, 1194
- Ratification of whole act, 1192**
 - Conditional ratification, 1193
 - Ratification of part of contract wholly unauthorized, 1193
 - Ratification of part with full knowledge, 1193
- Usurious contracts, 1193
- Public officers, 1184
- Ratification after disavowal, 1182
- Rescission of ratification, 1182
- Sealed instruments, 1211**
 - Contract for sale of land, 1212
 - Exception to general rule, 1213
 - Massachusetts, 1213
 - Necessity of writing under seal, 1211
 - Principal estopped to deny deed, 1212
 - Ratification by partnership, 1212
 - Seal surplusage, 1212
- Silent acquiescence, 1203**
 - Act done in presence of principal, 1207
 - Agent failing to notify principal estopped to claim silence a ratification, 1207
 - Corporations, 1207
 - Delay in hope of gaining advantage, 1206

Agency, cont'd.

- Duty to disavow, 1203
- Failure to disavow instantly, 1205
- Failure to examine agent's report, 1206
- General rule, 1203
- Opportunity to repudiate, 1204
- Prompt disavowal demanded by usage, 1206
- Prompt disavowal to prevent loss, 1206
- Reasonable time a question for jury, 1205
- Retaining agent's letters without reply, 1206
- Silence accompanied with possession of property, 1207
- Silence of one of two joint agents, 1207
- Speculative delay, 1206
- When silence is a ratification, 1204
- When silence is not a ratification, 1204
- Where act is done by stranger, 1208
 - As to third parties, 1209
 - In general, 1208
 - Silence likely to mislead, 1209
 - Some evidence of ratification, 1209
- Torts, 1185
- Usurious contracts, 1185
- Void and voidable acts, 1184
- What acts may be ratified, 1184
- What amounts to adoption of tort, 1185
- Who may ratify, 1182
 - By partners, 1184
 - Contracts made without statutory formalities, 1183
 - Corporations, 1182
 - Incompetent persons, 1174
 - Infants, 1184
 - In general, 1182
 - Ratification by agents, 1183
 - Ultra vires* acts of corporation, 1182
- Ratification of appointment, 964**
 - Effect of, 964
 - Essentials of ratification, 965
 - Examples, 964, 965
 - Ratification of past acts, 964
 - Subsequent ratification equivalent to original authority, 965
- Real estate:**
 - Agent to sell:**
 - After-acquired land, 1008
 - Authority must be clear, 1006
 - Authority not extended by construction, 1010
 - Certainty and extent of power, 1007
 - Directions as to time of payment, 1008
 - Descriptions of property, 1007
 - Illustrations, 1012
 - Implied power to execute conveyances, 1010
 - Meaning of "to sell," 1011
 - Must be in manner authorized, 1008
 - Power not under seal, 1011
 - Power to contract for sale, 1007
 - Power to superintend real estate, 1006
 - Powers implied, 1010
 - Sale on credit, 1009
 - Sufficiency of power, 1005
 - Warranties, 1012
 - When agent may receive payment, 1008
 - Reasonable skill and diligence, 1063**
 - Agent not liable for accidental loss, 1064
 - Agent to collect, 1066

Agency, cont'd.

- Agent to loan, 1065
- Agent to invest, 1065
- Agents to sell, 1067
- Attorneys, 1065
- Bankers, 1065
- Brokers, 1065
- Conveyancers, 1064
- Diligence a question for the jury, 1068
- Duty as to insurance, 1068
- Duty to advise principal of matters material to his interest, 1069
- Errors of judgment, 1068
- Factors and commission merchants, 1065
- Factor selling under price, 1067
- Gratuitous agency, 1070**
 - Agencies implying peculiar knowledge or skill, 1070
 - Gross negligence, 1070
 - Ordinary agencies not implying peculiar knowledge or skill, 1070
 - Nonfeasance, 1070
 - Physicians, 1071
 - Wilful and malicious fraud, 1070
- Illegal acts, 1068
- Inability to insure, 1069
- Insurance agents, 1065
- Insurance imperfectly made, 1069
- Measure of damages, 1068
- Medium of payment, 1066
- Mistake in doubtful matter of law, 1064
- Physicians and surgeons, 1065
- Rule as to skill and diligence of remunerated agent, 1063
- Reasonable time:**
 - Ratification, 1205
- Record of revocation, 1221**
- Reimbursement, 1117**
 - Advances and expenditures, 1117**
 - Needless or unauthorized expenditures, 1117
 - Loss and damage sustained, 1117**
 - General rule, 1117
 - Indemnity against liability, 1118
 - Loss not incurred in execution of agency, 1118
 - When right of action accrues, 1118
 - When the act performed is illegal, 1118
- Relationship, 1099**
 - Agent member of principal's family, 1099
 - How presumption overcome, 1100
 - Presumption that service is gratuitous, 1099
 - Proof of agreement to compensate, 1100
 - Relationship of brother and sister, 1099
 - Relationship of parent and child, 1099
 - Whether relationship is implied, 1099
- Release, 1028, 1030**
- Removal:**
 - Delegation of authority:**
 - Corporations, 966
- Remuneration, 1095**
 - Agency illegal, 1114
 - Agent acquiring adverse interests to principal, 1102
 - Agent acting for both parties to transaction, 1113**
 - Double agency known to the parties, 1113
 - Foundation of the rule, 1113
 - Parties ignorant of the double agency, 1113

Agency, cont'd.

- What evidence of knowledge is required, 1113
- Amount, 1114**
 - Statute limiting the number of hours constituting a day's work, 1117
 - Where agent serves beyond stipulated time, 1116
 - Where additional duties are imposed upon agent employed at fixed salary, 1116
 - Where contract is that remuneration is to be fixed by the principal, 1115
 - Where there is an express agreement, 1114
 - Where there is no express agreement, 1115**
 - Amount to be determined by the jury from all the facts, 1115
 - Character of service performed, 1115
 - Custom as evidence to fix the amount, 1116
 - Expert testimony as to value of services, 1110
 - Reasonable amount, 1115
 - Skill and experience of agent, 1115
 - Complete performance, 1101
 - Death of agent, 1108
 - Death of principal, 1108
 - Dependent upon contingency, 1096**
 - Illustrations, 1096
 - Performance prevented through fault of other party, 1096
 - Special contract, 1096
 - When entitled to remuneration, 1096
 - Extent of injury to principal by fraud, 1102
 - Failure to keep and render accounts properly, 1101
 - Faithful performance, 1101
 - Fraud, 1102
 - Gratuitous services, 1097
 - Gross negligence, 1101
 - Implied promise to pay, 1096**
 - Agent member of principal's family, 1099
 - Gratuitous service, 1097
 - Illustrations, 1097
 - Implied from circumstances, 1096
 - Person served standing *in loci praentis*, 1099
 - Prior request, 1096
 - Private agent, 1096
 - Proof of agreement to compensate where there is relationship, 1100
 - Question for the jury, 1097
 - Relation of parent and child, 1099
 - Relationship of brother and sister, 1099
 - Service performed in hope of future employment, 1099
 - Service performed with knowledge of party benefited, 1096
 - Service rendered in expectation of legacy, 1098
 - When promise not implied, 1097
 - Where party benefited suffers work to proceed, 1097
 - Whether gratuitous service will support subsequent promise to pay, 1098
 - Loss of, 1082
 - Misappropriation of goods and funds, 1103
 - Negligence, 1101

Agency, cont'd.

- Relationship, 1099**
 - Agent member of principal's family, 1099
 - How presumption overcome, 1100
 - Presumption that service is gratuitous, 1099
 - Proof of agreement to compensate, 1100
 - Relationship of brother and sister, 1099
 - Relationship of parent and child, 1099
 - Whether remuneration is implied, 1099
- Renunciation of agency by agent, 1109**
 - Epidemic in vicinity where services are to be performed, 1111
 - Misconduct of principal, 1110
 - Where he has good cause, 1110
 - Where agent has not good cause, 1111**
 - Contract severable, 1112
 - Modern rule in some states, 1112
 - Prevailing rule, 1111
 - Receiving agent back into employment, 1112
 - Subsequent offer to pay agent, 1112
 - Waiver of forfeiture by principal, 1112
 - Where agent reserves the right to renounce, 1109**
 - Forfeiture for failure to give notice, 1109
 - Unreasonable or oppressive forfeiture, 1110
 - Where contract requires notice to be given, 1109
- Revocation by law, 1108**
 - Death of agent, 1108
 - Death of principal, 1108
 - Sickness of agent, 1108
- Revocation by principal, 1103**
 - Agency revocable at pleasure of principal, 1103**
 - Compensation which he would have received if agency had continued, 1103
 - Contract that no compensation shall be received if authority is revoked, 1103
 - In general, 1103
 - Quantum meruit*, 1103
 - Agent discharged for cause, 1103**
 - Forfeiture of compensation, 1103
 - Reasonable compensation, 1104
 - Remuneration for services already rendered, 1103
 - Remuneration which might have been earned, 1104
 - Agent wrongfully discharged, 1104**
 - Action for compensation actually earned, 1107
 - Action for damages for breach of contract, 1104
 - Action on a *quantum meruit*, 1104
 - Awaiting expiration of term of service, 1104
 - Burden of proof, 1107
 - Compensation for "constructive service," 1107
 - Employment to reduce damages must be in the same locality, 1106
 - Employment to reduce damages must be of the same general nature, 1106

Agency, cont'd.

- Measure of damages, 1105
- Other employment in reduction of damages, 1106
- Readiness of agent to continue in service, 1108
- Remedies growing out of the wrongful act, 1104
- What tender of service on part of agent necessary, 1108
- When cause of action arises, 1104
- Where principal rejects services of agent before time for performance arrives, 1105
- Services performed in hope of future employment, 1099
- Services rendered in expectation of legacy, 1098
- Sickness of agent, 1108
- Slight negligence, 1101
- Special agreement, 1095
- Subagents, 984
- When the right may be deemed to have attached, 1101
- Where agency is terminated by mutual consent, 1113
- Where service has not been completely performed, 1103
- Where service has not been faithfully performed, 1101
- Where unauthorized acts are ratified, 1101
- Whether necessary, 950
- Whether stipulation for compensation per year or month constitutes a contract for the time mentioned, 1216
- Renunciation of agency by agent, see infra, REMUNERATION; TERMINATION.*
- Representations**, 1143
 - Authority of agent, 1012
 - Liability of principal for misrepresentations of agent, 1159
- Ratification, 1202
- Rescission of ratification, 1182
- Revocation, see infra, TERMINATION; REMUNERATION.*
- Satisfactory, 1216
- Seal:**
 - As to ratification of instruments under seal, see infra, RATIFICATION.*
 - Agent executing conveyances, 1011
- Appointment:**
 - Corporations:**
 - Authority to execute sealed instruments, 952
 - Early doctrine, 951
 - Modern doctrine, 951
 - Authority to execute sealed instruments, 952
 - Corporations, 951
- In whose name instruments under seal should be executed**, 1036
 - Agent bound, 1038
 - Agent not bound, 1040
 - Agent for principal, 1037, 1038
 - Agent using apt words to charge himself, 1038
 - Contract in principal's name, 1040
 - Conveyances of estates, 1041
 - Executed in presence of principal, 1038
 - Illustrations, 1037
 - Imperfect execution, 1038

Agency, cont'd.

- Instrument reciting that it is executed by agent, 1038
- Must purport to be the deed of principal, 1036
- One seal sufficient for several principals, 1037
- Parol evidence**, 1051
 - Admissibility of parol evidence to discharge agent or charge principal, 1051
 - Ambiguous instrument, 1052
 - General rule, 1051
 - Illustrations, 1051
 - Principal a corporation, 1040
 - "Principal by agent," 1037
 - That agent and not principal is bound a mere presumption, 1039
 - Where seal is surplusage, 1039
 - Whether agent's name should appear, 1038
- Lease under seal, 1018
- Power of partner to bind firm under seal, 959
- Sell, 957
- Separate estate of married women, 942
- Settle, see infra, AGENT TO SETTLE.*
- Shipping agent, 1034
- Sickness of agent, 1108
- Silence** (see also *infra, RATIFICATION*): Appointment, 966
- Skill, see infra, REASONABLE SKILL AND DILIGENCE.*
- Special agency, see infra, GENERAL AND SPECIAL AGENCIES.*
- Speculation by agent, 1071
- Statute of frauds:**
 - Agent to purchase lands**, 1083
 - Agreement by agent to advance money, 1084
 - Illustrations, 1084
 - Principal furnishing funds after the purchase, 1084
 - Principal showing by parol that purchase was made for his benefit, 1083
 - When ejectment lies, 1085
 - When principal supplies no part of the purchase money, 1084
 - Where principal has present interest in the lands, 1084
 - Liability of principal to third parties, 1140
 - Charging undisclosed principal on written contract, 1140
- Stoppage in transitu*, 1119
- Subagents** (see also *infra, DELEGATION OF AUTHORITY*), 938, 980
 - Death, 1226
 - Definition, 980
 - Liability of principal for torts, 1155
 - Notice to subagent, 1146
- Responsibility of agent for acts of subagent** 981
 - Appointment by principal, 982
 - Brokers, 982
 - Commission merchants, 981
 - Employment of attorney, 982
 - General rule, 981
 - Master of ship, 982
 - Necessity or emergency, 982
 - No authority to appoint, 982

Agency, cont'd.

- Public officers, 982
- Responsibility of agent for acts of principal:**
 - Agent for sale of land, 981
- Responsibility of principal for acts of sub-agent, 980**
 - Agents of independent contractors, 981
 - Authority to appoint implied from nature of agency, 981
 - General rule, 980
 - Insurance agents, 981
- Responsibility of subagent, 983**
 - Collection of money, 983
 - To agent, 983
 - To principal, 983
- Revocation of authority, 1220
- Rights of subagent, 984**
 - Against agent, 985
 - Against principal, 984
 - Compensation, 984
 - Employing surgical aid, 984
 - Insurance companies, 984
 - Lien, 984
- Purchase by agent, 1085
- Termination, 950, 1215**
 - Accomplishment of purpose, 1229
 - Agreement for term, if satisfactory, 1216
 - Authority to find purchasers, 1230
 - Authority to purchase, 1230
 - Bankruptcy of either party, 1227
 - By act of parties, 1215
 - By operation of law, 1222**
 - Agency coupled with an interest, 1223
 - Death of client, 1223
 - Death of one joint principal, 1223
 - Death of principal, 1222
 - Confiscation of property of principal, 1229
 - Death of agent, 1226
 - Death of principal:**
 - Acts done *bona fide* without notice of principal's death, 1224
 - Agent's liability as trustee, 1226
 - Exception to rule as to authority coupled with interest, 1224
 - Liability of agent for acts done after principal's death, 1225
 - Payment to or purchase by agent after principal's death, 1225
 - Whether instantaneous revocation, 1225
 - In accordance with agreement, 1215
- Insanity:**
 - Estoppel to set up, 1227
 - Of either party, 1226
- Lapse of time, 1229
- Marriage of *feme sole*, 1228
- Mere stipulation as to compensation per year or month, etc., 1216
- Renunciation by agent, 1222**
 - Implied, 1222
 - In general, 1222
 - On account of misconduct of principal, 1222
 - Rights of principal, 1222
 - When agent renouncing is liable to principal, 1222
- Revocation by principal, 1216**
 - Agency when coupled with an interest:**
 - Advances by a factor, 1219
 - Agency for protection of party authorized, 1218

Agency, cont'd.

- Authority executed wholly or in part, 1217
- Authority to collect a debt upon commission, 1218
- Authority to sell on commission, 1218
- Warrant of attorney to confess a judgment, 1218
- What constitutes authority coupled with an interest, 1217
- Whether revocable, 1217
- Agent to pay debts, 1216
- Agent to purchase, 1216
- Agent to sell, 1216
- Expenses incurred by agent before revocation, 1217
- How effected, 1219**
 - Appointment of another agent, 1219
 - Subagents, 1220
 - Where authority is in writing, 1219
 - Where authority is under seal, 1219
- In general, 1216
- Revocation after sale effected by agent, 1217
- Stipulation against revocation, 1217
- When effective, 1220**
 - Notice of revocation, 1220**
 - As to agent, 1220
 - As to third parties, 1220
 - Constructive notice, 1221
 - Constructive notice a question of law or fact, 1222
 - Effect of revocation and notice, 1222
 - Payment to agent without notice, 1221
 - Revocation by letter, 1220
 - Statutes requiring record of revocation, 1221
- War:**
 - Agencies to collect and preserve property, 1229
 - Assent of parties necessary to continuance, 1229
 - Certain agencies not revoked, 1228
 - Time of creation of such agency, 1229
- Torts (see also *infra*, LIABILITY OF AGENT TO THIRD PARTIES; LIABILITY OF PRINCIPAL TO THIRD PARTIES; LIABILITY OF THIRD PARTIES TO PRINCIPAL):**
 - Distinction between ratification of contracts and torts, 1214
 - Effect of ratification, 1214
 - Ratification of torts, 1185
- Trover and conversion, 1135**
 - Liability of agent, 1133
- Ultra vires:**
 - Ratification, 1182
- Undisclosed principal, see infra*, LIABILITY OF PRINCIPAL TO THIRD PARTIES; LIABILITY OF THIRD PARTIES TO PRINCIPAL.
- Unremunerated agent, 1060**
 - Diligence and skill, 1070
- Usages and customs:**
 - Agent to buy and agent to sell, 1076
 - Agent to receive payment, 1079
 - Amount of remuneration, 1116
 - Authority as affected by, 996
 - Construction of authority, 997, 1001
 - Credit authorized by, 1014

Agency, cont'd.

Power of agent to sell; to receive payment, 1016
Stockbroker purchasing from himself, 1077

Usury:

Liability of principal, 1152
Principal not responsible for usury of agent, 1035
Ratification of usurious contracts, 1185, 1193

Wager contracts:

Action by agent, 1163
Principal's right to recover for money lost, 1177

War:

Effect of, 1228

Warrant of attorney, 942

Warranty:

Authority of agent, 1012
Power of agent to sell personal property, 1014
Ratification, 1191

When principal is bound, see infra, GENERAL AND SPECIAL AGENCIES.

Witnesses:

Competency of principal and agent as witnesses, 969

ALIENATION, see ADVERSE POSSESSION.

ALIENS:

Agency, 942, 943, 945, 1229

ALLUVION, see ACCRETION.

A. M., 99

AMENDMENTS, see ACKNOWLEDGMENTS.

ANCIENT LIGHTS, 246

AND, 98

ANIMALS:

Abatement of nuisances: killing dangerous animals, 82, 84
Accident, 274

ANNUITIES (see also ABATEMENT OF LEGACIES):

Accident (in equity), 282

ANSWER:

Affidavit, 911

ANSWERS:

Admissions, 704

APPEARANCE BY ATTORNEY:

Infants, 941

APPOINTMENT OF AGENTS, see AGENCY.

APPORTIONMENT:

Accretions, 477

APPRENTICESHIP:

Accident (in equity), 282

ARBITRATION AND AWARD:

Abide, 184

Accident insurance, 327

Provisions of the policy, 327
When submission a condition precedent, 327

When submission not a condition precedent, 327

Accounts of arbitrators, 437

Agency, authority of agent to settle to submit to arbitration, 1031

Delegation of arbitrator's authority, 976

Scientific and technical matters, 977

Delegating part of matter submitted, 977

Examples, 976, 977

Ministerial duties, 977

Arbitration, etc., cont'd.

Rule stated, 976

ARREST:

Absconding debtors, 202
Breaking open doors: affray, 918
By private person: affray, 917

ARSON:

Adjoining, 637

AS:

As aforesaid, 919
As soon as possible, 324

ASPHYXIATION:

Accident insurance, 315

ASSAULT AND BATTERY:

Accessories, 261
Accident, 274
Accord and satisfaction, 410
Affray distinguished from, 917
Agency, liability of principal, 1153

ASSAULT WITH INTENT TO COMMIT RAPE:

Accessories, 261

ASSIGNMENT FOR THE BENEFIT OF CREDITORS:

Admissions of assignor, 689

ATTACHMENT, 201

About, 197
Abscond, 201
Absconding debtor, 201
Absent, 203
Action, 579

Agency:

Agent to receive payment, 1030
Seizure of principal's property under attachment against agent, 1175

ATTEMPTS:

Abortion, 193
Attempt defined, 193
Effect of failure, 193
Whether punishable, 193

ATTORNEY AND CLIENT (see also ADVICE OF COUNSEL):

Acting for both parties, 1074
Admissions by attorney, see ADMISSIONS.
Agency: authority of collecting agent to employ counsel, 1029
Appearance: infants, 941
Delegation of attorney's authority, 978
Liability for unskilful treatment, 1065
Notice to attorney as notice to client, 1144, 1151

Privileged communications:

Advice of counsel a privileged communication, 897

Advice of counsel as a defense, 897

Contempt, 898

Advice no justification, 898

Contempt not wilful or defiant, 898

General rule, 898

Qualifications of the rule, 898

Criminal actions, 897

In actions generally, 897

To clients generally, 897

Violation of law, 897

In general, 897

Reason of the rule, 897

Waiver by client, 897

Responsibility for subagents: attorney employed, 982

ATTORNMENT:

Adverse possession, 838

AUCTIONS AND AUCTIONEERS:

Agent purchasing for himself, 1079
Delegation of authority, 979

AUTHORITY, see **AGENCY**.

AUTHORITY TO EXECUTE SEALED INSTRUMENTS:

Corporations, 952

AVULSION, 471**BANKRUPTCY:**

Admissions: declarations of a bankrupt against assignee, 686

Agency: determination, 1227

BANKS AND BANKING:

Accounts: failure to object to pass-book when written up, 449

Agency: implied appointment of agent, 963

Bank accounts (see also **ACCOUNTS**), 436

Bank-books: effect of depositor's failure to object to pass-book, when written up, 449

Bills and notes, 1049

Bank as drawer or acceptor, 1049

Bill or note payable to cashier, 1049

Paper indorsed by cashier, 1049

Whether cashier personally liable, 1049

Cashier: accommodation paper, 349

Delegation of authority, 979, 980

Liability of bankers for negligence, 1065

Notice to cashier, 1148

Special deposit: liability of bank for theft by officer, 1159

Distinguished from abandonment, 2

BARTER:

Distinguished from abandonment, 2

BENEFICIAL OR BENEVOLENT SOCIETIES:

Agents, 328

Power to limit right of members to sue, 327

BILL, 575**BILLS AND NOTES** (see also **ACCOMMODATION PAPER**):

Accident (in equity), 282

Admissions:

Admissions of former holder, 685

Admissions of payee of note after parting with his interest, 688

Joint makers of promissory notes, 705

Agency, 956

Acceptance of forged bill, 1186

Action by agent where negotiable instrument is indorsed in blank to agent for collection, 1164

Action by agent where note is payable to agent of association or corporation, 1164

Action by agent where paper is payable to himself, 1163

Agency by undisclosed principal, 1171

Agent to draw and indorse negotiable instruments, 1032

Accommodation paper, 1034

Amount of instrument must be pursuant to authority, 1034

Authority strictly pursued, 1033

Express power, 1032

How authority is shown, 1032

Illustrations of implied power, 1032

Implied from duties to be performed, 1032

Implied power, 1032

Bills, etc., cont'd.

Must be for benefit of principal, 1034

Parol evidence, 1032

Provisions as to date of maturity, 1034

Sealed instrument, 1032

Subject to strict interpretation, 1033

Agent to manage business executing bills and notes, 1025

Authority of agent to sue in his own name, 1030

Delegation of authority, 973

Implied power to execute negotiable notes by agent to purchase, 1022

In whose name they should be executed, 1042

Liability of undisclosed principal, 1140

Parol evidence, 1052

Action between original parties, 1052

Action by *bona fide* holder, 1054

Inadmissibility, 1053

Instrument not indicating principal, 1053

Parties affected with notice, 1053

To discharge agent, 1053

When admissible, 1052

When parol evidence admitted, 1054

Payment by, 1027

Ratification, 1201

Banks and banking, 1049

Bank as drawer or acceptor, 1049

Bill or note payable to cashier, 1049

Paper indorsed by cashier, 1049

Whether cashier personally liable, 1049

Delegation of authority, 978, 979

Officers of private corporations:

Corporate seal, 1047

What paper is paper of corporation, 1042

When signature binds officer, 1043

Payment by, 1027, 416

Payment by note of debtor for less sum than amount of it, 416

Payment of a debt by note of third party for less sum, 417

Public officers: proving the liability of officers, 1056

BILLS OF LADING:

Agency: action by agent, 1164

BK., 97**BONA FIDE HOLDER**, see **ACCOMMODATION PAPER**.**BOOK ACCOUNTS**, see **ACCOUNTS**.**BOOKS AS EVIDENCE:**

Abortion, 194

BOTTOMRY:

Admiralty jurisdiction, 661

Bottomry bonds, 5

BOUNDARIES:

Accident (in equity), 282

Admissions, 683

Adverse possession:

Extent of possession where there are overlapping boundaries, 871

Both parties in possession of part of overlap, 871

Both parties in possession outside of overlap, 871

Constructive possession follows title, 871

Pennsylvania doctrine as to conflicting surveys, 873

Possession by holder of inferior title

Boundaries, cont'd.

- inside and by owner outside of overlap, 872
- Possession of overlap by claimant under colorable title, 872
- Possession outside of overlap by claimant under colorable title, 873
- Subsequent entry by owner, 873
- Where owner does not have possession, 872
- Where owner has possession, 871
- Notice, 834

BR., 97**BRIBERY:**

- Accomplices, 391

BROKERS:

- Acting for both parties, 966
- Action by principal, 1170
- Agency, 982
- Delegation of broker's authority, 978
- Subagents, 981

BUILDING CONTRACTS:

- Admiralty jurisdiction, 663
- Building materials and supplies, 664
- Contract for machinery of a vessel, 664
- Contract to repair on land, 664
- Liens created by local law, 664
- Repairs and necessities, 664
- Whether contracts for buildings are maritime, 663

BURDEN OF PROOF:

- Abortion, 195
- As to necessity of abortion, 195
- As to the advice of physician, 195

Accident insurance:

- Voluntary exposure, 308

Accommodation paper:

- Bona fide holder, 368**
 - Effect of evidence of accommodation, 368
 - Notice of restrictions, 369
 - Paper diverted of its proper use, 369
 - Paper fraudulently circulated, 369
 - Presumption that holder is a *bona fide* holder for value, 368
- Consent of parties, 346

Accounts: impeachment, 460, 461**Acknowledgments: to impeach certificate, 561****Act of God: carriers of goods, 597****Adverse possession, 887****Ouster, 887****To prove the adverse possession, 887****Affray, 916****Agency:**

- Agent making contract without authority, 1129
- Appointment, 968

BURGLARY:**Adjoining, 636****BUTTER:****Adulteration, 740****CANALS:**

- Admiralty jurisdiction, 651
- Vessel: whether canal boat is, 655

CARRIERS OF GOODS:

- Act of God, 592
- Act of God not proximate cause of loss, 594
- Act of God one of several causes, 595
- Burden of proof, 597

Carriers, etc., cont'd.

- Contracts of carriers and contracts in general, 599
- Excuse for delay in delivery, 599
- Freezing of canal, 599
- Implied undertaking to deliver within reasonable time, 598
- Upon carrier, 597
- Upon contracts to perform certain stipulated acts, 599
- Whether carrier must show absence of negligence, 597
- Delay of carrier, 596
- Freezing of goods in transit, 593
- Liability as insurers, 592
- Loss wholly independent of carrier's fault, 597
- Negligence of carrier as a co-operative cause, 595
- Unseaworthy vessel, 596
- When act of God remote or indirect cause, 594
- Limiting liability: authority of agent to ship, 1034

C. B. & Q. R. R. CO., 98**CERTIORARI:**

- Action, 579

CHANGE OF VENUE:

- Adjoining, 636

CHARGE, 481**CHARTER PARTY:**

- Admiralty jurisdiction, 662

CHASTITY, see ABDUCTION.**CHATTEL MORTGAGES:**

- Accession, 254**
 - Articles in incomplete state, 254
 - Lien upon increment of property mortgaged, 254
 - Live stock, 254
 - Plants and shrubs, 254
- Acknowledgments, 491
- Admiralty jurisdiction, 664

Agency:

- Wrongful mortgage by agent, 1174

CHECKS:

- Agency:**
 - Payment by, 1027
 - Parol evidence, 345

CHILD:

- Whether it includes grandchild, 774

CHILDREN (see also ABDUCTION; ADOPTION OF CHILDREN):

- Abandon, 2

CITIZ., 97**CLAIM OF TITLE:**

- Distinguished from color of title, 846

CLERKS:

- Acknowledgments, 500
- Agency: implied authority of clerks, 963
- Clerks of court: delegation of authority, 974

CO., 98**COLLECTIONS, see AGENCY.****COLLISIONS:**

- Act of God, 586

COLOR OF TITLE, see ADVERSE POSSESSION.**COM., 98****COMMISSION MERCHANTS AND FACTORS:**

- Action:**
 - Action by principal, 1170
 - Advances, 759
 - Agent employed, 981

Commission, etc., cont'd.

- Delegation of factor's authority, 978
- Liability for negligence, 1065
- Liability for selling under price, 1067
- Revocation of authority where factor has made advances, 1219

COMMITTEES:

- Delegation of authority, 974

COMPROMISE:**Admissions:**

- Admissibility of admissions made with a view to a compromise, 714
- Admissions of independent facts, 716
- Confidence, 715
- In general, 714
- Negotiations to effect compromise must appear, 715
- Offers of money to buy peace, 714
- Reason for the rule, 714
- Without prejudice, 715

- Agency: acceptance of fruits of compromise as ratification by principal, 1201

COMPUTATION OF TIME:

- After, 923

CONDITIONS, see ACT OF GOD.**CONFESSION OF JUDGMENT:**

- Agency: married women, 942

CONFESSIONS:

- Accessory, 269
- Admissions distinguished from, 670
- Adultery, 756

CONFINEMENT:

- Actual confinement, 601

CONFLICT OF LAWS:

- Accommodation paper: place of the contract, 342

- Acknowledgments, 504

- Adoption, 733

CONFUSION OF GOODS:**Agency:**

- Agent commingling principal's property with his own, 1039
- Bank deposits, 1090
- How principal's funds should be deposited, 1090
- Loss by theft, 1090

CONSENT (see also ADOPTION OF CHILDREN):

- Adultery, 752

- Affray, 917

CONSPIRACY:**Admissions:**

- Admissibility of admissions of co-conspirators, 711
- Foundation must be laid before admissions receivable, 713
- In general, 711
- Made after completion of abandonment of enterprise, 712
- Made during the pendency of unlawful enterprise, 711
- Made in the absence of the other conspirators, 712
- Not competent against one when made before his connection with enterprise, 712
- What is a sufficient foundation, 713
- When receivable before *prima facie* case established, 713

CONSTITUTIONAL LAW:

- Adoption of children, 727

CONSTRUCTION:

- Agent's authority, see AGENCY.*

CONSULS AND AMBASSADORS:

- Admiralty jurisdiction, 654
- Differences adjusted by consul, 654
- Protest of consul, 654

CONTEMPT:

- Action, 579
- Advice of counsel: liability of attorney for giving improper advice, 896

CONTESTED ELECTION:

- Action, 580

CONTRACTORS:

- Admissions: joint contractor, 705
- Whether agents, 949

CONTRACTS, see ACT OF GOD; AGENCY.**CONTRIBUTION:****Accommodation paper:**

- Successive accommodation parties, 357
- Accommodation indorser and surety maker, 360
- Agreement for contribution, 357
- California doctrine, 360
- Circumstances showing joint liability, 358
- Georgia doctrine, 360
- North Carolina doctrine, 359
- Ohio doctrine, 359
- Parol evidence to prove agreement, 358
- Vermont doctrine, 360
- When not entitled to, 358
- Whether entitled to, 357

CORONERS:

- Absence of coroner, 205

CORPORATIONS:**Accommodation paper:**

- Bona fide* purchaser, 349
- Cashier of bank, 349
- Implied power to execute, 348
- In violation of express statute, 349
- Notice of accommodation character, 349

Acknowledgments, 510

- Acknowledgment as act of corporation, 511
- Acknowledgment by officer as his own act, 511
- Articles of incorporation, 512
- Attorney for corporation, 512
- Authority to make, 510
- By agents or employes, 693
- By officer affixing seal, 510
- By officers of corporation, 510
- Officers, 707

Agency:

- Appointment by corporation, 950
- Authority to execute sealed instruments, 952
- Delegation of authority, 966
- General rule as to power to appoint, 950
- Implied appointment, 952
- Seal, 951
- Vote of directors, 951
- Competency to be principal, 944
- In general, 945
- Member of corporation as agent, 945
- Modern doctrine, 945
- Delegation of authority:
 - Removal, 976
 - Liability for injury done by agents, 1154
 - Ratification, 1182

Corporations, cont'd.

Ignorance, 1191

Loan by agent of corporation, 1200

Liability for malicious acts, 1157

Notice to president, 1147

Notice to stockholder, 1148

Ratification: by silent acquiescence, 1207

COSTS:

Accommodation paper, 355

Accrued costs, 479

Actual cost, 602

COUNSEL, see **ADVICE OF COUNSEL**.**COUNTY:**

County aforesaid, 919

COUNTY AFFAIRS, 908**COURT:***As to payment of money into court*, see **PAYMENT**.**COURTESY:**

Adverse possession, 808

COURTS OF ADMIRALTY, see **ADMIRALTY JURISDICTION**.**COVENANT:**

Accord and satisfaction, 411

C. P. C. C., 99**CRIMINAL LAW** (see also **ABATEMENT OF NUISANCES**; **ABDUCTION**; **ABORTION**; **ACCESSORY**; **ACCOMPLICES**; **ADULTERY**; **AFRAY**; **AGE**; **FORGERY**):

Acting through innocent agent, 260

Agency: liability of principal for act of agent, 1161

CRIMINAL PROCEDURE, 580**CROPS:**

Accession, 255

Liens, 758

CROSSINGS:

Adequate crossings, 632

CULTIVATION, see **ADVERSE POSSESSION**.**CURRENT ACCOUNTS**, see **ACCOUNTS**.**DAMAGES** (see also **ABDUCTION**):

Actual damages, 602

DEATH (see also **ACCOMMODATION PAPER**;**AGENCY**):

Absent, 205

Contracts, 590

DEATH BY WRONGFUL ACT:

Admiralty jurisdiction, 658

In absence of federal or state legislation, 658

In Alaska, 659

In England, 659

Libel, 659

Lien, 659

Where there are state statutes, 659

DEC., 99**DECEIT:**

Agency: liability of principal, 1159

DECLARATIONS (see also **ADMISSIONS**):

Advancements, 776

Adverse possession, 798, 891

Agent to receive payment, 1030

DEDICATION:

Actual dedication, 602

DEEDS (see also **ACKNOWLEDGMENTS**):

Abbreviations, 100

Agency:

Manner of execution, 1035

When agent bound, 1041

DE FACTO OFFICERS:

Acknowledgments, 495

DELEGATION OF AUTHORITY, see **AGENCY**.**DELIVERY:**

Actual delivery, 602

DEMAND:**Agency:**

Denied or repudiated by agent, 1093

Limitation of the rule, 1092

Necessity of demand, 1091

When not necessary, 1092

DE MINIMIS NON CURAT LEX:

Accretion, 476

DEMONSTRATIVE LEGACIES, see **ABATEMENT OF LEGACIES**.**DEMURRAGE:**

Admiralty jurisdiction, 661

DEPOSITIONS:

Admissions, 720

Affidavit distinguished from, 910

DEPUTIES:

Acknowledgments, 496

DESCENT BY DISTRIBUTION, see **ADVANCEMENTS**.**DESERTION**, 2**DETECTIVES:**

Malicious prosecution: advice of detectives as a defense, 905

DETERMINATION:

Actual determination, 602

DIRECTORS:

Liability for misconduct, 1133

Notice to director as notice to corporation, 1148

DISCLAIMER:

Adverse possession, 798, 810, 813, 815, 834

DISCRETION:

Abuse of discretion, 222

DIVORCE:

Acknowledgments: separate examination, 521

Adultery by divorced persons, 750

DOGS:

Killing dogs, 82

DOLLS, 98**DOWER:**

Advancements, 782

Adverse possession, 808, 821

DRAINS AND SEWERS:

Abutter's rights, 241

DRUNKARDS:

Agency, 940

DRUNKENNESS:

Accident insurance, 318

DURESS:

Accomplices, 391

Accounts, 436, 445, 446

Admissions, 715

DYING DECLARATIONS:

Abortion, 193

Advancements, 777

"E. AND O. E.", 452**EASEMENTS:**

Adverse possession, 875

EJECTMENT:

Adverse possession, 884

As a bar to, 884

Right of adverse claimant to maintain ejectment, 886

ELECTRIC RAILROADS:

Abutting owners: obstructing access, 227

ELEVATED RAILROADS:

Light and air, 229

EMBEZZLEMENT:

Abstracting, 209

EMINENT DOMAIN:

Abutting owners, 226, 229

Compensation for obstruction of right of access, 226

Compensation for indirect impairment in value by public improvements, 231

Common-law rule, 231

Damages allowed under constitutions or statutes, 233

Deprivation of possession, 231

Impairment of usefulness and value, 231

Negligent and unskilful work, 232

Lateral and subjacent support, 229

Obstruction by electric railroads, 227

Obstruction by horse railroads, 228

Obstruction by pipe-lines, 228

Obstruction by steam railroad, 227

Obstruction by telegraph and telephone poles, 228

Action, 580

ENCLOSURE, see **ADVERSE POSSESSION**.**ENGAGED:**

Actually engaged, 603

ENTICING AWAY, see **ABDUCTION**.**EQUITY**, see **ACCIDENT IN EQUITY**.**ERROR, WRIT OF:**

Accord and satisfaction, 412

Action, 583

ESTOPPEL:

Accident insurance:

Denying payment of premiums:

By acknowledgment of payment in policy, 290

By language of policy, 290

Accounts, 458

Acknowledgments: married women, 521, 559

Adverse possession: vendor and purchaser, 800

Agency, 960, 965

Acceptance of forged bill, 1186

Principal estopped to deny deed, 1212

EVENT:

Abide the event, 184

EVIDENCE (see also **ABORTION**; **ABDUCTION**; **ACCESSORY**; **ACCIDENT INSURANCE**; **ACKNOWLEDGMENTS**; **ADMISSIONS**; **ADULTERY**; **AGENCY**; **BURDEN OF PROOF**; **QUESTIONS OF LAW AND FACT**):*Abstract of title as*, see **ABSTRACT OF TITLE**.**EX. A.**, 98**EXCAVATIONS**, see **ABUTTING OWNERS**.**EXECUTION:**

Action, 578

Seizure of principal's property under execution against agent, 1175

EXECUTORS AND ADMINISTRATORS:

Accord and satisfaction, 410

Accounts stated, 438

Admissions, 707

Admissions of executors and administrators, 679

Admissions of former administrator, 682

Surviving promisor and executor of co-promisor, 706

Advancements, 782

Executors, etc., cont'd.

Adverse possession: tacking, 843

Delegation of representative's authority, 977

EXEMPLARY DAMAGES:

Abduction, 171, 172

EXPENSES:

Actual expenses, 603

EXPERT AND OPINION EVIDENCE:

Agency, 1116

EXPLOSIONS:

Accident, 274

EXTERNAL, 295**FALSE IMPRISONMENT:**

Accord and satisfaction, 410

FALSE REPRESENTATIONS:

Agency: liability of agent for false representations of agency, 1136

FEBY., 99**FENCES**, see **ADVERSE POSSESSION**.**FIRE INSURANCE:**

Absolute interest, 206

Duty of agent to insure, 1068

Agent's liability, 1068

Examples, 1068

Instructions to insure, 1068

Insurance imperfectly made, 1069

In the absence of instructions, 1068

FIRES:

Accident, 275

FIXTURES, see **ACCESSION**.**FLOODS:**

Act of God, 585

FOOD, see **ADULTERATION**.**FORCE:**

Actual force, 603

FOREIGN ATTACHMENT:

Action, 580

FORFEITURES AND PENALTIES, see **ACCIDENT (IN EQUITY)**.**FORGERY:**

Accountable receipt, 432

Acquittance, 572

Agency:

Acceptance of forged bill, 1186

Estoppel, 1186

Estoppel to set up forgery, 1186

Invalidity of promise to pay forged paper, 1186

Whether doctrine of ratification applicable to, 1185

Bill of parcels, 572

Clearance, 572

Receipt, 573

Script, 572

FORM:

Against the form of the statute, 925

FORNICATION:

Adultery, 748, 750

FRAUD:

Accounts, 436

Impeachment, 460

Surcharging and falsifying, 464

Actual fraud, 603

Adoption of children, 736

Agency:

Compensation of agent, 1102

Liability of agent, 1135

Liability of principal to third parties, 1158

Ratification of contracts tainted with fraud, 1184

Fraud, cont'd.

Rescission, 430

FRAUDS, STATUTE OF:

Accommodation paper, 344

Bank checks, 345

Verbal promise to indorse or accept, 344

Written acceptance or indorsement for accommodation, 345

Accord and satisfaction, 411, 428

Accounts, 442

Agency:

Agent to purchase lands, 1083

Agreement by agent to advance money 1084

Illustrations, 1084

Principal furnishing funds after the purchase, 1084

Principal showing by parol that purchase was made for his benefit, 1083

When ejectment lies, 1085

When principal supplies no part of the purchase money, 1084

Where principal has present interest in the lands, 1084

Liability of principal to third parties, 1140

Charging undisclosed principal on written contract, 1140

FRAUDULENT CONVEYANCES:

Accommodation paper, 350

Agency, 1174

GAMBLING CONTRACTS:

Agency, 972

Principal's right to recover for money lost, 1177

GAMING:

Accomplices, 392

GENERAL LEGACIES, see **ABATEMENT OF LEGACIES**.

GENERAL REPUTATION:

Adverse possession, 892

GIFTS (see also **ADVANCEMENTS**):

Distinguished from abandonment, 2

GOVERNOR:

Absence of governor, 205

GRANDCHILD:

Whether included under the term child, 774

GRANDCHILDREN, see **ADVANCEMENTS**.

GUARDIAN:

Abduction of ward, 168

GUARDIAN AND WARD:

Admissions of guardian, 678

HABEAS CORPUS:

Abduction, 165, 167

Action, 580

HARBORING, 268

HARBORING WIFE, see **ABDUCTION**.

HIGH SEAS:

Admiralty jurisdiction, 649

Penal statutes, 668

HIGHWAYS:

Abutter's rights, 236

Construction of underground passage-way, 243

Drover's rights and liabilities, 239

Extent of abutter's rights in rural roads, 242

Fencing up part of highway, 243

Grass, 242

Herbage, 242

Highways, cont'd.

How rights are protected, 243

Hunting on highway, 238

Minerals, 242

Pipe lines, 239

Poles, 240

Private railroad, 242

Public have only easement of passage, 238

Restriction upon rights of public, 236

Rights of rural abutter at common law, 237

Rural abutter as proprietor, 237

Rural and urban highways distinguished, 236

Sewers, 241

Soil of highway, 242

Steam railroads, 241

Trees, 242

Where abutter owns fee, 243

Adverse possession, 880

Abandoned highway, 881

As against municipality, 880

As against private owner, 880

Equitable estoppel, 882

Partial encroachment, 881

Public nuisance, 881

Where the possession is not adverse, 881

Hunting on, 238

Minerals, 242

Obstructions on, 72

Trees, 242

HOMICIDE:

Administering poison, 642

HORSES:

Accident, 275

HOTCHPOT:

Advancements, 785

Refusing to bring property into hotchpot, 786

HOUSES OF ILL-FAME:

Abatement of nuisances, 93, 96

Accessories, 262

HUSBAND AND WIFE (see also **ABDUCTION**; **ACKNOWLEDGMENTS**; **ADMISSIONS**; **ADVANCEMENTS**; **AGENCY**):

Accounts stated, 438

Adoption of children, 732

Adverse possession, 820

As between husband and wife, 820

As to third parties, 821

Dower of wife, 821

Examples, 820, 821

Tacking, 843

ICE AND SNOW:

Accident, 275

IGNORANCE, see **MISTAKE**.

IGNORANCE OF LAW:

Adultery, 751

ILLEGAL CONTRACTS:

Agency, 971

Reimbursement for losses, 1118

Lobbying contracts, 1114

Remuneration, 1114

IMMEDIATE, 323

IMPERCEPTIBLE INCREASE, 466

IND., 98

INDORSEMENT, see **ACCOMMODATION PAPER**.

INEVITABLE ACCIDENT, 587

INFAMY:

Accomplices, 394

INFANTS (see also ABDUCTION; ADOPTION OF CHILDREN; AGE):

Accounts stated, 438

Agency:

As principal, 940

Appearance by attorney, 941

Delivery by agent, 941

Infant partner, 940

Infant's acts by agent held valid, 942

Parent acting for infant, 941

Power of attorney made by infant, 941

Power to appoint an agent, 940

Prejudicial and beneficial agents, 941

Warrant of attorney by infant and another, 942

Infant as agent, 945

Ratification, 1174

Partnership, 940

Power of attorney, 941

Warrant of attorney, 941

INJUNCTION (see also ABATEMENT OF NUISANCES):

Abutting owners: obstruction to access, 228

INSANITY (see also ACCIDENT INSURANCE):

Agency:

Insanity of agent, 1227, 945

Insanity of principal, 1226, 940

INSOLVENCY:

Agency: termination, 1227

INSURANCE (see also ACCIDENT INSURANCE):

Agency:

Agent's duty to insure, see AGENCY.

Appointment: evidence, 968

INSURANCE AGENTS:

Action by agent on contract, 1164

Action by company on contract of agent, 1169

Agent acting for both parties, 966

Notice to agent as notice to company, 1147

Rights of, 984

Officers and agents of private corporations, 984

Surgical aid, 984

Subagents, 981

INT., 98

INTENT (see also ADULTERY; ADVERSE POSSESSION):

Abandon, 2

Accomplices, 391

INTENTION:

Accident insurance, 294

INTEREST:

Absolute interest, 206

Accounts, 457

Advancements, 785

Agency, 1093

Liability, 1093

Misapplication, 1094

Neglect or refusal to pay after demand, 1094

Neglect to notify principal of collection, 1094

Neglect to pay when no demand is necessary, 1094

Retention of property for agent's indemnity, 1093

When agent receives interest, 1094

INTERPRETERS:

Acknowledgments, 519

Admissions, 702

INTESTACY, see ADVANCEMENTS.

INTOXICATING LIQUORS:

About, 197

Adulteration, 739

Afternoon, 924

Agency:

Liability of agent selling without license, 1133

Liability of principal, 1153

INTOXICATION, 319

INVENTION, 3

ISLANDS, see ACCRETION.

JOINT TENANTS AND TENANTS IN COMMON:

Admissions, 707

Adverse possession:

Tenants in common, 801

Actual ouster, 803

Claiming under deed to whole, 804

Conveyance by cotenant, 806

Entry and exclusive claim to the whole, 804

Evidence required, 804

Excluding entry, 804

Exclusive possession, 805

Exclusive possession and reception of rents and profits, 804

Mere reception of rents and profits, 804

Must be an ouster, 801

Notice to cotenant, 805

Notorious act of ouster, 802

Partition, 805

Payment of taxes accompanied by possession, 805

Purchase at tax sale, 804

Question of law or fact, 806

Refusal to pay over rents, 804

Rule in general, 801

Taking rents and profits and claiming land as his own, 804

What amounts to ouster, 803

Where no notice is given, 805

Agency: competency to be principal, 944

J. P., 99

JUDGE:

Absence of judge, 205

Acknowledgments, 500, 506

JUDGMENT:

Accord and satisfaction, 412, 414

Payment by note of third party for less sum than judgment debt. 417

After judgment, 923

JUDICIAL NOTICE (see also ABBREVIATIONS):

Acknowledgments:

Official character of officer giving certificate, 530

That certain courts are courts of record, 537

JURISDICTION (see also ADMIRALTY JURISDICTION):

Crime in two counties, 271

JUSTICE OF THE PEACE:

Absence of justice of the peace, 205

Acknowledgments, 500

Malicious prosecution: justice's advice as a defense, 504

KNOWLEDGE:

LA., 98

LACHES:

Distinguished from acquiescence, 570

LAKES AND PONDS:

Reliction, 474

LAND:

Abandonment of, 3

LANDLORD AND TENANT:**Adverse possession,** 810

Claimants under tenant, 811

Death of landlord, 810

Disclaimer, 810

Failure to pay rent, 811

Limitation of rule, 811

Possession of tenant the possession of landlord, 810

Purchase of tax title, 811

Repudiation of relationship, 810

Surrender of possession to landlord, 811

Tenant at will, 810

Tenant holding over, 811

Where owner must have cause of action, 811

Disclaimer, 810

Tax title: purchase of tax title by tenant, 811

LARD:

Adulteration, 740

LAW, 575

Against law, 926

LAW-BOOKS:

Abbreviations, 101, 161

LEASE:

Abandonment of, 3

Agency, 956

Ratification by acceptance of rents, 1200

Ratification of notice to quit under lease, 1194

Agent to lease, 1018

Agent leasing his own lands with those of principal, 1019

Implied powers to take lease, 1019

Lease for unauthorized period, 1019

Power to lease implied, 1018

Scope of powers, 1019

Under seal, 1018

LEGACIES AND DEVISES, see ABATEMENT OF LEGACIES; ADEMPMENT OF LEGACIES; ADVANCEMENTS.**LETTERS (see also ADDRESS OF LETTERS):****Admissions,** 671, 717, 772

Unanswered letters, 673

Where the original letter is answered, 673

Agency:

Retaining agent's letters as ratification, 1206

LIBEL AND SLANDER:

Advice of counsel as a defense, 899

LIEN:**Agency,** 1119**LIFE INSURANCE, see ACCIDENT INSURANCE.****LIMITATION OF ACTIONS:**

Abstract of title, 221

Accessory, 263

Admissions:

Admissions of partner, 709

LIVING IN ADULTERY, see ADULTERY.**LOBBYING CONTRACTS:****Agency,** 971**Remuneration,** 1114**LOST PAPERS:**

Abstract of title as evidence of lost deeds, 219

Lost Papers, cont'd.**Accident in equity,** 282

Lost records, 263

MAIL:

Accounts, 451

MALICE:**Agency: liability of agent,** 1135

Malice aforethought, 920

MALICIOUS PROSECUTION:**Acquittal,** 573**Advice of counsel:****As a defense,** 899

Advice must be given before prosecution, 903

Advice of detectives, 905

Advice of justice of the peace, 904

Advice of pettifogger, 904

Advice of police officer, 905

After-acquired knowledge not communicated to counsel, 903

Cases holding that advice establishes probable cause, 900

Cases holding that advice negatives malice, 900

Cases holding that advice of counsel is evidence both to establish probable cause and to negative malice, 901

Disclosure of facts by client, 900

Effect of advice as evidence, 906

Effect of advice as to costs, 907

General rule, 899

Good faith of client in acting upon advice, 906

Omission of material facts, 902

Qualifications of attorney, 903

Question of law or fact, 906

Reputation of attorney, 904

Requisites as to evidence of facts communicated, 903

Requisites as to the advice given, 903

Statement that plaintiff was liable to prosecution, 903

Where attorney entertains doubts, 906

Where attorney is personally interested in subject-matter, 905

Corporations, 1157

Detectives: advice as a defense, 905

Justice's advice as a defense, 904

MALPRACTICE:

Liability of physician, 1065

MANDAMUS:

Action, 580

MANSLAUGHTER:

Accident, 274

MANURE:

Accession, 255

MARINE INSURANCE (see also ABANDONMENT AND TOTAL LOSS):

Admiralty jurisdiction, 662

MARRIAGE (see also ABDUCTION):**Proof of marriage:***In prosecutions for adultery, see ADULTERY:*

Admissions, 676

MARRIAGE BROKAGE CONTRACTS:**Agency,** 972**MARRIED WOMEN (see also ACKNOWLEDGMENTS):**

Accommodation paper, 350

Accounts stated, 438

Agency:**As principal,** 942

Married, etc., cont'd.

- By common law, 942
- By statute, 942
- Confessing judgment, 942
- Conveyance of wife's lands, 942
- Wife's separate estate, 942
- Married women as agents, 946**
 - As agent for husband, 946
 - Illustrations, 946
 - In general, 946
 - Limitations of doctrine, 946
 - As agent for third parties, 947
 - Husband as wife's agent, 947

MARITIME CONTRACTS:

- Subject matter determines jurisdiction, 649

MARITIME LIENS:

- Admiralty jurisdiction, 648

MASTER AND SERVANT:

- Adulteration, 745
- Liability of master, 745
- Agency:**
 - Agent to employ, 1034
 - Implied authority of servant as agent, 963

Death, 591

MASTER IN CHANCERY:

- Acknowledgments, 502

MASTER OF VESSEL:

- Delegation of authority, 980
- Responsibility for subagents, 982

MEASURE OF DAMAGES (see also ABDUCTION):

- Agent making contract without authority, 1129

MEAT, 739**MECHANIC'S LIEN:**

- Action, 580
- Addition, 608
- Adulteration, 741

MILITARY LAW:

- Absent officers and soldiers, 205

MILK:**MINES AND MINING CLAIMS:**

- Adverse possession, 826, 874

MINES AND MINING COMPANIES:

- Highways, 242

MISCARRIAGE, see ABORTION.**MISCEGENATION, 757**

- Constitutionality of statute, 757

MISDEMEANORS:

- Accessories, 261, 262

MISFEASANCE:

- Nonfeasance distinguished from, 1131

MISTAKE (see also ACCESSION):

- Accident distinguished from, 278
- Accord and satisfaction, 428
- Accounts:**
 - Impeachment, 460
 - Surcharging and falsifying, 464
- Adoption of children, 736
- Adultery, 751
- Agency:**
 - Compulsory payments, 1131
 - Liability of agent in doubtful matter of law, 1064
 - Money illegally received, 1131
 - Payment of money to agent by mistake, 1130
 - Undisclosed agency, 1130
- Partnership: impeachment, 460

MORTGAGES:

- Acknowledgments, 491

Mortgages, cont'd.

- Admissions: declarations of mortgagee, 682

Adverse possession:

- Between mortgagor and mortgagee, 815**
 - After foreclosure sale, 816
 - Disclaimer, 815
 - Possession by mortgagee, 817
 - Possession of grantee of mortgagor, 816
 - Possession of mortgagor, 815
 - Purchaser from trustee, 814
 - Recognition of mortgage, 817
- Possession must be open and notorious, 832

Agency:

- Agent to mortgage, 1017**
 - Agent mortgaging for his own benefit, 1017
 - Cancelled mortgage, 1018
 - Power to insert usual clauses, 1017
 - Redeemed from mortgage, 1018
 - When authority to mortgage not implied, 1018
- Authority of agent to manage business, 1024

MS., 99**MUNICIPAL CORPORATIONS:**

- Abatement of nuisances, 74**
 - Abatement without process of law, 87**
 - Appropriating private property, 94
 - Arbitrarily declaring that a thing is a nuisance, 89
 - Bowling-alley, 92
 - Cases of necessity, 92, 95
 - Conclusiveness of state's determination that a thing is a nuisance, 88
 - Declaring the keeping of bees a nuisance, 90
 - Destruction of buildings, 96
 - Destruction of property, 93
 - Extent of municipal control, 89
 - Fire limits, 92
 - Houses of ill-fame, 93, 96
 - How power conferred, 87
 - Injunction to restrain city, 92
 - Liability of municipality, 95
 - Method of abatement, 93
 - Necessary means, 93
 - Neglect in matter of nuisances, 95
 - Notice, 94
 - Nuisances *per se*, 92
 - Offensive odors and gases, 93
 - Order of removal, 95
 - Ordinance arbitrarily declaring a thing to be a nuisance, 90
 - Power to be reasonably exercised, 96
 - Public health and safety, 91
 - Service of order of removal, 95
 - Source of power, 87
 - Summary abatement, 93
 - Suppression of use, 96
 - Use authorized by common law or statute, 90
 - When power to abate implied, 87
 - Where fact of nuisance is evident, 96
 - Wooden buildings within certain limits, 92
 - Criminal proceedings, 77
- Adverse possession, 878**
 - Adverse user of abandoned highway, 881

Municipal, etc., cont'd.

- Cases holding that title can be acquired against municipality, 878
- Cases holding that title cannot be acquired against municipality, 880
- Equitable estoppel, 882
- Highways, 878
- Land in private right, 882
- Navigable river, 881
- No encroachment on public road, 881
- No prescription for public nuisance, 881
- Parks, 878
- Property dedicated to public use, 878
- Public square, 879
- Streets, 878
- Where the possession is not adverse, 881

Officers and agents of municipal corporations:

- Delegation of authority, 975
- Common council, 975
- Examples, 975, 976
- Rule stated, 975
- Selectmen of town, 976

NAVIGABLE WATERS:

- Accretion, 468
- Act of 1845, 650
- Canals connecting navigable waters, 651
- Contract of affreightment, 652
- Early view, 649
- Ebb and flow of the tide, 649
- General rule as to what are navigable waters, 649
- Genesee Chief case, 649, 650
- Great lakes, 650
- Internal rivers and waters, 651
- Low-water mark, 649
- Salvage, 651
- Waters navigable by vessels used in commerce, 649
- Waters navigable in fact, 651
- Waters wholly within a state, 651
- Whether jurisdiction dependent upon power of Congress to regulate commerce, 651

NECESSARY:

- Absolutely necessary, 209

NEGLIGENCE:

- Accident, 275
- Accident insurance, 294, 307, 308
- Want of due diligence, 310
- Contemplated risks, 310
- Due care in performing customary duties, 311
- Examples, 310, 311
- Express exception of incidental risk, 311
- Risks impliedly assumed, 310

- Act of God, 595

Agency:

- Compensation of negligent agent, 1101
- Liability of agents to third parties, 1134
- Liability of principal to third parties, 1155

NEGOTIABLE INSTRUMENTS, see ACCOMMODATION PAPER.

NONFEASANCE:

- Misfeasance distinguished from, 1133

NOTARIES PUBLIC:

- Acknowledgments (see, generally, ACKNOWLEDGMENTS), 500

- Liability for false certificate, 555

NOTICE (see also ACCIDENT INSURANCE; ADOPTION OF CHILDREN):

- Actual notice, 604

Notice, cont'd.

- Agency, see AGENCY.

- For notice of abandonment, see ABANDONMENT AND TOTAL LOSS.

NOVATION:

- Accord and satisfaction, 409

NOXIOUS THING, 189

N. P., 99

NUISANCES (see also ABATEMENT OF NUISANCES):

- Agency: liability of agent, 1134

OATH:

- Oath and affidavit, 909

OBSTRUCTIONS ON HIGHWAYS, 72

OCCUPANCY:

- Actual occupancy, 604

OCCUPATION, see ADVERSE POSSESSION.

OCCUPIED:

- Actually occupied, 604

OCCUR, 480

OCTB., 99

O. F. B. A., 97

OFFICERS OF CORPORATIONS:

- Admissions, 693, 707

Agency:

- Delegation of authority, 976
- Appointment and removal of agents, 976
- Calls, 976
- Dividends, 976
- General rule, 977
- Purchase of real estate, 976
- Purchase of stock, 976

- Liability of corporation for torts of officer, 1154

OFFICERS OF PRIVATE CORPORATIONS:

- Accounts, 437

Bills and notes:

- Corporate seal, 1047
- What paper is paper of corporation, 1042
- When signature binds officer, 1042
- Notice to officer as notice to corporation, 1144, 1148

- Notice to president, 1147

OLEOMARGARINE, 744

- Adulteration, 740

OPEN ACCOUNTS, see ACCOUNTS.

OUSTER:

- Actual ouster, 605

OVER, 574

OWING, 480

p. a., 98

PAPER, see ACCOMMODATION PAPER.

PARDON:

- Abatement of nuisances, 78

Accomplices:

- Right to pardon of accomplice testifying for prosecution, 406
- Approvement, 406
- Equitable right only, 407
- Immunity does not extend to other crimes, 407
- Implied promise, 406
- Proclamation promising a conditional pardon, 406
- Refusal of accomplice to testify before trial jury, 407
- Right of prosecuting officer, 406
- Statute holding out pardon, 406
- Where the pardoning power can act before conviction, 407

Pardon, cont'd.

Where the pardoning power cannot act before conviction, 407

Whether a bar to indictment, 407

PARENT AND CHILD (see also ADOPTION OF CHILDREN; ADVANCEMENTS):

Ademption of legacies, see ADEPTION OF LEGACIES:

As to the abduction of child, see ABDUCTION.

Adverse possession, 821

After child attains majority, 822

In general, 821

Where title is in child, 821

Widow, 821

Agency:

Parent as agent for infant, 941

Remuneration, 1099

In loco parentis:

Definition of the term, 615

What relationships included in the term, 615

PARKS AND SQUARES:

Adverse possession, 879

PAROL EVIDENCE (see also ABBREVIATIONS):

Accommodation paper, 343

Certificate, 551

Comakers, 343, 344

Conversation at and before acceptance, 343

One contracting as "principal," 344

Relation of comakers and parties successively liable distinguished, 344

To prove character of instrument, 343

To prove irregular indorsement, 343

To show agreement for contribution, 358

To show principal debtor, 344

To show who is the accommodation party, 343

When one party is principal and the other is surety, 343

Advancements, 776

Agency, 1051

Admissibility of parol evidence to discharge agent or charge principal, 1051

Ambiguous instrument, 1052

Appointment, 970

Bills and notes executed in agent's own name, 1052

Action between original parties, 1052

Action by *bona fide* holder, 1054

Inadmissibility, 1053

Instrument not indicating principal, 1053

Parties affected with notice, 1053

To discharge agent, 1053

When admissible, 1052

When parol evidence admitted, 1054

Construction of written authorities, 1001

General rule, 1051

Illustrations, 1051

Intention to contract as agent, 1054

Simple contracts, 1054

To charge undisclosed principal, 1055

To discharge agent who has contracted in his own name, 1055

To enable undisclosed principal to bring an action, 1055

To show that purchase of real estate was made for benefit of principal, 1083

PARTNERSHIP (see also ADMISSIONS):

Accommodation paper, 345

Partnership, cont'd.

Bona fide purchaser, 348

Burden of proof to show that all members of the firm consented to the act, 346

How consent proved, 347

Power of one partner to issue, 345

Accord and satisfaction, 427, 428

Accounts: impeachment, 460

Accounts stated, 439

Agency:

Agent of partnership, 958

Partner as agent of partnership, 958

Power of partnership to bind firm under seal, 959

Branch of the law of agency, 937

Competency of partnership to be principal:

Generally, 943

Implied power to appoint agents, 944

Dissolution by war, 943

Liability of partners where one partner purchases goods in his own name, 1140

Ratification, 1174

Whether one partner may execute an authority conferred on the partnership, 1057

Infants, 940

PASSENGERS, see ACCIDENT INSURANCE.

PAYMENT (see also AGENCY):

Accord and satisfaction, 409

Accounts stated as, 458

Admissions:

Payment of money into court, 719

Agency, 1143

Liability of agent, 1129

Money paid under mistake, 1178

Bills and notes:

Payment by note of debtor for less sum than amount of it, 416

Payment of a debt by note of third party for less sum, 417

Part payment as satisfaction, see ACCORD AND SATISFACTION.

Payment of money into court: admissions, 671

PENALTIES:

Accomplices, 405

Action, 580

Adulteration, 742

PERILS OF THE SEA:

Act of God distinguished from, 587

PERJURY:

Advice of counsel:

Whether a defense, 898

Where a question of law is involved, 898

Where the question is one of fact, 898

"PERSONALLY":

Acknowledgments, 545, 546

PEWS:

Absolute purchase of pew, 207

PHYSICIANS AND SURGEONS:

Liability for unskilful treatment, 1065

Liability where unremunerated, 1070

PILOTAGE:

Admiralty jurisdiction, 661, 662

PIPE LINES:

Abutting owner's rights, 239

Acquiescence of abutter, 240

Compensation to abutting owner, 239

Obstructing access, 228

Right of abutter to remove pipes, 239

PLEDGE AND COLLATERAL SECURITY:**Accommodation paper:**

- Whether pledgee is a bona fide holder, 365
- Alabama, 366
- Amount of recovery against accommodation acceptor or maker, 369
- For antecedent debt, 365
- New Hampshire, 366
- Of diverted paper, 366
- Paper procured by fraudulent representations, 367
- Payment of antecedent debt, 366

Agency: power of agent to sell, to pledge, 1004

PLEADINGS:

Admissions, 719

P. M., 99

POISON:

- Accident insurance, 314
- Administering poison, 642

POSSESSION (see also ADVERSE POSSESSION):

Actual change of possession, 601

POWER OF ATTORNEY:

Infants, 941

POWERS (see also AGENCY):

- Accident in equity, 281
- Charities, 281
- Creditors, 281
- Defective execution, 281
- Defects will be remedied in equity, 281
- Donee of the power, 281
- Husbands, 281
- Illegitimate children, 281
- Jurisdiction confined to powers created by private individuals, 281
- Nonexecution, 281
- Powers coupled with a trust, 281
- Purchasers, 281
- Relief forbade in equity, 281
- Remote relations, 281
- Strangers, 281
- To whom relief will be granted, 281
- Wives and legitimate children, 281
- Recording revocation of power, 1221

PRESCRIPTION, see ADVERSE POSSESSION.**PRESENTMENT, see ACCOMMODATION PAPER.****PRESUMPTIONS:**

Adverse possession, 888

PRINCIPAL, see ACCESSORY; ACCOMPLICE; AGENCY.**PRIVILEGED COMMUNICATIONS:****Attorney and client:**

- Advice of counsel a privileged communication, 897
- Advice of counsel as a defense, 897
- Contempt, 898
- Advice no justification, 898
- Contempt not wilful or defiant, 898
- General rule, 898
- Qualifications of the rule, 898
- Criminal actions, 897
- In actions generally, 897
- To clients generally, 897
- Violation of law, 897
- In general, 897
- Reason of the rule, 897
- Waiver by client, 897

PRIZE, see ADMIRALTY JURISDICTION.**PROBATE PROCEEDINGS:**

Action, 581

PROJECTIONS, see ABUTTING OWNERS.**PROVOCATION:**

Adequate provocation, 632

PROXIMATE AND REMOTE CAUSE:

Act of God, 595

PROXIMATE CAUSE, see ACCIDENT INSURANCE.**PUBLIC LANDS:**

Adverse possession, 875

PUBLIC OFFICERS:

Accounts, 438, 439

Admissions, 693

Bills and notes:

Proving the liability of officers, 1056

Delegation of authority, 973

Agent appointed by court to sell property, 975

Clerks of court, 974

Committees, 974

Discretionary powers, 974

General rule, 973

Sheriffs, 974

Writs, 974

Liability, 1056

Contracts under seal, 1056

For misfeasance, 1133

Negotiable instruments, 1056

Presumed to have contracted on principal's credit, 1056

Waiver of official immunity, 1057

Responsibility for subagents, 982

PUBLIC PLACE, 917**PURPRESTURE, 472****PURSUANCE, 430****QUARANTINE, see EXECUTORS AND ADMINISTRATORS.****QUARRIES:**

Adverse possession, 874

QUESTIONS OF LAW AND FACT (see also

ABANDONMENT AND TOTAL LOSS):

Abandon, 2

Accident insurance: reasonable time, 324

Accounts stated, 454

Adverse possession, 886

Actual possession, 827

Continuous possession, 837

Good faith, 869

Joint tenants and tenants in common, 806

Mixed question, 886

Ouster, 887

Sufficiency of enclosure, 829

What constitutes adverse possession, 886

Advice of counsel, 906

Agency:

Amount of remuneration where there is no express agreement, 1115

Appointment, 967

Construction of authority, 998

Diligence for the jury, 1068

Election to hold agent responsible, 1138

Extent of agent's authority, 986

Implied promise to remunerate agent, 1097

Ratification implied, 1195

Reasonable time for ratification, 1205

Whether agency is general or special, 986

Change of occupation, 303

QUICK WITH CHILD, 187

QUITCLAIM:

Adverse possession, 838

RAILROADS:**Abutting owners:**

Obstructing access to premises, 227

Accidents, 273

Admissions: employes of railroads, 697

Highways: compensation to abutting owner, 241

RAPE:

Abuse of woman or child, 222

REAL-ESTATE BROKERS:

Appointment: correspondence as to sale of real estate, 949

REAL PROPERTY (see also **ABSTRACT OF TITLE; ADVERSE POSSESSION**):

"About so much," 199

Accord and satisfaction, 409

Description of land:

Abbreviations, 100

About, 198

Executory contract of sale, 199

Whether in conveyances the term absolute carries a fee, 207

REASONABLE DOUBT:

Absolute certainty, 207

Absolute conviction, 207

Absolutely incompatible, 208

Accident insurance: injury while violating the law, 321

Accomplices, 393

REASONABLE SKILL AND DILIGENCE, see **AGENCY**.**REASONABLE TIME:**

Abstract of title, 214, 215

Accident insurance, 324

Accounts: retention of account, 451

Agency: ratification, 1205

RECEIPT:

Accord and satisfaction, 422

Part payment of liquidated debt or demand, 415

Accounts, 461

Admissions, 718

RECEIVE:

Accept distinguished from, 245

RECEIVING STOLEN GOODS:**Accomplices:**

Innocently concealing stolen property, 392

Whether receiver is an accomplice, 393

RECORD:

Actual record, 605

RECORDING ACTS:

Abstract of title, 212

Duty of officials to search records, 216

Acknowledgments, 485

Necessity of admitting deed to record, 485

Whether record is essential to admissions of deeds in evidence, 485

Whether recorded unacknowledged deed is notice, 490, 492

Revocation of power, 1221

Right of access to public records, 216

RELEASE:

Accord and satisfaction, 409

Part payment of liquidated debt or demand, 415

Agency:

Authority of agent to receive payment, 1028, 1030

Release, cont'd.

Joint parties, 427

Where less than the amount due is paid, 414

RELICITION, see **ACCRETION**.**REMAINDERS:****Adverse possession:**

Life tenant and remainderman, 807

After the life estate has fallen in, 809

As against the remainderman before life estate has fallen in, 807

Courtesy, 808

Grantee in fee of tenant for life, 809

Grantee of life tenant, 808

Life estate acquired by adverse possession, 809

Possession of widow, 808

Tacking, 843

REPAIRS, see **ABANDONMENT AND TOTAL LOSS**.**REPLEVIN:**

Action, 582

REPORTS:

Abbreviations, 101-161

REPRESENTATIONS:

Agency, 1143

Authority of agent, 1012

Liability of principal for misrepresentations of agent, 1159

RESCISSION:

Accord and satisfaction, 409

RES GESTÆ:

Abortion, 193

Admissibility in evidence, 193

Declaration to physician, 194

Exclamation indicating present pain, 194

Narrative of past transactions, 194

Accident insurance, 331

Admissions, 676

Advancements, 777

Adverse possession, 891

RESIDENCE:

Actual residence, 605

RESIDUARY LEGACIES, see **ABATEMENT OF LEGACIES**.**RESPONDENTIA:**

Admiralty jurisdiction, 661

RETROACTIVE STATUTES:**Acknowledgments:**

Curing defective acknowledgments, 566

Constitutionality of statutes, 567

How far retroactive, 566

RIGHT OF WAY:

Adverse possession, 875

RIOT:

Affray distinguished from, 915

RIPARIAN RIGHTS, see **ACCRETION**.**ROADBED**, 312**ROBBERY:**

Actual robbery, 603

SAIL:

About to sail, 197

SALES, AGENCY AS TO, see **AGENT TO SELL**.**SALVAGE** (see also **ABANDONMENT AND TOTAL LOSS**):

Admiralty jurisdiction, 661, 662

Waters within a state, 651

SATISFACTION, see **ACCORD AND SATISFACTION**.**SATISFACTORY:**

Agency, 1216

"SATISFIED":

Acknowledgments, 546

SCIRE FACIAS:

Action, 582

SEAL:**Agency:**Agent executing conveyances, 1011
Corporations, 951**Appointment:**

Authority to execute sealed instruments, 952

Early doctrine, 951

Modern doctrine, 951

Necessity, 951

Authority to execute sealed instruments, 952

SEAWEED:

Accretion, 467

SECRET TRUSTS:

Adverse possession, 813

SEDUCTION, see ABDUCTION.**SEIZIN:**

Actual seizin, 605

SEIZURE:

Actual seizure, 605

SELF-DEFENSE:

Affray, 916

SELL:

Meaning of the term, 1011

SEPARATE ESTATE OF MARRIED WOMEN:

Agency, 942

SERVICE:

Actual service, 605

SESSION:

Actually in session, 604

SET-OFF:

Accommodation paper, 373

Action, 582

SETTLER:

Actual settler, 606

SHERIFFS:

Delegation of authority, 974

SHIPS AND SHIPPING, see also ABANDONMENT AND TOTAL LOSS; ADMIRALTY JURISDICTION.**SILENCE:**

Admissions, 672

SNOW AND ICE:

Abutting owners: heaping snow in front of abutting premises, 226

SOLD:

Actually sold, 606

SPECIAL ASSESSMENTS:

Adjoining, 636

SPECIFIC LEGACIES, see ABATEMENT OF LEGACIES.**SPECIFIC PERFORMANCE:**

Advancements, 783

STATE:

Abatement of nuisances, 74

STATE LANDS:

Adverse possession, 876

STATUTES:

After passage of the act, 922

Against the form of the statute, 925

STEVEDORE:

Admiralty jurisdiction, 663

STOCK-BROKERS:

Delegation of authority, 979

Good faith, 1077

STOCKHOLDERS:

Admissions, 707

Notice to stockholder as notice to corporation, 1148

STOPPAGE IN TRANSITU:

Agency, 1119

STORMS:

Act of God, 585

STRANDING, see ABANDONMENT AND TOTAL LOSS.**STREET RAILROADS:****Abutting owners:**

Obstructing access, 228

Right to use of streets, 234

Awnings, 235, 236

Bay window, 235

Considerations determining the question of reasonableness, 235

Crowds blockading street attracted by advertisements in window, 236

Depositing building materials, 234

Deposit of goods by tradesman, 235

Drays, trucks, etc., 235

Excavation rendering street unsafe, 236

Excavations, 236

For purposes of deposit, 234

Fruit stand, 235

Hay scales, 235

Implied consent of city, 236

Liability of municipality, 236

Merchants unloading goods, 235

Passageway, 235

Porch, 236

Projections as nuisances, 235

Revocation of permission as to projections and excavations, 236

Right of municipality to forbid excavations, 236

Stairway, 235

Steps, 235

Use must be reasonable, 235

SUBAGENTS, see AGENTS.**SUBROGATION:****Accommodation paper:**

To creditor's securities, 371

Collateral security in the hands of holder, 372

In general, 371

Payment essential, 372

Securities available to accommodation party without payment, 372

Security held by accommodation party for indemnity, 372

Subrogation of creditor to securities of accommodation indorser, 371

Subrogation to judgment, 371

To defenses against holder, 373

Debtor, 373

Defenses strictly personal, 373

Failure of consideration, 373

Incapacity of plaintiff to sue maker, 373

Statement of the doctrine, 373

Usury, 373

Want of capacity in drawer, 373

SUCCESSION (see also ADVANCEMENTS):

Adoption of children, 727

SUFF., 97**SUICIDE**, see ACCIDENT INSURANCE.**SUICIDE WHILE INSANE:**

Accident insurance, 313, 314

SUIT:

Action distinguished from, 578

SUNDAY:

Accident insurance: injury while violating the Sabbath, 320
Acknowledgments, 526

SUPT., 98

SURETYSHIP, see ACCOMMODATION PAPER, ADMISSIONS.

SURPRISE:

Accident distinguished from, 278
SUSTAIN, 479

TACKING:

Adverse possession, 842
Continuity shown by parol, 845
Corporations, 844
Execution and judicial sale, 843
Husband and wife, 843
Paper evidence of transfer necessary, 845
Prior possession must have been *bona fide*, 845
Relying upon grantor's possession of other lands, 845
Rule stated, 842
Successive disseisors, 842
Where there is no privity, 843

TAX PROCEEDINGS:

Abbreviations, 100

TAX SALES:

Agency, 1085

TELEGRAPH AND TELEPHONE COMPANIES, 240

Abutting owners: obstructing access, 228

Admissions:

Admissions by telephone, 717
Evidence of conversation by telephone, 678
Poles in highways, 241

TESTIMONY:

Testimony and affidavit, 911

THE, 1**TIME:**

Actual time, 606

TITLE (see also ABSTRACT OF TITLE; ADVERSE POSSESSION):

As to color of title, see ADVERSE POSSESSION.

TORTS (see also AGENCY), 3**TOTAL LOSS, see ABANDONMENT AND TOTAL LOSS.****TOWAGE:**

Admiralty jurisdiction, 661, 662

TREASON:

Accessory, 260
Adhering, 633

TREES:

Accession, 255
Highways, 242

TROVER AND CONVERSION:

Agency, 1063, 1135

Liability of agent, 1133

TRUSTS AND TRUSTEES:

Admissions, 705

Acknowledgment of trust, 682

Admissions of *cestui que trust*, 679

Admissions of trustee, 678

Adverse possession, 812

As between trustee and cestui que trust, 812

As to third parties, 814

Constructive trusts, 813

Deed in trust made to secure *bona fide* debts, 813

Disclaimer, 812

Express trusts, 812

Trusts, etc., *cont'd.*

Purchaser from trustee, 814

Secret trusts, 813

Trustee guilty of breach of trust, 815

What amounts to repudiation, 813

Advice of counsel:

As a defense to trustees, 908

As to costs, 907

In England, 907

In United States, 907

Delegation of trustees' authority, 977

General rule, 977

Joint trustees, 977

Where there is no element of trust, 977

Good faith, 1073

ULTRA VIRES:

Agency: ratification, 1182

UNITED STATES COURTS:

As to courts of admiralty, see ADMIRALTY JURISDICTION.

UNSOUND MEAT, 739**USAGES AND CUSTOMS:****Agency:**

Agent to buy and agent to sell, 1076

Agent to receive payment, 1029

Amount of remuneration, 1116

Authority as affected by, 996

Construction of authority, 997, 1001

Credit authorized by, 1014

Power of agent to sell; to receive payment, 1016

Stockbroker purchasing from himself, 1077

Delegation of authority, 979

USE:

Actual use, 606

USER:

Adverse user, 789

USURY:

Accommodation paper, 342

By what law governed, 342

Accounts, 465

Agency:

Liability of principal, 1035, 1152

Ratification of usurious contracts, 1193

VALUE:

Actual value, 607

VENDOR AND PURCHASER:**Adverse possession:**

As between vendor and vendee, 818

Acquisition of tax title, 818, 819

Execution sale, 819

Intention must be manifest, 819

Possession of vendee, 820

Possession of vendor, 818

Re-entry by vendor, 820

Executory contracts of purchase, 799

After payment of purchase money, 801

As to third parties, 800

Before payment of purchase money, 799

Entering into possession under agreement to purchase, 800

Estoppel, 800

Parties holding under vendee, 800

Subpurchasers, 800

Vendee by title bond, 800

VESSEL.

What is, 655

Abandoned wreck, 655

Vessel, cont'd.

Barge, 655
 Bath-house built on boats, 655
 Boat in unfinished condition, 655
 Canal-boat, 655
 Criterion, 655
 Dredge, 655
 Floating dock permanently moored,
 655
 Floating elevator, 655
 Floating hotel, 655
 General rule, 655
 Light-boat, 655
 Marine pump, 655
 Old steamboat, 655
 Raft, 655
 Tug, 655
 United States revised statutes, 655
 Wharf-boat, 655

VIOLATION OF LAW, see ACCIDENT
 INSURANCE.

VOLUNTARY EXPOSURE, see ACCIDENT
 INSURANCE.

VS., 97

WAR:

Agency, 1228

WARRANT OF ATTORNEY:

Agency:

Infants, 941

Warrant of attorney by infant and an-
 other, 942

WARRANTY:

Agency:

Authority of agent, 1012

Power of agent to sell personal property,
 1014

Ratification, 1191

WATER:

Adverse possession, 875

WHARFAGE:

Admiralty jurisdiction, 661, 662

WILL:

Against her will, 926

WILLS (see also ABATEMENT OF LEGACIES;
 ADEPTION OF LEGACIES; ADVANCE-
 MENTS):

After the payment of debts, 921

Revocation: ademption of legacies distin-
 guished from, 612

WITHOUT PREJUDICE, 715**WITNESSES:**

Admissions, 720



